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PRELIMINARY STATEMENT

This is a negligent security case. On May 23, 2006, plaintiff Louis Miranda was stabbed in the eye with a filet knife by a Dickenson High School youth while he was walking arm in arm with his mother coming out of the McDonalds fast food restaurant located on the corner of Newark and Baldwin Avenues in Jersey City.[1] The youth in question was part of a larger group that only minutes earlier had caused a disruption inside the McDonalds and who are regularly associated with drugs, gang activity and violence each day when the Dickenson High School lets out for lunch.

As is typically the situation in these types of negligent security cases, the criminal assailant here is in jail, is uninsured, pro se and obviously could not satisfy a judgment in the case. Plaintiff's case against McDonald's[2] is one of negligence for failing to take reasonable measures to prevent the foreseeable criminal acts of the local high schools youths who converge on the restaurant each day during the lunch period. Plaintiff has not sued the third party criminal assailant. McDonalds however has brought a third party complaint against him for contribution and indemnification.

The law recognizes that in negligent security cases of this type, if a jury were permitted to allocate percentage fault for damages against the judgment proof third party criminal assailant, that it would likely allocate the majority of fault to that third party. This would operate to permit the business entity to escape liability for failing to meet its duty to take reasonable security measures and would cause the plaintiff to not be compensated for the injury, contrary to cases such as Butler v. Acme Markets, Inc. and Clohesy v. Food Circus. Thus the Supreme Court has established the rule

---

[1]Yes, the McDonald's across from the Courthouse.

[2]"McDonald's" herein generically refers to the McDonald's in question, the McDonald's Corporation and the individual corporations behind the local McDonalds, defendants Jesnel Corporation and Dorno Corporation.

that, under the appropriate factual circumstances, where the duty of one tortfeasor encompasses the obligation to prevent the specific misconduct of the other, then there should be no allocation of fault and the proprietor can be held liable for the entire judgment. In other words, where the criminal act in question was foreseeable, and the proprietor had a duty to take reasonable measures to prevent it, then there shall be no allocation of percentage fault to the judgment proof criminal assailant.

Plaintiff herein moves for the court to find as a matter of law that under the facts of this case, there should be no percentage allocation to the judgment proof criminal, Samuel Gilmente.[3] As plaintiffs will demonstrate herein, the particular facts and circumstances of this case show that the duty of McDonalds encompassed the obligation to prevent the specific misconduct of Samuel Gilmente and the incident in question was foreseeable. There should furthermore be no allocation of the relative percentages of negligence because plaintiff has not brought no claim against Gilmente.

[3]McDonalds would of course be free to pursue Gilmente for contribution and indemnification.

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[4], 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.
>
> Q. Never any fights on the sidewalk? They're always in the street?

---

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

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 legeslature 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. <u>But it's not a McDonald's issue, it's a high school issue</u>.

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

LEGAL DISCUSSION

I. THERE SHOULD BE NO ALLOCATION OF FAULT BETWEEN McDONALD'S AND THE THIRD PARTY CRIMINAL ASSAILANT GILMETE BECAUSE McDONALD'S DUTY ENCOMPASSED THE OBLIGATION TO PREVENT THE FORESEEABLE CRIMINAL ATTACK OF THE LATTER

A. Business Owners Such as Mcdonalds Have a Duty to Protect their Customers from the Foreseeable Criminal Acts of Third Parties

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.")

B. Given the History of Crime in the Area and the Notoriously Violent Dickenson Highs School Youths, the Attack in Question Was Not Only Foreseeable, It Was Virtually Inevitable

In the negligent security context, foreseeability is considered under a "totality of the circumstances" approach. *Clohesy,* 149 N.J. at 514-517. In *Clohesy* the Supreme Court found as a matter of law that the assault in the parking lot was foreseeable. Although there had never before been such an assault there, the Court considered other factors in concluding, "[I]t was foreseeable that over the course of time an individual would enter the parking lot and assault a Foodtown customer." *Id.* at 514.

