NOTICE TO THE BAR

MULTICOUNTY LITIGATION APPLICATION FOR DESIGNATION OF NEW JERSEY STATE-COURT LITIGATION INVOLVING MASSAGE ENVY

The Supreme Court has received an application pursuant to Directive #02-19, "Multicounty Litigation Guidelines and Criteria for Designation (Revised)," requesting Multicounty Litigation (MCL) designation of New Jersey state-court litigation against Massage Envy Franchising, LLC; Piscataway ME, LLC; CMGK, LLC, d/b/a/ Massage Envy Mays Landing; Massage Envy Spa Short Hills, LLC; and Summerwind Massage, LLC, d/b/a Massage Envy Closter, for injuries resulting from alleged sexual assaults by massage therapists in their employ. The request also is for the proposed MCL to be assigned to the Middlesex Vicinage. The application was submitted by counsel for plaintiffs in the litigation.

Anyone wishing to comment on or object to this application should provide such comments or objections in writing, with relevant supporting documentation, by **September 30, 2019** to:

Hon. Glenn A. Grant
Acting Administrative Director of the Courts
Attention: MCL Comments – Massage Envy Litigation
Hughes Justice Complex, P.O. Box 037
Trenton, New Jersey 08625-0037

Comments or objections may also be submitted by email to Comments.mailbox@njcourts.gov.

A copy of the application submitted to the Court is posted with this Notice on the Judiciary's Internet Website (www.njcourts.gov) in the Multicounty Litigation Information Center (http://www.njcourts.gov/attorneys/mcl/index.html).

Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts

Dated: August 20, 2019

Civil

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July 29, 2019

Via Federal Express – Overnight Delivery

Hon. Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Administrative Office of the Courts of the State of New Jersey
Richard J. Hughes Justice Complex
25 W. Market Street
Trenton, New Jersey 08625

RE: Application Pursuant to Rule 4:38A (Centralized Management of Multicounty Litigation) to Designate Massage Envy Cases as Multicounty Litigation for Centralized Management

Dear Judge Grant,

Plaintiffs respectfully submit this letter application requesting that the Massage Envy cases, originally filed in Middlesex County, be designated as a Multicounty Litigation ("MCL") for centralized management. In addition, Plaintiffs request that the MCL be assigned to Honorable Thomas Daniel McCloskey, J.S.C., in Middlesex County.

BACKGROUND

Massage Envy is a massage and spa therapy franchise with approximately 1,176 franchises throughout the United States, 47 of which are located in the state of New Jersey. In addition to Plaintiffs' cases, there are currently two other pending cases in New Jersey arising out of sexual misconduct by Massage Envy massage therapists in Hudson County and Essex County. Sexual assaults and exploitation at Massage Envy locations are a national epidemic,

with over 250 known reports of same occurring throughout the country, including within the state of New Jersey. The sexual misconduct at Massage Envy ranges from forcible sexual intercourse to digital and oral penetration of women's vaginas to the touching of women's breasts and the exposure of male and female genitals. The misconduct includes acts committed by both male and female massage therapists. As such, there is a high degree of commonality on injury or damages among Plaintiffs in this matter.

For over a decade, Massage Envy and its franchisees have conspired together to systematically cover up the rampant problem of sexual misconduct at Massage Envy franchise locations. Massage Envy and its franchisees falsely represented to consumers that it had a "zero tolerance" policy relating to sexual misconduct by massage therapists. Furthermore, Massage Envy and its franchisees falsely represented to consumers that the massage therapists in its employ and service were not only psychologically fit, but could be entrusted with the safety and well-being of its customers. Massage Envy and its franchisees represented that its massage therapists were properly screened and were safe.

PENDING CASES

On or about August 29, 2018, Plaintiffs, Jane Does #1 - #4, by and through their undersigned counsel, commenced a personal injury action in Middlesex County by filing a Complaint in the case of Doe et al. v. Massage Envy Franchising, LLC et al., No. MID-L-005163-10. On or about December 12, 2018, by consent and stipulation of Defendants, Plaintiffs

filed their First Amended Complaint adding Jane Doe #5 as a Plaintiff in the above action. Plaintiffs' Amended Complaint brings claims on behalf of each individual Plaintiff of sexual assault by massage therapists at Massage Envy franchise locations throughout the state of New Jersey.

On or about December 4, 2018, counsel for franchisee Defendant Summerwind Massage LLC d/b/a Massage Envy Closter ("MEC") filed a motion to dismiss certain counts of Jane Doe #4's Complaint against MEC and to sever the remaining count of Jane Doe #4 from the main action and transfer it to Bergen County.

On or about January 9, 2019, counsel for franchisee Defendant CMGK, LLC d/b/a Massage Envy Mays Landing ("Mays Landing") filed a motion to dismiss certain claims against Mays Landing and to sever and transfer the remaining claims of Jane Doe #2 to Atlantic County.

On or about January 9, 2019, counsel for franchisee Defendant Piscataway ME, LLC ("Piscataway") filed a motion to dismiss certain counts of Plaintiffs' Amended Complaint and to sever any remaining claims of Jane Doe #1, Jane Doe #3 and Jane Doe #5 from one another and from each of the other Plaintiffs.

On or about January 9, 2019, counsel for franchisee Defendant Massage Envy Spa Short Hills, LLC ("Short Hills") filed a motion to dismiss certain counts of Plaintiffs' Amended Complaint and to sever and transfer any remaining claims of Jane Doe #3 and Jane Doe #5 to Essex County.

On or about January 9, 2019, counsel for Defendant Massage Envy Franchising, LLC ("Massage Envy") filed a motion to dismiss Plaintiff's First Amended Complaint against Massage Envy.

On or about May 29, 2019, the Court denied the motions to dismiss of all Defendants and granted the motions to sever and transfer of Defendants Mays Landing, Short Hills, and MEC. The court retained jurisdiction over Defendants Massage Envy and Piscataway and all claims brought against said Defendants. *See* Exhibits A and B.

ARGUMENT

Plaintiffs submit that this litigation satisfies the criteria for Multicounty Litigation Designation as promulgated by Directive #02-19 pursuant to Rule 4:38A and respectfully request that these cases be consolidated for case management in the Middlesex County Superior Court before Judge Thomas Daniel McCloskey, J.S.C.

A. The Massage Envy litigation involves a large number of parties that are geographically dispersed throughout the State of New Jersey.

As with other Multicounty Litigations centralized by this Court, the Massage Envy litigation involves a large number of parties that are geographically dispersed throughout the state of New Jersey. The current New Jersey actions are pending in multiple vicinages, including Middlesex County, Atlantic County, Essex County, and Bergen County. Plaintiffs submit that this geographical diversity makes centralized management necessary for the efficient handling of this litigation.

B. The Massage Envy litigation involves many claims with common, recurrent issues of law and fact that are associated with a particular service which resulted in similar injuries among Plaintiffs and there is a value interdependence between different claims.

The pending actions involve many claims with common, recurrent issues of law and fact associated with massage services offered by Defendants. All cases arise out of Massage Envy's sexual misconduct against its customers and involve the conspiracy that Massage Envy and its franchisees have participated in to keep the misconduct from the public. All of the pending actions that have been filed to date involve personal injury damages arising out of Massage Envy's sexual misconduct. Discovery related to liability and causation as to the Massage Envy Defendants will be substantially similar in all of the cases.

To that end, common questions of law and fact that are significant to the litigation include, but are not limited to:

- Third party privacy rights related to the customer lists for the massage therapists who sexually violated Plaintiffs;
- Protective orders relating to the sexual misconduct and internal documents;
- Each Defendant's responsibilities under the franchise agreements;
- Massage Envy's operational control over each franchisee;
- The existence and scope of employment relationships at/between Massage Envy and the franchisees;

- Massage Envy's legal duty to and special relationship with franchisee customers;
- The indemnity agreements between Massage Envy and the franchisees;
- Ratification/vicarious liability of Massage Envy for its franchisees' conduct based on Massage Envy's conduct after reports of women being sexually violated;
- Massage Envy and the franchisees' liability for punitive damages and Plaintiffs' entitlement to financial discovery from Massage Envy and its franchisees;

The crux of every lawsuit filed against Defendants arising out of Massage Envy's sexual misconduct will involve the same or substantially similar investigation into the liability of the named Defendants, and its causal relationship to the damages suffered. Accordingly, the common questions of law and fact that will arise justify centralized management as it will result in the efficient utilization of judicial resources and facilities and personnel of the court. Centralization would expedite the progress, decrease the expense, and simplify the processing of this matter while not prejudicing any party.

C. Centralized management is fair and convenient to the parties, witnesses, and counsel and coordinated discovery would be advantageous.

Centralized management is beneficial to all parties involved as it would minimize duplicative practice and inconsistent discovery rulings. Additionally, the cases which have been transferred out of Middlesex County have not yet been assigned pretrial judges or given docket

numbers; therefore, centralization will allow Judge McCloskey to manage these cases from the beginning in an efficient manner.

Centralized management enables joint discovery to be coordinated and propounded, orderly deposition proceedings with designated lead counsel, and coordination of joint evidence and site examinations, among other things. Centralized management would also minimize and require that counsel work together to ensure duplicative motions are not filed, leading to possible duplicative and inconsistent rulings, orders or judgements, and that discovery disputes and the like are handled in an orderly fashion.

D. There is a degree of remoteness between the court and actual decision-makers in the litigation and issues of insurance, limits on assests and potential bankruptcy can best be addressed in coordinated proceedings

Centralized management is beneficial to all parties involved as there is a degree of remoteness between the court and actual-decision makers in the litigation, that is even the simplest of decisions of decisions may be required to pass through layers of local, regional, national, general, and house counsel. Centralized management enables a more efficient proceeding as it will address issues of insurance, limits on assets, and coordination of decision-making in a single multi-county matter involving numerous counsel, a massage and spa therapy franchise with approximately 1,176 franchises throughout the United States, 47 of which are located in the state of New Jersey, and a complex corporate, franchise structure. Specifically, this matter before this Honorable Court includes more than five (5) different local franchisee locations located in multiple counties

LAFFEY BUCCI KENT LLP

TRIAL LAWYERS

throughout the State of New Jersey and the largest provider of therapeutic massages and skin care in the United States.

CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that pursuant to Rule 4:38A, the Massage Envy cases be designated as Multicounty Litigation for Centralized Management and be assigned to Judge McCloskey.

Respectfully Submitted,

Brian D. Kent, Esq.
M. Stewart Ryan, Esq.
H. Nellie Fitzpatrick, Esq. *(Admitted Pro Hac Vice)*
LAFFEY, BUCCI & KENT, LLP
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Philadelphia, PA 19102
(215) 399 – 9255
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Attorneys for Plaintiffs Jane Does #1 - #5

cc: All Counsel of Record

EXHIBIT “A”

The Hon. Thomas Daniel McCloskey, J.S.C.
Superior Court of New Jersey
Law Division, Middlesex County
56 Paterson Street, P.O. Box 964
Chambers/Courtroom 305
New Brunswick, New Jersey 08903

PREPARED BY THE COURT:

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MIDDLESEX COUNTY
DOCKET NO.: MID-L-5163-18

Civil Action

ORDER DENYING MOTIONS TO DISMISS AND GRANTING IN PART MOTIONS TO SEVER & TRANSFER SPECIFIED CLAIMS

JANE DOE #1 (a fictitious name),
JANE DOE #2 (a fictitious name),
JANE DOE #3 (a fictitious name),
JANE DOE #4 (a fictitious name), and
JANE DOE #5 (a fictitious name), c/o Laffey, Bucci & Kent LLP, 1435 Walnut Street, 7th Floor, Philadelphia, PA 19102

Plaintiffs,

v.

MASSAGE ENVY FRANCHISING, LLC
14350 North 87th Street, Suite 200
Scottsdale, AZ 85260

= and =

PISCATAWAY ME, LLC
1348 Centennial Avenue
Piscataway, NJ 08854

= and =

CMGK, LLC, d/b/a
MASSAGE ENVY MAYS LANDING
278 Consumer Square
Mays Landing, NJ 08330

= and =

MASSAGE ENVY SPA SHORT HILLS, LLC 726 Morris Turnpike Short Hills, NJ 07078	:
= and =	:
SUMMERWIND MASSAGE, LLC, d/b/a MASSAGE ENVY CLOSTER 51 Vervalen Street Closter, NJ 07624	:
= and =	:
ABC, INC. 1 – 10 (fictitious entities),	:
= and =	:
JOHN DOES 1 – 10 (fictitious persons),	:
Defendants.	:

THIS MATTER, having come before the Court upon:

1. The motion to dismiss filed by Darren C. Barreiro, Esq. of the law offices of Greenbaum, Rowe, Smith & Davis LLP (Darren C. Barreiro appearing at oral argument, along with Robert Atkins, Esq. and Jacqueline P. Rubin, Esq. of Paul, Weiss, Rifkind, Wharton & Garrison, LLP of New York, New York, members of the New York Bar, each admitted *pro hac vice*), for and on behalf of defendant, **Massage Envy Franchising, LLC** ("MEF");

2. The motion to dismiss filed by Gerard C. Vince, II, Esq. and Carmen M. Finegan, Esq. of the law office of Gerard C. Vince, LLC (Carmen M. Finegan appearing at oral argument), for and on behalf of defendants, **Piscataway ME, LLC** ("Piscataway ME") and **Massage Envy Spa Short Hills, LLC** ("ME Short Hills");

3. The motion to dismiss filed by Christopher Marrone, Esq. and Sarah Cohen, Esq. of the law offices of Lauletta Birnbaum, LLC (Sarah Cohen, Esq. appearing at oral argument), for and on behalf of defendant, **CMGK, LLC d/b/a Massage Envy Mays Landing** ("ME Mays Landing"); and,

4. The motion to dismiss filed by Joseph DeDonato, Esq. of the law offices of Morgan Melhuish Abrutyn (Joseph DeDonato, Esq. appearing at oral argument), for and on behalf of defendant, **Summerwind Massage, LLC d/b/a Massage Envy Closter** i/p/a "Massage Envy Closter" ("ME Closter");

AND IN THE PRESENCE of Brian Kent, Esq. and Nellie Fitzpatrick, Esq. of the law offices of Laffey, Bucci & Kent LLP counsel for Jane Doe #1, Jane Doe #2, Jane Doe #3, Jane Doe #4, Jane Doe #5 (collectively, "Plaintiffs"), who appeared for and on behalf of the Plaintiffs in opposition thereto;

AND THE COURT, having reviewed and considered the moving papers submitted on behalf of the moving Defendants; the opposition papers submitted on behalf of the Plaintiffs with respect thereto; and the reply papers submitted on behalf of the Defendants and Plaintiffs in reply to their respective opposition papers;

AND THE COURT, having heard and considered the extensive oral argument of counsel appearing for the parties on the return date of May 3, 2019 on the Motions, for the reasons more fully set forth in the "Supplement" and "Statement of Reasons" attached hereto and made a part hereof, and for good cause having otherwise been shown:

IT IS on this **29th day of MAY 2019, ORDERED**, as follows:

A. The Motion to Dismiss, pursuant to R. 4:6-2(e), filed by Massage Envy Franchising, LLC as to Counts 1, 2, 3, 4, 5, 6, and 12-18 of the First Amended Compliant asserted

on behalf of Plaintiffs shall be, and hereby is, **DENIED,** without prejudice. The Court shall retain jurisdiction over this defendant and all claims asserted against it;

B. The Motion to Dismiss, pursuant to R. 4:6-2(e), filed by Piscataway ME, LLC as to Counts 1, 7, and 12-18 of the First Amended Complaint asserted on behalf of Jane Doe #1 shall be, and hereby is, **DENIED**, without prejudice The Court shall retain jurisdiction over this defendant and all claims asserted against it;

C. The Motion to Dismiss, pursuant to R. 4:6-2(e), filed by CMGK, LLC d/b/a Massage Envy Mays Landing as to Counts 1, 8, and 12-18 of the First Amended Complaint asserted on behalf of Jane Doe #2 shall be, and hereby is, **DENIED**, without prejudice; its application to sever and transfer is **GRANTED**; and the relevant counts asserted by Plaintiff Jane Doe #2 against it shall be, and hereby are, severed and transferred to Atlantic County;[1]

D. The Motion to Dismiss, pursuant to R. 4:6-2(e), filed by Massage Envy Spa Short Hills, LLC as to Counts 1, 9, and 11-12 of the First Amended Complaint asserted on behalf of Jane Doe #3 and Jane Doe #5 shall be, and hereby is, **DENIED**, without prejudice; its application to sever and transfer is **GRANTED**; and the relevant counts asserted by Plaintiffs Jane Doe #3 and Jane Doe #5 against it shall be, and hereby are, severed and transferred to Essex County; and that

E. The Motion to Dismiss, pursuant to R. 4:6-2(e), filed by Summerwind Massage, LLC d/b/a Massage Envy Closter as to Counts 1, 10, and 11-12 of the First Amended Complaint asserted on behalf of Jane Doe #4 shall be, and hereby is, **DENIED**, without prejudice;

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[1] With respect to paragraphs C, D and E of this Order, the undersigned has been designated by the Assignment Judge of the Middlesex Vicinage (Hon. Alberto Rivas, A.J.S.C.) to effectuate the severance, transfers and changes of venues for the claims of the Plaintiffs and defending parties as specified therein. *See* R. 4:3-3(a).

its application to sever and transfer is **GRANTED**; and the relevant counts asserted by Plaintiff Jane Doe #4 against it shall be, and hereby are, severed and transferred to Bergen County.

