

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

DAR NO. _____
APPEALS COURT DOCKET NO. 2026-P-0674

Brian Lesser and Burn, LLC,
Plaintiffs-Appellants

v.

Kristen L. Scanlon and Scanlon Law, LLP,
Defendants-Appellees

On Appeal from Dismissal Pursuant to Defendants'
Motion to Dismiss of the
Suffolk County Superior Court Case No.: 2584CV01657-C

APPELLANTS' APPLICATION FOR DIRECT APPELLATE REVIEW

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MASS. R.A.P. 16 CORPORATE DISCLOSURE STATEMENT

Pursuant to Mass. R.A.P. 16(a)(2), Plaintiff-Appellant Burn, LLC states as follows: Burn, LLC has no parent corporation and no publicly held corporation owns 10% or more of the company.

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1. Request For Direct Appellate Review

Appellants-Plaintiffs Brian Lesser and Burn, LLC (collectively, "Appellants" or "Clients") hereby request, pursuant to G.L. c. 211A, § 10 and Mass. R. App. P. 11, direct appellate review by this Court of the Judgment of the Suffolk County Superior Court (Gordon, J.) entered in Suffolk Superior Case No. 2584CV01657-C on March 2, 2026. A copy of the Judgment and the Superior Court's Memorandum of Decision and Order (the "Decision") are attached as ADD 147-163 (Decision); 164 (Judgment).

The question presented in this case is a narrow but significant and unresolved issue of Massachusetts law concerning the accrual of legal malpractice claims: whether a client can suffer appreciable harm for purposes of accrual under G.L. c. 260, §4 before related underlying litigation has resolved the very legal issue necessary to determine whether the attorney's advice amounted to malpractice. More specifically, where the alleged malpractice depends on an unsettled question of law, and the attorney's advice could be vindicated by a successful outcome in the underlying case, the issue is whether the client has sustained appreciable harm, or has had notice of a causal connection between the alleged

malpractice and that harm, before a court has ruled on the merits of the underlying legal issue giving rise to the alleged malpractice. Stated differently, the question is whether Massachusetts law requires a client to prejudice its position in ongoing litigation by filing a "protective" malpractice action against its own attorney before any court has determine that the attorney's advice was legally erroneous.

This case presents the tension between two lines of Massachusetts authority. The first, reflected in malpractice cases such as *Frankston v. Denniston*, 74 Mass. App. Ct. 366 (2009) and *Mass. Electric Co. v. Fletcher, Tilton & Whipple, P.C.*, 394 Mass. 265 (1985), wherein counsel's error is objectively identifiable when it occurs—such as missed deadlines, title defects, or plainly incorrect advice—and subsequent litigation merely reveals the consequences of that completed error ("**known error**" cases). The second, reflected in cases such as *Eck v. Kelleem*, 51 Mass. App. Ct. 850 (2001) and *Spilios v. Cohen*, 38 Mass. App. Ct. 338 (1995), involves outcome-determinative malpractice claims, where the underlying litigation itself determines whether counsel's advice was legally erroneous in the first instance ("**outcome-determinative**" cases). In those

cases, a client cannot be said to have suffered appreciable harm, or have notice of a causal connection between the alleged negligence and that harm, until the issue is resolved on the merits through a dispositive determination of the underlying legal issue (in this case, summary judgment), even if the underlying action continues as to damages or other ancillary matters. This case falls squarely within the latter category and presents an opportunity for this Court to clarify and reconcile these lines of authority.

At issue here is a question not yet addressed by this Court in the outcome-determinative context: whether a client must prejudice themselves in underlying litigation and file a "protective" malpractice action against their attorney before any court has determined on the merits that the attorney's legal advice was wrong, while simultaneously continuing to defend that very same advice in the underlying litigation, or risk forfeiting their malpractice claim entirely. The Superior Court's Decision (ADD 147-163) effectively holds that a malpractice claim accrues upon the filing of an adversary's complaint, the issuance of preliminary injunctive relief maintaining the status quo, or the incurrence of defense costs, even where the alleged

malpractice turns on an unanswered question that remained actively contested throughout the case, and was significant enough for this Court to take sua sponte review and solicit amicus briefing (Dkt. No. SJC-13755).¹ Under that rule, a client must treat a disputed legal position as attorney malpractice before any court has determined that counsel's advice was incorrect.

That result creates substantial practical and jurisprudential problems. It forces clients into inherently inconsistent litigation positions by requiring them to commence "protective" malpractice actions against their attorney while simultaneously defending the merits of the advice. It also requires, as here, clients to become adverse to their own counsel who is a necessary witness who was deposed in the underlying litigation concerning the very advice at issue. Moreover, the filing of a malpractice action itself may

¹ The Clients do not contend that the statute of limitations on the malpractice claim could not begin to accrue until entry of final judgment or the ascertainment of damages in the underlying litigation. Rather, Clients assert that they could not have been on notice that the Attorney's advice was erroneous, or that they had suffered appreciable harm as a result of that advice, until the trial court in the underlying litigation determined on summary judgment that the lease provision was enforceable. ADD 95-109 (summary judgment decision).

be treated by adversaries in the underlying litigation as an admission that counsel's advice was erroneous, thereby materially prejudicing the client's ability to continue litigating the underlying merits position.

The Superior Court's ruling therefore encourages premature and unnecessary malpractice filings, duplicative litigation, and inefficiency for litigants and the courts alike. As the motion judge himself recognized during oral argument, such a rule places a client "between a rock and a hard place," requiring the client either to preserve a potential malpractice claim before liability is established or risk forfeiting that claim entirely. Massachusetts law should not require litigants to abandon viable legal positions, force clients to become adverse to witnesses by commencing premature litigation, or to treat non-final, non-merits rulings as conclusive proof of attorney malpractice before any merits determination has resolved the underlying legal issue giving rise to the alleged malpractice claim.

Because this case presents a narrow but recurring issue concerning the accrual of legal malpractice claims, and exposes tension in the application of existing precedent, direct appellate review is warranted

under Mass. R. App. P. 11 and G.L. c. 211A, § 10. The issue is one of first impression for this Court and has significant implications for the bench and bar, as the existing case law provides limited guidance in distinguishing between "known error" malpractice claims and "outcome-determinative" claims where liability depends on the resolution of underlying litigation. As discussed below, other jurisdictions have recognized this precise conflict and delayed accrual where the viability of the malpractice claim depends on the outcome of underlying litigation. See *e.g.*, *U.S. Nat. Bank of Or. v. Davies*, 274 Or. 663, 670 (1976); *Jaquith v. Ferris*, 297 Or. 783, 788 (1984); *Suburban Real Estate Servs., Inc. v. Carlson*, 193 N.E.3d 1187, 1192 (Ill. 2022). Massachusetts law has not yet addressed this issue directly.

This Court has exercised direct appellate review to clarify the reach and proper application of existing doctrine and to provide guidance in areas where the law is unsettled or inconsistently applied. See *In Re Green*, 475 Mass. 624, 627 (2016) (granting direct appellate review "to clarify the reach" of prior precedent). This case presents precisely that circumstance and provides

an appropriate vehicle for resolving this doctrinal uncertainty.

For these reasons, this case involves an issue of first impression, a significant and unresolved novel question of Massachusetts law, and questions of such public interest that justice requires final determination by the full Supreme Judicial Court.

2. Statement of Prior Proceedings

This action arises from legal malpractice in connection with a commercial landlord-tenant dispute concerning the enforceability of a lease provision restricting the pledge and transfer of a liquor license. The Clients (Appellants) filed their Complaint with the Suffolk County Superior Court on June 13, 2025. A copy of the Complaint (the "Complaint") is attached as ADD 005-014. The Complaint asserted claims against Appellees-Defendants Kristen L. Scanlon and Scanlon Law, LLP (collectively, "Appellees" or "Attorney"), the Clients' counsel, alleging Negligence (Count I), Breach of Contract (Count II), Breach of Fiduciary Duty (Count III), and Negligent Misrepresentation (Count IV). *Id.*

On October 16, 2025, the Attorney filed a Motion to Dismiss pursuant to Mass. R. Civ. P. 12(b)(6) on the grounds that the Clients' claims were barred by the

three-year statute of limitations. A copy of the Attorney's Motion to Dismiss and supporting Memorandum of Law (the "Motion to Dismiss") are attached as ADD 015-075. The Attorney argued that the Clients (tenant in the underlying litigation) knew or should have known of the alleged malpractice and suffered "appreciable harm" no later than January 2020, when the landlord issued a notice of default and commenced litigation against the Clients arising from actions that the Clients had taken in reliance on their Attorney's legal advice. ADD 015-075; 141-146.

On December 3, 2025, the Clients filed their Opposition to the Motion to Dismiss, arguing that their claims did not begin to accrue until the underlying litigation resolved the unsettled legal issue of whether the lease provision at issue was enforceable. A copy of the Clients' Opposition to the Motion to Dismiss (the "Opposition") is attached as ADD 076-140. The Clients argued that, until a determination on the merits was made regarding the enforceability of the lease provision, any alleged harm remained contingent and not "appreciable" within the meaning of Massachusetts law, because the dispositive legal issue remained unresolved.

Following a hearing, the Superior Court (Gordon, J.) allowed the Attorney's Motion to Dismiss. In a Memorandum of Decision and Order dated February 24, 2026, the Court concluded that the Clients' claims accrued, at the latest, in 2020, when the Clients received the notice of default, were named in the underlying lawsuit, began accruing legal fees, and were subject to preliminary injunctive relief restricting their ability to transfer or encumber the liquor license. ADD 147-163.

In so ruling, the Court determined that these events constituted sufficient notice of appreciable harm to trigger the statute of limitations, notwithstanding that the underlying litigation had not yet resolved the dispositive and unsettled legal issue concerning the enforceability of the lease provision—the very issue necessary to determine whether their Attorney's legal advice constituted malpractice at all. *Id.* The Court rejected the Clients' position that accrual should be tied to a determination on the merits of that issue, reasoning that Massachusetts law does not require such "finality" for a malpractice claim to accrue. ADD 162 fn. 12.

At the same time, the Court recognized the practical tension created by that rule—namely, that it may require a client to pursue a malpractice claim while continuing to defend the validity of the attorney’s advice in ongoing litigation:

I agree, This is a problem with the rule.

It’s a problem with the rule that, if the limitations period is running at a point in time when there is no finality, it may be compromising someone’s ability to take the position that in fact on the merits they were right...it does put a client between a rock and a hard place.

ADD 192. The transcript of the hearing before Judge Gordon of the Superior Court on February 17, 2026 is attached as ADD 165-214. The Court further acknowledged that under this framework, a client would have to either seek a potentially discoverable tolling agreement or file suit against counsel before it is known whether the advice at issue was incorrect or constituted malpractice at all. ADD 162 fn. 12; *see also* 200-201.

3. Statement of Facts Relevant to Appeal

A. Lease, Liquor License and Pledge Transaction

In 1996, N&M Trust VII (the "Landlord") leased the ground and first floors of 647 Tremont Street, Boston (the "Premises") to the Client, Appellant Burn, Inc. ADD 006, ¶ 9. At execution, the Landlord held an all-alcohol License (the "Liquor License") for the prior restaurant at the Premises. *Id.* ¶ 11. The Lease required Burn, Inc. to become a sublicensee of the Liquor License, and in 1996 the Boston Licensing Board and ABCC approved transfer to Burn, Inc. ADD 006-007, ¶¶ 12-13. The Lease prohibited transfer, assignment, or pledge of the Liquor License and required retransfer upon expiration or termination of the Lease (the "Negative Pledge Agreement.") ADD 007, ¶¶ 14-15. Any transfer, pledge, or assignment of the Liquor License constituted a default. ADD 007, ¶ 16. Despite these provisions, the Appellees-Attorney (Appellees) unequivocally advised the Clients that the Negative Pledge Agreement was unenforceable as against public policy, and the Clients relied on that advice. ADD 007, ¶ 17; AAD 010, 36.

In January 2018, the Client, Appellant Brian Lesser, became involved with the restaurant at the Premises. ADD 009, ¶ 33. With the Landlord's knowledge,

Burn, Inc. converted to Burn, LLC and succeeded to the Lease. *Id.*; ADD 043, ¶ 18. On or about November 1, 2018, the Clients entered into a separate Pledge Agreement by which Burn, LLC pledged the Liquor License to Lesser to secure a loan (the "Licensing Pledge Agreement"). ADD 044, ¶ 20. The Attorney advised their Clients concerning the Pledge Agreement's legality and prepared and submitted the regulatory filings necessary to obtain approval from the Boston Licensing Board and ABCC. ADD 007, ¶ 17; ADD 008, ¶¶ 22-25; ADD 009, ¶¶ 29-30. On September 4, 2019, the Boston Licensing Board and ABCC approved the pledge. ADD 008, ¶ 24.

B. Underlying Litigation and Interim Proceedings

On January 8, 2020, the Landlord issued a letter to the Clients (tenant) demanding termination of the pledge and served a Notice of Default of the Lease. ADD 010, ¶ 37. The Landlord then sued for injunctive relief, breach of agreement, aiding and abetting breach, and violation of G.L. c. 93A, § 11, premised on the pledge as an event of default under the Lease. ADD 011, ¶ 41; ADD 046-047, ¶¶ 31-39. The Attorney was a witness for the Client and was deposed in the litigation. ADD 082, fn. 2; ADD 192-194. On January 31, 2020, the Landlord moved for a preliminary injunction to extinguish encumbrances and

force a sale of the Liquor License back to the Landlord. The Clients opposed, relying on the duly approved pledge and their Attorney's advice. ADD 116, dkt. entry 5; dkt. entry 6. On February 20, 2020, the Superior Court denied the motion "for the reasons set forth in the opposition." ADD 116. The Landlord then abandoned his requests to extinguish encumbrances and force a reverted sale and instead petitioned the Appeals Court, seeking only an injunction restraining the Clients from transferring or further encumbering the License. ADD 117, dkt. entry 12. Weeks later, on March 19, 2020 a single justice issued interim injunctive relief to preserve the status quo given the finite number of licenses. *Id.*

Additional interlocutory proceedings followed concerning the parties' respective rights to transfer, pledge, or sell the Liquor License. Throughout these proceedings, the enforceability of the Negative Pledge Agreement remained actively disputed. The interlocutory rulings addressed preliminary relief and likelihood of success standards rather than final adjudication of the enforceability issue. ADD 117, dkt. entry 12; ADD 74-75; ADD 118-119, dkt. entry 19; ADD 123, dkt. entry 58.

C. First Merits Determination

On or about April 26, 2023, the court granted partial summary judgment for the Landlord, holding that the Lease's Negative Pledge Agreement is lawful and the Pledge Agreement is null and void. ADD 011, ¶ 42; ADD 095-109; ADD 123, dkt. entry 61. This was the first time that a court had ruled on the merits as to the enforceability of the lease provision that the Attorney advised the Clients was unenforceable as against public policy. The court reserved multiple other claims for trial, including claims under G.L. c. 93A, § 11, misrepresentation, and conversion, concluding that the disputed issues of material fact remained concerning representations made to regulators and related conduct surrounding the pledge transaction. *Id.*

After a five-day jury-waived trial on the reserved claims, the Court entered final judgment on January 24, 2024, found willful and knowing violations of G.L. c. 93A, § 11, and awarded treble damages. ADD 011, ¶ 43; ADD 127, dkt. entry 92; ADD 129, dkt. entry 112. Only with these rulings did the Clients have definitive notice that their Attorney's advice had caused appreciable harm. The Clients appealed.

D. Subsequent Appeal to the Supreme Judicial Court

On March 26, 2025, the Supreme Judicial Court took the appeal *sua sponte* and solicited *amicus curiae* briefs concerning the enforceability of the Negative Pledge Agreement and related G.L. c. 93A, § 11 issues. ADD 138-140 (SJC Docket No. SJC-13755). On December 16, 2025, the Supreme Judicial Court (Kafker, J.) affirmed the trial court's decisions. SJC Docket No. SJC-13755, *Nicosia v. Burn, LLC*, 496 Mass. 792 (2025).²

4. Statement of Issues of Law Raised by the Appeal, Together With a Statement Indicating Whether the Issues Were Raised and Properly Preserved in the Lower Court

1) Whether the Superior Court erred in dismissing the Clients' (Appellants) claims when the undisputed facts show that it was impossible for the Clients to suffer appreciable harm for purposes of accrual under G.L. c. 260, §4, or have notice of a causal connection between the alleged malpractice and that harm, until the underlying trial court ruled on the merits of

² The Clients do not contend that accrual was tolled pending exhaustion of appeals, but only that accrual could not begin before the trial court decided on the merits on summary judgment that the Attorney's advice was legally erroneous.

that issue because the alleged malpractice depended on an unsettled question of law, and the attorney's advice could be vindicated by a successful outcome.

- 2) Whether the Clients (Appellants) were required to prejudice themselves in underlying litigation and file a "protective" malpractice action against their Attorney (Appellees) before any court has determined on the merits that the Attorney's legal advice was wrong, while simultaneously continuing to defend that very same advice in the underlying litigation, or risk forfeiting their malpractice claim entirely.

These issues were raised before the Superior Court in the Clients' Opposition to the Attorney's Motion to Dismiss, were addressed by Judge Gordon in the Superior Court's Memorandum of Decision and Order, and therefore were raised and properly preserved in the lower court.

5. **Brief Argument Supporting Appellants-Clients' Position**

- A. **The Superior Court failed to identify this case as an "outcome-determinative" malpractice claim**

This case presents a narrow but significant unresolved question concerning the accrual of legal

malpractice claims where the alleged malpractice depends entirely on the resolution of an unsettled question of law being actively litigated in underlying proceedings. It is well settled in Massachusetts that a legal malpractice claim does not accrue until a client sustains "appreciable harm" and has notice of a causal connection between that harm and the attorney's conduct. *Williams v. Ely*, 423 Mass. 467, 473 (1996). The unresolved question presented here is whether appreciable harm can exist where the underlying litigation itself is necessary to determine whether the attorney's advice was legally incorrect at all.

Massachusetts cases addressing accrual generally fall into two distinct categories. The first category involves "**known error**" malpractice claims, where counsel's malpractice is objectively identifiable when it occurs, and subsequent litigation merely reveals the consequences of that error. Cases such as *Frankston*, 74 Mass. App. Ct. 366 and *Mass. Electric Co.*, 394 Mass. at 265, fall within this category. Those cases involve situations such as missed deadlines, title defects, or plainly erroneous legal conduct where the alleged malpractice itself is not dependent on future adjudication.

The second category involves "**outcome-determinative**" malpractice claims, where the underlying litigation itself determines whether counsel's advice was wrong and whether any appreciable harm was caused by that advice. In *Spilios*, 38 Mass. App. Ct. at 339, the Appeals Court held that accrual did not occur until the underlying divorce litigation concluded because "only when the trial ended and the decision was rendered was it possible to know whether the defendant[] [counsel's] judgment...would be vindicated by a successful trial outcome." Likewise, in *Eck*, 51 Mass. App. Ct. at 853, the Appeals Court recognized that accrual was delayed where the underlying litigation itself was necessary to determine whether counsel's advice had been erroneous. As the *Eck* court explained, accrual requires "notice of a causal relationship between the harmful event attributed to the defendant...and the harm suffered by the plaintiff." *Id.* at 854.

B. Appellants-Clients could not sustain appreciable harm until the enforceability issue was resolved on the merits

Like the plaintiffs in *Eck* and *Spilios*, the Clients continued throughout the underlying litigation to defend and rely upon their Attorney's legal advice because the dispositive legal issue—the enforceability of the lease

provision—remained actively contested and unresolved. As in *Eck*, the Attorney here remained aligned with the Clients' litigation position that the advice was correct and the lease provision unenforceable, and served as a necessary witness and was deposed concerning that advice. 51 Mass. App. Ct. at 854-55. Thus, commencing a malpractice action before resolution of the enforceability issue would have forced the Clients into the untenable position of becoming adverse to their own witness while continuing to rely on that witness's testimony and advocate the very legal position that purportedly constituted the malpractice. *Id.* at 852, 854-855 (no accrual where litigation strategy was to rely on initial attorney's opinion that sale agreement insulated Eck against underlying claim; Eck had "right to repose confidence in the professional[] ability and good faith" of litigation attorney in underlying action). Until the underlying court determined that the lease provision was enforceable, the Clients, like the Plaintiffs in *Eck*, had every reason to continue trusting and litigating the Attorney's position that the advice was sound. Thus, this case falls squarely within the "outcome-determinative" category.

Here, the alleged malpractice depended entirely on whether their Attorney's advice concerning the enforceability of the Negative Pledge Agreement was legally correct. That issue remained unresolved for years and was actively contested throughout the underlying litigation. The issue generated conflicting interim rulings, multiple interlocutory proceedings, emergency motions, and ultimately *sua sponte* review by this Court accompanied by solicitation of amicus briefs concerning the enforceability issue itself.

Until the Superior Court's summary judgment ruling in April 2023, no court had resolved whether the Negative Pledge Agreement was enforceable or whether the Attorney's legal advice to the Clients was wrong. The Clients do not contend that accrual required entry of final judgment, a determination on damages, or exhaustion of appellate rights. Rather, the April 2023 summary judgment ruling (ADD 095-109) was the first merits determination establishing that the Attorney's advice concerning enforceability was legally incorrect.

Had the Clients prevailed on that issue, their Attorney's advice would have been vindicated, and no malpractice claim could have existed. *Spilios*, 38 Mass. App. Ct. at 339. In that circumstance, the legal fees

incurred defending the Landlord's claims would not have constituted appreciable harm caused by malpractice, because the advice itself would have been correct. Likewise, the interlocutory injunctions restricting transfer of the Liquor License would merely have reflected provisional efforts to preserve the status quo pending adjudication of a disputed legal issue. The underlying litigation was therefore not merely a consequence of completed malpractice; it was the mechanism necessary to determine whether any malpractice had occurred at all.

The notice of default, the filing of the Landlord's lawsuit, and the interlocutory injunction proceedings merely reflected genuine adversarial disagreement concerning an unresolved legal issue. They did not establish that the Attorney's advice was incorrect, nor did they provide notice that the Clients had sustained appreciable harm caused by malpractice, because the dispositive issue remained unresolved. Indeed, requiring the Clients to file a "protective" malpractice action, or even enter into a tolling agreement premised on potential malpractice exposure,³ would itself have

³ ADD 162, fn. 12; ADD 200-201.

materially prejudiced the Clients' position in the underlying litigation by providing the Landlord with powerful impeachment material suggesting that the Clients themselves believed that the Attorney's advice as erroneous before any court had resolved the enforceability issue on the merits.

C. The rule applied in the lower court creates inherently conflicting litigation obligations

The Superior Court nevertheless concluded that accrual occurred years before the summary judgment ruling based on the notice of default, the filing of the Landlord lawsuit, the incurrence of legal fees, and interlocutory injunctive proceedings. In doing so, however, the court expressly recognized the practical conflict created by the rule, acknowledging that it placed the Clients "between a rock and a hard place" by requiring them to preserve a malpractice claim while simultaneously continuing to defend the validity of the very legal position their attorneys advised was correct.

Treating interlocutory rulings, preliminary injunction proceedings, or litigation expenses as conclusive notice of malpractice in an outcome-determinative case forces litigants into inherently inconsistent positions. A client must simultaneously

maintain in the underlying litigation that counsel's advice was correct while asserting in a malpractice action that the same advice was negligent. *U.S. Nat. Bank of Or.*, 274 Or. at 670 ("plaintiff's decedent would have been defending one suit or action, claiming he had acted in conformance with the law, while simultaneously maintaining an action against defendants, claiming that he had not acted in conformance with the law because of faulty advice from defendants. Such an inconsistent position would have given rise to impeachment of defendant in his defense of the action brought against him...").

Here, the Clients would have been required to sue their Attorney (and witness) for malpractice while simultaneously continuing to argue in the Landlord litigation, and ultimately before this Court, that the Negative Pledge Agreement was unenforceable as against public policy. The rule adopted below therefore encourages premature malpractice litigation, creates inefficiency and duplicative proceedings, and risks undermining the client's position in the underlying action before the dispositive legal issue has even been resolved. *U.S. Nat. Bank of Or.*, 274 Or. at 670 ("This is one of those situations in which common sense dictates

that a 'later event' (the appearance of defendant's probable liability) should take place before the statute commences to run.").

D. Other jurisdictions have recognized this precise conflict

Other jurisdictions confronting this precise issue have recognized the same problem and adopted the position urged by Appellants-Clients here. In *U.S. Nat. Bank of Or.*, 274 Or. at 669, the Oregon Supreme Court held that a malpractice claim did not accrue while the client was defending litigation testing the legality of counsel's advice because, if the client ultimately prevailed, "he would not normally be in a position to claim that negligent advice...was the cause of his expense of defense." *Id.* at 668-69. The court further explained that requiring earlier accrual would force a litigant to defend one action by asserting that he acted lawfully while simultaneously prosecuting a malpractice claim alleging that he acted unlawfully because of counsel' advice. *Id.* at 669-70 ("Plaintiff[]...could have played it safe by filing an action against defendants immediately upon being sued...[h]owever, it does not seem wise to encourage the filing of such provisional actions. More important, it could prove to be disastrous to a

plaintiff's defense of the action brought against him and, thus, perhaps disastrous to his former legal advisor as well."). The same conflict existed here. Until the enforceability issue was resolved on summary judgment, and ultimately reviewed by this Court, the Clients continued to maintain that their Attorney's advice was legally correct and that the pledge restriction violated public policy.

Courts in other jurisdictions have similarly concluded that where the viability of a malpractice claim depends on the outcome of underlying litigation, accrual is delayed until that issue is resolved on the merits. *See, e.g., Jaquith*, 297 Or. at 788 (**Oregon**); *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 156-57 (Tex. 1991); *Apex Towing Co. v. Tolin*, 41 S.W.3d 118, 119-21 (Tex. 2001) (**Texas**); *Suburban Real Estate Servs., Inc.*, 193 N.E.3d at 1192 (**Illinois**); *eUnify Inc. v. Anthony M. Serra CPA Inc.*, 642 F.Supp. 3d 971, 980 (2022) (**Arizona**); *Perez-Abreu, Zamora & De La Fe, P.A. v. Taracido*, 790 So.2d 1051, 1054 (2001) (**Florida**).

This case presents an ideal vehicle for this Court to clarify the distinction between "known error" malpractice claims and "outcome-determinative" claims where the existence of malpractice itself depends on the

resolution of underlying litigation. Because the issue is one of first impression, has substantial implications for the bench and bar, and presents acknowledged practical and jurisprudential difficulties under existing accrual doctrine, direct appellate review is warranted.

6. **Statement of Reasons Why Direct Appellate Review is Appropriate**

This case warrants direct appellate review because it presents a narrow but significant unresolved question concerning the accrual of legal malpractice claims that has a substantial implication for litigants, attorneys, and courts throughout the Commonwealth. Specifically, this case presents the unresolved question of whether a client can sustain appreciable harm, or have notice of a causal connection between alleged malpractice and that harm, before underlying litigation has resolved the very legal issue necessary to determine whether counsel's advice constituted malpractice in the first instance.

The issue presented here exposes a substantial tension in existing Massachusetts accrual jurisprudence. Existing appellate authority provides limited guidance concerning where the latter category begins and the former ends, particularly where, as here, the existence

of the alleged malpractice depends entirely on a genuinely unsettled question of law being actively litigated in the underlying proceedings.

This uncertainty creates substantial practical consequences for the bench and bar. Under the rule adopted by the Superior Court, a litigant defending the legality of their counsel's advice in ongoing litigation is required to commence a "protective" malpractice action against that same counsel before any court has determined whether the advice was wrong. As the lower court itself recognized, that rule places litigants "between a rock and a hard place" by forcing them to either risk forfeiture of malpractice claims or to undermine their own position in the underlying litigation through premature malpractice allegations. ADD 192.

This case presents as especially appropriate vehicle for review because the dispositive legal issue remained actively contested for years and generated conflicting interlocutory rulings, emergency motions, multiple single-justice proceedings, and ultimately *sua sponte* review by this Court accompanied by solicitation of amicus briefs on the very issue upon which the Appellees-Attorney's advice, and thus the alleged

malpractice, was predicated. Indeed, this Court identified the enforceability issue as the "primary issue presented" in the underlying appeal. *Nicosia v. Burn, LLC*, 496 Mass. at 793. The procedural history of the underlying litigation therefore provides a uniquely clear factual context in which to address the accrual issue presented here. Massachusetts law has not yet addressed this issue directly or provided clear guidance concerning the treatment of "outcome-determinative" malpractice claims involving unsettled legal questions.

This Court has repeatedly exercised direct appellate review to clarify unsettled or inconsistently applied legal doctrine and to provide guidance to the bench and bar in areas of recurring importance. See *In Re Green*, 475 Mass. at 627; *Adjartey v. Central Div. of Housing Ct. Dept.*, 481 Mass. 830, 831 (2019) (granting direct appellate review to "clarify several important issues raised by the facts in this case"); *Columbia Plaza Assoc. v. Northeastern Univ.*, 493 Mass. 570, 576 (2024) citing *Bristol Asphalt Co. v. Rochester Bituminous Prods., Inc.*, 493 Mass. 539 (2024) (discussing SJC's further appellate review which "simplified and clarified the existing framework"); *Com. v. Denehy*, 466 Mass. 723,

724 (2014) (granting direct appellate review to "clarify ambiguities").

This case presents precisely that circumstance. Because the issue is one of first impression, has broad implications for malpractice and accrual doctrine throughout the Commonwealth, and presents acknowledged practical and jurisprudential difficulties under existing law, direct appellate review is warranted pursuant to G.L. c. 211A, § 10 and Mass. R. App. P. 11.

Respectfully submitted,

APPELLANTS,

BRIAN LESSER and BURN, LLC,
By their counsel,

/s/ Jeffrey P. Allen

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ADDENDUM

Certified Suffolk County Superior Court Docket	ADD. 001
Complaint in Superior Court Case	ADD. 005
Defendants, Kristen L. Scanlon and Scanlon Law, LLP's Motion to Dismiss Complaint and Demand for Jury Trial	ADD. 015
Defendants, Kristen L. Scanlon and Scanlon Law, LLP's Memorandum of Law in Support of Their Motion to Dismiss Complaint and Demand for Jury Trial with Exhibits	ADD. 018
Exhibit 1 Verified Complaint for Injunctive Relief and for Other Relief, and Jury Demand Suffolk Superior, Dkt. 2084CV00218	ADD. 039
Exhibit 2 Suffolk Superior Docket (partial), Dkt. 2084CV00218	ADD. 050
Exhibit 3 Defendants' Memorandum Of Law in Opposition to "Plaintiffs' Motion for Preliminary Injunction," Suffolk Superior, Dkt. 2084CV00218	ADD. 060
Exhibit 4 Order on Plaintiffs' Motion to Sell the Disputed Liquor License and Place the Sale Proceeds in Escrow During the Pendency of this Case, Suffolk Superior, Dkt. 2084CV00218	ADD. 074
Plaintiffs' Opposition to Defendants' Motion to Dismiss with Exhibits	ADD. 076
Exhibit A Memorandum and Order on Motions for Summary Judgment Suffolk Superior, Dkt. 2084CV00218	ADD. 095

Exhibit B Suffolk Superior Docket, Dkt. 2084CV00218	ADD. 111
Exhibit C Memorandum of Decision on Plaintiffs' Request for Attorney's Fees and Costs	ADD. 132
Exhibit D Supreme Judicial Court Docket, Dkt. SJC-13755	ADD. 138
Defendants, Kristen L. Scanlon and Scanlon Law, LLP's, Reply to the Plaintiff's Opposition to the Motion to Dismiss	ADD. 141
Memorandum of Decision and Order on Defendants' Motion to Dismiss Complaint dated February 24, 2026	ADD. 147
Judgment on Motion to Dismiss entered February 25, 2026	ADD. 164
Hearing Transcript of Oral Argument on Defendants' Motion to Dismiss, February 17, 2026, Suffolk Superior Court-Boston, Courtroom 313	ADD. 165
Notice of Appeal dated March 4, 2026	ADD. 215

2584CV01657 Lesser, Brian J et al vs. Scanlon, Kristen et al

- Case Type:
- Torts
- Case Status:
- Open
- File Date
- 06/13/2025
- DCM Track:
- A - Average
- Initiating Action:
- Malpractice - Other
- Status Date:
- 06/13/2025
- Case Judge:
-
- Next Event:
-

[All Information](#) | [Party](#) | [Event](#) | [Tickler](#) | [Docket](#) | [Disposition](#)

Party Information

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- Plaintiff

Alias

Party Attorney

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[More Party Information](#)

Burn, LLC
- Plaintiff

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[More Party Information](#)

Scanlon, Kristen
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ADD 001

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[More Party Information](#)

Events















<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
02/17/2026 02:00 PM	Civil C	BOS-3rd FL, CR 313 (SC)	Rule 12 Hearing	Gordon, Hon. Robert B	Held - Under advisement

Ticklers






<u>Tickler</u>	<u>Start Date</u>	<u>Due Date</u>	<u>Days Due</u>	<u>Completed Date</u>
Service	06/16/2025	09/15/2025	91	
Answer	06/16/2025	10/14/2025	120	
Rule 12/19/20 Served By	06/16/2025	10/14/2025	120	03/02/2026
Rule 12/19/20 Filed By	06/16/2025	11/13/2025	150	03/02/2026
Rule 12/19/20 Heard By	06/16/2025	12/15/2025	182	03/02/2026
Rule 15 Served By	06/16/2025	08/10/2026	420	03/02/2026
Rule 15 Filed By	06/16/2025	09/09/2026	450	03/02/2026
Rule 15 Heard By	06/16/2025	09/09/2026	450	03/02/2026

ADD 002

<u>Tickler</u>	<u>Start Date</u>	<u>Due Date</u>	<u>Days Due</u>	<u>Completed Date</u>
Discovery	06/16/2025	06/07/2027	721	03/02/2026
Rule 56 Served By	06/16/2025	07/06/2027	750	03/02/2026
Rule 56 Filed By	06/16/2025	08/05/2027	780	03/02/2026
Final Pre-Trial Conference	06/16/2025	12/03/2027	900	03/02/2026
Judgment	06/16/2025	06/15/2028	1095	03/02/2026
Under Advisement	02/17/2026	03/19/2026	30	

Docket Information				
<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>	
06/13/2025	Civil action cover sheet filed.	1		
06/13/2025	Complaint electronically filed.	2		Image
06/16/2025	Case assigned to: DCM Track A - Average was added on 06/16/2025			Image
08/25/2025	Attorney appearance electronically filed.			
08/25/2025	Attorney appearance electronically filed.			Image
09/03/2025	Service Returned for Scanlon Law, LLP Defendant Service accepted by counsel 08/12/2025 Applies To: Scanlon Law, LLP (Defendant)	3		Image Image
09/12/2025	Defendant Kristen Scanlon, Scanlon Law, LLP's Notice of Motion to Dismiss	4		Image
10/16/2025	Defendants Kristen Scanlon, Scanlon Law, LLP's Motion to Dismiss Complaint and Demand for Jury Trial	5		Image
10/16/2025	Kristen Scanlon, Scanlon Law, LLP's Memorandum in support of Motion to Dismiss Complaint and Demand for Jury Trial	6		Image
10/16/2025	Opposition to Motion to Dismiss filed by Brian J Lesser, Burn, LLC	7		Image
10/16/2025	Reply/Sur-reply Reply to Plaintiff's Opposition to Motion to Dismiss	8		Image Image
10/16/2025	Affidavit of Compliance with Rule 9A	9		
10/16/2025	Defendants Kristen Scanlon, Scanlon Law, LLP's Submission of Rule 9C Certification Concerning Motion to Dismiss Plaintiff's Complaint	10		Image
10/16/2025	Defendants Kristen Scanlon, Scanlon Law, LLP's Submission of Rule 9A Notice of Filing and List of Documents Filed	11		Image Image
02/17/2026	Matter taken under advisement: Rule 12 Hearing scheduled on: 02/17/2026 02:00 PM Has been: Held - Under advisement Hon. Robert B Gordon, Presiding Staff: Michael O'Loughlin, Assistant Clerk Magistrate			
03/02/2026	MEMORANDUM & ORDER: OF DECISION ON DEFENDANTS' MOTION TO DISMISS: CONCLUSION AND ORDER - The claims set forth in Plaintiffs' Complaint are time-barred by the controlling statute of limitations, G.L. c.260, Sec. 4. For this reason, the Defendants' Motion to Dismiss shall be, and hereby is, ALLOWED. SO ORDERED. Dated: February 24, 2026 (See P#11.1 for complete decision) Judge: Gordon, Hon. Robert B Notice sent 3/5/26	11.1		Image
03/02/2026	JUDGMENT on Defendants, Kristen Scanlon, Scanlon Law, LLP 12(b) motion to dismiss against Plaintiff(s) Brian J Lesser. It is ORDERED and ADJUDGED:	12		Image

ADD 003

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	<p>For the reasons stated in the Courts' Memorandum of Decision and Order on Defendants' Motion to Dismiss Complaint, dated February 24, 2026, judgment shall, and hereby does, enter in favor of the Defendants.</p> <p>entered on docket pursuant to Mass R Civ P 58(a) and notice sent to parties pursuant to Mass R Civ P 77(d)</p>		
03/05/2026	<p>Notice of appeal filed.</p> <p>Notice sent 3/6/26</p> <p>Applies To: Lesser, Brian J (Plaintiff); Burn, LLC (Plaintiff)</p>	13	 Image
04/22/2026	Transcript of 2/17/26 received from transcriber Ben Gold (via email)		
05/13/2026	Appeal: Statement of the Case on Appeal (Cover Sheet).		 Image
05/13/2026	Notice of assembly of record sent to Counsel		 Image
05/13/2026	Notice to Clerk of the Appeals Court of Assembly of Record		 Image
05/18/2026	<p>Notice of Entry of appeal received from the Appeals Court</p> <p>In accordance with Massachusetts Rule of Appellate Procedure 10(a)(3), please note that the above-referenced case (2026-P-0674) was entered in this Court on May 14, 2026.</p>	14	 Image

Case Disposition

<u>Disposition</u>	<u>Date</u>	<u>Case Judge</u>
Judgment after Finding on Motion	03/02/2026	

ER

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
DEPARTMENT OF THE TRIAL COURT
C.A. No.

BRIAN J. LESSER and BURN, LLC

Plaintiffs,

v.

KRISTEN L. SCANLON and SCANLON
LAW, LLP

Defendants.

COMPLAINT AND DEMAND FOR JURY TRIAL

I. PARTIES

1. Plaintiff Brian J. Lesser is an individual residing at 21 Sanderson Lane, Weston, Massachusetts 02493.
2. Plaintiff Burn, LLC is a domestic limited liability company with a principal place of business located at 782 Tremont Street, Boston, Massachusetts 02118.
3. Defendant Kristen L. Scanlon is an attorney in the Commonwealth of Massachusetts (BBO #677078) and manager of Scanlon Law, LLP with a principal place of business located at 112 Water Street, Suite 201, Boston, Massachusetts 02109.

II. JURISDICTION AND VENUE

4. This Court has jurisdiction over this matter pursuant to M.G.L. c. 212, § 3 because damages exceed \$50,000.00.
5. Venue is proper pursuant to M.G.L. c. 223, § 1 because Plaintiff Burn, LLC and Defendant Scanlon Law, LLP have a principal place of business in Boston, Massachusetts.

ADD 005

III. FACTS

a. Parties

6. Plaintiff Brian J. Lesser (“Plaintiff Lesser”) is an entrepreneur, investor, and owner of several restaurants in the greater Boston area.

7. Plaintiff Lesser is the Manager of Plaintiff Burn, LLC (“Burn, LLC”).

8. On May 30, 1996, Burn, Inc. was organized as a domestic profit corporation in Massachusetts with Andrew W. Husbands as its President.

b. The Lease

9. On or about August 2, 1996, a commercial landlord, N&M Trust VII, entered into a commercial lease with Burn, Inc. (the “Lease”) for Burn, Inc.’s lease of the entire ground floor and first floor (the “Premises”) of the building located at 647 Tremont Street, Boston, MA (the “Property”). The Lease permitted Burn, Inc. to use the Premises to operate a restaurant and bar.

10. The Lease was personally guaranteed by Christopher J. Hart and Andrew W. Husbands.

11. At the time of the execution of the Lease, N&M Trust VII owned and its Property held an all alcohol beverages Liquor License LB 99213 (the “Liquor License”) for the restaurant that was previously operated at the Premises.

12. The Lease’s Article 11.24, entitled “Liquor License”, required that:

“[Burn, Inc.] agree[d] to use best efforts at its sole cost and expense to cause Tenant in the name of Burn, Inc. to be (i) a sublicensee of the Liquor License for the Premises so that [Burn, Inc.] will be permitted to serve all legal alcoholic beverages on the Premises seven days a week, or (ii) a license under MGL ch. 138 by reason of an assignment of a license held by Landlord or by an affiliate of Landlord to Tenant for the Term of the Lease with an automatic reversion to Landlord or Landlord’s affiliate, as

appropriate, upon expiration or earlier termination of the Term, so that Tenant will be permitted to serve all legal alcoholic beverages on the Premises seven days a week.”

13. In accordance with the Lease, and with the approval of the Alcoholic Beverages Control Commission, Burn, Inc. did become a sublicensee of the Liquor License and proceeded to operate a restaurant serving alcohol at the Premises.

14. The Lease’s Article 11.24, entitled “Liquor License”, also required that:

“[Burn, Inc.] understands and agrees that the sublicense or license [sic] benefitting the Premises may not be transferred to any location other than the Building, nor may [Burn, Inc.] pledge, assign, sell or transfer the Liquor License to any person, mortgage or entity other than Landlord or a transferee approved in advance in writing by Landlord....

[Burn, Inc.] agrees not to sell, transfer or pledge the Liquor License to any third party or mortgagee and not to transfer, move or attempt to transfer or move the Liquor License to any other location. In addition, as Landlord has transferred its Liquor License to [Burn, Inc.] for one dollar and other good and valuable consideration, [Burn, Inc.] hereby agrees for one dollar to sell the Liquor License to Landlord upon expiration or earlier termination of the Term, to execute all documents and attend all hearings necessary to effectuate such sale and to cooperate with Landlord in the transfer of said Liquor License to Landlord or Landlord’s designee.

15. The Lease’s Article 11.24 was also known and referred to as a “Negative Pledge Agreement.”

16. The Lease’s Article 8.1(c), entitled “Events of Default”, stated that Burn, Inc. would be in default of the Lease if Burn, Inc. transferred, pledged or assigned any interest in N&M Trust VII’s assets and/or the Liquor License.

17. However, at all relevant times, Plaintiffs believed the Negative Pledge Agreement was unenforceable as a matter of law, as Attorney Scanlon, a self-purported expert in the area, advised Plaintiffs it was against public policy.

18. From approximately 1996 through 2018, Burn, Inc. operated a restaurant, named “Tremont 647”, and N&M Trust VII and Burn, Inc. executed several amendments to the Lease to extend the term of the Lease.

19. Despite the various Lease amendments, the Lease’s original provisions regarding the Liquor License and the Negative Pledge Agreement remained unchanged.

c. Representation by Kristen L. Scanlon, Esq.

20. Defendant Kristen L. Scanlon, Esq. (“Defendant Scanlon”) has been an attorney licensed to practice law in the Commonwealth of Massachusetts since December 4, 2009, and has been licensed to practice law at all relevant times.

21. At present, Defendant Scanlon is a solo practitioner at Scanlon Law, LLP and primarily concentrates her practice in licensing, permitting, and business consulting for the hospitality industry.

22. Defendant Scanlon has provided legal representation to Plaintiff Lesser and entities with which he has been involved for approximately 10 years.

23. To perfect its security interest in the Liquor License, Burn, LLC petitioned the Boston Licensing Board and the Alcohol Beverage Control Commission (“the ABCC”) to approve the Licensing Pledge Agreement.

24. On or about September 4, 2019, the Boston Licensing Board and the ABCC approved Burn, LLC’s petition.

25. Defendant Scanlon prepared the necessary legal documents and made the necessary filings with the Boston Licensing Board and the ABCC to effectuate the approval.

26. In doing so, Defendant Scanlon falsely represented to the Boston Licensing Board and the ABCC that the pledge of the license would not violate or constitute default under the terms of any agreement.

27. Defendant Scanlon reviewed all the Lease provisions prior to petitioning for approval of the License Pledge Agreement.

28. Defendant Scanlon advised and counseled Plaintiff Lesser and Burn, LLC during the petition process and Plaintiffs relied on Defendant Scanlon's legal advice.

29. Prior to filing the petition, Defendant Scanlon asked Plaintiff Lesser to sign an attestation, submitted as part of the Licensing Pledge Agreement, affirming that the pledge of the Liquor License would not violate any other agreements.

30. Defendant Scanlon failed to provide Plaintiff Lesser with the complete set of documents included in the submission, including the Lease containing Article 11.24.

31. By withholding these operative documents, Defendant Scanlon deprived Plaintiff Lesser of the opportunity to make an informed assessment of the representations he was being asked to affirm.