In so concluding the Court considered that generally speaking, in the last two years the crime rate in the area had been increasing. That in 1994, 757,000 crimes occurred in parking lots in the United States, and, generally speaking, parking lots can be dangerous. *Id.* at 514-516. The Court noted that the absence of a prior similar incident is no impediment to a judicial finding of foreseeability; "foreseeability can stem from prior criminal acts that are lesser in degree than the one committed against a

plaintiff. It can also arise from prior criminal acts that did not occur on the defendant's property, but instead occurred in close proximity to the defendant's premises." *Id.* at 516-517.

The facts and circumstances of the instant case are much worse than those presented in *Clohesy* and as the Supreme Court did in *Clohesy* at 516-17, this Court should find here that this attack was foreseeable as a matter of law. 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 further shows this incident was bound to happen in the absence of McDonald's hiring a security guard, 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 this attack being generally foreseeable, the particular facts and circumstances of this incident show it was specifically foreseeable, and preventable by McDonald's. 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.

Therefore, given all these factors, it was clearly foreseeable that in the absence of McDonalds hiring a security guard or taking any other adequate security measures, a McDonald's customer would, sooner or later, be the victim of a violent crime as occurred here. Furthermore, given the particular circumstances of this incident, McDonald's knew these kids were being disruptive and threatening, yet nothing was done about it.

C. Since It Had a Duty to Protect Louis Miranda from this Foreseeable Criminal Attack, McDonald's Should Not Be Permitted to Lessen its Liability via an Allocation of Percentage Fault to the Judgment Proof Criminal

New Jersey law recognizes that in the typical negligent security case, the criminal assailant will be judgment proof and/or non-existent in the litigation. Therefore, if the defendant business owner were permitted to "point the finger" at trial at the criminal assailant and have the jury apportion a percentage of fault for the plaintiffs injury, that this would likely permit the business owner that failed to meet its duty under *Butler* and *Clohsey* from escaping significant liability, thus undermining the policies behind those decisions. That is, as between a business who failed to provide adequate security, and an intentional tortfeasor criminal, a jury would likely find the criminal who actually committed the assault more responsible for the injury. This problem was articulated by the Appellate Division dissent in *Blazovic v. Andrich*, 124 N.J. 90, 96 (1991) which recognized that if allocation of fault is permitted:

> [T]hen the results in cases like *Butler v. Acme Markets, Inc.,* 89 *N.J.* 270 (1982) could readily be undone. A negligent property owner need only join the known or unknown "John Doe" assailants as third-party defendants. Clearly the assailants' paramount, and probably exclusive, responsibility for the victim's beating will be

> reflected in the jury's percentage allocation of fault. Thus ... the injured party would be left to his dubious remedy against unknown assailants.

Thus in *Blazovic* the dissent in the Appellate Division urged a bright line rule whereby percentage fault should never be permitted to be allocated among negligent defendants and intentional tort defendants. *Blazovic*, 124 N.J. at 96-97.

The *Blazovic* Court noted that most jurisdiction have adopted the bright line rule that juries should not be permitted to allocate percentage fault between negligent and intentional tort defendants. *Blazovic*, 124 N.J. at 100-101. The Supreme Court also was cognizant of the concern of the dissent in the Appellate Division of the inequities that could result:

> The dissenting opinion below implies that to permit apportionment between Plantation and the intentional tortfeasors in effect would dilute Plantation's duty to prevent violent confrontations in its parking lot. That reasoning finds support in a line of cases decided by this Court in which we have precluded defendants from relying on a plaintiff's negligence to offset the defendant's duty, under circumstances in which the defendant's duty encompassed the obligation to prevent the plaintiff's allegedly-inappropriate conduct. *Cf. Cowan v. Doering,* 111 *N.J.* 451, 458-67 (1988) (hospital could not assert contributory negligence as defense when its duty included exercise of reasonable care to prevent plaintiff from engaging in self-damaging conduct); *Suter, supra,* 81 *N.J.* at 165-68 (comparative negligence not available as defense in products-liability case when factory worker sustains injury while using unsafe machine for its intended purpose); *Soronen v. Olde Milford Inn, Inc.,* 46 *N.J.* 582, 589-92 (1966) (contributory negligence not available as defense to tavern keeper who negligently sells alcoholic beverages to visibly-intoxicated customer, proximately contributing to resulting injury). In each of those cases we recognized that the inappropriate imposition of a comparative-negligence defense could "lead to the dilution or diminution of a duty of care." *Cowan v. Doering, supra,* 111 *N.J.* at 467.

Blazovic, 124 N.J. at 110-111. Although the Supreme Court rejected the dissent's suggestion of a bright line rule precluding apportionment among intentional torfeasors, its realized the inequities that could result from allocation of fault to judgment proof intentional tortfeasors. It therefore adopted a case-by-case approach whereby, under the appropriate factual circumstances, apportionment should

be precluded and the injured plaintiff should be able to collect the entire judgment against the solvent business owner:

> We recognize that the reasoning underlying those decisions could appropriately be applied to preclude apportionment of fault between two tortfeasors when the duty of one encompassed the obligation to prevent the specific misconduct of the other. *Cf. Butler v. Acme Markets, supra,* 89 *N.J.* 270, 445 *A.*2d 1141 (proprietor with knowledge of repeated criminal attacks on patrons was negligent in failing to take action to prevent similar attack on plaintiff).

Blazovic, 124 N.J. at 111. Under the particular facts of *Blazovic* however, the Court declined to preclude apportionment because:

> [I]t would be highly speculative to conclude that the causal connection between Plantation's alleged negligence and the combined misconduct of plaintiff and the individual defendants was sufficient to invoke the rationale of *Cowan, Suter,* and *Soronen.* Our view is that the events that allegedly took place in the parking lot **neither were sufficiently foreseeable** nor bore an adequate causal relationship to Plantation's alleged fault to justify the imposition on Plantation of the entire responsibility for the resultant injury. In this case we adhere to the general principle that liability should be imposed in proportion to fault.

Blazovic at 112 (emphasis added). As we have already shown, the facts and circumstances of the instant matter however are the type the *Blazovic* Court likely had in mind when it ruled that an apportionment should be precluded, "[W]hen the duty of one [tortfeasor, here McDonalds] encompassed the obligation to prevent the specific misconduct of the other [tortfeasor, here Gilmente]." *Blazovic*, at 111.

As we have laid out in detail above, McDonald's clearly had the duty under *Butler, Clohesy* and their progeny, in addition to an independent duty under the McDonald's Security Manual, to take reasonable security measures. And given the history of crime in the area, including as proven through empirical data and government crime statistics, as well as the problem of the notoriously violent Dickenson High School youths gathering at this McDonald's everyday, the attack in question

was clearly foreseeable (if not inevitable).

Martin v. Prime Hospitality Corp., 345 N.J.Super. 278 (App. Div. 2001) provides a good example of the application of the *Blazovic* doctrine, albeit in the converse. In *Martin* the female plaintiff alleged she was sexually assaulted by the defendant Harris. The two had been drinking together with their respective group of friends at a bar located at a Ramada Inn. At the end of the night, without incident, Martin voluntarily went to Harris' hotel room at the Ramada. It was alleged that Harris subsequently raped Martin and he plead guilty to related criminal charges. *Martin*, 345 N.J.Super. at 280-284.

Martin sued the Ramada Inn and Harris. Harris defaulted and Ramada obtained a default judgment against him on its cross-claim. Thereafter, Martin's trial then proceeded against the Ramada (aka, "Prime"). The trial judge submitted the case to the jury solely on the issue of whether Prime was negligent in failing to provide adequate security for the safety of Martin. Despite Prime's vigorous argument and requested jury charge, the judge refused to allow the jury to compare fault among Prime, Martin and Harris. *Martin*, 345 N.J.Super. at 283-284.