IT IS FURTHER ORDERED, that the within Order shall be deemed served on all counsel of record upon its posting by the Court to the eCourt case jacket for this matter.

SO ORDERED:

HON. THOMAS DANIEL McCLOSKEY, J.S.C.

Pursuant to R. 1:6-2(f), the Court's "Statement of Reasons" is attached hereto and made a part hereof.

(X) Opposed.
( ) Unopposed.

PAPERS CONSIDERED:

(X) Defendants' Notices of Motion, supporting Certifications & Briefs (x 4)
(X) Plaintiffs' Opposition & Reply Papers
(X) Defendant-Movants' Reply Papers

SUPPLEMENT TO THE COURT'S ORDER OF MAY 29, 2019
STATEMENT OF REASONS – [R. 1:6-2(f)]

This matter came before the Court on Friday, May 3, 2019, for oral argument on four Motions to Dismiss ("Motions") filed by the defendants, pursuant to R. 4:6-2(e), seeking dismissal of the First Amended Complaint of the five (5) named "Jane Doe" plaintiffs as to each respective moving defendant.[1] Specifically, the motions included:

(1) the motion to dismiss filed by Darren C. Barreiro, Esq. of the law offices of Greenbaum, Rowe, Smith & Davis LLP (Darren C. Barreiro appearing at oral argument, along with Robert Atkins, Esq. and Jacqueline P. Rubin, Esq. of Paul, Weiss, Rifkind, Wharton & Garrison, LLP of New York, New York, members of the New York Bar, each admitted *pro hac vice*), on behalf of defendant Massage Envy Franchising, LLC ("MEF");

(2) the motion to dismiss filed by Gerard C. Vince, II, Esq. and Carmen M. Finegan, Esq. of the law office of Gerard C. Vince, LLC (Carmen M. Finegan appearing at oral argument), on behalf of defendants Piscataway ME, LLC ("Piscataway ME") and Massage Envy Spa Short Hills, LLC ("ME Short Hills");

(3) the motion to dismiss filed by Christopher Marrone, Esq. and Sarah Cohen, Esq. of the law offices of Lauletta Birnbaum, LLC (Sarah Cohen, Esq. appearing at oral argument), on behalf of defendants CMGK, LLC d/b/a Massage Envy Mays Landing ("ME Mays Landing"); and

(4) the motion to dismiss filed by Joseph DeDonato, Esq. of the law offices of Morgan Melhuish Abrutyn (Joseph DeDonato, Esq. appearing at oral argument), on behalf of defendant Summerwind Massage, LLC d/b/a Massage Envy Closter i/p/a "Massage Envy Closter" ("ME Closter") (all individual defendants are collectively referred to hereinafter as the "Defendants"). The moving Defendants sought to dismiss all causes of action plead by each plaintiff in the First Amended Complaint as to each individual defendant, respectively, which were as follows:

COUNT I:	VICARIOUS LIABILITY	[Plaintiffs v. All Defendants]
COUNT II:	NEGLIGENCE	[Jane Doe #1 v. Massage Envy Franchising, LLC]
COUNT III:	NEGLIGENCE	[Jane Doe #2 v. Massage Envy Franchising, LLC]
COUNT IV:	NEGLIGENCE	[Jane Doe #3 v. Massage Envy Franchising, LLC]
COUNT V:	NEGLIGENCE	[Jane Doe #4 v. Massage Envy Franchising, LLC]
COUNT VI:	NEGLIGENCE	[Jane Doe #5 v. Massage Envy Franchising, LLC]
COUNT VII:	NEGLIGENCE	[Jane Doe #1 v. Piscataway ME, LLC]
COUNT VIII:	NEGLIGENCE	[Jane Doe #2 v. Massage Envy Mays Landing]
COUNT IX:	NEGLIGENCE	[Jane Doe #3 v. Massage Envy Spa Short Hills, LLC]
COUNT X:	NEGLIGENCE	[Jane Doe #4 v. Summerwind Massage, LLC d/b/a Massage Envy Closter]
COUNT XI:	NEGLIGENCE	[Jane Doe #5 v. Massage Envy Spa Short Hills, LLC]

[1] The five (5) individually named plaintiffs are separate adult females. Their names and addresses are not contained in the Complaint and First Amended Complaint in order to protect their identities and privacy interests due to the sensitive nature of the injuries and damages they each allege against the defendants.

COUNT XII: NEGLIGENT PERFORMANCE OF UNDERTAKING TO RENDER SERVICES [Plaintiffs v. All Defendants]

COUNT XIII: NEGLIGENCE PER SE PLAINTIFFS v. ALL DEFENDANTS

COUNT XIV: NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS [Plaintiffs v. All Defendants]

COUNT XV: NEGLIGENT MISREPRESENTATION [Plaintiffs v. All Defendants]

COUNT XVI: VIOLATION OF NEW JERSEY CONSUMER FRAUD ACT, N.J.S.A. §56:8-1 [Plaintiffs v. All Defendants]

COUNT XVII: FRAUDULENT CONCEALMENT [Plaintiffs v. All Defendants]

COUNT XVIII: CIVIL CONSPIRACY [Plaintiffs v. All Defendants]

Brian D. Kent, Esq. and Nellie Fitzpatrick, Esq. of the law offices of Laffey, Bucci & Kent LLP, counsel for plaintiffs Jane Doe #1, Jane Doe #2, Jane Doe #3, Jane Doe #4, and Jane Doe #5 (collectively, "Plaintiffs"), appeared in opposition to the Motions.

I. Factual Background and Procedural History.

Because the Motions are all brought pursuant to R. 4:6-2(e), the factual background is gleaned from the plaintiffs' initial and amended pleadings and is accepted as true for purposes of analyzing whether to dismiss claims asserted in the Plaintiffs' First Amended Complaint, in whole or in part, and as relevant and/or applicable to an affected defendant.

a. The Defendants.

Massage Envy Franchising, LLC (hereinafter referred to as "MEF"), is an Arizona corporation with its principal place of business located in Scottsdale, Arizona. MEF is a massage and spa therapy franchise with approximately 1,179 franchises located across the United States and is the largest employer of massage therapists nationwide. MEF is the franchisor of Piscataway ME, LLC, CMGK, LLC d/b/a Massage Envy Mays Landing, Massage Envy Spa Short Hills, LLC, and Summerwind Massage, LLC d/b/a Massage Envy Closter i/p/a "Massage Envy Closter", franchisees that each operate a day spa that offers massages and other spa services.

Piscataway ME, LLC (hereinafter referred to as "Piscataway ME"), is a New Jersey corporation with its principal place of business located at 1348 Centennial Avenue, Piscataway, Middlesex County, NJ 08854.

CMGK, LLC d/b/a Massage Envy Mays Landing (hereinafter referred to as "ME Mays Landing"), is a New Jersey corporation with its principal place of business located at 278 Consumer Square, Mays Landing, Atlantic County, NJ 08330.

Massage Envy Spa Short Hills, LLC (hereinafter referred to as "ME Short Hills"), is a New Jersey corporation with its principal place of business located at 726 Morris Turnpike, Short Hills, Essex County, NJ 07078.

Summerwind Massage, LLC d/b/a Massage Envy Closter (hereinafter referred to as "ME Closter"), is a New Jersey corporation with its principal place of business located at 51 Vervalen Street, Closter, Bergen County, NJ 07624.

As it pertains to each individual Plaintiff, the Court notes the following facts pertinent to their claims and which are drawn from the First Amended Complaint:

b. Jane Doe #1

On or about November 19, 2016, Jane Doe #1 was scheduled to receive a massage at Massage Envy Piscataway. On the date in question, the male massage therapist assigned to massage Jane Doe #1 at this Massage Envy location was Magdy Mesak (hereinafter "Mesak"). When Jane Doe #1 arrived at this Massage Envy location for her massage, the staff recommended Mesak to her. Mesak was aided in his commission of the sexual assault by virtue of his duties as a massage therapist because Jane Doe #1 was already undressed in a private room in a vulnerable position per the protocol of Massage Envy franchises. The sexual assault of Jane Doe #1 occurred on a massage table on the premises of this Massage Envy location, during normal business hours, and was done in the course and scope of the performance of duties of Mesak while he was making skin-to-skin contact with Jane Doe #1.

Prior to the massage on the date at issue, Jane Doe #1 filled out a form utilized by Massage Envy where she indicated areas on her body that she did not want contacted during any massage. Those areas included her chest, glutes, and inner thighs. During the massage Mesak began massaging Jane Doe #1's upper chest above her breasts and her stomach. Mesak then began massaging her breasts including her nipples. Jane Doe #1 twice requested that Mesak stop massaging these sensitive and intimate areas of her body. Mesak also massaged the area at the top of Jane Doe #1's underwear. Again, Jane Doe #1 told him to stop massaging that area. Mesak proceeded to have Jane Doe #1 turn on to her side, began massaging her stomach, and again moved up her body and was making contact with her breasts. Jane Doe #1 was forced to again stop the massage and suggest that Mesak only massage her back. Jane Doe #1 then laid on her stomach. Mesak briefly left the room and, upon his return, began massaging her back. Mesak, under the guise of massaging her back, placed his hands underneath Jane Doe #1's underwear and made contact with her buttocks. Jane Doe #1 twice asked him to stop. Mesak then started massaging Jane Doe #1's buttocks outside of her underwear. Finally, Mesak began touching her buttocks again and then touched the area between her legs and made contact with her vaginal area.

c. Jane Doe #2

On or about September 23, 2017, Jane Doe #2 was scheduled to receive a massage at Massage Envy Mays Landing. When Jane Doe #2 arrived at Massage Envy Mays Landing, an individual named Steffon Davis (hereinafter "Davis") was assigned to massage her. Davis was aided in his commission of the sexual assault by virtue of his duties as a massage therapist because Jane Doe #2 was already undressed in a private room in a vulnerable position per the protocol of Massage Envy franchises. The sexual assault of Jane Doe #2 occurred on a massage table on the premises of this Massage Envy location, during normal business hours, and was done in the course and scope of the performance of duties of Davis while he was making skin-to-skin contact with Jane Doe #2.

As the massage progressed Jane Doe #2 became concerned that Davis was not properly trained. Davis did not notify Jane Doe #2 when he would proceed to the next area of Jane Doe #2's body. While Jane Doe #2 was lying face down she felt his erect penis brush against her body. Despite her presenting with a shoulder injury, Davis massaged her legs and worked his way up to her thighs. As Davis massaged one leg he repeatedly rubbed against her vaginal area and ultimately penetrated Jane Doe #2's vagina with his finger. Davis also massaged her other leg and engaged in the same conduct. He repeatedly rubbed against her vaginal area and ultimately penetrated Jane Doe #2's vagina with his finger. During the course of the massage Jane Doe #2 was asked to turn over by Davis and Davis did not keep her properly covered. When Davis replaced the cover he left her breasts exposed. Davis then massaged Jane Doe #2's exposed breasts. Davis was extremely close to Jane Doe #2, such that she could feel him breathing on her neck and his chin touching her forehead. Davis cupped her breast. Davis also took Jane Doe #2's hand and placed it in his lap. As the massage progressed Davis became more physically aggressive. Davis applied significant pressure to Jane Doe #2's back. While Davis was massaging her shoulders he wrapped his hands around her neck choking her, causing her to cough.

d. Jane Doe #3

On or about January 23, 2015, Jane Doe #3 was scheduled to receive a massage at Massage Envy Short Hills. When Jane Doe #3 arrived at this Massage Envy location, an individual named Leonard Drittij (hereinafter "Drittij") was assigned to massage her. Drittij was aided in his commission of the sexual assault by virtue of his duties as a massage therapist because Jane Doe #3 was already undressed in a private room in a vulnerable position per the protocol of Massage Envy franchises. The sexual assault of Jane Doe #3 occurred on a massage table on the premises of this Massage Envy location, during normal business hours, and was done in the course and scope of the performance of duties of Drittij while he was making skin-to-skin contact with Jane Doe #3.

During the course of the massage Drittij made conversation with Jane Doe #3, including comments that were suggestive and sexual in nature. The conversation made Jane Doe #3 extremely uncomfortable. Despite presenting with chronic back pain and tension in her back, Drittij asked Jane Doe #3 if he could massage her stomach. Jane Doe #3 agreed. As Jane Doe #3 moved from her stomach to her back so as to face upwards, Drittij completely removed the draping cloth covering Jane Doe #3. This left Jane Doe #3 in a state of complete nudity. Drittij then proceeded to move around the massage table so that he was standing near Jane Doe #3's head. Drittij began massaging her stomach and then moved his hands past her waist and started grabbing Jane Doe #3's buttocks. As Drittij engaged in this conduct he pushed his face into Jane Doe #3's stomach. He continued moving his body and pushing his face toward the area of Jane Doe #3's genitals. At the same time, Drittij's groin was touching the top of Jane Doe #3's head. Drittij was moving his body back and forth, repeatedly making contact with intimate parts of Jane Doe #3's body. Drittij was also repeatedly making contact with Jane Doe #3's body using intimate parts of his own body. Drittij'a groin also brushed against Jane Doe #3's shoulder. When Jane Doe #3 reported the assault by Drittij to Massage Envy Short Hills, she was told that if she reported the incident to law enforcement there was "a lot of red tape" and it was unlikely any action would be taken. Jane Doe #3 was dejected by the advice provided by Massage Envy Short Hills and, as a result, did not report to law enforcement.

e. Jane Doe #4

On or about winter of 2015, Jane Doe #4 was scheduled to receive a massage at Massage Envy Closter. On the date of the incident, Jane Doe #4 was assigned a massage therapist she knew only as "Michael." Jane Doe #4 never learned further information so as to identify "Michael." Only Defendants know "Michael's" true identity. "Michael" was aided in his commission of the sexual assault by virtue of his duties as a massage therapist because Jane Doe #4 was already undressed in a private room in a vulnerable position per the protocol of Massage Envy franchises. The sexual assault of Jane Doe #4 occurred on a massage table on the premises of this Massage Envy location, during normal business hours, and was done in the course and scope of the performance of duties of "Michael" while he was making skin-to-skin contact with Jane Doe #4.

As the massage progressed, "Michael," without explanation or apparent purpose, began massaging Jane Doe #4's breasts. This made Jane Doe #4 uncomfortable and she felt violated. Jane Doe was unsure how to respond. "Michael" then proceeded to ask Jane Doe #4 to turn over and lie on her stomach. "Michael" began massaging Jane Doe underneath the draping sheet in the area of her inner thighs and buttocks. As "Michael" continued to massage her in this area of Jane Doe #4's body he reached toward her vagina with his finger. "Michael" then penetrated Jane Doe #4's vagina with his finger. Jane Doe #4 was shocked, felt violated, and was unsure what to do.

f. Jane Doe #5

On or about December 27, 2016, Jane Doe #5 was scheduled to receive a massage at Massage Envy Short Hills. On the date of the incident, Jane Doe #5 was scheduled to receive massage services from massage therapist Doudi Zaky (hereinafter "Zaky"). Zaky was aided in his commission of the sexual assault by virtue of his duties as a massage therapist because Jane Doe #5 was already undressed in a private room in a vulnerable position per the protocol of Massage Envy franchises. The sexual assault of Jane Doe #5 occurred on a massage table on the premises of this Massage Envy location, during normal business hours, and was done in the course and scope of the performance of duties of Zaky while he was making skin-to-skin contact with Jane Doe #3.

During the course of the massage in question Zaky was massaging Jane Doe #5's inner thighs and rubbing the area of her groin and legs as Jane Does #5 was laying on her stomach. Zaky asked Jane Doe #5, "how far can we go" and expressed to Jane Doe #5 that he was attracted to her. Jane Doe #5, shocked and stunned, sat up on the massage table by propping herself up onto her forearms. The draping that was covering Jane Doe #5 had fallen onto the floor leaving her completely exposed. Jane Doe #5 stated to Zaky, "are you kidding me?" Zaky then grabbed Jane Doe #5 from under her arms. Zaky pulled Jane Doe #5 into his body and began forcibly kissing her. Jane Doe #5 was scared and did not know what to do. Jane Doe #5 pushed Zaky away. Zaky then apologized and appeared to be very upset. Jane Doe #5, still shocked, stunned, and scared of what Zaky may do asked Zaky to just finish the massage so that she could leave. Zaky remained upset throughout the remainder of the massage. Jane Doe #5 attempted twice to report this assault to the owner of Massage Envy Short Hills via telephone but never received a return call.

g. Procedural History

Through their counsel, Plaintiffs filed a Complaint against Defendants on August 29, 2018. Rather than filing Answers to the Complaint, Defendants each filed a motion to extend time to answer. The respective motions were granted over Plaintiffs' objections, one being granted on October 12, 2018 and the other three (3) granted on October 26, 2018. On December 4, 2018, counsel for ME Closter filed a motion to dismiss for failure to state a claim. The next day, December 5, 2018, Plaintiffs filed a motion for leave to file a First Amended Complaint to add Jane Doe #5 as a plaintiff, and to properly identify ME Closter, which had been improperly pled as "Massage Envy Closter."

