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PRELIMINARY STATEMENT

Defendants' motion for summary judgment seeks to dismiss McDonald's Corporation and Dorno Corporation on the basis that discovery in this matter has failed to produce any evidence that either of these defendants were responsible in any way for this incident and plaintiffs' injuries. Defendants further argue that the plaintiffs have failed to establish a prima facie case of negligence against McDonald's Corporation or Dorno Corporation since the proper defendant in this matter is the Jesnel Corporation, the owner, operator and franchisee of the subject McDonald's restaurant. However, defendants' motion must be denied since discovery has clearly established that all these defendants constitute and function as a single corporate enterprise, thereby rendering all defendants in the enterprise as a whole negligent in this matter.

Defendants McDonald's Corporation, Dorno Corporation, and Jesnel Corporation are involved in the fast-food services at McDonald's restaurant. Despite the separate formal corporate status of each of these defendants, each of them are liable under the single enterprise doctrine, under which parents and subsidiary companies, become, in effect, a single entity. In order for numerous corporate defendants to be constituted as a single entity for purposes of negligence against them, a plaintiff needs to show that common factors exist between these defendants in their business functions. As demonstrated in the deposition of Celestina Quintana*, infra*, and from other discovery in this matter, the relationship between all the defendants demonstrate common factors between them including, but not limited to, common goals and purposes, common officers, integration of the business of the various corporations, the rendering of services by one corporation to another without an independent business of its own, one corporation collecting all revenue of all corporations in the enterprise, self-representation by the group of corporations as a single enterprise, holding themselves

out to the public as a single entity, and one corporation involving itself in the day to day affairs of the other corporations of the group. As such, these above factors show that defendants McDonald's Corporation, Dorno Corporation, and Jesnel Corporation constitute and function as a single enterprise who are all liable for plaintiffs' claims of negligence against them. This is particularly so as it concerns Jesnel Corporation's relationship with its umbrella corporation, Dorno Corporation.

Additionally, defendants' move to dismiss plaintiffs' punitive damages claim asserting that plaintiffs' cannot prove the defendants' conduct was willful or wanton. However, to states a claim for punitive damages, defendants only need to show that defendants' conduct constituted reckless indifference to the consequences arising from defendants' conduct . The circumstances of this matter clearly show the likelihood that serious harm would result to the plaintiff for defendants' failure to provide adequate security measures, and reckless disregard by the defendants' in their failure to implement adequate security measures. Therefore, defendants' conduct warrants a claim for punitive damages against them.

Finally, plaintiffs cross-move for discovery relief from defendants' violation of this Court's Order of February 17, 2006 requiring defendants to comply with certain discovery requests. Movants seek to have the complaints against them dismissed based largely on a self serving affidavit of a Mr. Robert Johnson who assures this Court the McDonald's Corporation had nothing to do with operating this restaurant. However, defendants violated this February 17, 2006 Court's Order which required them to produce, among other things, the complete McDonald's Corporation Operations and Training Manual. This large document would have shown that not only is the McDonald's Corporation involved in the operations of the restaurant, but that they actually have an operations manual which is so detailed, extensive and required to be followed that it is referred to in the

business as the McDonalds operations "Bible." Movants also violated the Court order in failing to produce the entire franchise agreement, and yet rely on an amendment to that document on this motion which they incorrectly claim is actually the entire agreement. Although plaintiffs noticed the depositions of every person they certified had knowledge relevant to this case, defendants have never disclosed the affiant, Mr. Johnson, as one such person. Accordingly, this is further reason why the Court should deny defendants' motion for summary judgment with prejudice, or in the alternative, deny the motion without prejudice to allow plaintiffs to take Mr. Johnson's deposition and to comply with the February 17, 2006 discovery order (while not effecting the trial date).

RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS IN SUPPORT OF SUMMARY JUDGMENT MOTION

1. Denied. See Counterstatement of Facts herein, #1-16.

2. Admitted.

3. Admitted.

4. Admitted except for the fact that Dorno Corporation is the holding company for McDonald's franchisee, Jesnel Corporation. All three defendants, McDonald's Corporation, Dorno Corporation and Jesnel Corporation, are involved in the fast-food services at McDonald's restaurant. Despite the separate formal corporate status of each of these defendants, discovery has clearly established that these defendants constitute and function as a single corporate enterprise.

5. Denied. See Counterstatement of Facts herein, #1-16.

6. Plaintiff can neither admit or deny since it has insufficient information and knowledge. Additionally, objection as defendant fails to cite the motion record as required under *R*. 4:46-2(b).

7. Denied. Defendant McDonald's Corporation owns the restaurant itself, leasing the property to Jesnel Corporation. (See Exhibit L, pp. 114:25; 115:1-6). Defendant McDonald's Corporation controls virtually every aspect of the operation of the restaurant McDonald's as proliferated through its "McDonald's Operations and Training Manual", as indicated in the Security section of that document. (See Exhibit "K" to plaintiff's certification herein, cover page, pp. 17-1, 17-3, 17-4, 17-10, 17-11, 17-22). Furthermore, defendants have failed to comply with discovery by not providing the operations and training manual pursuant to the Court order (See Exhibit O) and not providing the name of Robert Johnson as a party with relevant knowledge in its answers to interrogatories. (See Exhibit P). Defendant has also failed to provide the complete franchisee agreement in

discovery. In addition, denied, McDonald's has made arrangements for McDonald's food to be offered at the McDonald's restaurant, (see Exhibit D to Defendant's motion for summary judgment.

8. See # 7.

9. See # 7.

10. See # 7.

11. See # 7.

12. See # 7.

13. See #7. Additionally, denied. Celestina Quintana testified that the Dorno Corporation is a parent corporation of Jesnel Corporation. (See Exhibit L, pp. 26:22-25; 27:1-3).

14. See # 7. Additionally, denied. The deposition of Celestina Quintana reveals that defendants, McDonald's Corporation, Jesnel Corporation and Dorno Corporation constitute and function as a single corporate enterprise. (See Exhibit L, p. 26:22-25; 27:1-3; p.27:9-14, p. 24:8-21, p. 93:5-18).

15. See #7. Additionally, denied. The deposition of Celestina Quintana reveals that defendants, McDonald's Corporation, Jesnel Corporation and Dorno Corporation constitute and function as a single corporate enterprise. (See Exhibit L, p. 26:22-25; 27:1-3; p.27:9-14, p. 24:8-21, p. 93:5-18).

16. See # 7. Additionally, denied. The deposition of Celestina Quintana reveals that defendants, McDonald's Corporation, Jesnel Corporation and Dorno Corporation constitute and function as a single corporate enterprise. (See Exhibit L, p. 26:22-25; 27:1-3; p.27:9-14, p. 24:8-21, p. 93:5-18).

17. See # 7. Additionally, denied. The deposition of Celestina Quintana reveals that defendants, McDonald's Corporation, Jesnel Corporation and Dorno Corporation constitute and function as a single corporate enterprise. (See Exhibit L, p. 26:22-25; 27:1-3; p.27:9-14, p. 24:8-21, p. 93:5-18).

18. See # 7. Additionally, denied. The deposition of Celestina Quintana reveals that defendants,

McDonald's Corporation, Jesnel Corporation and Dorno Corporation constitute and function as a single corporate enterprise. (See Exhibit L, p. 26:22-25; 27:1-3; p.27:9-14, p. 24:8-21, p. 93:5-18). Celestina Quintana testified that the officers of Dorno Corporation are her and her husband, and that there has never been any other officers of Dorno Corporation. (See Exhibit L, p.27:9-14).

19. Denied. (See Exhibit D to Defendant's Motion for Summary Judgment). Additionally, plaintiffs have insufficient information and knowledge to respond to this paragraph since Exhibit "D" of defendants' certification consists only of an amendment to the franchise agreement and not the entire agreement.

20. Objection. Argumentative and calls for a legal conclusion. Notwithstanding such objections, denied. All three defendants, McDonald's Corporation, Dorno Corporation and Jesnel Corporation, are involved in the fast-food services at McDonald's restaurant. Despite the separate formal corporate status of each of these defendants, discovery has clearly established that these defendants constitute and function as a single corporate enterprise.

21. Objection. Argumentative and calls for a legal conclusion. Notwithstanding such objections, denied. All three defendants, McDonald's Corporation, Dorno Corporation and Jesnel Corporation, are involved in the fast-food services at McDonald's restaurant. Despite the separate formal corporate status of each of these defendants, discovery has clearly established that these defendants constitute and function as a single corporate enterprise.

22. Admitted.

23. Admitted.

24. Objection, the record speaks for itself. Additionally, see Counterstatement of Facts herein, #1-16.

25. Objection, the record speaks for itself. Additionally, see Counterstatement of Facts herein, #1-16.

26. Objection, the record speaks for itself. Additionally, see Counterstatement of Facts herein, #1-16.

27. Objection, the record speaks for itself. Additionally, see Counterstatement of Facts herein, #1-16.

28. Objection, the record speaks for itself. Additionally, see Counterstatement of Facts herein, #1-16.

29. Objection, the record speaks for itself. Additionally, see Counterstatement of Facts herein, #1-16.

30. Objection, the record speaks for itself. Additionally, see Counterstatement of Facts herein, #1-16.

31. Objection, the record speaks for itself. Additionally, see Counterstatement of Facts herein, #1-16.

32. Objection, the record speaks for itself. Additionally, see Counterstatement of Facts herein, #1-16.

33. Objection, the record speaks for itself. Additionally, see Counterstatement of Facts herein, #1-16.

34. Objection, the record speaks for itself. Additionally, see Counterstatement of Facts herein, #1-16.

35. Objection, the record speaks for itself. Additionally, see Counterstatement of Facts herein, #1-16.

36. Objection, the record speaks for itself. Additionally, see Counterstatement of Facts herein, #1-16.

37. Objection, the record speaks for itself. Additionally, see Counterstatement of Facts herein, #1-16.

38. Objection, the record speaks for itself. Additionally, see Counterstatement of Facts herein, #1-16.

39. Objection, the record speaks for itself. Additionally, see Counterstatement of Facts herein, #1-16.

40. Admitted.

41. Admitted.

42. Admitted.

43. Admitted.

44. Admitted.

45. Admitted.

46. Objection, Samuel Gilmete is an admitted perjurer, and thus his testimony is unreliable. As such, Samuel Gilmente's new sworn version of events at his deposition, which directly contradict his previous sworn version at his plea agreement hearing, should be disregarded.