As did the Supreme Court in *Blazovic*, the Appellate Division agreed, "[T]hat apportionment of fault is not appropriate in all circumstances." *Martin*, 345 N.J.Super. at 284. Citing the *Restatement* the Court noted:

> The modification of joint and several liability and the application of comparative responsibility to intentional tortfeasors create a difficult problem. When a person is injured by an intentional tort and another person negligently failed to protect against the risk of an intentional tort, the great culpability of the intentional tortfeasor may lead a factfinder to assign the bulk of responsibility for the harm to the intentional tortfeasor, who often will be insolvent. This would leave the person who negligently failed to protect the plaintiff with little or no compensation for the harm. Yet when the risk of an intentional tort is the specific risk that required the negligent tortfeasor to protect the injured person, that result significantly diminishes the purpose for requiring a person to take precautions against this risk.

Id. at 284. The Court went on to recount the *Blazovic* rule that:

> [T]he defendant responsible for security [is] precluded from relying on apportionment only when that defendant's duty of care encompasses the obligation to prevent the specific misconduct that caused plaintiff's injury.

Id. at 21. The Court in *Martin* concluded under the facts of that case that fault should have been apportioned. When comparing the facts and reasoning of the Court in *Martin* with the facts of the instant case, it is clear there should be no apportionment to the criminal assailant.

In *Martin* the Court's apportionment reasoning was based on the fact that the record was devoid of any indication of a history of prior criminal conduct in the relevant area, "Unlike *Butler* where there was a history of prior criminal attacks, Prime had no warning that Harris constituted a danger to its patrons." *Martin*, 345 N.J.Super. at 291. As demonstrated above, in this case the McDonald's is in a high crime area, the police are called there frequently, and the Dickenson High School ranks are notoriously crime-ridden and violent.

In *Martin* the Court also rested its ruling in the fact that plaintiff had voluntarily gone to Harris' room without incident and the "evidence supported the argument that Harris and Martin were engaged in consensual sex..." and thus there was no indication to the hotel that anything untoward was about to occur *Id.* at 291. As we have shown in this case however, the youths had been disruptive for quite some time, as they were notorious for each day during the lunch period. At one point, a witness approached the store manager and asked if she would do something about them 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*) Had an off-duty police officer, or adequately trained and uniformed security officer been assigned to the McDonald's

premises, the assault by Samuel Gilmete upon plaintiff Louis Miranda would likely have been prevented. Had the manager simply reprimanded the youths or called the police, this whole incident would have been averted.

Thus in *Martin* the Court concluded the sexual assault, which took place in Harris' private room, with no history of crime in the area and no indication whatsoever that anything untoward was about to happen, "[W]as neither sufficiently foreseeable nor sufficiently related to Prime's alleged fault to justify imposing responsibility on Prime for all of Martin's injuries. ... Accordingly, under *Blazovic,* in our opinion, Harris's fault should have been compared and apportioned." *Martin*, 345 N.J.Super. at 292. The Court restated the *Blazovic* rule as follows:

> In conclusion, to determine when *Blazovic* excuses apportionment, the overall focus is on whether plaintiff's injury was so foreseeable to the supervising defendant that a failure to act or an inadequate response that causes the plaintiff to suffer the foreseeable injury warrants imposition of the entire fault upon that defendant. ... Just as in *Blazovic* that was not the case here.

Martin, at 292-293. As we have demonstrated herein through, *inter alia*, testimony, empirical data and official government reports, the converse is true and the Blazovic rule should be applied. This incident was clearly foreseeable. McDonald's did nothing to meet its obligations under the law, testifying it undertook no security analysis whatsoever, (*Exhibit L, Deposition of Celestina Qunitana at 48-49*), and taking the pass the buck attitude that, "it's not a McDonald's issue, it's a high school issue." (*Exhibit L, Deposition of Celestina Qunitana at 102*).