Following ME Closter, on January 9, 2019, MEF, Piscataway ME, ME Short Hills, and ME Mays Landing each filed motions to dismiss the First Amended Complaint as applicable to each respective defendant. Plaintiffs opposed the Motions on February 13, 2019. On February 22, 2019, MEF sought an adjournment of the Motions, requesting that replies be due on March 7, 2019 and the Motions be made returnable on March 15, 2019. This request was granted by the Court. Defendants filed replies to Plaintiffs' oppositions on March 7, 2019. On March 12, 2019, MEF again requested the return date of the Motions be adjourned for one cycle to March 29, 2019 due to Robert Atkins, Esq. – *pro hac vice* counsel for MEF – having undergone surgery. This second adjournment request was granted.

Due to the Court's extremely busy calendar and the complexity of the Motions, the hearing return date was adjourned *sua sponte* by the Court until May 3, 2019, a non-motion day. On May 3, 2019, all parties appeared before the Court for oral argument on the Motions. Having since reviewed, re-reviewed and considered the submissions of all counsel for the Defendants in support of their Motions, the papers submitted on behalf of the Plaintiffs in opposition thereto, those submitted on behalf of the Defendants in reply, and having considered the extensive oral argument of counsel heard on the return date, the Court now renders its decision on the Motions.

II. Standard of Review.

In reviewing a motion to dismiss for failure to state a claim under R. 4:6-2(e), the standard of review is whether the complaint fails to articulate a legal basis entitling the plaintiff to relief. It requires the Court to "search[ ] the complaint in depth with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of a claim, opportunity being given to amend if necessary." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (quoting Di Cristofaro v. Laurel Grove Memorial Park, 43 N.J. Super. 244, 252 (App. Div. 1957). Every reasonable inference is therefore accorded the plaintiff and the motion is granted only in rare instances, and ordinarily without prejudice. At this early stage of the litigation, the Court is not concerned with the ability of plaintiff to prove the allegations contained in the compliant. Ibid.

A motion to dismiss for failure to state a claim must be granted only if even a "painstaking" and "generous" reading of the allegation does not provide a legal basis for recovery. Printing Mart-Morristown, supra. See also Camden County Energy Recovery Assoc. v. NJDEP, 320 N.J. Super. 59, 64-65 (App. Div. 1999), aff'd, 170 N.J. 246 (2001). "[I]f a generous reading of the allegations merely suggests a cause of action, the complaint will withstand the motion [to dismiss]." F.G.

MacDonell, 150 N.J. 550, 556 (1997). A complaint should not be dismissed under R. 4:6-2(e) where a cause of action is suggested by the facts and a theory of actionability may be articulated by amendment of the complaint. Pressler, Current N.J. Court Rules, comment 4.11 on R. 4:6-2 (2014) (citing Printing Mart-Morristown, 116 N.J. at 746).

However, if the complaint states no legal basis for relief and discovery would not provide one, dismissal of the complaint is appropriate. Camden County Energy Recovery Assoc. v. NJDEP, 320 N.J. Super. 59, 64 (App. Div. 1999), aff'd 170 N.J. 246 (2001). "Discovery is intended to lead to facts supporting or opposing an asserted legal theory; it is not designed to lead to formulation of a legal theory." Ibid.

III. The Court's Analysis – Discussion of Applicable Law.

After an exhaustive examination of the motion record, in applying the standard of review the Court is constrained to employ on motions to dismiss pursuant to R. 4:6-2(e), in this Court's view, Plaintiffs have adequately pleaded all causes of action and, therefore, the First Amended Complaint should survive the Motions. However, even though the First Amended Complaint will not be dismissed as to all defendants, the venue in which this Court sits – Middlesex County – is an improper location for the claims of the First Amended Complaint to be litigated and tried, apart from those lodged against MEF and ME Piscataway. Therefore, the pertinent claims of the Plaintiffs – to be specified herein - will be severed and transferred to the appropriate vicinages.

Trial courts have been instructed by the New Jersey Supreme Court to only grant motions to dismiss pursuant to R. 4:6-2(e) in "only the rarest of instances" when brought at such an early stage of the litigation. See Printing Mart-Morristown, supra, at 772. The Supreme Court further instructs that even if a complaint must be dismissed after being subjected to a fastidious review, barring other pleading issues (e.g., statute of limitations) the complaint should be dismissed without prejudice to a plaintiff filing an amended complaint. Ibid. The First Amended Complaint at issue here requires no such dismissal or further opportunity to amend at this time. Even without considering the expanded factual allegations proffered in Plaintiffs' opposing papers and at oral argument, a "fundament of a cause of action" is still suggested in the First Amended Complaint as to all causes of action pleaded.

However, as the Supreme Court envisioned in Printing Mart-Morristown, statute of limitations issues are raised in this matter. Specifically, ME Short Hills (Counts 4, 9, 12-15, 17, and 18) and ME Closter (Counts 5, 9-13, 15, and 16) argue that the referenced counts alleged against them by plaintiffs Jane Doe #3 and Jane Doe #4 for personal injury are barred by the two (2)-year statute of limitations as provided in N.J.S.A. 2A:14-2. The statute provides, in pertinent part, that "[e]very action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this State shall be commenced within two years next after the cause of any such action shall have accrued..." In response, these plaintiffs argue that the 2-year statute of limitations period has been tolled because they were unaware of their claims as a result of the alleged conspiracy, perpetrated by MEF and all franchisees, to conceal numerous allegations of sexual assault across New Jersey, and even across the country. Plaintiffs cite to an article published by *Buzzfeed* in November 26, 2017, which put them on notice of their claims against the Defendants.

In support of their tolling argument, plaintiffs Jane Doe #3 and Jane Doe #4 rely on D.M. v. River Dell Regional High School, 373 N.J. Super. 639 (App. Div. 2004) where six (6) plaintiffs were sexually abused by an athletic coach. Though the abuse occurred between 1969 and 1981, the plaintiffs did not file suit until 2003. Id. at 643. One of the reasons offered there for the plaintiffs not bringing suit earlier was because many did not became aware others were victimized until an article about the abuse was published in a local newspaper in 2001. Id. at 650. The Appellate Division made note that if such allegations were true, "discovery rule principles articulated in Lopez v. Swyer, 62 N.J. 267, 272-76, 300 A.2d 563, 565-68 (1972) would serve to preserve the remaining plaintiffs' claims." Ibid.

The Court is persuaded that Plaintiffs' civil conspiracy claim should - at least at this early stage of the litigation - allow for the survival of the claims of personal injury against statute of limitations defenses, as it is plausibly asserted that any alleged "cover-up" by MEF and the defendant franchisees may have prevented Plaintiffs from realizing they had a cause of action and thereby "tolled" the running of the statute. And, as the Appellate Division clairvoyantly stated in D.M. v. River Dell, this matter may very well require a Lopez hearing to properly determine if the action should proceed.[2] Again, the Court pauses to note that Plaintiffs need not have to prove any of their allegations at this time; they are only required to sufficiently plead facts that give rise to a fundament of a claim. See Printing Mart-Morristown, supra, at 776. Applying this standard, Plaintiffs' claims must survive for now.

In the same vein, the Court does not find that Plaintiffs' claims for violation of the New Jersey Consumer Fraud Act (the "NJCFA"), N.J.S.A. 56:8-2 (Count 16), are barred by the statute of limitations, at least as of this time. As Plaintiffs' accurately point out in their opposition papers, New Jersey has consistently held that fraud claims are subject to the six (6)-year statute of limitations period. See Mirra v. Holland Am. Line, 331 N.J. Super. 86, 90 (App. Div. 2000) (finding that "the statute of limitations that applies to consumer fraud claims is the same six-year general limitation contained in N.J.S.A. 2A:14-1"); Catena v. Raytheon Company, 145 A.3d 1085, 1095 (App. Div. 2016); Kanter ex rel. Estate of Schwartz v. Equitable Life, 363 Fed. Appx. 862, 867 (3d. Cir. 2010). Whether the Plaintiffs can or will be able to establish that any of them suffered an "ascertainable loss" so as to warrant recovery under the NJCFA is an issue best left to be addressed by way of dispositive motion after discovery has been completed, or, after it has matured sufficiently to merit consideration of dismissal. Therefore, Plaintiffs' claims for violation of the NJCFA are still ripe.

However, notwithstanding the Court's agreement with Plaintiffs that no cause of action brought in their First Amended Complaint should be dismissed at this early stage of the litigation, the Court does not agree that Middlesex County is the proper venue in which these claims should be litigated tried as to all named Defendants. Pursuant to R. 4:29-1(a), multiple parties may only

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[2] This is especially so in light of the Court's determination, *infra*, that the claims of plaintiffs Jane Doe #3 and Jane Doe #4 against defendant ME Short Hills and defendant ME Closter should be severed and transferred, respectively, to Essex County and Bergen County for disposition by the trial courts there; and, that the motion to dismiss of the defendant MEF is being denied, without prejudice, to its possible renewal vis-à-vis, *inter alia*, Jane Doe #3 and Jane Doe #4 on the statute of limitation, NJCFA and all other issues raised in the moving papers.

be joined in the same action if a claim "arises out of or in respect of the same transaction, occurrence, or series of transactions or occurrences and involves any question of law or fact common to all of them." While certain claims commonly underlie all of the causes of action alleged, Plaintiffs' claims primarily arise out of distinct occurrences involving different individual adult females that are not near in temporal proximity – all alleged incidents occurring over a three-year period and at different locations. Furthermore, apart from the single franchisor defendant, MEF, the four (4) franchisee defendants – ME Mays Landing, ME Closter, ME Short Hills and Piscataway ME - all reside and operate in different counties (i.e., Atlantic, Bergen, Essex, and Middlesex, respectively).

R. 4:3-2, entitled "Venue in the Superior Court", provides in pertinent part as follows:

> (a) *Where Laid.* Venue shall be laid by the plaintiff in Superior Court actions as follows: * * * (3) except as otherwise provided by [citations omitted], the venue in all other actions in the Superior Court shall be laid in the county in which the cause of action arose, or in which any party to the action resides at the time of its commencement, or in which the summons was served on a nonresident defendant
> . . . * * *

[Emphasis added].

R. 4:3-3, entitled "Change of Venue in the Superior Court", further provides in pertinent part as follows:

> (a) *By Whom Ordered; Grounds.* In actions in the Superior Court a change of venue may be ordered by the Assignment Judge or the designee of the Assignment Judge of the county in which venue is laid . . . (1) if venue is not laid in accordance with R. 4:3-2, or . . . (3) for the convenience of parties and witnesses in the interest of justice . . . * * *

Under R. 4:38-2(a), entitled "Severance of claims", "[t]he court, for the convenience of the parties or to avoid prejudice, may order a separate trial of any claim, cross-claim, counterclaim, third-party claim, or separate issue, or of any number of claims, cross-claims, counterclaims, third-party claims, or issues." As the incidents involving Jane Doe #2, Jane Doe #3, Jane Doe #4, and Jane Doe #5 arose outside of Middlesex County, their claims will be severed and transferred to the respective counties in which their causes of action arose.[3]

As the Court noted at the conclusion of oral argument and re-iterates here, this determination does not preclude the Plaintiffs from applying to the Supreme Court under R. 4:38A for "Multicounty Litigation and Centralized Management" designation, and the Court encourages

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[3] Pursuant to R. 4:3-2(a), for an additional reason, venue for the four (4) named defendant franchisees is also properly laid in the respective counties in which they reside, to wit: Piscataway ME, LLC (Piscataway, Middlesex County); CMGK, LLC, d/b/a Massage Envy Mays Landing (Mays Landing, Atlantic County); Massage Envy Spa Short Hills, LLC (Short Hills, Essex County); and Summerwind Massage, LLC d/b/a/ Massage Envy Closter (Closter, Bergen County).

them to do so[4]. Pursuant to Directive #02-19 issued the Honorable Glenn A. Grant, J.A.D., Acting Administrative Director of the Courts, dated February 22, 2019, in order to determine whether designation for multicounty litigation is appropriate, the following factors must be considered:

- whether the case(s) possess(es) the following characteristics:
  - it involves large numbers of parties;
  - it involves many claims with common, recurrent issues of law and fact that are associated with a single product, mass disaster, or complex environmental or toxic tort;
  - there is geographical dispersement of parties;
  - there is a high degree of commonality of injury or damages among plaintiffs;
  - there is a value interdependence between different claims, that is, the perceived strength or weakness of the causation and liability aspects of the case(s) are often dependent upon the success or failure of similar lawsuits in other jurisdictions; and
- there is a degree of remoteness between the court and actual decision-makers in the litigation, that is, even the simplest of decisions may be required to pass through layers of local, regional, national, general and house counsel.
- whether there is a risk that centralization may unreasonably delay the progress, increase the expense, or complicate the processing of any action, or otherwise prejudice a party;
- whether centralized management is fair and convenient to the parties, witnesses and counsel;
- whether there is a risk of duplicative and inconsistent rulings, orders or judgments if the cases are not managed in a coordinated fashion;
- whether coordinated discovery would be advantageous;
- whether the cases require specialized expertise and case processing as provided by the dedicated multicounty litigation judge and staff;
- whether centralization would result in the efficient utilization of judicial resources and the facilities and personnel of the court;
- whether issues of insurance, limits on assets and potential bankruptcy can be best addressed in coordinated proceedings; and

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[4] Alternatively, Plaintiffs are free to petition the Chief Justice of the Supreme Court of New Jersey to designate Middlesex County as the venue for their unique category of cases, and pursuant to R. 4:3-2(c). It provides:

> (c) *Exceptions in Multicounty Vicinages.* With the approval of the Chief Justice, the assignment judge of any multicounty vicinage may order that in lieu of laying venue in the county of the vicinage as provided by these rules, venue in any designated category of cases shall be laid in any single county within the vicinage.

- whether there are related matters pending in Federal court or in other state courts that require coordination with a single New Jersey judge.

At oral argument, Plaintiffs' counsel readily admitted that nearly, if not, all of these factors apply to this case. If such designation is granted, the case would be afforded the centralized management Plaintiffs seek, but which is presently beyond this Court's authority to provide.

IV. Conclusion.

For all of the foregoing reasons, then, the Court hereby renders its decision and makes the following disposition of the Motions:

1. The Motion to Dismiss, pursuant to R. 4:6-2(e), filed by defendant Massage Envy Franchising, LLC as to Counts 1, 2, 3, 4, 5, 6, and 12-18 of the First Amended Compliant on behalf of Plaintiffs shall be **DENIED**, and without prejudice to its possible renewal once discovery proceeds and the facts become more fully developed. The Court shall retain jurisdiction over this defendant and all claims asserted against it.

2. The Motion to Dismiss, pursuant to R. 4:6-2(e), filed by defendant Piscataway ME, LLC as to Counts 1, 7, and 12-18 of the First Amended Compliant on behalf of Jane Doe #1 shall be **DENIED**, and without prejudice to its possible renewal once discovery proceeds and the facts become more fully developed. The Court shall retain jurisdiction over this defendant and all claims asserted against it.

3. The Motion to Dismiss, pursuant to R. 4:6-2(e), filed by defendant CMGK, LLC d/b/a Massage Envy Mays Landing as to Counts 1, 8, and 12-18 of the First Amended Compliant on behalf of Jane Doe #2 shall be **DENIED**, without prejudice, and the relevant counts asserted by plaintiff Jane Doe #2 against it shall be severed and transferred to Atlantic County for pre-trial discovery, litigation and appropriate disposition by the trial court there.

4. The Motion to Dismiss, pursuant to R. 4:6-2(e), filed by Massage Envy Spa Short Hills, LLC as to Counts 1, 9, and 11-12 of the First Amended Complaint on behalf of Jane Doe #3 and Jane Doe #5 shall be **DENIED**, without prejudice, and the relevant counts asserted by plaintiffs Jane Doe #3 and Jane Doe #5 against it shall be severed and transferred to Essex County for pre-trial discovery, litigation and appropriate disposition by the trial court there.

5. The Motion to Dismiss, pursuant to R. 4:6-2(e), filed by Summerwind Massage, LLC d/b/a Massage Envy Closter as to Counts 1, 10, and 11-12 of the Amended Compliant on behalf of Jane Doe #4 shall be **DENIED**, without prejudice, and the relevant counts asserted by Jane Doe #4 against it shall be severed and transferred to Bergen County for pre-trial discovery, litigation and appropriate disposition by the trial court there.

An appropriate Order implementing the Court's decision above accompanies this Statement of Reasons.

EXHIBIT "B"

SUPERIOR COURT OF NEW JERSEY
MIDDLESEX COUNTY
LAW DIVISION, CIVIL PART
DOCKET NO.: MID-L-005163-18

JANE DOES NUMBER ONE THROUGH NUMBER FIVE,

Plaintiffs

v.

MASSAGE ENVY FRANCHISING, LLC, ET AL.,

Defendants.

TRANSCRIPT

OF

MOTION

Place: Middlesex County
Courthouse
56 Paterson Street
New Brunswick, NJ 08903

Date: May 3, 2019

BEFORE:

HON. THOMAS D. MCCLOSKEY, J.S.C.

TRANSCRIPT ORDERED BY:

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(Laffey, Bucci & Kent, LLP)

APPEARANCES:

BRIAN KENT, ESQ.
(Laffey, Bucci & Kent, LLP)
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Attorney for the Defendant, Massage Envy Piscataway LLC and Short Hills location.

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Attorney for the Defendant, Massage Envy, Mays Landing.

I N D E X

THE COURT: Good morning, everyone.

MR. KENT: Good morning, Your Honor.

MR. ATKINS: Good morning, Your Honor.

MS. FINEGAN: Good morning, Your Honor.