47. Admitted. Additionally, objection, irrelevant to this motion.

48. Denied. Plaintiff's security expert, David Johnston, opines in his report that defendants McDonald's Corporation and Jesnel Corporation did not have an effective security program in existence at the time of the accident. (See Exhibit J to plaintiffs' certification herein). However, it is irrelevant as to which defendants David Johnston refers to in his report as his opinion analyzes the

lack of effective security on the defendants' premises as a whole, not the lack of effective security of each defendant separately. Additionally, all three defendants, McDonald's Corporation, Dorno Corporation and Jesnel Corporation, are involved in the fast-food services at McDonald's restaurant. Despite the separate formal corporate status of each of these defendants, discovery has clearly established that these defendants constitute and function as a single corporate enterprise.

49. Denied. Plaintiff's security expert, David Johnston, opines in his report that defendants McDonald's Corporation and Jesnel Corporation did not have an effective security program in existence at the time of the accident. (See Exhibit J to plaintiffs' certification herein). However, it is irrelevant as to which defendants David Johnston refers to in his report as his opinion analyzes the lack of effective security on the defendants' premises as a whole, not the lack of effective security of each defendant separately. Additionally, all three defendants, McDonald's Corporation, Dorno Corporation and Jesnel Corporation, are involved in the fast-food services at McDonald's restaurant. Despite the separate formal corporate status of each of these defendants, discovery has clearly established that these defendants constitute and function as a single corporate enterprise.

50. Objection, the record speaks for itself. Notwithstanding such objection, denied to the extent that it only refers to the defendant Jesnel Corporation. All three defendants, McDonald's Corporation, Dorno Corporation and Jesnel Corporation, are involved in the fast-food services at McDonald's restaurant. Despite the separate formal corporate status of each of these defendants, discovery has clearly established that these defendants constitute and function as a single corporate enterprise. The deposition of Celestina Quintana reveals that defendants, McDonald's Corporation, Jesnel Corporation and Dorno Corporation constitute and function as a single corporate enterprise. (See Exhibit L, p. 26:22-25; 27:1-3; p.27:9-14, p. 24:8-21, p. 93:5-18).

51. See # 50.

52. See # 50.

53. See # 50. Additionally, defendants spoliated the video from the interior closed circuit television cameras by not produced it, in violation of this Court order. As such, defendants should be precluded from disputing plaintiff's version of events when defendant spoliated the very evidence that would have shown what happened.

COUNTER STATEMENT OF MATERIAL FACTS

A. The Incident

1. On Friday, May 23, 2003, plaintiff Louis Miranda was eating lunch together with his elderly mother, sister and Nephew at the McDonald's located at 564 Newark Avenue, in Jersey City, New Jersey.

2. The restaurant at the time was very crowded and very loud (*Exhibit A, Deposition of Louis Miranda at 38, 198-199*) (*Exhibit C, Deposition of Filomena Miranda at 30-31*) (*Exhibit D, Deposition of Anthony Walters at 25-28*)

3. In the area where Louis and his family were sitting there was a large group of youths acting in an inappropriate and raucous manner. These kids were throwing food, squirting ketchup packets about and shouting profanity among themselves and at customers. (*Exhibit C, Deposition of Filomena Miranda at 33-34, 43-49*) (*Exhibit D, Deposition of Anthony Walters at 26-29, 44*)

4. These youths were dressed in intimidating clothing with numerous facial piercings, black makeup, baggy clothes and a general "gothic" look. (*Exhibit D, Deposition of Anthony Walters at 27-28*)

5. These youths were being so disruptive and threatening that many customers got up and walked out of the restaurant. (*Exhibit C, Deposition of Filomena Miranda at 39, 62-63*) (*Exhibit D, Deposition of Anthony Walters at 36, 45*)

6. At one point, Louis' nephew, Anthony Walters, approached the store manager and asked if she would do something about these youths and their behavior inside the McDonald's. She responded by stating that "they're good kids" and did nothing to supervise or stop their behavior or call the police. (*Exhibit C, Deposition of Filomena Miranda at 62-63*) (*Exhibit D, Deposition of*

Anthony Walters at 41-42)

7. At one point an unskilled cleaning lady who worked at the McDonald's said something to the youths, presumably attempting to get them to stop their behavior; they just laughed at her and continued. (*Exhibit C, Deposition of Filomena Miranda at 98-99*)

8. After being in the dining area for about 10 to 15 minutes having lunch, Anthony Walters (Louis' nephew), asked one of the youths in the group near them to stop using profanity because his mother and grandmother were with them. (*Exhibit A, Deposition of Louis Miranda at 41, 49*) (*Exhibit C, Deposition of Filomena Miranda at 60*) (*Exhibit D, Deposition of Anthony Walters at 43-44*)

9. The youth could then be heard to say, "Go fuck yourself, you fucking asshole, I'm going to fuck you." The nephew, Anthony Walters again asked them to please stop cursing because his mother and grandmother were with them. (*Exhibit A, Deposition of Louis Miranda at 45-47*)

10. The youths were generally talking loudly, cursing and told plaintiff and his nephew to "shut up", etc. (*Exhibit A, Deposition of Louis Miranda at 58-60*) (*Exhibit C, Deposition of Filomena Miranda at 46-49*) (*Exhibit C, Deposition of Filomena Miranda at 60*) (*Exhibit D, Deposition of Anthony Walters at 43-44*)

11. In response to Anthony Walters asking the youths to stop using profanity, plaintiff Louis Miranda told his nephew to ignore them and not to get involved. (*Exhibit D, Deposition of Anthony Walters at 45-46*)

12. There were also a number of restaurant employees in the area, including a manager. (*Exhibit A, Deposition of Louis Miranda at 53-54*) (*Exhibit D, Deposition of Anthony Walters at 40, 44*)

13. About two minutes after this exchange, the group got up, walked outside the restaurant and loitered against the glass by the exit door. (*Exhibit A, Deposition of Louis Miranda at 48, 52*)

14. A few minutes after that, Louis and his family proceed to walk out the restaurant. (*Exhibit A, Deposition of Louis Miranda at 50-51*) Louis' mother was scared and wanted to leave; she was 80 years old. (*Exhibit A, Deposition of Louis Miranda at 201*) (*Exhibit C, Deposition of Filomena Miranda at 46, 50-51*) (*Exhibit D, Deposition of Anthony Walters at 47-48*)

15. As Louis walked with his mother in his right arm out the McDonalds door, Samuel Gilmente reached around and stabbed him in the right eye with a filet knife. (*Exhibit A, Deposition of Louis Miranda at 62-66*) (*Exhibit B, incident and injury medical illustration*) (*Exhibit C, Deposition of Filomena Miranda at 50-52, 57*) (*Exhibit D, Deposition of Anthony Walters at 49-54, 56-57*) (*Exhibit M, Gilmente Guilty Plea*)

16. There was never any other contact between plaintiff and the assailant. (*Exhibit A, Deposition of Louis Miranda at 42-43, 65*)

B. The History of Criminal Activity and the Violence-Prone Dickenson High School Youths

1. Daniel O'Connor, a retired 25 year veteran of the New Jersey State Police, conducted an investigation concerning the events surrounding this McDonald's and its history of crime and violence generally, and specifically as it relates to the Dickenson High School students converging on the restaurant each day during the lunch period. (*Exhibit E, Report of Daniel O'Connor at 1, 5*) (*Exhibit F, Deposition of Daniel O'Connor at 20, 25-28, 35-42, 50-52*)

2. It is well known that Dickenson High School has a long history of violence and criminal activity associated with its students. In fact, a popular encyclopedia article on the school notes:

Today, Dickinson High school has one of the best science magnet programs in the

> state and is one of the few inner city high schools that offers a large choice of magnet and prep programs. Despite its achievements, however, **Dickinson High School** suffers from the problems which afflict many inner city schools: it has low test scores and high drop out rates, and also **has an infamous reputation in Hudson County as being the worst and most violence-prone school in the city**. Some consider other Jersey City High schools, such as Lincoln High School and Snyder High School, to be far worse, but the label is often given to Dickinson High School, perhaps because of its prominent location in Jersey City.

(*Exhibit G, Encyclopedia Article on Dickenson High School*) (emphasis added)

3. Daniel O'Connor's investigation similarly revealed what is well known in the area concerning the serious problems associated with Dickenson High School:

> The McDonald's Restaurant owned by Celeste Quintana located at the corner of Newark and Baldwin Avenues in Jersey City, NJ is located in a high crime area. Police Officers from the North and East Districts verbally confirmed that this location is besieged by Dickinson High school students at lunchtime each day and problems arise regularly.
> ...
> A lieutenant...told me about eight hundred students are allowed to leave Dickinson High School each day at lunch time and they then converge on McDonald's and other fast food restaurants in the vicinity of the high school. These pupils are constantly involved in fights, marijuana smoking, drug deals, larcenies and vandalism during the lunch period which can run from 11:00AM to 2:00PM.