32. Unbeknownst to Plaintiffs, the petition to approve the pledge of the Liquor License violated the terms of the Lease.

d. Sale of the Liquor License and Subsequent Litigation

33. At the relevant time, Burn, LLC, formerly known as Burn, Inc., operated "Whaling in Oklahoma," a New England-Japanese fusion restaurant, from the leased premises.

34. In or around January 2020, the restaurant Whaling in Oklahoma began declining.

35. Based on Defendants' advice and counsel regarding the enforceability of the Negative Pledge Agreement and the ownership of the Liquor License, Plaintiffs agreed to assign the Lease and Liquor License to a new operator to open a new restaurant.

36. Specifically, Attorney Scanlon advised Plaintiffs that the Negative Pledge Agreement was unenforceable as a matter of law, as it was against public policy, and that therefore Burn, LLC was free to transfer the Liquor License to a new tenant rather than back to the Landlord, as set forth in the Article 11.24 of the Lease.

37. On January 8, 2020, Nicosia, through counsel, sent Burn, Inc., a Notice of Default of Lease, asserting that the assignment of the Liquor License violated Article 11.24 of the Lease, which was an event of default. The Notice advised that the Lease was terminated, and demanded that Burn, LLC transfer the Liquor License to the Landlord for one dollar as set forth in the Lease.

38. On January 24, 2020, NIC Limited Partnership and Mario Nicosia individually and as trustee of N&M Trust VII filed a lawsuit against Plaintiff Lesser, Burn, LLC, BL Note Holding Tremont Street, LLC and others in Suffolk Superior Court captioned *Mario Nicosia Individually & Trustee of the N&M Trust VII et al. vs. Burn LLC et al.*, No. 2084CV00218 (the "Nicosia Lawsuit").

39. In the Nicosia Lawsuit, Mario Nicosia and NIC Limited Partnership asserted claims against Plaintiff Lesser and Burn, LLC seeking to enforce the Lease and have the Liquor License returned to them.

40. Mario Nicosia and NIC Limited Partnership alleged that Plaintiff Lesser and Burn, LLC breached the Lease by pledging the Liquor License as security for the

Promissory Note which constituted an “Event of Default” under Article 8.1(c) of the Lease.

41. Mario Nicosia and NIC Limited Partnership also asserted claims of misrepresentation, conversion, and a violation of M.G.L c. 93A § 11.

42. On April 28, 2023, in an Order for Summary Judgement, the Court ruled that defendants in the Nicosia Lawsuit breached the Lease by pledging the Liquor License, ordered the immediate transfer of the Liquor License back to the landlord, and declared Article 11.24 of the Lease as enforceable.

43. In or around January of 2024, the Court entered judgement against Plaintiff Lesser, Burn, LLC, and BL Note Holding Tremont Street, LLC for the claims of misrepresentation, conversion, and violation of M.G.L c. 93A § 11.

44. On or about June 11, 2024, the Court ordered a judgement total of \$2,096,566.03, including attorneys fees, to be paid by Plaintiff Lesser, Burn, LLC, and BL Note Holding Tremont Street, LLC.

IV. CLAIMS

COUNT I **(Negligence – All Defendants)**

45. Plaintiffs repeat and realleges paragraphs 1 – 62 of this Complaint and incorporates them by reference as if fully set forth herein.

46. Defendants owed Plaintiffs a duty of care in providing legal representation and counsel having the skill and knowledge of the average attorney licensed to practice in the Commonwealth of Massachusetts.

47. Defendants breached their duty through the aforementioned acts.

48. As a result of the Defendants negligence, Plaintiffs have suffered and will continue to suffer direct and consequential damages including, but not limited to, those listed above.

COUNT II
(Breach of Contract – All Defendants)

49. Plaintiffs repeat and reallege the foregoing paragraphs of this Complaint and incorporate them by reference as if fully set forth herein.

50. At all times relevant hereto, Defendant Scanlon held herself out to Plaintiffs to be a lawyer skilled in licensing, permitting, and business consulting for the hospitality industry.

51. In consideration of compensation paid by and on behalf of Plaintiffs, including the payment of legal fees, Defendants agreed to provide Plaintiffs with competent legal representation and counsel in order to protect Plaintiffs from foreseeable legal risks.

52. This agreement constituted a binding contract between Plaintiffs and Defendants.

53. Defendants breached this contract through the aforementioned acts.

54. As a result of the breach of contract, Plaintiffs have suffered and will continue to suffer direct and consequential damages including, but not limited to, those listed above.

COUNT III
(Breach of Fiduciary Duty – All Defendants)

55. Plaintiffs repeat and reallege the foregoing paragraphs of this Complaint and incorporate them by reference as if fully set forth herein.

56. A fiduciary relationship existed between Plaintiffs and Defendants as a result of their attorney-client relationship

57. Defendants breached their fiduciary duty through the aforementioned acts.

58. As a result of the breach of fiduciary duty, Plaintiffs have suffered and will continue to suffer direct and consequential damages including, but not limited to, those listed above.

COUNT IV
(Negligent Misrepresentation – All Defendants)

59. Plaintiffs repeat and reallege the foregoing paragraphs of this Complaint and incorporate them by reference as if fully set forth herein.

60. Defendants in the course of their business provided false information for the guidance of Plaintiffs in the course of their business transactions.

61. The false information resulted in pecuniary loss to Plaintiffs by their justifiable reliance on the information.

62. Defendants failed to exercise reasonable care or competence in obtaining and communicating the information.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Enter judgment for Plaintiffs on each count of this Complaint awarding damages against the Defendant plus interest, and costs;
2. Award Plaintiffs its attorneys' fees; and
3. Grant such other further relief as the Court may deem just and proper.

JURY DEMAND

Plaintiffs demand a trial by jury on all issues so triable.

Dated: June 13, 2025

Respectfully submitted,
BRIAN LESSER AND BURN LLC
By their counsel,



Jeffrey P. Allen BBO #015500

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPT.

BRIAN J. LESSER and BURN, LLC ,

Plaintiffs,

KRISTEN L. SCANLON and SCANLON
LAW, LLP,

Defendant.

Case No.: 2584CV01657 ^C

**DEFENDANTS, KRISTEN L. SCANLON AND SCANLON LAW, LLP'S, MOTION TO
DISMISS COMPLAINT AND DEMAND FOR JURY TRIAL**

NOW COMES the Defendants, Kristen L. Scanlon (“Attorney Scanlon”) and Scanlon Law, LLC (“SLL”)¹ (collectively, the “Defendants”), and hereby move to dismiss the Plaintiffs, Brian J. Lesser (“Mr. Lesser”) and Burn, LLC’s (“BL”) (collectively, the “Plaintiffs”), Complaint and Demand for Jury Trial (the “Complaint”), in its entirety, pursuant to Mass. R. Civ. P. 12(b)(6). In support of this Motion, the Defendants state that the Plaintiffs have failed to state a claim upon which relief may be granted. Additionally, the Defendants rely upon their accompanying Memorandum of Law in Support of the Motion to Dismiss attached hereto.

WHEREFORE, the Defendants respectfully request that this Honorable Court:

1. DISMISS the Complaint in its entirety with prejudice;
2. AWARD the Defendants costs and fees pursuant to G.L. c. 231, § 6F because the Complaint is wholly insubstantial, frivolous, and not advanced in good faith; or

¹ The Complaint incorrectly refers to Scanlon Law, LLC as Scanlon Law, LLP. The entity Scanlon Law, LLP does not exist.

3. GRANT whatever additional relief deemed necessary to the Court.

Respectfully submitted,
**KRISTEN L SCANLON and
SCANLON LAW, LLC,**
By their attorneys,

/s/ Gina L. Fleury

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CERTIFICATE OF SERVICE

I, Gina L. Fleury, hereby certify that on this 12th day of September, 2025, a copy of the foregoing was served via email, on the following:

Jeffrey P. Allen, Esq.
Jacqueline A. Schmedel, Esq.
Lawson and Weitzen, LLP
99 Black Falcon Avenue, Suite 345
Boston, MA 02210
jallen@lawson-weitzen.com
jschmedel@lawson-weitzen.com

/s/ Gina L. Fleury

Gina L. Fleury

CN

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPT.

BRIAN J. LESSER and BURN, LLC ,

Plaintiffs,

KRISTEN L. SCANLON and SCANLON
LAW, LLP,

Defendant.

Case No.: 2584CV01657 ^C

**DEFENDANTS, KRISTEN L. SCANLON AND SCANLON LAW, LLP'S,
MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS
COMPLAINT AND DEMAND FOR JURY TRIAL**

NOW COME the Defendants, Kristen L. Scanlon (“Attorney Scanlon”) and Scanlon Law, LLC (“SLL”)¹ (collectively, the “Defendants”), and hereby submit this Memorandum of Law in Support of their Motion to Dismiss the Plaintiffs, Brian J. Lesser (“Mr. Lesser”) and Burn, LLC’s (“BL”) (collectively, the “Plaintiffs”), Complaint and Demand for Jury Trial (the “Complaint”), in its entirety and with prejudice, pursuant to Mass. R. Civ. P. 12(b)(6).

In support of their Motion, the Defendants state that the Plaintiffs have failed to state a claim upon which relief may be granted because the Plaintiffs’ claims are barred by the three-year statute of limitations, which ran from the date that they knew or should have known that they were harmed by the Defendants’ alleged tortious conduct. Here, the Plaintiffs had actual knowledge of the claimed harm as early as January 8, 2020, but the Plaintiffs filed the Complaint **two and a half years after the expiration of the statute of limitations.**

¹ The Complaint incorrectly refers to Scanlon Law, LLC as Scanlon Law, LLP. The entity Scanlon Law, LLP does not exist.

I. BACKGROUND²

Mr. Lesser is a sophisticated businessman because, as the Complaint alleges, he “is an entrepreneur, investor, and owner of several restaurants in the greater Boston area.” *Complaint*, ¶ 6. Mr. Lesser is the manager of BL. *Complaint*, ¶ 7. The Complaint alleges that on or around August 2, 1996, M&M Trust VII entered into a commercial lease (the “lease”) with Burn, Inc.³ *Complaint*, ¶ 9. As part of the lease, Burn, Inc. allegedly became a so-called “sublicensee” of an all-alcoholic beverages Liquor License, Boston LB #99213 (the “liquor license”). *Complaint*, ¶¶ 11, 13. The lease contained a provision that prohibited the Plaintiffs from transferring, assigning, selling, or pledging the liquor license (the “Negative Pledge Agreement”) and stated that doing so would be an “Event of Default” of the lease. *Complaint*, ¶¶ 14-16. The Plaintiffs allege that they believed the Negative Pledge Agreement was unenforceable based on advice from Attorney Scanlon. *Complaint*, ¶ 17.

The Plaintiffs further allege that Attorney Scanlon had provided them legal representation for approximately 10 years. On September 4, 2019, the Defendants filed a petition to approve a Licensing Pledge (the “petition”) with the Boston Licensing Board (the “Board”) and the Alcohol Beverage Control Commission (the “ABCC”). *Complaint*, ¶¶ 22-24. Additionally, the Plaintiffs allege that in filing the petition, Attorney Scanlon “falsely represented to the . . . Board and the

² Allegations of the Complaint are to be taken as true in considering a motion to dismiss under Mass. R. Civ. P. 12(b)(6). *Curtis v. Herb Chambers I-95, Inc.*, 458 Mass. 674, 676 (2011). However, any recitation of and/or reference to the allegations made in the Plaintiffs’ Complaint or anything in this Motion shall not constitute or be treated as an admission to any allegation in the Complaint.

³ Burn, Inc. was converted to Burn, LLC on March 7, 2018. Although not specifically alleged in the Complaint, the Court may take judicial notice of such fact and consider same in evaluating the Motion to Dismiss. The Court may take judicial notice of facts of matters of public record. *Schaer*, 432 Mass. at 477. The information about BL’s conversion is a matter of public record as it is publicly available through a search of the Secretary of the Commonwealth’s business entity database.

ABCC that the pledge of the license would not violate or constitute default under the terms of any agreement.” *Complaint*, ¶ 26. The Plaintiffs also allege that Attorney Scanlon failed to provide a complete set of the documents that would be filed with the Board and ABCC, and in doing so, the Plaintiffs were unable to make an informed assessment of the representations therein. *Complaint*, ¶¶ 29-31. The Plaintiffs allege that, unbeknownst to them, the petition violated the terms of the lease. *Complaint*, ¶ 32. The Plaintiffs further claim they agreed to assign the lease and liquor license to another operator to open a new restaurant based on Attorney Scanlon’s advice that the Negative Pledge Agreement was unenforceable. *Complaint*, ¶¶ 35-36.

On January 8, 2020, Mario Nicosia (“Mr. Nicosia”) sent Mr. Lesser a Notice of Default of Lease (the “Notice of Default”). *Complaint*, ¶ 37. The Notice of Default stated that (1) the assignment of the liquor license violated the Negative Pledge Agreement; (2) the assignment was an Event of Default; (3) the lease was terminated; and (4) the Plaintiffs were to transfer the liquor license to the landlord for one dollar. *Complaint*, ¶ 37. Then, on January 24, 2020, NIC Limited Partnership and Mr. Nicosia, individually and as trustee of N&M Trust VII (collectively, the “landlord”) filed a complaint against the Plaintiffs, and others, in Suffolk Superior Court, C.A. No.: 2084CV00218 (the “underlying lawsuit”). *Complaint*, ¶ 38. In the underlying lawsuit, the landlords sought to enforce the lease and to have the liquor license returned as well as claimed that pledging the liquor license was an Event of Default. *Complaint*, ¶¶ 39-40. The landlord also alleged that the petition falsely represented to the Board and ABCC that it would not violate or constitute a default under the terms of any agreement. **Exhibit 1, ¶ 24.**⁴ On January 24, 2020, the

⁴ This Court may take judicial notice of the records in a related judicial proceeding, including docket entries and papers filed, when deciding a Motion to Dismiss. *Jarosz v. Palmer*, 436 Mass. 526, 530 (2002). Therefore, the Court may take judicial notice of any of the filings in the underlying lawsuit regardless of whether the Plaintiffs specifically include them in the Complaint. In fact, Massachusetts courts regularly consider court filings and docket entries in deciding a

landlords also filed a motion for preliminary injunction seeking to, *inter alia*, enjoin the Plaintiffs from further encumbering the liquor license. **Exhibit 2, dkt. entry 5.**

On February 3, 2020, Attorneys William A. Kelley, Jr., Mark D. Donovan, and Kevin M. Considine filed their appearances on behalf of the Plaintiffs in the underlying lawsuit. **Exhibit 2, p. 6.** Also on February 3, 2020, the Plaintiffs filed their opposition to the motion for preliminary injunction in which the Plaintiffs advanced the legal argument that the Negative Pledge Agreement is unenforceable as void as a matter of public policy. **Exhibit 3, p. 1.** Finally, on February 3, 2020, the Plaintiffs filed an answer to the complaint in which they asserted counterclaims. **Exhibit 2, dkt. entry 7.**

After a hearing on the motion for preliminary injunction in the underlying lawsuit, the trial court denied the motion on February 20, 2020. **Exhibit 2.** However, on March 20, 2020, a single justice of the Massachusetts Appeals Court issued the preliminary injunction to enjoin the Plaintiffs from pledging, assigning, selling, transferring, hypothecating, or otherwise encumbering the liquor license. **Exhibit 2, dkt. entry 12.** As grounds for its decision, the Single Justice stated,

None of the cases cited by the [Plaintiffs] stand inarguably for the position that an agreement to transfer a license . . . is unenforceable as a matter of public policy. . . . Thus, there is a reasonable likelihood that the [landlord] will succeed in enforcing the bargain they made with the [Plaintiffs].

Exhibit 2, dkt. entry 12.

On July 31, 2020, the landlord filed a motion to sell the liquor license and place the sale proceeds in escrow. **Exhibit 2, dkt. entry 14.** On September 20, 2020, the trial court allowed the motion to sell the liquor license as a result of the preliminary injunction. **Exhibit 4.** The trial court

motion to dismiss on statute of limitations grounds. *See, e.g., LaRace v. Wells Fargo Back, N.A.*, 92 Mass. App. Ct. 1126, at *1 (2018)(Rule 1:28); *O'Malley v. Burr*, No. 1784CV03497-BLS2, 2018 Mass. Super. LEXIS 44, at *4-*11 (Mass. Super. Ct. March 22, 2018); *Shulman v. Tosi*, No. NOCV2016-01268, 2017 Mass. Super. LEXIS 62, at *7-*8 (Mass. Super. Ct. June 1, 2017).

ordered that the Plaintiff execute any necessary documents and to cooperate to effectuate the transfer of the liquor license to the landlord to be sold. **Exhibit 4, p. 1-2.**

Thereafter, the Plaintiffs filed a petition seeking review by a single justice of the Massachusetts Appeals Court of a preliminary injunction order issued by the trial court, which was denied. **Exhibit 2, dkt. entry 19.** In denying the petition for review, the Single Justice stated, “The cases cited by the [Plaintiffs] do not support the conclusion that the lease provisions . . . are unenforceable.” **Exhibit 2, dkt. entry 19.** Further, the Single Justice found the trial court properly adopted the conclusion that the landlord established a likelihood of success on the merits of the underlying lawsuit. **Exhibit 2, dkt. entry 19.**

On April 28, 2023, the Court in the underlying lawsuit partially allowed the landlord’s motion for summary judgment finding that the Plaintiffs breached the lease by pledging the liquor license. *Complaint*, ¶ 42. In January of 2024, the Court in the underlying lawsuit entered judgement against the Plaintiffs for claims of misrepresentation, conversion, and violation of M.G.L. c. 93A. *Complaint*, ¶ 43. On June 11, 2024, the Court order a judgment total of \$2,096,566.03 against the Plaintiffs in favor of the landlord. *Complaint*, ¶ 44.

The Plaintiffs filed their Complaint on June 13, 2025, alleging the following causes of action against the Defendants: Count I – negligence; Count II – breach of contract; Count III – breach of fiduciary duty; and Count IV – negligent misrepresentation. *Complaint*, ¶¶ 45-62. In short, the Plaintiffs claim they sustained injuries as result of the Defendants’ faulty legal advice that the Negative Pledge Agreement was unenforceable and the false representation to the Board and ABCC that the petition did not violate any agreements. *Complaint*, ¶¶ 17, 26, 31, 35-36. The Defendants deny all allegations against them; however, even taking all allegations in the

Complaint as true, the Complaint fails to state a claim upon which relief may be granted, as it was filed beyond the expiration of the statute of limitations.

II. LEGAL STANDARD

To survive a motion to dismiss under Mass. R. Civ. P. 12(b)(6), a complaint must set forth “factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief.” *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (internal quotations omitted); *Greenleaf Arms Realty Trust, LLC v. New Boston Fund, Inc.*, 81 Mass. App. Ct. 282, 288 (2012) (“ultimate inquiry is whether the plaintiff has alleged facts that are adequately detailed so as to plausibly suggest an entitlement to relief.”). The basis of the plaintiff’s entitlement to relief must rest on “more than labels and conclusions.” *Iannacchino*, 451 Mass. at 636, quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While the factual allegations need not be overly detailed, they “must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact)” *Iannacchino*, 451 Mass. at 636, quoting *Bell Atl. Corp.*, 550 U.S. at 555.

In considering a motion to dismiss, the court does “not accept legal conclusions cast in the form of factual allegations.” *Schaer v. Brandeis Univ.*, 432 Mass. 474, 477 (2000). “The rule that we accept [plaintiff’s] well-pleaded factual averments and indulge every reasonable inference hospitable to [his] case does not entitle [plaintiff] to rest on subjective characterizations or conclusory descriptions of a general scenario which could be dominated by unpleaded facts.” *Id.*

III. ARGUMENTS

A. The Complaint Is Barred Due To The Expiration Of The Statute Of Limitations

Dismissal for failure to state a claim under Mass. R. Civ. P. 12(b)(6) is appropriate when “a complaint shows on its face that the statute of limitations has run prior to the date the action

was commenced.” *Babco Indus. Inc. v. New England Merchants Nat. Bank*, 6 Mass. App. Ct. 929, 929 (1978). For the reasons discussed below, the Complaint, on its face, shows that the Plaintiffs failed to file the Complaint before the expiration of the applicable statute of limitations. As a result, the Court must dismiss the Complaint in its entirety with prejudice.

1. M.G.L. c. 260, § 4 governs because the counts in the Complaint are sound in legal malpractice regardless of the labels.

“Actions of *contract or tort* for malpractice, error or mistake against attorneys . . . *shall* be commenced *only* within three years next after the cause of action accrues.” M.G.L. c. 260, § 4 (emphasis added). Here, M.G.L. c. 260, § 4 (“§ 4”) applies to all four the causes of action⁵ asserted by the Plaintiffs against the Defendants. *See Max-Planck-Gesellschaft Zur Foerderung Der Wissenschaften E.V. v. Wolf Greenfield & Sacks, PC*, 736 F. Supp. 353, 364 (D. Mass. 2010) (applying § 4 to breach of fiduciary claim); *see also Trustees of Boston Univ. v. Clough, Harbour & Assocs., LLP*, 495 Mass. 682, 685 (2025) (noting unambiguous language of statute of limitations show legislative intent). The Plaintiffs filed their Complaint on June 13, 2025; therefore, the causes of action must have accrued on or after June 13, 2022. The Plaintiffs’ Complaint is untimely because the causes of action accrued years before June 13, 2022.

The Plaintiffs may attempt to argue that the breach of contract claim is subject to a six-year statute of limitations based on M.G.L. c. 260, § 2; however, such an argument is meritless. The plain language of the statute makes clear that claims against an attorney for malpractice, error, or mistake, regardless if those claims are contract claims or tort claims, are subject to § 4. *See* M.G.L.

⁵ Even if claims of breach of fiduciary duty and negligent misrepresentation by an attorney are not subject to M.G.L. c. 260, § 4, which is denied, those claims are still subject to a three-year statute of limitations. *See* M.G.L. c. 260, § 2A; *see also Union Prods v. Warner 7 Stackpole, LLP*, No. 2003-02091, 2004 Mass. Super. LEXIS 639, at *6 (Mass. Super. Ct. Dec. 20, 2004) (“Claims for breach of fiduciary duty, legal malpractice, and misrepresentations are governed by a three-year statute of limitations.”).

c. 260, § 4; *RTR Techs., Inc. v. Helming*, 707 F.3d 84, 89 (1st Cir. 2013); *Alves v. Cohan*, 102 Mass. App. Ct. 1116, at *2 (2023) (Rule 23.0), *further appellate review denied* 492 Mass. 1102 (2023); *Light v. Roney*, No.: 95-141, 1995 Mass. Super. LEXIS 442, at *7-*8 (Mass. Super. Ct. Aug. 30, 1995) (“In other words, in the context of injuries arising from professional-client relationships, it is unimportant how the cause of action is labeled.”).

Even ignoring that the plain language of § 4 applies to actions of tort *and* contract, the gist of the Plaintiffs’ breach of contract claim subjects it to the three-year statute of limitations. A party may attempt to disguise a claim in a late-filed complaint as a claim with a longer statute of limitations to remedy an untimely filed complaint. *See, e.g., Klein v. Catalano*, 386 Mass. 701, 719-720 (1982); *Green v. Wyman-Gordon, Co.*, 422 Mass. 551, 558 (1996); *Alves*, 102 Mass. App. Ct. at *5-*6. To ensure that the correct statute of limitations is applied to claims, courts look to the gist of the action rather than the label because a “plaintiff may not . . . escape the consequences of a . . . statute of limitations on tort actions merely by [relabeling the claims].” *Alves*, 102 Mass. App. Ct. at *5, *citing Anthony’s Pier Four, Inc. v. Crandall Dry Dock Eng’rs Inc.*, 396 Mass. 818, 823 (1986).

Previously, the Massachusetts Supreme Judicial Court (“SJC”) held that the gist of an action for an attorney’s errors is breach of contract. *Hendrickson v. Sears*, 365 Mass. 83, 86 (1974). As reasoning for its decision, the SJC noted that the Legislature had made explicit provisions that apply the same statute of limitations equally to tort claims and contract claims, such as § 4, but the Legislature had not done so for actions against attorneys *at the time of that case*. *Id.* at 85. However, since the SJC decided *Hendrickson* in 1974, the Legislature, in 1981, amended § 4 to include attorneys as professionals that benefit from the three-year statute of limitations for actions both in tort and contract. M.G.L. c. 260, § 4 (amended 1981).

Since the Legislature amended § 4, Massachusetts courts have found that the gist of a breach of contract claim against an attorney for their alleged errors or mistakes was that of a legal malpractice claim subjecting the claims to the three-year statute of limitations under § 4. *See, e.g., Ballistreri v. Martin*, 96 Mass. App. Ct. 1116, at *3-*4 (2020) (Former Rule 1:28); *Alves*, 102 Mass. App. Ct. at *5-*6; *Stotsky-Hilman v. Dietrich*, 93 Mass. App. Ct. 1101, at *3-*4 (2018) (Former Rule 1:28). In *Stotsky-Hilman*, the court noted that § 4 explicitly barred the plaintiff's contract claims because "claims of professional malpractice, whether sounding in contract or tort, generally arise from a common nucleus of facts." *Stotsky-Hilman*, 93 Mass. App. Ct. at *3. The court further stated that even if § 4 did not explicitly bar the breach of contract claim, it would still reach the decision that the contract claim was untimely based on the gist of the action. *Id.* at *3-*4. It determined that the gist of the action was that of negligence because the allegations were essentially that the contract required the attorney to perform their services consistent with the applicable standard of care and that they failed to do so. *Id.* at *4-*5.

Here, the Plaintiffs' allegations for the breach of contract claim are that (1) Attorney Scanlon held herself out as a lawyer skilled in licensing, permitting, and business consulting for the hospitality industry; (2) the Defendants agreed to provide Plaintiffs with competent legal representation and counsel; and (3) the Defendants breached the contract by failing to do so. *Complaint*, ¶¶ 50-53. Rather than asserting any factual allegations that suggest breach of contract, the Plaintiffs are essentially alleging that the Defendants had a duty to exercise ordinary and reasonable skill usually exercised by one of that profession but failed to do so, which is the hallmark of a claim of professional negligence. *See Klein*, 386 Mass. at 718 (defining professional standard of care). Moreover, the claims arise from the same set of operative facts (i.e., the Defendants' advice concerning the Liquor License). As a result, § 4 governs all the claims in the

Complaint, including Count II for breach of contract.

2. The Plaintiffs knew or should have reasonably known that they allegedly suffered appreciable harm by the Defendants' conduct more than three years before the initiation of this action.

The statute of limitations for actions against attorneys under § 4 begins to run when the plaintiff knew or should have known that they have been harmed by the defendant's conduct. *Williams v. Ely*, 423 Mass. 467, 473 (1996). This rule "is not an endless protected time zone against the deadline of a statute of limitations." *Frankston v. Denniston*, 74 Mass. App. Ct. 366, 373 (2009). Commencement of the statute of limitations clock does not require that the plaintiff "knew the full extent of harm or loss or know precisely in what manner and what harmful after-effects flow from the alleged malpractice." *Frankston*, 74 Mass. App. Ct. at 374. Critically, the plaintiff is not required to know that their attorney's actions constituted negligence for the cause of action to accrue. *Lyons v. Nutt*, 436 Mass. 244, 249 (2002). Instead, "once a client or former client knows or reasonably should know that he . . . has sustained *appreciable harm* as a result of the lawyer's conduct, the statute of limitations starts to run." *Frankston*, 74 Mass. App. Ct. at 374 (emphasis in original), *citing Williams*, 423 Mass. at 473. "Appreciable harm is injury, loss or detriment that is capable of being measured or perceived." *Ballistreri v. Martin*, 96 Mass. App. Ct. 1116 at *2, *citing Kennedy v. Goffstein*, 62 Mass. App. Ct. 230, 233 (2004) (internal quotation omitted). Once a plaintiff has reasonable notice that a particular act may have caused harm, it creates a duty to inquire and starts the running of the statute of limitations. *Frankson*, 74 Mass. App. Ct. at 373.

All the claims in the Complaint are barred because the Plaintiffs did not file their Complaint three years after they knew of their alleged injuries.⁶ The Plaintiffs will likely argue they could not

⁶ All the claims in the Complaint are analyzed under the same framework to determine when the statute of limitations began to run as they are all actions of tort or contract of the malpractice, error, or mistake of an attorney. M.G.L. c. 260, § 4. However, even assuming that only the breach of

have been aware of harm stemming from the Defendants' alleged malpractice because they believed there was a legal basis to be successful on their defense that the Negative Pledge Agreement was unenforceable and did not know it was unsuccessful until the trial court entered partial summary judgment in April of 2023 or ordered a judgment of over \$2 million on June 11, 2024 in the underlying lawsuit. *Complaint*, ¶¶ 43-44. Importantly, "[t]hat a case is ongoing and not finally adjudicated through the trial or appellate stage **does not** mean that there is no duty of inquiry into the harm and its connection to the attorney's conduct and no accrual of a legal malpractice claim." *Frankston*, 74 Mass. App. Ct. at 375-376 (emphasis added); see *Massachusetts Elec. Co. v. Fletcher, Tilton & Whipple, P.C.*, 394 Mass. 265, 268 (1985). In fact, this Court has previously rejected an argument that a plaintiff did not become aware of their attorneys' malpractice because they continued to believe their defenses had legal merit and could succeed until an unfavorable summary judgment decision refuted that defense. *Haney v. Greenbaum*, No. 1684CV01633, 2018 Mass. Super. LEXIS 60, at *17 n.4 (Mass. Super. Ct. Apr. 9, 2018) (Ames, J.). The Court cited to multiple other instances that put the plaintiff on notice of the alleged malpractice that started the running of the statute of limitations. *Id.* at *14-*17.

Indeed, there are multiple distinct events that, undoubtably, put the Plaintiffs on actual notice of appreciable harm due to the Defendants' alleged tortious conduct sufficient to commence the accrual of the statute of limitations years before the partial summary judgment and ultimate

contract claim and negligence claim are subject to § 4, which is denied, the analysis remains the same as the statute of limitations for claims of an attorney's negligent misrepresentation and breach of fiduciary duty also begin to run when the plaintiff knew or should have reasonably known of the injury. *Murphy v. Smith*, 411 Mass. 133, 136 (1991) (negligent misrepresentations); *Max-Planck*, 364 (attorney's breach of fiduciary duty). And even applying the more stringent standard that a claim for breach of fiduciary duty accrues when the plaintiff has actual knowledge of the facts giving rise to the injury, the Plaintiffs *still* filed their Complaint late. See discussion *infra* § I(3).

verdict. This includes but is not limited to (1) when the landlord sent a Notice of Default to the Plaintiffs on January 8, 2020; (2) when the landlord filed the lawsuit and motion for preliminary injunction on January 24, 2020; (3) when the Plaintiffs began to incur legal expenses to ameliorate the harm allegedly caused by the Defendants no later than February 3, 2020; (4) when the Single Justice of the Appeals Court enjoined the Plaintiffs from encumbering the license on March 20, 2020; and (5) when the Single Justice denied the Plaintiffs' petition for review of the preliminary injunction order on October 29, 2020. All of these instances occurred more than three years before the Complaint was filed.

a. The statute of limitations began to accrue on January 8, 2020 when the Plaintiffs received a Notice of Default which put the Plaintiffs on notice of the Defendants' alleged tortious conduct that resulted in appreciable harm.

The Plaintiffs were placed on notice of the Defendants' alleged tortious conduct and resulting harm when they received the Notice of Default, thereby commencing the accrual of the statute of limitations. A plaintiff's receipt of a demand letter and/or notice of claim for issues arising out of an attorney's malpractice places the plaintiff on reasonable notice of the attorney's alleged tortious conduct and causes the statute of limitations to begin to run. *Murphy v. Smith*, 411 Mass. 133, 136 (1991); *Tallarico v. Tierney*, 92 Mass. App. Ct. 1102, at *3-*4 (2017).

According to the allegations in the Complaint, the landlord sent the Plaintiffs a Notice of Default on January 8, 2020, in response to the Plaintiffs' decision to assign the liquor license, which was a decision allegedly made based on the Defendants' advice that the so-called Negative Pledge Agreement was unenforceable. *Complaint*, ¶ 37. Through their own allegations in the Complaint, the Plaintiffs confirm that the Notice of Default informed the Plaintiffs that the assignment of the liquor license was allegedly a violation of the lease and resulted in the termination of the lease. *Complaint*, ¶ 37. The termination of the lease is undoubtably appreciable

harm to the Plaintiffs, and the Notice of Default sufficiently put the Plaintiffs on notice of the nexus between the reason for termination of the lease (i.e., assigning the liquor license) and the Defendants' advice (i.e., advising the Negative Pledge Agreement in the lease was unenforceable). *Complaint*, ¶ 35.

Because the Plaintiffs were placed on notice of the Defendants' alleged tortious conduct of improper advice about the liquor license and the appreciable harm resulting therefrom, the statute of limitations for the Plaintiffs' claims began to accrue on January 8, 2020. For the Complaint to have been timely, the Plaintiffs were required to file the Complaint on or before April 24, 2023.⁷ The Plaintiffs filed the Complaint on June 13, 2025 or 781 days late.

b. The Plaintiffs sustained appreciable harm as of January 24, 2020 when the complaint and motion for preliminary injunction were filed in the underlying lawsuit.

After the Plaintiffs were already on notice of the appreciable harm from the Defendants' alleged conduct, the Plaintiffs were put on further notice of the Defendants' alleged tortious conduct on January 24, 2020, when the plaintiffs in the underlying lawsuit filed a complaint and motion for preliminary injunction.

The initiation of an underlying lawsuit and the filing of a complaint that is based upon the negligence of an attorney constitute appreciable harm sufficient to commence the running of statute of limitations regardless of the ultimate result of the underlying lawsuit. *Mass. Elec. Co. v. Fletcher, Tilton & Whipple, P.C.*, 394 Mass. 265, 267-268 (1985) (concluding limitations period

⁷ This accounts for the SJC's order tolling the applicable statute of limitations due to the COVID-19 pandemic. THIRD UPDATED ORDER REGARDING COURT OPERATIONS BY THE COVID-19 PANDEMIC, Supreme Judicial Court, OE-144 (June 24, 2020) (the "SJC's COVID-19 Order"). Pursuant to the SJC's COVID-19 Order, when a claim accrued before March 17, 2020, and the statute of limitations would have expired after June 30, 2020, the statute of limitations was extended 106 days. *Shaw's Supermarkets, Inc. v. Melendez*, 488 Mass. 338, 341-345 (2021).

accrued “at least by the date [the underlying plaintiff] commenced its action”). Similarly, when a party in an underlying matter advances legal theories that are premised upon an attorney’s alleged legal errors or omissions, the advancement of those theories provides the client with adequate knowledge and sufficient notice of the purported malpractice harm. This triggers a duty to inquire and initiates the running of the statute of limitations. *Frankston*, 74 Mass. App. Ct. at 373 (finding asserting statute of limitations defense put underlying plaintiff on notice of attorney’s failure to timely file).

In their Complaint, the Plaintiffs allege that the landlord filed the underlying lawsuit on January 24, 2020, in which the landlord asserted, *inter alia*, that the Plaintiffs breached the lease by pledging the liquor license. *Complaint*, ¶¶ 35-36, 38-40. The landlord also alleged that the Plaintiffs falsely represented to the Board and ABCC that the petition did not violate any agreements. **Exhibit 1, ¶ 24**. At that time, the Plaintiffs had reasonable notice that the Defendants’ advice about the enforceability and representations to the Board and ABCC may have caused them harm. This notice created a duty to inquire into the alleged problems underlying the potential legal error and began the running of the statute of limitations.

Even assuming that the statute of limitations began to accrue when the landlords filed the underlying lawsuit and motion, rather than the earlier dates discussed above, the Plaintiffs were required to file their Complaint on or before **May 10, 2023** (including the additional time provided by the SJC’s COVID-19 Order). The Plaintiffs did not file their Complaint until June 13, 2025, thus filing it **765 days late**.

- c. **The Plaintiffs suffered appreciable harm when they incurred legal expenses to defend against the allegations in the underlying lawsuit as late as February 3, 2020.**

The Plaintiffs continued to be on notice of the Defendants’ alleged tortious conduct when

they began to incur legal fees to remedy the alleged errors by the Defendants. Incurring legal expenses due to the attorney's negligence constitutes appreciable harm that causes the statute of limitations to run. *Mass. Elec. Co.*, 394 Mass. at 268; *Frankston*, 74 Mass. App. Ct. at 376. Be it incurring legal costs to defend a lawsuit that ultimately settled (*Mass. Elec. Co.*, 394 Mass. at 268), to defend a significant motion (*Frankston*, 74 Mass. App. Ct. at 376), to "ameliorate the harm caused" by the attorney's error (*Pelletier v. Chouinard*, 27 Mass. App. Ct. 92, 95 (1989)), to retain new counsel despite ultimately winning at the appeal level (*Cantu v. Paul Cos.*, 401 Mass. 53, 57 (1987)), to retain an outside consultant to investigate after attorney gave faulty advice (*Fessenden Sch. v. Hub Int'l Ltd*, 99 Mass App. Ct. 1132 at *7-*8 (2021) (Rule 23.0)), or to respond to a demand letter (*Tallarico*, 92 Mass. App. Ct. at *3-*4), incurring legal costs puts a potential plaintiff on notice that they were harmed by an attorney's conduct.

Here, the Plaintiffs suffered appreciable harm when it hired counsel in the underlying lawsuit to defend against claims that allegedly arose from the Defendants' advice and began incurring legal costs and expenses. On February 3, 2020, counsel for the Plaintiffs in the underlying lawsuit filed their appearances, submitted an answer with counterclaims, and opposed the motion for preliminary injunction. **Exhibit 2; Exhibit 3.** Surely, the Plaintiffs incurred costs and expenses from their counsel in the underlying lawsuit before February 3, 2020 by way of strategizing an initial defense, drafting the answer to the complaint, determining applicable counterclaims, researching legal authority to oppose the motion for preliminary injunction, and writing the opposition to the motion for preliminary injunction. However, for the purposes of this Motion, the Defendants rely on the publicly available information about when the documents were filed in the underlying lawsuit to determine when the statute of limitations could have started run as it relates to legal expenses. Under these circumstances, the statute of limitations for legal malpractice claims

expired on May 20, 2023, yet, the Plaintiffs did not file their Complaint until 755 days later.

d. The Plaintiffs were on notice that they allegedly suffered appreciable harm on March 20, 2020 when the Single Justice of Massachusetts Appeals Court issued unfavorable decisions against them in the underlying lawsuit.

Finally, ignoring the three prior instances that commenced the running of the statute of limitations, the Plaintiffs were unequivocally put on notice of the Defendants' alleged tortious conduct and resulting appreciable harm once the Single Justice enjoined the Plaintiffs from encumbering the liquor license and questioned the Plaintiffs' defense that the Negative Pledge Agreement was unenforceable. A party was on actual notice of appreciable harm due to their attorney's actions when a court grants a preliminary injunction adverse to that party and refuses to credit that party's arguments in opposition of the preliminary injunction. *Haney*, 2018 Mass. Super. LEXIS 60, at *14-*17 (noting "the decision clearly indicated that [the underlying plaintiff] had a strong claim against [the underlying defendant] and therefore, whatever the outcome of the litigation, [the underlying plaintiff] would continue to suffer appreciable harm . . .").

Here, the Plaintiffs were aware that they suffered appreciable harm when the Single Justice enjoined them from further encumbering the liquor license, even though the Defendants told the Plaintiffs they could do so, as alleged in the Complaint. In fact, the Plaintiffs argued that they would suffer harm should the preliminary injunction be entered. Exhibit 3, p. 6-7. The Plaintiffs argued that the injunction would impose restrictions on the Plaintiffs to protect the value of the liquor license. **Exhibit 3, p. 6.** The Plaintiffs cannot now credibly argue that they were not on notice of the very appreciable harm they argued they *would* suffer *if* the preliminary injunction was granted once the preliminary injunction *was*, in fact, granted on March 20, 2020 and then when they were ordered to effectuate the sale of the liquor license.

Further, the Plaintiffs were aware that they would continue to suffer appreciable harm when

the Single Justice's decision (and subsequent decisions) clearly indicated that the landlords had strong claims against the Plaintiffs. The Single Justice did not credit the Plaintiffs' argument that the Negative Pledge Agreement is unenforceable and found that there was a likelihood that the landlord's claims against the Plaintiff would succeed on their merits in the underlying lawsuit. **Exhibit 2, dkt. entry 12.** This was bolstered by a second Single Justice's denial of the Plaintiffs' petition to review the trial court's entry of preliminary injunction and even further bolstered by the trial court's order requiring the Plaintiffs to effectuate the transfer of the liquor license that, allegedly based on the Defendants' advice, the Plaintiffs believed they were free to transfer. **Exhibit 2, dkt. entry 19; Exhibit 4.** Therefore, the Plaintiffs were aware that the landlord at least had strong claims against them regardless of the outcome, which put them on notice of appreciable harm.

Therefore, even ignoring the prior instances that put the Plaintiffs on actual notice of the appreciable harm suffered as a result of Defendants' alleged faulty legal advice, under these circumstances, the statute of limitations would have accrued on March 20, 2020 (i.e., the date of the Single Justice's order), and accounting for the SJC's COVID-19 Order, the Plaintiffs were required to file their Complaint on or before **July 4, 2023** to be timely. The Plaintiffs failed to do so and filed their Complaint **710 days later**.

3. The Plaintiffs had actual knowledge of the facts giving rise to a breach of fiduciary duty claim for years and still did not timely file their Complaint.

As outlined above, the breach of fiduciary claim should be analyzed in the same manner as the three other claims because § 4 equally applies to all four causes of action in the Complaint. *See supra* note 6. However, even if this Court is inclined to apply the more stringent actual knowledge standard employed in cases involving the accrual of the statute of limitations for a non-attorney breaches of fiduciary duty, the Plaintiffs still have failed to file their Complaint before the

expiration of the statute of limitations. *See Doe v. Harbor Sch., Inc.*, 446 Mass. 245, 248 (2006) (applying actual knowledge standard in breach of fiduciary duty against group home counselor). Similar to the standard for the running of the statute of limitations pursuant § 4, a plaintiff does not need to know that the actions constituted a breach of fiduciary duty but only needs to know that there are facts sufficient to make a causal link between the fiduciary's conduct and the alleged injury. *Id.* at 256. Here, there is no question that the Plaintiffs had actual knowledge of the facts giving rise to their alleged injuries thereby causing the statute of limitations to run.

The Plaintiffs in the Complaint concede that Mr. Lesser (the manager of BL) received the Notice of Default on January 8, 2020, thus putting Mr. Lesser and BL on actual notice of the Event of Default and termination of lease, which the Plaintiffs claim were the result of the Defendants' alleged breach of fiduciary duty. *Complaint*, ¶ 37. Then, the Plaintiffs were both made aware of the underlying lawsuit and the motion for preliminary injunction by virtue of being named parties to the underlying lawsuit, being served with the complaint and motion, appearing in the case, answering the complaint, and opposing the motion. **Exhibit 2, p. 5-6**. Likewise, the Plaintiff had actual knowledge of incurring legal fees to ameliorate the Defendants' alleged breach of fiduciary duty by virtue of those attorneys filing appearance and performing legal work on this case on behalf of both Plaintiffs. **Exhibit 2, p. 5-6**. Finally, the Plaintiffs had actual knowledge of the Single Justice's decision granted preliminary injunction on March 20, 2020 because the Single Justice issued its decision on the docket of the underlying lawsuit in which the Plaintiffs were named parties and the Plaintiffs later petitioned a second Single Justice to review the entry of preliminary injunction. **Exhibit 2, dkt. entry 12, 19**.

In sum, the Plaintiffs had actual knowledge of the facts giving rise to the purported above-listed injuries suffered as result of the Defendants' alleged breach of fiduciary duty. They had

actual knowledge as early as January 8, 2020 and as late as March 20, 2020. Still, the Plaintiffs did not file their Complaint within three years of any the distinct events that put them on actual notice. As a result, the Complaint is untimely and must be dismissed as a matter of law.

IV. CONCLUSION

Even when taking every allegation in the Complaint as true, the Plaintiffs' Complaint, on its face, demonstrates that the Plaintiffs have failed to file the Complaint before the expiration of the statute of limitations. The Plaintiffs had actual knowledge of the Defendants' alleged tortious conduct of providing faulty legal advice that the Negative Pledge Agreement was unenforceable and resultant appreciable harm as early as January 8, 2020, and if being generous to the Plaintiffs, no later than March 20, 2020. As a result, the Plaintiffs' Complaint was filed between 710 and 781 days after the expiration of the statute of limitations. For those reasons, the Defendants respectfully request that this Honorable Court dismiss the Complaint in its entirety with prejudice.