THE COURT: Please be seated. Okay. We're on the record in the matter of Jane Doe One through Five versus Massage Envy Franchising LLC; Piscataway ME, LLC; CMGK, LLC, doing business as Massage Envy Mays Landing; Massage Envy Spa Short Hills, LLC; and Summerwind Massage, LLC, doing business as Massage Envy Closter.

Docket number MID-L-5163-18.

May I have appearances of counsel for the record, please?

MR. KENT: Good morning, Your Honor. Brian Kent and Nellie Fitzpatrick on behalf of the plaintiffs.

MS. FITZPATRICK: Good morning, Your Honor.

THE COURT: Good morning.

MR. DE DONATO: Good morning, Judge. Joseph De Donato, Morgan, Melhuish, Abrutyn for Massage Envy Closter.

THE COURT: Good morning.

MR. ATKINS: Good morning, Your Honor. Robert Atkins for Massage Envy Franchising.

THE COURT: Good morning.

MS. RUBIN: Hi. Good morning, Your Honor. Jackie Rubin for Massage Envy Franchising as well.

MR. BARREIRO: Good morning, Your Honor. Darren Barreiro, of Greenbaum, Rowe, Smith and Davis on behalf of Massage Envy Franchising also.

THE COURT: Good morning.

MR. BERNSTEIN: Hi. Good morning, Your Honor. Adam Bernstein also from Paul Weiss, also on behalf of Massage Envy Franchising.

THE COURT: Good morning.

MS. FINEGAN: Good morning, Your Honor. Carmen Finegan from the Law Office of Gerard Vince on behalf of Piscataway ME LLC and the Short Hills location.

THE COURT: Okay. Thank you.

MS. COHEN: Good morning, Your Honor. Sarah Cohen from Lauletta Birnbaum on behalf of Massage Envy Mays Landing.

THE COURT: Okay. Did we leave anybody out? Okay. Good morning, everybody and thank you waiting and also for waiting for this day, but before the Court today, I have four particular applications and -- and let me start off the top. We have the application of Massage Envy Closter to dismiss Counts

five, nine, 10, 11, 12, 13, 15 and 16 of the plaintiff's complaint and to sever the remaining claim of Count 14 of Jane Doe Number Four from the main action and transfer the venue of the severed claim to Bergen County.

I have the motion, a similar motion, Massage Envy Mays Landing to dismiss and sever and transfer due to improper joinder and venue. I have the application of the defendants Piscataway ME LLC and Massage Envy Spa Short Hills seeking similarly the dismissal in severance and transfer of the matter joining, I believe it's Jane Doe's Three and Five, at least Jane Doe Five to Essex County and the overall matter to dismiss the plaintiff's first amended complaint of Massage Envy Franchising LLC.

I think I've covered everything; is that correct?

MR. ATKINS: Yes, sir.

THE COURT: Okay. So, Mr. De Donato, let's start with you and we'll go down the line and then I'll hear from the plaintiffs.

MR. DE DONATO: Okay. Good morning, Your Honor. Thank you. I realize, Your Honor, these briefs have been in Your Honor's chambers since January. So, I'm going to be very brief on the topics

because I think that they've -- they've been there so long, Your Honor's probably fully aware -- well, is aware of all the legal issues presented.

THE COURT: Well, they're coming close to getting a driver's license. So, okay.

MR. DE DONATO: I --

THE COURT: And -- and -- and for the record, I have thoroughly poured over, as is my way, everything that has been written and everything that has been attached. So, you can assume that I am very much up to speed on all the legal issues here, but this is your opportunity to convince one way or the other.

MR. DE DONATO: Thank you, sir. I'll just speak on the two year statute of limitation question because as Your Honor is familiar with the issues, the only real case cited in opposition was D.M. versus River Dell High School and the only issue there was a claim of repressed memory, which doesn't exist here; multiple sexual incidents or claim multiple sexual incidents, which does not exist here; and if the Court knows in that case, there was one claimant who did complain about the prior sexual incident and that case was dismissed on the statute of limitation basis.

In this situation, it was -- the complaint

was filed two and a half -- two years and nine months after the event occurred in the winter of 2015. The complaint in Paragraph 92 reflects that Jane Doe Four went back to my client's facility and complained about the therapist. So, she was fully aware what took place here. She was on notice of -- of the event that she was complaining of. So, it was incumbent upon her to file within the statutory time period.

So, I don't think the discovery rule was ever meant to cover this situation. Repressed memory cases were not meant to cover this situation and for that basis, I think all the two year causes of action are -- are entitled to be dismissed.

THE COURT: Now, we're -- we're talking specifically about Jane Does Three and Four, correct?

MR. DE DONATO: Just Four, Your Honor.

THE COURT: Okay.

MR. DE DONATO: Just Four is Closter.

THE COURT: On the statute?

MR. DE DONATO: On the statute question, yes.

MS. FINEGAN: Your Honor --

MR. DE DONATO: Oh, I'm sorry.

MS. FINEGAN: -- just so it's clear. No, no. That's all right. And just so that we don't have

to repeat ourselves. Jane Doe Three is a Short Hills -- out of Short Hills --

THE COURT: Right.

MS. FINEGAN: -- and has the exact same arguments in terms of dismissal.

THE COURT: And Jane Doe Three's incident as I recall from the papers, it was January 23rd of 2015 and Jane Doe Four's was sometime in 2015 also.

MR. DE DONATO: Winter 2015. So, it could not be any later than December 31st, 2015. Using that date, the filing of the complaint was two years and nine months after the -- following the event and again, that -- Jane Doe Three is, but that's not my -- that's not my case.

MS. FINEGAN: And Your Honor, just so -- it's three years and seven months is the difference between the alleged incident and again the knowingness she reported it to Short Hills at the time and doesn't file the complaint until three years and seven months later.

THE COURT: Yes. Okay.

MR. DE DONATO: And -- and Your Honor, as the brief argues, that would only leave the six years statute of limitation cause of action for the Consumer Fraud Act, which in the belief, we believe that should

be -- is misjoined here and should be brought in Bergan County.

This is a Bergen County plaintiff, a Bergen County defendant, a Bergen County cause -- alleged transaction. My client does not have an office in Middlesex County, does not do business in Middlesex County. The case just does not belong here. That -- one cause of action respectfully should be transferred to Bergen County and be heard there.

The mere fact that Massage Envy, a franchisor, has been named in this case is under the cases that I believe we've cited insufficient to create the nexus to keep the case here. It's not properly joined. These are discreet, independent events and my client in Closter, and I don't know how much further north you can get from New Brunswick than Closter, that case should not be joined in this matter.

Unless Your Honor has any further questions, that's -- that's my argument.

THE COURT: Okay. Okay. Ms. Cohen?

MS. COHEN: Yes, Your Honor.

THE COURT: Let's hear -- hear you on your application regarding Massage Envy Mays Landing.

MS. COHEN: I just intend to join in the --

the -- what Mr. De Donato had said and add that my client, Massage Envy Mays Landing, has absolutely no nexus to Middlesex County. It doesn't do -- it doesn't do business here, doesn't have any customers or clients here, doesn't advertise here, and the event occurred in Atlantic County and we believe that the plaintiff is an Atlantic County plaintiff as well, even though she has not identified herself, but I'll just say that it doesn't belong here. It's not part of the same transaction or occurrence. These are independently owned and operated franchises and this -- what remains in this case should be heard in Atlantic County, at least as related to Massage Envy Mays Landing.

So, unless Your Honor has any questions for me --

THE COURT: Okay.

MR. COHEN: -- I'll keep it brief. Thank you.

THE COURT: Thank you. Mr. Atkins, Mr. Barreiro, either/or or both?

MR. ATKINS: I have a wee bit more to say. So, for the record, may I please the Court? I'm Robert Atkins. I represent Massage Envy Franchising and I stress that because I represent the franchisor,

not the franchisee, not the owner or operator of any of these locations and not the employee of -- I'm sorry, not the employer of any of the employees alleged to have committed these assaults.

We are moving to dismiss all of the claims on various grounds. I'll focus today on four of them, although obviously I'm happy to address any of them, but I'm going to focus on vicarious liability, direct negligence, negligent misrepresentation, and I'll make some comments about the statute of limitations.

The big picture here, Your Honor, is that we represent the franchisor and there are two fundamental facts that are not contradicted by any facts in the pleading and I think these two facts dispose of all the claims against the franchisor. Number one, as I said before, the alleged assailants were employees of the franchisees. They were not employees of the franchisor and I'll call them M.E.F. There's no allegations that M.E.F. hired any of these people, paid any of these people, solicited them to work, interviewed them, screened them, or controlled them in any way and there are no facts alleged to the contrary. That's number one and I'll come back to that with respect to the specific causes of action.

Number two, and this is affirmatively

alleged by the plaintiffs, the alleged assailants, the employees, committed crimes and intentional violations of New Jersey law and that's pled specifically in Paragraphs 127 and 149. So, that heinous conduct, if true, is way outside the scope of their employment, their employment by the franchisees. So, I submit and I'll -- we'll talk about it in depth in a moment that that cuts off any liability under tort concepts, negligence or any of the negligence claims and it certainly cuts off liability with respect to my client, the franchisor, which is even further removed not being the employer --

THE COURT: Yes.

MR. ATKINS: -- but in any event --

THE COURT: Let me ask you this.

MR. ATKINS: Yes, Your Honor.

THE COURT: It wasn't clear from the record, but with respect to any of the claimants, Janes -- Jane Does One through Five, did any of them report their incidents to prosecutorial authorities?

MR. ATKINS: I --

THE COURT: That anyone knows?

MR. ATKINS: I -- there may be folks in the room who do know that. I know and just to, sort of, bring it back to the pleading, there's no allegation

that any of these plaintiffs reported their incidents to M.E.F. and there's no allegation that the franchisees reported it to M.E.F., which I think is what's critical here from -- from -- from the plaintiff and I'll come back to that as well and it seems to me that the, sort of, telltale sale of the inability of plaintiffs to assert any cognizable claim against M.E.F. specifically is, and we went through this in our papers, this, sort of, lumping together of all the defendants.

There are numerous allegations that are made against quote, "the defendants, the defendants knew, the defendants employed, the defendants were aware, the defendants should've done x, y, and z." That is not sufficient to state a claim against frankly any of the individual defendants because it's not clear who did what, but more importantly to me, this complaint lacks other than conclusions and legal buzzwords, specific allegations of fact as to what M.E.F. did with respect to the -- either the employees or the plaintiffs.

So, let me now turn to the causes of action and I'll start with vicarious liability. It is, in fact, the first cause of action and primary cause of action of M.E.F. So, I wanted to focus on that. This

area is a well-litigated, well-adjudicated area of the law and by that, I mean cases in which there are allegations of sexual misconduct or harassment or hostile work environments created by employees and claims are brought against the employer under the New Jersey law of respondeat superior and those cases, many of which we've cited and discussed here, Your Honor, are regularly dismissed under the New Jersey principles of respondeat superior.

I presume the pleading requirements are familiar to the Court. The two critical ones, I submit, are not sufficiently pled with respect to M.E.F. Number one, the predicate requirement for a claim of vicarious liability is that there be a master/servant relationship between the party sought to be held vicarious liable and the person, in this case an employee of the franchisee who committed the misconduct.

So, number one, it needs to be a master/servant relationship, an employer/employee or, and this has come up in the franchisor case as we cited to Your Honor, there has to be some control by the franchisee over the hiring and conduct of the employee. The -- the franchisor, forgive me. And the second element to establish vicarious liability is

that the conduct or the misconduct, more broadly, of the employee was within the scope of employment.

So, let me drill down a little bit about each of those requirements. Let me start with the master/servant relationship. There are no specific facts alleged in the complaint that would establish or could establish that M.E.F. was the employer of these -- okay? They are the employees of the franchisee and there's, kind of, a tipoff, a giveaway about that in the pleading because the only thing that's alleged is the -- the bear conclusion that M.E.F. was the employer and/or the franchisees were the employer and it -- it can't be either of those. Meaning, if -- if they're saying that M.E.F. was the sole employer, there's no allegations to support that and I think that would not dispute that these folks were the employees of the franchisees, or that both were the employers, that is M.E.F. and the franchisee and there are no facts to sustain that because these folks were the employees of the franchisees and the franchisor and those are the grounds, or one of the principle grounds, on which these vicarious liability claims against franchisors are regularly dismissed.

We highlighted for Your Honor, and I'll mention them quickly, two cases, which are directly on

point, both involving incidents of either sexual -- sexual assault or hostile working environment and those cases are the J.M.L. case and the Mihalik (phonetic) case.

In the J.M.L. case, it was about a employee of a karate studio, a karate franchise who was sexually assaulted by an instructor in the studio and the plaintiff brought claims against the franchisee of the studio and the franchisor and the Court held there was no vicarious liability and in fact, no direct liability for negligence, which I'll come back to because the franchisor did not own the location, it was owned by the franchisee, and because the franchisor had no role in the hiring of the employee.

Facts that are true in the case of my client, M.E.F., and there are no allegations to the contrary. There is no allegation that M.E.F. had anything to do with hiring any of the employees who committed these crimes. That's the J.M.L. case.

The Mihalik case, very similar, was a case and in fact it was just last year and the case was dismissed on a motion to dismiss regarding an alleged hostile work environment and again, the Court found that the franchisor was not the employer or the employee, same situation here, and importantly said

nearly alleging that the franchiser, quote, "Controlled either the franchisee or the" -- "importantly the employee, is" -- "is insufficient to state a claim as merely a conclusory allegation," and just like this case, in Mihalik, there were no specific allegations that the franchisor controlled the hiring or had anything to do with hiring or overseeing the conduct of the employee.

Those cases are squarely on point, applied directly to this situation, and that alone is grounds for dismissing the vicarious liability claim against M.E.F., but there's a second reason and an independent reason for why the vicarious liability claims cannot be sustained on this pleading and that is because the plaintiffs themselves alleged that the employees of the franchisees who committed these alleged acts of misconduct in fact engaged in crimes.

Paragraph 127 refers to the behavior of the employees as unlawful sexual conduct. Paragraph 149 describes the conduct at issue as violations of New Jersey criminal statutes and I think we can all agree that committing a crime is not what the franchisees hired these employees to do. Needless to say, they were not authorized and there's no allegation that they were, Your Honor. These employees did not serve

their employers. They betrayed their employers and, again, this is a ground frequently cited for dismissing cases just like this and in fact, the test for whether conduct or misconduct is within the scope of the employment was articulated by the New Jersey Supreme Court in Davis v. Devereux and that case, in fact, involved a criminal assault against a patient.

So, a case very much like this one and the Supreme Court in -- in Davis that the test for whether misconduct is within the scope of employment is whether, and I'll quote, "the conduct of the employee was in an effort to fulfill an assigned task," and in the words of the restatement, the conduct actuated -- was actuated in order to serve the employer. So, test number one is, was the conduct intended to serve the employer within the scope of the employee's job or as the Supreme Court said in Davis, was the conduct, quote, "Not of a kind of conduct employed" -- "that was the person was employed to perform."

I -- I -- I find it difficult to believe there could be a debate here and I don't think there really is. I think the answer is obvious. These alleged heinous crimes were plainly not within the scope of the employment. They were not done to serve the franchisees. They were not actuated by an attempt

to do their job and the plaintiffs, I believe, have cited no case in which there was a crime committed by an employee, but nonetheless, the employer, or more distantly the franchisor, was held to be vicarious liable when that crime was committed outside the scope of the job.

And, so, for both of those reasons, Your Honor, the lack of a master/servant relationship and conduct clearly outside the scope of employment based on the allegations of the complaint itself warrant the dismissal of --

THE COURT: Well, let --

MR. ATKINS: -- the cause of action of the --

THE COURT: Let me -- let me ask you --

MR. ATKINS: Yes, Your Honor.

THE COURT: -- a couple questions. So, you agree that your application is an application under Rule 4:6-2e, correct?

MR. ATKINS: Yes, Your Honor.

THE COURT: Okay. And the standards that the Court must apply in evaluating a 4:6-2e application are that I must accept as true all the allegations set forth in the complaint, correct?

MR. ATKINS: Correct.

THE COURT: And if there's even a fundament of a claim asserted, that I am obligated to deny the application to allow the matter to proceed to discovery in a normal course. Would you agree with that?

MR. ATKINS: I would, Your Honor.

THE COURT: Okay. And in fact, our -- our Court, especially in the Printing Mart case, it was very specific in cautioning trial Courts to dismiss cases at this early stage of the litigation before they've been allowed to develop with the filing of a responsive pleading and discovery to proceed in a normal course. Now, on -- on the score of Master/servant relationship, on even the J.M.L. case states that there's a special legislative recognition of franchisor or franchisee relationships and the Court's -- as the Court -- and I'm quoting the Court, this is the Appellate Division of 2005 in J.M.L., quote, "The degree of control, the actual exercise of control, and the use of slogans are the issuance of assurances concerning the safety of patrons." closed quote, is what the Court looks at when assessing whether the franchisor may be liable for the acts of the franchisees or the employees and the Mihalik case was a 2018 Federal District Court case. I'm not bound

by that and, am I?

MR. ATKINS: No, you're not, Your Honor.

THE COURT: Okay. But back to my reference to J.M.L., and the overlay of the standards that the Court must apply under a 4:6-2e application. There's at least a fundament of a claim alleged in the complaint that there is control at some level between M.E.F. and the franchisees that are named as defendants in this case. Would you agree?

MR. ATKINS: I would agree that the word "control" is used in the pleading.