(*Exhibit E, Report of Daniel O'Connor at 5*)

4. Mr. O'Connor further elaborated on this at his deposition and related his personal knowledge of the situation:

> Well, considering what I was told by the other police officers, my own knowledge of the area, I knew it was a high crime area. I know that the high school for many years has been besieged by gangs and crime and drugs. You have the Latin Kings in there, the Cripts, the Bloods, There's another gang, I forgot the name of them, that was more notable back in the '80s but they're still there. I know that they have constant problems.

(*Exhibit F, Deposition of Daniel O'Connor at 35*) In fact, when Mr. O'Connor was outside the McDonalds waiting for his deposition he saw this same activity:

> [I] saw it today then I was here for lunch sitting out in the lobby there, and I could here the foul language and the screaming and yelling and I saw it today while I was sitting in your lobby out here waiting to get my deposition.

(*Exhibit F, Deposition of Daniel O'Connor at 39*)

5. Even well-coached McDonald's employees had to concede the Dickenson High School students converge on the restaurant during the lunch period, "Generally [they] leave from school. At that time, they fill up the house... There have been cases that they start fooling around very hard, and then me, in this case, I call the manager..." (*Exhibit H, Deposition of McDonald's employee Almenares at 29, 30, 33, 34*) (*Exhibit I, Deposition of McDonald's employee Martinez at 21, 41-43*)

6. Even the owner of Dorno Corporation[1], after first being evasive, ultimately acknowledged a problem with these kids:

> Q. Ever any problems with the high school youths gathering at that McDonald's at lunch time in the past?
> MR. CORCORAN: Objection to that. You can answer.
> A. They come in and eat. They have 30 minutes to eat and then they leave.
>
> Q. So no other problems with them in the past besides this incident?
> MR. CORCORAN: Objection to the form. You can answer.
> A. They're teenagers. They come in, they have 32 minutes to eat, I believe. They eat and they leave.
>
> Q. I understand the age group of a high school student. I understand the 20 or 30 minute rule that we talked about earlier. But the particular question is: Any problems with those kids in the past at all at this McDonald's?
> MR. CORCORAN: Objection to the form.
> A. Outside. They, they have fights in front of the school and then they spill out into the street.
>
> Q. Out into the street in front of McDonald's?
> A. And the street, yeah. Not on the sidewalk. In the middle of the street.

---

[1]Defendant Dorno Corporation is an umbrella company for about 8 McDonald's restaurants in North Jersey, including the one where this assault happened.

Q. Never any fights on the sidewalk? They're always in the street?
A. I'm sure they are on the sidewalk, also.

(*Exhibit L, Deposition of Celestina Qunitana at 101-102*)

7. In fact, McDonald's has had to call the Dickenson High School police to the restaurant to handle the youths. (*Exhibit L, Deposition of Celestina Qunitana at 102*)

8. Furthermore, the former principal of Dickenson High School, Mr. Robert Donato, confirmed and elaborated upon what everyone else has said when he was interviewed by plaintiff's security expert, David Johnston, which he relies on in forming his opinions and conclusions in this case:

> According to Robert Donato, a retired Principal at nearby Dickinson High School, which was attended by the Gilmete brothers on May 23, 2003; their approximately 3,300 students regularly patronized nearby fast food restaurants such as McDonald's in large numbers, because the High School's lunchroom seating capacity in 2003 was only 700 students. The McDonald's Restaurant at 564 Newark Avenue was approximately one city block from Dickinson High School. Further, according to Mr. Donato, six off-duty Jersey City Police Officers had been hired by the Jersey City Board of Education to patrol the streets adjacent to the High School on school days for the purpose of suppressing and preventing gang violence and assaults. The aforementioned off-duty police officers were augmented by two Jersey City Police Officers and thirteen security officers that were assigned to the Dickinson High School building and premises, as well as six full-time Crisis Intervention Specialists.

(*Exhibit J, Report of David Johnston, CCP at 9*)

9. Thus, since Dickenson High School did not have the capacity to seat all the students, each day they converged on the McDonalds in question. As such, the McDonalds became a *de facto* extension of the school during the 4 hour lunch period. (*Exhibit J, Report of David Johnston, CCP at 9*)

10. In fact, the violence and criminal activity was so bad at the McDonalds, that over an approximate three year period before the incident in question, the Jersey City Police Department was

summoned to this McDonalds location about 360 times. (*Exhibit E, Report of Daniel O'Connor at exhibit #3, police calls log*) (*Exhibit I, Deposition of McDonald's employee Martinez at 9-11*) (*Exhibit J, Report of David Johnston, CCP at 10*)

11. Empirical studies and official government crime reports show that 564 Newark Avenue in Jersey City is a dangerous place. (*Exhibit N, Supplemental Report of David Johnston, NJ Uniform Crime Report, Cap Index Report*)

12. Pursuant to *N.J.S.A.* 52:17B-5.5, the Attorney General is required to submit to the governor and legislature an annual crime report analyzing crime statistics in the Garden State. (*Exhibit N, NJ Uniform Crime Report at 1*)

13. This official government report documents that the City of Jersey City had the highest 2003 rate of Aggravated Assaults of any municipality on New Jersey, 1,440 reported incidents. There were more Aggravated Assaults report in Jersey City than Camden and Newark, though Camden and Newark reported more overall crimes in 2003. Moreover, in 2003, Jersey City reported the occurrence of more violent crimes than any other municipality in New Jersey, with 2,930 incidents reported. (*Exhibit N, Supplemental Report of David Johnston at 3, NJ Uniform Crime Report at 108*)

14. CAP Index, Inc. is a nationally recognized empirical crime data reporting service. It is widely accepted and used in the security industry for risk management, loss prevention and security analysis. Its CRIMECAST report models analyzes the strong relationship that exists between a neighborhood's "social disorganization" and the amount of crime that is perpetrated there. (*Exhibit N, Cap Index Report at D-1*)

15. The CRIMECAST model produces probability measures that place any location in the

United States in context with national and local levels of criminality. It refers to these probability measures as CRIMECAST scores. CRIMECAST scores focus on Crimes Against Person (homicide, rape, and aggravated assault) and Property (burglary, larceny, and motor vehicle theft). (*Exhibit N, Cap Index Report at D-1*)

16. The CAP Index crime forecasting model incorporates a wide variety of information from the following sources; FBI Uniform Crime Reports; National Crime Surveys; local police data; and company crime loss reports from all the major industries. (*Exhibit N, Cap Index Report at D-1*)

17. The CAP Index Scores for this McDonalds, 564 Newark Avenue, are as follows:

Current Scores (2003)	**National Scores**	**State Scores**	**County Scores**
Aggravated Assault	315	513	276
Crimes Against Persons	389	534	287
CAP Index	513	565	299

(*Exhibit N, Supplemental Report of David Johnston at 4-6, Cap Index Report*)

18. These scores mean that a patron or McDonald's employee at 564 Newark Avenue was almost three times more likely to be victimized by an Aggravated Assault than any other location in Hudson County; more than five times more likely to be victimized by an Aggravated Assault than any other location in the State of New Jersey; more than three times more like to be victimized by an Aggravated Assault than any other location in the United States. Other Crimes Against Persons followed this elevated risk of victimization. (*Exhibit N, Supplemental Report of David Johnston at 4-6, Cap Index Report at A-1, A-2*)

19. Despite all this, McDonald's took no security measures to protect its patrons from attacks and other crimes. (*Exhibit L, Deposition of Celestina Qunitana at 48-49*)

C. McDonald's Makes the Economic Decision to take No Security Measures

1. McDonald's maintains an Operations and Training Manual governing security, aka, the McDonald's "Security Bible." Among other things, the McDonald's "Security Bible" states:

> *Customers and employees should feel secure in the your restaurant.*
> *There should be no concern about robberies, burglars, vandals, or loiterers.*
> *Customers' only experience should be one of feeling secure and cared for.*
>
> Good security helps you conduct business smoothly. It assures customers and employees of a consistently pleasant environment. And it ensures that you will not suffer unnecessary losses from criminal activity.

(*Exhibit K, McDonald's Security Bible at* 17-1)

> Managers and crew should be alert to people loitering inside the restaurant...call the police if loiterers don't leave in a reasonable period of time

(*Exhibit K, McDonald's Security Bible at* 17-3)

> All Security guard needs should be coordinated with the regional security manager.

(Exhibit K, McDonald's Security Bible at 17-24)

> Each restaurant manager should evaluate restaurant and install equipment and hardware as needed.
>
> *For assistance, contact your security manager or the director of security*.

(*Exhibit K, McDonald's Security Bible 17-32*)

2. Despite becoming a *de facto* extension of the violence-prone Dickenson High School, and despite the history of violence and criminal activity in the area, and despite the school employing extensive security to police these kids, and despite McDonald's own internal security manual mandates it, as a cost savings measure McDonald's decided to take no security measures whatsoever. (*Exhibit L, Deposition of Celestina Qunitana at 48-49*)

3. No one who worked at the McDonalds in question had any particularized security training

or qualifications. In fact, the same is true with respect to the eight other McDonald's restaurants run under the umbrella of Dorno Corporation. (*Exhibit L, Deposition of Celestina Qunitana at 42*)

4. The president of the McDonald's corporations that ran this store, Celestina Quintana, testified:

> Q. Who is in charge of security for the restaurants run under the umbrella of Dorno Corporation?
> A. Who is? The police department in the neighborhood.

(*Exhibit L, Deposition of Celestina Qunitana at 42*)

5. And although the McDonald's Security Manual is clear that all restaurants are supposed to, "Contact your [regional] security manager to determine if an armed or unarmed guard is needed in your situation." (*Exhibit K, McDonald's Security Bible at 17-26*) Ms. Quintana was clear she did not do this nor anything else to protect the McDonald's customers from the serious problem of crime in the area and the Dickenson High School situation:

> Q. Has Dorno Corporation or Jesnel Corporation ever done a security analysis of its restaurants?
> A. There is no need. We have not had any-- other than what we train our people to, with the, what they are trained, how we train them. But there is no need to do a security analysis.
>
> Q. Because you say there is no need your answer to the question is no?
> A. No.