Respectfully submitted,

**KRISTEN L SCANLON and
SCANLON LAW, LLC,**
By their attorneys,

/s/ Gina L. Fleury

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Facsimile: 857.313.3951

CERTIFICATE OF SERVICE

I, Gina L. Fleury, hereby certify that on this 12th day of September, 2025, a copy of the foregoing was served via email, on the following:

Jeffrey P. Allen, Esq.
Jacqueline A. Schmedel, Esq.
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99 Black Falcon Avenue, Suite 345
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jallen@lawson-weitzen.com
jschmedel@lawson-weitzen.com

/s/ Gina L. Fleury

Gina L. Fleury

EXHIBIT 1

1

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUPERIOR COURT
CIVIL ACTION NO.

20-0218 E

MARIO NICOSIA, TRUSTEE OF THE N&M
TRUST VII, NIC LIMITED PARTNERSHIP and
MARIO NICOSIA, INDIVIDUALLY,

Plaintiffs,

v.

BURN LLC, BL NOTE HOLDING TREMONT
STREET LLC, TIMOTHY MASLOW, BRIAN
LESSER, and ANDREW HUSBANDS,

Defendants.

RECEIVED
CLERK OF SUPERIOR COURT
2020 JAN 21 10 2 37
SUFFOLK SUPERIOR COURT
1000 STATE STREET
SUFFOLK, MA 01901

**VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF
AND FOR OTHER RELIEF, AND JURY DEMAND**

INTRODUCTION

1. Defendants have, in violation of lease agreements, encumbered a valuable asset – specifically, an all alcohol beverages Liquor License LB 99213 (the “Liquor License”) – which asset was originally plaintiff Landlord’s and is now required to transferred back to plaintiff Landlord or its designee, unencumbered and free of all liens. Defendants have impaired plaintiffs’ valuable property and have failed and refused to respond to plaintiffs’ demands. The Liquor License, which has a fair market value of hundreds of thousands of dollars, is now at risk because of defendants’ wrongful actions.
2. Plaintiffs seek orders that defendants immediately transfer and convey the Liquor License back to plaintiff Landlord or its designee, that they pay plaintiffs any damages suffered, and that they pay plaintiffs’ attorneys fees pursuant to the parties’ agreements.

1

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUPERIOR COURT
CIVIL ACTION NO.

20-0218 E

MARIO NICOSIA, TRUSTEE OF THE N&M
TRUST VII, NIC LIMITED PARTNERSHIP and
MARIO NICOSIA, INDIVIDUALLY,

Plaintiffs,

v.

BURN LLC, BL NOTE HOLDING TREMONT
STREET LLC, TIMOTHY MASLOW, BRIAN
LESSER, and ANDREW HUSBANDS,

Defendants.

MASSACHUSETTS
SUPERIOR COURT
CLERK / MARIO NICOSIA
2025 JAN 24 / P 2 31

**VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF
AND FOR OTHER RELIEF, AND JURY DEMAND**

INTRODUCTION

1. Defendants have, in violation of lease agreements, encumbered a valuable asset – specifically, an all alcohol beverages Liquor License LB 99213 (the “Liquor License”) – which asset was originally plaintiff Landlord’s and is now required to transferred back to plaintiff Landlord or its designee, unencumbered and free of all liens. Defendants have impaired plaintiffs’ valuable property and have failed and refused to respond to plaintiffs’ demands. The Liquor License, which has a fair market value of hundreds of thousands of dollars, is now at risk because of defendants’ wrongful actions.
2. Plaintiffs seek orders that defendants immediately transfer and convey the Liquor License back to plaintiff Landlord or its designee, that they pay plaintiffs any damages suffered, and that they pay plaintiffs’ attorneys fees pursuant to the parties’ agreements.

THE PARTIES

3. Plaintiff Mario Nicosia is the Trustee of the N & M Trust VII (the "Trust"), which is a Massachusetts trust with an address at 530 Harrison Avenue, Boston, Massachusetts, and it is the Landlord pursuant to a Lease dated August 3, 1996 and thereafter extended for commercial premises located at 647 Tremont Street, Boston, Massachusetts (the "Lease").
4. Plaintiff NIC Limited Partnership ("NIC") is a Massachusetts limited partnership with an address at 530 Harrison Avenue, Boston, Massachusetts, and it is the sole beneficiary of the Trust. It is now the record property owner of the Premises.
5. Plaintiff Mario Nicosia ("Nicosia") is an individual who resides at 520 Harrison Avenue, Boston, Massachusetts, and he is the owners' representative pursuant to the Lease, and plaintiffs' decision maker for all matters concerning the Liquor License and the Lease.
6. Defendant Burn LLC is a Massachusetts limited liability company that was formed on or about March 7, 2018, and it is the successor Tenant to Burn, Inc. under the Lease. Burn LLC's address is 647 Tremont Street, Boston, Massachusetts.
7. Defendant BL Note Holding Tremont Street LLC is a Massachusetts limited liability company that was formed on or about November 4, 2019. It has a principal place of business at 236 Commercial Street, Suite 100, Boston, Massachusetts 02109.
8. Defendant Timothy Maslow is one of Burn, LLC's two Managers, and his address is listed with the Corporations Division of the Secretary of State as 647 Tremont Street, Boston, Massachusetts.

9. Defendant Brian Lesser is the other Manager of Burn, LLC, and his address is listed with the Corporations Division of the Secretary of State as 236 Commercial Street, Boston, Massachusetts.
10. Defendant Andrew Husbands is, according to the records of the Licensing Board of the City of Boston, the 51 percent Member of Burn, LLC, with an address last known to plaintiffs of 139 Williams Street, Jamaica Plain, Massachusetts. Husbands is identified in the Lease as “Tenant’s Representative”, and Husband also guaranteed all of Tenants’ obligations under the Lease.

STATEMENT OF THE FACTS

11. For many years Nicosia owned and operated the St. Cloud restaurant located on the ground floor of premises he beneficially owned at 647 Tremont Street, Boston, Massachusetts (“the Premises”).
12. Nicosia also beneficially owned the Liquor License, which was held in the name of N&M Trust VII and was specific to, and allowed the serving of alcohol only at the Premises.
13. In or about 1996, Nicosia closed his St. Cloud restaurant located at the Premises, and thereafter entered into the Lease, through the Trust, with Tenant Burn, Inc., now Burn, LLC.
14. Burn, Inc and Burn, LLC have at all times operated a restaurant at the premises, originally known as “Burn”, and in the last year and a half as “Whaling in Oklahoma”.
15. Pursuant to the Lease, Nicosia arranged to transfer the Liquor License to Burn, Inc., with certain clear restrictions on the transfer and with rights of reversion.
16. The specific, operative language of the Lease reads as follows:

Tenant agrees to use best efforts at its sole cost and expense to cause Tenant in the name of Burn, Inc. to be (i) a sublicensee of the Liquor License for the Premises so that Tenant will be permitted to serve all legal alcoholic beverages on the Premises seven days a week, or (ii) a license under MGL ch. 138 by reason of an assignment of a license held by Landlord or by an affiliate of Landlord to Tenant for the Term of the Lease with an automatic reversion to Landlord or Landlords' affiliate, as appropriate, upon expiration or earlier termination of the Term, so that Tenant will be permitted to serve all legal alcoholic beverages on the Premises seven days a week. Tenant understands and agrees the sublicense or license ("Liquor License") benefiting the Premises may not be transferred to any location other than the Building, nor may Tenant pledge, assign, sell or transfer the Liquor License to any person, mortgagee or entity other than Landlord or a transferee approved in advance in writing by Landlord....

Tenant agrees not to sell, transfer, or pledge the Liquor License to any third party or mortgagee and not to transfer, move or attempt to transfer or move the Liquor License to any other location. In addition, as Landlord has transferred its Liquor License to Tenant for one dollar and other good and valuable consideration, Tenant hereby agrees for one dollar to sell the Liquor License to Landlord upon expiration or earlier termination of the Term, to execute all documents and attend all hearings necessary to effectuate such sale and to cooperate with Landlord in the transfer of said Liquor License to Landlord or Landlord's designee.

See Lease, Exh. 1 hereto, at sec. 11.24.

17. The Lease also provides that "Events of Default" under the Lease include:

Tenant transfers, pledges, or assigns any interest in Landlord's Assets and/or the Liquor License.

See Lease, Exh. 1 hereto, at sec. 8.1c

18. In or around March 2018, Burn LLC became the Tenant under the Lease to operate the new restaurant "Whaling in Oklahoma", succeeding Burn, Inc. Husbands remained involved as majority member of the new company.

19. Not disclosed or known to plaintiffs, Burn, LLC thereafter purported, in clear violation of the Lease, to encumber the Liquor License by pledging it as security for financing for the new restaurant.
20. The "License Pledge Agreement", dated November 1, 2018, and attached hereto as Exh. 2, was made between Burn, LLC and defendant Brian Lesser, a Manager of Burn, LLC, and specifically provided that the Liquor License was pledged as security for "the prompt satisfaction of the Obligations", and granted to Lender Lesser "a lien thereon and security interest therein". See Exh. 2 at page 1, number 2(a). The License Pledge Agreement represented that Lesser loaned Burn, Inc. \$445,000, *id.* at page 1, paragraph "Background".
21. The License Pledge Agreement provided, Exh. 2 and page 2, c, that upon an "Event of Default" Lender Lesser may "forthwith realize upon the Pledged License at public or private sale...." *Id.*
22. Defendant Lesser, who signed the License Pledge Agreement for both Burn, LLC and himself as Lender, thereafter assigned the License Pledge Agreement to a limited liability company specifically organized, upon information, to hold it, BL Note Holding Tremont Street, LLC, and wholly owned and controlled, upon information and belief, by Lesser. Exh. 3 hereto.
23. The Promissory Note, dated as of November 1, 2018, Exh. 4 hereto, provided interest on the principal amount of \$445,000 at five percent per annum, and required repayment on or before December 31, 2019. Upon information and belief, the Promissory Note is now in default.

24. The License Pledge Agreement, submitted to both the City of Boston and the Commonwealth's Alcoholic Beverages Control Commission, falsely represented to those agencies that borrower Burn LLC "has...all requisite power and authority to enter into this License Pledge Agreement" and that the License Pledge Agreement does not violate "any provision of...or constitute a default under the terms of any agreement...applicable to the Borrower or any of its property". Exh. 2 hereto at page 2, § 3(a) and (c).
25. While the License Pledge Agreement was signed by defendant Lesser and only one other of the individual defendants, all of the individual defendants, upon information and belief, knew about and participated in this transaction.
26. Shortly after learning about the License Pledge Agreement, plaintiff sent by hand delivery and electronic mail the letter attached hereto as Exhibit 5, demanding immediate release of the pledge and no further encumbrance of the Liquor License.
27. Defendants did not answer Exh. 5 hereto or provide any of the information requested or take any of the action demanded.
28. Defendants new restaurant "Whaling in Oklahoma" has not done well financially, and defendants have stated to Nicosia that they will be closing it imminently, likely by the end of January, 2019, and they wish to sublet the Premises to a new tenant restaurant and provide the Liquor License to such sub-tenant.
29. Landlord does not consent to any subletting of the Premises, *see* Lease at section 5.13, requiring Landlord's consent, nor does Landlord consent to the transfer of the Liquor License, and Landlord has terminated the Lease effective the end of January, 2019, *see* Exh. 6. hereto.
30. Defendants have not responded to Exh. 6 hereto.

CAUSES OF ACTION

COUNT I: FOR INJUNCTIVE RELIEF

31. Plaintiffs repeat and incorporate their above paragraphs.
32. Plaintiffs request temporary, preliminary, and permanent relief extinguishing any pledge or other encumbrance affecting the Liquor License, and pursuant to the Lease requiring that defendants execute all documents and take all other necessary steps to return the Liquor License to the Landlord or its designee.

**COUNT II: FOR BREACH OF AGREEMENT AND
AIDING AND ABETTING BREACH OF AGREEMENT**

33. Plaintiffs repeat and incorporate their above paragraphs.
34. Defendant Burn LLC has breached the Lease, defendant Husbands has breached his guarantee attached to the Lease, and all the individual defendants and defendant BL Note Holding Tremont Street LLC have aided and abetted those breaches, entitling plaintiffs to injunctive relief, their damages, and their attorneys fees and costs.

COUNT III: VIOLATION OF CH. 93A, SECTION 11

35. Plaintiffs repeat and incorporate their above paragraphs.
36. Defendants, without revealing their wrongful conduct to Nicosia, recently offered to purchase the Liquor License from him for \$100,000, which is approximately, upon information and belief, one-fifth of its value.
37. Defendants' course of conduct as described above is an effort wrongfully to obtain permanent ownership of the Liquor License for no payment or for a vastly discounted payment.

38. Defendants' conduct occurred in trade or commerce and constitutes willful breach of their contractual obligations and unfair and deceptive conduct intended wrongfully to obtain property. Their deceptive actions include statements to the City of Boston and the Commonwealth that are knowingly false and deceptive, and may cause confusion and impair plaintiffs' property rights.
39. Defendants failure to respond to Exh. 5 hereto, even to inform plaintiffs whether the pledge agreement is still in place, or otherwise to provide information about the status of the valuable Liquor License is a further unfair practice.


Plaintiffs respectfully request that judgement enter for them on all counts, that they be awarded injunctive relief and damages, including, without limitation, multiple damages, their attorneys' fees and costs, and whatever other relief is fair and reasonable under the circumstances.

PLAINTIFFS DEMAND A JURY TRIAL ON ANY ISSUES SO TRIABLE

Respectfully submitted,

Mario Nicosia, Trustee of the N&M VII Trust, NIC Limited Partnership and Mario Nicosia, Individually,

By their attorneys,


David L. Kelston, BBO #267310
Noah Rosmarin, BBO #630632
Adkins, Kelston & Zavez, P.C.
90 Canal Street, Suite 120
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SUFFOLK, ss. SUPERIOR COURT DEPT.

(date) January 24, 2020
Notice ordered issued heretofore returnable
at the SUFFOLK SUP. CRT. ROOM 916
on Tuesday, February 4, 2020 at 2:00 p.m.
to show cause why the injunctive
Relief sought in Count I of the Vented Complaint
should not be granted
By the Court, 615
ATTEST:



Assistant Clerk

Dated: January 24, 2020

VERIFICATION

I, Mario Nicosia, state under the pains and penalties of perjury that the above factual allegations are true and accurate to my direct knowledge or are based on my best information and belief.

1/24/21
Dated



Mario Nicosia

EXHIBIT 2

2084CV00218 Mario Nicosia Individually & Trustee of the N&M Trust VII et al vs. Burn LLC et al

- Case Type:
Equitable Remedies
- Case Status:
Open
- File Date
01/24/2020
- DCM Track:
F - Fast Track
- Initiating Action:
Injunction
- Status Date:
01/24/2020
- Case Judge:
- Next Event:

All Information | Party | Judgment | Subsequent Action/Subject | Event | Tickler | Docket | Disposition

Party Information

Mario Nicosia Individually & Trustee of the N&M Trust VII
- Plaintiff

Alias

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- Plaintiff

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Burn LLC
- Defendant

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Maslow, Timothy
- Defendant

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- Defendant

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Husbands, Andrew
- Defendant

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More Party Information

Judgments

<u>Date</u>	<u>Type</u>	<u>Method</u>	<u>For</u>	<u>Against</u>
01/30/2024	Judgment After Finding - Rule 20	After Jury Waived Trial	Mario Nicosia Individually & Trustee of the N&M Trust VII	Lesser, Brian
01/30/2024	Judgment After Finding - Rule 20	After Jury Waived Trial	NIC Limited Partnership	Lesser, Brian
01/22/2024	Judgment After Finding - Rule 20	After Jury Waived Trial	Mario Nicosia Individually & Trustee of the N&M Trust VII	Lesser, Brian

Subsequent Action/Subject

<u>Description</u>	<u>Status</u>	<u>SA/Subject #</u>	<u>Status Date</u>	<u>Responding Party</u>	<u>Judgments</u>	<u>Pleading Party</u>
Counterclaim	Filed	1	02/03/2020	NIC Limited Partnership	0	Husbands, Andrew

Events

<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
02/04/2020 02:00 PM	Civil E	BOS-9th FL, CR 916 (SC)	Hearing on Preliminary Injunction	Giles, Hon. Linda E	Held as Scheduled
08/19/2020 09:30 AM	Civil E	BOS-9th FL, CR 916 (SC)	Motion Hearing	Sullivan, Hon. Susan E	Decision rendered
04/13/2022 02:00 PM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	BLS Rule 16 Litigation Control Conference	Krupp, Hon. Peter B	Rescheduled
04/20/2022 02:00 PM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	BLS Rule 16 Litigation Control Conference	Krupp, Hon. Peter B	Held - Under advisement
07/07/2022 02:00 PM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Conference to Review Status	Krupp, Hon. Peter B	Canceled
09/29/2022 02:00 PM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Conference to Review Status	Kazanjan, Hon. Helene	Held as Scheduled
02/09/2023 02:00 PM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Rule 56 Hearing	Kazanjan, Hon. Helene	Rescheduled
03/08/2023 02:00 PM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Rule 56 Hearing	Krupp, Hon. Peter B	Held - Under advisement
06/08/2023 02:00 PM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Final Pre-Trial Conference	Krupp, Hon. Peter B	Rescheduled
06/21/2023 02:00 PM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Final Pre-Trial Conference	Krupp, Hon. Peter B	Held as Scheduled
08/10/2023 02:00 PM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Motion Hearing	Krupp, Hon. Peter B	Held as Scheduled
11/17/2023 05:30 AM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Conference to Review Status	Krupp, Hon. Peter B	
11/30/2023 02:00 PM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Final Trial Conference	Krupp, Hon. Peter B	Rescheduled
12/08/2023 02:00 PM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Final Trial Conference	Kazanjan, Hon. Helene	Held as Scheduled
12/15/2023 03:00 PM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Motion Hearing	Kazanjan, Hon. Helene	Held as Scheduled
12/18/2023 09:00 AM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Jury Trial	Kazanjan, Hon. Helene	Held as Scheduled
12/18/2023 09:00 AM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Jury Trial	Krupp, Hon. Peter B	Held as Scheduled
12/20/2023 09:00 AM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Jury Waived Trial	Kazanjan, Hon. Helene	Held as Scheduled

ADD 053

Date	Session	Location	Type	Event Judge	Result
12/21/2023 09:00 AM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Jury Waived Trial	Kazanjian, Hon. Helene	Held as Scheduled
12/22/2023 09:00 AM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Jury Waived Trial - Rule 20	Kazanjian, Hon. Helene	Held as Scheduled
12/28/2023 09:00 AM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Jury Waived Trial - Rule 20	Kazanjian, Hon. Helene	Held - Under advisement
04/12/2024 12:00 PM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Motion Hearing to Assess Attorney's Fees	Krupp, Hon. Peter B	Rescheduled
04/12/2024 02:00 PM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Motion Hearing to Assess Attorney's Fees	Kazanjian, Hon. Helene	Held as Scheduled










Ticklers

Tickler	Start Date	Due Date	Days Due	Completed Date
Service	01/24/2020	04/23/2020	90	
Answer	01/24/2020	05/26/2020	123	
Rule 12/19/20 Served By	01/24/2020	05/26/2020	123	06/21/2023
Rule 12/19/20 Filed By	01/24/2020	06/22/2020	150	06/21/2023
Rule 12/19/20 Heard By	01/24/2020	07/22/2020	180	06/21/2023
Rule 15 Served By	01/24/2020	05/26/2020	123	06/21/2023
Rule 15 Filed By	01/24/2020	07/23/2021	546	06/21/2023
Rule 15 Heard By	01/24/2020	08/23/2021	577	06/21/2023
Discovery	01/24/2020	09/29/2021	614	01/24/2024
Rule 56 Served By	01/24/2020	10/07/2022	987	06/21/2023
Rule 56 Filed By	01/24/2020	11/23/2022	1034	06/21/2023
Final Pre-Trial Conference	01/24/2020	03/18/2022	784	06/21/2023
Judgment	01/24/2020	01/24/2022	731	01/24/2024
Under Advisement	04/20/2022	05/20/2022	30	04/25/2022
Under Advisement	03/08/2023	04/07/2023	30	04/26/2023
Under Advisement	12/28/2023	01/27/2024	30	01/18/2024



Docket Information

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
01/24/2020	Attorney appearance On this date David Kelston, Esq. added for Plaintiff Mario Nicosia Individually & Trustee of the N&M Trust VII		
01/24/2020	Attorney appearance On this date David Kelston, Esq. added for Plaintiff NIC Limited Partnership		
01/24/2020	Case assigned to: DCM Track F - Fast Track was added on 01/24/2020		
01/24/2020	Original civil complaint filed.	1	
01/24/2020	Civil action cover sheet filed.	2	Image
01/24/2020	Summons and order of notice issued on a Complaint for a Preliminary Injunction , returnable on 02/04/2020 02:00 PM Hearing on Preliminary Injunction. Applies To: Burn LLC (Defendant); Note Holding Tremont Street LLC (Defendant); Maslow, Timothy (Defendant); Lesser, Brian (Defendant); Husbands, Andrew (Defendant)		
01/24/2020	Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership's MOTION for appointment of Special Process Server. M. Anthony Lopes/M. Anthony Lopes & Associates - The motion is hereby ALLOWED	3	










ADD 054

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
01/24/2020	Plaintiffs(s) Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership's Motion for Short Order of Notice	4	
01/31/2020	Plaintiff Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership's Motion for a Preliminary Injunction	5	
01/31/2020	Attorney appearance On this date Noah N Rosmarin, Esq. added for Plaintiff Mario Nicosia Individually & Trustee of the N&M Trust VII		
01/31/2020	Attorney appearance On this date Noah N Rosmarin, Esq. added for Plaintiff NIC Limited Partnership		
02/03/2020	Opposition to "Plaintiffs' Motion for Preliminary Injunction" (P#5) and Memorandum of Law in Opposition filed by Burn LLC, Note Holding Tremont Street LLC, Timothy Maslow, Brian Lesser, Andrew Husbands	6	
02/03/2020	Attorney appearance On this date Kevin M Considine, Esq. added for Defendant Burn LLC		
02/03/2020	Attorney appearance On this date William A Kelley, Jr., Esq. added for Defendant Burn LLC		
02/03/2020	Attorney appearance On this date Mark D Donovan, Esq. added for Defendant Burn LLC		
02/03/2020	Attorney appearance On this date Kevin M Considine, Esq. added for Defendant Note Holding Tremont Street LLC		
02/03/2020	Attorney appearance On this date William A Kelley, Jr., Esq. added for Defendant Note Holding Tremont Street LLC		
02/03/2020	Attorney appearance On this date Mark D Donovan, Esq. added for Defendant Note Holding Tremont Street LLC		
02/03/2020	Attorney appearance On this date Kevin M Considine, Esq. added for Defendant Timothy Maslow		
02/03/2020	Attorney appearance On this date William A Kelley, Jr., Esq. added for Defendant Timothy Maslow		
02/03/2020	Attorney appearance On this date Mark D Donovan, Esq. added for Defendant Timothy Maslow		
02/03/2020	Attorney appearance On this date Kevin M Considine, Esq. added for Defendant Brian Lesser		
02/03/2020	Attorney appearance On this date William A Kelley, Jr., Esq. added for Defendant Brian Lesser		
02/03/2020	Attorney appearance On this date Mark D Donovan, Esq. added for Defendant Brian Lesser		
02/03/2020	Attorney appearance On this date Kevin M Considine, Esq. added for Defendant Andrew Husbands		
02/03/2020	Attorney appearance On this date Mark D Donovan, Esq. added for Defendant Andrew Husbands		
02/03/2020	Received from Defendant Burn LLC, Note Holding Tremont Street LLC, Maslow, Timothy, Lesser, Brian, and Husbands, Andrew : Answer with a counterclaim;	7	
02/04/2020	Counterclaim filed.		
02/04/2020	Event Result:: Hearing on Preliminary Injunction scheduled on: 02/04/2020 02:00 PM Has been: Held as Scheduled Hon. Linda E Giles, Presiding Staff: Philip Drapos, Assistant Clerk Magistrate		
02/20/2020	Endorsement on Motion for Preliminary Injunction (#5.0): DENIED After hearing and reservation and for the reasons set forth in the opposition, the court hereby DENIES the motion (dated 2/10/20) notice sent 2/18/20		
02/27/2020	Received from Plaintiff Mario Nicosia Individually & Trustee of the N&M Trust VII and NIC Limited Partnership : Answer to the Counterclaim;	8	
03/12/2020	Short Order of Notice, returned SERVED returnable on 02/04/2020 02:00 PM Hearing on Preliminary Injunction. Applies To: Note Holding Tremont Street LLC (Defendant)	9	

























ADD 055

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
03/12/2020	Short Order of Notice, returned SERVED returnable on 02/04/2020 02:00 PM Hearing on Preliminary Injunction. Applies To: Husbands, Andrew (Defendant)	10	 Image
03/12/2020	Short Order of Notice, returned SERVED returnable on 02/04/2020 02:00 PM Hearing on Preliminary Injunction. Applies To: Masiow, Timothy (Defendant)	11	 Image
03/20/2020	Notice of docket entry received from Appeals Court Please take note that on March 19, 2020, the following entry was made on the docket of the above-referenced case: ORDER: The plaintiffs have filed a petition, pursuant to G.L.c. 231, s. 118, first para., seeking review of the order denying their request for a preliminary injunction requiring the defendants to terminate the pledge of the contested liquor license and to refrain from further encumbering or transferring the license. In that petition, the plaintiffs abandon their request that the defendants be ordered to terminate the pledge agreement in place, but continue to seek an injunction restraining the defendants from transferring or further encumbering the contested license. The plaintiffs filed a motion seeking the same relief pending a decision on this petition in the form of a temporary restraining order, which I allowed. The defendants have filed a response to the petition. After careful review of the parties' submissions, the petition is allowed. Pursuant to G.L.c. 231, s. 118, first para., a single justice of this court has the authority to issue a preliminary injunction. <i>Edwin R. Sage Co. v. Foley</i> , 12 Mass. App. Ct. 20, 22-23 (1981). "The authority [to issue a preliminary injunction] does not depend on a determination that the trial court judge, in denying relief, made incorrect rulings of law or abused his [or her] discretion." <i>Jet-Line Services Inc. v. Board of Selectman</i> , 25 Mass. App. Ct. 645, 646 (1988). Instead, a single justice may issue a preliminary injunction if the petitioner shows a likelihood of success on the merits; a likelihood of irreparable harm will result from the denial of the injunction; and that the risk of irreparable harm to the moving party outweighs the risk of harm to the opposing parties. See <i>Packaging Indus. Group, Inc. v. Cheney</i> , 380 Mass. 609, 616-617 (1980). "A preliminary injunction ordinarily is issued to preserve the status quo pending the outcome of litigation." <i>Doe v. Super Intendent of Schs. of Weston</i> , 461 Mass. 159, 164 (2011). In this case, the plaintiffs have made the requisite showing to warrant issuance of a preliminary injunction to maintain the status quo. Likelihood of success on the merits. To obtain a preliminary injunction the moving party must demonstrate a likelihood of success on the merits. <i>Packaging Indus. Group, Inc. v. Cheney</i> , 380 Mass. 609, 616-617 (1980). The plaintiffs are not required to demonstrate inevitable success on the merits, nor would it be appropriate for me to decide, in this context, the merits of the plaintiffs' claim that the defendants breached the lease or the defendant's argument that the requirement that the license revert to the lessor plaintiff is unenforceable. See <i>Jet-Line Services Inc. v. Board of Selectman</i> , 25 Mass. App. Ct. 645, 648 (1988). None of the cases cited by the defendants stand inarguably for the proposition that an agreement to transfer a license pursuant to the procedures set forth by statute and regulations is unenforceable as a matter of public policy. <i>Contrast Beacon Hill Civic Assn. v. Ristorante Toscano, Inc.</i> , 422 Mass. 318 (1996) (contractual waiver of right to apply for license pursuant to regulatory scheme unenforceable as against public policy); <i>Hastings Assocs. v. 369 Bldg. Fund</i> , 42 Mass. App. Ct. 162, 173-178 (1997) (plaintiff may not recover under contract calling for illegal de facto transfer of liquor license outside of regulatory regime and where plaintiff's own application had been denied). Thus, there is a reasonable likelihood that the plaintiffs will succeed in enforcing the bargain they made with the lessee defendant. Irreparable harm to the plaintiffs. To obtain a preliminary injunction, the moving party must also demonstrate that it faces a substantial risk of irreparable harm if the stay is denied. <i>Packaging Indus. Group, Inc. v. Cheney</i> , 380 Mass. 609, 616-617 (1980). The parties in this case dispute whether the lost opportunity to apply for a transfer of the contested liquor license is irreparable harm or merely economic harm from which the plaintiff could be made whole by a money judgment. See <i>Id.</i> at 621. None of the parties cite to legal authority, and I am not aware of any, that addresses whether a lost opportunity to acquire a specific, existing liquor license is irreparable harm. Thus, I am left to consider the particular circumstances of this case and this liquor license. I conclude that were the defendants to transfer or further encumber the liquor license to a third-party and the plaintiffs were successful in their claims, the plaintiffs would face irreparable harm. There are a finite number of liquor licenses available in the city of Boston where the plaintiffs' commercial real estate is located. Though the value of the license may be determined, there is no guarantee that one would be available for purchase at the time a money judgment is satisfied. The difference in value in the plaintiffs' commercial real estate with and without the license during any delay in acquiring a different license would be difficult to calculate, and would not be included in damages awarded after trial. Moreover, given the dire financial condition reported by one of the defendants, a money judgment may be unenforceable. For these reasons, I find that the plaintiffs have established a risk irreparable harm. Harm to the non-moving party. I have also considered the potential harm to the defendants and balance that harm against the irreparable harm the plaintiffs face if their motion were denied. <i>Packaging Indus. Group, Inc. v. Cheney</i> , 380 Mass. 609, 616-617 (1980). I requested that the defendants address in their response the harm they would suffer if they were prohibited from pledging, assigning, selling or transferring the license to a third party during the pendency of the Superior Court proceedings. The defendants' response focused on their inability to satisfy their debts without a sale of the license at market value. The defendants also argued that the license may be subject to revocation if the plaintiffs' petition is allowed. However, there is no evidence that regulators are contemplating an action to revoke the license. In my judgment, these considerations do not outweigh the potential harm to the plaintiffs. Public interest. Although the injunction does not enjoin governmental action, I have nevertheless considered the public interest. See <i>Garcia v. Department of Housing and Urban Development</i> , 480 Mass. 736, 747 (2018). The issuance of this injunction will not adversely affect the public interest in regulating the sale of alcohol. Order. For these reasons, until further order of this Court, a single justice thereof, or the Superior Court, defendants shall not pledge, assign, sell, transfer, hypothecate or otherwise encumber the liquor license at issue in this case, or any interests in such liquor license. Due to the current restrictions on access to the Appeals Court, the filing fee due for the issuance of this preliminary injunction is hereby waived. So ordered. (Kinder, J.) *Notice/Attest/Giles, J.	12	

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<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
07/16/2020	Notice of 93A complaint sent to Attorney General		
07/16/2020	Plaintiffs Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership's Motion to Amend Complaint (without opposition)	13	 Image
07/31/2020	Plaintiff Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership's Motion to Sell the Disputed Liquor License and Place the Sale Proceeds in Escrow During the Pendency of this Case (with opposition and reply)	14	 Image
08/03/2020	Endorsement on Motion to Amend Complaint (#13.0): ALLOWED There being no opposition and for reasons stated in motion (dated 7/27/20) notice sent 7/31/20		 Image
08/03/2020	Amended: First amended complaint filed by Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership (Filed 7/27/20)	15	 Image
08/10/2020	The following form was generated: Notice to Appear Sent On: 08/10/2020 10:51:28 Notice Sent To: David Kelston, Esq. Adkins, Kelston & Zavez P.C. 90 Canal St STE 120, Boston, MA 02114 Notice Sent To: Noah N Rosmarin, Esq. Adkins Kelston & Zavez PC 90 Canal St Suite 120, Boston, MA 02114 Notice Sent To: Kevin M Considine, Esq. Considine & Furey, LLP One Beacon St 22nd Floor, Boston, MA 02108 Notice Sent To: William A Kelley, Jr., Esq. Considine & Furey LLP One Beacon St 22nd Floor, Boston, MA 02108 Notice Sent To: Mark D Donovan, Esq. Considine & Furey, LLP One Beacon St 22nd Floor, Boston, MA 02108		
08/19/2020	Decision rendered on matter taken under advisement: Motion Hearing scheduled on: 08/19/2020 09:30 AM Has been: Decision rendered Hon. Susan E Sullivan, Presiding Staff: Philip Drapos, Assistant Clerk Magistrate		
09/16/2020	Endorsement on Motion to Sell the Disputed Liquor License and Place the Sale Proceeds in Escrow (#14.0): ALLOWED for reasons stated by the plaintiffs, motion allowed. See Order (dated 9/10/20) notice sent 9/15/20		 Image
09/16/2020	ORDER: Order on Plaintiffs' Motion to Sell the Disputed Liquor License and Place the Sale Proceeds in Escrow During the Pendency of this Case (see P#16) (dated 9/10/20) notice sent 9/15/20	16	 Image
09/28/2020	Received from Defendant Burn LLC, Note Holding Tremont Street LLC, Timothy Maslow, Brian J Lesser, and Andrew Husbands: Answer to amended complaint;	17	 Image
10/05/2020	Received from Plaintiff Mario Nicosia Individually & Trustee of the N&M Trust VII and NIC Limited Partnership : Answer to the Counterclaim;	18	 Image
10/29/2020	Notice of docket entry received from Appeals Court Please take note that on October 29, 2020, the following entry was made on the docket of the above-referenced case: ORDER: The defendants have filed a petition pursuant to G. L. c. 231, s. 118, first par., seeking review by the single justice of a preliminary injunction order issued by the Superior Court. A trial judge's decision on a preliminary injunction requires "an evaluation in combination of the moving party's claim of injury and its chance of success on the merits." <i>Edwin R. Sage Co. v. Foley</i> , 12 Mass. App. Ct. 20, 25 (1981), quoting <i>Commonwealth v. County of Suffolk</i> , 383 Mass. 286, 288 (1981). When reviewing such a decision, the single justice "focuses on whether the trial court abused its discretion -- that is, whether the court applied proper legal standards and whether the record discloses reasonable support for its evaluation of factual questions." <i>Edwin R. Sage Co.</i> , 12 Mass. App. Ct. at 25. See <i>Fordyce v. Town of Hanover</i> , 457 Mass. 248, 256 (2010). Here, the trial judge properly adopted the prior single justice's conclusion that the plaintiffs established a likelihood of success on the merits and substantial risk of irreparable harm. To begin, "[m]any contracts cannot lawfully be performed without securing a permit, license, or approval from some governmental officer or board, and yet the contracts are not deemed illegal." <i>Nussenbaum v. Chambers & Chambers, Inc.</i> , 322 Mass. 419, 423 (1948)). The cases cited by the defendants do not support the conclusion that the lease provisions at issue in this case are unenforceable. See <i>Beacon Hill Civic Ass'n v. Ristorante Toscano, Inc.</i> , 422 Mass. 318, 323 (1996) (contract unenforceable where parties agreed to forego their respective rights to apply for and oppose application for liquor license where it would undermine statute's purpose); <i>Hastings Assocs., Inc. v. Local 369 Building Fund, Inc.</i> , 42 Mass. App. Ct. 162, 175, 178-179 (1997) (recovery prohibited under "illegal contract" involving de facto transfer and use of liquor license without licensing authority approval); <i>Number Three Lounge, Inc. v. Alcoholic Beverages Control Comm'n</i> , 7 Mass. App. Ct. 301, 311, 312 (1979) (impermissible for unlicensed parties to use "straw titleholder . . . to obfuscate the[ir] beneficial interests" in liquor license). Nor do the defendants substantiate the claim that the lease provisions regarding transfer of the license are against the public welfare or purpose of G. L. c. 138. Compare <i>Connolly v. Alcoholic Beverages Control Comm'n</i> , 334 Mass. 613, 619 (1956) ("The provisions for the issue of licenses . . . [under c. 138] imply no intention to create rights generally for persons to engage or	19	

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<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	continue in the transaction of the business authorized by the licenses . . . but are enacted with a view only to meet the reasonable demand of the public for pure alcoholic beverages and, to that end, to provide, in the opinion of the licensing authorities, an adequate number of places at which the public may obtain, in the manner and for the kind of use indicated, the different sorts of beverages for the sale of which provision is made") with Ristorante Toscano, Inc., 422 Mass. at 321 (waiver of statutory participation rights impermissible where "application review provisions of c. 138 are grounded in general policy concerns" regarding provision of liquor licenses). The trial judge's conclusion that "a sale now will mitigate against an almost guaranteed decline in value over the pendency of the litigation" is reasonable given the evidence presented regarding closures of bars and restaurants due to COVID-19. The defendants' challenge to the timing of the sale does not contradict the ample evidence in the record that supports the trial judge's finding that the defendants intended to sell the license; in fact, they had previously agreed to sell the license and the business for \$525,000. Finally, because the defendants -- including BL Note Holding Tremont Street, Inc., the party claiming a security interest in the license -- have briefed their argument on the validity of the pledge agreement before both the trial court and a single justice of this court, there has been no deprivation of due process. See Commonwealth v. One 1977 Pontiac Grand Prix Auto., 375 Mass. 669, 672 (1978) (no deprivation of due process where it was "apparent from the facts that [the defendant] had actual notice of the proceedings, had opportunity to participate in them, and took full advantage of the opportunity"). Moreover, the trial judge reasonably concluded that the sum of \$525,000 ordered to be placed in escrow obviates the risk of harm to the defendants should they prevail on appeal. See Property Acquisition Group, LLC v. Ivester, 95 Mass. App. Ct. 170, 181 (2019) (no error to vacate stay of summary process action where mortgagors could "be made whole by money damages"). Because the defendants have failed to show that the trial judge made an error of law or otherwise abused her discretion, the petition is denied. (Wendlandt, J.) Notice/attest/Sullivan, J.		
11/12/2020	CD containing PDF Transcript of 8/19/20 received from Hunt Reporting		
12/03/2020	Plaintiff Mario Nicosia Individually & Trustee of the N&M Trust VII's Joint Motion to Extend Tracking order	20	
12/22/2020	Endorsement on Motion to Extend Tracking Order (#20.0): ALLOWED (dated 12/7/20) notice sent 12/15/20		
07/14/2021	Plaintiff, Defendant Mario Nicosia individually & Trustee of the N&M Trust VII, NIC Limited Partnership, Burn LLC, BL Note Holding Tremont Street LLC, Timothy Maslow, Brian Lesser, Andrew Husbands's Joint Motion to Extend Tracking Order	21	 
07/26/2021	Endorsement on Motion to Extend Tracking Order (#21.0): ALLOWED (date 7/19/21) Allowed in part/ denied in part. Deadline to serve motion amended complaint extended until July 23, 2021, Non expert discovery to be completed by September 29, 2021 R.56 Motion to be filed by November 30, 2021. if Parties intended R. 56 Motions to be filed by November 30, 2022 as stated in a motion, reach out to clerk to set up status conference to discuss with the court Notice 7/22/21		 
07/29/2021	Other Interested Party Joseph Matzkin Esq's EMERGENCY Motion to intervene	22	
07/29/2021	Attorney appearance On this date William Robert Covino, Esq. added for Other interested party Joseph Matzkin Esq		 
07/29/2021	Attorney appearance On this date Kristyn M Kelley, Esq. added for Other interested party Joseph Matzkin Esq		 
08/02/2021	Plaintiffs Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership's Response to Attorney Joseph Matzkin's Emergency Motion (P#22) to Intervene	23	 
08/05/2021	Endorsement on Motion to intervene (#22.0): ALLOWED motion to intervene ALLOWED. opposition to plaintiff's motion to compel shall be served by 8/11/21. (dated 8/02/21) notice sent 8/05/21		 
08/16/2021	Plaintiffs(s) Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership motion filed to compel Further Deposition Testimony of Fact Witness Joseph H. Matzkin and to Amend the Complaint (w/opposition)	24	 
08/16/2021	Opposition to "Plaintiffs' Motion to Compel Further Deposition Testimony of Fact Witness Joseph H. Matzkin and to Amend thye Complaint" filed by Burn LLC, BL Note Holding Tremont Street LLC, Timothy Maslow, Brian Lesser, Andrew Husbands	25	 
08/16/2021	Opposition to Plaintiffs' Motion to Amend the Complaint filed by Joseph Matzkin Esq	26	 
08/16/2021	Affidavit of Noah Rosmarin	27	 
08/16/2021	Affidavit of David Kelston Providing Certain Information and Documents Relevant to Plaintiffs' Motion to Compel and Amend	28	
08/16/2021	Plaintiffs Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership's Reply to Defendants' and Proposed Defendant's Opposition to Plaintiffs' Motion to Compel Further Deposition Testimony of Fact Witness Joseph H. Mtzkin and to Amend the Complaint (Consolidated Reply)	29	

ADD 058

EXHIBIT 3

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUPERIOR COURT
CIVIL ACTION NO. 2020CV00218

MARIO NICOSIA, TRUSTEE OF THE N&M)
TRUST VII, NIC LIMITED PARTNERSHIP and)
MARIO NICOSIA, INDIVIDUALLY,)
Plaintiffs,)

v.)

BURN LLC, BL NOTE HOLDING TREMONT)
STREET LLC, TIMOTHY MASLOW, BRIAN J.)
LESSER, and ANDREW HUSBANDS,)
Defendants.)

SUFFOLK SUPERIOR COURT
CIVIL CLERK'S OFFICE
2020 FEB - 3 P 4: 18
MICHAEL JOSEPH DONOHUE
CLERK / MAGISTRATE

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO
"PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION"

INTRODUCTION

Plaintiffs' entire case is based on their claim to have an undisclosed beneficial interest in a liquor license issued pursuant to G.L. c. 138. Such an undisclosed interest within the highly regulated realm of the licensed sale of alcoholic beverages violates detailed disclosure requirements of chapter 138, is against public policy, and is unenforceable of as matter of law.

The law is clear. Businesses selling intoxicating liquor are heavily regulated. *Connolly v. Alcoholic Beverages Control Commission*, 334 Mass 613, 619 (1956); *Arno v. Alcoholic Beverages Control Commission*, 377 Mass. 83, 85-86 (1979). "Because of this the licensing authorities have the legitimate right to expect full disclosure of holdings in the nature of substantial indirect as well as direct beneficial interests in an entity which seeks to own a license . . ." *Number Three Lounge, Inc. v. Alcoholic Beverages Control Commission*, 7 Mass. App. Ct. 301, at 312 (1979). Licenses must be approved by both local licensing authorities and the State Alcoholic Beverages Control Commission. G. L. c. 138, §§12, 67. A lease agreement

predicated on the transfer of a liquor license in violation of G.L. c. 138 renders performance under the contract illegal. Hastings Associates, Inc. v. Local 368 Building Fund, Inc., 42 Mass. App. Ct. 162 (1997). There is no dispute here that Plaintiffs' neither disclosed nor received approval by local and state licensing authorities to obtain any interest in the liquor license held by Burn, LLC. Accordingly, their contract claims to the license are unenforceable.

ARGUMENT

"A preliminary injunction is an extraordinary remedy never awarded as of right[,]" Winter v. Natural Res. Def. Council, Inc. 555 U.S. 7, 24 (2008), and "should not be granted unless the plaintiffs [make] a clear showing of entitlement thereto." Student No. 9 v. Board of Educ., 440 Mass. 752, 762 (2004). To prevail on a motion for preliminary injunction, the plaintiff must show (1) a likelihood of success on the merits of the claim, (2) that he will suffer irreparable harm without the requested injunctive relief, and that (3) the harm, without the injunction, outweighs any harm to the defendant that would result from it being enjoined. Packaging Indus. Grp., Inc. v. Cheney, 380 Mass. 609,617 (1980). Plaintiffs have failed to meet their burden.

(A) Likelihood of Success on the Merits

Plaintiffs request that this Court order Defendants within ten days (1) to terminate the duly approved Pledge Agreement; and (2) to sell Burn, LLC's liquor license to Plaintiffs for \$1.00. Plaintiffs fail to grasp the regulatory framework in which liquor licenses are issued, transferred, or pledged. G.L. c. 138 sets out the procedure for the issuance or pledges of liquor licenses. The license owned by Burn, LLC had to be approved by the Licensing Board for the City of Boston, G.L. c. 138 §12, and the Alcoholic Beverages Control Commission, §67. Selectmen of Barnstable v. Alcoholic Beverages Control Committee, 373 Mass. 708, 714 (1977).

Applications are initially submitted to local licensing authorities, who are required by §15A to publish notice thereof in a newspaper providing general circulation. The notice sets forth the name of the applicant in full, the kind of license applied for, and a detailed description of the location where the license is intended to be exercised. No application shall be acted upon by local licensing authorities except after a hearing which shall be held no sooner than ten calendar days after publication of the notice. Licenses are issued or denied with a view only to serve the public need and in a manner to protect the common good. G.L. c. 138, §23. A copy of Burn, LLC's application is attached to the Verified Complaint. It was also attached as Exhibit H to the lease between N&M Trust VII, as Landlord and Burn, Inc., as Tenant. The application identifies St. Cloud Corp. as the transferor – not N&M Trust VII as alleged in the Verified Complaint – and Burn, Inc. as transferee. The application also contains the following:

13.a. State the names, addresses and telephone numbers of all persons or entities who will have any direct or indirect beneficial interest in this license, as required by Massachusetts General Law c. 138, §15A.