Under these circumstances, McDonald's apathy should not be rewarded and it should not be allowed to diminish its responsibility under *Butler* and *Clohesy*. *See Martin* at 284 ("[W]hen the risk of an intentional tort is the specific risk that required the negligent tortfeasor to protect the injured person, that result significantly diminishes the purpose for requiring a person to take precautions

against this risk.") Plaintiffs' motion for partial summary judgment to bar an allocation of percentage fault to the judgment proof third party defendant should be granted.

II. THERE SHOULD FURTHER BE NO ALLOCATION BECAUSE PLAINITFF HAS NOT ASSERTED ANY CLAIMS AGAINST THE THIRD PARTY DEFENDANT CRIMINAL

There should also be no allocation of fault between the negligent defendant McDonald's and the intentional tortfeasor criminal because plaintiff has not brought any claim against the Gilmetes. *N.J.S.A.* 2A:15-5.1 requires comparison of plaintiff's negligence with the negligence, now fault as the result of *Blazovic,* of the person or persons against whom recovery is sought. *N.J.S.A.* 2A:15-5.2 requires the trier of fact to return a special verdict on "[t]he percentage of negligence of each *party* " with "the total of all percentages of negligence of all the parties to the suit " being fixed at 100%. *Id*. As such, the plain language of sections 5.1 and 5.2 makes the negligence of the person or persons *against whom recovery is sought* and the negligence of each party or parties to the suit the prerequisites to apportioning fault. *See Bencivenga v. J.J.A.M.M., Inc., 258 N.J. Super 399 (App. Div. 1992)* (emphasis added).

Here, even though the intentional tortfeasors Samuel and Phil Gilmete are parties to the overall lawsuit, plaintiff filed suit only against the negligent defendant McDonald's. Although the defendant McDonald's filed a third party complaint against these intentional tortfeasors, plaintiff never filed a direct claim against them. Thus, plaintiffs are not seeking recovery against these third party defendants. Rather, they are seeking recovery against the negligence defendant McDonald's. Therefore, fault cannot be apportioned between the negligent defendant McDonald's and intentional tortfeasors according to *N.J.S.A.* 2A:15-5.1 since plaintiffs never filed a direct claim against them. It is noted that in both *Blazovic* and *Martin*, unlike here, the plaintiff did in fact bring direct claims against the intentional torfeasors.

This, however, does not leave the negligent defendant without a remedy to recover against

an intentional tortfeasor. Rather than seeking allocation of fault of an intentional tortfeasor, a negligent tortfeasor compelled to pay more than his or her percentage share can seek contribution from other joint tortfeasors. *N.J.S.A.* 2A:15-5.3(e). The recovering party may obtain the full amount of the molded verdict from any of the responsible parties, but that party could in turn seek contribution from the other joint tortfeasors to the extent its payment exceeded its percentage share. *Ibid.* In that respect, the Supreme Court recited *N.J.S.A.* 2A:15-5.3, which provides that "[a]ny party who is so compelled to pay more than such party's percentage share may seek contribution from the other joint tortfeasors." *See also Cartel Capital Corp. v. Fireco of New Jersey*, 81 N.J. 548, 569 (1980).

Accordingly, McDonald's can seek contribution for any judgment against it by the plaintiffs from the intentional tortfeasors Samuel and Phil Gilmete. This is especially appropriate where the negligent defendant has filed a third party complaint directly against the intentional tortfeasors while plaintiffs only claim is against the negligent defendant. Otherwise, plaintiffs would be barred from collecting any judgment directly against the intentional tortfeasors Samuel and Phil Gilmete since no suit has been brought against them by the plaintiffs.

CONCLUSION

Accordingly, for all these reasons, it is respectfully requested the Court grant the within motion for partial summary judgment on the allocation issue.

Respectfully submitted,
Lynch ♦ Keefe ♦ Bartels

By: _____
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Peggy Miranda