(*Exhibit L, Deposition of Celestina Qunitana at 48-49*)

6. When asked why the McDonald's has done nothing to address the serious problem of violent high school gangs gathering at the McDonald's, its owner gave an apathetic, pass the buck explanation, which alarmingly misunderstands its duties under Supreme Court law:

> Q. What have you guys done to try to address that problem?
> A. Other than, than having dialogue with the principal and the principal sends

> down his police officer. Because they have police officers and security guards. But it's not a McDonald's issue, it's a high school issue.

(*Exhibit L, Deposition of Celestina Qunitana at 102*) (emphasis added)

D. The Defendants Constitute a Single Entity

1. Celestina Quintana testified at her deposition that her current occupation is a McDonald's franchising owner/operator. (See Exhibit L, p. 9:9-11).

2. Celestina Quintana testified that she first became involved with the McDonald's business in 1990. (See Exhibit L, p. 9:16-18).

3. Celestina Quintana testified that Jesnel Corporation is a corporation that she runs under McDonald's. (See Exhibit L, p.10:19-25).

4. Celestina Quintana testified that Jesnel Corporation is in the business of operating the McDonald's restaurant where the subject incident occurred as well as other McDonald's restaurants. (See Exhibit L, p.14:1-6).

5. Celestina Quintana testified that the Dorno Corporation is a parent corporation of Jesnel Corporation. (See Exhibit L, pp. 26:22-25; 27:1-3).

6. Celestina Quintana testified that the officers of Jesnel Corporation are her and her husband, and that there has never been any other officers of Jesnel Corporation. (See Exhibit L, p.13:1-6).

7. Celestina Quintana testified that the officers of Dorno Corporation are her and her husband, and that there has never been any other officers of Dorno Corporation. (See Exhibit L, p.27:9-14).

8. Celestina Quintana testified that she is not sure of her exact title with Jesnel Corporation but has different titles with respect to Jesnel Corporation. (See Exhibit L, pp. 31:22-25; 32:1-2).

9. Celestina Quintana testified that she is not sure of her exact title with Dorno Corporation but

has different titles with respect to Dorno Corporation. (See Exhibit L, pp. 31:11-15).

10. Celestina Quintana testified that the entities involved in determining the store hours for the various McDonald's restaurants that she is involved in running are the McDonald's Corporation, and herself as the particular restaurant manager. (See Exhibit L, p. 24:8-21).

11. Celestina Quintana testified that the McDonald's Corporation modifies or changes the guidelines as occurrence happen in the business. (See Exhibit L, pp. 44:12-15).

12. Ms Quintana testified that Jesnel Corporation has a franchise agreement with McDonald's national in which Dorno Corporation is the managing company that governs the relationship between the national and local entities. (See Exhibit L, p. 93:5-18).

13. The deposition of Celestina Quintana reveals that defendants, McDonald's Corporation, Jesnel Corporation and Dorno Corporation constitute and function as a single corporate enterprise. (See Exhibit L, p. 26:22-25; 27:1-3; p.27:9-14, p. 24:8-21, p. 93:5-18).

14. The security portion of the operations and training manual of defendant McDonald's Corporation shows that defendant McDonald's Corporation has control over the operations and the day to day activities of the McDonald's restaurant. (See Exhibit K, 17-1, 17-3, 17-4, 17-10, 17-11, 17-22).

15. Defendant McDonald's Corporation controls virtually every aspect of the operation of McDonald's as proliferated through its "McDonald's Operations and Training Manual" , as indicated in the Security section of that documents. (See Exhibit K, 17-1, 17-3, 17-4, 17-10, 17-11, 17-22).

16. Among other things, McDonald's Corporation controls the standards for security in the McDonald's Restaurants. (See Exhibit K, 17-1)

17. McDonald's Corporation sets forth the requirements for patrons who loiter in the

McDonald's restaurants. (See Exhibit K, 17-3)

18. McDonald's Corporation sets forth the requirements concerning confidential information of the McDonald's restaurants. (See Exhibit K, 17-4)

19. McDonald's Corporation sets forth the conditions for termination of any McDonald's employees. (See Exhibit K, 17-10, 17-22)

20. McDonald's Corporation sets forth the conditions for controlling vandalism and loitering in the McDonald's restaurants. (See Exhibit K, 17-11)

21. McDonald's Corporation sets forth the conditions for security equipment and hardware in the McDonald's restaurants. (See Exhibit K, 17-11)

22. Defendant McDonald's Corporation owns the restaurant itself, leasing the property to Jesnel Corporation. (See Exhibit L, pp. 114:25; 115:1-6)

23. All three defendants, McDonald's Corporation, Dorno Corporation and Jesnel Corporation, are intimately involved in the operations of this restaurant; McDonalds Corporation sets forth every last detail of how the restaurant is to be run and sees to it that Dorno Corporation and Jesnel Corporation carry out those requirements or suffer the consequences. (See Exhibit K, 17-1, 17-3, 17-4, 17-10, 17-11, 17-22); (See Exhibit L, p. 26:22-25; 27:1-3; p.27:9-14, p. 24:8-21, p. 93:5-18).

24. Discovery has revealed that the defendants McDonald's Corporation, Dorno Corporation and Jesnel Corporation constitute and function as a single corporate enterprise. (See Exhibit K, 17-1, 17-3, 17-4, 17-10, 17-11, 17-22); (See Exhibit L, p. 26:22-25; 27:1-3; p.27:9-14, p. 24:8-21, p. 93:5-18).

25. On February 17, 2006, this court entered an order requiring defendants to produce certain discovery, including the operations and training manual of McDonald's Corporation. (See Exhibit

O, 2/1706 Court Order). Defendants have failed to comply with this court order and produce this operations and training manual of McDonald's Corporation. This operation and training manual of McDonald's Corporation will show what McDonald's does and does not know with respect to the activities at the McDonald's restaurants.

26. On November 12, 2004, Robert Johnson signed an affidavit of behalf of McDonald's Corporation concerning their alleged non-involvement in the McDonald's restaurant at issue. (See Exhibit E to Defendants' Summary Judgment Motion).

27. Robert Johnson's name was not provided in discovery as someone with relevant knowledge in this matter, and plaintiffs first knowledge of this person was from the affidavit attached to defendants' motion hereto. (See Exhibit P, Defendant's Answers to Form C Interrogatories). Plaintiff needs to take Robert Johnson's deposition to establish the relationship between defendants McDonald's Corporation, Dorno Corporation and Jesnel Corporation.

28. Attached to the summary judgment motion an amendment to franchise agreement showing the relationship between all the defendants. (See Exhibit D to Defendants' Summary Judgment Motion). However, defendants have not provided the entire franchise agreement showing the relationship between all the defendants.

29. The amendment to franchise agreement states that McDonald's has made arrangements for McDonald's food products to be at the subject McDonald's restaurant. (See Exhibit D to Defendants' Summary Judgment Motion).

30. The amendment to franchise agreement indicates that McDonald's is involved in the day to day operations of the subject McDonald's restaurant. (See Exhibit D to Defendants' Summary Judgment Motion).

31. Defendants have not provided the McDonald's Corporation representative's name to the franchise agreement. (See Exhibit D to Defendants' Summary Judgment Motion). Plaintiff needs the entire franchise agreement and witnesses name to take his deposition to establish the relationship between McDonald's Corporation, Dorno Corporation and Jesnel Corporation.

LEGAL ARGUMENT

POINT I

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO McDONALD'S CORPORATION AND DORNO CORPORATION SHOULD BE DENIED SINCE THE PLAINTIFFS HAVE MADE A PRIMA FACIE CASE OF NEGLIGENCE AGAINST THEM.

It is well settled in New Jersey that business owners and landlords have a duty to protect patrons and tenants from foreseeable criminal acts of third parties. *Clohesy v. Food Circus Supermarkets, Inc.*, 149 N.J. 496, 500, 516-17 (1997) (supermarket liable in negligent security for customer's murder after her abduction from parking lot); *Butler v. Acme Mkts., Inc.*, 89 N.J. 270, 274 (1982) (supermarket liable to customer who was mugged in parking lot); *Trentacost v. Brussel*, 82 N.J. 214, 231-32 (1980) (imposing liability on landlord for failure to "take reasonable security measures for tenant protection on the premises"); *Braitman v. Overlook Terrace Corp.*, 68 N.J. 368, 371-72, 382-83 (1975) (holding landlord could be liable for burglary of tenant's apartment because landlord had breached duty of care by failing to provide functioning deadbolt lock).

When a landlord knows or should know of a pattern of criminal activity on his premises that poses a foreseeable risk of harm to his tenants and their guests and does not take reasonable steps to meet the danger, he cannot escape liability merely because the criminal act was committed by a third party who was not within his control. *See Trentacost*, 82 N.J. at 222; *see also Taneian v. Meghrigian*, 15 N.J. 267 (1954) at 281 (describing landlord's duty of reasonable care to protect tenants and their social guests against dangers in common areas); *Scully v. Fitzgerald*, 179 N.J. 114 (2004) (holding that landlord owes duty "to take reasonable steps to curtail the dangerous activities" on premises "of which he should be aware and that pose a hazard to the life and property of other

tenants"); *Williams v. Gorman*, 214 N.J.Super. 517, 523 (App.Div.1986) (asserting that landlord has duty to protect tenant from other tenant's foreseeable criminal acts), *cert. denied*, 107 N.J. 111 (1987).