The only entity disclosed in answer to this question was Burn, Inc. Mario Nicosia, as President of St. Cloud Corp., signed the application as the transferor of the license.

Plaintiffs now claim to be unaware that Burn, LLC has owned the liquor license since 1996, and ask this Court to grant them rights to the license based on unenforceable provisions in the lease. In *Number Three Lounge*, supra, the Appeals Court upheld the Alcoholic Beverages Control Commission's revocation of a liquor license where the licensee failed to disclose an indirect beneficial interest. The Court reasoned, "... licensing authorities have the legitimate right to expect full disclosure of holdings in the nature of substantial indirect as well as direct beneficial interests in an entity which seeks to own a license." *Id.*, at 312. "The concept of an ownership interest can vary from an absolute proprietary interest to a mere possessory right."

Id, at 310, citing Animal Rescue League v. Assessors of Bourne, 310 Mass. 330, 333 (1941); Northgate Const. Co. v. State Tax Comm., 377 Mass. 205, 208 (1979). “. . . [T] fact finder must if necessary pierce labels, look beyond form, and come to grips with the substance of the corporate relationship and the economic realities that are present. Number Three Lounge, supra, at 371.

Plaintiffs cannot seriously dispute that what they really seek here is to have this Court enforce provisions in the lease that effectively would result in an illegal transfer of the Defendant’s liquor license in violation of G.L. c. 138, §2 and 23. In Hastings, supra, the Appeals Court found similar provisions to be unenforceable where performance under a lease agreement called for illegal conduct.

In Beacon Hill Civic Association v. Ristorante Toscano, Inc., 422 Mass. 318, the Appeals Court address the public policy underlying chapter 138, and recognized “. . . contract rights are [not] absolute; for government cannot exist if the citizen may at will . . . exercise his freedom of contract to work . . . harm [to his fellow citizens]. Equally fundamental with the private right is [the right] of the public to regulate it in the common interest.” Citing Commonwealth v. Henry’s Drywall Co., 366 Mass. 539, 543 (1974), quoting Nebbia v. New York, 291 U.S. 502, 523 (1934). “Public Policy in this context refers to a court’s conviction, grounded in legislation and precedent, that denying enforcement of a contractual term is necessary to protect some aspect of the public welfare.” Citing Somerset Sav. Bank v. Chicago Title Ins. Co., 420 Mass. 422, 431 (1995); Begelfor v. Najarian, 381 Mass. 177, 189 (1980). In Toscano, supra, the restaurant had agreed to waive a right that was created by statute, specifically to apply for a full liquor license at its restaurant. The Court held that Toscano’s contractual waiver[s] of the right to apply for a license was unenforceable. “To accept such . . . waiver as valid would destroy the very purpose

of the statute.” Quoting *Spence v. Reeder*, 382 Mass. 398, 413 (1981) [“it is a principle universally accepted that the public interest in freedom of contract is sometimes outweighed by public policy, and in such cases the contract will not be enforced.”] *Id.* In sum, where a “statute . . . rests upon grounds of public policy, it is not in the power of one who may be directly affected by it to contract in advance that it may be disregarded.” *Desseau v. Holmes*, 187 Mass. 486, 488 (1905). For these reasons Plaintiffs have failed to establish a likelihood of success on the merits.

(B) Irreparable Harm

“In the context of a preliminary injunction the only rights which may be irreparably lost are those not capable of vindication by a final judgment, rendered either at law or in equity.” *Cheney*, *supra*, 380 Mass. at 617 n.11. For this reason, economic harm generally does not qualify as irreparable harm. *Id.* at 621 (affirming denial of preliminary injunction where “the record reveals no reason why money damages would not adequately redress any harm the plaintiffs might suffer prior to a final judgment should they prevail on the merits”); *Loyal Order of Moose, Inc. v. Yarmouth Lodge #2270 v. Board of Health of Yarmouth*, 439 Mass. 597, 602 (2003) (purely economic harm must threaten “the very existence of the movant’s business” to constitute irreparable harm). Plaintiffs claim that liquor licenses are unique, like real property, and are attached to a particular location. This is false. While it is true that a license can be approved for only one location at a time, it is also true that they are transferable to other locations if approved by the local and state licensing authorities pursuant to chapter 138. The argument that this particular license is “inextricably tied” to 647 Tremont Street as argued by Plaintiffs is belied by the fact that Nicosia told Mr. Lesser that he wanted to transfer the license to another location. Affidavit of Brian J. Lesser, ¶11, attached hereto as Exhibit I.

Simply put, the enforcement of well-established principles of public policy as they relate to liquor licensing law cannot possibly result in irreparable harm to Plaintiffs – even where they were unaware of the policy. Indeed, “[t]he public policy thus declared supersedes the ordinary doctrine of estoppel, so far as that would interfere with the accomplishment of the dominant purpose” of these provisions. Toscano, *supra*, quoting *Haverhill Gas Co. v. Findlen*, 357 Mass. 417, 420 (1970), quoting *New York, N.H. & H.R.R. v. York & Whitney Co.*, 215 Mass. 36, 40 (1913). In short, “[e]stoppel cannot rest on an illegal contract.” *New York, N.H. & H.R.R.*, *supra*.

(C) Balance of Harm and Public Interest

The resulting harm to Burn, LLC and BL Note Holding Tremont Street, LLC by any Court imposed restriction on the right of Defendants to protect the value of the liquor license would far outweigh any harm to Plaintiffs. Burn, LLC owes BL Note Holding approximately \$668,000. Lesser Affidavit, See ¶ 5. There are few other assets that Burn, LLC possesses to pay off its debt. *Id.*, ¶ 7. Both the Licensing Commission for the City of Boston and the Alcoholic Beverages Control Commission have approved a Pledge of the liquor license to secure this debt. See Exhibits 2-4 of the Verified Complaint and Exhibit 2 herein.

Conversely, any harm to Plaintiffs is speculative and the result of their own actions or inactions. They have known since 1996 that the liquor license has been owned by Burn, LLC, but they never objected. They claim – through the Affidavit of Mario Nicosia – to be experienced with restaurant liquor licenses. See, e.g., ¶¶ 2, 13-20. Mr. Nicosia himself signed the application to transfer the license to Burn, Inc. The application omitted the disclosure of any interest in a liquor license that Plaintiffs now claim they have a right to control.

For the foregoing reasons, Plaintiffs' Motion for a Preliminary Injunction should be denied.

Respectfully submitted,

BURN LLC, BL NOTE HOLDING
TREMONT STREET LLC, TIMOTHY MASLOW
BRIAN J. LESSER and ANDREW HUSBANDS,



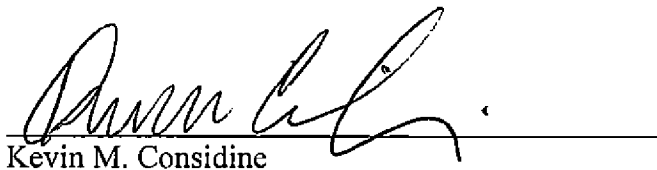
By their Attorneys,
Kevin M. Considine, BBO #542253
William A. Kelley, Jr., BBO #265990
Mark D. Donovan, BBO #673243
CONSIDINE & FUREY, LLP
One Beacon Street, 22nd Floor
Boston, MA 02108
Telephone: 617-723-7200

DATED: February 3, 2020

SUFFOLK SUPERIOR COURT
CIVIL CLERK'S OFFICE
2020 FEB - 3 1 P 4: 18
MICHAEL JOSEPH BOHONYAH
CLERK / MAGISTRATE

CERTIFICATE OF SERVICE

I, Kevin M. Considine, hereby certify that I served a copy of the attached Defendants' Memorandum of Law in Opposition to "Plaintiffs' Motion for Preliminary Injunction and Defendants' Opposition to "Plaintiffs' Motion for Preliminary Injunction and Affidavit of Brian J. Lesser by email and by hand delivery upon David L. Kelston, Esq., Adkins, Kelston & Zavez, P.C., 90 Canal Street, Suite 120, Boston, MA 02114.


Kevin M. Considine

DATED: February 3, 2020

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0218

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EXHIBIT 1

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUPERIOR COURT
CIVIL ACTION NO. 2020CV00218

MARIO NICOSIA, TRUSTEE OF THE N&M)
TRUST VII, NIC LIMITED PARTNERSHIP and)
MARIO NICOSIA, INDIVIDUALLY,)
Plaintiffs,)

v.)

BURN LLC, BL NOTE HOLDING TREMONT)
STREET LLC, TIMOTHY MASLOW, BRIAN J.)
LESSER, and ANDREW HUSBANDS,)
Defendants.)

AFFIDAVIT OF BRIAN J. LESSER

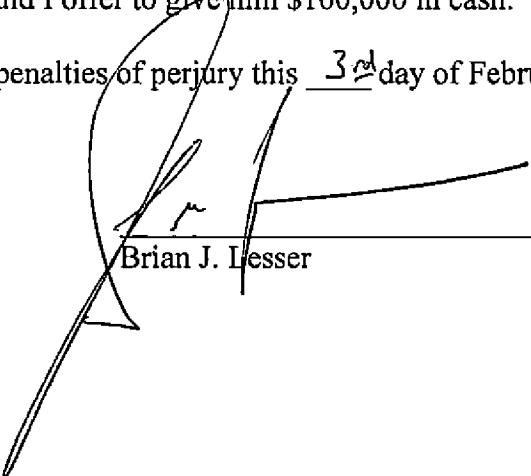
I, Brian J. Lesser, do depose and say as follows:

- 1.) I am an individual with an address at 236 Commercial Street, Suite 100, Boston, Massachusetts. I am the sole Manager of BL Note Holding Tremont Street, LLC, and one of the two Managers of Burn, LLC.
- 2.) I offer this affidavit in opposition to Plaintiffs' Motion for a Preliminary Injunction in the above-captioned matter.
- 3.) I have been in the restaurant business for approximately 35 years; have an ownership interest in 13 restaurants with three more restaurants scheduled to open this year; and am generally familiar with the licensing standards for the liquor licenses in Massachusetts.
- 4.) I first became involved with the restaurant located at 647 Tremont Street in approximately January, 2018.

- 5.) BL Note Holding Tremont Street, LLC is the holder of a promissory note made by Burn, LLC in the original principal amount of \$445,000. Burn, LLC owes approximately \$668,000 in principal and interest under the note, which is in default.
- 6.) In addition, Burn, LLC owes trade vendors approximately \$75,000 in outstanding liabilities.
- 7.) Burn, LLC has assets worth approximately \$15,000, excluding the liquor license.
- 8.) On December 31, 2019, I, on behalf of Burn, LLC, the Tenant, met with Mario Nicosia, the Landlord's Representative under the 1996 lease for 647 Tremont Street. During this meeting, I informed Mr. Nicosia that the Whaling in Oklahoma restaurant was not doing well financially and the Tenant was considering whether to re-concept the restaurant or for a sale and assignment of the lease and liquor license to an accredited restaurant operator that would be acceptable to the Landlord.
- 9.) I disclosed the identity of Tenant's proposed new operator and Mr. Nicosia stated that he was familiar with the proposed new operator's experience in the restaurant business and that he would be acceptable to Landlord.
- 10.) It was during this same meeting that Mr. Nicosia claimed that he owned the Burn, LLC's liquor license. I explained that the Tenant had in fact owned the license since 1996, and offered to send a copy of the license to the Landlord. Mr. Nicosia declined the offer but said that he would call his attorney to verify and, if the license was in fact in the name of Burn, LLC, he would approve the new operator. Nicosia promised to get back to me the following week. Relying on Nicosia's promise, I agreed to sell the restaurant and liquor license to the proposed new operator for \$525,000.

- 11.) During our meeting on December 31st, Mr. Nicosia stated that he could rent out the space at 647 Tremont Street to anyone, and that it had additional value because it is handicap accessible. He also told me that he wanted the Burn, LLC liquor license to be transferred to one of his two other projects, one on Waverly Street or the other a catering facility he was building on Harrison Avenue.
- 12.) I never told Mr. Nicosia that the Whaling in Oklahoma restaurant was closing or indicated a date. Nor did I offer to give him \$100,000 in cash.

Signed under the pains and penalties of perjury this 3rd day of February, 2020.



Brian J. Lesser

EXHIBIT 2



Licensing Board for the City of Boston

1 City Hall Plaza, Room 809, Boston, MA 02201 Phone: 617-635-4170 Fax: 617-635-4742

Commissioners:

Kathleen M. Joyce, Chairman

Keeana S. Saxon

Liam P. Curran

Executive Secretary:

Lesley Delaney Hawkins

September 4, 2019

Kristen L. Scanlon, Scanlon Law
354 Commonwealth Avenue, Suite 3F
Boston, MA 02115

**Re: 645-647 Tremont Street
Burn, LLC**

Dear Attorney Scanlon,

Please be advised that the **ABCC has approved** the petition to pledge the license to **BL Note Holding Tremont Street LLC** for the above licensed business.

If you should have any questions contact Mary Beth Collins from this office at 617-635-4170.

For the Board,

Lesley Delaney Hawkins, Esq.
Executive Secretary



ADD 072

EXHIBIT 4

NOTIFY

16

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT

DOCKET NO. 2084CV218E

**MARIO NICOSIA, TRUSTEE OF THE
N & M TRUST VII, NIC LIMITED
PARTNERSHIP and MARIO NICOSIA,
INDIVIDUALLY,**

Plaintiffs

VS.

**BURN LLC, BL NOTE HOLDING
TREMONT STREET LLC, TIMOTHY
MASLOW, BRIAN LESSER, and
ANDREW HUSBANDS,**

Defendants

**ORDER ON PLAINTIFFS' MOTION TO SELL
THE DISPUTED LIQUOR LICENSE AND PLACE THE SALE PROCEEDS
IN ESCROW DURING THE PENDENCY OF THIS CASE**

For the reasons stated within plaintiffs' motion and memorandum, the motion is **ALLOWED**. A reasonable likelihood of success on the merits and irreparable harm to the plaintiffs, balanced against potential harm to the defendants, has been established and a preliminary injunction was issued by Kinder, J. (Appeals Court). Both parties claim an entitlement to and intent to sell the liquor license, and a sale now will mitigate against an almost guaranteed decline in value over the pendency of this litigation. When the plaintiffs have entered into a contract for the sale of the premises with the license, the defendants shall execute all necessary documents and cooperate as necessary and required to effectuate the transfer of the

notice sent
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liquor license to the plaintiff(s) for sale with the premises. Following the sale, the plaintiffs shall place in escrow funds equal to the portion of the sale price allocated to the liquor license, but in no event shall an amount less than \$525,000.00 be placed in escrow and held in escrow pending the resolution of this litigation.

Date: September 10, 2020



Susan E. Sullivan
Assoc. Justice of the Superior Court

CN

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
DEPARTMENT OF THE TRIAL COURT
C.A. No. 2584CV01657 ^C

BRIAN J. LESSER and BURN, LLC

Plaintiffs,

v.

KRISTEN L. SCANLON and SCANLON
LAW, LLP

Defendants.

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs, Brian J. Lesser and Burn, LLC (“Plaintiffs”) respectfully submit this Opposition to Defendants Kristen L. Scanlon and Scanlon Law, LLC’s (“Defendants”) Motion to Dismiss. Defendants ask this Court to dispose of Plaintiffs’ well-pleaded Complaint at the threshold, notwithstanding the detailed factual allegations that easily meet the Rule 12(b)(6) standard. Plaintiffs allege that Defendants—attorneys who owed them duties of competence, loyalty, and candor—misrepresented the enforceability of the Lease’s “Negative Pledge” provision, withheld operative documents, and advised Plaintiffs to pursue a course of action that directly resulted in millions of dollars in liability. These allegations, accepted as true and with all reasonable inferences drawn in Plaintiffs’ favor, state claims for negligence, breach of contract, breach of fiduciary duty, and negligent misrepresentation. Dismissal at this early stage would be inconsistent with Massachusetts law, which requires only a plausible statement of claim, not proof.

Defendants' sole argument is a statute-of-limitations defense. They contend accrual began in 2020, when the landlord sent a default notice, filed a complaint, and obtained interim injunctive relief. Under Massachusetts law, a legal-malpractice claim accrues when a client knows or should know that they have sustained appreciable, non-contingent harm caused by counsel. Here, no such harm existed until the Superior Court (i) on April 26, 2023 upheld the Lease's Negative Pledge and voided the subsequent pledge, and (ii) on January 22, 2024 entered final judgment and imposed G.L. c. 93A, § 11 liability. Earlier notices and interim orders left enforceability unresolved and, at times, favored Plaintiffs. At the pleadings stage, the complaint more than plausibly alleges timely claims for negligence, breach of fiduciary duty, contract, and negligent misrepresentation and demonstrates that Plaintiffs reasonably continued to rely on Defendants' advice, warranting the application of the continuing representation doctrine. The motion should be denied.

BACKGROUND

Lease and Negative Pledge Agreement

In 1996, N&M Trust VII (the "Landlord") leased the ground and first floors of 647 Tremont Street, Boston (the "Premises") to Burn, Inc. (Compl. ¶ 9.) At execution, the Landlord held all-alcohol License LB 99213 (the "Liquor License") for the prior restaurant at the Premises. (Compl. ¶ 11.) The Lease required Burn, Inc. to become a sublicensee of the Liquor License, and in 1996 the Boston Licensing Board and ABCC approved transfer to Burn, Inc. (Compl. ¶¶ 12–13.) Article 11.24 barred any transfer, assignment, or sale of the Liquor License and provided for reversion upon expiration or termination, known as a "Negative Pledge Agreement." (Compl. ¶¶ 14–15.) Under Article 8.1(c) ("Events of Default"), any transfer, pledge, or assignment of the Landlord's assets and/or the Liquor License constituted a default. (Compl. ¶ 16.) Despite this clause, Defendants assured Plaintiffs in no uncertain terms that the Negative Pledge Agreement was

legally unenforceable and Plaintiffs reasonably relied on that representation, as Defendants held themselves out as subject matter experts in this area of the law. (Compl. ¶ 17.)

Licensing Pledge Agreement

In January 2018, Plaintiff Brian Lesser became involved with the restaurant “Whaling in Oklahoma” at the Premises. (Compl. ¶ 33.) With the Landlord’s knowledge, Burn, Inc. converted to Burn, LLC and succeeded to the Lease. (*Id.*; Defendants’ Exhibit 1, Verified Complaint ¶ 18.) On or about November 1, 2018, Plaintiffs, not with the help of Defendants, entered into a separate Pledge Agreement by which Burn, LLC pledged the Liquor License to Lesser to secure a \$445,000 loan (the “Licensing Pledge Agreement”). (Defendants’ Exhibit 1, Verified Complaint ¶ 20.) Defendants did not draft that Pledge Agreement; their role concerned legal advice and agency filings related to approval of the already-executed pledge. (Compl. ¶¶ 17, 22–25, 29–30.)

Defendants’ Representation

Defendants, Plaintiffs’ longtime counsel (Compl. ¶ 22), advised Plaintiffs on numerous occasions that Lease’s Negative Pledge Agreement was unenforceable and contrary to public policy. (Compl. ¶¶ 17, 36.) Acting for Plaintiffs, Defendants prepared and filed a petition with the Boston Licensing Board and ABCC seeking approval of the pledge to Lesser to secure financing; they reviewed Lease provisions, required Lesser to sign an attestation that, to the best of his knowledge and belief, the pledge would not violate other agreements, and obtained regulatory approval on September 4, 2019. (Compl. ¶¶ 23–25, 29–30.) Defendants did not provide Lesser with other documents submitted with the petition. (Compl. ¶ 30.)

Provisional Developments – No Merits Ruling

On January 8, 2020, the Landlord issued a letter demanding termination of the pledge and served a Notice of Default, asserting violation of Article 11.24. (Compl. ¶ 37.) The Landlord then sued for injunctive relief, breach of agreement, aiding and abetting breach, and violation of G.L. c. 93A, § 11—premised on the pledge as an event of default, not on the act of petitioning regulators. (Compl. ¶ 38; Defendants’ Exhibit 1, Verified Complaint ¶¶ 31–39.) On January 31, 2020, the Landlord moved for a preliminary injunction to extinguish encumbrances and force a sale of the Liquor License back to the Landlord; Plaintiffs opposed, relying on the duly approved pledge. (Defendants’ Exhibit 2, dkt. entry 5; dkt. entry 6.) The Superior Court denied the motion “for the reasons set forth in the opposition.” (Defendants’ Exhibit 2, dkt. entry 5 endorsement.) Weeks later, on March 19, 2020 a single justice issued interim injunctive relief to preserve the status quo given the finite number of licenses. (Defendants’ Exhibit 2, dkt. entry 12.) Thus, as the Complaint alleges, there was no merits ruling until April 2023 and Plaintiffs reasonably believed the dispute remained winnable.

On March 7, 2023, Plaintiffs filed an emergency motion to prevent a sale of the Liquor License based on the approved pledge; the motion was first allowed on the papers, then denied after the hearing. (Defendants’ Exhibit 2, dkt. 58.)¹

First merits determination

On or about April 26, 2023, the court granted partial summary judgment, holding that the Lease’s Negative Pledge Agreement is lawful and the Pledge Agreement is null and void. Compl. ¶ 42; (Exhibit A, dkt. entry 61 Memorandum and Order on Motions for Summary Judgment

¹ Defendants’ Motion to Dismiss Exhibit 2 only includes Docket Entries 1-29. However, the Court may take judicial notice of the court’s records in a related action. *Jarosz v. Palmer*, 436 Mass. 526, 530 (2002) citing *Brookline v. Goldstein*, 388 Mass. 443, 447 (1983).

(judicially noticeable court record)). The Court did not adjudicate petition-related issues on summary judgment; instead, it reserved for trial the claims tied to the petition/attestation (including G.L. c. 93A, misrepresentation, and conversion) because those turned on disputed facts. (Plaintiffs' Exhibit A, dkt. entry 61, Memorandum and Order on Motions for Summary Judgment (judicially noticeable court record)). The Landlord's 2020 suit likewise targeted the License Pledge Agreement as a Lease default, not the petition for approval. (Compl. ¶¶ 37–38; Defs.' Ex. 1, Verified Compl. ¶¶ 31–39.)

As alleged, Plaintiffs still reasonably relied on Defendants' advice. (Compl. ¶ 28.) After a five-day jury-waived trial on the reserved claims, the Court entered final judgment on January 22, 2024, found willful and knowing violations of G.L. c. 93A, § 11, and awarded treble damages—expressly linking liability to the petition and attestation submitted to the Boston Licensing Board and ABCC (i.e., actions undertaken through Defendants' advice and agency filings, not the drafting of the Pledge Agreement). (Compl. ¶ 43; Exhibit B, dkt. entry 92, 93; Exhibit C, Memorandum of Decision and Order on Plaintiff's Request for Attorney's Fees and Costs, dkt. entry 112 (judicially noticeable court records). Only with these rulings did Plaintiffs have definitive notice that Defendants' conduct had caused appreciable harm.

ARGUMENT

I. Standard of Review

On a Rule 12(b)(6) motion, the Court accepts all well-pleaded facts as true, draws every reasonable inference in the plaintiff's favor, and asks only whether the complaint states a plausible claim. *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008). It is so “well understood that a complaint will be read with utmost generosity in favor of the pleader that one may say, with but a

touch of hyperbole, that a motion to dismiss under Mass. R. Civ. P. 12(b)(6), lies only when the plaintiff has somehow managed within the four corners of the complaint to plead himself out of court.” *McEneaney v. Chestnut Hill Realty Corp.*, 38 Mass App. Ct. 573, 579-80 (Mass. App. Ct. 1995) (Kass, J. concurring in part). A statute-of-limitations defense warrants dismissal only if untimeliness is apparent on the face of the complaint. See *Epstein v. Seigel*, 396 Mass. 278, 279 (1985). Accrual for legal malpractice follows the discovery rule: the claim accrues when the client “knows or reasonably should know that he or she has sustained appreciable harm as a result of the lawyer’s conduct.” *Lyons v. Nutt*, 436 Mass. 244, 247 (2002) (emphasis added).

II. Accrual turns on appreciable harm, which did not exist until the 2023 summary judgment ruling.

The Supreme Judicial Court has held that a claim for legal malpractice accrues when a client suffers “appreciable harm” and knows or should know that harm resulted from the attorney’s conduct. *Williams v. Ely*, 423 Mass. 467, 473 (1996). However, appreciable harm is not triggered by contingent, theoretical, or reversible events. Instead, the courts have defined appreciable harm to mean an injury “capable of being measured or perceived.” *Vinci v. Byers*, 65 Mass. App. Ct. 135, 139 (2005). The client “need not know the full extent” of damages, but there must be some concrete, non-contingent loss. *Id.* Additionally, “the plaintiff has the burden of proving that the facts take the case outside of the statute of limitations.” *Williams*, 423 Mass. at 474.

The Appeals Court’s decision in *Eck v. Kellem* is directly on point. 51 Mass. App. Ct. 850 (2001). In *Eck*, the plaintiff sued his former attorney for negligently drafting a purchase and sale agreement that was supposed to insulate him from liability for hazardous waste. *Id.* at 851. When the purchaser later sued Eck for hazardous waste, he retained new counsel but continued to rely on Kellem’s assurances that the agreement protected him. *Id.* at 852. Judgment was not entered against Eck until 1994. *Id.* at 853. The Appeals Court held that the statute of limitations on Eck’s

malpractice claims did not begin to run when the purchaser first filed suit in 1989, but only when judgment entered, because until that time Eck had no notice of “appreciable harm” and had every reason to rely on his attorneys’ assurances that the claims were defensible. *Id.* at 856. The Appeals Court accordingly affirmed the trial court’s decision of the defendant attorney’s motion for summary judgment and remanded the case for trial. *Id.*

The same reasoning controls here. As in *Eck*, Plaintiffs’ counsel repeatedly assured them that the Lease’s Negative Pledge provision was unenforceable and that their position was legally sound. Plaintiffs reasonably relied on that advice through years of litigation, bolstered by early court rulings denying preliminary injunctive relief. As alleged, Defendants consistently advised that the Lease’s Negative Pledge clause was unenforceable under G.L. c. 138 and directed the related agency filings; Plaintiffs reasonably relied on that advice throughout the underlying dispute until the court’s 2023 and 2024 merits ruling.² (Compl. ¶¶ 17, 22-25.) Until April 2023, no court had determined that the pledge violated the Lease; Plaintiffs reasonably believed their position remained viable. Only when the Superior Court entered partial summary judgment in 2023, followed by final judgment in January 2024, did Plaintiffs sustain cognizable, appreciable harm.

Just as in *Eck*, accrual was tied to the entry of judgment, not the mere initiation of litigation or interim proceedings. Dismissing Plaintiffs’ claims as time-barred would ignore Massachusetts precedent holding that “a cause of action accrues on the happening of an event likely to put the plaintiff on notice” of actual, non-contingent harm—not speculative or reversible injuries.

² Plaintiffs are not relying on extra-record material at this stage. Without inviting conversion, Plaintiffs note that sworn testimony exists corroborating the Complaint’s allegations regarding Defendants’ position on the unenforceability of the Negative Pledge Agreement under G.L. c. 128. Should the motion be converted under Rule 12(d) or addressed at summary judgment, Plaintiffs will submit that testimony.

Hendrickson v. Sears, 365 Mass. 83, 89 (1974). Because Plaintiffs’ harm was not appreciable until judgment, their claims are timely under *Eck*.

Defendants contend that the January 2020 default notice and lawsuit show Plaintiffs knew or should have known they were harmed, but that argument ignores the obvious: those filings consisted only of allegations, not findings of wrongdoings. Despite Defendants’ argument otherwise, exposure to potential liability during active litigation, where defenses remain viable, does not start the clock on the statute of limitations. *Eck*, 51 Mass. App. Ct. at 855–856. Under *Spilios v. Cohen* and *Lyons*, accrual could not begin earlier because harm remained speculative and reversible until those merit rulings. See *Lyons*, 436 Mass. at 250–51; *Spilios v. Cohen*, 38 Mass.App.Ct. 338 (discussing *Spilios* and holding limitations could not begin before adverse decision fixed harm). Even if Defendants dispute Plaintiff’s allegations about reliance or the timing of harm, those issues are fact-intensive and cannot be adjudicated under Rule 12(b)(6).

Defendants further argue that Plaintiffs’ payment of legal fees create the appreciable harm necessary to start the limitations clock. If every legal fee incurred in the defense of a lawsuit over a contested area of law sufficed, virtually every client defending a lawsuit could immediately sue their counsel. Instead, courts require that the fees be tied to clear malpractice-caused harm. Until adverse judgments issued in 2023, Plaintiffs’ expenses were merely the cost of defending a disputed claim—not “appreciable harm” caused by malpractice.

The January 2020 default notice, lawsuit, and injunction proceedings were provisional. The Superior Court denied the landlord’s preliminary injunction request “for the reasons set forth in [Plaintiffs’] opposition,” validating Plaintiffs’ belief – formed on Defendants’ advice – that the Negative Pledge Agreement was unenforceable. (Defendants’ Exhibit 2, dkt. entry 5 order endorsed ‘Denied’.) The single-justice’s later order preserved the status quo without adjudicating

enforceability. Plaintiffs' first non-contingent loss came with the court's April 2023 partial summary judgment declaring the Negative Pledge Agreement enforceable and voiding the pledge, followed by a final judgment in January 2024, finding intentional misrepresentation and a violation of G.L. c. 93A, § 11, and later an award in excess of \$2 million. Compl. ¶ 43-44.

III. Neither the Landlord's issuance of a notice of default nor the Landlord's filing of a complaint put the Plaintiffs on notice of Defendants' tortious conduct.

Defendants cite to two cases to support their argument that a plaintiff's receipt of a demand letter and/or notice of claim for issues arising out of an attorney's malpractice placed the plaintiff on reasonable notice of the attorney's alleged tortious conduct and triggers the statute of limitations: *Murphy v. Smith*, 400 Mass. 133 (1991) and *Tallarico v. Tierney*, 92 Mass. App. Ct. 1102 (2017). Neither of these cases stand for the position proffered by Defendants.

Murphy involved a negligent title certification—an error the SJC treated as inflicting appreciable harm at the moment of purchase because the buyers paid for land that was not what counsel certified it to be, and a subsequent letter from a neighbor's attorney supplied concrete notice of a specific, existing, irrefutable title defect. 400 Mass. at 136-137 & n.6. The Court did not hold that a demand or notice letter—or legal fees, standing alone—automatically triggers accrual. To the contrary, after recognizing discovery and appreciable harm on those facts, the SJC vacated summary judgment because factual disputes existed about tolling under the continuing-representation doctrine. *Id.* at 137-138. Here, by contrast, Plaintiffs' supposed losses (the Negative Pledge Agreement enforceability and G.L. c. 93A, § 11 exposure) were wholly contingent and potentially reversible until the Superior Court's April 26, 2023 partial summary judgment and the January 22, 2024 final judgment fixed liability. Interim correspondence and provisional proceedings did not adjudicate enforceability or establish a non-contingent injury. Where, as here, liability remained unsettled and Plaintiffs reasonably relied on counsel's advice throughout the

underlying dispute, Massachusetts law defers accrual until a merits determination. See *Eck v. Kellem*, 51 Mass. App. Ct. 850, 855 (2001). Murphy does not compel a different result. Moreover, *Murphy* itself illustrates why dismissal is premature: the SJC vacated summary judgment because the timing and scope of the attorney’s continuing representation presented questions of fact. 400 Mass. at 137-138.

Defendants’ reliance on *Tallarico v. Tierney*, 92 Mass. App. Ct. 1102 (2017) (a Rule 1:28 that is non-precedential), is likewise misplaced. In any event, *Tallarico* was decided on a developed summary-judgment record; here, the timing of the knowledge, the nature of any harm, and whether representation continued are questions of fact inappropriate for Rule 12(b)(6). *Tallarico* involved a transaction-level injury fixed at inception: the attorney drafted a promissory note and mortgages in 2005 on behalf of two business partners; by October 25, 2007 the partners’ relationship soured and the attorney, on behalf of the other partner, sent a demand for full payment of the mortgage. 92 Mass. App. Ct. at *1. Plaintiff Tallarico hired counsel and filed a complaint in 2011, claiming that the attorney committed malpractice by falsely inducing them to sign the promissory note and mortgage and attempting to inequitably enforce plaintiff’s mortgage while leaving the other partner’s mortgage untouched. *Id.* at 2. On those undisputed facts, the Appeals Court held the October 2007 demand (and the plaintiffs’ engagement of counsel) supplied the “necessary coalescence of discovery and appreciable harm.” *Id.*

By contrast, Plaintiffs’ alleged losses here were not fixed by any single transaction event. Whether the Lease’s Negative Pledge Agreement was enforceable and whether the subsequent pledge was valid remained genuinely disputed through years of litigation. Furthermore, this dispute is still on appeal. On March 26, 2025, the Supreme Judicial Court took the appeal *sua sponte* and is soliciting *amicus curiae* briefs to determine: (1) Whether the motion judge erred in

rejecting defendants/appellants' argument that the provision of the release restricting the pledging or assignment of a liquor license was unenforceable as a matter of public policy; and (2) Whether the trial judge erred in concluding that the defendants/appellants violated G.L. c. 93A, § 11, including whether the representation made in defendants/appellants' pledge agreement that the pledge of a liquor license did not violate or constitute a default under the terms of the agreement was an unfair or deceptive act or practice. (Exhibit D, Docket No. SJC-13755) (judicially noticeable court record). Early steps (default notices, provisional injunction activity, agency approvals/filings) did not adjudicate enforceability or establish liability. Furthermore, unlike *Tallarico*—where the facts were clear that the attorney-client relationship had ended by the time of the demand—when the representation, what Plaintiffs knew, and when, are fact questions inappropriate for resolution on a motion to dismiss. On the face of the Complaint, there was no “coalescence” until the court’s April 26, 2023 partial summary judgment (upholding the Negative Pledge Agreement and voiding the pledge) and the January 22, 2024 final judgment (imposing G.L. c. 93A, § 11 liability) fixed a concrete injury. *Tallarico*’s accrual analysis, predicated on immediate, transaction-level harm and no ongoing representation, does not control and cannot sustain dismissal on limitations grounds at the pleadings stage.

Even Landlord’s filing of the Verified Complaint did not trigger the statute of limitations. Defendants rely on *Massachusetts Elec. Co. v. Fletcher, Tilton & Whipple, P.C* to support their argument that Massachusetts courts consider the filing of a complaint to be sufficient to put a plaintiff on notice of appreciable harm. 394 Mass. 265, 268 (1985); Defs. Motion, p. 13. Defendants again obfuscate court’s decision. In or about 1972, *Mass. Elec. Co.*, an electrical company, was sued for personal injury. *Id.* at 266. During that litigation, the attorney for the electrical company found documentation harmful to their position and shredded it, then later

disclosed his actions pursuant to the rules of ethics. *Id.* The excess insurer covering this dispute learned of what happened and notified the electric companies that it would reserve its rights as a result of the allegations of destruction of documents. *Id.*

The judge in the personal injury case ruled that the document destruction would be admissible at trial, which electrical company contended in its later lawsuit against the attorney forced them into making a larger settlement than they would have otherwise. *Id.* at 267. A few years later, in January 1980, the excess insurer for the electrical company in the personal injury action sought reimbursement of the settlement amount, alleging a breach of the cooperation clause in its insurance policy by the destruction documents. *Id.* at 267. The electrical company sued its attorney in July 1983. *Id.* at 265. The court in malpractice case concluded that the appreciable harm incurred when the excess insurer commenced action, as it was clear the electrical company would incur substantial, unavoidable defense costs directly predicated on the attorney's misconduct. *Id.* at 268.

Our facts here are different in every material way. The Landlord's Verified Complaint contested enforceability of the Lease's Negative Pledge Agreement and the subsequent pledge's validity—issues that remained genuinely unresolved for years and, early on, even cut in Plaintiffs' favor (the preliminary-injunction motion was initially denied, and a later status-quo order did not decide the merits). No court had yet held the pledge void or the clause enforceable; no separate adverse claim like the *Mass. Elec. Co.* insurer action fixed injury; and Plaintiffs and litigation counsel reasonably continued to rely on the legal position their attorneys advanced.

Massachusetts courts have squarely recognized that *Mass. Elec. Co.* does not create a categorical “filing equals accrual” rule: where the client's liability remains contingent and counsel's assurances align the defense strategy, accrual can await the merits judgment that first

renders harm cognizable. See *Eck v. Kellem*, 51 Mass. App. Ct. 850, 854–56 (2001) (distinguishing *Mass. Elec. Co.*; statute did not run until judgment where reliance persisted and harm was not yet certain). Here, appreciable harm arose only when the Superior Court’s April 26, 2023 partial summary judgment (upholding the Negative Pledge Agreement and voiding the subsequent pledge) and the January 22, 2024 final judgment (imposing G.L. c. 93A, § 11 liability) fixed Plaintiffs’ injury. *Mass. Elec. Co.* does not compel a different result. To the extent Defendants contend Plaintiffs suffered appreciable harm earlier, that assertion raises factual questions that cannot be resolved on the pleadings.

Defendants, citing the unpublished case *Haney v. Greenbaum*, claim that this Court has previously rejected the argument that a plaintiff did not become aware of their attorneys’ malpractice because they continued to believe their defenses had legal merit and could succeed until an unfavorable summary judgment decision refuted that defense. No. 1684CV01633, 2018 Mass. Super. LEXIS 60, at * 7 n.4 (Mass. Super Ct. Apr. 9, 2018); Defs. Motion p. 11. Defendants plainly overread the case. The court in *Haney* did not announce a categorical rule that a plaintiff’s continued belief in the merit of his defense can never defer accrual until an adverse ruling. Rather, the court rejected plaintiff’s version of that argument because the summary judgment record showed (1) plaintiff had actual knowledge of the malpractice four years earlier 2012 when he signed a Verified Complaint that his lawyers made a mistake in classifying his company as a public charity, and (2) non-contingent harm immediately followed when he began paying attorneys fees to fight a statutory violation alleged by the Attorney General’s office for claiming his company was a public charity without making the requisite filings with the Attorney General’s office. *Haney*, 2018 Mass. Super. LEXIS 60, at * 7.

Crucially, the *Haney* court addressed the precise contention that Defendants invoke – that the plaintiff did not become aware of malpractice until an unfavorable May 2015 summary judgment because his attorneys had said their theory “could succeed” – and rejected it because plaintiff already knew of the alleged act of malpractice and was already suffering appreciable harm. *Id.* Those predicate facts are not alleged here. Unlike *Haney*, this Complaint alleges neither a verified pleading acknowledging any drafting/formation error nor an early asset freeze that itself created an unavoidable, measurable injury. As pleaded, interim steps (default notice, regulatory filings, status-quo orders) left liability contingent until the court’s April 2023 summary judgment (and January 2024 final judgment) made it concrete. This is precisely the scenario in which Massachusetts courts defer accrual. *See Eck v. Kellem* (limitations did not run until judgment where the client, reasonably relying on counsel’s assurances and aligned defense strategy, had no cognizable harm before the adverse merits outcome). 51 Mass. App. Ct. at 855-856. *Haney* further underscores the point that the court relied on a summary judgment record, establishing early actual knowledge and non-contingent harm. That is precisely the kind of record-based determination that is unavailable at Rule 12(b)(6).

IV. Defendants’ “legal fees start the clock” theory overreads Massachusetts law and ignores the posture of this case.

Defendants argue that fees incurred in responding to the 2020 default notice and injunction motion started limitations. That is not the law. Massachusetts does not hold that every litigant who retains counsel to defend a live dispute immediately accrues malpractice claims against prior counsel. Rather, the question is whether the client has sustained appreciable harm attributable to the lawyer’s conduct. *Lyons*, 436 Mass. at 247–48.

Defendants cite a number of cases to argue that accrual of attorneys’ fees alone are enough. None of them support dismissal at this early state, and further, none of them apply here. In *Cantu*

v. St. Paul Cos., Cantu was a defendant of a medical malpractice case. 401 Mass. 53 (1987). His defense counsel failed to give timely notice to Cantu's excess insurer. *Id.* at 55. The jury returned a verdict above the primary limits, and the excess carrier denied coverage because of the late notice. *Id.* To protect himself from personal exposure and to address the coverage problem, Cantu hired a new attorney and incurred fees. *Id.* The court treated those post-verdict coverage-related fees as "appreciable harm" caused by the alleged malpractice. *Id.* at 57. The court reasoned that plaintiff knew, upon the entry of judgment, that defendant failed to give timely notice to plaintiff's excess insurance carrier, that the jury verdict exceeded plaintiff's primary coverage, and that, as a result, after judgment Plaintiff retained new counsel to advise him on the financial exposure in connection with the medical malpractice case and incurred legal fees. *Id.* "At that point, the necessary coalescence of discovery and appreciable harm occurred. It is of no import whether Cantu won on appeal; he had been harmed by having to pay legal fees." *Id.* Here, Plaintiffs' claimed losses—G.L. 93A, § 11 liability in light of the Pledge Agreement violating the Lease—remained contingent on the outcome of the underlying merits and could have been avoided prior to judgment.

Cantu could be applicable insofar that the court in *Cantu* discussed the doctrine of continuing representation. 401 Mass. 53, 58 (1987) ("the statute of limitations may be tolled while the defendant attorney continues to represent the plaintiff"). The court in *Eck* analyzed *Cantu* under the facts of the case, finding that while defendant Kellem was not Eck's attorney in the underlying lawsuit, similar to this instant case, both Eck and his litigation attorney were aligned entirely with defendant Kellem's legal position, and Eck had "every good reason to accept, trust, and rely on" his attorneys' position that Eck was not exposed to liability for hazardous waste. *Eck*, 51 Mass.App.Ct. at 855. Whether or not defendant Kellem was negligent in the preparation of the

purchase and sale agreement had to await the outcome of the hazardous waste suit before it could be said that Eck suffered any cognizable harm. *Id.*

The same is true here: as pleaded, Plaintiffs consistently and reasonably relied on Defendants' advice throughout the underlying dispute. Plaintiffs were furthermore entitled to rely on Defendants' representations until the 2023 summary judgment and 2024 final judgment made clear that such reliance was misplaced. Thus, while *Cantu* shows that fees can constitute appreciable harm where they are immediate, unavoidable, and directly related to defense of an attorney's alleged error, *Eck* confirms that fees incurred in defense of contingent claims are not enough to trigger accrual. Defendants do not allege, nor could they, that the representation ceased in 2020. Even if the Court were to view earlier harm as possible, when Defendants' attorney-client relationship with Plaintiffs ended—and thus whether continuing-representation tolling applies—is a fact question that cannot be resolved on a Rule 12(b)(6) motion.

Defendants similarly rely on *Frankston v. Denniston*, 74 Mass. App. Ct. 366 (2009) (holding that the statute of limitations began to run not when a summary judgment motion was filed that highlighted the attorney's failure to preserve a claim, forcing the plaintiff to incur "additional attorneys' fees and expenses required to ameliorate the harm caused by [the attorney's] alleged error"), *Pelletier v. Chouinard*, 27 Mass. App. Ct. 92 (1989) (holding that the statute of limitations for an attorney's negligent drafting of a deed began to run not when he filed suit to have the deed reformed, but rather when the matter went to trial and plaintiff lost his bid to reform the deed), and *Fessenden Sch. V. Hub Int'l Ltd.*, 99 Mass. App. Ct. 1132 (2021) (holding that the statute of limitations on an attorney's faulty advice began to run not in 1995 when the issue stemming from the faulty advice first arose, but in 2012 when plaintiff hired a firm to fix the issue and incurred fees in the process).

Accordingly, none of Defendants' fee-accrual cases support the contention that incurring fees alone triggers the statute of limitations, much less that this suit should be thrown out before the discovery process has ensued. In each, the plaintiff's accrued fees were the direct, immediate, and unavoidable product of a discrete malpractice-created problem (post-verdict coverage gap in *Cantu*; a limitations defense squarely joined in *Frankston*; a deed defect tried to the court in *Pelletier*; paid consultants to reconstruct missing coverage in *Fessenden*). Here, by contrast, Plaintiffs' 2020 fees were the ordinary costs of litigating live, undecided merits issues. Appreciable harm did not materialize until the Superior Court's 2023 partial summary judgment and the January 2024 final judgment. At a minimum, whether any pre-2023 fees were the direct, unavoidable product of malpractice (as in *Cantu*, *Frankston*, *Pelletier*, and *Fessenden*), or merely the costs of litigating unsettled merits, is a fact question not suited to dismissal at the pleadings stage.


