

NOTICE TO THE BAR

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

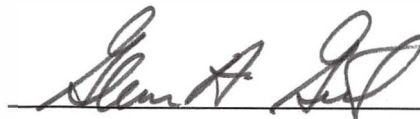
The Supreme Court has received an application pursuant to Directive #02-19, "Multicounty Litigation Guidelines and Criteria for Designation (Revised)," requesting Multicounty Litigation (MCL) designation of New Jersey state-court litigation against Massage Envy Franchising, LLC; Piscataway ME, LLC; CMGK, 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>).



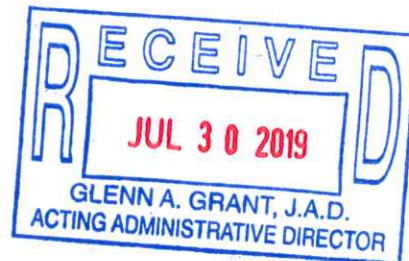
Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts

Dated: August 20, 2019

CIVIL



BRIAN D. KENT, ESQUIRE
 DIRECT DIAL: (215) 399-5774
 E-MAIL: BKENT@LAFFEYBUCCIKENT.COM



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 assets 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



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,

A handwritten signature in black ink, appearing to be "B Kent", written over a horizontal line.

Brian D. Kent, Esq.
M. Stewart Ryan, Esq.
H. Nellie Fitzpatrick, Esq. (*Admitted Pro Hac Vice*)
LAFFEY, BUCCI & KENT, LLP
1435 Walnut Street, 7th Floor
Philadelphia, PA 19102
(215) 399 – 9255
bkent@laffeybuccikent.com

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

FILED
MAY 29 2019

Hon. Thomas Daniel McCloskey, J.S.C.

PREPARED BY THE COURT:

:
:
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. :

MESSAGE 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 :
MESSAGE ENVY MAYS LANDING :
278 Consumer Square :
Mays Landing, NJ 08330 :

= and = :

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**

MESSAGE ENVY SPA SHORT HILLS, LLC :
726 Morris Turnpike :
Short Hills, NJ 07078 :

= and = :

SUMMERWIND MASSAGE, LLC, d/b/a MESSAGE 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 Complaint 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

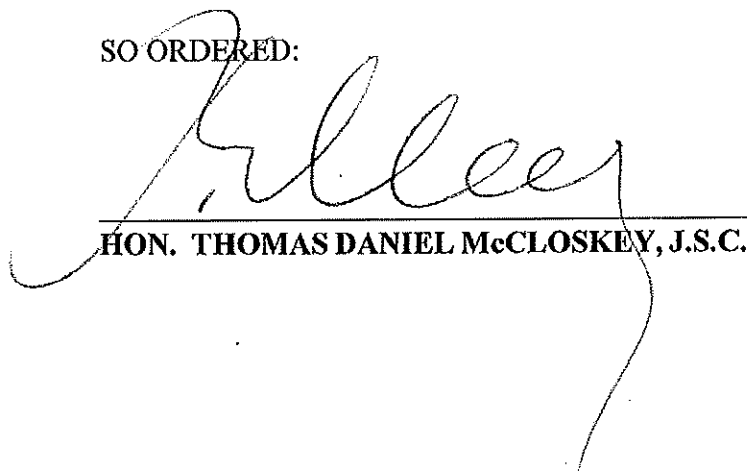
E. The Motion to Dismiss, pursuant to R. 4:6-2(e), filed by Summerwind Massage, LLC d/b/a Massage Envy Closter as to Counts 1, 10, and 11-12 of the First Amended Complaint asserted on behalf of Jane Doe #4 shall be, and hereby is, **DENIED**, without prejudice;

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.

- Opposed.
- Unopposed.

PAPERS CONSIDERED:

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

Jane Doe #1, et al., v. Massage Envy Franchising, LLC, et al.

Dkt. No. MID-L-5163-18

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.