As the Court held in *Clohesy,* foreseeability does not require the existence of prior similar criminal incidents, but depends instead on an evaluation of the totality of the circumstances. *Clohesy supra,* 149 *N.J.* at 506-08. In this regard, the Supreme Court in both *Butler v. Acme* and *Clohesy v. Food Circus* adopted the *Restatement (Second) of Torts* Section 344, Comment (f) as a standard for determining in cases of injury by third persons "which criminal incidents may give rise to liability." *Butler,* 89 *N.J.* at 280; *Clohesy,* 149 *N.J.* at 506-07. The *Restatement* articulates the duty owed by a proprietor of premises to those who enter the premises as follows:

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Restatement (Second) of Torts, § 344 at 223-234 (1965). The official comment states:

> f. Duty to police premises. Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of the third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

Restatement (Second) of Torts, § 344 at 225-226, Comment (f) (1965). *See also, e.g., J.S. v.*

*R.T.H.*155 N.J. 330 (1998) at 338; *James v. Arms Technology, Inc.,* 359 *N.J.Super.* 291, 324 (App.Div.2003); *Morris v. Krauszer's Food Stores,* 300 *N.J.Super.* 529, 535 (App.Div.1997); *Gaita v. Laurel Grove Cemetery Co.,* 323 *N.J.Super.* 89, 94-96 (Law Div.1998). The Supreme Court has embraced a liberal negligent security standard as a matter of public interest. *Butler,* 89 *N.J.* at 280 (imposing duty because store is in the best position to provide either warnings or adequate protection for its patrons and because the public interest lies in providing a reasonably safe place for a patron to shop).

For example, in *Butler*, 89 N.J. 270 (1982), the plaintiff customer was assaulted in the parking lot after having just finished shopping at the defendant supermarket. The plaintiff contended Acme was negligent in failing to provide a safe place in which to shop and park. *Id*. at 274. The area had a history of criminal activity, including 7 muggings over the course of a year. Additionally, although Acme had hired off-duty police officers to supply security for the Acme market on certain evenings, only one security officer was on duty inside the store at the time of the attack. Moreover, no signs or warnings were posted advising the patrons of the possibility of criminal attack. *Id*. at 274-75.

The Supreme Court held that Acme owed a duty of reasonable care to safeguard its business invitees from criminal acts of third persons. *Id*. at 280. It was reasonable for the jury to determine that absent warnings, hiring one guard who primarily remained inside the store was an insufficient response in light of the known, repeated history of attacks on the premises. *Id*. The Court further held that Acme as the business invitor is in the best position to provide either warnings or adequate protection for its patrons when the risk of injury is prevalent under certain conditions, and the public interest lies in providing a reasonably safe place for a patron to shop. *Id*. at 284.

In addition to its pre-existing common law duty as articulated in *Butler*, *Clohesy* and their progeny, McDonald's corporate imposed upon, and the local restaurant assumed, an additional duty to take reasonable security measures to protect its Big Mac-eating patrons. The so-called McDonald's "Security Bible" recognizes the importance of its duty to provide security. (*Exhibit K, McDonald's Security Bible at* 17-1) *("Customers ... should feel secure in the your restaurant."*) The manual requires each restaurant to contact the regional security manager in assessing its security needs. *(Exhibit K, McDonald's Security Bible at 17-24, 17-32*). *See e.g., Zepf v. Hilton Hotel & Casino*, 346 N.J.Super. 6, 11-12 (App. Div. 2001) (noting the relevance of defendant's security manual in identifying its duty to provide security)

In this case however, McDonald's did nothing to meet its duty under *Butler*, *Clohesy* and its own security manual. No one who worked at the McDonalds in question had any particularized security training or qualifications. In fact, the same is true with respect to the eight other McDonald's restaurants run under the umbrella of Dorno Corporation. The president of the McDonald's corporations that ran this store, Celestina Quintana, readily admitted:

> Q. Who is in charge of security for the restaurants run under the umbrella of Dorno Corporation?
> A. Who is? The police department in the neighborhood.

(*Exhibit L, Deposition of Celestina Qunitana at 42*) Ms. Quintana was clear her companies did nothing to protect, or at the very least warn, its customers of the serious problem of crime in the area and the Dickenson High School situation:

> Q. Has Dorno Corporation or Jesnel Corporation ever done a security analysis of its restaurants?
> A. There is no need. We have not had any-- other than what we train our people to, with the, what they are trained, how we train them. But there is no need to do a security analysis.

Q. Because you say there is no need your answer to the question is no?
A. No.

(*Exhibit L, Deposition of Celestina Qunitana at 48-49*) When asked why the McDonald's has done nothing to address the serious problem of violent high school gangs gathering at the McDonald's, its owner gave an apathetic, pass the buck explanation, which seriously misunderstand its duties under Supreme Court law:

Q. What have you guys done to try to address that problem?
A. Other than, than having dialogue with the principal and the principal sends down his police officer. Because they have police officers and security guards. But it's not a McDonald's issue, it's a high school issue.

(*Exhibit L, Deposition of Celestina Qunitana at 102*) (emphasis added)

In *Butler*, there were only 7 muggings in the area of the Acme Store over the course of the year. Here however the Jersey City Police Department was summoned to this McDonald's location over 360 times over the course of approximately a three year period before the attack on plaintiff. (*Exhibit E, Report of Daniel O'Connor at exhibit #3, police calls log*) (*Exhibit I, Deposition of McDonald's employee Martinez at 9-11*) (*Exhibit J, Report of David Johnston, CCP at 10*) Here the disruptive presence of the notoriously violent Dickenson High School youths was a daily occurrence. The McDonald's is located in one of the most dangerous areas in the entire country. (*Exhibit N, Supplemental Report of David Johnston at 4-6, Cap Index Report at A-1, A-2*) In *Butler* the defendant had a number of security guard on staff to provide security. In fact, they even had one on duty at the time of the incident; the Supreme Court said that was not enough. *Butler*, 89 N.J. at 280-81. In this case McDonald's the criminal activity was more prevalent and the store is located in a more dangerous area, yet McDonald's had no security whatsoever.

Furthermore, the attack on the victim in *Butler* did not occur from a customer of the Acme

store, but rather a person outside the premises while the victim was in the parking lot. In the instant matter the attack came from one of the Dickinson High school youths which defendants themselves admit: "[L]eave from school [and] fill up the house..." (*Exhibit H, Deposition of McDonald's employee Almenares at 29, 30, 33, 34*) (*Exhibit I, Deposition of McDonald's employee Martinez at 21, 41-43*) (*See also Exhibit E, Report of Daniel O'Connor at 5*- "These pupils are constantly involved in fights, marijuana smoking, drug deals, larcenies and vandalism during the lunch period which can run from 11:00AM to 2:00PM.").

Defendants also argue that the plaintiffs have failed to establish a prima facie case of negligence against McDonald's Corporation or Dorno Corporation since the proper defendant in this matter is the Jesnel Corporation, the owner, operator and franchisee of the subject McDonald's restaurant. However, despite the separate formal corporate status of each of these defendants, discovery has clearly established that these defendants constitute and function as a single corporate enterprise, thereby rendering all defendants in the enterprise as a whole negligent in this matter.

While parent and subsidiary corporations are ordinarily separate artificial entities which have no liability for each other's conduct, there are well-recognized exceptions to that general rule, all based on "the engagement of the subsidiary in no independent business of its own but exclusively the performance of a service for the parent . . ." *OTR Associates v. IBC Services, Inc.*, 353 N.J. Super. 48, 52 (App. Div.), *certif. denied*, 175 N.J. 78 (2002); *see also Stae, Dep/t of Envtl. Prot. V. Ventron Corp*. 94 N.J, 473, 501 (1983)("the parent so dominated the subsidiary that it had no separate existence but was merely a conduit for the parent.") Where a separate formal corporate identity is maintained to perpetuate fraud or injustice or otherwise to circumvent the law, the customary rubric for charging the parent with the subsidiary conduct is "piercing the corporate veil."

Id. Where there is no proof of fraud, though, other labels are relied on by the courts in order to hold the parent liable for the subsidiary's conduct. This occurs in circumstances in which fairness, justice, and the reasonable expectations of third parties so compel, with courts commonly referring to the subsidiary as an agent, mere instrumentality, or alter ego of the parent. *OTR, supra.*

However, as the United States Supreme court explained in *National Labor Relations Board v. Deena Artware, Inc.*, 361 U.S. 398, 403 (1960), a case in which the plaintiff attempted to impose back-pay liability on the parent for the statutory violations of the subsidiary, these various expressions of an agency relationship are "not a complete catalogue. The several companies may be represented as one. **Apart from that is the question whether in fact the economic enterprise is one, the corporate forms being largely paper arrangements that do not reflect the business realities."** (Citations omitted; emphasis added).

The Court in *Deena Artware* enumerated some of the elements of the single enterprise doctrine, under which parent and subsidiary become, in effect, a single entity, all of which are present here:

> One company may in fact be operated as a division of another;...one may be only a shell, inadequately financed;...the affairs of the group may be so intermingled that no distinct corporate lines are maintained. ...These are some though by no means all,...of the relevant considerations, as the authorities recognize. Id. at 403-04. (Citations omitted).