CONCLUSION

Under Massachusetts law, a legal-malpractice claim accrues only when the client knows or should know of appreciable, non-contingent harm attributable to counsel. On the face of the Complaint, no such harm existed until the Superior Court's April 26, 2023 partial summary judgment and the January 22, 2024 final judgment. Earlier default notices, complaint, and provisional injunction activity did not adjudicate enforceability or fix liability (and, at times, favored Plaintiffs) while Plaintiffs reasonably relied on Defendants' advice and filings. Defendants' own fee-accrual authorities (*Cantu*, *Frankston*, *Pelletier*, *Fessenden*) each involved immediate, unavoidable expenditures to confront a discrete malpractice-created problem, not the ordinary costs of litigating live, unsettled merits issues present here. At a minimum, the accrual date, the existence and timing of "appreciable harm," and whether (and when) Defendants' representation ended are fact questions not resolvable under Rule 12(b)(6). For those reasons,

Plaintiffs request this Honorable Court to deny Defendants' Motion to Dismiss, or in the alternative, if the Court is inclined to dismiss this action, Plaintiffs respectfully request leave to amend their complaint.

Respectfully submitted,
BRIAN LESSER AND BURN LLC
By their counsel,

Dated: October 3, 2025




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CERTIFICATE OF SERVICE

I, Jacqueline A. Schmedel, hereby certify that on this 3rd day of October, a copy of the foregoing was served via email, on the following:

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Jacqueline A. Schmedel

EXHIBIT A

✓ 4/27

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NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
Civil No. 20-218-BLS1

MARIO NICOSIA,¹ & another²
Plaintiffs

vs.

BURN LLC, & others³
Defendants

4/28/23
notice sent
BA (4)

MEMORANDUM AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs Mario Nicosia and NIC Limited Partnership bring this action for breach of a commercial lease agreement, which required the return of a liquor license for the premises at the completion of the lease term. Defendants claim the lease provision requiring the return of the liquor license is unenforceable and pursue a variety of counterclaims. The case is before me on cross-motions for summary judgment on the claims and counterclaims. For the following reasons, the motions are allowed in part and denied in part.

BACKGROUND

A. Factual Background

Mario Nicosia is the Trustee of the N&M Trust VII (the "Trust" or "Landlord"), which is the landlord of a commercial building at 647 Tremont Street in Boston (the "Premises"). NIC Limited Partnership is the sole beneficiary of the Trust and the record owner of the Premises.

¹ Individually and as Trustee of the N&M Trust VII.

² NIC Limited Partnership.

³ BL Note Holding Tremont Street LLC, Timothy Maslow, Brian Lesser, and Andrew Husbands.

On August 2, 1996, the Trust entered into a lease of the Premises with Burn, Inc., as tenant (the "Lease"). Under the Lease, Burn, Inc. agreed to use its best efforts to secure regulatory approval to become a sublicensee under an all alcoholic beverages license for the Premises that had been issued to a corporation that Mr. Nicosia controlled (the "License"), or to become the licensee under the License by transfer of the License to Burn, Inc. In either event, upon the termination of the Lease, Burn, Inc. agreed that it would use its best efforts to obtain regulatory approval for the transfer of the License back to the Landlord or the Landlord's affiliate.

To protect the Landlord's rights to the License, Section 11.24 of the Lease states as follows:

Tenant understands and agrees that the sublicense or license ("Liquor License") benefitting the Premises may not be transferred to any location other than the Building, nor may Tenant pledge, assign, sell or transfer the Liquor License to any person, mortgagee or entity other than Landlord or a transferee approved in advance in writing by Landlord. . . . Tenant agrees not to sell, transfer or pledge the Liquor License to any third party or mortgagee and not to transfer, move or attempt to transfer or move the Liquor License to any other location. . . . Tenant hereby agrees for one dollar to sell the Liquor License to Landlord upon expiration or earlier termination of the term, to execute all documents and attend all hearings necessary to effectuate such a sale and to cooperate with Landlord in the transfer of said Liquor License to Landlord or Landlord's designee. . . . Tenant also agrees to obtain the approval of BLC and ABCC of the resale of the Liquor License to Landlord or its successors. . . .

Section 8.1 of the Lease describes "Events of Default" to include "(c) Tenant transfers, pledges or assigns any interest in Landlord's Assets and/or the Liquor License." "[I]f an Event of Default occurs," Section 9.1(b) of the Lease allows the Landlord "immediately or at any time thereafter" to "give Tenant a written notice terminating this Lease on a date not less than ten days after Landlord gives such notice, and upon such date this Lease shall terminate and all rights of

Tenant shall cease without further notice or lapse of time.” Section 9(a) allows the Landlord to sue “for damages or specific performance for the collection of unpaid Rent or the performance of any of Tenant’s obligations” (emphasis added).

Burn, Inc. also entered into a “Negative Pledge Agreement” for the duration of the Lease. Under Section 2 of that agreement, Burn, Inc., as “Pledgor,” agreed: “During the term of this Negative Pledge Agreement, Pledgor shall not mortgage, pledge, hypothecate, convey, encumber, sell or otherwise transfer the License . . . without the prior written consent of the Pledgee,” (i.e. the Trust), and that “[a]ny breach of the provisions of this Negative Pledge Agreement shall be deemed an event of default under the Lease for which the Pledgee shall have all the rights and remedies reserved in the Lease.”⁴

In 1996, the Boston Licensing Board and the Massachusetts Alcoholic Beverages Control Commission (“ABCC”) approved the transfer of the License to Burn, Inc. In reviewing the transfer, ABCC was provided with a copy of the Lease, among other documents.

By agreements dated May 17, 2000, December 17, 2012, and December 13, 2016, Landlord and Burn, Inc. extended the Lease through December 31, 2022, including the obligation thereunder to return the License to the Landlord upon expiration of the Lease.⁵

⁴ Officers of Burn, Inc., including Andrew Husbands, also signed the Negative Pledge Agreement.

⁵ The 2000 extension stated: “The terms of the Article 11.24 of the Lease and of a certain ‘Negative Pledge Agreement’ by and between Landlord and Tenant and relating to the all alcoholic beverages license located at the Premises (‘the license’) are reconfirmed. Tenant hereby acknowledges that the license shall return to Landlord at the conclusion of the term of the Lease as extended, and that in no event should the license be transferred to a restaurant that does not include the Premises.” The 2012 extension changed the Basic Rent and added new extension options, but in all other respects “ratified and confirmed” the Lease.

In January 2018, defendant Brian J. Lesser became involved with the restaurant at the Premises. In March 2018, Mr. Lesser told Mr. Nicosia of his (Mr. Lesser's) intention to convert Burn, Inc. to a limited liability company ("LLC"), but stated that the conversion "would not affect any of the Tenant's lease obligations." Through a representative, Mr. Nicosia relayed that he was "fine with the . . . change" as long as it did not "jeopardize the license."

Or, or about March 7, 2018, Burn, Inc., converted from an S corporation to a LLC known as Burn, LLC. Burn, LLC was the successor Tenant to Burn, Inc. under the Lease. Defendants Mr. Lesser, Timothy Maslow, and Andrew Husbands are all members of Burn, LLC.

On November 1, 2018, Burn, LLC executed a Promissory Note (the "Note"), promising to pay Mr. Lesser \$445,000; and a License Pledge Agreement (the "Pledge Agreement"), pledging the License to Mr. Lesser as collateral for payment of the Note. Mr. Lesser signed the Pledge Agreement on behalf of Burn, LLC, as "Borrower," and individually, as "Lender." In the Pledge Agreement, Mr. Lesser represents that Burn, LLC "has . . . all requisite power and authority to enter into this Pledge Agreement" and "to pledge the Pledged License" as security for the Note, and that the Pledge Agreement "will not . . . violate or constitute a default under the terms of any agreement, indenture, or other instrument . . . applicable to the Borrower or any of its property."

On June 2, 2019, Mr. Lesser assigned the Note payable to BL Note Holdings Tremont Street LLC ("BL Note Holdings"). Mr. Lesser is the sole manager of BL Note Holdings.

Burn, LLC sought approval of the Pledge Agreement by the Boston Licensing Board and ABCC. In doing so, Burn, LLC submitted to the regulators an application, which included the Pledge Agreement which falsely represented that the pledge of the License "will not . . . violate

or constitute a default under the terms of any agreement.”⁶ On or about September 4, 2019, the Boston Licensing Board advised Burn, LLC that the ABCC had approved the petition to pledge the License as security for the Note that was assigned to BL Note Holdings. In seeking approval from ABCB of the pledge of the License, defendants did not supply the agencies with a copy of the Lease, its extensions, or the Negative Pledge Agreement. There is nothing to indicate that the regulators, who reviewed the petition to permit the pledge of the License, were aware of the terms of the Lease; instead, they had the misleading assurances by Mr. Lesser that the Pledge Agreement did not violate any other agreement.

On December 31, 2019, Mr. Lesser and Mr. Nicosia met. Both men claimed to have the right to control the License. The parties dispute what occurred at this meeting. Defendants contend that Mr. Lesser told Mr. Nicosia that the restaurant was not doing well financially and that he (Mr. Lesser) was evaluating opportunities to assign the Lease and License to an accredited restaurant operator acceptable to Mr. Nicosia, that Mr. Lesser disclosed the identity of a proposed new operator, and that Mr. Nicosia stated the proposed new operator was acceptable to him and that he (Mr. Nicosia) would get back to Mr. Lesser the following week about the proposed new tenant. According to plaintiffs, Mr. Lesser said that his restaurant would be closing, that he owned the License, that he would assign or sell it, and offered to pay Mr. Nicosia \$100,000 for the License. Plaintiffs deny that Mr. Nicosia stated that the proposed new operator would be acceptable to him or that he would get back to Mr. Lesser on the topic.

On January 7 and 8, 2020, plaintiffs demanded by letter that defendants terminate the Pledge Agreement and gave notice of default and termination of the Lease. Plaintiffs stated that

⁶ In the application, Mr. Lesser declared “under the pains and penalties of perjury that . . . all statements and representations therein are true to the best of my knowledge and belief.”

the assignment of the Lease constituted an event of default under Section 8.1(c) of the Lease and that the Lease would terminate under Section 9.1(b) of the Lease. On January 24, 2020, Mr. Lesser agreed to sell the restaurant at the Premises and the License to the proposed new operator.

B. Procedural History

Plaintiffs filed this case on January 24, 2020. Their operative pleading is the Amended Complaint (Docket #15). In the Amended Complaint, plaintiffs seek to enforce the Lease and have the License returned to them. They seek injunctive relief (Count I), declaratory relief (Count II), and monetary damages (Count IV).⁷ They also bring claims for unjust enrichment (Count III), violation of G.L. c. 93A (Count V), misrepresentation in connection with the defendants' intent to honor the Lease (Count VI), and conversion (Count VII).

Defendants pursue a Counterclaim (Docket #7). Contending that termination of the Lease was improper, defendants bring claims for breach of the Lease (Count I). Defendants also bring counterclaims for conversion of defendants' personal property (Count II) and violation of G.L. c. 93A based on various alleged misrepresentations by Mr. Nicosia (Count III).

The parties have cross-moved for summary judgment. Plaintiffs move for summary judgment on Counts I and II of the Amended Complaint and on all counts of the Counterclaim. Defendants move for summary judgment on all counts in the Amended Complaint and Count I of the Counterclaim.

⁷ In addition to suing for breach of contract by Burn LLC, Count IV also asserts a claim against the individual defendants for aiding and abetting the breaches of the Lease.

DISCUSSION

I. The Summary Judgment Standard

Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); Cassesso v. Comm'r of Corr., 390 Mass. 419, 422 (1983). See Dorchester Mut. Ins. Co. v. Miville, 491 Mass. 485, 492 (2023); Dorchester Mut. Ins. Co. v. Krussell, 485 Mass. 431, 435 (2020).

Interpretation of a contract is ordinarily an issue of law for the court. Dorchester Mut., 491 Mass. at 492-493; Helfman v. Northeastern Univ., 485 Mass. 308, 328 (2020); Balles v. Babcock Power Inc., 476 Mass. 565, 571 & n.12 (2017). At the heart of this case is the enforceability of Section 11.24 of the Lease, which bars assignment of the License. At argument, all parties agreed that the enforceability of the Lease was ripe for summary judgment.

II. Enforceability of the Lease

The parties sharply disagree about the enforceability of Section 11.24. Plaintiffs argue that “sophisticated parties agreed to an unambiguous, detailed Lease” and that defendants “without any justification discarded and repudiated the agreement.” Plaintiffs’ Reply to Defendants’ Memorandum in Opposition to Plaintiffs’ Motion for Summary Judgment at 9 (Docket #47). Defendants assert that the contractual language “prohibiting the pledge of a liquor license . . . is against public policy and unenforceable as a matter of law.” Defendants’ Memorandum in Support of Defendants’ Motion for Summary Judgment at 15 (Docket #48).

“[A] contract should be construed to give it effect as a rational business instrument and in a manner which will carry out the intent of the parties.” Shane v. Winter Hill Fed. Sav. & Loan Ass’n, 397 Mass. 479, 483 (1986), citing McMahon v. Monarch Life Ins. Co., 345 Mass. 261, 264 (1962). “Courts do not go out of their way to discover some illegal element in a contract or

to impose hardship upon the parties beyond that which is necessary to uphold the policy of the law.” Nusenbaum v. Chambers & Chambers, Inc., 322 Mass. 419, 422 (1948). “While courts are hesitant to invalidate contracts on . . . public policy grounds, the public interest in freedom of contract is sometimes outweighed by other public policy considerations; in those cases the contract will not be enforced.” A.Z. v. B.Z., 431 Mass. 150, 160 (2000).

Defendants principally rely on three cases to argue that Section 11.24 of the Lease is unenforceable as a matter of public policy.⁸ None of the cases establishes that a contractual agreement to transfer a liquor license through a valid regulatory process is unenforceable. The three cases involve regulatory *rejection* of licenses or contested provisions, whereas here the Board and ABCC *approved* the transfer of the License in 1996, with the Lease before them.

Defendants first cite Number Three Lounge, Inc. v. Alcoholic Beverages Control Comm’n, 7 Mass. App. Ct. 301 (1979). In that case, the court upheld ABCC’s revocation of a liquor license where the plaintiff submitted false applications which did not disclose “the identity of the true owners of the lounge.” Number Three Lounge, 7 Mass. App. Ct. at 302. Here, the parties did not obfuscate ownership or make any similar misrepresentation to the regulators during the 1996 transfer and the regulators approved the transfer, with full knowledge of the terms of the Lease.⁹

⁸ See Defendants’ Memorandum of Law in Support of “Defendants’ Motion for Partial Summary Judgment” at 16 (Docket #49), citing Beacon Hill Civic Ass’n v. Ristorante Toscano, Inc., 422 Mass. 318 (1996); Hastings Assocs., Inc. v. Local 369 Bldg. Fund, Inc., 42 Mass. App. Ct. 162 (1997); and Number Three Lounge, Inc. v. Alcoholic Beverages Control Comm’n, 7 Mass. App. Ct. 301 (1979).

⁹ This is in obvious contrast to defendants’ more recent submission to ABCC, misrepresenting through the Pledge Agreement that the pledge of the License did not violate any contract, and withholding from ABCC the Lease and the Negative Pledge Agreement, which would have put the lie to the representation in the Pledge Agreement.

Defendants next cite Hastings Assocs., Inc. v. Local 369 Bldg. Fund, Inc., 42 Mass. App. Ct. 162 (1997), where the court found that a plaintiff may not recover under a contract that subverts the regulatory approval process. In that case, after a municipality denied plaintiff a liquor license, plaintiff contracted to use the defendant's license without proper regulatory authorization. Hastings Assocs., 42 Mass. App. Ct. at 165-166. Because the parties "effectively substituted their own judgment for that of the local licensing authority," and thwarted the regulatory process, plaintiff could not "recover under its illegal arrangement." Id. at 178. Here, the 1996 transfer did not thwart the regulatory process. Rather, regulators approved the transfer with all relevant information. Moreover, the future resale of the License under Section 11.24 of the Lease is expressly subject to regulatory approval.

Defendants finally cite Beacon Hill Civic Ass'n v. Ristorante Toscano, Inc., 422 Mass. 318 (1996), in which a restaurant agreed not to apply for an all alcohol license in exchange for a civic association's promise not to oppose the restaurant's application for a beer and wine license. Beacon Hill, 422 Mass. at 319. The court invalidated the agreement as against public policy, id. at 323, because Massachusetts law regarding review of liquor license applications encourages "free and open discussion before the licensing officials." Id. at 322. The court found that the parties' agreement impaired that interest. Beacon Hill is inapposite. In Beacon Hill, the Boston Licensing Board explicitly "decreed illegal" the contractual term restraining participation in discussions before regulatory officials. Id. at 319. The facts here are completely different; the Board had the Lease before it, including the contested restraint on transferring, pledging or assigning the License, and approved the 1996 transfer of the License to Burn, Inc. on those terms.

In reviewing decisions from administrative agencies, courts generally “accord due weight to the experience, technical competence, and specialized knowledge of the agency,” Seagram Distillers Co. v. Alcoholic Beverages Control Comm’n, 401 Mass. 713, 721 (1988), quoting G.L. c. 30A, § 14(7), including the ABCC with its “specialized knowledge of the problems affecting the regulation of the sale of alcoholic beverages.” Connolly v. Alcoholic Beverages Control Comm’n, 334 Mass. 613, 618 (1956). Unlike in Beacon Hill, here the regulators’ approval of the 1996 transfer – with the Lease before them – strongly suggests the Lease’s terms are not contrary to public policy. The Boston Licensing Board and ABCC’s decision merits deference.

The public policy interest in free and open discussion before licensing officials, which was recognized by Beacon Hill, is not implicated to the same extent in the instant case. No party waived its right to participate in discussions before the Boston Licensing Board or the ABCC. Instead, under Section 11.24 of the Lease, the tenant pledges only “to execute all documents and attend all hearings necessary to effectuate such sale [of the License back to Landlord].” Unlike the restaurant in Beacon Hill, defendants remains free to go before the regulators to seek their own liquor license. The Lease compels defendants to participate in a narrow set of discussions, rather than acting as a broad prohibition on participation like that condemned in Beacon Hill.

Defendants argue that the 2019 ABCC approval of its pledge of the License as security for the Note assigned to BL Note Holdings is entitled to deference and that it has a perfected security interest in the License. While a decision of the regulators is generally entitled to deference, their 2019 approval of the pledge is not dispositive. In its submission to regulators, Burn, LLC and Mr. Lesser attested through the Pledge Agreement that the pledge of the License “will not . . . violate or constitute a default under the terms of any agreement.” Defendants did

not include the Lease or the Negative Pledge Agreement in its submission for regulatory approval. Given that the regulators did not have the Lease before them and that defendants misleadingly attested that the pledge did not violate any other agreements, the regulators' allowance of the pledge cannot be understood as affecting or construing the enforceability of the Lease.

Consistent with the regulatory approval of the transfer of the License in 1996, Section 11.24 of the Lease is enforceable. Defendants could not assign or pledge the Lease under the Pledge Agreement without violating the Lease, creating an event of default thereunder, and entitling the Landlord to specific performance.¹⁰

III. The Amended Complaint

A. Equitable Relief/Breach of Contract

Plaintiffs move for summary judgment on Counts I and II of the Amended Complaint, which seek injunctive (Count I) and declaratory (Count II) relief for defendants' breach of the Lease. Defendants cross-move for summary judgment on Counts I and II, as well as Count IV, which seeks damages for breach (and aiding and abetting the breach) of the Lease.¹¹ For the

¹⁰ Defendants also argue that under G.L.c. 138, § 23, para. 13, they had a statutory right to pledge the License as security for a loan, provided the local licensing authority approved the pledge. This reference proves nothing. Section 23 is silent on the question of whether the holder of a License may contractually agree not to pledge the License and to take all steps necessary to transfer the License to another upon a future event. See also, e.g., *Id.*, para. 9 ("Any license under this chapter . . . may be transferred . . ."). Powers granted by statute are routinely bargained away by contract in many contexts. See, e.g., Garrity v. Conservation Comm'n of Hingham, 462 Mass. 779, 785 (2012); Canal Elec. Co. v. Westinghouse Elec. Corp., 406 Mass. 369, 377-378 (1990). The statutory recognition of the power to pledge a liquor license protects the license holder's private rights. A contractual agreement not to invoke the power to pledge a license – certainly in this context – does not intrude on public policy concerns.

¹¹ Although plaintiffs have not moved for summary judgment on Count IV, where defendants move for summary judgment on that count, the Court may enter summary judgment thereon for either party. See Mass. R. Civ. P. 56(c) ("Summary judgment, when appropriate, may be rendered against the moving party.").

reasons described above, defendants have breached the Lease by, among other things, pledging or assigning the License. Summary judgment shall be entered for plaintiffs on so much of Count IV as alleges that Burn, LLC breached the Lease.¹² Injunctive and declaratory relief shall be granted accordingly, including to compel defendants to take all steps necessary to reconvey the License to Landlord or its designee.

An “injunction is an exercise of a court’s equitable authority, to be ordered only after taking into account all of the circumstances that bear on the need for prospective relief.” Salazar v. Buono, 559 U.S. 700, 714 (2010). Injunctive relief is appropriate when the “remedy at law would be inadequate.” Turners Falls Fire Dist. v. Millers Falls Water Supply Dist., 189 Mass. 263, 266 (1905).

Declaratory relief may be granted “where an actual controversy exists and a declaration of rights with regard to that controversy will remove the uncertainty underlying the dispute.” Minovitch v. Battin, 2005 WL 2009453 at * 7 (Mass. Super. July 15, 2005) (Connors, J.), citing School Comm. Of Cambridge v. Superintendent of Schools of Cambridge, 320 Mass. 516, 518 (1946). See also, e.g., Kligler v. Attorney Gen., 491 Mass. 38, 53-54 (2022) (“addressing the request for declaratory relief in the instant case would remove, and . . . afford relief from, uncertainty and insecurity in the applicability of [laws], and thus would serve the remedial purpose of the declaratory judgment act”) (internal quotations omitted). A declaratory judgment

¹² To succeed on a breach of contract claim, plaintiffs must show “(1) an agreement was made between the plaintiffs and the defendant supported by valid consideration; (2) the plaintiffs have been ready, willing, and able to perform; (3) the defendant’s breach has prevented them from performing; and (4) the plaintiffs have suffered damage.” Singarella v. Boston, 342 Mass. 385, 387 (1961) (citations omitted). Here, defendants breached the Lease by pledging or assigning the License and refusing to take steps to return the License to Landlord.

may be entered “to secure determinations of right, duty, status or other legal relations under . . . written contracts.” G.L. c. 231A, § 2.

There is no dispute that the parties entered into the Lease through December 31, 2022; and that Burn, LLC breached the Lease by pledging the License to Mr. Lesser as security for a Note that Mr. Lesser assigned to BL Note Holdings, an entity he solely managed and controlled. A liquor license is a unique asset, and there is no assurance plaintiffs could obtain one at this time. Providing adequate relief to plaintiffs for this breach requires a declaration of the rights of the parties and injunctive relief.

B. Unjust Enrichment

Count III of the Amended Complaint asserts a claim for unjust enrichment. “[A] claim of unjust enrichment ‘will not lie where there is a valid [underlying] contract that defines the obligations of the parties.’” Zelby Holdings, Inc. v. VideogeniX, Inc., 92 Mass. App. Ct. 86, 92 (2017), quoting Metropolitan Life Ins. Co. v. Cotter, 464 Mass. 623, 641 (2013). Because the Lease constitutes a valid and enforceable underlying contract defining the obligations of the parties, defendants are entitled to summary judgment on Count III.

C. Plaintiffs’ Remaining Claims

Material disputes of fact bar entry of summary judgment on plaintiffs’ remaining claims for violation of G.L. c. 93A, § 11 (Count V), misrepresentation (Count VI), and conversion (Count VII). Those material disputes of fact include, but are not limited to, whether defendants offered \$1,00,000 to purchase the License while concealing false statements made to regulatory authorities; misrepresented their intentions in reorganizing as an LLC; made certain statements during the meeting on December 31, 2019; and exercised wrongful and sufficient control over

DENIED. Defendants' Motion for Partial Summary Judgment (Docket #48) is **ALLOWED** as to Count I.I of the Amended Complaint; and summary judgment is **GRANTED** to plaintiffs on so much of Count IV of the Amended Complaint as alleges liability for breach of the Lease by Burn, LLC. Defendants' Motion for Partial Summary Judgment is otherwise **DENIED**.

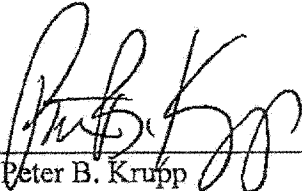
2. It is hereby **DECLARED** and **ADJUDGED** as follows:

- A. The Lease, including Section 11.24 concerning the License, is lawful and enforceable.
- B. The pledge of the License was an event of default under the Lease. The pledge of the License to Brian Lesser, and any assignment of that pledge by Mr. Lesser to BL Note Holding Tremont Street LLC is hereby extinguished, and is null and void.
- C. The Landlord's termination of the Lease was valid.

3. It is hereby further **ORDERED** that, pursuant to Section 11.24 of the Lease, defendants shall execute all documents and attend all hearings necessary to effectuate the sale of the License to the Landlord or its designee, and shall cooperate with the Landlord in the transfer of the License to the Landlord or its designee.

4. The Court will conduct a Final Pretrial Conference on June 8, 2023, to set a trial date for the claims remaining in the case.

Dated: April 26, 2023


Peter B. Krupp
Justice of the Superior Court

the License to amount to conversion.¹³ Accordingly, I cannot grant defendants summary judgment on these counts.

IV. The Counterclaim

A. Breach of Contract

Defendants allege in Count I of the Counterclaim that plaintiffs breached the Lease by terminating Burn, LLC's tenancy. For the reasons described above, Section 11.24 of the Lease is enforceable; Burn, LLC breached the Lease by assigning the License, which was an express event of default under the Lease; and plaintiffs had good reason under the terms of the Lease to terminate it. Summary judgment shall be entered for plaintiffs on Count I of defendants' counterclaim.

B. Defendants' Remaining Counterclaims

On Counts II and III of the Counterclaim, material disputes of fact bar entry of summary judgment for the plaintiffs. Count II alleges that plaintiffs converted restaurant equipment from Burn, LLC's property. This allegation is factually disputed. Count III alleges a violation of G.L. c. 93A based on the disputed statements allegedly made during the meeting between Mr. Lesser and Mr. Nicosia on December 31, 2019. As a result, plaintiffs' motion for summary judgment on these counterclaims will be denied.

ORDER

1. Plaintiffs' Motion for Partial Summary Judgment (Docket #44) is **ALLOWED** as to Counts I and II of the Amended Complaint and Count I of the Counterclaim, but is otherwise

¹³ "The elements of conversion may be established by a showing that one person exercised dominion over the personal property of another, without right, and thereby deprived the rightful owner of its use and enjoyment." *In re Hilson*, 448 Mass. 603, 611 (2007). By failing to execute all documents and attend all hearings necessary to effectuate the sale of the License to the Landlord, defendants plausibly exercised wrongful control of the License.

EXHIBIT B

2084CV00218 Mario Nicosia Individually & Trustee of the N&M Trust VII et al vs. Burn LLC et al

- Case Type:
Equitable Remedies
- Case Status:
Open
- File Date
01/24/2020
- DCM Track:
F - Fast Track
- Initiating Action:
Injunction
- Status Date:
01/24/2020
- Case Judge:
- Next Event:

All Information Party Judgment Subsequent Action/Subject Event Tickler Docket Disposition

Party Information

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- Plaintiff

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Judgments

Date	Type	Method	For	Against
01/30/2024	Judgment After Finding - Rule 20	After Jury Waived Trial	Mario Nicosia Individually & Trustee of the N&M Trust VII	Lesser, Brian
01/30/2024	Judgment After Finding - Rule 20	After Jury Waived Trial	NIC Limited Partnership	Lesser, Brian
01/22/2024	Judgment After Finding - Rule 20	After Jury Waived Trial	Mario Nicosia Individually & Trustee of the N&M Trust VII	Lesser, Brian

Subsequent Action/Subject

Status	Description	SA/Subject #	Status Date	Responding Party	Judgments	Pleading Party
Filed	Counterclaim	1	02/03/2020	NIC Limited Partnership	0	Husbands, Andrew

Events

Date	Session	Location	Type	Event Judge	Result
02/04/2020 02:00 PM	Civil E	BOS-9th FL, CR 916 (SC)	Hearing on Preliminary Injunction	Giles, Hon. Linda E	Held as Scheduled
08/19/2020 09:30 AM	Civil E	BOS-9th FL, CR 916 (SC)	Motion Hearing	Sullivan, Hon. Susan E	Decision rendered
04/13/2022 02:00 PM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	BLS Rule 16 Litigation Control Conference	Krupp, Hon. Peter B	Rescheduled
04/20/2022 02:00 PM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	BLS Rule 16 Litigation Control Conference	Krupp, Hon. Peter B	Held - Under advisement
07/07/2022 02:00 PM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Conference to Review Status	Krupp, Hon. Peter B	Canceled
09/29/2022 02:00 PM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Conference to Review Status	Kazanjian, Hon. Helene	Held as Scheduled
02/09/2023 02:00 PM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Rule 56 Hearing	Kazanjian, Hon. Helene	Rescheduled
03/08/2023 02:00 PM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Rule 56 Hearing	Krupp, Hon. Peter B	Held - Under advisement
06/08/2023 02:00 PM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Final Pre-Trial Conference	Krupp, Hon. Peter B	Rescheduled
06/21/2023 02:00 PM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Final Pre-Trial Conference	Krupp, Hon. Peter B	Held as Scheduled
08/10/2023 02:00 PM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Motion Hearing	Krupp, Hon. Peter B	Held as Scheduled
11/17/2023 05:30 AM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Conference to Review Status	Krupp, Hon. Peter B	
11/30/2023 02:00 PM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Final Trial Conference	Krupp, Hon. Peter B	Rescheduled
12/08/2023 02:00 PM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Final Trial Conference	Kazanjian, Hon. Helene	Held as Scheduled
12/15/2023 03:00 PM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Motion Hearing	Kazanjian, Hon. Helene	Held as Scheduled
12/18/2023 09:00 AM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Jury Trial	Krupp, Hon. Peter B	Held as Scheduled
12/18/2023 09:00 AM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Jury Trial	Kazanjian, Hon. Helene	Held as Scheduled
12/20/2023 09:00 AM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Jury Waived Trial	Kazanjian, Hon. Helene	Held as Scheduled




ADD 114

Date	Session	Location	Type	Event Judge	Result
12/21/2023 09:00 AM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Jury Waived Trial	Kazanjian, Hon. Helene	Held as Scheduled
12/22/2023 09:00 AM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Jury Waived Trial - Rule 20	Kazanjian, Hon. Helene	Held as Scheduled
12/28/2023 09:00 AM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Jury Waived Trial - Rule 20	Kazanjian, Hon. Helene	Held - Under advisement
04/12/2024 12:00 PM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Motion Hearing to Assess Attorney's Fees	Krupp, Hon. Peter B	Rescheduled
04/12/2024 02:00 PM	Business Litigation 1	BOS-10th FL, CR 1015 (SC)	Motion Hearing to Assess Attorney's Fees	Kazanjian, Hon. Helene	Held as Scheduled







Ticklers

Tickler	Start Date	Due Date	Days Due	Completed Date
Service	01/24/2020	04/23/2020	90	
Answer	01/24/2020	05/26/2020	123	
Rule 12/19/20 Served By	01/24/2020	05/26/2020	123	06/21/2023
Rule 12/19/20 Filed By	01/24/2020	06/22/2020	150	06/21/2023
Rule 12/19/20 Heard By	01/24/2020	07/22/2020	180	06/21/2023
Rule 15 Served By	01/24/2020	05/26/2020	123	06/21/2023
Rule 15 Filed By	01/24/2020	07/23/2021	546	06/21/2023
Rule 15 Heard By	01/24/2020	08/23/2021	577	06/21/2023
Discovery	01/24/2020	09/29/2021	614	01/24/2024
Rule 56 Served By	01/24/2020	10/07/2022	987	06/21/2023
Rule 56 Filed By	01/24/2020	11/23/2022	1034	06/21/2023
Final Pre-Trial Conference	01/24/2020	03/18/2022	784	06/21/2023
Judgment	01/24/2020	01/24/2022	731	01/24/2024
Under Advisement	04/20/2022	05/20/2022	30	04/25/2022
Under Advisement	12/28/2023	01/27/2024	30	01/18/2024
Under Advisement	03/08/2023	04/07/2023	30	04/26/2023



Docket Information

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
01/24/2020	Attorney appearance On this date David Kelston, Esq. added for Plaintiff Mario Nicosia Individually & Trustee of the N&M Trust VII		
01/24/2020	Attorney appearance On this date David Kelston, Esq. added for Plaintiff NIC Limited Partnership		
01/24/2020	Case assigned to: DCM Track F - Fast Track was added on 01/24/2020		
01/24/2020	Original civil complaint filed.	1	
01/24/2020	Civil action cover sheet filed.	2	
01/24/2020	Summons and order of notice issued on a Complaint for a Preliminary Injunction , returnable on 02/04/2020 02:00 PM Hearing on Preliminary Injunction. Applies To: Burn LLC (Defendant); Note Holding Tremont Street LLC (Defendant); Maslow, Timothy (Defendant); Lesser, Brian (Defendant); Husbands, Andrew (Defendant)		
01/24/2020	Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership's MOTION for appointment of Special Process Server, M. Anthony Lopes/M. Anthony Lopes & Associates - The motion is hereby ALLOWED	3	










ADD 115

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
01/24/2020	Plaintiffs(s) Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership's Motion for Short Order of Notice	4	 Image
01/31/2020	Plaintiff Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership's Motion for a Preliminary Injunction	5	 Image
01/31/2020	Attorney appearance On this date Noah N Rosmarin, Esq. added for Plaintiff Mario Nicosia Individually & Trustee of the N&M Trust VII		
01/31/2020	Attorney appearance On this date Noah N Rosmarin, Esq. added for Plaintiff NIC Limited Partnership		
02/03/2020	Opposition to "Plaintiffs' Motion for Preliminary Injunction" (P#5) and Memorandum of Law in Opposition filed by Burn LLC, Note Holding Tremont Street LLC, Timothy Maslow, Brian Lesser, Andrew Husbands	6	 Image
02/03/2020	Attorney appearance On this date Kevin M Considine, Esq. added for Defendant Burn LLC		
02/03/2020	Attorney appearance On this date William A Kelley, Jr., Esq. added for Defendant Burn LLC		
02/03/2020	Attorney appearance On this date Mark D Donovan, Esq. added for Defendant Burn LLC		
02/03/2020	Attorney appearance On this date Kevin M Considine, Esq. added for Defendant Note Holding Tremont Street LLC		
02/03/2020	Attorney appearance On this date William A Kelley, Jr., Esq. added for Defendant Note Holding Tremont Street LLC		
02/03/2020	Attorney appearance On this date Mark D Donovan, Esq. added for Defendant Note Holding Tremont Street LLC		
02/03/2020	Attorney appearance On this date Kevin M Considine, Esq. added for Defendant Timothy Maslow		
02/03/2020	Attorney appearance On this date William A Kelley, Jr., Esq. added for Defendant Timothy Maslow		
02/03/2020	Attorney appearance On this date Mark D Donovan, Esq. added for Defendant Timothy Maslow		
02/03/2020	Attorney appearance On this date Kevin M Considine, Esq. added for Defendant Brian Lesser		
02/03/2020	Attorney appearance On this date William A Kelley, Jr., Esq. added for Defendant Brian Lesser		
02/03/2020	Attorney appearance On this date Mark D Donovan, Esq. added for Defendant Brian Lesser		
02/03/2020	Attorney appearance On this date Kevin M Considine, Esq. added for Defendant Andrew Husbands		
02/03/2020	Attorney appearance On this date Mark D Donovan, Esq. added for Defendant Andrew Husbands		
02/03/2020	Received from Defendant Burn LLC, Note Holding Tremont Street LLC, Maslow, Timothy, Lesser, Brian, and Husbands, Andrew : Answer with a counterclaim;	7	 Image
02/04/2020	Counterclaim filed.		
02/04/2020	Event Result:: Hearing on Preliminary Injunction scheduled on: 02/04/2020 02:00 PM Has been: Held as Scheduled Hon. Linda E Giles, Presiding Staff: Philip Drapos, Assistant Clerk Magistrate		
02/20/2020	Endorsement on Motion for Preliminary Injunction (#5.0): DENIED After hearing and reservation and for the reasons set forth in the opposition, the court hereby DENIES the motion (dated 2/10/20) notice sent 2/18/20		 Image
02/27/2020	Received from Plaintiff Mario Nicosia Individually & Trustee of the N&M Trust VII and NIC Limited Partnership : Answer to the Counterclaim;	8	 Image
03/12/2020	Short Order of Notice, returned SERVED returnable on 02/04/2020 02:00 PM Hearing on Preliminary Injunction. Applies To: Note Holding Tremont Street LLC (Defendant)	9	 Image



ADD 116

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
03/12/2020	Short Order of Notice, returned SERVED returnable on 02/04/2020 02:00 PM Hearing on Preliminary Injunction. Applies To: Husbands, Andrew (Defendant)	10	 Image
03/12/2020	Short Order of Notice, returned SERVED returnable on 02/04/2020 02:00 PM Hearing on Preliminary Injunction. Applies To: Maslow, Timothy (Defendant)	11	 Image
03/20/2020	Notice of docket entry received from Appeals Court Please take note that on March 19, 2020, the following entry was made on the docket of the above-referenced case: ORDER: The plaintiffs have filed a petition, pursuant to G.L.c. 231, s. 118, first para., seeking review of the order denying their request for a preliminary injunction requiring the defendants to terminate the pledge of the contested liquor license and to refrain from further encumbering or transferring the license. In that petition, the plaintiffs abandon their request that the defendants be ordered to terminate the pledge agreement in place, but continue to seek an injunction restraining the defendants from transferring or further encumbering the contested license. The plaintiffs filed a motion seeking the same relief pending a decision on this petition in the form of a temporary restraining order, which I allowed. The defendants have filed a response to the petition. After careful review of the parties' submissions, the petition is allowed. Pursuant to G.L.c. 231, s. 118, first para., a single justice of this court has the authority to issue a preliminary injunction. <i>Edwin R. Sage Co. v. Foley</i> , 12 Mass. App. Ct. 20, 22-23 (1981). "The authority [to issue a preliminary injunction] does not depend on a determination that the trial court judge, in denying relief, made incorrect rulings of law or abused his [or her] discretion." <i>Jet-Line Services Inc. v. Board of Selectman</i> , 25 Mass. App. Ct. 645, 646 (1988). Instead, a single justice may issue a preliminary injunction if the petitioner shows a likelihood of success on the merits; a likelihood of irreparable harm will result from the denial of the injunction; and that the risk of irreparable harm to the moving party outweighs the risk of harm to the opposing parties. See <i>Packaging Indus. Group, Inc. v. Cheney</i> , 380 Mass. 609, 616-617 (1980). "A preliminary injunction ordinarily is issued to preserve the status quo pending the outcome of litigation." <i>Doe v. Super Intendant of Schs. of Weston</i> , 461 Mass. 159, 164 (2011). In this case, the plaintiffs have made the requisite showing to warrant issuance of a preliminary injunction to maintain the status quo. Likelihood of success on the merits. To obtain a preliminary injunction the moving party must demonstrate a likelihood of success on the merits. <i>Packaging Indus. Group, Inc. v. Cheney</i> , 380 Mass. 609, 616-617 (1980). The plaintiffs are not required to demonstrate inevitable success on the merits, nor would it be appropriate for me to decide, in this context, the merits of the plaintiffs' claim that the defendants breached the lease or the defendant's argument that the requirement that the license revert to the lessor plaintiff is unenforceable. See <i>Jet-Line Services Inc. v. Board of Selectman</i> , 25 Mass. App. Ct. 645, 648 (1988). None of the cases cited by the defendants stand inarguably for the proposition that an agreement to transfer a license pursuant to the procedures set forth by statute and regulations is unenforceable as a matter of public policy. <i>Contrast Beacon Hill Civic Assn. v. Ristorante Toscano, Inc.</i> , 422 Mass. 318 (1996) (contractual waiver of right to apply for license pursuant to regulatory scheme unenforceable as against public policy); <i>Hastings Assocs. v. 369 Bldg. Fund</i> , 42 Mass. App. Ct. 162, 173-178 (1997) (plaintiff may not recover under contract calling for illegal de facto transfer of liquor license outside of regulatory regime and where plaintiff's own application had been denied). Thus, there is a reasonable likelihood that the plaintiffs will succeed in enforcing the bargain they made with the lessee defendant. Irreparable harm to the plaintiffs. To obtain a preliminary injunction, the moving party must also demonstrate that it faces a substantial risk of irreparable harm if the stay is denied. <i>Packaging Indus. Group, Inc. v. Cheney</i> , 380 Mass. 609, 616-617 (1980). The parties in this case dispute whether the lost opportunity to apply for a transfer of the contested liquor license is irreparable harm or merely economic harm from which the plaintiff could be made whole by a money judgment. See <i>Id.</i> at 621. None of the parties cite to legal authority, and I am not aware of any, that addresses whether a lost opportunity to acquire a specific, existing liquor license is irreparable harm. Thus, I am left to consider the particular circumstances of this case and this liquor license. I conclude that were the defendants to transfer or further encumber the liquor license to a third-party and the plaintiffs were successful in their claims, the plaintiffs would face irreparable harm. There are a finite number of liquor licenses available in the city of Boston where the plaintiffs' commercial real estate is located. Though the value of the license may be determined, there is no guarantee that one would be available for purchase at the time a money judgment is satisfied. The difference in value in the plaintiffs' commercial real estate with and without the license during any delay in acquiring a different license would be difficult to calculate, and would not be included in damages awarded after trial. Moreover, given the dire financial condition reported by one of the defendants, a money judgment may be unenforceable. For these reasons, I find that the plaintiffs have established a risk irreparable harm. Harm to the non-moving party. I have also considered the potential harm to the defendants and balance that harm against the irreparable harm the plaintiffs face if their motion were denied. <i>Packaging Indus. Group, Inc. v. Cheney</i> , 380 Mass. 609, 616-617 (1980). I requested that the defendants address in their response the harm they would suffer if they were prohibited from pledging, assigning, selling or transferring the license to a third party during the pendency of the Superior Court proceedings. The defendants' response focused on their inability to satisfy their debts without a sale of the license at market value. The defendants also argued that the license may be subject to revocation if the plaintiffs' petition is allowed. However, there is no evidence that regulators are contemplating an action to revoke the license. In my judgment, these considerations do not outweigh the potential harm to the plaintiffs. Public interest. Although the injunction does not enjoin governmental action, I have nevertheless considered the public interest. See <i>Garcia v. Department of Housing and Urban Development</i> , 480 Mass. 736, 747 (2018). The issuance of this injunction will not adversely affect the public interest in regulating the sale of alcohol. Order. For these reasons, until further order of this Court, a single justice thereof, or the Superior Court, defendants shall not pledge, assign, sell, transfer, hypothecate or otherwise encumber the liquor license at issue in this case, or any interests in such liquor license. Due to the current restrictions on access to the Appeals Court, the filing fee due for the issuance of this preliminary injunction is hereby waived. So ordered. (Kinder, J.) *Notice/Attest/Giles, J.	12	