Jane Doe #1, et al., v. Massage Envy Franchising, LLC, et al.

Dkt. No. MID-L-5163-18

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's 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 complaint. 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.

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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 become 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 “NJCFCA”), 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

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.

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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

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).

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them to do so⁴. 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 dispersment 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

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 Complaint 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 Complaint 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 Complaint 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 Complaint 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”

1 APPEARANCES (continued):

2 NELLIE FITZPATRICK, ESQ.
3 (Laffey, Bucci & Kent, LLP)
4 Attorney for the Plaintiffs.

5 JOSEPH DE DONATO, ESQ.
6 (Morgan, Melhuish & Abrutyn, LLP)
7 Attorney for the Defendant, Massage Envy Closter.

8 ROBERT R. ATKINS, ESQ.
9 (Law Office of Paul, Weiss, Rifkind, Wharton &
10 Garrison, LLP)
11 Attorney for the Defendant, Massage Envy
12 Franchising.

13 JACQUELINE P. RUBIN, ESQ.
14 (Law office of Paul, Weiss, Rifkind, Wharton &
15 Garrison, LLP)
16 Attorney for the Defendant, Massage Envy
17 Franchising.

18 ADAM J. BERNSTEIN, ESQ.
19 (Law Office of Paul, Weiss, Rifkind, Wharton &
20 Garrison, LLP)
21 Attorney for the Defendant, Massage Envy
22 Franchising.

23 DARREN C. BARREIRO, ESQ.
24 (Greenbaum, Rowe, Smith & Davis, LLP)
25 Attorney for the Defendant, Massage Envy
Franchising.

CARMEN M. FINEGAN, ESQ.
(Law Office of Gerard Vince, LLC)
Attorney for the Defendant, Massage Envy
Piscataway LLC and Short Hills location.

SARAH A. COHEN, ESQ.
(Lauletta Birnbaum, LLC)
Attorney for the Defendant, Massage Envy, Mays
Landing.

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1 THE COURT: Good morning, everyone.

2 MR. KENT: Good morning, Your Honor.

3 MR. ATKINS: Good morning, Your Honor.

4 MS. FINEGAN: Good morning, Your Honor.

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

12 Docket number MID-L-5163-18.

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

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

18 MS. FITZPATRICK: Good morning, Your Honor.

19 THE COURT: Good morning.

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

23 THE COURT: Good morning.

24 MR. ATKINS: Good morning, Your Honor.

25 Robert Atkins for Massage Envy Franchising.

1 THE COURT: Good morning.

2 MS. RUBIN: Hi. Good morning, Your Honor.

3 Jackie Rubin for Massage Envy Franchising as well.

4 MR. BARREIRO: Good morning, Your Honor.

5 Darren Barreiro, of Greenbaum, Rowe, Smith and Davis
6 on behalf of Massage Envy Franchising also.

7 THE COURT: Good morning.

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

11 THE COURT: Good morning.

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

16 THE COURT: Okay. Thank you.

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

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

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

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

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

18 MR. ATKINS: Yes, sir.

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

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

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

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

6 MR. DE DONATO: I --

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

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

25 In this situation, it was -- the complaint

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

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

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

16 MR. DE DONATO: Just Four, Your Honor.

17 THE COURT: Okay.

18 MR. DE DONATO: Just Four is Closter.

19 THE COURT: On the statute?

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

22 MS. FINEGAN: Your Honor --

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

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

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

3 THE COURT: Right.

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

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

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

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

21 THE COURT: Yes. Okay.

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

1 be -- is misjoined here and should be brought in
2 Bergen County.

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

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

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

21 THE COURT: Okay. Okay. Ms. Cohen?

22 MS. COHEN: Yes, Your Honor.

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

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

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

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

17 THE COURT: Okay.

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

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

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

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

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

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

25 Number two, and this is affirmatively

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

13 THE COURT: Yes.

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

15 THE COURT: Let me ask you this.

16 MR. ATKINS: Yes, Your Honor.

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

21 MR. ATKINS: I --

22 THE COURT: That anyone knows?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 THE COURT: Well, let --

13 MR. ATKINS: -- the cause of action of the
14 --

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

16 MR. ATKINS: Yes, Your Honor.

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

20 MR. ATKINS: Yes, Your Honor.

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

25 MR. ATKINS: Correct.

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

6 MR. ATKINS: I would, Your Honor.

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

1 by that and, am I?