Among the authorities relied on by the Supreme Court in *Deena Artware* was Adolf A. Berle, Jr., "The Theory of Enterprise Entity," 47 *Colum. L. Rev.* 343 (l947), (Pa642) a seminal article in which this leading corporations scholar discussed the rationale for the occasional and apparently ad hoc judicial disregard of the corporate fiction of the separateness of related corporations. Berle's thesis

was that the "divergence between corporate theory and the underlying economic facts" had always created problems for the courts "in which the theory of 'artificial personality' simply did not work, and was consequently extended, disregarded, sometimes buttressed by further fiction, at others manipulated to get a convenient result." *Id*. at 344. The Berle thesis posits that these various rules, including piercing the corporate veil, mere instrumentality, alter ego and agency, are not separate doctrines but rather "applications of a single dominant principle." *Ibid*. That single dominant principle is economic unity in which all components of the enterprise whether or not separately incorporated, are completely integrated into a single and singly-controlled enterprise. Such a classic enterprise unity exists where the controlling corporation "has so handled [its subsidiaries] that they have ceased to represent a separate enterprise, and have become, as a business matter, more or less indistinguishable parts of a larger enterprise." *Id*. at 348. In that setting, Berle notes, the courts have created a new entity, apart from its separate formal corporate components, in which all the assets and liabilities of all the component parts are aggregated. *Ibid*. As Berle makes clear, it is not the parent-subsidiary relationship between two corporations that renders them a single entity. Rather, he explains:

> The controlling corporation has a choice. It can, if it chooses, elect to permit, or perhaps require, its subsidiary to manage its own affairs, make its own decisions, and operate as a separate enterprise, the parent retaining only an investor's interest. Or it can integrate the operations of the subsidiary with its own, in whole or in part, thereby bringing the two operations together into a single enterprise entity. There is no compulsion on it to adopt or refrain from either course; but the legal consequences vary with the choice.
>
> *Id*. at 357.

The imposition of tort liability under the single enterprise doctrine also has been recognized

by 2 Blumberg on Corporate Groups, Second Edition (2005). The development of the law in this regard, discussed under the heading "Intragroup Tort Liability: Enterprise Liability for Economically Integrated Groups," is summarized as follows:

> When a corporate group consists of composite entities that are highly integrated in their operations, courts often consider intragroup tort liability for all the entities that make up the enterprise. It is of particular interest, as discussed throughout this chapter, that intragroup liability in these...cases is often based on the idea of liability extending throughout the enterprise rather than liability based on traditional veil-piercing.
>
> Enterprise tort liability...can be seen as being broadly consistent with the general tort policies. Tort claimants are often involuntary creditors, in contrast to contract claimants. Because tort claimants are typically involuntary claimants, there are very strong social policies supporting full compensation for them. In addition tort liability spreads the cost of tortious harm across all the economic actors that cause it. Both of these tort principles give generalized support to the idea of casting tort liability over the whole economic enterprise.
>
> *Id*. at 61-63.

The single enterprise doctrine is not just an academic theory. It has been accepted not only by the United States Supreme Court in *Deena Artware*, but by the majority of federal and state courts which have considered the issue. *See e.g., United States v. Johns-Manville Corporation*, 231 F. Supp. 690, 698 (E.D.Pa. 1963) (evidence supported finding that "[t]he corporate existence of the subsidiaries apart from the parent was mere form and the agents of the subsidiaries acted as agents for the parent, all of the corporations being one unitary enterprise"); *My Bread Baking Co. v. Cumberland Farms, Inc.*, 233 N.E. 2d 748, 752 (Mass. 1968) (separate corporate status may be disregarded and the corporate group treated as a single entity when it fails to "make clear which corporation is taking action in a particular situation" and the "businesses...records, and finances" are

intermingled.); *Hartford Steam Service Co., v. Sullivan*, 220 A.2d 772, 774 (Conn. Super. 1966) (single-enterprise liability is not "the negative concept variously described as 'piercing the corporate veil' or 'disregarding the corporate fiction'" but "is, rather, a positive principle, the effect of which is to remove judicial blinders so as to enable the court to see things as they really are."); *Las Palmas Assocs. v. Las Palmas Ctr. Assocs.*, 1 Cal. Rptr. 2d 301, 318 (Ct. App. 1991), review denied, (1992) (applying single enterprise theory when the court "has determined that though there are two or more personalities, there is but one enterprise; and that this enterprise has been so handled that it should respond, as a whole, for the debts of certain component elements of it.") *See also* Reporter's Notes, Restatement of Agency 2d, §14M, and cases collected therein; Annot., "Liability of Corporation for Contracts of Subsidiary," 38 A.L.R.3d 1102 (1971) and supplement service.

In applying the single enterprise doctrine in tort cases, the courts have held the entire corporate group, as a single entity, liable for the torts of a single component. *See e.g., Del Santo v. Bristol County Stadium, Inc.*, 273 F.2d 605 (1st Cir. 1960); *Sisco-Hamilton Co. v. Lennon*, 240 F.2d 68 (7th Cir. 1957); *St. Paul Fire & Marine Ins. Co. v. Arkla Chemical Corp.*, 435 F.2d 857 (8th Cir. 1971); *Handlos v. Litton Industries, Inc.*, 326 F. Supp. 965 (E.D. Wis. 1971), affirmed, 492 F.2d 1246 (7th Cir. 1974); *Kissun v. Humana, Inc.*, 479 S.E.2d 751 (Ga. 1997); *Seelbach, Inc. v. Cadick*, 405 S.W. 2d 745 (Ky. 1966); *Glenn v. Wagner*, 313 S.E.2d 832, *rev'd on other grounds*, 329 S.E.2d 326 (N.C. Ct. App. 1985); *North American Van Lines, Inc. v. Emmons*, 50 S.W.3d 103 (Tex. App. 2001), *review denied. And see Berg v. Zummo*, 851 So.2d 1223 (La. Ct. App.), writ denied, 860 So.2d 546 (La. 2003) (single enterprise doctrine applied in the context of a dram shop action). See also discussion and cases collected in *Blumberg, supra,* at §61.04; Annot. "Liability of Corporation for Torts of Subsidiary." 7 A.L.R. 3d, §4(b) (1966) and supplemental service.

Although not precisely described as such, the single enterprise doctrine has been recognized by the New Jersey courts. For example, in *Stochastic Decisions, Inc. v. DiDomenico*, 236 N.J. Super. 388 (App. Div. 1989), while the court used the veil-piercing rubric, it held that courts should impose "liability upon one or more of a group of closely identified corporations" and "need not consider with nicety which of them ought to be held liable for the acts of one corporation for which the plaintiff deserves payment", when "there is a confused intermingling of activity of two or more corporations engaged in a common enterprise with substantial disregard of the separate nature of the corporate entities, or serious ambiguity about the manner and capacity in which the various corporations and their respective representatives are acting." 236 N.J. Super. at 394. In *Stochastic*, the appellate court affirmed the trial court's holdings that there was "a pervasive commingling of corporate assets and identities," a finding that the corporations had held themselves out to the public as "one and the same," and reliance thereon by those doing business with the group. *Id*. at 393. Although the court did not use the label "single enterprise," this was nevertheless a classic application of the doctrine. In reaching its decision, the court relied upon the Massachusetts Supreme Judicial Court decision in *My Bread Baking Co., supra*, where the issue was whether the parent corporation was liable for the conversion of certain bakery racks in local stores it operated through separate subsidiary corporations. The court held that separate corporate entities may be disregarded where there is common control of a group of separate corporations engaged in a single enterprise and they fail:

> a) to make clear which corporation is taking action in a particular situation and the nature and extent of that action, or b) to observe with care the formal barriers between the corporations with the proper segregation of their businesses, records and finances.

233 N.E.2d at 752.

A similar theory was applied by the court in *OTR Associates v. IBC Services, Inc.*, 353 N.J. Super. 48 (App. Div.), *certif. denied*, 175 N.J. 78 (2002). The *OTR* court found that the defendant's subsidiary had no independent business of its own, but rather had been formed exclusively to perform services for the parent. This resulted in the subsidiary being undercapitalized, which rendered it judgment proof. The parent, Blimpie, conceded that the subsidiary, IBC, was formed for the sole purpose of holding the lease on a particular franchised premises. IBC's only asset was the lease; it had no business premises, other income, employees or office staff. The court stated:

> The *leit motif* of the testimony of plaintiff's partners who were involved in the dealings with IBC was that they believed that they were dealing with Blimpie, the national and financially responsible franchising company, and never discovered the fact of separate corporate entities until after the eviction.
>
> *Id.* at 53-54.

The court found that IBC's observance of corporate formalities (i.e., it had officers and directors, filed annual reports, and had its own bank accounts) would not preclude treating the various entities as one:

> The separate corporate shell created by Blimpie to avoid liability may have been mechanistically impeccable, but in every functional and operational sense, the subsidiary had no separate identity.
>
> *Id*. at 56.

New Jersey courts thus will look past corporate formalities in order to treat a multi-corporation enterprise group as a single entity.

The proofs here established a textbook case for doing so. The factors generally recognized by the case law as compelling the single-entity determination include: ownership of one corporation

by another, common goals and purposes of all corporations, common officers, unified administrative and financial control, integration of the business of the various corporations, inadequate capitalization of subsidiaries, noncompliance with corporate formalities, unclear allocation of profits and losses, fragmentation of a single enterprise into multiple separate corporations, common employees, the rendering of services by one corporation to another without an independent business of its own, centralized accounting, one corporation collecting all revenue of all corporations in the enterprise, parties transacting business with the group reasonably believing there is only one corporate enterprise, self-representation by the group of corporations as a single enterprise, and one corporation involving itself in the day to day affairs of the other corporations in the group. Any number of these factors will militate a finding of single entity. *See e.g., National Plan Administrators, Inc. v. National Health Ins. Co.*, 150 S.W. 3d, 718, 745 (Tex. App. 2004) (petition for review filed); *Berg v. Zummo*, 851 So. 2d 1223, 1124-1125 (La. Ct. App. 4th Cir.), *writ denied*, 860 So. 2d 546 (La. 2003); *Eagle Air, Inc. v. Corroon and Black/Dawson Co. of Alaska, Inc.*, 648 P. 2d 1000 (Alaska l982); *My Bread Baking Co.*, 233 N.E. 2d at 751-752.