ADD 117

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
07/16/2020	Notice of 93A complaint sent to Attorney General		
07/16/2020	Plaintiffs Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership's Motion to Amend Complaint (without opposition)	13	 Image
07/31/2020	Plaintiff Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership's Motion to Sell the Disputed Liquor License and Place the Sale Proceeds in Escrow During the Pendency of this Case (with opposition and reply)	14	 Image
08/03/2020	Endorsement on Motion to Amend Complaint (#13.0): ALLOWED There being no opposition and for reasons stated in motion (dated 7/27/20) notice sent 7/31/20		 Image
08/03/2020	Amended: First amended complaint filed by Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership (Filed 7/27/20)	15	 Image
08/10/2020	The following form was generated: Notice to Appear Sent On: 08/10/2020 10:51:28 Notice Sent To: David Kelston, Esq. Adkins, Kelston & Zavez P.C. 90 Canal St STE 120, Boston, MA 02114 Notice Sent To: Noah N Rosmarin, Esq. Adkins Kelston & Zavez PC 90 Canal St Suite 120, Boston, MA 02114 Notice Sent To: Kevin M Considine, Esq. Considine & Furey, LLP One Beacon St 22nd Floor, Boston, MA 02108 Notice Sent To: William A Kelley, Jr., Esq. Considine & Furey LLP One Beacon St 22nd Floor, Boston, MA 02108 Notice Sent To: Mark D Donovan, Esq. Considine & Furey, LLP One Beacon St 22nd Floor, Boston, MA 02108		
08/19/2020	Decision rendered on matter taken under advisement: Motion Hearing scheduled on: 08/19/2020 09:30 AM Has been: Decision rendered Hon. Susan E Sullivan, Presiding Staff: Philip Drapos, Assistant Clerk Magistrate		
09/16/2020	Endorsement on Motion to Sell the Disputed Liquor License and Place the Sale Proceeds in Escrow (#14.0): ALLOWED for reasons stated by the plaintiffs, motion allowed. See Order (dated 9/10/20) notice sent 9/15/20		 Image
09/16/2020	ORDER: Order on Plaintiffs' Motion to Sell the Disputed Liquor License and Place the Sale Proceeds in Escrow During the Pendency of this Case (see P#16) (dated 9/10/20) notice sent 9/15/20	16	 Image
09/28/2020	Received from Defendant Burn LLC, Note Holding Tremont Street LLC, Timothy Maslow, Brian J Lesser, and Andrew Husbands: Answer to amended complaint;	17	 Image
10/05/2020	Received from Plaintiff Mario Nicosia Individually & Trustee of the N&M Trust VII and NIC Limited Partnership : Answer to the Counterclaim;	18	 Image
10/29/2020	Notice of docket entry received from Appeals Court Please take note that on October 29, 2020, the following entry was made on the docket of the above-referenced case: ORDER: The defendants have filed a petition pursuant to G. L. c. 231, s. 118, first par., seeking review by the single justice of a preliminary injunction order issued by the Superior Court. A trial judge's decision on a preliminary injunction requires "an evaluation in combination of the moving party's claim of injury and its chance of success on the merits." <i>Edwin R. Sage Co. v. Foley</i> , 12 Mass. App. Ct. 20, 25 (1981), quoting <i>Commonwealth v. County of Suffolk</i> , 383 Mass. 286, 288 (1981). When reviewing such a decision, the single justice "focuses on whether the trial court abused its discretion -- that is, whether the court applied proper legal standards and whether the record discloses reasonable support for its evaluation of factual questions." <i>Edwin R. Sage Co.</i> , 12 Mass. App. Ct. at 25. See <i>Fordyce v. Town of Hanover</i> , 457 Mass. 248, 256 (2010). Here, the trial judge properly adopted the prior single justice's conclusion that the plaintiffs established a likelihood of success on the merits and substantial risk of irreparable harm. To begin, [m]any contracts cannot lawfully be performed without securing a permit, license, or approval from some governmental officer or board, and yet the contracts are not deemed illegal." <i>Nussenbaum v. Chambers & Chambers, Inc.</i> , 322 Mass. 419, 423 (1948)). The cases cited by the defendants do not support the conclusion that the lease provisions at issue in this case are unenforceable. See <i>Beacon Hill Civic Ass'n v. Ristorante Toscano, Inc.</i> , 422 Mass. 318, 323 (1996) (contract unenforceable where parties agreed to forego their respective rights to apply for and oppose application for liquor license where it would undermine statute's purpose); <i>Hastings Assocs., Inc. v. Local 369 Building Fund, Inc.</i> , 42 Mass. App. Ct. 162, 175, 178-179 (1997) (recovery prohibited under "illegal contract" involving de facto transfer and use of liquor license without licensing authority approval); <i>Number Three Lounge, Inc. v. Alcoholic Beverages Control Comm'n</i> , 7 Mass. App. Ct. 301, 311, 312 (1979) (impermissible for unlicensed parties to use "straw titleholder . . . to obfuscate the[ir] beneficial interests" in liquor license). Nor do the defendants substantiate the claim that the lease provisions regarding transfer of the license are against the public welfare or purpose of G. L. c. 138. Compare <i>Connolly v. Alcoholic Beverages Control Comm'n</i> , 334 Mass. 613, 619 (1956) ("The provisions for the issue of licenses . . . [under c. 138] imply no intention to create rights generally for persons to engage or	19	




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<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	continue in the transaction of the business authorized by the licenses . . . but are enacted with a view only to meet the reasonable demand of the public for pure alcoholic beverages and, to that end, to provide, in the opinion of the licensing authorities, an adequate number of places at which the public may obtain, in the manner and for the kind of use indicated, the different sorts of beverages for the sale of which provision is made") with Ristorante Toscano, Inc., 422 Mass. at 321 (waiver of statutory participation rights impermissible where "application review provisions of c. 138 are grounded in general policy concerns" regarding provision of liquor licenses). The trial judge's conclusion that "a sale now will mitigate against an almost guaranteed decline in value over the pendency of the litigation" is reasonable given the evidence presented regarding closures of bars and restaurants due to COVID-19. The defendants' challenge to the timing of the sale does not contradict the ample evidence in the record that supports the trial judge's finding that the defendants intended to sell the license; in fact, they had previously agreed to sell the license and the business for \$525,000. Finally, because the defendants -- including BL Note Holding Tremont Street, Inc., the party claiming a security interest in the license -- have briefed their argument on the validity of the pledge agreement before both the trial court and a single justice of this court, there has been no deprivation of due process. See Commonwealth v. One 1977 Pontiac Grand Prix Auto., 375 Mass. 669, 872 (1978) (no deprivation of due process where it was "apparent from the facts that [the defendant] had actual notice of the proceedings, had opportunity to participate in them, and took full advantage of the opportunity"). Moreover, the trial judge reasonably concluded that the sum of \$525,000 ordered to be placed in escrow obviates the risk of harm to the defendants should they prevail on appeal. See Property Acquisition Group, LLC v. Ivester, 95 Mass. App. Ct. 170, 181 (2019) (no error to vacate stay of summary process action where mortgagors could "be made whole by money damages"). Because the defendants have failed to show that the trial judge made an error of law or otherwise abused her discretion, the petition is denied. (Wendlandt, J.) Notice/attest/Sullivan, J.		
11/12/2020	CD containing PDF Transcript of 8/19/20 received from Hunt Reporting		
12/03/2020	Plaintiff Mario Nicosia Individually & Trustee of the N&M Trust VII's Joint Motion to Extend Tracking order	20	 Image
12/22/2020	Endorsement on Motion to Extend Tracking Order (#20.0): ALLOWED (dated 12/7/20) notice sent 12/15/20		 Image
07/14/2021	Plaintiff, Defendant Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership, Burn LLC, BL Note Holding Tremont Street LLC, Timothy Maslow, Brian Lesser, Andrew Husbands's Joint Motion to Extend Tracking Order	21	 Image
07/26/2021	Endorsement on Motion to to Extend Tracking Order (#21.0): ALLOWED (date 7/19/21) Allowed in part/ denied in part. Deadline to serve motion amended complaint extended until July 23, 2021. Non expert discovery to be completed by September 29, 2021 R.56 Motion to be filed by November 30, 2021. If Parties intended R. 56 Motions to be filed by November 30, 2022 as stated in a motion, reach out to clerk to set up status conference to discuss with the court Notice 7/22/21		 Image
07/29/2021	Other Interested Party Joseph Matzkin Esq's EMERGENCY Motion to intervene	22	 Image
07/29/2021	Attorney appearance On this date William Robert Covino, Esq. added for Other interested party Joseph Matzkin Esq		 Image
07/29/2021	Attorney appearance On this date Kristyn M Kelley, Esq. added for Other interested party Joseph Matzkin Esq		 Image
08/02/2021	Plaintiffs Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership's Response to Attorney Joseph Matzkin's Emergency Motion (P#22) to Intervene	23	 Image
08/05/2021	Endorsement on Motion to intervene (#22.0): ALLOWED motion to intervene ALLOWED. opposition to plaintiff's motion to compel shall be served by 8/11/21. (dated 8/02/21) notice sent 8/05/21		 Image
08/16/2021	Plaintiffs(s) Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership motion filed to compel Further Deposition Testimony of Fact Witness Joseph H. Matzkin and to Amend the Complaint (w/opposition)	24	 Image
08/16/2021	Opposition to "Plaintiffs' Motion to Compel Further Deposition Testimony of Fact Witness Joseph H. Matzkin and to Amend thye Complaint" filed by Burn LLC, BL Note Holding Tremont Street LLC, Timothy Maslow, Brian Lesser, Andrew Husbands	25	 Image
08/16/2021	Opposition to Plaintiffs' Motion to Amend the Complaint filed by Joseph Matzkin Esq	26	 Image
08/16/2021	Affidavit of Noah Rosmarin	27	 Image
08/16/2021	Affidavit of David Kelston Providing Certain Information and Documents Relevant to Plaintiffs' Motion to Compel and Amend	28	 Image
08/16/2021	Plaintiffs Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership's Reply to Defendants' and Proposed Defendant's Opposition to Plaintiffs' Motion to Compel Further Deposition Testimony of Fact Witness Joseph H. Mtzkin and to Amend the Complaint (Consolidated Reply)	29	 Image

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<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
09/14/2021	Plaintiff Mario Nicosia Individually & Trustee of the N&M Trust VII's Submission of Joint Status Report	30	 Image
09/15/2021	Plaintiff Mario Nicosia Individually & Trustee of the N&M Trust VII's Submission of Amended Joint Status Report	31	 Image
10/20/2021	General correspondence regarding NOTICE OF TRANSFER TO BUSINESS LITIGATION SESSION "BLS1" (See (#32 for complete notice) Upon review, the court orders this case transferred to the Business Litigation Session (BLS) and assigned to BLS1. In the future, all parties must include the initials "BLS1" at the end of the docket number on all filings, as shown above. Dated: Oct. 18, 2021 Notice sent 10/19/21	32	 Image
10/20/2021	Civil action cover sheet mailed re: BLS		
10/20/2021	Endorsement on Motion to compel Further Deposition Testimony of Fact Witness Joseph H. Matzkin and to Amend the Complaint (#24.0): Reserved this matter is referred to BLS for consideration of acceptance. (dated 10/15/21) notice sent 10/20/21		 Image
03/17/2022	The following form was generated: Notice to Appear - BLS Sent On: 03/17/2022 11:26:26		
03/23/2022	ORDER: scheduling order Date 3/17/22 Notice 3/21/22	33	 Image
04/04/2022	Plaintiffs, Defendants Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership, Burn LLC, BL Note Holding Tremont Street LLC, Timothy Maslow, Brian Lesser, Andrew Husbands, Joseph Matzkin Esq's Joint Motion to Continue Hearing	34	 Image
04/06/2022	Event Result:: BLS Rule 16 Litigation Control Conference scheduled on: 04/13/2022 02:00 PM Has been: Rescheduled For the following reason: Joint request of parties Hon. Peter B Krupp, Presiding Staff: Gloria Brooks, Assistant Clerk Magistrate		
04/06/2022	The following form was generated: Notice to Appear - BLS Sent On: 04/06/2022 13:13:12		
04/06/2022	Plaintiff Mario Nicosia Individually & Trustee of the N&M Trust VII's Joint Motion to continue Hearing Scheduled for April 13, 2022	35	 Image
04/12/2022	Endorsement on Motion to continue hearing (#34.0): ALLOWED the clerk shall schedule the Rule 16 conference from 4/13/22 to one of the later convenient to the parties. (dated 4/05/22) notice sent 4/12/22		 Image
04/20/2022	Matter taken under advisement: BLS Rule 16 Litigation Control Conference scheduled on: 04/20/2022 02:00 PM Has been: Held - Under advisement Hon. Peter B Krupp, Presiding Staff: Gloria Brooks, Assistant Clerk Magistrate		
04/20/2022	The following form was generated: Notice to Appear Sent On: 04/20/2022 15:18:00		
05/09/2022	ORDER: Order on Motion to Compel Joseph H Matzkin Deposition, Motion to Amend the Complaint, and Setting Schedule (see P#36) (dated 4/25/22) notice sent 5/4/22	36	 Image
06/29/2022	Plaintiffs Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership's Motion to reconsider the order (April 25, 2022) denying without prejudice the motion to amend, or, in the alternative, to compel the witness to answer certain questions	37	
06/29/2022	Opposition to plaintiff's Motion to reconsider the order (April 25, 2022) denying without prejudice the motion to amend, or, in the alternative, to compel the witness to answer certain questions filed by Burn LLC, BL Note Holding Tremont Street LLC, Timothy Maslow, Brian Lesser, Andrew Husbands	38	 Image
06/29/2022	Opposition to plaintiff's Motion to reconsider the order (April 25, 2022) denying without prejudice the motion to amend, or, in the alternative, to compel the witness to answer certain questions filed by Joseph Matzkin Esq	39	 Image












ADD 120

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
06/29/2022	Reply/Sur-reply (consolidated) to defendants' and Mr. Matzkin's separate oppositions to plaintiff's Motion to reconsider the order (April 25, 2022) denying without prejudice the motion to amend, or, in the alternative, to compel the witness to answer certain questions	40	 Image
07/07/2022	Attorney appearance On this date Mary K Nelson, Esq. added for Defendant Burn LLC		
07/07/2022	Attorney appearance On this date Mary K Nelson, Esq. added for Defendant BL Note Holding Tremont Street LLC		
07/07/2022	Attorney appearance On this date Mary K Nelson, Esq. added for Defendant Timothy Maslow		
07/07/2022	Attorney appearance On this date Mary K Nelson, Esq. added for Defendant Brian Lesser		
07/07/2022	Attorney appearance On this date Mary K Nelson, Esq. added for Defendant Andrew Husbands		
07/12/2022	Endorsement on Motion to reconsider the Order (April 25, 2022) denying without prejudice the motion to amend, or, in the alternative, to compel the witness to answer certain questions (#37.0): DENIED After review, Denied. See Memorandum and Order of same date. Dated: 7/6/22 Notice sent 7/11/22 Judge: Krupp, Hon. Peter B Applies To: Mario Nicosia Individually & Trustee of the N&M Trust VII (Plaintiff); NIC Limited Partnership (Plaintiff)		
07/12/2022	MEMORANDUM & ORDER: ON MOTION FOR RECONSIDERATION: The case is before me on Plaintiffs' Motion to Reconsider the Order (April 25, 2022) Denying Without Prejudice the Motion to Amend, or, in the Alternative, to Compel the Witness to Answer Certain Questions (Docket #37). For the following reasons, the motion is DENIED. Dated: July 6, 2022 Notice sent 7/11/22 (See P#41 for complete order) Judge: Krupp, Hon. Peter B	41	 Image
08/01/2022	Plaintiff, Defendant Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership, Burn LLC, BL Note Holding Tremont Street LLC, Timothy Maslow, Brian Lesser, Andrew Husbands's Joint Motion to extend tracking order	42	 Image
08/09/2022	Endorsement on Motion to Extend Tracking Order (#42.0): ALLOWED (dated 8/5/22) notice sent 8/8/22		 Image
09/29/2022	Event Result:: Conference to Review Status scheduled on: 09/29/2022 02:00 PM Has been: Held as Scheduled Hon. Helene Kazanjian, Presiding Staff: Gloria Brooks, Assistant Clerk Magistrate		
10/06/2022	Endorsement on Motion to Extend Tracking Order (Joint) (#42.0): ALLOWED 09/29/2022 ALLOWED (Kazanjian, J.) Notice Sent 10/05/2022)		 Image
10/06/2022	Plaintiffs, Defendants Mario Nicosia Individually & Trustee of the N&M Trust VII, Burn LLC, BL Note Holding Tremont Street LLC, Timothy Maslow, Brian Lesser, Andrew Husbands's Joint Motion for Court to Allow them to Serve and File Motions for Partial Summary Judgement 09/29/2022 ALLOWED. (Kazanjian, J.) Notice Sent 10/05/2022	43	 Image
11/23/2022	Plaintiffs Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership's Motion for Partial Summary Judgment. [Leave Granted September 29th, 2022]	44	 Image
11/23/2022	Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership's Memorandum in support of Their Motion for Partial Summary Judgment on Counts 1 and 2 and on the Counterclaim.	45	 Image
11/23/2022	Burn LLC, BL Note Holding Tremont Street LLC, Timothy Maslow, Brian Lesser, Andrew Husbands's Memorandum in support of in Opposition to "Plaintiffs Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership's Motion for Partial Summary Judgment".	46	 Image
11/23/2022	Reply/Sur-reply To Defendant's/Plaintiff's-in-Counterclaim's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment.	47	 Image

ADD 121

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	Applies To: Mario Nicosia Individually & Trustee of the N&M Trust VII (Plaintiff); NIC Limited Partnership (Plaintiff)		
11/23/2022	Defendants Burn LLC, BL Note Holding Tremont Street LLC, Timothy Maslow, Brian Lesser, Andrew Husbands's Motion for Summary Partial Judgment.	48	 Image
11/23/2022	Burn LLC, BL Note Holding Tremont Street LLC, Timothy Maslow, Brian Lesser, Andrew Husbands's Memorandum in support of Defendants Burn LLC, BL Note Holding Tremont Street LLC, Timothy Maslow, Brian Lesser, Andrew Husbands's Motion for Summary Partial Judgment.	49	 Image
11/23/2022	Opposition to Defendants Burn LLC, BL Note Holding Tremont Street LLC, Timothy Maslow, Brian Lesser, Andrew Husbands's Motion for Summary Partial Judgment. filed by Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership	50	 Image
11/23/2022	Reply/Sur-reply "Plaintiffs" Opposition to Defendants' Motion for Summary Partial Judgment.	51	 Image
11/23/2022	Statement of Undisputed Facts Applies To: Mario Nicosia Individually & Trustee of the N&M Trust VII (Plaintiff); NIC Limited Partnership (Plaintiff)	52	 Image
11/23/2022	Defendants Andrew Husbands, Brian Lesser, Timothy Maslow, BL Note Holding Tremont Street LLC, Burn LLC's Statement of material facts Applies To: Burn LLC (Defendant); BL Note Holding Tremont Street LLC (Defendant); Maslow, Timothy (Defendant); Lesser, Brian (Defendant); Husbands, Andrew (Defendant)	53	 Image
11/23/2022	Certificate of Compliance Applies To: Mario Nicosia Individually & Trustee of the N&M Trust VII (Plaintiff); NIC Limited Partnership (Plaintiff)		 Image
11/23/2022	Plaintiffs Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership's Certificate of 9C.		 Image
11/23/2022	Certificate of Compliance Superior Court Rule 9A Applies To: Burn LLC (Defendant); BL Note Holding Tremont Street LLC (Defendant); Maslow, Timothy (Defendant); Lesser, Brian (Defendant); Husbands, Andrew (Defendant)		 Image
11/23/2022	Request for hearing filed (Joint) Applies To: Mario Nicosia Individually & Trustee of the N&M Trust VII (Plaintiff); NIC Limited Partnership (Plaintiff); Burn LLC (Defendant); BL Note Holding Tremont Street LLC (Defendant); Maslow, Timothy (Defendant); Lesser, Brian (Defendant); Husbands, Andrew (Defendant)	54	 Image
11/23/2022	Rule 9A notice of filing And List of Documents in Superior Court Rule 9A Package. Applies To: Mario Nicosia Individually & Trustee of the N&M Trust VII (Plaintiff); NIC Limited Partnership (Plaintiff); Burn LLC (Defendant); BL Note Holding Tremont Street LLC (Defendant); Maslow, Timothy (Defendant); Lesser, Brian (Defendant); Husbands, Andrew (Defendant)		 Image
11/23/2022	Plaintiffs Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership's Request to file a Sur-Reply on Summary Judgment Pursuant to Sup. CT. Ruler 9A(a)(6).	55	 Image
12/09/2022	Reply/Sur-reply Plaintiff's Sur-Reply to Disregard and/or Strike Defendants' Summary Judgment Reply	56	 Image
12/14/2022	Endorsement on Request for Leave to file Sur-Reply (#55.0): ALLOWED Plaintiff's may file a sur-reply that is no more than 5 pages (dated 12/7/22) notice sent 12/12/22		 Image
02/08/2023	Defendant Burn LLC, BL Note Holding Tremont Street LLC, Timothy Maslow, Brian Lesser, Andrew Husbands's Assented to Motion to Continue Hearing	57	 Image
02/09/2023	Event Result:: Rule 56 Hearing scheduled on: 02/09/2023 02:00 PM Has been: Rescheduled For the following reason: By Court prior to date Hon. Peter B Krupp, Presiding Staff: Gloria Brooks, Assistant Clerk Magistrate		

ADD 122




<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
02/09/2023	The following form was generated: Notice to Appear Sent On: 02/09/2023 09:54:54		
03/07/2023	Defendants Burn LLC, BL Note Holding Tremont Street LLC, Timothy Maslow, Brian Lesser, Andrew Husbands's EMERGENCY Motion to Stay The Sale Of Disputed Liquor License	58	 Image
03/07/2023	Affidavit		 Image
03/08/2023	Opposition to Defendants' Emergency Motion to Stay the Sale of Disputed Liquor License filed by Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership	59	 Image
03/08/2023	Matter taken under advisement: Rule 56 Hearing scheduled on: 03/08/2023 02:00 PM Has been: Held - Under advisement Hon. Peter B Krupp, Presiding Staff: Gloria Brooks, Assistant Clerk Magistrate		
03/08/2023	Endorsement on Motion to stay the sale of disputed liquor license (#58.0): ALLOWED After hearing, DENIED for the reason stated on the record this date		 Image
04/05/2023	Defendant Burn LLC, BL Note Holding Tremont Street LLC, Timothy Maslow, Brian Lesser, Andrew Husbands's Motion to withdraw as counsel.	60	 Image
04/10/2023	Attorney appearance On this date Mary K Nelson, Esq. dismissed/withdrawn for Defendant Burn LLC		
04/10/2023	Attorney appearance On this date Mary K Nelson, Esq. dismissed/withdrawn for Defendant BL Note Holding Tremont Street LLC		
04/10/2023	Attorney appearance On this date Mary K Nelson, Esq. dismissed/withdrawn for Defendant Timothy Maslow		
04/10/2023	Attorney appearance On this date Mary K Nelson, Esq. dismissed/withdrawn for Defendant Brian Lesser		
04/10/2023	Attorney appearance On this date Mary K Nelson, Esq. dismissed/withdrawn for Defendant Andrew Husbands		
04/12/2023	Endorsement on Motion to withdraw as counsel (#60.0): ALLOWED (Dated 4/10/2023) Notice sent 4/12/2023		 Image
04/28/2023	Endorsement on Motion for summary judgment (#44.0): ALLOWED, DENIED after hearing, ALLOWED in part and DENIED in part. see Memorandum and Order of same date. (dated 4/26/23) notice sent 4/28/23		 Image
04/28/2023	Endorsement on Motion for summary judgment (#48.0): ALLOWED, DENIED after hearing, ALLOWED in part and DENIED in part. see Memorandum and Order of same date. (dated 4/26/23) notice sent 4/28/23		 Image
04/28/2023	Endorsement on Motion to stay the sale of disputed liquor license (#58.0): DENIED after hearing, DENIED, see Memorandum and Order of same date. (dated 4/26/23) notice sent 4/28/23		 Image
04/28/2023	MEMORANDUM & ORDER: on motions for summary judgment. ORDER: plaintiff's partial motion for SOJ is ALLOWED as to Counts I and II of amended complaint; Count I of counterclaim, but otherwise DENIED. defendants' motion for partial SOJ is ALLOWED as to Count III of amended complaint and Summary Judgment is GRANTED to plaintiff's so much of Count IV of amended complaint. defendant's motion for partial SOJ is otherwise DENIED. (dated 4/26/23) notice sent 4/28/23 Judge: Krupp, Hon. Peter B	61	 Image
05/04/2023	Defendants Burn LLC, BL Note Holding Tremont Street LLC, Timothy Maslow, Brian Lesser, Andrew Husbands's Assented to Motion to Continue Final PreTrial Conference	62	 Image
05/09/2023	Event Result: Final Pre-Trial Conference scheduled on: 06/08/2023 02:00 PM Has been: Rescheduled For the following reason: Joint request of parties Hon. Peter B Krupp, Presiding		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	Staff: Gloria Brooks, Assistant Clerk Magistrate		
05/11/2023	Endorsement on Motion to Continue Final Pre Trial Conference (#62.0): ALLOWED The final pre Trial Conference is continued from 6/8/23 to 6/21/23 at 2:00pm (dated 5/8/23) notice sent 5/11/23		 Image
06/20/2023	Conference Memorandum --Joint Pre Trial Memorandum	63	 Image
06/21/2023	Event Result:: Final Pre-Trial Conference scheduled on: 06/21/2023 02:00 PM Has been: Held as Scheduled Hon. Peter B Krupp, Presiding Staff: Gloria Brooks, Assistant Clerk Magistrate		
08/01/2023	Plaintiffs Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership's Motion for A Real Estate Attachment With Authority	64	 Image
08/01/2023	Opposition to Plaintiffs' Verified Motion For A Real Estate Attachment With Authority filed by Burn LLC, BL Note Holding Tremont Street LLC, Timothy Maslow, Brian Lesser, Andrew Husbands	65	 Image
08/01/2023	Reply/Sur-reply To Defendants' Opposition To Plaintiffs' Verified Motion For A Real Estate Attachment	66	 Image
08/01/2023	Defendant Burn LLC, BL Note Holding Tremont Street LLC, Timothy Maslow, Brian Lesser, Andrew Husbands's Motion for Entry of Separate and Final Judgment pursuant to Mass. R. Civ. P. 54(b)	67	 Image
08/01/2023	Burn LLC, BL Note Holding Tremont Street LLC, Timothy Maslow, Brian Lesser, Andrew Husbands's Memorandum in support of "Defendants' Motion for Entry of Separate and Final Judgment pursuant to Mass. R. Civ. P. 54(b)"	68	 Image
08/01/2023	Defendant Burn LLC, BL Note Holding Tremont Street LLC, Timothy Maslow, Brian Lesser, Andrew Husbands's Submission of Superior Court Rule 9A List of Documents and Notice of Filing	69	 Image
08/01/2023	Opposition to Defendants' Motion for Entry of Separate and Final Judgment pursuant to Mass. R. Civ. P. 54(b) filed by Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership	70	 Image
08/10/2023	Event Result:: Motion Hearing scheduled on: 08/10/2023 02:00 PM Has been: Held as Scheduled Hon. Helene Kazanjian, Presiding Staff: Gloria Brooks, Assistant Clerk Magistrate		
08/11/2023	Endorsement on Motion for a Real Estate Attachment, with Authority (#64.0): ALLOWED After hearing, the Motion is ALLOWED in the amount of \$725,628.00. Plaintiff's have shown a reasonable likelihood that they will recover judgment in this amount greater over and above any liability insurance. (Dated 8/10/2023) Notice sent 8/16/23		 Image
08/11/2023	Endorsement on Motion for entry of separate and Final Judgment pursuant to Mass. R. Civ. P. 54(b) (#67.0): DENIED Without prejudice to rehearing if the parties request in connection with a broader settlement. (Dated 8/10/2023)		 Image
11/03/2023	Plaintiffs Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership's Assented to Motion to Reschedule The Final Trial Conference And Extend The Deadline For Pre Trial Filings	71	 Image
11/07/2023	Event Result:: Final Trial Conference scheduled on: 11/30/2023 02:00 PM Has been: Rescheduled For the following reason: Joint request of parties Hon. Helene Kazanjian, Presiding Staff: Gloria Brooks, Assistant Clerk Magistrate		
11/08/2023	Endorsement on Motion to re-schedule the final trial conference and extend the deadline for pre-trial filings (#71.0): ALLOWED (Dated 11/7/23) Notice sent 11/9/23		 Image
12/01/2023	Plaintiff Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership's Motion in limine to Preclude Defendants from Asserting an Advice of Counsel Defense at Trial	72	 Image














ADD 124

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
12/01/2023	Opposition to Motion in limine to Preclude Defendants from Asserting an Advice of Counsel Defense at Trial filed by Burn LLC, BL Note Holding Tremont Street LLC, Timothy Maslow, Brian Lesser, Andrew Husbands	73	 Image
12/01/2023	Plaintiffs Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership's Motion in limine and Supporting Memorandum to Preclude Defendants from Proffering Expert Opinion Testimony	74	 Image
12/01/2023	Opposition to Motion in limine and Supporting Memorandum to Preclude Defendants from Proffering Expert Opinion Testimony filed by Burn LLC, BL Note Holding Tremont Street LLC, Timothy Maslow, Brian Lesser, Andrew Husbands	75	 Image
12/01/2023	Plaintiffs Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership's Motion in limine to Exclude Evidence Concerning Defendants' Wrongful Termination of Lease Claims and/or Defendants' Claim that the Lease is Unenforceable	76	 Image
12/01/2023	Opposition to Motion in limine to Exclude Evidence Concerning Defendants' Wrongful Termination of Lease Claims and/or Defendants' Claim that the Lease is Unenforceable filed by Burn LLC, BL Note Holding Tremont Street LLC, Timothy Maslow, Brian Lesser, Andrew Husbands	77	 Image
12/01/2023	Plaintiffs Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership's Response to Defendants' Oppositions to Plaintiffs' Motions in Limine	78	 Image
12/01/2023	List of Documents Applies To: Mario Nicosia Individually & Trustee of the N&M Trust VII (Plaintiff); NIC Limited Partnership (Plaintiff)		 Image
12/01/2023	Defendants Burn LLC, BL Note Holding Tremont Street LLC, Timothy Maslow, Brian Lesser, Andrew Husbands's Motion in limine to Preclude Plaintiffs from Introducing AS Evidence The License Pledge Agreement	79	 Image
12/01/2023	Defendants Burn LLC, BL Note Holding Tremont Street LLC, Timothy Maslow, Brian Lesser, Andrew Husbands's Motion in limine to Preclude Argument Individual Defendants Breached or Aided and Abetted Breach of Contract	80	 Image
12/01/2023	Defendants Burn LLC, BL Note Holding Tremont Street LLC, Timothy Maslow, Brian Lesser, Andrew Husbands's Motion in limine to Preclude Plaintiffs From Offering Communications Between the Defendants and the ABCC in Support of their Claim for Misrepresentation	81	 Image
12/01/2023	Opposition to Three Motions in Limine filed by Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership	82	 Image
12/01/2023	Defendants Burn LLC, BL Note Holding Tremont Street LLC, Timothy Maslow, Brian Lesser, Andrew Husbands's Notice of Filing and List of Documents		 Image
12/04/2023	Proposed Filings/Orders Defendants' Proposed Jury Voir Dire Questions		 Image
12/04/2023	Proposed Filings/Orders Defendants' Proposed Jury Instructions		 Image
12/08/2023	Event Result:: Jury Trial scheduled on: 12/18/2023 09:00 AM Has been: Held as Scheduled Hon. Helene Kazanjian, Presiding Staff: Gloria Brooks, Assistant Clerk Magistrate		
12/08/2023	Event Result:: Final Trial Conference scheduled on: 12/08/2023 02:00 PM Has been: Held as Scheduled Hon. Helene Kazanjian, Presiding Staff: Gloria Brooks, Assistant Clerk Magistrate		
12/11/2023	Attorney appearance On this date Andrew E Goloboy, Esq. added for Defendant Timothy Maslow		
12/11/2023	Defendant Timothy Maslow's Motion to Withdraw Attorney Appearance	83	 Image
12/11/2023	Defendant Timothy Maslow's Motion to Withdraw Attorney Appearance	84	 Image
12/11/2023	Affidavit of No Opposition and Compliance with Rule 9A		 Image

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<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
12/11/2023	Self-Represented Defendant Timothy Maslow's Notice of filing Rule 9A and List of Documents		 Image
12/12/2023	Party(s) file Stipulation of Dismissal (filed 12/12/23) as to plffs vs deft with prejudice without costs and with all Rights of appeal waived Judgment entered on docket pursuant to Mass R Civ P 58(a) as amended And notice sent to parties pursuant to Mass R Civ P 77(d) Applies To: Maslow, Timothy (Defendant)	85	 Image
12/15/2023	Event Result:: Motion Hearing scheduled on: 12/15/2023 03:00 PM Has been: Held as Scheduled Hon. Helene Kazanjian, Presiding Staff: Gloria Brooks, Assistant Clerk Magistrate		
12/18/2023	Event Result:: Jury Trial scheduled on: 12/18/2023 09:00 AM Has been: Held as Scheduled Hon. Helene Kazanjian, Presiding Staff: Gloria Brooks, Assistant Clerk Magistrate		
12/20/2023	Event Result:: Jury Waived Trial scheduled on: 12/20/2023 09:00 AM Has been: Held as Scheduled Hon. Helene Kazanjian, Presiding Staff: Gloria Brooks, Assistant Clerk Magistrate		
12/20/2023	Attorney appearance On this date Kevin M Considine, Esq. dismissed/withdrawn for Defendant Timothy Maslow		
12/21/2023	Endorsement on Motion to Withdraw Attorney Appearance (#83.0): ALLOWED (Dated 12/20/2023) Notice sent 12/22/23		 Image
12/21/2023	Event Result:: Jury Waived Trial scheduled on: 12/21/2023 09:00 AM Has been: Held as Scheduled Hon. Helene Kazanjian, Presiding Staff: Gloria Brooks, Assistant Clerk Magistrate		
12/22/2023	Event Result:: Jury Waived Trial - Rule 20 scheduled on: 12/22/2023 09:00 AM Has been: Held as Scheduled Hon. Helene Kazanjian, Presiding Staff: Gloria Brooks, Assistant Clerk Magistrate		
12/26/2023	Waiver of jury claim filed by party Applies To: Mario Nicosia Individually & Trustee of the N&M Trust VII (Plaintiff); NIC Limited Partnership (Plaintiff); Burn LLC (Defendant); BL Note Holding Tremont Street LLC (Defendant); Lesser, Brian (Defendant); Husbands, Andrew (Defendant)	86	 Image
12/26/2023	Plaintiffs' Emergency Trial Submission on Misrepresentation, Count VI	87	 Image
12/28/2023	Matter taken under advisement: Jury Waived Trial - Rule 20 scheduled on: 12/28/2023 09:00 AM Has been: Held - Under advisement Hon. Helene Kazanjian, Presiding Staff: Gloria Brooks, Assistant Clerk Magistrate		
01/05/2024	Plaintiff Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership's Notice of Comments and Proposed Changes to the Court's Rule 20 Waiver Verdict Slip	88	 Image
01/08/2024	Plaintiff Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership's Response to Defendants' Filing a New Case with Their Comments on and Edits to the Rule 20 Waiver Verdict Slip	89	 Image
01/09/2024	Defendant Burn LLC, BL Note Holding Tremont Street LLC, Timothy Maslow, Brian Lesser, Andrew Husbands's Response to Plaintiffs' Comments and Edits to the Rule 20 Waiver Verdict Slip	90	 Image
01/19/2024	Rule 20 Waiver Verdict Slip (Dated 1/18/24)	91	 Image









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<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	Judge: Kazanjian, Hon. Helene Notice Sent 1/22/24		
01/24/2024	JUDGMENT entered on this date.: Judgment After Finding - Rule 20 After Jury Waived Trial Presiding: Hon. Helene Kazanjian Judgment For: Mario Nicosia Individually & Trustee of the N&M Trust VII Judgment Against: Burn LLC BL Note Holding Tremont Street LLC Brian Lesser Terms of Judgment: Interest Begins: 01/24/2020 Jdgmnt Date: 01/22/2024 Interest Rate: .12 Daily Interest Rate: .000329 Damages: Damage Amt: 484518.91 Filing Fees: 520.00 Costs Pd to Court: 20.00 Judgment Total: 717,633.32 Entered on docket pursuant to Mass R Civ P 58(a) And notice sent to parties pursuant to Mass R Civ P 77(d)	92	 Image
02/01/2024	Defendant Burn LLC, BL Note Holding Tremont Street LLC, Brian Lesser's Notice of Motion		 Image
02/02/2024	JUDGMENT entered on this date.: Judgment After Finding - Rule 20 After Jury Waived Trial Presiding: Hon. Helene Kazanjian Judgment For: Mario Nicosia Individually & Trustee of the N&M Trust VII Judgment Against: Burn LLC BL Note Holding Tremont Street LLC Brian Lesser Terms of Judgment: Interest Begins: 01/24/2020 Jdgmnt Date: 01/30/2024 Interest Rate: .12 Daily Interest Rate: .000329 Damages: Damage Amt: 484518.91 Filing Fees: 540.00 Damages Multiplier: Treble Punitive Damages: 969037.82 Judgment Total: 1,687,946.39 Entered on docket pursuant to Mass R Civ P 58(a) And notice sent to parties pursuant to Mass R Civ P 77(d)	93	 Image
02/02/2024	Transcript of 12/28/23 received (via email)		
02/12/2024	Plaintiffs Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership's Application for Fees and Costs	94	 Image
02/12/2024	Affidavit filed by Plaintiffs Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership in support of Application for Fees and Costs (Filed by David L. Kelston)	95	 Image
02/12/2024	Affidavit filed by Plaintiffs Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership in support of Application for Fees and Costs (Filed by Max. D. Stern)		 Image
02/12/2024	Affidavit filed by Plaintiffs Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership in support of Petition for a Award of Attorneys Fees (Filed by Peter R. Fenn)		 Image
02/14/2024	Plaintiffs Burn LLC, BL Note Holding Tremont Street LLC, Brian Lesser's Request for a Hearing on Plaintiffs' Application for Fees and Costs	96	 Image
02/15/2024	Response to Defendants' Request for a Hearing on Plaintiffs' Application for Fees and Costs filed by Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership	97	 Image
02/19/2024	Defendants Burn LLC, BL Note Holding Tremont Street LLC, Brian Lesser's Motion to Amend The Pleadings To Conform To The Evidence Pursuant To Mass. R. Civ. P. 15(b) And To Amend The Judgment Pursuant To Mass. R. Civ. P. 52(b)	98	 Image
02/19/2024	Burn LLC, Brian Lesser, BL Note Holding Tremont Street LLC's Memorandum in support of Motion to Amend The Pleadings To Conform To The Evidence Pursuant To Mass. R. Civ. P. 15(b) And To Amend The Judgment Pursuant To Mass. R. Civ. P. 52(b)	99	 Image
02/19/2024	Opposition to Motion to Amend The Pleadings To Conform To The Evidence Pursuant To Mass. R. Civ. P. 15(b) And To Amend The Judgment Pursuant To Mass. R. Civ. P. 52(b), Together With Plaintiffs' Motion Concerning Mr. Husbands If This Court Is Incline To Reopen The Evidence Or Otherwise Amend The Pleadings filed by Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership	100	 Image
02/19/2024	Reply/Sur-reply Opposition to Motion to Amend The Pleadings To Conform To The Evidence Pursuant To Mass. R. Civ. P. 15(b) And To Amend The	101	 Image










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<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	Judgment Pursuant To Mass. R. Civ. P. 52(b), Together With Plaintiffs' Motion Concerning Mr. Husbands If This Court is Incline To Reopen The Evidence Or Otherwise Amend The Pleadings		
02/19/2024	Notice Of Filing		
02/20/2024	Defendant Burn LLC, BL Note Holding Tremont Street LLC, Brian Lesser's Notice of Appeal	102	
02/20/2024	Notice of appeal filed. (See p#102) Notice sent 2/22/24 Applies To: Burn LLC (Defendant); BL Note Holding Tremont Street LLC (Defendant); Lesser, Brian (Defendant)		
02/29/2024	Defendant Burn LLC, BL Note Holding Tremont Street LLC, Brian Lesser's Notice of Transcripts	103	
03/01/2024	Transcript of 12/18/2023 12/20/2023 12/21/2023 12/22/2023 12/28/2023 received (via email)		
03/01/2024	Plaintiff Mario Nicosia Individually & Trustee of the N&M Trust VII, NIC Limited Partnership's Motion to increase total real estate attachments to \$2.75 million	104	
03/01/2024	Affidavit of David Kelston in Support of Plaintiffs' Motion to Increase Total Real Estate Attachments to \$2.75 Million	105	
03/01/2024	Opposition to Plaintiffs' Motion with authority to increase Total Real Estate Attachments to \$2.75 Million filed by Burn LLC, BL Note Holding Tremont Street LLC, Brian Lesser, Andrew Husbands	106	
03/01/2024	Reply/Sur-reply Plaintiffs' Reply on their Motion with Authority to Increase Total Real Estate Attachments to \$2.75 Million	107	
03/14/2024	The following form was generated: Notice to Appear - BLS Sent On: 03/14/2024 11:15:43		
03/22/2024	Notice of assembly of record sent to Counsel		
03/22/2024	Notice to Clerk of the Appeals Court of Assembly of Record		
04/09/2024	Opposition to Plaintiff's Application for Fees and Costs filed by Burn LLC, BL Note Holding Tremont Street LLC, Brian Lesser	108	
04/12/2024	Event Result:: Motion Hearing to Assess Attorney's Fees scheduled on: 04/12/2024 12:00 PM Has been: Rescheduled For the following reason: By Court prior to date Hon. Helene Kazanjian, Presiding Staff: Gloria Brooks, Assistant Clerk Magistrate		
04/12/2024	Event Result:: Motion Hearing to Assess Attorney's Fees scheduled on: 04/12/2024 02:00 PM Has been: Held as Scheduled Hon. Helene Kazanjian, Presiding Staff: Gloria Brooks, Assistant Clerk Magistrate		
04/19/2024	's	109	
05/31/2024	Endorsement on Motion to Amend The Pleadings To Conform To The Evidence Pursuant To Mass. R. Civ. P. 15(b) And To Amend The Judgment Pursuant To Mass. R. Civ. P. 52(b) (#98,0): DENIED The issues raised in this Motion were raised at the time of Trial and the Court's verdict reflects its decision on them. The Court was also mindful Judge Krupp's Summary Judgment decision which constituted law of case. The Motion is DENIED. (Dated 4/19/2024) Notice Sent 6/3/24		 
05/31/2024	Court received COMMONWEALTH OF MASSACHUSETTS APPEALS COURT NOTICE OF FAILURE TO ENTER APPEAL TIMELY PURSUANT TO MASS.R.A.P. 10(a)(1) related to appeal On March 22, 2024, the Suffolk Superior Court transmitted a notice of assembly to the Appeals Court in the above-referenced case, pursuant to Mass.R.A.P. 9(e). The Appeals Court received the notice on March 22, 2024. Pursuant to Rule 10(a)(1) of the Massachusetts Rules of Appellate Procedure, each appellant has 14 days from receipt of the notice of assembly to docket the appeal in the Appeals Court by paying the required entry fee or moving for waiver of the fee on grounds of indigency. As of today's date, May 31, 2024, no appellant has entered the appeal pursuant to Mass.R.A.P. 10(a)(1). This notice is sent for informational purposes only and does not constitute a dismissal of the appeal. If an appellant or cross-appellant in this matter wishes to pursue the appeal, the party must file a motion to the single justice for leave to docket the appeal late. Otherwise, an appellee may file a motion to dismiss the appeal in the trial court. See	110	

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<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	Mass.R.A.P. 10(c). A copy of this notice is sent this date to the active counsel and self-represented parties identified on the above notice of assembly. For information about the filing of a motion to docket the appeal late, see https://www.mass.gov/service-details/single-justice-practice .		
05/31/2024	Endorsement on Submission of Opposition to Motion to Amend The Pleadings To Conform To The Evidence Pursuant To Mass. R. Civ. P. 15(b) And To Amend The Judgment Pursuant To Mass. R. Civ. P. 52(b), Together With Plaintiffs' Motion Concerning Mr. Husbands If This Court Is Incline To Reopen The Evidence Or Otherwise Amend The Pleadings (#100.0): DENIED Plaintiff's Motion concerning Mr. Husbands is DENIED as having waived. (Dated 4/19/2024) Notice Sent 6/3/24		 Image
05/31/2024	Endorsement on Motion to increase total real estate attachments to \$2.75 million (#104.0): Other action taken After hearing, the court will increase the real estate attachment to a total amount of \$2,096,566.03. The Court has not factored in anticipated interest as the amount is too speculative at this time. Defendant's has 10 days from the date this Order is Docketed to secure a bond in Lieu of the attachment. (Dated 4/19/2024) Notice Sent 6/3/24		 Image
06/03/2024	Defendant Burn LLC, BL Note Holding Tremont Street LLC, Brian Lesser's Notice of Appeal	111	 Image
06/03/2024	Notice of appeal filed. (See p#111) Notice sent 6/5/24 Applies To: Burn LLC (Defendant); BL Note Holding Tremont Street LLC (Defendant); Lesser, Brian (Defendant)		
06/03/2024	Notice of docket entry received from Appeals Court Please take note that on June 3, 2024, the following entry was made on the docket of the above-referenced case: Motion to docket appeal late filed for Burn LLC, BL Note Holding Tremont Street LLC and Brian J. Lesser by Attorney Kevin Considine.	113	 Image
06/05/2024	MEMORANDUM & ORDER: Memorandum of Decision and Order on Plaintiff's Request for Attorney's fees and costs See paper #112 Order: For the reasons stated above, the Court Orders Defendant's Burn, LLC; BL Note Holding Tremont Street, LLC; and Brian Lesser to pay Plaintiff's \$394,427 in Attorney's fees and \$14,192.64 in costs. (Dated 4/22/2024) Judge: Kazanjian, Hon. Helene Notice sent 06/06/2024.	112	 Image
06/10/2024	Court received Copy of Plaintiff's Status Report in Response to Motion of Defendants for Leave to Docket the Appeal late filed with the Appeals Court related to appeal		 Image
06/11/2024	AMENDED/CORRECTED JUDGMENT entered on this date.: Judgment After Finding - Rule 20 After Jury Waived Trial Presiding: Hon. Helene Kazanjian Judgment For: Mario Nicosia Individually & Trustee of the N&M Trust VII NIC Limited Partnership Judgment Against: Burn LLC BL Note Holding Tremont Street LLC Brian Lesser Terms of Judgment: Interest Begins: 01/24/2020 Jdgmnt Date: 01/30/2024 Interest Rate: .12 Daily Interest Rate: .000329 Damages: Damage Amt: 484518.91 Filing Fees: 540.00 Damages Multiplier: Treble Other Costs: 14192.64 Punitive Damages: 969037.82 Crt Ord Atty Fee: 394427.00 Judgment Total: 2,096,566.03 Entered on docket pursuant to Mass R Civ P 58(a) And notice sent to parties pursuant to Mass R Civ P 77(d)	113	 Image
06/13/2024	Notice of docket entry received from Appeals Court Please take note that on June 13, 2024, the following entry was made on the docket of the above-referenced case: Order: Re#1,4: To the extent the defendants seek to docket late the appeal assembled and transmitted by the Suffolk Superior Court on 03/22/2024, the request for relief is denied. Where the most recent amended judgment in this matter entered on 06/11/2024, I conclude that the appellants' 02/20/2024 and 06/03/2024 notices of appeal, and the assembly issued on 03/22/2024, were premature. See Jones v. Boykan, 74 Mass. App. Ct. 213, 218 (2009) ("It is the entry of a final judgment, not the order found in the concluding paragraph of the judge's memorandum of decision, that starts the appellate clock" [internal quotations and citations omitted]). To the extent the defendants seek to docket an appeal pursuant to their 06/03/2024 notice of appeal, the request for relief is denied without prejudice to their ability to seek	114	 Image

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<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	assembly of the record and docketing as set forth in the Massachusetts Rules of Appellate Procedure. See Mass. R. A. P. 9, 10. (Hand, J.) *Notice/Attest/Kazanjian, J.		
06/17/2024	Defendant Burn LLC, BL Note Holding Tremont Street LLC, Brian Lesser's Notice of Appeal	115	 Image
06/17/2024	Notice of appeal filed. (See p#115) Notice sent 6/20/24 Applies To: Burn LLC (Defendant); BL Note Holding Tremont Street LLC (Defendant); Lesser, Brian (Defendant)		
07/01/2024	General correspondence regarding Notice of Transcript Order Transcript of 4/12/24 ordered Trial transcripts 12/18 12/20 12/21 12/22 and 12/28 were previously filed with the clerk's office on 3/1/24	116	 Image
07/03/2024	Transcript of 4/12/24 received from transcriber Spencer Von Jarrett		
07/24/2024	Notice of assembly of record sent to Counsel		
07/24/2024	Notice to Clerk of the Appeals Court of Assembly of Record		
08/02/2024	Notice of Entry of appeal received from the Appeals Court In accordance with Massachusetts Rule of Appellate Procedure 10(a)(3), please note that the above-referenced case (2024-P-0876) was entered in this Court on August 1, 2024.	117	 Image
10/24/2024	Defendants BL Note Holding Tremont Street LLC, Timothy Maslow, Brian Lesser, Andrew Husbands's Motion to Withdraw as Counsel	118	 Image
10/28/2024	Endorsement on Motion to Withdraw as Counsel (#118.0): ALLOWED dated (10/25/24) Notice sent 10/29/24		 Image
10/30/2024	Plaintiffs, Defendants Burn LLC, BL Note Holding Tremont Street LLC, Brian Lesser, Mario Nicosia Individually & Trustee of the N&M Trust VII's Joint Motion to Approve Stipulation pursuant to Mass.R.App.P.8(e(1)) to Add a Complete Copy of "Defendants' Opposition to Plaintiff's Verified Motion for a Real Estate Attachment, With authority"	119	 Image
11/12/2024	Endorsement on Motion to Approve Stipulation pursuant to Mass.R.App.P.8(e(1)) to Add a Complete Copy of "Defendants' Opposition to Plaintiff's Verified Motion for a Real Estate Attachment, With authority" (#119.0): ALLOWED (Dated: 11/6/24) Notice Sent 11/12/24		 Image
03/26/2025	Notice of docket entry received from Appeals Court Please take note that on March 26, 2025, the following entry was made on the docket of the above-referenced case (2024-P-0876): ORDER: Case transferred to SJC sua sponte. *Notice/Attest.	120	 Image
04/09/2025	Notice of Entry of appeal received from the Appeals Court Pursuant to Mass. R. A. P. 10(a)(3), you are hereby notified that, on March 26, 2025, the above-referenced case (SJC-13755) was entered on the docket of this court.	121	 Image
Case Disposition			
<u>Disposition</u>	<u>Date</u>	<u>Case Judge</u>	
Disposed by Court Finding	02/02/2024		

Please be aware that the Trial Court has been experiencing technical issues causing a backlog that may delay processing of your filings. We appreciate your understanding and patience as we work diligently to resolve these issues.