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

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

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

12 THE COURT: And it is an issue.

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

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

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

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

24 MR. ATKINS: Right.

25 THE COURT: -- the -- the New Jersey

1 Superior Court.

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

14 THE COURT: And certainly not crimes.

15 MR. ATKINS: Pardon me?

16 THE COURT: And certainly not crimes.

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

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

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

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

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

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

1 happen.

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

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

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

20 MR. ATKINS: I --

21 THE COURT: I took apart --

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

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

1 MR. ATKINS: Yes.

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

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

7 THE COURT: Okay.

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

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

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

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

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

6 MR. ATKINS: Yes.

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

9 MR. ATKINS: As -- as my worthy adversary
10 knows, I defend these cases in lots of places. So,
11 the fact that we might have to have cases in Bergen
12 and Middlesex and elsewhere is not terribly different
13 from the fact that I defend these in Florida and
14 California and elsewhere and, so, we're prepared to do
15 that and as you probably noted in the papers, we don't
16 always get the same results in the -- in all the cases
17 --

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

20 MR. ATKINS: Right.

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

23 MR. ATKINS: Right. So --

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

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

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

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

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

1 through six for each of the plaintiffs. There's also
2 a claim for negligence performance of services,
3 negligence per se and negligent infliction of
4 emotional distress and those are Counts 12, 13, and
5 14.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 MR. ATKINS: -- pause on that.

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

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

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

22 THE COURT: Well, we --

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

25 THE COURT: You would agree with me -- you

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

3 MR. ATKINS: I would, Your Honor.

4 THE COURT: Okay.

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

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

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

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

10 THE COURT: Okay.

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

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

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

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

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

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

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

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

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

21 MR. ATKINS: I --

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

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

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

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

14 MR. ATKINS: Correct.

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

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

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

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

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

1 THE COURT: Or a spoliation of evidence.

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

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

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

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

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

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

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

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

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

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

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

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

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

21 MR. ATKINS: Absolutely and --

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

24 MR. ATKINS: That --

25 THE COURT: -- by reason of them having been

1 victimized?

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

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

20 THE COURT: Okay.

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

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

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

3 MR. ATKINS: Thank you, Your Honor.

4 THE COURT: Yes.

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

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

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

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

21 THE COURT: Whether it -- is it --

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

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

25 MS. FINEGAN: Correct.

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

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

4 THE COURT: Okay.

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

7 THE COURT: Okay.

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

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

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

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

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

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

6 MS. FINEGAN: I am, Your Honor.

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

8 MS. FINEGAN: I am often in --

9 THE COURT: -- co-defendant, right?

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

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

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

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

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

9 MS. FINEGAN: Oh, okay.

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

14 MS. FINEGAN: Your Honor --

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

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

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

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

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

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

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

4 THE COURT: Well, as is McDonalds.

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

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

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

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

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

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

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

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

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

25 The intentional act exclusion and I think

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

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

1 dealing with those scenarios.

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

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

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

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

1 THE COURT: Do franchisees do background
2 checks?

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

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

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

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

14 THE COURT: I was just going to get to that
15 --

16 MR. KENT: -- and --

17 THE COURT: -- and -- and to your last point
18 --

19 MR. KENT: Yes.

20 THE COURT: I'm sorry to interrupt you, but
21 --

22 MR. KENT: That's okay.

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

1 that go to the civil conspiracy claim of concealing or
2 --

3 MR. KENT: It does.

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

9 MR. KENT: Correct.

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

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

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

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

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

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

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

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

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

25 MR. KENT: They were 100 percent within

1 their rights to do so. Yes.