Here, the deposition testimony of Celeste Quintana, the McDonald's franchising owner/operator, shows that all three defendants, McDonald's Corporation, Jesnel Corporation and Dorno Corporation constitute and function as a single corporate enterprise. This is even more so as it relates to Jesnel Corporation and its umbrella parent, Dorno Corporation. Celestina Quintana testified that Jesnel Corporation is a corporation that she runs under McDonald's. (See Exhibit L, p.10:19-25). Ms Quintana also testified the Dorno Corporation is a parent corporation of Jesnel Corporation. (See Exhibit L, pp. 26:22-25; 27:1-3); and that her and her husband are the officers of both the Dorno Corporation and the Jesnel Corporation. (See Exhibit L, p.13:1-6; 27:9-14). In fact,

the Dorno Corporation is an umbrella company for about 8 McDonald's restaurants in North Jersey, including the one where this assault happened. Ms Quintana testified that both Jesnel and Dorno Corporation have a franchise agreement with McDonald's national that governs the relationship between the national and local entities. (See Exhibit L, p. 93:5-18). Celestina Quintana further testified that the entities involved in determining the store hours for the various McDonald's restaurants that she is involved in running are the McDonald's Corporation, and herself as the particular restaurant manager. (See Exhibit L, p. 24:8-21). Moreover, Celestina Quintana testified that the McDonald's Corporation modifies or changes the guidelines as occurrence happen in the business. (See Exhibit L, pp. 44:12-15). Based on the deposition of Celestina Quintana, it is clear that defendants, McDonald's Corporation, Jesnel Corporation and Dorno Corporation constitute and function as a single corporate enterprise, particularly so as it relates to Jesnel Corporation and its parent umbrella, Dorno Corporation.

Additionally, the security portion of the operations and training manual of defendant McDonald's Corporation show that defendant McDonald's Corporation dictates to virtually the last detail how the McDonald's restaurant is to be operated through its Operations and Training Manual. (See Exhibit K, cover page, pp. 17-1, 17-3, 17-4, 17-10, 17-11, 17-22). The cover page of the security portion of the McDonald's Corporation operations and training manual states:

> Operations and Training
> This Manual and its contents are the sole property of McDonald's Corporation. Any unauthorized use is strictly forbidden.

(See Exhibit K, cover page). In fact, defendant McDonald's Corporation refused to provide its entire operation and training manual as required under Court Order which would further demonstrate

their involvement in the day to day activities of McDonald's. *See Point IV, infra.* Defendant McDonald's Corporation also owns the restaurant, leasing the property to Jesnel Corporation. (See Exhibit L. pp. 114:25;115:1-6).

Based on the above, the factors generally recognized by the case law as compelling the single-entity determination are present in this matter. All three defendants, McDonald's Corporation, Dorno Corporation and Jesnel Corporation, are involved in the fast-food services at McDonald's restaurant. Dorno Corporation and Jesnel Corporation have the same officers, namely Celestina Quintana and her husband. There is clearly integration of the business of all three defendants. The McDonald's restaurant is fragmented into multiple separate corporations are under the umbrella of the Dorno Corporation. There is self-representation by the group of corporations as a single enterprise as the defendants hold themselves out to the public as one entity. All are intimately involved in the operations of this restaurant; McDonalds Corporation sets forth every last detail of how the restaurant is to be operated and sees to it that Dorno Corporation and Jesnel Corporation carry out those requirements or suffer the consequences. (See Exhibit K, pp. 17-1, 17-3, 17-4, 17-10, 17-11, 17-22).

Thus, all these factors militate a finding of a single entity in which the defendants McDonald's Corporation, Dorno Corporation and Jesnel Corporation constitute and function as a single corporate enterprise, particularly so as it relates to Dorno Corporation. Accordingly, defendant McDonald's Corporation and Dorno Corporation's motion for summary judgment should be denied.

POINT II

PLAINTIFFS' CLAIM FOR PUNITIVE DAMAGES SHOULD NOT BE DISMISSED SINCE THE AGGRAVATING FACTORS BY DEFENDANTS IN THIS ACTION ARE SUFFICIENT TO SUPPORT A PUNITIVE DAMAGES CLAIM UNDER N.J.S.A. 2A:15-5.12.

Punitive damages may be awarded to the plaintiff if plaintiff proves, by clear and convincing evidence, that defendant's conduct was reckless. Punitive damages are warranted if the defendants' conduct constitutes reckless indifference to the consequences of harm to others. *N.J.S.A. 2A:15-5.12; Smith v. Whitaker*, 160 N.J. 221, 241 (1999); *Nappe v. Anschelewitz, Barr, Ansell & Bonello*, 97 N.J. 37, 49 (1984); *see also Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 610 (1997)(noting that to justify punitive damages award defendant's conduct must be reckless); *DiGiovanni v. Pessel*, 55 N.J. 188, 190 (1970)(noting punitive damages may be justified by defendant's "conscious and deliberate disregard of the interests of others")(*quoting* William Prosser, *Handbook on the Law of Torts § 2* (2d ed. 1955)). As such, plaintiff must prove by clear and convincing evidence a "deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to the consequences." *Berg v. Reaction Motors Div.*, 37 N.J. 396, 414 (1962), *codified at N.J.S.A.* 2A:15-5.10.

"The defendant, however, does not have to recognize that his conduct is 'extremely dangerous,' but a reasonable person must know or should know that the actions are sufficiently dangerous." *Parks v. Pep Boys*, 282 N.J. Super. 1, 17 (App. Div. 1995)(citing *McLaughlin v. Rova Farms, Inc.*, 56 N.J. 288, 306 (1970)). The standard can be established if the defendant knew or had reason to know of circumstances which would bring home to the ordinary reasonable person the highly dangerous character of his or her conduct. *Id*.

Aggravating circumstances must be evaluated on a case-by-case basis. *McMahon, supra,* at 580. Such circumstances must demonstrate a reckless disregard of persons who foreseeably might be harmed by defendant's conduct. *N.J.S.A.* 2A:15-5.12a. The Appellate Division in *Dong* examined the non-exclusive list of circumstances prescribed by the Punitive Damages Act, *N.J.S.A.* 2A:15-5.12a, to determine whether the plaintiff was entitled to punitive damages. These circumstances include the *likelihood*, at the relevant time, that serious harm would result from the defendant's conduct, *N.J.S.A.* 2A:15-5.12b(1), the defendant's *awareness* of reckless disregard of the likelihood that serious harm would arise from his conduct, *N.J.S.A.* 2A:15-5.12b(2), and any *concealment* by the defendant of his conduct, *N.J.S.A.* 2A:15-5.12b(4)(*emphasis added*).

Here, defendants' conduct does warrant a claim for punitive damages since defendants' failure to provide adequate security demonstrates a reckless disregard for its obligation to take reasonable security measures and the severe injury to plaintiff which resulted. First, the assault upon the plaintiff Louis Miranda was by one of the notoriously violent Dickinson High School youths that would gather at the McDonald's each day. Dickinson High School "has an infamous reputation in Hudson County as being the worst and most violence-prone school in the city." (*Exhibit G, Encyclopedia Article on Dickenson High School)*. (*Exhibit E, Report of Dan O'Connor*). As indicated in the O'Connor Report:

> [A]bout eight hundred students are allowed to leave Dickinson High School each day at lunch time and they then converge on McDonald's and other fast food restaurants in the vicinity of the high school. These pupils are constantly involved in fights, marijuana smoking, drug deals, larcenies and vandalism during the lunch period which can run from 11:00AM to 2:00PM.

(Exhibit E, Report of Dan O'Connor at 5) Mr. O'Connor also elaborated at his deposition based on his previous experience as a New Jersey State Trooper and his investigation surrounding this incident

that he knew it was a high crime area, and that Dickinson High School has been besieged by gangs, crime and drugs. (*Exhibit F, Deposition of Daniel O'Connor at* (*Exhibit F, Deposition of Daniel O'Connor at 20, 25-28, 35-42, 50-52*).

Furthermore, the former principal of Dickinson High School, Mr. Robert Donato explains that "students regularly patronized nearby fast food restaurants such as McDonald's [approximately one city block from Dickenson High School] in large numbers, because the High School's lunchroom seating capacity in 2003 was only 700 students" and "six off-duty Jersey City Police Officers had been hired by the Jersey City Board of Education to patrol the streets adjacent to the High School on school days for the purpose of suppressing and preventing gang violence and assaults." *(Exhibit J, Report of David Johnston, CCP at 9*). Even the McDonald's manager admitted that there are problems with the Dickinson High School students, and that she had witnessed fights between them in the past out in the street and sidewalk in front of the McDonald's store. They have had to summon the school police in the past. (*Exhibit L, Deposition of Celestina Quintana at 101-102*).

Furthermore, the history of crime in the area of the McDonald's store highlight defendant's disregard for its obligations to provide security, at least to police the kids during the lunch period. As shown in the Attorney General's Uniform Crime Report, the area where the McDonald's store is located in Jersey City is a dangerous place. The City of Jersey City had the highest 2003 rate of Aggravated Assaults of any municipality on New Jersey, 1,440 reported incidents. There were more Aggravated Assaults report in Jersey City than Camden and Newark, though Camden and Newark reported more overall crimes in 2003. Moreover, in 2003, Jersey City reported the occurrence of more violent crimes than any other municipality in New Jersey, with 2,930 incidents reported.

(*Exhibit N, Supplemental Report of David Johnston at 3, NJ Uniform Crime Report*).

According to the CAP report, a patron or McDonald's employee at 564 Newark Avenue was almost three times more likely to be victimized by an Aggravated Assault than any other location in Hudson County; more than five times more likely to be victimized by an Aggravated Assault than any other location in the State of New Jersey; and more than three times more like to be victimized by an Aggravated Assault than any other location in the United States. (*Exhibit N, Supplemental Report of David Johnston at 4-6, Cap Index Report*)

Moreover, the violence and criminal activity was so bad at this particular McDonald's, that over an approximate three year period before the incident in question, the Jersey City Police Department was summoned to this McDonald's location about 360 times. (*Exhibit E, Report of Daniel O'Connor at exhibit #3, police calls log*) (*Exhibit I, Deposition of McDonald's employee Martinez at 9-11*) (*Exhibit J, Report of David Johnston, CCP at 10*).