EXHIBIT C

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NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

**SUPERIOR COURT
CIVIL ACTION NO.
2084CV00218-BLS1**

**MARIO NICOSIA, TRUSTEE OF THE N&M
TRUST VII, NIC LIMITED PARTNERSHIP and
MARIO NICOSIA, INDIVIDUALLY,
Plaintiffs/Defendants in Counterclaim**

vs.

**BURN, LLC, BL NOTE HOLDING TREMONT
STREET, LLC, TIMOTHY MASLOW, BRIAN
J. LESSER, and ANDREW HUSBANDS,
Defendants/Plaintiffs in Counterclaim**

**MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' REQUEST
FOR ATTORNEY'S FEES AND COSTS**

Plaintiffs Mario Nicosia ("Nicosia") and NIC Limited Partnership (collectively, "Plaintiffs") brought this action in January 2020 for breach of a commercial lease agreement (the "Lease") for restaurant premises located at 647 Tremont Street in Boston (the "Premises"). After summary judgment and a jury-waived trial, pursuant to Superior Court Rule 20(2)(h), the matter is now before the court on Plaintiffs' Request for Attorney's Fees and Costs. After careful consideration of the parties' written submissions and the arguments advanced at the hearing on April 12, 2024, the Plaintiffs' Request for Attorney's Fees and Costs is **ALLOWED**.

BACKGROUND

Nicosia is the Trustee of the N&M Trust VII (the "Trust" or "Landlord"). In 1996, the Trust entered into the Lease with Burn, Inc. (the "Tenant") for the Premises. The Lease was extended through December 31, 2022.¹ Disputes arose between the parties as to the

¹ The parties agreed on January 22, 2018, that Burn, LLC, would become the named tenant under the Lease, as successor to Burn, Inc.

transferability of the liquor license associated with the Premises (the "License"), and the Lease was ultimately terminated. Plaintiffs' primary claim was that the Lease, and a related Negative Pledge Agreement, provided that the License could not be transferred or pledged and had to be returned to the Landlord at the completion of the lease term. Defendants argued that the Lease provision restricting the transfer of the License, and the related Negative Pledge Agreement, were unenforceable. Defendants filed counterclaims. In the Amended Complaint, Plaintiffs sought: (1) damages; (2) a declaration that the Lease was enforceable, including Section 11.24 concerning the License; and (3) an order that Defendants should return the License.

On cross-motions for summary judgment, with respect to the Amended Complaint, the court (Krupp, J.) allowed summary judgment for Plaintiffs on Count I (injunctive relief), Count II (declaratory relief),² and so much of Count IV (breach of contract) that alleged that Burn, LLC had breached the Lease, and for Defendants on Count III (unjust enrichment). The court also allowed summary judgment for Plaintiffs on Count I of the Counterclaim. In sum, the court found the Lease enforceable, including the provision prohibiting the transfer or pledge of the License, and requiring the return of the License to the Landlord.

² In his Memorandum and Order on Motions for Summary Judgment, the court (Krupp, J.) declared and ordered the following:

2. It is hereby **DECLARED** and **ADJUDGED** as follows:

- A. The Lease, including Section 11.24 concerning the License, is lawful and enforceable.
- B. The pledge of the License was an event of default under the Lease. The pledge of the License to Brian Lesser, and any assignment of that pledge by Mr. Lesser to BL Note Holding Tremont Street LLC is hereby extinguished, and is null and void.
- C. The Landlord's termination of the Lease was valid.

3. It is hereby further **ORDERED** that, pursuant to Section 11.24 of the Lease, defendants shall execute all documents and attend all hearings necessary to effectuate the sale of the License to the Landlord or its designee, and shall cooperate with the Landlord in the transfer of the License to the Landlord or its designee.

After a five-day jury-waived trial on the remaining claims, the court found for Plaintiffs on Count IV (breach of contract), as to defendant Burn, LLC. The court also found for Plaintiffs on Counts V (G.L. c. 93A) and VII (conversion), as to defendants Burn, LLC; BL Note Holding Tremont Street, LLC; and Brian Lesser. The court found for the defendant Andrew Husbands on Counts V and VII. The court awarded Plaintiffs \$484,518.91 in damages. The court further found that the unfair and deceptive practices that were the subject of Count V were willful and knowing, and, accordingly, trebled the damages. Finally, the court found for Plaintiff on all of Defendants' counterclaims.

DISCUSSION

While Plaintiffs did not prevail on all claims, including their claims against Andrew Husbands, they received all the relief they were seeking. The court, therefore, finds that Plaintiffs are the "prevailing party." *Ferman v. Sturgis Cleaners, Inc.*, 481 Mass. 488, 491-96 (2019). As such, Plaintiffs are entitled to an award of attorney's fees, pursuant to G.L. c. 93A. *H1 Lincoln, Inc. v. South Washington Street, LLC*, 489 Mass. 1, 27 n.18 (2022); *Hyannis Anglers Club, Inc. v. Harris Warren Commercial Kitchens, LLC*, 91 Mass. App. Ct. 555, 562-63 (2017). The amount of the award is within the discretion of the judge and is determined by a standard of reasonableness. *Berman v. Linnane*, 434 Mass. 301, 302-03 (2001); *Heller v. Silverbranch Constr. Corp.*, 376 Mass 621, 629 (1978). To determine a reasonable fee award the court applies the lodestar method, which requires the court to multiply the fair market rate for the legal services by the number of hours reasonably spent on the case. *Ross v. Continental Resources*, 73 Mass. App. Ct. 497, 515 (2009). Plaintiffs have the burden of proving the reasonableness of their requested rates and hours. *Commonwealth v. Ennis*, 441 Mass. 718, 722 (2004).


In making its decision, the court must apply the factors outlined in *Linthicum v. Archambault*, 379 Mass. 381, 388-89 (1979) (overruled in part on other grounds by *Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp.*, 418 Mass. 737 (1994)), which are: (1) the nature of the case and the issues presented; (2) the time and labor required; (3) the amount of damages involved; (4) the result obtained; (5) the experience, reputation, and ability of the attorney; (6) the usual price charged for similar services by other attorneys in the same area; and (7) the amount of awards in similar cases. *Id.*

Plaintiffs seek \$394,427 in attorney's fees and \$14,192.64 in costs. Defendants contest the number of hours expended on the litigation but not the rates sought. The case was actively litigated by both sides for four years, including preliminary injunction hearings, three appeals to the Single Justice of the Appeals Court, discovery, summary judgment, and a jury-waived trial. In support of this fee petition, Plaintiffs have submitted affidavits and verified billing records. The court does not agree with Defendants that Plaintiffs' bills contain impermissible "block billing." While some of the entries are somewhat vague, none of the disputed entries are associated with unusually large blocks of time. Further, along with the docket report, also submitted in connection with this fee petition, the court can adequately determine and assess the work done.

The court finds based on all the circumstances, that the time expended by Plaintiffs' counsel was reasonable and is supported by the record. Accordingly, the court awards the full amount sought by Plaintiffs in both fees and costs.

ORDER

For the reasons stated above, the court orders defendants Burn, LLC; BL Note Holding Tremont Street, LLC; and Brian Lesser to pay Plaintiffs \$394,427 in attorneys' fees and \$14,192.64 in costs.


Héline Kazanjian
Justice of the Superior Court

Dated: April 22, 2024

EXHIBIT D

SUPREME JUDICIAL COURT
for the Commonwealth
Case Docket

MARIO NICOSIA, TRUSTEE OF THE N&M TRUST VII & another vs. BURN
LLC & others
SJC-13755

CASE HEADER

Case Status	Br'fd & Arg Date Ordered
Status Date	09/03/2025
Nature	Corporate/business
Entry Date	03/26/2025
Appellant	Defendant
Case Type	Civil
Brief Status	
Brief Due	
Quorum	
Argued Date	
Decision Date	
AC/SJ Number	2024-P-0876
Citation	
DAR/FAR Number	
Lower Ct Number	2084CV00218
Lower Court	Suffolk Superior Court
Lower Ct Judge	Peter B. Krupp, J.
Route to SJC	Sua Sponte Transfer from Appeals Court

FUTURE CALENDAR

Friday, October 10th 2025, 9:00 AM
Presiding: Budd, C.J., Gaziano, Kafker, Georges, Jr., Dewar, Wolohojian, JJ.
John Adams Courthouse, Rm 1

INVOLVED PARTY

Mario Nicosia, Trustee of the N&M Trust VII
Plaintiff/Appellee
Red brief & appendix filed

NIC Limited Partnership
Plaintiff/Appellee
On brief of another party

Burn LLC
Defendant/Appellant
Blue br, app & reply br filed

BL Note Holding Tremont Street LLC
Defendant/Appellant
On brief of another party

Brian Lesser
Defendant/Appellant
On brief of another party

Andrew Husbands
Defendant

Timothy Maslow
Defendant

Joseph Matzkin
Other interested party

Suzanne Iannella
Amicus
Amicus brief filed

ATTORNEY APPEARANCE

[Noah Rosmarin, Esquire](#)
[David L. Kelston, Esquire](#)

[Noah Rosmarin, Esquire](#)
[David L. Kelston, Esquire](#)

[Kevin M. Considine, Esquire](#)
[Alexander Furey, Esquire](#)
[William A. Kelley, Jr., Esquire](#)
[Mark D. Donovan, Esquire](#)

[Kevin M. Considine, Esquire](#)
[Alexander Furey, Esquire](#)
[William A. Kelley, Jr., Esquire](#)
[Mark D. Donovan, Esquire](#)

[Kevin M. Considine, Esquire](#)
[Alexander Furey, Esquire](#)
[William A. Kelley, Jr., Esquire](#)
[Mark D. Donovan, Esquire](#)

[Kevin M. Considine, Esquire](#)
[Mark D. Donovan, Esquire](#)

[William A. Kelley, Jr., Esquire](#)
[Andrew E. Goloboy, Esquire](#)
[Mark D. Donovan, Esquire](#)

[William Robert Covino, Esquire](#)
[Kristyn St. George, Esquire](#)

[Albert L. Farrah, Esquire](#)

ADD 138

Pioneer New England Legal Foundation

Amicus
Amicus brief filed







Spark Business Consulting, Inc.

Amicus
Amicus brief filed

[Benjamin Robbins, Esquire](#)
[Frank J. Bailey, Esquire](#)

[Joshua Bowman, Esquire](#)
[Richard Heller, Esquire](#)
[Scott McConchie, Esquire](#)

DOCUMENTS

[Appellant Burn LLC Et Al Amended Brief](#) 
[Appellee Nicosia Et Al Brief](#) 
[Appellant Burn LLC Et Al Reply Brief](#) 
[Amicus Iannella Brief](#) 
[Amicus Pioneer New England Legal Foundation Brief](#) 
[Amicus Spark Business Consulting Inc Brief](#) 

DOCKET ENTRIES

Entry Date	Paper	Entry Text
03/26/2025	#1	Entered.
03/26/2025	#2	ANNOUNCEMENT: The Justices are soliciting amicus briefs. 1. Whether the motion judge erred in rejecting the defendants' argument that the provision of the lease restricting the pledging or assignment of a license to sell all alcoholic beverages was unenforceable as a matter of public policy; 2. Whether the trial judge erred in concluding that the defendants violated G. L. c. 93A, § 11, including whether the representation made in the defendants' pledge agreement that the pledge of a license to sell all alcoholic beverages did not violate or constitute a default under the terms of any agreement was an unfair or deceptive act or practice
03/31/2025	#3	Appellee brief filed for Mario Nicosia, Trustee of the N&M Trust VII and NIC Limited Partnership by Attorney David Kelston.
03/31/2025	#4	Supplemental Record Appendix filed for Mario Nicosia, Trustee of the N&M Trust VII and NIC Limited Partnership by Attorney David Kelston.
03/31/2025	#5	Unopposed Motion to File a Supplemental Appendix filed for Mario Nicosia, Trustee of the N&M Trust VII and NIC Limited Partnership by Attorney David Kelston and Attorney Noah Rosmarin. (Referred to the Quorum)..
03/31/2025	#6	Motion For Leave to Respond to Statement in Appellants' Reply Brief filed for Mario Nicosia, Trustee of the N&M Trust VII and NIC Limited Partnership by Attorney David Kelston and Attorney Noah Rosmarin. (Referred to the Quorum).
03/31/2025		The clerk's office has received the appellees' brief and supplemental appendix through e-fileMA. The brief has been accepted for filing and entered on the docket. The appellee shall file with the clerk 4 copies of the brief and 3 copies of thee appendix within 5 days. (See Mass. R. App. p. 20). The clerk's office may require additional copies if necessary.
03/31/2025	#7	Appellant brief (AMENDED) filed for Burn LLC, BL Note Holding Tremont Street LLC and Brian Lesser by Attorney Kevin Considine.
03/31/2025	#8	Appendix Volume 1 (CORRECTED) filed for Burn LLC, BL Note Holding Tremont Street LLC and Brian Lesser by Attorney Kevin Considine.
03/31/2025	#9	Appendix Volume 2 filed for Burn LLC, BL Note Holding Tremont Street LLC and Brian Lesser by Attorney Kevin Considine.
03/31/2025	#10	Appendix Volume 3 filed for Burn LLC, BL Note Holding Tremont Street LLC and Brian Lesser by Attorney Kevin Considine.
03/31/2025	#11	Appendix Volume 4 filed for Burn LLC, BL Note Holding Tremont Street LLC and Brian Lesser by Attorney Kevin Considine.
03/31/2025	#12	Appendix Volume 5 filed for Burn LLC, BL Note Holding Tremont Street LLC and Brian Lesser by Attorney Kevin Considine.
03/31/2025	#13	Appendix Volume 6 filed for Burn LLC, BL Note Holding Tremont Street LLC and Brian Lesser by Attorney Kevin Considine.
03/31/2025	#14	Appendix Volume 7 filed for Burn LLC, BL Note Holding Tremont Street LLC and Brian Lesser by Attorney Kevin Considine.
03/31/2025	#15	Appendix Volume 8 filed for Burn LLC, BL Note Holding Tremont Street LLC and Brian Lesser by Attorney Kevin Considine.
03/31/2025	#16	Appendix Volume 9 filed for Burn LLC, BL Note Holding Tremont Street LLC and Brian Lesser by Attorney Kevin Considine.
04/01/2025	#17	Appendix Volume 10 filed for Burn LLC, BL Note Holding Tremont Street LLC and Brian Lesser by Attorney Kevin Considine.
03/31/2025	#18	Appendix Volume 11 (CORRECTED) filed for Burn LLC, BL Note Holding Tremont Street LLC and Brian Lesser by Attorney Kevin Considine.
03/31/2025	#19	Appendix Volume 12 (CORRECTED) filed for Burn LLC, BL Note Holding Tremont Street LLC and Brian Lesser by Attorney Kevin Considine.
03/31/2025	#20	Appendix Volume 13 (CORRECTED) filed for Burn LLC, BL Note Holding Tremont Street LLC and Brian Lesser by Attorney Kevin Considine.

ADD 139

04/01/2025 #21 Reply brief filed for Burn LLC, BL Note Holding Tremont Street LLC and Brian Lesser by Attorney Kevin Considine.

04/01/2025 The clerk's office has received the appellant's amended brief, appendices (volumes 1 to 13) and reply brief through e-fileMA. The briefs and appendices have been accepted for filing and entered on the docket. The appellant shall file with the clerk 4 copies of the briefs and 2 copies of the appendices within 10 days. (See Mass.R.A.P. 20). The clerk's office may require additional copies if necessary.

04/04/2025 #22 Additional 4 copies of appellee's brief and 3 copies of supplemental appendix filed by Mario Nicosia, Trustee of the N&M Trust VII & others.

04/07/2025 #23 Additional 4 copies of appellant's brief and reply brief; 2 copies of appendices filed by Burn LLC & others.

04/11/2025 #24 CORRECTED ANNOUNCEMENT: The Justices are soliciting amicus briefs
1. Whether the motion judge erred in rejecting the defendants' argument that the provision of the lease restricting the pledging or assignment of a license to sell all alcoholic beverages was unenforceable as a matter of public policy;
2. Whether the trial judge erred in concluding that the defendants violated G. L. c. 93A, § 11, including whether the representation made in the defendants' pledge agreement that the pledge of a license to sell all alcoholic beverages did not violate or constitute a default under the terms of any agreement was an unfair or deceptive act or practice in violation of that provision, where the pledge agreement was submitted to regulators; and
3. Whether the trial judge erred in concluding that a license to sell all alcoholic beverages was the appropriate subject of a claim for conversion.

07/10/2025 #25 NOTICE of September argument sent.

07/11/2025 #26 Appearance filed for Burn LLC, BL Note Holding Tremont Street LLC and Brian Lesser by Attorney Alexander Furey.

08/21/2025 #27 NOTICE of October argument sent.

09/03/2025 #28 ORDERED for argument on October 10.

09/05/2025 #29 Amicus brief filed for Suzanne Iannella by Attorney Albert Farrah.

09/05/2025 The clerk's office has received the amicus brief through e-fileMA. The brief has been accepted for filing and entered on the docket. The amicus shall file with the clerk 4 copies of the brief within 5 days. (See Mass.R.A.P. 20). The clerk's office may require additional copies if necessary.

09/09/2025 #30 Additional 4 copies of amicus brief filed by Suzanne Iannella.

09/16/2025 #31 Amicus brief filed for Pioneer New England Legal Foundation by Attorney Benjamin Robbins and Attorney Frank J. Bailey.

09/16/2025 The clerk's office has received the amicus brief through e-fileMA. The brief has been accepted for filing and entered on the docket. The amicus shall file with the clerk 4 copies of the brief within 5 days. (See Mass.R.A.P. 20). The clerk's office may require additional copies if necessary.

09/19/2025 #32 Amicus brief filed for Spark Business Consulting, Inc. by Attorney Joshua M. Bowman, Attorney Richard Heller and Attorney Scott McConchie.

09/22/2025 The clerk's office has received the amicus brief through e-fileMA. The brief has been accepted for filing and entered on the docket. The amicus curiae (Spark Business Consulting, Inc.) shall file with the clerk 4 copies of the brief within 5 days. (See Mass.R.A.P. 20). The clerk's office may require additional copies if necessary.

09/22/2025 #33 Additional 4 copies of amicus brief filed by Pioneer New England Legal Foundation.

09/23/2025 #34 Additional 4 copies of amicus brief filed by Spark Business Consulting, Inc..

09/25/2025 #35 Motion to file response to amicus Spark Business Consulting, Inc.'s brief filed for Mario Nicosia, Trustee of the N&M Trust VII and NIC Limited Partnership by Attorney David Kelston and Attorney Noah Rosmarin. (Referred to the Quorum.)

09/25/2025 #36 Response to amicus Spark Business Consulting, Inc.'s brief filed for Mario Nicosia, Trustee of the N&M Trust VII and NIC Limited Partnership by Attorney David Kelston and Attorney Noah Rosmarin.

As of 10/01/2025 4:20pm

CN

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPT.

BRIAN J. LESSER and BURN, LLC,

Plaintiffs,

KRISTEN L. SCANLON and SCANLON
LAW, LLP,

Defendants.

Case No.: 2584CV01657 ^C

**DEFENDANTS, KRISTEN L. SCANLON AND SCANLON LAW, LLCS', REPLY TO
THE PLAINTIFF'S OPPOSITION TO THE MOTION TO DISMISS**

Pursuant to Mass. Super. Ct. R. 9A(a)(3), the Defendants, Kristen L. Scanlon (“Attorney Scanlon”) and Scanlon Law, LLC¹ (“SLL”) (collectively, the “Defendants”), submits this Reply to the Plaintiffs, Brian J. Lesser (“Mr. Lesser”) and Burn, LLC’s (“BL”) (collectively, the Plaintiffs”), Opposition (“the Opposition”) to the Defendants’ Motion to Dismiss (the “Motion”).

A. The Plaintiff’s Contention that the Statute of Limitations did not Accrue until the Motion for Summary Judgment Decision Fails as a Matter of Law

The Plaintiffs argue that the multiple separate and distinct events listed in the Motion that put the Plaintiffs on notice of the Defendants’ alleged malpractice do not constitute appreciable harm sufficient to start the running of the statute of limitations because such events are contingent, theoretical or reversible events. The Plaintiffs argue that for the statute of limitations to run, a merit decision on the motion for summary judgment was required. That argument fails as a matter of law.

¹ The Complaint incorrectly refers to Scanlon Law, LLC as Scanlon Law, LLP. The entity Scanlon Law, LLP does not exist.

As outlined in the Motion, Massachusetts courts have held that an underlying case need not be decided on the merits for the statute of limitations to accrue under M.G.L. c. 260, § 4 (“§4”). Recently, the Massachusetts Appeals Court, in an unpublished decision, affirmed a Rule 12(b)(6) dismissal where the statute of limitations ran before the unfavorable summary judgment decision issued. *Hyman v. Stanford*, No. 24-P-167, 2025 Mass. App. Unpub. LEXIS 185, at *4-*5 (Mass. App. Ct. Mar. 18, 2025) (Rule 23.0 Decision).

In support of their argument, the Plaintiffs rely upon *Eck v. Kellem* to assert that the statute of limitations did not begin to run until judgment entered because the plaintiffs had every reason to rely on their prior attorneys’ assurances that the claims were defensible. 51 Mass. App. Ct. 850 (2001). The crucial difference between *Eck* and this case is that, unlike in *Eck*, here, two separate Single Justices of the Massachusetts Appeals Court held that the underlying plaintiffs had a likelihood of success on the merits of their case resulting in actual knowledge that the Defendants allegedly misadvised the Plaintiffs.

Much more recent than the *Eck* case (a little over two months ago), the Massachusetts Appeals Court rejected a similar argument to what the Plaintiffs argue here, albeit in an unpublished decision. *Javaras v. LaFortune*, 24-P-322, 2025 Mass. App. Unpub. LEXIS 623, at *1-*6 (Mass. App. Ct. Aug. 5, 2025) (Rule 23.0 Decision). In *Javaras*, the attorney gave improper advice that the trustee plaintiff could use funds from the trust to pursue litigation against the beneficiaries. *Id.* at *2. Thereafter, the trial court issued a memorandum of decision of a preliminary injunction contradicting the advice. *Id.* at *3. The court found that the statute of limitations accrued at the time of the memorandum of decision of the preliminary injunction, reasoning that at that point, the plaintiff “knew or reasonably should have known that the attorney had misadvised him” and “it is not necessary that the plaintiff client know the full extent of harm

or loss or know precisely in what manner and what harmful after-effects flow from the alleged malpractice.” *Id.* at *4, citing *Frankston v. Denniston*, 74 Mass. App. Ct. 366, 374 (2009).

Notably, the court rejected the plaintiff’s argument that “the statute of limitations was tolled due to the attorney’s frequent advice that the adverse rulings were wrong and could be corrected on appeal.” *Javaras*, 2025 Mass. App. Unpub. LEXIS 623, at *4. (emphasis added).

As was the case in *Javaras*, here, the statute of limitations began to accrue at the latest on March 20, 2020, when the Single Justice granted a Preliminary Injunction or, being more generous to the Plaintiffs, on October 20, 2020², when the second Single Justice rejected the Plaintiffs’ petition for relief from the Preliminary Injunction. **Exhibit 2, dkt. entry 12, dkt. entry 19.** In both instances, the Single Justices found that the underlying plaintiffs established a likelihood of success of the merits thereby contradicting the Defendants’ advice. **Exhibit 2, dkt. entry 12, dkt. entry 19; Complaint, ¶¶ 17, 26, 31, 35-36.** Therefore, as was the case in *Javaras*, even though the Preliminary Injunction was not a decision on the merits, the Preliminary Injunction made or should have made the Plaintiffs aware that the Defendants allegedly misadvised them.

Additionally, the other cases cited by the Plaintiffs to support their argument that the statute of limitations did not begin to run until there was a merit decision are unavailing. *See Opposition* at 8. First, in *Lyons v. Nutt*, the Massachusetts Supreme Judicial Court (“SJC”) affirmed summary judgment where the statute of limitations occurred years before the merit decision when plaintiff began to question his attorney’s abilities. 436 Mass. 244, 246 (2002). Second, in *Vinci v. Byers*, the statute of limitations accrued on the date of a meeting that caused the plaintiff to question the defense. 65 Mass. App. Ct. 135, 141 (2005). There, the court pointed to other distinct, non-merit

² As outlined in their Motion, the Defendants assert that the statute of limitations began to run in January of 2020 with multiple separate and distinct events that would also suffice to cause the statute of limitations to run before March 20, 2020.

decision events that also could have caused the statute of limitations to run, including making a misrepresentation on a financial statement. *Id.* Lastly, *Spilios v. Cohen* is of no aid to the Plaintiffs because although the statute of limitations did begin to run after trial, it did so because the plaintiff's theory was that the attorney was unprepared for trial and should have accepted a settlement offer instead of proceeding to trial. 38 Mass. App. Ct. 338, 340 (1995). Here, the Plaintiffs do not allege that the Defendants were unprepared at the underlying trial or even was counsel of record for that trial; therefore, *Spilios* does not apply.

In sum, the Plaintiff was not required to know the full extent of their injury by way of a merit decision for the statute of limitations to begin to run. *See Vinci*, 65 Mass. App. Ct. at 139. Rather, the statute of limitations began to run when the Plaintiffs "knew or reasonably should have known that the [Defendants] had misadvised [them]." *Javaras*, 2025 Mass. App. Unpub. LEXIS 623, at *4. The Plaintiffs knew or should have known that they suffered appreciable harm by the Defendants' alleged conduct as early as January of 2020 when the Plaintiffs received a Notice of Default causing the Plaintiffs began to accrue attorneys' fees or as late as October 2020 when the Preliminary Injunction was affirmed, all of which stemmed from the Defendants' advice. Yet, they did not file their Complaint within three years of any of those dates.

B. The Continuing Representation Doctrine did not Toll the Accrual of the Statute of Limitations

The Plaintiffs also rely on the continuing representation doctrine to contend that the accrual statute of limitations was tolled as they purportedly continued to rely on the advice of the Defendants even after they hired counsel to defend them in the underlying lawsuit. However, the continuing representation doctrine does not save the Plaintiffs' untimely claims.

The SJC has adopted the continuing representation doctrine that tolls the statute of limitations "when the attorney in question continues to represent the plaintiff's interest in the

matter in question.” *Murphy v. Smith*, 411 Mass. 133, 137 (1991). However, **the doctrine does not apply when the client actually knows that they suffered appreciable harm as result of the attorney’s conduct.** *Vinci v. Byers*, 65 Mass. App. Ct. 135, 141 (2005). Once a client knows that they suffered appreciable harm as result of the attorney’s conduct, “there is no innocent reliance which the continued representation doctrine seeks to protect.” *Lyons*, 436 Mass. at 250, *citing Cantu v. St. Paul Cos.*, 401 Mass. 53, 58 (1987).

As outlined in further detail in the Motion, the Plaintiffs were represented in the underlying lawsuit by counsel other than the Defendants. The Plaintiffs were aware that they suffered appreciable harm as early as January of 2020 when the Plaintiffs received a Notice of Default or at the latest on October 20, 2020, when the second Single Justice rejected the Plaintiffs’ petition for relief from the preliminary injunction. The fact that the Plaintiffs allege that they and their counsel continued to rely on the Defendants’ advice is of no consequence. Indeed, the Appeals Court rejected “the contention that the statute of limitations tolled due to the attorney’s frequent advice that the adverse rulings were wrong and would be corrected on appeal” because “the accrual of a legal malpractice claim does not necessarily depend on the outcome of the underlying litigation.” *Javaras*, 2025 Mass. App. Unpub. LEXIS 623, at *4.

As a result, the continuing representation doctrine did not toll the statute of limitations, and the Plaintiffs filed their Complaint late. For those reasons, and the reasons outlined in the Motion, the Defendants respectfully request that this Honorable Court dismiss the Complaint with prejudice pursuant to Mass. R. Civ. P. 12(b)(6).

Respectfully submitted,
**KRISTEN L. SCANLON and
SCANLON LAW, LLP,**
By their attorneys,

/s/ Gina L. Fleury

Kenneth B. Walton, BBO# 562174

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Gina L. Fleury, BBO# 703142

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
NO. 2584CV01657-C

BRIAN J. LESSER and BURN, LLC

v.

KRISTEN L. SCANLON and SCANLON LAW, LLP

MEMORANDUM OF DECISION AND ORDER ON
DEFENDANTS' MOTION TO DISMISS COMPLAINT

Plaintiffs Brian Lesser ("Lesser") and Burn, LLC ("Burn") (collectively, the "Plaintiffs") have brought this action against Defendants Kristen L. Scanlon, Esq. ("Attorney Scanlon") and her law firm, Scanlon Law, LLC¹ ("Scanlon Law") (collectively, the "Defendants"), asserting claims of negligence, breach of contract, breach of fiduciary duty, and negligent misrepresentation. Presented for decision is Defendants' Motion to Dismiss the Complaint pursuant to Mass. R. Civ. P. 12(b)(6), which rests on the ground that Plaintiffs' claims are barred by the applicable statute of limitations. After review of the parties' filings and a hearing, and for the reasons which follow, the Defendants' Motion to Dismiss shall be ALLOWED.

¹ The Complaint incorrectly names the firm as "Scanlon Law LLP." The misidentification is of no consequence to the Court's decision.

FACTUAL ALLEGATIONS²

Lesser is an investor and owner of several Boston area restaurants and the Manager of Burn.³ In 1996, Burn entered into a commercial contract to lease part of the premises at 647 Tremont Street, Boston, from its owner, N&M Trust VII (“N&M”), for the purpose of operating a restaurant (the “Lease”). Article 11.24 of Lease granted Burn a sublicense of N&M’s Liquor License (No. LB 99213), subject to a “Negative Pledge Agreement” prohibiting Burn from transferring the license to any other location or “pledg[ing], assign[ing], sell[ing] or transfer[ring] the Liquor License to any person, mortgage or entity other than [N&M] or a transferee approved in advance writing by [N&M]” (Compl., ¶ 14.) Pursuant to Article 8.1(c) of the Lease, a breach of the Negative Pledge Agreement by Burn would constitute a material default. The Boston Licensing Board (“BLB”) and the Alcohol Beverage Control Commission (“ABCC”) approved N&M’s grant of license to Burn in accordance with the aforementioned terms. Burn operated a restaurant at this location from 1996 to 2018. To do so, Burn and N&M extended the Lease several times. However, these parties never altered or amended the terms of the Negative Pledge Agreement.

Attorney Scanlon was admitted to the Massachusetts bar in December, 2009, and thereafter operated Scanlon Law as a solo practitioner. Her practice focused on licensing, permitting and business consulting for the hospitality industry. Scanlon provided legal counsel to Lesser and his associated business entities, including Burn, for approximately ten years. At some

² The following facts are drawn from the allegations set forth in the Complaint, including the documents attached to, referenced in or relied upon in the pleading. See Eigerman v. Putnam Invs., Inc., 450 Mass. 281, 285 n.6 (2007); Marram v. Kobrick Offshore Fund, Ltd., 442 Mass. 43, 45 n.4 (2004); Schaer v. Brandeis Univ., 432 Mass. 474, 477 (2000). Additionally, the undersigned takes judicial notice of court records in related proceedings, see Jarosz v. Palmer, 436 Mass. 526, 530 (2002), which the parties concede is appropriate for the Court to do.

³ Burn, Inc. operated as a Subchapter S corporation from 1996 until 2018, when it was converted to Burn, LLC. For purposes hereof, the entities are referred to collectively as “Burn.”

point, Attorney Scanlon reviewed the Lease and advised Plaintiffs that the Negative Pledge Agreement was unenforceable and void as contrary to public policy.

On November 1, 2018, Burn executed a promissory note for a loan to Lesser, and pledged the Liquor License as collateral (the “License Pledge”). Attorney Scanlon did not draft, and was not otherwise involved in, the License Pledge agreement. After they executed the License Pledge, however, Attorney Scanlon prepared and submitted petitions to the BLB and ABCC, on behalf of Plaintiffs, for approval of the License Pledge. Plaintiffs allege that Attorney Scanlon falsely represented to the BLB and ABCC that the License Pledge did not violate any prior agreements (specifically, the Lease). Attorney Scanlon requested that Lesser sign an attestation to this effect, which she then submitted in support of the petitions. Plaintiffs contend that Lesser only executed this affidavit because Attorney Scanlon withheld operative documents and information from him, including the Lease. Lesser was thereby prevented from making an informed assessment of the documents he signed.⁴ Based on Attorney Scanlon’s submissions, the BLB and ABCC approved the License Pledge on or about September 4, 2019.

In or around January, 2020, Burn sought to assign the Lease and its interest in the Liquor License to a third party to operate a new restaurant at the location. Attorney Scanlon again advised Plaintiffs that the Negative Pledge Agreement was unenforceable as contrary to public policy, and, therefore, Burn was free to transfer the Liquor License to a new tenant rather than back to N&M.

On January 8, 2020, Mario Nicosia, trustee of N&M, sent a letter through counsel to

⁴ While of no bearing on the statute of limitations issue raised by Defendants’ Rule 12 motion or the Court’s resolution thereof, the undersigned notes merely as an aside that the allegation that Attorney Scanlon deprived Plaintiffs of an opportunity to review the Lease – a document which Plaintiffs executed thirteen years before Attorney Scanlon began practicing law in Massachusetts, and extended repeatedly thereafter – strains the bounds of plausibility.

Burn, asserting that Burn's assignment of the Liquor License violated the Negative Pledge Agreement and that Burn was thereby in default of the Lease. The letter further stated that the Lease was terminated and, pursuant to the applicable Lease terms, N&M demanded that Burn transfer the Liquor License back to N&M for one dollar.

On January 24, 2020, Nicosia, N&M and an affiliated entity (the "N&M plaintiffs") filed suit in Suffolk Superior Court against Burn, Lesser and others (the "Burn parties") for breach of the Lease and violation of G.L. c. 93A. See Nicosia v. Burn LLC, No. 2084CV00218, Dkt. No. 1 (Mass. Super. Ct. Jan. 24, 2020) (the "N&M Lawsuit"). In addition to damages, the N&M plaintiffs requested preliminary and permanent injunctive relief in the form of an order voiding the License Pledge, requiring the Burn parties to return the Liquor License to N&M, and prohibiting the Burn parties from otherwise transferring or further encumbering the license. Attorney Scanlon and Scanlon Law did *not* represent the Burn parties in connection with the N&M lawsuit, and Plaintiff's Complaint here does not allege that Defendants had any involvement with that litigation.

On February 10, 2020, this Court (Giles, J.) denied the N&M plaintiffs' request for a preliminary injunction, see id., Dkt. Nos. 5-7. The N&M plaintiffs timely appealed this decision to a single justice of the Appeals Court. See G.L. c. 231, § 118. On March 19, 2020, the Single Justice (Kinder, J.) reversed the denial of preliminary injunction in part,⁵ and ordered that the Burn parties "not pledge, assign, sell, transfer, hypothecate or otherwise encumber the liquor license at issue . . . , or any interests in such liquor license" until further order of the Court. Trustee of N&M Trust VII v. Burn LLC, No. 2020-J-0129, slip op. (Mass. App. Ct. Mar. 19,

⁵ In their appeal, the N&M Parties "abandon[ed] their request that [Burn, *et al.*] be ordered to terminate the Pledge Agreement in place, but continue[d] to seek an injunction restraining [them] from transferring or further encumbering the contested license."

2020). Relevant here, the Single Justice concluded that the N&M plaintiffs were likely to succeed in enforcing the Negative Pledge Agreement, as “[n]one of the cases cited by the defendants stand inarguably for the proposition” that it was “unenforceable as a matter of public policy.” Id. The Single Justice also concluded that the N&M plaintiffs were likely to suffer irreparable harm if they were denied an injunction, because “[t]here are a finite number of liquor licenses available in the city of Boston” and, even if the N&M plaintiffs prevailed, “there is no guarantee that one would be available for purchase at the time a money judgment is satisfied.” Id. Said harm was deemed to outweigh the alleged harm to the Burn parties from the requested injunction, which they claimed might subject the license to revocation or jeopardize their ability to sell their interest at market value. Id.

On July 31, 2020, the N&M plaintiffs moved for leave to sell the Liquor License and place the proceeds in escrow, which the Court (Sullivan, S., J.) allowed. Nicosia, No. 2084CV00218, Dkt. No. 16 (Mass. Super. Ct. Sept. 10, 2020). The Burn parties timely appealed pursuant to G.L. c. 231, § 118. On October 29, 2020, the Single Justice (Wendlandt, J.) affirmed the order, concluding (once again) that “[t]he cases cited by the defendants do not support the conclusion that the lease provisions at issue . . . are unenforceable[.]” and that “the trial judge properly adopted the prior single justice’s conclusion that the [N&M] plaintiffs established a likelihood of success on the merits and substantial risk of irreparable harm.” Nicosia v. Burn, LLC, No. 2020-J-0453, slip op. (Mass. App. Ct. Oct. 29, 2020). Further, Justice Wendlandt found that the Burn parties did not “substantiate the claim that the lease provisions regarding transfer of the license are against the public welfare or purpose of G.L. c. 138.” Id.

On April 28, 2023, this Court (Krupp, J.) granted partial summary judgment for the N&M plaintiffs. In its ruling, the Court declared that the Negative Pledge Agreement was lawful and

enforceable, the License Pledge was an event of default under the Lease, the License Pledge was null and void, and N&M's termination of the Lease was valid. Nicosia, No. 2084CV00218, Dkt. No. 61.

Following a jury-waived trial of the remaining claims and counterclaims, the Court (Kazanjian, J.) entered judgment for the N&M plaintiffs on their claims of breach of contract, violation of G.L. c. 93A, and conversion against Burn and Lesser, denied the Burn parties' counterclaims, and awarded the N&M plaintiffs \$2,096,566.03, inclusive of actual damages, treble damages under G.L. c. 93A, prejudgment interest, costs and attorneys' fees. Id., Dkt. No. 92 (Jan. 24, 2024) and No. 113 (June 11, 2024).

Plaintiffs filed the present action on June 13, 2025.

DISCUSSION

I. LEGAL STANDARD

Defendants have moved to dismiss Plaintiffs' claims pursuant to Mass. R. Civ. P. 12(b)(6). To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain "factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief" Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007). "The allegations must be more than 'mere labels and conclusions,' and must 'raise a right to relief above the speculative level.'" Buffalo-Water I, LLC v. Fidelity Real Estate Co., LLC, 481 Mass. 13, 17 (2018), quoting Galiastro v. Mortgage Elec. Registration Sys., Inc., 467 Mass. 160, 165 (2014). The Rule 12 Court considers the factual allegations of the complaint and any documents annexed thereto or relied upon therein, as well as any matters of public record susceptible to judicial notice. See Golchin v. Liberty Mut. Ins. Co., 460 Mass. 222, 224 (2011); Jarosz v. Palmer, 436 Mass. 526, 530 (2002). The Court must "accept as true the

factual allegations in the complaint and the attached exhibits, [and] draw all reasonable inferences in the plaintiff's favor" Buffalo-Water 1, 481 Mass. at 17. Plaintiffs, however, must allege specific facts sufficient to support their claims. Summarily asserted speculations and conclusions will not suffice. Ortiz v. Examworks, Inc., 470 Mass. 784, 792-93 (2015).

II. STATUTE OF LIMITATIONS

Defendants move to dismiss on the singular ground that Plaintiffs' claims are barred by the statute of limitations. "Although the question of when [a] cause of action accrued [to commence running of the statute of limitations] typically presents a question of fact, when the facts regarding discovery of harm are undisputed, the question may be decided as matter of law." Vinci v. Byers, 65 Mass. App. Ct. 135, 139 (2005). Thus, where the allegations of a complaint show that the action is barred by the statute of limitations, "[a] motion to dismiss under rule 12(b)(6) is an appropriate vehicle for raising such a defense." Hyman v. Stanford, 105 Mass. App. Ct. 1118, WL 843301, at *2 (Mar. 18, 2025) (Rule 23.0), quoting Epstein v. Seigel, 396 Mass. 278, 279 (1985). Here, even construing the factual allegations of the Complaint and the matters of public record in the light most favorable to Plaintiffs, the Court agrees that their claims are time-barred.