2 THE COURT: Okay.

3 MR. KENT: Yes.

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

6 MR. KENT: Correct.

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

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

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

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

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

12 MR. KENT: Potentially and the case --

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

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

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

9 THE COURT: The allegation was suppressed?

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

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

24 MR. KENT: Correct.

25 THE COURT: -- as is an affirmative

1 statement of something that is known to be false.

2 MR. KENT: That's --

3 THE COURT: Isn't that true?

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

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

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

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

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

5 MR. KENT: Correct.

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

8 MR. KENT: Yes.

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

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

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

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

19 THE COURT: I understand.

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

21 THE COURT: I agree.

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

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

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

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

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

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

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

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

6 MR. KENT: I would --

7 THE COURT: Can you supplement or provide me
8 the reasons you think joinder substantially outweighs
9 the interest of -- of the named parties in not joining
10 --

11 MR. KENT: Sure.

12 THE COURT: -- these claims?

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

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

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

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

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

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

7 MR. KENT: Sure.

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

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

13 THE COURT: Okay.

14 MR. KENT: -- I can --

15 THE COURT: But -- but --

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

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

2 --

3 MR. KENT: Yes.

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

11 MR. KENT: Yes.

12 THE COURT: -- model?

13 MR. KENT: Yes.

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

19 MR. KENT: Correct.

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

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

1 body. Yes.

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

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

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

17 MR. KENT: Oh --

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

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

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

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

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

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

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

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

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

1 --

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

5 MR. KENT: Well --

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

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

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

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

5 MR. KENT: It would, Your Honor.

6 THE COURT: -- rather than different
7 locations?

8 MR. KENT: Yes.

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

12 MR. KENT: There are other matters --

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

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

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

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

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

1 a method to my madness --

2 MR. KENT: Yes.

3 THE COURT: -- in asking these arguments
4 because I've just ticked off all the criteria that are
5 considered if an application is made to the Supreme
6 Court and the Administrative Office of the Court to
7 seek multi-county litigation designation under Rule
8 4:38a and it would appear to me that this case as I've
9 come to understand it might benefit from making that
10 application and seeking that designation and in fact,
11 Judge Grant, the acting administrator of the -- the
12 acting director of the Administrative Office of the
13 Court in a notice to the bar issued the revised
14 directive for multi-county litigation and the
15 guidelines. It's directive number 2-19 pursuant to
16 rule 4:38a and that was just issued at the end of
17 February of this year and it lays out and formalizes
18 the criteria for designation.

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

22 MR. KENT: Sure.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 MR. ATKINS: I --

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

14 THE COURT: Mr. Atkins?

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

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

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

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

1 to do.

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

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

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

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

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

1 it requires --

2 THE COURT: The employer/employee.

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

7 THE COURT: Right.

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

10 THE COURT: Right.

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

14 THE COURT: Right.

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

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

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

13 THE COURT: What about the civil conspiracy
14 claim?

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

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

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

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

25 THE COURT: Well, isn't the product a

1 service?

2 MR. ATKINS: Yes, sure.

3 THE COURT: A massage.

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

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

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

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

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

12 THE COURT: Thank you.

13 MR. ATKINS: Thank you.

14 THE COURT: Mr. De Donato?

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

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

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

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

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

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

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

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

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

23 MR. ATKINS: Thank you, Your Honor.

24 MR. KENT: Thank you, Your Honor.

25 MS. FINEGAN: Thank you, Your Honor.

1 MR. DE DONATO: Thank you, Your Honor.

2 MS. COHEN: Thank you, Your Honor.

3 MR. BARREIRO: Thank you, Your Honor.

4 MS. FITZPATRICK: Thank you, Your Honor.

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

10 MR. ATKINS: Thank you, Your Honor.

11 THE COURT: Thank you all.

12 MR. ATKINS: Thank you.

13 THE COURT: Thank you.

14 (The Proceeding Concludes.)

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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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