In addition to the particular facts and circumstances of this incident further show McDonald's apathy. At the time in question the restaurant was filled with the Dickenson High School students (*Exhibit A, Deposition of Louis Miranda at 38, 198-199*) (*Exhibit C, Deposition of Filomena Miranda at 30-31, 33-34, 43-49*) (*Exhibit D, Deposition of Anthony Walters at 25-29, 44*) These youths were dressed in intimidating clothing with numerous facial piercings, black makeup, baggy clothes and a general "gothic" look. (*Exhibit D, Deposition of Anthony Walters at 27-28*) These youths were being so disruptive and threatening that many customers got up and walked out of the restaurant. They were shouting profanities and throwing food. (*Exhibit C, Deposition of Filomena Miranda at 39, 62-63*) (*Exhibit D, Deposition of Anthony Walters at 36, 45*)

At one point a witness approached the store manager and asked if she would do something

about these youths and their behavior inside the McDonald's. She responded by stating that "they're good kids;" she did nothing to supervise or stop their behavior or call the police. (*Exhibit C, Deposition of Filomena Miranda at 62-63*) (*Exhibit D, Deposition of Anthony Walters at 41-42*) At another point an unskilled cleaning lady who worked at the McDonald's said something to the youths, presumably attempting to get them to stop their behavior; they just laughed at her and continued. (*Exhibit C, Deposition of Filomena Miranda at 98-99*) Nothing was done to address these kids; the manager did nothing herself and she did not call the police.

Moreover, defendants' concealed this conduct by spoliating the videotape which shows the incident taking place. The whole incident in question was captured on the defendant's in house surveillance videotape system. Obviously, a videotape of the happenings at this McDonalds on the day of the incident in question would be important evidence. Despite heavy resistance, this Court ordered the defendants to turn this surveillance videotape over within 15 days of February 17, 2006. *(See Exhibit O; 2/17/06 Order).* As we suspected however, the defendants spoliated this evidence and have not produced it, in violation of this Court order.

At the motion hearing on February 17th, Judge Curran was clear that either they produce the evidence or the spoliation relief plaintiffs were requesting would be granted at trial; namely, that they be precluded, among other things, from disputing plaintiff's version of events. *Rule* 4:23-2 (specifically providing that one of the remedies available to the Court is to preclude the disobedient party from asserting any claims or defenses in the matter); *Sea Coast Builders v. Rutgers*, 358 N.J. Super. 524 (App. Div. 2003); *Weeks v. ARA Services,* 869 F.Supp. 194 (S.D.N.Y. 1994); *Rosenblatt v. Zimmerman*, 166 N.J. 391 (holding that a party aggrieved by another's intentional destruction of evidence relative to litigation between the two has a claim for fraudulent concealment against the

other); *Marinelli v. Mitts and Merrill*, 303 N.J. Super. 61 (App. Div. 1997)(recognizing tort of spoliation of evidence); *Manorcare Health Services, Inc. v. Osmose Wood Preserving, Inc.*, 336 N.J.Super. 218, 232, 236 (App. Div. 2001) (The courts endeavor to level the playing field short of "dismissal with prejudice" by ordering sanctions such as excluding evidence at trial or by giving an adverse jury charge); *Mosaid Techs, Inc. v. Samsung Elecs. Co.,* 348 F.Supp.2d 332 (D.N.J. 2004) (holding spoliation inference, allowing jury to conclude that destroyed evidence would have been harmful to offending party, would be given to jury.) Indeed, defendant's behavior in destroying this evidence creates the inference that defendant knows the tape is damaging to their case. *Rosenblit*, 166 N.J. at 409. Defendant clearly recognized the importance of this evidence and had a duty to preserve it. If it has since been lost or destroyed, defendant would be liable and justice requires an appropriate remedy. *Id.*; *see also Mosaid Techs, Inc. v. Samsung Elecs. Co.,* 348 F.Supp.2d 332 (D.N.J. 2004) (holding spoliation inference, allowing jury to conclude that destroyed evidence would have been harmful to offending party, would be given to jury.)

Therefore, given all these factors, as the record currently stands, there is a jury question as to punitive damages. Accordingly, defendants' motion for summary judgment as to plaintiffs' claim for punitive damages should be denied at this juncture.

POINT III

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED SINCE A GENUINE ISSUE OF MATERIAL FACT EXISTS.

The present version of Rule 4:46-2(c) reflects the Court's decision in *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520 (1995), which held that a trial court should make the same type of evaluation of evidential materials in ruling on a motion for summary judgment as in ruling on a motion for judgment under Rule 4:37-2(b) or Rule 4:40-1 or a motion for judgment notwithstanding the verdict under Rule 4:40-2. The standard is "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 523, 666 A.2d 146. This is the same standard adopted by the Supreme Court of the United States in *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "[T]he essence of the inquiry" under this standard is "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Brill*, supra, 142 N.J. at 536, 666 A.2d 146 (*quoting Anderson v. Liberty Lobby,Inc.*, *supra*, 477 U.S. at 251-52, 106 S.Ct. at 2512, 91 L.Ed.2d at 214). Under this standard genuine "[c]redibility determinations ... continue to be made by a jury and not the judge." *Id.* at 540, 666 A.2d 146.

Although *Rule* 4:46-5(a) states that the mere allegations or denials of pleadings are not evidence which can defeat a motion for summary judgment, there is no particular form of evidential

material that either party to a summary judgment is required to present. Rule 4:46-2(a) states that a motion for summary judgment may be submitted "with or without supporting affidavits, and Rule 4:46-2(c) provides that the motion shall be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged."

Similarly, a party may defeat a motion for summary judgment by demonstrating that the evidential materials relied upon by the moving party, considered in light of the applicable burden of proof, raise sufficient credibility issues "to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." *Brill*, supra, 142 N.J. at 523, 666 A.2d 146; *see Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160, 90 S.Ct. 1598, 1609-10, 26 L.Ed.2d 142, 155 (1970) ("Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented)."

Here, in this matter, plaintiffs have shown that a genuine issue of material fact exists. Therefore, defendants' motion for summary judgment should be denied.

POINT IV

PLAINTIFFS' CROSS-MOTION FOR DISCOVERY RELIEF AGAINST THE DEFENDANTS SHOULD BE GRANTED SINCE DEFENDANT HAS FAILED TO COMPLY WITH THE COURT ORDER COMPELLING DISCOVERY FROM DEFENDANTS AND FAILED TO PROVIDE RESPONSES TO PLAINTIFFS' DISCOVERY DEMANDS.

On February 17, 2006, this court entered an order requiring defendants to produce certain discovery, including the operations and training manual of McDonald's Corporation. *(See Exhibit O, 2/1706 Court Order)*. However, defendants have failed to comply with this court order and produce this operations and training manual of McDonald's Corporation. Additionally, on November 12, 2004, Robert Johnson signed an affidavit of behalf of McDonald's Corporation concerning their alleged non-involvement in the McDonald's restaurant at issue. *(See Exhibit E to Defendants' Summary Judgment Motion)*. Robert Johnson's name was not provided in discovery as someone with relevant knowledge in this matter, and plaintiffs first knowledge of this person was from the affidavit attached to defendants' motion hereto. *(See Exhibit P, Defendant's Answers to Form C Interrogatories)*. Furthermore, attached to the defendants' summary judgment motion is an amendment to franchise agreement showing the relationship between all the defendants. (See Exhibit D to Defendants' Summary Judgment Motion). However, defendants have not provided the entire franchise agreement showing the relationship between all the defendants.

Additionally, the amendment to the franchise agreement does not contain any signature of the person attesting to this document. Such documents must be incorporated by reference to a certification or affidavit based on personal knowledge. See *Sellers v. Shonfeld*, 270 Super. 424 (App. Div. 1993); *Celino v. General Accident Insurance*, 211 Super. 538 (App. Div. 1986); *Rule* 1:6-6. Defendant fails to provide any certification referencing the exhibits to the summary judgment

motion. Therefore, defendants' exhibits in support of its summary judgement motion is not sufficiently supported by credible evidence.

Accordingly, defendant's motion for summary judgment must be denied because defendants' failed to provide all documents requested in discovery and required by Court Order. *(Exhibit O, 2/1706 Court Order).* Plaintiffs are severely prejudiced in not having this discovery since it is necessary to properly establish the relationship between the defendants McDonald's Corporation, Dorno Corporation and Jesnel Corporation. Plaintiffs are entitled to the operations and training manual of McDonald's Corporations as per the Court's order, and also entitled to take the deposition of Robert Johnson. The operations and training manual of McDonald's Corporation may very well contradict the affidavit of Robert Johnson as to the McDonald's Corporation involvement in the hiring, firing, rates, hours, etc. of the employees at the McDonald's restaurant. This discovery may also show that McDonald's Corporation is involved in the day to day operations of the McDonald's restaurant. Plaintiff also needs to take Robert Johnson's deposition to establish the relationship between defendants McDonald's Corporation, Dorno Corporation and Jesnel Corporation. Plaintiff further needs the entire franchise agreement and witness' name to take his deposition to establish the relationship between McDonald's Corporation, Dorno Corporation and Jesnel Corporation.

Therefore, plaintiffs respectfully request that this court deny defendants' motion for summary judgment with prejudice, or in the alternative, denied defendants' summary judgment motion without prejudice to compel defendants to produce the operations and training manual and entire franchise agreement of McDonald's Corporation, and allow plaintiffs the opportunity to take Mr. Johnson's deposition and the deposition of the witness to the franchise agreement.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully requests that defendants' motion for summary judgment be denied in its entirety. Plaintiffs also respectfully requests that their cross-motion for discovery relief be granted.

Respectfully submitted,

RICHARD C. SCIRIA

Dated: June 21, 2006

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