THE COURT: And it is an issue.

MR. ATKINS: Well, my view, Your Honor, if I may, is that simply uttering the word "control," which is (indiscernible) to a legal conclusion, with no supporting facts at all --

THE COURT: Well, that's -- your argument is that Mihalik says a conclusory allegation is insufficient.

MR. ATKINS: Yes, and I think that --

THE COURT: On -- on -- on -- on such an application, but that's the -- that's the district Court --

MR. ATKINS: Right.

THE COURT: -- the -- the New Jersey

Superior Court.

MR. ATKINS: That is correct, but -- but I still think that under the New Jersey rules, there must be something more than simply the legal conclusion. I think that in order to keep a party, a franchisor, who has that case, recognizes there is a fundamental difference between the franchisor and the franchisee. That model is predicated as a matter of law on the franchisor not being the employer. In fact, we didn't burden you with it, but there's an entire body of law from coast to coast about how franchisors are not liable for labor disputes, wage disputes, occupational hazards --

THE COURT: And certainly not crimes.

MR. ATKINS: Pardon me?

THE COURT: And certainly not crimes.

MR. ATKINS: Well, certainly not crimes committed by people who aren't the employees over whom they -- there are no allegation had anything to do with hiring them and I submit the absence of it, the -- the threadbare nature of this pleading is because there are no facts.

Now, if Your Honor is so inclined to let this go forward, that will be what happens, but I believe a pleading, especially in this area,

especially with respect to this well-established legal paradigm, in which the franchisors are not as a matter of law or fact the employees. So, if they want to drag the franchisor to this case, there has to be some allegation that they had something to do with this person now alleged to be an assailant being on the premises, being there and behaving the way he did.

There's absolutely no allegation that M.E.F. had anything to do with that and given that background, I would expect that the standard, at the pleading stage was that there has to be something to bring this non-employer into this case and I would submit there's nothing in this rather prolix complaint that would sustain any claim against M.E.F.

THE COURT: Let me ask you -- shifting gears for a moment -- about what's been argued by the other defendants and that is their efforts to sever the -- the respective claims alleged against them and so far as they're located in counties other than Middlesex County and if I was inclined to grant their applications, that would put M.E.F. in a position where it's defending the same or similar claims of the plaintiffs who -- whoever may be left in the case or not in multiple counties, correct?

MR. ATKINS: That's -- that's what will

happen.

THE COURT: And don't I have discretion under Rule 4:38-2 to allow for the joinder of those claims and have them heard in Middlesex County?

MR. ATKINS: I think Your Honor has discretion. I just think in the exercise of discretion, I think each of these franchisees has made a compelling argument for why they don't belong here and --

THE COURT: Well, I -- and when looking at the rule, 4:29-1b, Joinder by Order of the Court, the Court on its own motion can join them, but the rule says, and I'm quoting, "The Court shall not order such joinder unless it finds for specific reasons stated on the record that the interest of judicial economy and of non-parties, which would be served by such joinder substantially outweigh the interests of the named parties in not joining additional parties." So, I -- I do have --

MR. ATKINS: I --

THE COURT: I took apart --

MR. ATKINS: I don't think any --

THE COURT: -- high threshold standards that I would have to meet and I'm sure I'm going to hear from Mr. Kent --

MR. ATKINS: Yes.

THE COURT: -- in a moment on that issue, but that said, I mean I do have the discretion from -- at least from the interests of judicial economy.

MR. ATKINS: I don't think anyone on this side of the table disagrees with that at all.

THE COURT: Okay.

MR. ATKINS: I wouldn't -- I wouldn't question Your Honor's authority or -- or discretion in this regard.

THE COURT: And -- and ultimately -- I mean, I could -- I'm not saying you're going to do it, but if I held everything together for the purpose of -- in the interest of judicial economy and providing a mechanism for uniformed discovery and rulings that wouldn't be dispirit because my colleagues in other counties may be faced with the same or similar applications if I sever and transfer the claims out to different counties, there is at least some argument that the plaintiff raises that judicial economy would be served.

MR. ATKINS: There -- there -- there's no doubt there are arguments on the other side and I defer to my colleagues here, I -- I -- I -- it is -- it is a little hard to imagine a better argument safe

for the fact that there's -- the fact that M.E.F. stands in each one of these cases. That --

THE COURT: But -- but now M.E.F. would be prepared nonetheless the -- as you stated in your papers --

MR. ATKINS: Yes.

THE COURT: -- to defend in any -- any and every county if that's the case.

MR. ATKINS: As -- as my worthy adversary knows, I defend these cases in lots of places. So, the fact that we might have to have cases in Bergen and Middlesex and elsewhere is not terribly different from the fact that I defend these in Florida and California and elsewhere and, so, we're prepared to do that and as you probably noted in the papers, we don't always get the same results in the -- in all the cases --

THE COURT: Well -- well -- well, there you go.

MR. ATKINS: Right.

THE COURT: I mean, that's one of the elements.

MR. ATKINS: Right. So --

THE COURT: One thing that as I've read the papers that has, I won't say concerned the Court, but

floats around in the back of my mind is playing out the scenarios. If I sever and transfer and send claims of whatever Jane Doe to different counties, my colleagues in those counties are going to be receiving this and there's the possibility we -- we have -- we have different views on the merits of -- of the arguments for dismissal that you've raised here and on the statute issues that could provoke dispirit rulings.

MR. ATKINS: Your Honor, we actually already faced that issue in this Courthouse because one of these cases in this county was dismissed based on the same arguments that I'm making and I -- although I obviously believe in my position, I respect Your Honor enough to know that you're not going to do what that Judge did simply because that Judge did that, but you're going to make a judgment on your own and the quality of our -- our arguments, and, so, we -- we face this issue and are prepared to salute Your Honor, if you -- if you will.

THE COURT: I -- I understand. Okay. Okay.

MR. ATKINS: Okay. Thank you. Let me turn now to the negligence claims against M.E.F. and they come in several forms. So, there is the -- what I'll just call direct negligence and that's Counts two

through six for each of the plaintiffs. There's also a claim for negligence performance of services, negligence per se and negligent infliction of emotional distress and those are Counts 12, 13, and 14.

I think each one of those -- and all of them fail for two fundamental reasons: insufficient allegations of a duty owed by the franchisor, M.E.F., to these plaintiffs and insufficient allegations to establish, of course, causation.

So, let me start with duty, and this sounds like and is like the argument I've already made and we've briefed about the lack of a relationship between M.E.F. and these customers of these franchise locations. Again, to establish a duty to assert a viable negligence claim, there must be facts to establish that M.E.F. either was the employer, they're not, or had some control of the hiring and the managing of the employees and again, I go back to the -- my argument and the conversation we had about the pleading standard, there's nothing in this complaint, page after page after page, when a single fact to support that fundamental requirement for a negligence claim. In fact, we know that the employees who committed these crimes, allegedly, were employees of

someone else, the franchisees, and M.E.F. had no control over the hiring, there's no allegation that they did, and these are the grounds on which these kinds of claims against franchisors are quite typically dismissed and we go back to -- to J.M.L. just like the Court J.M.L. found there was no grounds to establish respondeat superior, the Court found there was no claim of -- no viable claim of negligence against the franchisor, this was the karate studio, because they didn't own the place, they didn't hire the employee, and they had no role in hiring the employee. That's the legal framework for viewing negligence claims against a franchisor and, again, there are no facts pled to -- that would support that here.

The other case is Caprilioni versus Radisson (phonetic). This is actually a slip and fall case. This is the cracked sidewalk outside the Radisson, sued the hotel, sued the franchisor, case thrown out. Again, no duty. What's interesting about this is the -- the franchisor didn't own the location, didn't operate the location, didn't control the daily operations, had nothing to do with the maintenance of the place, but it did have a right to inspect the location and even though they had the right to inspect

and could've inspected and might've found this cracked sidewalk, that was insufficient to establish negligence given their role as a franchisor.

So, that's basis number one, no duty, and that's, as you well know, is just -- is a gatekeeping element for any negligence claim, but even if there were a duty and even if the -- there was a proper allegation of a duty, the negligence claim fails because there's -- they have -- the plaintiffs have failed to adequately allege causation and in this context, we're talking about proximate cause. That means as the Supreme Court laid out in Conklin, that there has to be an act or a failure to act by M.E.F., not the, quote, "defendants" not the grab bag of, quote, "defendants," but something M.E.F. did or didn't do that directly resulted in the harm to these specific plaintiffs, number one.

Number two, there have to be facts to show that but for whatever it is the M.E.F. did or didn't do, these plaintiffs would not be harmed. So, that's the standard. So, the question here is, are there facts alleged as to M.E.F. that could satisfy those elements of causation?

Now, the only allegations I see are these, sort of, vague assertions about M.E.F. not having

certain procedures or protocols or policies. The complaint does not actually allege what those policies should've been, how they would've had -- possibly had any affect on the conduct of these alleged criminals and thus, there's no allegation on this that the procedures, whatever they might be, and we don't know what they are, would in fact have resulted in these plaintiffs not being harmed. That is that the absence of some unarticulated policy is in fact what caused these plaintiffs to be heard and had there been these policies, and I don't know what they are, we wouldn't be here today.

That's proximate cause and I think it's important to bear in mind in considering that issue that we're talking about criminal behavior. We're not talking about some, kind of, employee handbook for the rest of this. We're talking about people for whatever reason are alleged to have committed crimes and that, to me, invokes what Conklin said, the Supreme Court said in conduct -- Conklin, Your Honor, with respect to proximate cause and here I'm just going to quote, "To establish proximate cause, the conduct has to be in the natural and continuous sequence unbroken by any efficient intervening cause and thus produces the result complained of."

So, you know, absent that, I think they failed to allege anything that M.E.F. did or didn't do that is the cause of these events, but considering that in the context of a crime, I submit that this pleading would have to have far more than these vague unarticulated assertions of missing policies at the franchisor level. So, taking this bedrock principles of the need to allege facts to establish proximate cause, it is an extra challenge in a case where we're talking about criminals and, so, there's nothing in this complaint that could possibly establish that M.E.F. was the proximate cause. So, in the absence of a duty and/or -- the complaint and/or facts to show causation, all of those negligence claims fail as a matter of law.

So, I'm -- I'm now going to turn to the negligent misrepresentation claim. Again, I assume the Court is familiar with the elements. There's nothing unusual, at least in the type of claim here. There needs to be a misrepresentation of fact. So, false statement, number one. That false statement needs to be, of course, communicated and received by -- communicated to and received by each of these five plaintiffs. Each of those five plaintiffs has to have had relied on that. In other words, I assume the

theory is, it's not really spelled out, but absence seen and relying on some false statement, I suppose they chose to seek a massage at these franchisee locations and the complaint would have to have facts sufficient to show that but for whatever these false statements are, these plaintiffs wouldn't have gone -- wouldn't have been harmed and I submit, Your Honor, that none of those elements is pled with this -- with sufficiency.

So, I'll -- I'll just start with the allegation that's actually in the negligent misrepresentation Count, Count number 15. It's paragraph 368, "Defendants," plural, "negligently misrepresented material facts to plaintiffs," plural. We don't know which defendants. Is it all defendants? We don't know which plaintiffs. Is it all five, is it just some of them, but critically, what we don't know from the pleading is when, where, what form of medium, and did the plaintiffs actually see these alleged false statements? Did they actually rely on them and but for these statements would not have been in harms way? None of those things are alleged, no facts could establish and critically, they don't even allege whether these statements were, a, made before or after the incidents, but more importantly, they don't allege

whether the plaintiffs, if in fact they saw them and we don't know they did, whether they saw them or heard them before or after the incident. It is the most naked kind of misrepresentation, false advertising claim that you could imagine. That's that paragraph.

They also argue, and this is mostly in the brief, but it's alleged to some extent in the complaint that M.E.F. had a, quote, "Zero tolerance policy." That's it. Number one, there's nothing false about that statement. It's not alleged that M.E.F. said it had a zero tolerance policy, but in fact does not. That's not alleged. So, it's not even a -- a false statement.

Number two, again, like the other paragraph we just talked about, no allegation as to where it appeared, no allegation of which, if any of the five plaintiffs, saw it, heard it, or read it, and -- and again, if they did and that's not alleged, when they saw it or read it, before or after, and no allegation that these plaintiffs actually saw it, read it, were induced into going to one of these franchisee locations as a result of hearing or seeing or reading that M.E.F. had a, quote, "Zero tolerance policy," and, so, that is insufficient to sustain the negligent misrepresentation claim.

The third allegedly false statement that I think -- and I could be corrected, I don't -- I'm not sure this is in the complaint. It's argued in the brief, but in any event, it is alleged that M.E.F. or one of its officers said that M.E.F. has a, quote, "Commitment to safety." Again, no allegation that that in fact is false, no allegation that any plaintiff actually heard or saw it. We don't know where it appeared, we don't know when it appeared, we don't know who saw it and there are no facts alleged, none, that any of these plaintiffs relied on that in deciding to go to any of these franchisee locations and as a result were harmed.

So, for all those reasons, Your Honor, I think the negligent misrepresentation claim is -- is not even close to being cognizable because none of the predicate facts, none of the essential facts, have been pled or appear in the complaint.

I am going to move on to the New Jersey Consumer Fraud Act, unless Your Honor wants to --

THE COURT: Well, let me ask you a --

MR. ATKINS: -- pause on that.

THE COURT: -- question about the -- your -- your last arguments on negligent misrepresentation. I -- I -- again, under a 4:6-2e standard, a pleading

must be dismissed, and I'm quoting now from the rule, "If it states no basis for relief and discovery would not provide one." How do we know that discovery will not provide one?

MR. ATKINS: Well, I know that, but that's not the answer you're looking for. I know that because it would've been pled. I -- these -- these are so fundamental. The notion -- now, let's just imagine this was one plaintiff, let's make it simple, right? It's a false advertising case and the claimant is -- there's this false statement out there in the ether. I don't believe it's sufficient to state a claim, I don't think it's sufficient to get to discovery if you cannot say, "I saw that ad, I bought that product because of that ad. I wouldn't have bought it if I hadn't seen that ad. I remember when I saw that ad. It was before I bought the product." That -- it's elemental and to -- what they're really saying is it's sufficient to have a Count that's called negligent misrepresentation and that the defendant used these words --

THE COURT: Well, we --

MR. ATKINS: -- and I don't believe that's -- I don't think that's sufficient.

THE COURT: You would agree with me -- you

would be agree me, we are a notice pleading state, correct?

MR. ATKINS: I would, Your Honor.

THE COURT: Okay.

MR. ATKINS: And I do not know and I have not received notice from this pleading as to which of these plaintiffs saw what, when, and where, and I do not believe that that's an invitation to do discovery, to say, Mr. Atkins, that's when you'll find out, that we should be put to the burden and the cost of litigating that when they don't plead facts that are within their knowledge. I mean, they're able to, with all respect, allege the facts of the underlying incidents, serious as they are, grave as they are and I would expect if they wanted to append to this negligence, this tort case, some, kind of, false advertising misrepresentation deception claim, I would expect to see at least something comparable to the allegations of what happened to them at these locations. I -- I find it striking that these plaintiffs recall -- I'm not -- I'm not surprised they recall what happened to them. Lord knows that would be in their memory and they would share with us in the complaint and put us on notice of what happened, but with respect to the negligent misrepresentation, there

is nothing. It is a caption on a Count and I don't believe that's grounds for -- for pursuing discovery.

If you cannot say what I saw, when I saw it, what it did to me, what I would've done had I not seen that false ad and I don't -- I don't think they have done what's necessary to crack open discovery, spend money, spend time writing down, chasing facts that are -- that are fundamental to the claim.

So, let me -- let me turn if, Your Honor --

THE COURT: Okay.

MR. ATKINS: -- if -- if you will, to the New Jersey Consumer Fraud Act claim. To the extent that that's intend to -- intended to capture the misrepresentation false advertising theory, I think it fails for the same reasons and I'm not sure -- I'm not -- it's not clear it to me whether that is what that -- the -- the statutory claim is, but if it is, it fails for the same reason as the negligent misrepresentation, but there are -- there are other grounds, Your Honor.

As capacious as the New Jersey Consumer Fraud Act is and we all know that, it is not without its limit. It is not for any kind of bad conduct by anybody. It is after all a consumer protection statute. These plaintiffs were not consumers of

M.E.F. M.E.F. would've have had to do something in connection with the sale of the services provided by the franchisees that was dishonest or deceptive, number one, and that dishonesty or deception would've have to had caused the plaintiffs to buy the services or contract for the services provided by the franchisees and the fact of the matter and there's nothing in the complaint to the contrary, that -- and there's no argument more importantly in the brief, that conduct must result in what is referred as to ascertainable loss. The ascertainable loss is not, cannot be, and never has been personal injury, emotional distress, pain and suffering. It is for economic harm. The statute is for the loss of money in purchasing a product or a service that turns out not to be what it is advertised to be.

So, the damages can only be and I think they're only claiming, and this is critical, the payment for the massages or the membership at the franchisee, not with M.E.F. So, M.E.F. did not make or sell anything to the plaintiffs. The plaintiffs didn't buy anything from M.E.F. The plaintiffs didn't pay M.E.F. The relief they're seeking cannot be from M.E.F. because M.E.F. didn't charge them and they didn't pay M.E.F. and as I -- M.E.F. didn't receive

any payments. We know who charged, we know who the plaintiffs bought the services from and that's the franchisees.

So, on those fundamental elements, there can be no statutory claim against M.E.F. It wasn't the purveyor of the service, it didn't provide the service, it didn't receive payment for the service. Somebody else did and the relief sought can only be from that somebody else because only that somebody else charged for the services that plaintiffs claim it wouldn't have otherwise purchased.

THE COURT: Well, I -- you -- you would agree with me though that but for the fact and existence of the franchisor and the franchise model in this instance, there would not be franchisees?

MR. ATKINS: Well, that's -- that's no different than any other licensee arrangement, right? If somebody who --

THE COURT: So, I suppose that going to the local Y.M.C.A., I'm drawn to Massage Envy.

MR. ATKINS: I --

THE COURT: I paid my fee. I don't know who owns Massage Envy at the location I'm at. I don't know how the brand and the logo and everything that goes in with the marketing and solicitation of me as a

patron to pay a fee comes from. The control of the -- of the franchisor under the franchise agreement would spell out what the franchisee is obligated to do or what not to do in furtherance of the brand, which presumably would involve the imposition of policies and procedures, right?

MR. ATKINS: Yes. There's a franchise agreement.

THE COURT: And I would agree that the Consumer Fraud Act does not contemplate as an ascertainable loss personal injury damages and there's economic, but there is the economic component which you conceded could be just the fee, correct?

MR. ATKINS: Correct.

THE COURT: And isn't that still yet a fundament of a claim?

MR. ATKINS: No, no. Because -- because first of all, the knowledge of the plaintiff as to the ownership structure or the license agreement or the franchise agreement is not an element of this claim. The question is who did -- who were they a consumer of as a fact, as an objective fact? And here, there's nothing to discover because we know, and it's pled, that they bought these services, they became members of if they did, the franchisee, not the franchisor.

We know that and put another way, it's not the lack of knowledge as to who owns the location that is the alleged fraud. They weren't deceived, if you will, into going to Short Hills, not to pick on them, but just to use an example. They didn't go there they -- because they thought it was owned by an entity that they never heard of, M.E.F. with a headquarters in Arizona, that's not why they went there.

So, it's not an element of the claim as a matter of law, it's not an element of the claim as pled and to come back to the ascertainable loss, the ascertainable loss is not caused -- is not something that M.E.F. charged and couldn't be recovered from and, again, we know who charged it, we know who could refund the fee, if that's where we end up, and frankly, the end of the day, this all boils down to a claim to -- for recoupment of their membership fee, membership in the franchisee.

Fraudulent concealment, also a claim. This one suffers from some of the same infirmities of the other causes of action. Mainly, there needs to be a material of misrepresentation or an omission because after all, fraudulent concealment is just another phrase for a breach of a duty to disclose. They're one in the same and that's why --

THE COURT: Or a spoliation of evidence.

MR. ATKINS: Spoliation of evidence, not alleged here. What's alleged here is that M.E.F. didn't sufficiently or didn't at all, I'll just take the extreme version of it, disclose what it knew about other non-New Jersey incidents of this sort. I'm not sure what form that was supposed to take, but it doesn't matter here. There was some duty to disclose that to the public.

Now, of course it has to be a duty, and this is where we're headed -- it has to be a duty owed to the five plaintiffs, not the general public, not somebody who has a case in California and that's what's called in the case law a special relationship. That's the critical element of the claim that's missing here. In fact, they don't even allege a special relationship and with all respect, again, a complaint that's full of legal conclusion and buzzwords and legal jargon, you would expect to see this critical element of this particular claim somewhere alleged and it's not. What is alleged is not sufficient. What is alleged is that -- again, it's defendants, I'll take that to B or include M.E.F., had superior knowledge of these facts, number one, and two, the plaintiffs, quote, "Trusted

defendants that the services would not result in criminal conduct." Those two predicates the Courts have found to be insufficient and just to make a policy point and then I'll get to the cases, those things could be said of any supplier of any product or any service. That is to say of course the supplier or manufacturer always has superior knowledge relative to a consumer and in some colloquial sense, all consumers, quote, "trust providers of products and services." That's why that's not sufficient and just to refer, Your Honor, to one case applying New Jersey law, Stevenson v. Mazda decision, actually addresses both of these points quite nicely. "With respect to the trust component, the Court holds expressly," and that becomes an important word, "The Court holds that it is not enough to allege that the consumer had trust in the provider." This is what it says, "The mere fact of that," quote, "trust is insufficient," this is consumer trust, "to show a special relationship requiring a duty to disclose. Rather, for a duty to disclose to arise, one party must" -- it's italicized, "expressly repose a trust and confidence in the other." That is to say that there is some connection, a relationship between the plaintiff and the defendant, in which the plaintiff said expressly or

did something under the circumstances to repose trust. I trust you to disclose something you know. It is not sufficient to simply be a consumer and believe what a provider says.

The Court also says that with respect to, quote, "Superior knowledge," that's not sufficient, saying, "In New Jersey, such knowledge, superior knowledge, does not create a duty to disclose," citing Berman (phonetic) 189 New Jersey Super at 94.

So, it is -- the claim again fails for all the reasons I've tried to articulate with respect to misrepresentations, but most importantly, there is no alleged special relationship. It's not alleged and the things that are alleged, we know to be legally insufficient. That's the Fraudulent Concealment claim.

I will now come back to the statute of limitations argument. Setting aside the -- the points the franchisees have made with respect to M.E.F. as to those two plaintiffs, Jane Does Three and Four. I believe the argument is that the statute was told (indiscernible) the M.E.F. because -- and this is not in the complaint, it's in the briefs, because the plaintiffs didn't know they had a claim against M.E.F. until they read this article in the online news

service Buzzfeed, which was in the end of 2017 and they analogize that, again to the case my colleague raised, to the River Dell High School case and actually the River Dell High School case makes my point.

In the River Dell case, the students who had been abused by the teacher didn't know they had a claim against the school or the school district, I don't recall which it was, but the school because they didn't learn until later that the school actually knew about the incident, knew about the behavior of this miscreant and didn't do anything about it. So, they had a claim based on what they saw in the newspaper. "I didn't know they knew about it and didn't do anything about it."

Now, I have to go outside the pleading because this argument's not in the pleading and it's also not in the brief, but I'll share with you, because I think it's critical, why it is that reading this Buzzfeed article has no nexus to the claim and that is the Buzzfeed article was about how there are these -- these incidents at Massage Envy franchisees around the country and that M.E.F. knew about it, but that's not the claim that we're seeking to dismiss under the statute of limitations.

The claims are the negligence claims. They did not learn because they could not have learned because the article was not about the elements of those claims, control, employer, scope of employment. They didn't read the article and said, "Now I know from the article that the franchisor owns, operates, controls the franchisee, I had no idea. I actually thought it was what Atkins said, that the franchisor didn't have anything to do with the franchisees. Now I know." That's not what they learned. It's not what they alleged they learned. In other words, they didn't learn anything later. That is the factual predicate to the claims that are barred by the statute of limitations.

So, there's no basis for toning the statute of limitations because they didn't learn anything later that has anything to do with the claims.

THE COURT: Well, the claim, it's also suffered from the torts of assault and battery, right? Wouldn't that fall within the two year statute?

MR. ATKINS: Absolutely and --

THE COURT: And what would they have not known or should've known --

MR. ATKINS: That --

THE COURT: -- by reason of them having been

victimized?

MR. ATKINS: Correct. And that's -- that's the argument I for one find compelling by the franchisees the folks sadly, unfortunately knew at the time. It happened to them, there's allegations that they reported it and went back to complain all, you know, sad incidents, but to -- to bring those claims against the franchisor, either under a theory of vicarious liability or negligence, which we've talked about today, it would have to assert what I claim they have to assert as to control or scope of employment or duty or causation. They didn't learn any of that from the Buzzfeed article. So, it couldn't have made a difference, it didn't make a difference and therefore, the claim -- those claims as to negligence and tort liability by those two plaintiffs I believe, Your Honor, are time-barred.

I have hogged the microphone and I would be happy to sit, unless Your Honor has questions --

THE COURT: Okay.

MR. ATKINS: -- or address -- address any of the other claims as well.

THE COURT: I -- I can assure you I'm going to a lot more questions. So -- but I appreciate your argument and flushing things out. I do want to hear

from counsel who represents Piscataway Massage Envy and Massage Envy in Short Hills, Ms. Finegan.

MR. ATKINS: Thank you, Your Honor.

THE COURT: Yes.

MR. FINEGAN: Is there something specific you wanted to hear about, Your Honor, and I say that only because -- I'm having difficulty with my chair. So, one thing I want to make clear at the start is that the owner of Piscataway, Piscataway is separate and apart from the Short Hills location. There is no nexus between the two of them. It's just happenstance that my office represents two separate franchisees.

Other than that, Your Honor, our arguments are in terms of Piscataway, we believe it stays here. While it should be severed, there's no transfer request from Piscataway.

THE COURT: Well, whatever I ultimately rule, you are here in Middlesex regardless.

MS. FINEGAN: We are here in Middlesex, Your Honor. Yes.

THE COURT: Whether it -- is it --

MS. FINEGAN: We are not asking to go anywhere else.

THE COURT: -- with everyone or on your own.

MS. FINEGAN: Correct.

THE COURT: You don't -- you don't deny that?

MS. FINEGAN: No. We don't --

THE COURT: Okay.

MS. FINEGAN: -- and we don't ask for any relief to leave Middlesex County, Your Honor.

THE COURT: Okay.

MS. FINEGAN: It's the Short Hills location that asked for the transfer. They're based out of Essex and, again, it's the same argument as the other defendants, Mays Landing and Closter. There's no nexus between Short Hills and Middlesex County. There's no allegation that there's a nexus between those plaintiffs, which are Jane Doe Three and Jane Doe Five related to the Short Hills location. There's no allegation that they live here in Middlesex County and my understanding is that they don't. They are either from Essex County or elsewhere.

So, the Essex County, those Jane Doe Three and Five have no nexus, there's no reason for them to be here in Middlesex County, there's no reason for Middlesex County to be burdened with those allegations and not only should they be severed from the other Jane Doe plaintiffs, but they should be transferred up to Essex County.

THE COURT: But what about -- and -- and we're going to hear from Mr. -- in a moment by Ms. Fitzpatrick, but what about my comments early about what the joinder Rule 4:30 -- 38-2 provides for, which invests in this Court the discretion to join claims in the interest of judicial economy. I mean, on the one hand, each of these incidents are separate and discreet, but the overarching allegations made in the first amended complaint would pertain to the same or similar transactions and occurrences and there would some merit to holding things together here in Middlesex County at least with respect for centralized management of discovery and I would have the power ultimately also to sever off claims and order separate trials and return things back to their separate counties, wouldn't I?

MS. FINEGAN: Arguably yes, Your Honor would, but that doesn't -- I -- I don't necessarily believe just because the connection between each of the five Jane Does is that we all happen to be franchisees of M.E.F. in and of itself doesn't mean that Jane Doe One and their complaint and how that allegations or that incident came up or came about or happened, especially because it was that employee, that therapist, was employed by someone separate and

apart from Jane Does Two, Three, Four and Five.

THE COURT: Well, if I sent back -- severed and sent back the claim of Jane Doe Five to Essex County, you're going to be in Essex County and Middlesex.

MS. FINEGAN: I am, Your Honor.

THE COURT: M.E.F. is --

MS. FINEGAN: I am often in --

THE COURT: -- co-defendant, right?

MS. FINEGAN: If Your Honor decided that M.E.F. was staying in as a defendant in each of these litigations, yes.

THE COURT: Well, I -- yes. So, I -- I'm really, kind of, segueing into hearing from Mr. Kent because the threshold question I'm confronted with is whether or not I am duty-bound under the Court rules to sever and transfer the claims of the Jane Doe plaintiffs who are at franchisees not in Middlesex County. When we have the franchisor involved in each of those claims and whether or not I'm going to provoke or create dispirit rulings and dispirit management of discovery and tax the judicial economies of our Court system.

MS. FINEGAN: Your Honor, I think something that's important too is I -- and just going back to

your prior point about my -- our office -- being in two separate counties, being Essex and -- and here in Middlesex, it's not a basis to deny. In other words, what my office has to do to represent two separate clients should have no bearing respectfully on this Court and while it may be more convenient --

THE COURT: No. I'm not suggesting it is, but --

MS. FINEGAN: Oh, okay.

THE COURT: -- but the point is is that in your case, I'm being asked to sever and transfer one claim and you're going to be in Essex and you'll be in Middlesex and --

MS. FINEGAN: Your Honor --

THE COURT: -- and -- let me bring to the point though. Now, we get into discovery. You're being me on a -- on a motion in theory down the road to dismiss or for summary judgment in a matter where I stringently case manage cases and you're going to get a trial date and you're going to get claims dismissed and paired down sooner than, let's say things shake out in Essex County. Am I going to create more of an issue for the -- for the Court from a case management perspective and the possibility of dispirit rulings or inconsistent rulings which would be ultimately near to

the detriment of everybody who's involved here from the perspective of cost and expense?

MS. FINEGAN: Arguably, Your Honor, the facts that are at issue for Jane Doe One are going to separate and apart from the facts that are available and/or relative to Jane Doe Number Three.

THE COURT: And -- and -- and again to my point, once you get to a stage where centralized case management is concluded, I would have the -- the discretion to then sever and transfer the matter to Essex County for trial, right?

MS. FINEGAN: But then the only -- again, Your Honor, I go back to the fact that the only thing tying each of these five plaintiffs together is the fact that we all happen to be franchisees of M.E.F. In other words, if there was a slip and fall in, let's say, seven different McDonalds throughout the state, does that mean each of those slip and fall accidents should be managed here because they all happen to be McDonalds?

THE COURT: Well, Johnson and Johnson's here. Take a -- it. Everybody's coming to Middlesex County and by dint of being centrally located, which goes to the argument of convenience for a non-convenience.

MS. FINEGAN: But again, Your Honor, Johnson and Johnson is here, are they not? I mean, they're based out of New Brunswick.

THE COURT: Well, as is McDonalds.

MS. FINEGAN: Massage Envy Short Hills is -- but each of their franchisees arguably is different.

THE COURT: I understand. Okay. Let me -- let me hear from Mr. Kent and Ms. Fitzpatrick.

MR. KENT: Good morning, Your Honor. All right. That was a lot to digest. Just as a -- a threshold issue, just so Your Honor has some background here, obviously Bob and I -- this is not our first go around with regards to these arguments, but what -- I am physically and legally somewhat prevented from putting into a pleading every single fact and every piece of discovery that I know about concerning all the torts that are here and the reason that is is because every case that Massage Envy franchising and the franchisees are involved in, they enter into a protective order to preclude me from doing that and that has effect in after the case is resolved.

So, when Massage Envy franchising stands up in this case and says, "Well, Mr. Kent hasn't pled" -- I -- if Your Honor were to order me tomorrow to

disclose all of that information and I would be protected from a lawsuit from them, I -- I would be more than happy to do it, more than happy, but from an equity standpoint, I am somewhat precluded from doing that. The only thing I can say to the Court is here are the torts that we're alleging and the facts that we're basing that on since we are in a notice pleading in New Jersey and the discovery is going to show X. I can't tell you what that is, I can only hope that Your Honor says, Yes, these are factual issues that you all have to do discovery on, and I think all of the issues that Mr. Atkins had brought up for the Court for the most part are fact-dependent, such as the control aspect of -- of things and -- and of course, I can't get into every single element of control until we have all of the depositions and all of the documents that outline everything, but I can say this is a pure franchisor/franchisee relationship and what I mean by that is at the franchise level, the policies that are -- are implemented and everything that happens at the lower level is a product of Massage Envy franchising and what we've alleged in our complaint is to that effect, that everything that's happening at the lower level, whether it be policies relating to sexual assaults and prevention, how these -- how these

individuals are trained, the screening of these individuals and things of that nature and how it's been inadequate with regards to these specific therapists is all at the corporate national level and then dictated down to the local level and of course there's going to be arguments and there have been already about different jurisdictions that have found control and not control, but all those arguments are really summary judgment motions.

They're not at -- at the pleading stage of things because we've alleged that they do control and we've alleged certain things, at least in our negligence claims and things like that as to how they exercise that control, but that has to play out with regards to discovery, but if -- if I was allowed to disclose everything that I know and all that information, I would certainly do so. I am legally prevented from doing that at this point, but I can represent to the Court that that -- we will have facts in discovery like that that will come out, which as Your Honor already noted, if discovery could show those things, like control vicarious liability and all of that duty, foreseeability, then the motion should be -- to dismiss should be denied and I hope that that's how Your Honor finds.

Now, with regards to just this specific arguments that Mr. Atkins made as it relates to vicarious liability. The employment relationship is something that will be in dispute regarding this because there are -- we've believe that there's going to be things that are shown throughout this with regards to benefits and advertising funds and things of that nature where they are conjoined and where there may be a franchisee that's providing a certain benefit to an employee and there may be a franchisor who is providing a certain benefit to an employee and that's going to be a decision for the Court on a summary judgment motion or for a Jury as to who the actual employer is of these two defendants.

That's why when we plead this, we say it's either the franchisor or the franchisee who actually employees this person. In the very least, they're an agent of the franchisor because of the exercise of control that is -- that -- that the franchisor has over its franchisees, but vicarious liability is a factual issue. We've already -- we've pleaded enough facts to support that and because it's notice pleading, this stage is not appropriate for that decision.

The intentional act exclusion and I think

this is -- this is specific to these types of cases because we're not dealing with a McDonalds where you buy hamburger, we're not dealing with Johnson and Johnson in terms of pharma product and things of that nature. We're dealing with the service that's provided where an individual takes their clothes off and there's going to be a -- a -- a massage therapist who is touching parts of their body skin-to-skin where -- where they are close to intimate parts of the body. It's just a natural consequence of a massage.

We don't know what the individual therapists are going to say in terms of the actual assault and we can say assault because there wasn't any consent by our clients for this to happen, but what those therapists may say is, "Listen, when I was massaging this woman's breast, one, I was trained by Massage Envy that that's appropriate for some muscle or something like that," or "Two, if I graze a vaginal area or a genital part or something like that, it was a mistake, it was not intentional," and certainly that would fall under within the scope and employment or agency with both defendants in this case. It's certainly foreseeable that that can happen because as discovery will show and -- and things of that nature with regards to this policies, they have policies

dealing with those scenarios.

So, it -- it's certainly foreseeable that that can happen. We just don't know what the evidence is going to show as to -- as to whether it was intentional or whether it was not. It may be intentional, it may be outside the scope for some, maybe not intentional for others. We just don't know that at this point.

And when we say unlawful sexual conduct, just to be clear when we plead that in the -- in the complaint, it's not just as Mr. Atkins says criminal because when we alleged unlawful, it can be a negligent act, which is why we say that it's a negligent act or in the alternative a criminal and intentional act. It could be one or the other.

THE COURT: Have any of the Jane Does, meaning as plaintiffs in this case, recorded their incidents to prosecutorial authorities?

MR. KENT: They have, yes, not all of them, but some, yes, and I can represent to the Court that they're -- at least one that I know of is an open investigation as we speak and some of the individuals involved here we already do know did have prior criminal backgrounds before -- before they were employed at a certain franchisee level.

THE COURT: Do franchisees do background checks?

MR. KENT: My understanding, yes they do, but as Your Honor is going to see in discovery here, the screening process is on both levels. There are things that both entities are involved in from this screening process, such as the companies that they're going to use and the -- the way that they're going to employ those backgrounds.

So, when, you know, Mr. Atkins is talking about, "We're not involved in hiring, we're not involved in screening," I -- I think that's going to be different when we get into discovery in this case because there are policies and procedures at the national level that are going to speak to those issues.

With regards to the -- the specific claims like the direct negligence outside of the -- the vicarious liability claims and -- and not to go outside of the pleadings, I'm not really going outside the pleadings. In our -- in our complaint, we alleged about a commitment to safety after this Buzzfeed investigative article came out and what -- and we specifically quoted what the C.E.A. -- or the C.E.O. said that they were going to do after this Buzzfeed

article came out to prevent sexual assaults at the franchisee level after the -- this investigative article came out about the rampant number of sexual assaults are happening and that's very significant because I think that shows a lot of things. One, it shows that they control the franchise level. They're coming out and saying, "This is what Massage Envy franchising is going to do to ensure that at the franchise level, this does not happen," and, two, it -- with regards to -- well, I'll get into that in a -- in a -- in a second, but the -- the one thing that nobody really has touched on is the conspiracy argument --

THE COURT: I was just going to get to that --

MR. KENT: -- and --

THE COURT: -- and -- and to your last point --

MR. KENT: Yes.

THE COURT: I'm sorry to interrupt you, but --

MR. KENT: That's okay.

THE COURT: -- the -- the thought had crossed my mind to ask you. So, you've beat me to the punch, but the aftermath of the Buzzfeed article, does

that go to the civil conspiracy claim of concealing or --

MR. KENT: It does.

THE COURT: -- or -- or -- or exhibiting a pattern within the franchises that, for a lack of a better term, would have the imprimatur or impetus from the national office to keep things quiet and conceal it from being reported --

MR. KENT: Correct.

THE COURT: -- which would be the predicate claim of fraudulent concealment also to -- or -- is -- what -- what is the nature and basis for the civil conspiracy claim?

MR. KENT: Yes. The civil conspiracy claim is basically that you have the national and its franchisees executing a policy that we're not going to warn our plaintiffs and customers about the dangers associated with their service, which they know about. So -- and -- and in that Buzzfeed article, if you were to read it, Your Honor, the one thing that it talks about is every time there is a sexual assault that happens at a franchise level, the franchisee's required to report that to the national via web portal and they have a database with regards to all that information that they keep and what national then does

is they conspire and instruct the franchisee, they have an agreement that they are not going to make that information public. All right?

So, you have women who, if you were to ask them just like our plaintiffs, and as we pled in our complaint, if you knew about this rampant problem of sexual assaults at this specific company, not in the massage -- in Massage Envy specifically, would you have purchased that service and they -- they -- as we have pled, have said no and the agreement that they -- that exists between Massage Envy franchising and the franchisees that we alleged is in order for us to protect the brand and -- and make money, we are going to keep this hidden from the public and if it does happen, not only we're not going to tell people that this is just a danger associated with -- with our company, we're not going to specifically tell them about the amount of assaults, we're not going to even tell them that it's a possibility it can happen to them, but we're going to actively work to ensure that that information does not go to the public and these five plaintiffs and as Your Honor will see in discovery as we think and as it's stated in the Buzzfeed article, that they have a -- they're -- they have a policy that they instruct the franchisees about

not to -- to avoid the police and I think Your Honor will see in discovery in these cases involving our -- our plaintiffs themselves is the franchisees or the franchisor even though they knew about the sexual assaults at issue in this case, they didn't report to anybody. They didn't report it to the massage therapy board and they didn't report it to law enforcement either, even though they knew these sexual assaults had apparently happened and that is further evidence that they are continuing this conspiracy and that speaks to the statute of limitations issue, Your Honor, because this also has not been addressed by anyone.

As Your Honor knows in New Jersey, the statute of limitations for a certain case if there is a conspiracy alleged is continued until the date of the last act in furtherance of that conspiracy. Here, we have facts that we pled that shows a conspiracy is still continuing today at least with regards to our five plaintiffs in the case because those individual franchisees and the franchisor haven't reported anything publicly and haven't reported it to law enforcement and massage therapy board, despite the fact that they know about the sexual assaults occurring and the one point that was made with regards

to the -- the -- our conspiracy claims is that there's no underlying tort. The only thing that we need to plead with regards to the conspiracy is that there was an -- this was an agreement to commit an unlawful act and the unlawful act is -- you're -- and as Mr. Atkins stated perfectly, you're not warning customers about the danger associated with your service or your product. That is the agreement that they have to commit that unlawful act.

Now, that can be a negligence argument and a negligent act for a failure to -- to -- when you have a duty to warn of that danger just like any other product that you would have that you sell or any other service that you have or it could be a fraudulent one as well because they are intentionally doing that, but because that conspiracy still exists today, then the statute of limitations for these women have not expired, even the ones that may be beyond the two year personal injury because of the conspiracy that's continuing to exist.

THE COURT: Well, each of the complainants were well within their respective rights and at least in one or two that you've mentioned to report those incidents to local law enforcement, correct?

MR. KENT: They were 100 percent within

their rights to do so. Yes.

THE COURT: Okay.

MR. KENT: Yes.

THE COURT: Okay. And they either chose to do or not do so?

MR. KENT: Correct.

THE COURT: How would the alleged conspiracy of the franchisor and the franchisee to suppress the release of that information or to act in a way to prevent it from being reported or more affirmatively suppressed, how does that total the running of the two-year statute?

MR. KENT: So, just real quick. If the conspiracy -- maybe I wasn't clear enough about it. If the conspiracy existed before the assault happened, so, if they had conspired to keep this information hidden about sexual assaults within their company and that would be a material fact that would affect the safety of the person as it's talked about in fraud. If it affects the safety of the consumer, that they would want to know to protect themselves, then they have a duty to disclose that information and it wasn't disclosed. That is the basis of our conspiracy.

Understanding after the fact, what I'm saying is not that it would've had -- would've had an

effect on the plaintiff if they were, you know, after the fact and it was reported or not reported, but that's evidence of the fact that the conspiracy existed before the fact because after the assaults happen, they're still not reporting that to law enforcement and to the massage therapy board, including with regards to our five plaintiffs in the case. So --

THE COURT: Well, with -- with that said then, would that provoke the need for the equivalent of a Lopez hearing?

MR. KENT: Potentially and the case --

THE COURT: So, to ascertain when the franchisor or franchisees knew or at least incur and the plaintiffs could've discovered that there could have been incidents either before they subscribed to membership or before their incident occurred?

MR. KENT: Potentially and I think that the case that we cited -- and I apologize, Your Honor, Mr. Atkin's had just talked about it, I know Mr. De Donato talked about to as well with regards to this school district. That's what the Court did in that case. They actually said that, Well, if they were not on notice until this article came out about the fact that the school or the school board knew about a

problem associated with this specific person, then consistent with Lopez, we're going to have a hearing with regards to that information, but at least as we've pled it, they didn't have that information concerning that prior to the Buzzfeed article coming out and the reason they didn't is because of that conspiracy that they're precluding the public from finding out in order to protect the brand.

THE COURT: The allegation was suppressed?

MR. KENT: Correct. Yes. Yes, and, really, that -- there's a lot of discussion about negligent misrepresentation. I mean, I think we can all agree that misrepresentation, even negligence or fraud, can be one of two things. It can be affirmative representation where I am saying something completely false to you or it can be by concealment and not giving you all the information that you need if I'm selling you a service or a product to -- that would affect your decision regarding your own personal safety at the end of the day.

THE COURT: Well, silence in this -- in -- in the face of a duty to speak is every much a misrepresentation --

MR. KENT: Correct.

THE COURT: -- as is an affirmative

statement of something that is known to be false.

MR. KENT: That's --

THE COURT: Isn't that true?

MR. KENT: That's exactly right and what we -- that's basically what we plead in our complaint and that's what we argued in -- in our brief before Your Honor as well.

Just touching -- just going back -- or just touching on that consumer fraud claim as well, Mr. Atkins had talked about the ascertainable loss aspect and I just wanted to clarify this for the Court. We -- we agree with the defendants that under the Consumer Fraud Act, we can't have a claim for pain and suffering, but the ascertainable loss can be other economic loss relating to the assaults here, such as future medical care and things of that nature, past medical care and specifically we have cited to cases that state that as long as that -- it is medical care relating to repairing whatever the harm that was caused, then -- and -- and you can put that in economic form, you can make a claim.

So, Mr. Atkins had asked whether or not we're just making a claim for the money spent to Massage Envy. It's not just the money spent. It's all the economic harm that we'll be out -- able to

ascertain at the end of the day with regards to the harm to each plaintiff in the case.

THE COURT: Well, at the minimum, it would be the payback of the -- the subscription fee --

MR. KENT: Correct.

THE COURT: -- which is quantifiable and ascertainable --

MR. KENT: Yes.

THE COURT: -- whether it's $35 or $100.

MR. KENT: At -- at a very minimum, yes, but -- but --

THE COURT: But that would be enough to satisfy that element of the Consumer Fraud Act. Is that your argument?

MR. KENT: It would be enough to satisfy that element. I just wanted to make sure that on -- on the record, Mr. Atkins had suggested that that's the only element of the damages that we're claiming --

THE COURT: I understand.

MR. KENT: -- and -- and it's not.

THE COURT: I agree.

MR. KENT: We have other economic damages that we're claiming here.

Going back to the -- going back to the joinder claim, I think Your Honor talked about this

issue in one of the factors and I didn't know whether Massage Envy would fight the joinder in these cases because we may have five depositions of their corporate clients and things of that nature going over the same things over and over again, but as we sit here today and you hear the arguments about control and about vicarious liability of Massage Envy franchising and about policies and procedures at the franchise level, these are all issues that are going to be identical in each and every case that we're litigating here.

The only thing that's different in the cases is how the -- the -- these women were assaulted. Everything else with regards to liability, franchisor/franchisee relationship, control aspect, policies and procedures and what's implemented at the franchise level and liability is going to be identical in every single case. The -- and -- and we will have potentially, I guess, four different Courts dealing with the same exact issues in the case when they don't have to and as Your Honor said, you can reserve the right to sever them at the end of the day if you deem it appropriate to have four separate trials and four separate jurisdictions after the discovery of everything is -- is, sort of, vetted out, but for

purposes right now, joinder is appropriate because of the nexus involving. And the other aspect is, Your Honor, if you -- we have pled conspiracy and we have alleged sufficient facts in that regard. If the conspiracy does exist, we can't really litigate against each of the defendants without these cases being together. So, if conspiracy as we pled exists and we can't litigate that claim separately in different jurisdictions because we're alleging here that this is conspiracy amongst all these franchisees and the franchisor to keep this from being led out to the public and specifically our clients who were assaulted here.

THE COURT: Okay. Now, let's hold the point because it -- and I raised this with Mr. Atkins before and of course as the trial Judge, I'm -- I'm constrained by what the rules provide and the joinder rules 4:21 -- 29-1b as I recited early, the Court, on its own motion, or -- in regards to these applications, I could order the joinder of all the claims of all the franchisees that have been made in your single complaint if -- if I was to go along with that, but I -- I -- I shall not order such joinder unless the Court finds specific reasons that I'd state on the record about the interest of judicial economy

and of non-parties, which would be served by such joinder substantially outweigh the interest of the named parties and not joining the additional parties.

That's seems to me to be a high threshold I have to overcome. Can you --

MR. KENT: I would --

THE COURT: Can you supplement or provide me the reasons you think joinder substantially outweighs the interest of -- of the named parties in not joining --

MR. KENT: Sure.

THE COURT: -- these claims?

MR. KENT: I think it's two-fold. One -- one is the conspiracy claim itself. We will be litigating -- I mean, each -- if Your Honor deems the conspiracy claim that we've pled that appropriately, each of these named defendants have to be together in the same case. We -- we can't have it separate because it's a conspiracy that we pled exists amongst all of them, that they're committing this conspiracy and it's not -- if it's conspiracy that exists, it's not just a conspiracy that -- that exists where Jane Doe Number One was harmed down in Atlantic County. If they are conspiring together and someone in Middlesex County was harmed as a result of that conspiracy, and

they all have this agreement and at least one of the actors acted in furtherance of that agreement in Middlesex County, which we've alleged and pled here, then it's all appropriate.

The joinder is a -- would be a separate issue, but that issue itself where we've pled the conspiracy and that the individual plaintiff in Middlesex has been harmed as a result of each of the franchise defendants and the franchisor agreeing that they're going to have this -- this -- this effort to conceal this danger and one of those actors, not all of them, but one of those actors acts in furtherance of that conspiracy of that conspiracy, well then that's enough to give us a complaint against all of the franchise locations just for one of the plaintiffs in Middlesex County.

Now, if it was separate, like, with regards to the other individual claims, like, negligence and, like, fraud, I would agree, then you go to the joinder rule and you start talking about whether or not it would be equitable and I think for the reasons that I stated before, with regards judicial timing and things of that nature, where we're going to have, literally, you have four Courts have disparate opinions and judgments about the organizational aspect, vicarious

liability, contracts amongst the plaintiff and whether M.E.F. or the franchisee and I think that would substantially outweigh the need to sever these -- these issues because it streamlines everything and --

THE COURT: Well, to that point -- let me -- let me ask you some questions.

MR. KENT: Sure.

THE COURT: So, right now, we have -- we have I wont say a large number of parties, but there's enough parties involved in this case. Do you foresee other Jane Does coming forward?

MR. KENT: So, I don't know that and --

THE COURT: Okay.

MR. KENT: -- I can --

THE COURT: But -- but --

MR. KENT: I can represent to the Court, I -- I don't have additional clients that we're representing about to file or anything like that, but I can tell you what's happened in other jurisdictions is other women do come forward because they're identified as witnesses pursuant to a customer list and after they're -- they have been identified as witnesses in a customer list, they decide that they want to become a plaintiff because they were also assaulted. So --

THE COURT: But we -- okay. That was just --

MR. KENT: Yes.

THE COURT: -- informational for my purposes, but here we have five discreet plaintiffs and -- and the parties that have been joined here. Is it your contention that this complaint, the first amended complaint, involves claims that are common or it may raise recurrent issues of law and fact that are associated with the Massage Envy franchise --

MR. KENT: Yes.

THE COURT: -- model?

MR. KENT: Yes.

THE COURT: And -- and there is clearly a geographical disbursement of the parties given the fact that we have different franchises in Atlantic County, Essex County, Bergen County, Middlesex County, implicated in this case, correct?

MR. KENT: Correct.

THE COURT: Do you believe that there's a high degree of commonality of injury or damages that are alleged by your client?

MR. KENT: Yes. All -- all of the injuries and damages that have happened are relating to a touching of genitals or parts of -- other parts of the

body. Yes.

THE COURT: All right. Now, is -- is there is a risk -- if I kept this centralized here, that it may unreasonably delay the progress or increase the expense or complicate the processing of any action or otherwise prejudice of any party here?

MR. KENT: I think it would be the opposite, Your Honor. I think that if -- if these cases are not held together and held here, that it could delay the process and increase the expense, not only for the plaintiff, but also for the defendants even though I know that they were weigh in and probably say we're not worried about that expense, but --

THE COURT: Well, is -- is -- is -- is it your argument that centralized management by me would be a fair and more convenient --

MR. KENT: Oh --

THE COURT: -- way for the parties and the witnesses and counsel?

MR. KENT: Absolutely and -- and just so you're --

THE COURT: And -- and -- and we've all touched upon -- there is a risk if I severed and transferred claims out of -- of -- of -- of those plaintiffs who were the subject of being accosted at

Massage Envy franchises not located in Middlesex County, but there is a risk potentially of duplicative and inconsistent rulings or orders of judgments issuing from the -- from our Courts if they're not managed in a coordinated fashion. is that your argument?

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

THE COURT: And -- and -- and wouldn't coordinated discovery be advantageous?

MR. KENT: It would and -- and Your Honor, we had this almost identical argument in front of Judge -- I believe it was Judge Cresitello (phonetic) recently on the evangelical Lutheran church cases up here where were there multiple cases in Camden County, there were multiple cases here, there were defendants in Mercer County and elsewhere, but -- and -- and different assaults, different timeframes, different years and things of that nature and the cases were all joined together here and discovery's ongoing here because of those exact reasons that you're discussing right now.

THE COURT: Well it -- would -- is it your argument that centralization would result in a more efficient utilization of judicial resources?

MR. KENT: Yes, 100 percent. I -- I think

--

THE COURT: And are -- are there any issues of insurance that have been implicated among the defendants that you've named --

MR. KENT: Well --

THE COURT: -- or the potential of bankruptcy of the franchisees?

MR. KENT: I -- I -- I -- I don't know about that, but I do know that there's definitely insurance implications here because of the franchisor/franchisee relationship. Now, it's a tricky area for me because I don't want to get into the things that are protected in current lawsuits or prior lawsuits in violation of protective order, but I can reassure Your Honor that if we do move forward with discovery in these cases that there will be issues that are common to each defendant relating to insurance and insurance policies all the same.

THE COURT: Now, that does raise an issue because I can foresee the potential of -- of policies, general liability policies that any one of the franchisees or the master franchisor have given -- given notice to carriers involved here of coverage being denied because of the nature of the allegations made -- being disclaimed and -- and -- and now the

potential bankruptcies of the LLCs that own and operate these separate franchisees. Wouldn't -- is -- is it your argument that centrally managing these would better coordinate those issues too --

MR. KENT: It would, Your Honor.

THE COURT: -- rather than different locations?

MR. KENT: Yes.

THE COURT: And are there any other related matters that are pending in Federal Court or in other states that you're aware of --

MR. KENT: There are other matters --

THE COURT: -- that don't require coordination?

MR. KENT: There are other matters pending in other states and I'm sure Mr. Atkins would love if you coordinated these actions down in West Palm Beach, especially during the winter, but no. There's no -- there's no -- I don't know of any other Federal Court cases or outside state cases that would be -- that would be coordinated here.

THE COURT: All right. And -- and --

MR. KENT: There are other cases pending out of state.

THE COURT: Now, there's a reason -- there's

a method to my madness --

MR. KENT: Yes.

THE COURT: -- in asking these arguments because I've just ticked off all the criteria that are considered if an application is made to the Supreme Court and the Administrative Office of the Court to seek multi-county litigation designation under Rule 4:38a and it would appear to me that this case as I've come to understand it might benefit from making that application and seeking that designation and in fact, Judge Grant, the acting administrator of the -- the acting director of the Administrative Office of the Court in a notice to the bar issued the revised directive for multi-county litigation and the guidelines. It's directive number 2-19 pursuant to rule 4:38a and that was just issued at the end of February of this year and it lays out and formalizes the criteria for designation.

Now, I as -- as a trial Judge here in Middlesex County having -- having this case before me, I don't have that authority --

MR. KENT: Sure.

THE COURT: -- to seek that, kind of, designation, but it would seem to me and -- and -- and harkening back to my days in practice involved in the

same or similar, kind of, complex litigated matters in here in Middlesex County and having been involved in -- in that era and creating the mechanisms that had now were the template, which became the templates for centralized case management of mass tort cases here in Middlesex County and other types of cases.

These guidelines appear to me to be somewhat tailor or fit for -- for what you have alleged in this case and who's joined in this, but then again, on the motions to dismiss that are before me, I have to consider that because there are issues of joinder that are involved and there is a compelling argument made by those franchisees who aren't located in Middlesex County that they're entitled to have their separate and discreet claims of the Jane Doe plaintiff affecting that franchise litigated in the County of origin.

So, I have this tension that I have before me that I have to reconcile and the other thing is going back to -- back to my questions with Mr. Atkins and I'm -- I'm perfectly willing to hear everybody else, but you know, on a motion, in a 4:6-2e motion to dismiss, the standard of review of this first amended complaint is whether the complaint fails to articulate a legal basis that would entitle the plaintiffs to --

to relief and to quote the Printing-Morristown case that I alluded to before. It's in the papers, Printing Morristown versus Sharp Electronic Corp., 116 N.J. 739 and this is -- the Supreme Court at Page 746 of the decision saying, "The Court may must," quote, "make a" -- "search the complaint in depth with liberality to ascertain whether the fundament of a cause of action may be gleamed even from an obscure statement of a claim opportunity being given to amend, if necessary," and I am to give every reasonable inference and accord every reasonable inference to the plaintiffs and the motions to dismiss would be granted only in rare instances and ordinarily without prejudice and even at this stage of the litigation, the Court may -- I'm not concerned with the ability of the plaintiffs to prove the allegations made in the complaint and I have to make a painstaking and generous reading of the allegations to convince myself that they do not provide a legal basis for recovery and -- and -- and I'm just quoting from the Supreme Court.

"If a generous reading of the allegations merely suggest a cause of action, the complaint will withstand the motion." That's the Supreme Court in F.G. McDonald, 150 N.J. 550 in 1997 and a complaint

should not be dismissed under 4:6-2e where a cause of action is suggested by the facts and a theory of action ability may be articulated by an amendment to the complaint and finally, again to the standard of the motions before me, it's the Supreme Court and Printing Mart said at the end, "It's a signal," -- I'm quoting the Supreme Court, "It's signaling to the trial Courts to approach with great caution applications for dismissal under Rule 4:6-2e for failure of a complaint to steady claim on which relief may be granted. We have sought to make clear that such motions almost always brought at the very early stage of litigation should be granted only in the rarest of instances. If a complaint must be dismissed after it had been accorded the kind of meticulous and indulgent examination counsel (indiscernible) in its opinion, then barring any other impediment, such as the statute of limitations, the dismissal should be without prejudice to the plaintiff filing an amended complaint."

That's the standard I'm confronted with here in a case that cries out for centralized case management. However, as currently pled, it involves franchisees who are implicated by a particular plaintiff in different counties. So, I am struggling

with how best to resolve these motions given these countervailing considerations, which is why I've accorded the time for this today and I really wanted to hear the depth and -- and Mr. Atkins has -- has eloquently articulated the position from the franchisor's perspective on -- on the nature of the claims that are alleged and I'm not quite sure how I am going to go on this yet, but I mean, in all events, there does appear to be a tool that's available under our newly amended Court rules that would facilitate the designation.

Now, one way I can go in this case is I could deny the motions to dismiss without prejudice, sever the claims asserted by the Jane Doe defendants in other locales against those franchisees and transfer them to those venues and subject to them being litigated and whatever's properly -- duly laid here in Middlesex County retain that.

Now, by doing that, I'm provoking what the multi-county litigation factors and the guidelines are preaching, which would facilitate centralized management. Perhaps if you made that application and got that designation, it would come back to Middlesex County, but we're not quite there yet.

So, I -- I -- these are thoughts that have

occurred to me as I've read the papers over and over again and hearing the argument. It's very helpful to me to hear this and it's filled in a lot of blanks.

Does -- does anyone else want to offer anything in argument? I'm -- and by the way, I'm not intending to rule today if you gathered. I'm going to reserve and I'm going to issue a decision and an order, you -- you know, within a week or so, but I do want to hear from anyone and everyone else who may have something to add to the argument based upon what thoughts I have expressed. Mr. --

MR. ATKINS: I --

MR. KENT: I -- no, you go.

THE COURT: Mr. Atkins?

MR. ATKINS: Okay. I just -- a couple of responses. So, as to the argument about the protective order and the inability to allege what he knows and I respect that and I appreciate the honesty, but it's not really an answer at least to everything. So, the protective order doesn't prevent the plaintiffs from alleging what happened to them, which obviously what they've done with respect to the incidents, but it's also true of the claims for negligent misrepresentation and the New Jersey Consumer Fraud Act to the extent it's about

misrepresentation. They can allege those things and they have, that's number one.

Also, with respect to vicarious liability. The scope of employment issue is not one that turns on what Mr. Kent knows from discovery in other cases because the issue is a legal question about whether or not the employee committing the crime was within the scope or not within the scope. They've pled that it was a crime, they've pled it was an intentional violation of law. So, that's a given and that's not in dispute. So, the only question is does anybody in good -- is anybody capable in good faith of alleging that that was authorized, that that was in service of the principle or the employer and I have not heard it because it's -- it's not credible, they haven't argued it and obviously it's -- it's not true and there is no exception, I seem to have heard them say, for foreseeability. That's not an exception to the scope of employment issue to the contrary.

The statement of agency, which they invoke and Davis say that serious crimes are not only unexpectable, but are in the nature different from what servants are expected to do. So, it's not just that a crime might or might not be foreseeable. It's that it's not expected of what the employee's supposed

to do.

They also cited to Restatement 219, another one of the -- another agency principle and again, this is what they invoke, it's that the employer's agent, if they really are in an agent in this case, I believe the employees are agents of the employer, must have purported to act or speak on behalf of the principle, same doctrine. This is the authority they're citing.

Also, with respect to Restatement 219, the conduct of the agent to be chargeable to the principle under principles of respondeat superior has to do -- it has to seem regular on its face, obviously not, and it must be that the agent appears to be acting in the ordinary course of the business.

So, the scope of employment, one, is not something that depends on information that Mr. Kent is bound not to disclose, number one, and, two, hasn't been properly pled as a matter of law and therefore, the vicarious lability Count at least can be decided on the current state of the pleading.

THE COURT: Well, doesn't the Restatement of Agency at Section 219b(2) make an exception to the vicarious liability standard if -- and -- and impose a -- a reasonableness or a negligent standard?

MR. ATKINS: No, but it -- as I just read,

it requires --

THE COURT: The employer/employee.

MR. ATKINS: Yes, it -- it -- it -- it, sort of -- it -- it -- the fundamental principle of respondeat superior is baked into all of those provisions.

THE COURT: Right.

MR. ATKINS: So, if -- in the absence of an employer/employee relationship --

THE COURT: Right.

MR. ATKINS: -- you can argue that the miscreant of this case is an agent, but not an employee --

THE COURT: Right.

MR. ATKINS: -- but you have to go to the next step, which is that the agent, like an employee, has to be acting on behalf of the principle, it has to be acting in a way that's expected, it has to be acting in a way that's in service of the plaintiffs -- I'm sorry, in service of the principle's interest and -- and -- and I know you've probably seen it, but a nice counterpoint to this case is the Mason case about the bouncer who got into a fight with a bar customer. There, it was found that there was vicarious liability because the guy was doing his job, right, and it was

part of his job to get physical, if necessary, with the bar patron. Okay?

Here, that's -- you know, that's the -- we're at the opposite end of -- of that spectrum. So, my point is it's not well-pled and the protective order argument doesn't (indiscernible). Same thing with respect to fraudulent concealment. Whether there's a special relationship between M.E.F. and these individual plaintiffs, whether they expressly repose trust and confidence is something they know they either did or didn't do so it can be pled. Again, it doesn't turn on discovery in another case.

THE COURT: What about the civil conspiracy claim?

MR. ATKINS: What about the civil conspiracy claim? The civil conspiracy claim is not a, sort of, refuge or a catchall for all kinds of bad conduct. You need to have an agreement. There could be torts. I've argued why it hasn't been well-pled. There could be all kinds of things, but simply saying that a franchisor develops a policy which is followed by the franchisee, I think that's the claim. That's missing the critical element of an agreement, which gives rise to the -- the cause of action of civil conspiracy. That's missing here and the -- what they describe as

awful as they think it is, is not a conspiracy. It's a bad policy. It's a (indiscernible).

Indeed, he's arguing, I think that the fact that M.E.F. allegedly can impose this policy of not reporting to the police supports his argument of control and if that's the case, it can't be a conspiracy. It's, like, a parent (indiscernible). So, that's my response that on that.

With respect to the New Jersey Consumer Fraud Act, at the end of the day, the claims of the plaintiffs are and have to be economic damages and the -- the only economic damages other than a refund of the payment for the defective or fraudulent service or product is the cost of correcting that fraudulent service, to replacing that product. I mean, after all, it's a consumer protection statute against being duped into buying a product that isn't what it's advertised to be. So, the damages of what you spent and what you spent to replace it. They're not alleging anything other than a refund of the membership fee. If they were seeking it, and I don't believe they are and I don't mean to be facile or glib about it. If they were seeking a better service that is the same --

THE COURT: Well, isn't the product a

service?

MR. ATKINS: Yes, sure.

THE COURT: A massage.

MR. ATKINS: Yes. So, I -- I -- and I am really not trying to be wise about this. If they wanted another and better and safe massage, that would be damages under the New Jersey Consumer Fraud Act, give me a product that is what it was advertised to be, but it's not for personal injury, it's not for medical costs, it's not -- obviously it's not for pain and suffering and to the extent there's any economic harm, membership fee, a new membership, a new massage, that's all between the plaintiff and the franchisee, not M.E.F.

The only thing I would note about the Buzzfeed article is that it's -- to the extent that it's intended to be a proof -- intended to be proof that M.E.F. controls the franchises, which I think I heard or has the ability to influence it. A, that's not proof of control, that's just a policy; and, two, it came after all of these alleged incidents.

So, it's out of time and to the extent the argument is that there's something in the Buzzfeed that misled these plaintiffs, it couldn't have been because it predate -- all these incidents predate the

argument and as the Buzzfeed article pertains to the statute of limitations, I'll take another crack at that, unlike River Dell, the facts about the existence of these other incidents was publicly known. There were other articles, there were other lawsuits. This was not something that the plaintiffs couldn't have known or couldn't have discovered.

The Buzzfeed article, as dramatic as it is, was not something that revealed to the plaintiffs something they couldn't have otherwise known. Thank you, Your Honor.

THE COURT: Thank you.

MR. ATKINS: Thank you.

THE COURT: Mr. De Donato?

MR. DE DONATO: Your Honor, not to beat a dead horse or maybe just slightly, and I will not utter a word on severance or transfer, which has been back and forth, but on the civil conspiracy issue, the Lopez case that Your Honor mentions, some conspiracy itself is not a cause of action, it's the underlying action. So, with regard to my client and Jane Doe Four and Jane Doe Three, they knew -- or Jane Doe Four came back and complained she knew where the problem was. The Courthouse was opened to her for two years to file a lawsuit against my client, forgetting what

might exist between the franchisor and whatever else has been argued. Those arguments do not fall as to my client.

That's the only argument I would make as to the statute of limitations.

THE COURT: Thank you. Thank you. Ms. Finegan.

MS. FINEGAN: I would say the exact same argument, Your Honor, holds true for Jane Doe Three. In addition, I think in terms of the conspiracy, unless I misunderstood plaintiff's argument, his argument about a conspiracy and again, I think my co-counsel has very well-addressed those arguments, but I just -- to add to that, I think his argument that there's conspiracy is that there's a conspiracy allegedly between M.E.F. and each individual franchisee, not that there's conspiracy between the franchisees themselves and therefore that argument of conspiracy couldn't hold all of these parties together and not to, again, beat the dead horse about severing and transferring, but I don't think conspiracy states the underlying issues with transferring and severing the individual claims.

THE COURT: Okay. Now that we have completely beat that horse dead -- no. Thank you.

First of all, a lot of you haven't -- haven't been before me, but I remember being in practice and I take it as my solemn duty to reciprocate the work that you put into these papers to read everything and to analyze it and I scheduled this purposely for today on a non-motion Friday while I'm still on trial in a case to not let this get out any further than it had gotten to and I appreciate the quality of the work product and the argument that's here.

There's a lot going on that I have to address and it's been helpful to me to focus in on what the plaintiffs are seeking, what they've alleged and what the respective defensives of -- of the named defendants are in this case.

So, what I -- I am going to do is, I am going to reserve decision and I'm hopefully going to issue a decision within a week or so with an order as I think about it some more and I want to thank everyone for making the time and commitment for being here today and the time that's spent. It's most appreciated. Okay.

MR. ATKINS: Thank you, Your Honor.

MR. KENT: Thank you, Your Honor.

MS. FINEGAN: Thank you, Your Honor.

MR. DE DONATO: Thank you, Your Honor.

MS. COHEN: Thank you, Your Honor.

MR. BARREIRO: Thank you, Your Honor.

MS. FITZPATRICK: Thank you, Your Honor.

THE COURT: Unless there's anything else for the good of the order -- unless there's anything else for the good of the order, well -- we'll stand adjourned under -- and take it under advisement. All right?

MR. ATKINS: Thank you, Your Honor.

THE COURT: Thank you all.

MR. ATKINS: Thank you.

THE COURT: Thank you.

(The Proceeding Concludes.)

CERTIFICATION

I, Kristin Corrado, the assigned transcriber, do hereby certify that the foregoing transcript of proceedings as recorded on CourtSmart, Timestamp 9:20:27 a.m. to 11:21:48 a.m. is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded.

DATE: May 25, 2019 Kristin Corrado

Kristin Corrado, AOC #718

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