Plaintiffs concede that the applicable statute of limitations is set forth in G.L. c. 260, § 4, which provides that "[a]ctions of contract or tort for malpractice, error or mistake against attorneys . . . shall be commenced only within three years next after the cause of action accrues." See Balistreri v. Martin, 96 Mass. App. Ct. 1116, 2020 WL 132516, at *2 (Jan. 13, 2020) (Rule 1:28) ("[R]ecognizing that professional malpractice claims generally arise in contract and in tort from a shared set of facts, the Legislature specifically included both types of claims under the umbrella of G.L. c. 260, § 4."). See also Alves v. Cohan, 102 Mass. App. Ct. 1116, 2023 WL

2903418, at *2 (Apr. 12, 2023) (Rule 23.0) (G.L. c. 260, § 4 applies where “gist of the action” sounds in legal malpractice, regardless of titles plaintiff may have affixed to claims), quoting Anthony’s Pier Four, Inc. v. Crandall Dry Dock Eng’rs, Inc., 396 Mass. 818, 823 (1986). Plaintiffs’ Complaint, filed on June 13, 2025, is thus time-barred if the claims asserted therein accrued before June 13, 2022. Because Plaintiffs’ claims, on their face, concern Attorney Scanlon’s alleged malpractice in 2019 and 2020, Plaintiffs bear the burden of alleging facts that would take such six-year old claims outside the statutory bar. O’Connor v. Redstone, 452 Mass. 537, 551 (2008).

“The statute of limitations applicable to a legal malpractice claim begins to run when a client ‘knows or reasonably should know that he or she has sustained appreciable harm as a result of the lawyer’s conduct.’” Lyons v. Nutt, 436 Mass. 244, 247 (2002), quoting Williams v. Ely, 423 Mass. 467, 473 (1996). “Appreciable harm” in this context is an “injury, loss or detriment that is capable of being measured or perceived.” Frankston v. Denniston, 74 Mass. App. Ct. 366, 374 (2009), quoting Vinci v. Byers, 65 Mass. App. Ct. 135, 139 (2005).

Plaintiffs contend that their claims against Defendants did not accrue until, at the earliest, April 28, 2023, when the Court entered partial summary judgment in favor of the N&M Plaintiffs. Until that point, Plaintiffs argue, they lacked actual or constructive knowledge of any appreciable harm arising from Attorney Scanlon’s alleged malpractice. In short, Plaintiffs contend that “Massachusetts law defers accrual until merits determination[.]” See Pls.’ Opp. at 10. The Court does not agree.

Plaintiffs’ “construction of what constitutes appreciable harm or loss is too narrow.” Frankston, 74 Mass. App. Ct. at 373. It is well settled “that accrual of a legal malpractice claim does not necessarily depend on the ultimate outcome of the underlying litigation.” Id. at 376,

citing Massachusetts Elec. Co. v. Fletcher, Tilton & Whipple, P.C., 394 Mass. 265, 268 (1985). “[I]t is not necessary that the plaintiff client know the full extent of harm or loss or know precisely in what manner and what harmful after-effects flow from the alleged malpractice.” Frankston, 74 Mass. App. Ct. at 374. The plaintiff “need not know that his lawyer was negligent,” Lyons, 436 Mass. at 249, nor “the full extent of its injury for a cause of action to accrue and for the statute of limitations to begin running.” Taygeta Corp. v. Varian Assocs., 436 Mass. 217, 229 (2002). See also Swasey v. Barron, 46 Mass. App. Ct. 127, 129 (1999) (“Massachusetts does not require discovery of each of the elements of the cause of action . . . before the limitation clock in G.L. c. 260, § 4, starts ticking.” [quotations omitted]). Rather, “when the plaintiff has reasonable notice that a certain act has been a cause of harm, the plaintiff has a duty to inquire, and the statute of limitations starts to run.” Tallarico v. Tierney, 92 Mass. App. Ct. 1102, 2017 WL 3297707 at *2 (Aug. 3, 2017) (Rule 1:28), citing Passatempo v. McMennen, 461 Mass. 279, 293-94 (2012). All that is required are facts that “put plaintiff on notice sufficient to trigger some further examination of the [attorney’s] conduct.” Swasey, 46 Mass. App. at 131. “In the legal malpractice context, [appreciable harm] generally occurs when the client expends legal fees to ameliorate the harm caused by the attorney’s error.” Haney v. Greenbaum, Nagel, Fisher & Paliotti, LLP, No. 1684CV01633, 2018 WL 3013910, at *5 (Mass. Super. Ct. Apr. 12, 2018) (Ames, J.), citing Frankston, 74 Mass. App. Ct. at 375.

The Appeals Court’s decision in Frankston is squarely on point, and lays bare the untimeliness of Plaintiffs’ claims. In Frankston, the plaintiff brought a legal malpractice action, asserting *inter alia* that his former attorney had failed to inform him that the statute of limitations was set to expire on his underlying claims. 74 Mass. App. Ct. at 371. The Appeals Court held that the plaintiff’s cause of action for malpractice accrued when the defendants in the underlying

action moved for summary judgment on statute of limitations grounds, *not* when the merits of that defense were ultimately adjudicated. *Id.* at 373. The Court reasoned that the summary judgment motion itself “brought to the fore the very issues that underlie[d] the alleged legal malpractice . . . and yielded to Frankston the requisite knowledge of, and sufficient notice of, the purported malpractice harm.” *Id.* The Appeals Court further noted that, although the summary judgment motion was *denied*, the legal fees Frankston incurred in defending the motion and would continue to incur to litigate the issue further constituted “appreciable harm” and triggered a duty of inquiry as to a potential legal error or omission by his former counsel. *Id.* at 375. The fact that the issue remained live (insofar as concerned its ultimate judicial resolution) did not preclude a running of the statute of limitations on the plaintiff’s malpractice claims:

“That a case is ongoing and not finally adjudicated through the trial or appellate stage does not mean that there is no duty of inquiry into the harm and its connection to the attorney’s conduct and no accrual of a legal malpractice claim; the risks of a statute of limitations bar on a legal malpractice claim are not left back stage, suspended to the final curtain call.”

Frankston, 74 Mass. App. Ct. at 375.

Thus, and directly contrary to Plaintiffs’ central argument in this case, the accrual of a cause of action for legal malpractice is not tolled or forestalled until the issuance of an adverse final judgment. The authorities for this proposition in Massachusetts are legion. *See, e.g., Lyons*, 436 Mass. at 248-49 (cause of action accrued when plaintiff realized his attorneys “didn’t know what they were doing,” not when resulting litigation was resolved); Massachusetts Elec., 394 Mass. at 268 (cause of action accrued when complaint was filed against electric companies, because “[w]hatever the ultimate result of that case . . . it was then clear that the electric companies would incur substantial legal expenses in the defense of a claim that was based in part on the alleged negligent conduct of their attorneys”); Murphy v. Smith, 411 Mass. 133, 136

(1991) (neighbor's letter that asserted conflicting legal right to property was sufficient notice of attorney's potential negligence in certifying good record title); Cantu v. St. Paul Cos., 401 Mass. 53, 57 (1987) (although extent of harm caused by attorney's failure to give notice to excess insurer would not be known until appeal concluded in underlying case, plaintiff had sufficient notice of harm when he retained another attorney for advice on his personal liability for the judgment); Vinci, 65 Mass. App. Ct. at 140 (malpractice claim accrued once plaintiff knew "that as a result of [attorney's] advice, [his] position in his divorce case had been negatively affected," even though he "did not yet know the full extent of the harm"); Hyman, 2025 WL 843301, at *2 (plaintiff had notice of appreciable harm sufficient to start limitations clock running where attorneys left plaintiff in the lurch, without doing any work, even though summary judgment against plaintiff did not enter until months later); Tallarico, 2017 WL 3297707, at *2 (Aug. 3, 2017) (Rule 1:28) (action for malpractice arising from attorney's drafting of promissory note accrued when plaintiff received demand letter seeking full payment of loan, and plaintiff retained new counsel to respond); Hancy, 2018 WL 3013910, at *6 (malpractice action accrued where plaintiff "was aware that [] firm had erred and he was paying legal fees as a result of this error").⁶

The parties spill substantial amounts of ink disputing whether Nicosia's demand letter or the filing of the N&M Lawsuit commenced the running of the three-year statute of limitations.⁷

⁶ Plaintiffs' acrobatic efforts to distinguish these cases are noted, but suggest distinctions without a difference that are unpersuasive.

⁷ To be sure, when Defendants allegedly counseled Plaintiffs that the Negative Plcde Agreement was unenforceable in 2019-2020, the issue arguably presented an open question of law that would have required Plaintiffs to incur legal expenses to resolve – for instance, through a declaratory judgment action. The costs of such an action would not necessarily constitute expenses to ameliorate the harm caused by the attorney's error. Compare Pelletier v. Chouinard, 27 Mass. App. Ct. 92, 95 (1989) (legal expenses incurred to ameliorate harm cause by negligent attorney is appreciable harm); with Kensington v. Johnson, No. CIV.A. 10-2668-BLS1, 2011 WL 1815623, at *8 (Mass. Super. Ct. Apr. 19, 2011) (Lauriat, J.) (declining to apply rule articulated in Massachusetts Elec., Frankston and Pelletier that statute of limitations runs when legal expenses are first incurred, where record did

But the Court need not resolve such finely parsed issues in order to decide the pending motion. It cannot be gainsaid that Plaintiffs had both actual and constructive notice of appreciable harm arising from Attorney Scanlon's legal advice once that very theory was rejected in three successive judicial rulings. See N&M Trust VII, No. 2020-J-0129, slip op. (Mass. App. Ct. Mar. 19, 2020) (Kinder, J., single justice) (N&M plaintiffs likely to succeed, as "[n]one of the cases cited" supported Burn's argument); Nicosia, No. 2084CV00218, Dkt. No. 16, slip op. at 1 (Mass. Super. Ct. Sept. 10, 2020) (Sullivan, S., J.) (the N&M plaintiffs' "reasonable likelihood of success on the merits . . . has been established"); Nicosia, No. 2020-J-0453, slip op. (Mass. App. Ct. Oct. 29, 2020) (Wendlandt, J., single justice) ("[T]he cases cited by the defendants do not support the conclusion that the lease provisions at issue . . . are unenforceable[,] and "the trial judge properly adopted the prior single justice's conclusion that the [N&M] plaintiffs established a likelihood of success on the merits"). In Frankston, the mere filing of an unsuccessful summary judgment motion by an opposing party "sent a strong storm warning of gathering and darkening clouds" sufficient to trigger the running of the statute of limitations. 74 Mass. App. Ct. at 373. Here, Plaintiffs received three separate court decisions that (1) explicitly rejected the legal theory attributed to Attorney Scanlon; and (2) stated that the N&M plaintiffs were likely to prevail in their action. Plaintiffs obviously incurred legal expense in addressing such issues both in this Court and before the Appeals Court, and were thus indisputably on notice that they would incur further expense litigating whether they breached the Negative Pledge Agreement. At the same time, the foregoing judicial decisions plainly prevented Plaintiffs from transferring, assigning or encumbering their interests in the Liquor License, a substantial form of financial and operational

not indicate that initial expenses were incurred "expressly to repair the harm caused by [attorney's] negligence"). However, the costs Plaintiffs incurred in retaining counsel to defend the License Pledge against N&M's claims to invalidate it could be fairly characterized as such. Regardless, the Court need not rely on the demand letter or the filing of the N&M Lawsuit to conclude that Defendants are entitled to dismissal on time-bar grounds.

harm. There is simply no plausible position that Plaintiffs, upon receipt of *any* of these three decisions, lacked adequate notice of appreciable harm and the need to examine the potential error of Attorney Scanlon’s legal advice. See Swasey, 46 Mass. App. Ct. at 131.⁸ As such, Plaintiffs’ cause of action accrued no later than (and, indeed, well before) October 2020. The three-year statute of limitations on this claim thus expired in 2023, two years before Plaintiff filed the present action.⁹

Plaintiffs likewise cannot rely on the continuing representation doctrine to rescue their time-barred claims. This doctrine “tolls the statute of limitations in legal malpractice actions where the attorney in question continues to represent the plaintiff’s interests in the matter in question.” Frankston, 74 Mass. App. Ct. at 377, quoting Murphy, 411 Mass. at 137. The “obvious and insurmountable obstacle” for Plaintiffs here is that the Complaint does not plausibly suggest any continuing legal representation by Defendants in connection with the N&M Lawsuit or any other matter after 2019 or, at the very latest, 2020. Frankston, 74 Mass. App. Ct. at 377. See Javaras v. LaFortune, 105 Mass. App. Ct. 1142, 2025 WL 2215447, at *2 (Aug. 5, 2025), review denied, 496 Mass. 1112 (2025) (tolling unavailable where attorney’s representation ended more than three years before client filed malpractice action).¹⁰ From the

⁸ Although Plaintiffs’ counsel insisted at hearing that the injunctive relief affirmed by two different Single Justices of the Appeals Court cannot be considered sufficiently “appreciable harm” to trigger the running of the statute of limitations on Burn’s legal malpractice claim against Attorney Scanlon, the undersigned takes notice that – in opposing the issuance of this very equitable remedy – Plaintiffs asserted the diametrically opposite position in sworn submissions to the Court. During argument, Plaintiffs’ counsel made no attempt to explain this glaring inconsistency.

⁹ The Supreme Judicial Court’s COVID-related orders, which tolled the running of the limitations period on civil claims from March 17, 2020 through June 30, 2020, do not bring Plaintiffs’ claims within the limitations period. See SJC’s Third Updated Order Regarding Court Operations under the Exigent Circumstances Created by the COVID-19 (Coronavirus) Pandemic (July 1, 2020) (Repealed Sept. 17, 2020); Shaw’s Supermarkets, Inc. v. Melendez, 488 Mass. 338, 341-42 (2021); Woods v. Hanover Ins. Grp., Inc., 102 Mass. App. Ct. 1116, 2023 WL 2939970, at *2 (Apr. 24, 2023) (Rule 23.0).

¹⁰ Although Plaintiffs’ counsel suggested at hearing that his clients might seek leave to amend their Complaint to assert continuing representation by Attorney Scanlon, counsel commendably acknowledged that he presently

outset of the N&M Lawsuit, Plaintiffs were represented by separate counsel. Moreover, even if the Complaint colorably suggested that Attorney Scanlon continued to represent Plaintiffs, a statute of limitations is not tolled once the client has *actual* knowledge of the attorney's alleged malpractice. See Vinci, 65 Mass. App. Ct. at 140, quoting Lyons, 436 Mass. at 250 ("If the client has such knowledge, then there is no innocent reliance which the continued representation doctrine seeks to protect."). As noted *ante*, Plaintiffs cannot plausibly claim that they lacked actual knowledge of the malpractice they now allege after receiving decisions from three different judges who expressly concluded that Attorney Scanlon's legal theory was baseless. See Javaras, 2025 WL 2215447, at *2 (client could not justifiably rely on attorney's proclamations that "adverse rulings were wrong and would be corrected on appeal" to toll statute of limitations under continuing representation theory).

Against this tsunami of countervailing precedent, Plaintiffs cite but a single case; Eck v. Kellem, 51 Mass. App. Ct. 850 (2001). (See Pl.'s Opp., *passim*.) But Eck provides no refuge here. In Eck, plaintiff alleged that defendant-attorney Kellem had negligently failed to draft a purchase and sale agreement to protect Eck as seller against liability for hazardous waste. Id. at 851-52. When the purchaser subsequently sued him, Eck retained new counsel to defend the suit. Id. at 852. Nonetheless, Kellem continued to participate in the defense, reassuring Eck and successor counsel that the P&S agreement adequately protected Eck and testifying on Eck's behalf at trial. Id. at 854-55. Indeed, Eck's new counsel attested that he entrusted the entire defense strategy to Kellem. Id. The Appeals Court concluded that Kellem's substantial involvement in the defense, and Eck's justifiable reliance thereupon, rendered the matter

possesses no good faith basis for alleging such and would require discovery to establish it. Given that Lesser and Burn are ½ of the attorney-client relationship in issue here, and have had every incentive to allege continuing representation on the part of Attorney Scanlon if this were in fact the case, the Court cannot give credence to such a speculative notion in order to defer the dismissal of untimely malpractice claims.

analogous to continuing representation,¹¹ and accordingly held that similar tolling should apply such that Eck's cause of action against Kellem accrued not upon the filing of the underlying suit but upon the entry of judgment. Id. at 855.

Eck did *not* hold, as a general principle, that a cause of action for legal malpractice accrues only upon a merits decision in the underlying suit. To the contrary, subsequent decisions have expressly recognized the holding in Eck as limited to "the particular circumstances presented" in that case. HDH Corp. v. LaFlamme, 62 Mass. App. Ct. 1106, 2004 WL 2331715, at *2 & n.4 (Oct. 15, 2004) (rejecting Eck as "inapposite" where "[t]here was no suggestion of continuing representation" and pleading in underlying action put plaintiff on notice of prior counsel's error). Accord Frankston, 74 Mass. App. Ct. at 377 n.9 (declining to apply Eck tolling where complaint did not allege that defendant continued to work with plaintiff's new counsel or direct defense of the underlying suit); Lahnston v. Williamson, No. MICV201000368F, 2013 WL 3778150, at *2 (Mass. Super. Ct. July 9, 2013) (Curran, J.), aff'd, 87 Mass. App. Ct. 1120 (2015) (noting that Eck permitted tolling only where defendant attorney convinced subsequent counsel of defense strategy and client "had every good reason to accept, trust, and rely on former and subsequent counsel's entirely aligned position", but concluding that no similar circumstances were present in case before it).

The matter at bar is on all fours with the precedents declining to apply or extend Eck in the manner Plaintiffs urge. There is no allegation that Attorney Scanlon actively directed Plaintiffs' defense of the N&M Lawsuit, reassured Plaintiffs' trial counsel of the defense strategy, or testified at trial on Plaintiffs' behalf. Indeed, there is no allegation that Attorney

¹¹ Indeed, Kellen appears to have been continuing to represent Eck in every respect *except* as counsel of record, an exception obviously designed to facilitate Kellen's appearance as a witness at trial. See Mass. R. Prof. Cond. 3.7 (Lawyer as Witness) ("A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness ...").

Scanlon had an active role or involvement of *any* kind, direct or indirect, in either the N&M Lawsuit or any contemporaneous communication with Plaintiffs or their trial counsel regarding same. In short, the Complaint asserts no facts remotely similar to either a continuing representation or the closely analogous circumstances presented in Eck.

Plaintiffs' vague assertions that they "relied on [Attorney Scanlon's] advice through the years of litigation" does not plausibly bring this matter within the Eck framework. The Complaint makes clear that Attorney Scanlon provided the legal advice at issue *before* the N&M Lawsuit was filed, and there is no suggestion that this lawyer played any participatory role in that suit. To adopt Plaintiffs' argument, therefore, would allow the very limited exception to swallow the very broad rule. The statute of limitations would continue to be tolled long after an attorney's representation of (or even communication with) a client had ended, so long as the client professed to be relying upon the attorney's advice in some manner in the underlying litigation. Once again, that is not (nor should be) the law. See Frankston, 74 Mass. App. Ct. at 376-77 & n.9; Javaras, 2025 WL 2215447, at *2.¹²

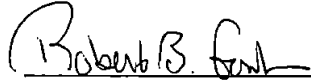
¹² At hearing, Plaintiffs' counsel raised a problematic concern in the realm of policy. Namely, to require a plaintiff to sue their lawyer for malpractice before it has been finally adjudged that the lawyer's counsel in fact violated the standard of professional care casts such a client between a rock and a hard place. To beat the running of the limitations clock may often require the client to take legal action against his former lawyer while the legal issue implicating the lawyer's putative malpractice remains live in the underlying litigation. But doing so may compromise the client's ability to continue to defend the lawyer's legal advice/theory in that underlying matter. Much the same kind of concern animates the tolling required in cases of continuing representation. Just as the law should not force clients with mere notice of malpractice to sue the very lawyers who continue to represent them, one might argue that the law should not compel plaintiffs to shoot themselves in the foot by asserting legal negligence claims that undermine their ability to defend the very positions their lawyers counselled them to take in the first place. A thorny problem, to be sure, but one the undersigned has no reason to think that the numerous courts rejecting "merits finality" as the trigger for malpractice claim accrual failed to consider. On a more practical level, any conflict between the limitations-driven need to sue, on the one hand, and the self-harm resulting from asserting on the record that one's legal position is the product of attorney malpractice, on the other, is readily reconciled through the execution of a confidential tolling agreement. Through such commonplace agreements, by which a statute of limitations does not run against an unfiled claim so that parties can address themselves without prejudice to related matters, a would-be malpractice litigant is relieved of the Hobson's choice Plaintiffs posit. See Beal Bank, SSB v. Arter & Hadden, LLP, 167 P.3d 666, 673 (Cal. 2007) ("The liberal use of tolling agreements and stays in malpractice cases may reduce the impact on the underlying litigation, ensure that plaintiffs do not have their claims prematurely barred, protect defendants' . . . interests in "receiving timely notice and avoiding stale claims . . . , and allow current counsel, to the extent practicable, to continue to work to ameliorate the consequences of any past

As a final point, and in contrast to Eck, Plaintiffs cannot plausibly allege that any continued reliance on Attorney Scanlon's advice was reasonable after the legal theory underlying such advice had been rejected by courts in three separate rulings. See Javaras, 2025 WL 2215447, at *2 (rejecting claimed tolling where plaintiff's reliance on attorney's advice was not reasonable in the face of repeated adverse rulings).¹³

CONCLUSION AND ORDER

The claims set forth in Plaintiffs' Complaint are time-barred by the controlling statute of limitations, G.L. c. 260, § 4. For this reason, the Defendants' Motion to Dismiss shall be, and hereby is, **ALLOWED**.

SO ORDERED.




Robert B. Gordon
Justice of the Superior Court

Dated: February 24, 2026

mistakes." [internal quotations omitted]). Accord Erikson v. Renda, 590 S.W.3d 557, 569-70 (Tex. 2019) ("Limitations can yield harsh consequences . . . [but] [e]ven without equitable tolling, malpractice litigants . . . have options to ensure their claims are not eliminated by the passage of time. Tolling agreements provide advantages that make them attractive to both client and counsel, and . . . have the benefit of ensuring an attorney has timely notice of a legal-malpractice claim, so evidence may be preserved and the attorney afforded a fair opportunity to mount a defense.").

¹³ For the same reasons, this case is distinguishable from Spilios v. Cohen, 38 Mass. App. Ct. 338 (1995), cited in Pls.' Opp. at p. 8. In that matter, "the defendant continued to represent the wife [through the trial], 'a decisive fact,' which '[brought] the case within the continuing representation doctrine[.]'" Swasey v. Barron, 46 Mass. App. Ct. 127, 132 (1999), quoting Spilios, 38 Mass. App. Ct. at 341. Further, the plaintiff in Spilios had not been presented with multiple adverse rulings on the matter at issue which, in the case at bar, provided Plaintiffs with actual and constructive notice that Attorney Scanlon's advice had caused them appreciable harm. Cf. Frankston, Javaras, supra.

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JUDGMENT ON MOTION TO DISMISS		Trial Court of Massachusetts The Superior Court	
DOCKET NUMBER 2584CV01657		John E Powers, III Suffolk County Civil	
CASE NAME Lesser, Brian J et al vs. Scanlon, Kristen et al		COURT NAME & ADDRESS Suffolk County Superior Court - Civil Suffolk County Courthouse, 12th Floor Three Pemberton Square Boston, MA 02108	
JUDGMENT FOR THE FOLLOWING DEFENDANT(S) Scanlon, Kristen Scanlon Law, LLP			
JUDGMENT AGAINST THE FOLLOWING PLAINTIFF(S) Lesser, Brian J			
<p>This action came on before the Court, Hon. Robert B Gordon, presiding, and upon review of the motion to dismiss pursuant to Mass. R.Civ.P. 12(b),</p> <p>It is ORDERED AND ADJUDGED:</p> <p>For the reasons stated in the Courts' Memorandum of Decision and Order on Defendants' Motion to Dismiss Complaint, dated February 24, 2026, judgment shall, and hereby does, enter in favor of the Defendants.</p>			
<p>JUDGMENT ENTERED ON DOCKET <u>March 20 26</u> PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. 58(a) <u>John E</u> AND NOTICE SEND TO PARTIES PURSUANT TO THE PRO- <u>2/26</u> VISIONS OF MASS. R. CIV. P. 77(d) AS FOLLOWS <u>3-2-26</u></p>			
DATE JUDGMENT ENTERED 02/25/2026	CLERK OF COURTS/ ASST. CLERK X <u>Michael T. O'Leary</u>		

COMMONWEALTH OF MASSACHUSETTS

Suffolk SS,

SUFFOLK SUPERIOR COURT

* * * * *

BRIAN J. LESSER, ET AL

V

SCANLON LAW, LLP, ET AL

* * * * *

Docket Number: 2584CV01657

BEFORE THE HONORABLE ROBERT B. GORDON

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Suffolk Superior Court - Boston
 Courtroom 313
 February 17, 2026

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PROCEEDINGS

(Case called at 2:27 p.m.)

COURT OFFICER: The next matter, Brian Lesser et al versus Kristen Scanlon, Civil Action 251657. This is a Rule 12 hearing. Please, Counsel, identify yourself to the court for the record, beginning with plaintiff counsel.

MR. ALLEN: Good afternoon, Your Honor. Jeffrey Allen for the plaintiff. With me is Jacqueline Schmedel.

THE COURT: Good afternoon, Counsel.

MR. WALTON: Good afternoon, Your Honor. Ken Walton for the defendant Kristen Scanlon with my associate Gina Fleury.

THE COURT: Good afternoon, Counsel. So we are here on the defendant's motion to dismiss. I have read these papers. You may presume a thorough familiarity with everything in them. This really is a one issue -- is a one issue motion for present purposes. And it has to do with when -- when the statute of limitations applicable to a legal malpractice claim can be deemed to have accrued, given the particular facts of this situation. So, it's your motion, Counsel, and I'll -- I'll hear from you first.

MR. WALTON: Thank you, Your Honor. And -- and Your Honor, I know that you have read the papers, so I'm going to hone in on -- on what we're here to discuss. And as Your Honor noted that in front of the last case that was heard,

1 it's a 12B6 Motion. So the facts that we are relying on are
2 either in the complaint or in -- they are in judicial
3 documents, which can be under the case, it's the Curtis
4 case, the Schaer case, the Jarosz case can all be viewed as
5 positive. To start with, I -- I just want to say that
6 obviously my client denies liability in this case for this
7 reason: the pledge agreement that's really at issue in the
8 case, she didn't even draft it. It was drafted by another
9 attorney. That point is just not even discussed. But
10 for -- again -- for purposes of this motion, I understand
11 the allegations are --

12 THE COURT: Although the allegation isn't that the --
13 the pledge agreement was itself defective, the allegation is
14 that the advice that the pledge agreement was legally
15 unenforceable because it was contrary to public policy --

16 MR. WALTON: I understand, Your Honour.

17 THE COURT: -- produced -- produced reliant behaviors,
18 that were, you know, harmful to Brian.

19 MR. WALTON: Right, Your Honor. But the part that's
20 left out, and again, it's not really for argument today.
21 I'm just pointing it out.

22 THE COURT: Sure.

23 MR. WALTON: That pledge agreement was not drafted by
24 my client, it was drafted by another lawyer.

25 THE COURT: Understood.

1 MR. WALTON: So what -- what are the facts?

2 THE COURT: It becomes hard -- it becomes harder to
3 argue that the -- a contract that you drafted is contrary to
4 public policy.

5 MR. WALTON: It -- it is. And what -- and look, if --
6 if my client had drafted that agreement, I would say they
7 drafted it, but they didn't. It's unclear to me, frankly,
8 why that attorney was not the one who was sued by
9 plaintiff's counsel in this case. But that's -- that's for
10 another day.

11 The -- the -- the relevant -- I -- I know Your Honor
12 knows the appreciable harm standard. I'm not going to stand
13 up here and cite case law to you. But I want to point on
14 some really pivotal facts in this case that are undisputed,
15 underline, undisputed. There was a notice of default
16 January 8, 2020, where the landlord said, you violated the
17 lease by doing this agreement. You are in default. That
18 was on January 8, 2020. The next -- the next action was the
19 landlord suing on January 24, 2020, Act Number 2.

20 Act Number 3 was the filing of appearances by counsel
21 for the plaintiffs in this case, by other attorneys, not my
22 client. She had separate independent legal counsel. Next,
23 Your Honor, there was a motion for preliminary injunction.
24 Now, the plaintiffs, in their papers, they say, oh, well,
25 that motion was denied. It was initially denied, but then

1 it went up to a single justice of the appeals court. And
2 the single Justice said, I see a reasonable likelihood of
3 success for the plaintiffs in this lawsuit. So right there,
4 March 20, 2020, five years, I'm sorry, the lawsuit here was
5 filed on June 13, 2025. So that's actually five years and
6 three months before this lawsuit was filed. They are on
7 notice from the single justice that he doesn't believe in
8 their case.

9 But it -- but it continues. Later in October of the
10 same year, 2020, it -- it winds up in front of another
11 single justice of the appeals court. Which is frankly
12 unique to see two -- a case go up twice to a single justice
13 on an interlocutory appeal. But it did. In that justice,
14 in these docket entries, Your Honor, are -- are in our
15 papers, we -- we attached the docket as Exhibit 2. And I --
16 I know you looked at it.

17 THE COURT: Yep. Kinder -- Kinder was the first.
18 Wendlandt was the second.

19 MR. WALTON: Exactly. So there's the notice. But --
20 but, Your Honor, in their papers, the plaintiffs say, "We
21 did not sustain harm, appreciable harm, until we got in
22 order on the motion for summary judgment." Well, Your
23 Honor, that is directly contradict by a pleading filed by
24 the plaintiffs in this case, in the underlying case. And
25 Your Honor, I cite to it. It's attached as Exhibit 3 to our

1 motion. It's the defendant's memo in opposition to the
2 motion -- to the motion for preliminary injunction. And
3 here's what they say. They say, "The resulting harm to BL
4 Note Holding Tremont, LLC, by any court-imposed
5 restriction."

6 And by that they mean the injunction. "On the right of
7 the defendants to protect the value of the liquor license
8 would far outweigh any harm to plaintiffs." So they say the
9 resulting harm, if this injunction is -- is entered, we will
10 be harmed. And -- and, Your Honor, that fact -- that
11 admission, not by us, but by them, that admission that the
12 entering of the injunction caused harm, is certainly
13 enough --

14 THE COURT: Would -- would cause harm.

15 MR. WALTON: Would cause harm. But it did. They said,
16 would cause harm in the paper. And then later the court
17 entered the injunction. So they -- they say, we're going to
18 be harmed. And then they were. Now that -- that is the --
19 the fact in this case that cannot be avoided. It can't be
20 avoided that the single justice said, I'm entering this
21 injunction.

22 And -- and they said, if you do that, we are going to
23 be harmed. Your Honor, turning very quickly to the
24 controlling cases, which again, I know, you know, so cut me
25 off anytime you want. But I -- it'll be a two-minute

1 summary. Mass Electric and SJC case said, "The second the
2 party starts to incur legal fees. That's appreciable harm."
3 For --

4 THE COURT: Hold on, by the way, just pause. Don't
5 lose your trail of thought. Why isn't that your argument?

6 MR. WALTON: Well, no, it is.

7 THE COURT: If your --

8 MR. WALTON: It is.

9 THE COURT: If -- if the incurring of legal fees is
10 enough to trick -- to trick -- to trigger the harm standard,
11 you don't need an injunction. You don't need an appellate
12 court affirming an injunction. And you certainly don't need
13 Judge Krupp entering summary judgment, the incurring of
14 fees. I mean, isn't that what -- isn't that what Frankston
15 says?

16 MR. WALTON: It does, Your Honor. Thank you. You --
17 you jumped ahead to my -- the next case I was going to talk
18 about. It says exactly that. And I think I can stop there.
19 I guess, so, to answer your question, why am I talking about
20 this harm issue? Because they talked about it. And I'm
21 trying to counter what they said. But yes, Your Honor.
22 That's exactly what Mass Electric said.

23 Then, Cantu, another SJC case, says the exact same
24 thing. Then Frankston says the exact same thing, legal
25 expenses. And Lyons, an SJC case says the same thing. I'll

1 -- I'll quote, "A client did not know that his lawyer was
2 negligent for the cause of action to accrue. He only -- he
3 need only know he sustained appreciable harm."

4 Another case, Your Honor, and -- and I stipulate it's
5 an unpublished opinion. August 2nd of last year, 2025,
6 really the most recent case to talk about this on the SJC
7 appeals court level. I -- I bring it up because it's just
8 spot. It's a -- it's a preliminary injunction. This is the
9 Giava v. ULL Fortune. It said, "The second that preliminary
10 injunction entered the court, the -- the plaintiff should
11 know that they had notice of a claim." And then finally,
12 Your Honor, I -- I raised it -- oh, and then one more, I'm
13 sorry. The Talarico case that said -- this -- this case,
14 even back then --

15 THE COURT: Talarico?

16 MR. WALTON: Talarico, Talarico, yes. Said that, "The
17 receipt of a demand letter, which is equivalent to the
18 notice of default that was entered, that was enough to start
19 the statute of limitations." Now, the plaintiffs put all
20 their eggs in one basket. They -- they try to distinguish,
21 incorrectly, I would assert, all of the cases I just talked
22 about. I -- I -- you don't need me, Your Honor, or them, to
23 tell you what those cases say. They're -- they're very
24 straightforward.

25 They put all their eggs in Eck versus Kiley, an appeals

1 court case, which sits below Mass Electric and sits below
2 the Cantu case. Obviously because it's appeals court. But
3 in that case, it was a completely different situation. The
4 court says a couple things. They say they're relying on
5 this purchase and sale agreement. There was no injunction
6 hearing.

7 There was no statement that there would be appreciable
8 harm. In fact, the court says, "We see a continuing
9 representation issue here." Which in this case, Your Honor,
10 is not even alleged. You know why? Because there was no
11 continuing representation. So I give the plaintiff's
12 counsel credit for that. They don't make a bogus allegation
13 that my client continued to represent because she didn't.

14 THE COURT: Technically -- technically, Eck was not an
15 actual continuing representation.

16 MR. WALTON: No -- no. It's -- I agree -- I agree.
17 They use -- I -- I can't remember the exact word they said.

18 THE COURT: I assume -- I assume the problem in Eck was
19 that the lawyer could not represent them consistent with the
20 Canons.

21 MR. WALTON: Correct.

22 THE COURT: Because the lawyer testified as a trial
23 witness.

24 MR. WALTON: Correct. Then --

25 THE COURT: And so that was a case where the lawyer --

1 the lawyer was packing the snowballs. Kiley was packing the
2 snowballs for trial counsel, setting the strategy, involved
3 in the strategy, et cetera, but could not be literally
4 counsel of record because he was a witness at the trial.

5 MR. WALTON: Agreed, Your Honor, agreed. And so these
6 cases, as Your Honor noted, and that's -- that's actually
7 why on the -- this pile of cases on the top was Mass
8 Electric, the SJC case that said, "The incurring of legal
9 fees is enough." The -- on February 3, 2020 at the latest,
10 the latest, it's undisputed that the plaintiffs in this case
11 started incurring legal fees because they had three lawyers,
12 three separate lawyers, not my client. Three separate
13 lawyers enter appearances in the lawsuit.

14 So I think, Your Honor, even though I understand your
15 prior comments about motion to dismiss versus possibly a
16 motion for summary judgment, the facts here are undisputed.
17 The case law is crystal clear, and the statute of
18 limitations against my client was missed. Thank you very
19 much.

20 THE COURT: Thank you, Counsel.

21 MR. ALLEN: Your Honor, first of all, I don't believe
22 the facts is crystal clear. But I think we -- let's talk
23 about the harm, because you pointed out. The harm, the
24 legal fees have to be created by the negligence. There's a
25 causal connection in the -- in the standard. The legal fees

1 or the harm has to be connected to the malpractice or
2 alleged malpractice. In this case, this -- the legal fees
3 would've been incurred even if the -- the defendant's legal
4 advice had been correct. Even if she hadn't committed
5 malpractice, he would've still incurred the legal fees.

6 THE COURT: So the legal fees that were incurred, tell
7 me if I have it wrong, the legal fees that were incurred
8 here was the fact that a default process was activated. And
9 the default process was activated by reason of the pledge
10 agreement

11 MR. ALLEN: And other factors. This was a landlord
12 tenant dispute with --

13 THE COURT: Right. But the main -- but the main issue,
14 I thought, the main issue was that this license had been
15 pledged contrary to the pledge agreement. And Attorney
16 Scanlon is alleged to have advised Burn, "Have no fear, this
17 can't -- this can't be enforced."

18 MR. ALLEN: She testified in the underlying action that
19 this can be enforced.

20 THE COURT: This can't be enforced, it's contrary to
21 public policy, go forth.

22 MR. ALLEN: Right.

23 THE COURT: You know, pledge this and all will be fine.
24 That activated the enforcement action. That activated the
25 position taken by the landlord that says, hey, wait a

1 minute, you violated your pledge agreement.

2 MR. ALLEN: That was one of the landlords.

3 THE COURT: You're -- you are in default.

4 MR. ALLEN: Right, but there were other issues that the
5 landlord wrote up.

6 THE COURT: Right. But that's a big one.

7 MR. ALLEN: That's a big one. But --

8 THE COURT: And that -- that in fact caused the
9 incurring of defense costs.

10 MR. ALLEN: To -- to a degree. But there were other
11 issues that occurred. But had Scanlon's advice, and I don't
12 -- Ms. Scanlon's advice, been correct, he still would've
13 incurred those legal fees. So the legal fees weren't the
14 result of the negligence. It was a result of the action he
15 took in --

16 THE COURT: Now that's interesting. I mean, but he did
17 -- Scanlon's -- Scanlon's was advice.

18 MR. ALLEN: So let's say she that was right. Let's say
19 she was right.

20 THE COURT: That's true. But --

21 MR. ALLEN: But he would've incurred the exact same
22 legal fees if she had been right.

23 THE COURT: -- but regardless, her advice is what
24 activated the incurring of legal fees, right or wrong? In
25 other words -- in other words, the malpractice claim for

1 purposes of the statute of limitations, whether she has a
2 good claim or a bad claim against Scanlon isn't really the
3 issue. The issue -- the issue is when does one have
4 reasonable notice that one might have a claim. And it seems
5 to me whether right or wrong, once -- once your counterparty
6 says, hey, you know, that thing you did with the pledge
7 agreement, you just committed a default of the lease.

8 MR. ALLEN: But that's just a mere allegation. Every
9 case that comes before Your Honor has allegations. And
10 that --

11 THE COURT: Well, isn't that what Frankston says?
12 That's all it takes.

13 MR. ALLEN: No, no.

14 THE COURT: Incurring legal fees because you're
15 confronting accusations

16 MR. ALLEN: You -- but you're incurring legal fees in
17 this case because of his actions. That's why he's incurring
18 legal fees. The -- the incurring her advice as to incurring
19 legal fees is really irrelevant to the incurring of legal
20 fees. Because he pledged the license to a third party. He
21 wasn't aware that the -- the --

22 THE COURT: Relying -- relying on the advice of
23 Counsel?

24 MR. ALLEN: We don't know that.

25 THE COURT: Well, that's the allegation.

1 MR. ALLEN: That --

2 THE COURT: The allegation is --

3 MR. ALLEN: Right.

4 THE COURT: -- this was -- this -- this pledge occurred
5 because Scanlon gave the green light.

6 MR. ALLEN: We don't have the facts yet at this stage
7 of when that advice -- again -- when the --

8 THE COURT: But that's the allegation.

9 MR. ALLEN: Right.

10 THE COURT: That's the allegation.

11 MR. ALLEN: But -- and I will go one step further, Your
12 Honor, a single justice's decision that there's a reasonable
13 likelihood of success in order to maintain the status quo is
14 not notice that he's going -- that the -- that the --that --
15 that --

16 THE COURT: Why?

17 MR. ALLEN: Because it is just a single justice. It's
18 not a jury verdict. It's not a judgment of the court.

19 THE COURT: It's more than an allegation.

20 MR. ALLEN: It's more than an --

21 THE COURT: There are cases -- there are cases that say
22 the making of an allegation is enough.

23 MR. ALLEN: In certain circumstances.

24 THE COURT: Is enough.

25 MR. ALLEN: Right.

1 THE COURT: Now we're saying three judges?

2 MR. ALLEN: Two, two judges. But doesn't matter. But
3 that in and of itself is not enough. And I'll tell you why.
4 Let's say he starts a malpractice case at that point against
5 Ms. Scanlon. Now that's an admission in the underlying
6 case. You know -- you know your -- you know you couldn't
7 have pledge your license because that's why you're suing
8 your lawyer. So that becomes an admission in the underlying
9 case. So that's why you have to wait for a judgment so that
10 you don't prejudice yourself. You don't shoot yourself in
11 the foot.

12 THE COURT: Well, Counsel, I hear your point. And it's
13 not a bad point. But I don't know how to square that point.
14 And again, I think it's a reasonable point. And I think I
15 would worry about it. I think as a matter --

16 MR. ALLEN: That's why you've --

17 THE COURT: -- as a matter part, but it has simply
18 never been the law. You can't -- there -- there -- there's
19 no case, including Eck --

20 MR. ALLEN: Right.

21 THE COURT: -- that stands for the proposition --

22 MR. ALLEN: That you have to --

23 THE COURT: -- that you have to have -- you have to
24 have a merits-based finality to the underlying issue before
25 you can accuse someone of malpractice. Because, well, you

1 might be shooting yourself in the foot.

2 MR. ALLEN: I do think -- I do think Eck does sort of
3 say that. That there has to be a charge --

4 THE COURT: Eck is -- Eck is essentially a continuing
5 representation case. It isn't -- it -- it extends it by a
6 scooch. It extends it by a scooch, because the lawyer was
7 not literally represent -- I mean, they still had a
8 relationship. His advice -- the advice of the lawyer was
9 still being relied upon. He was actively involved in the --
10 in the legal strategy. He was in every real sense, a lawyer
11 representing, but couldn't literally be because of the
12 Canons.

13 MR. ALLEN: But -- but as we say here, there's two
14 factors that he knew or should have known his lawyer was
15 wrong. Just because a judge, one judge or two judges say,
16 because we're going maintain the status quo, I'm not getting
17 to the merit.

18 THE COURT: Just say -- actually it just says you have
19 to be on inquiry notice. You have to be on notice. And you
20 don't have to actually -- you don't have to actually have
21 confidence that the lawyer's wrong. You have to be on
22 notice that something the lawyer did --

23 MR. ALLEN: Might have been wrong?

24 THE COURT: And might be -- is exposing you to harm.

25 MR. ALLEN: It has to be a reasonable belief that --

1 that the lawyer was wrong. It has to be -- you -- it's
2 more, otherwise, you --

3 THE COURT: You have to be on inquiry notice.

4 MR. ALLEN: Yes.

5 THE COURT: Based on -- based on some measure of harm
6 that what the lawyer did --

7 MR. ALLEN: Not some measure, appreciable harm.

8 THE COURT: Yeah, appreciable. But here, we had an
9 injunction. They couldn't -- they couldn't -- they couldn't
10 do anything with the license.

11 MR. ALLEN: They couldn't sell.

12 THE COURT: That they wanted to do. They couldn't sell
13 it. They couldn't encumber it.

14 MR. ALLEN: Right.

15 THE COURT: They couldn't take loans against it.

16 MR. ALLEN: Right.

17 THE COURT: They were enjoined.

18 MR. ALLEN: Yes.

19 THE COURT: Far more, right? Far more restriction than
20 the simple allegations that Frankston --

21 MR. ALLEN: But nowhere in any of those decisions, did
22 they rule or consider whether that pledge to the landlord
23 was against public policy.

24 THE COURT: Of course they did.

25 MR. ALLEN: They -- they said that there's a -- they

1 said there's --

2 THE COURT: Of course they did. That's exactly what
3 Justice Wendlandt said.

4 MR. ALLEN: Said, but that wasn't a final judgment.
5 That's why --

6 THE COURT: I -- I understand.

7 MR. ALLEN: -- that's why Judge Krupp, if -- if that
8 was a judge -- and Judge Krupp, they have to.

9 THE COURT: Of course. Of course. It's -- it is
10 predictive, the way all preliminary injunctions are
11 predictive. They're not --

12 MR. ALLEN: Exactly.

13 THE COURT: -- they're not collateral estoppel to the
14 underlying point. They're predictive. But -- but the
15 question is, when does a predictive ruling of a judge, or in
16 this case multiple judges, when is that sufficient to place
17 you on inquiry notice?

18 MR. ALLEN: But then if you're on inquiry notice, let's
19 just assume you are, then the harm, the appreciable harm,
20 even if those judges were wrong, or even if he wins the
21 case --

22 THE COURT: Right. That's right.

23 MR. ALLEN: -- and her, let's say her -- her advice was
24 correct, he would've incurred the same legal fees.

25 THE COURT: But again --

1 MR. ALLEN: No, he --

2 THE COURT: -- if the law -- if the law says, and lots
3 of cases say this, finality of merit -- of underlying
4 merit's decision is not required. But your point is that
5 has to be the standard. Because until you have finality of
6 a merit's decision, you run the risk of having to shoot
7 yourself in the foot by accusing a lawyer of wrongdoing,
8 when in fact you -- the lawyer might have been right all
9 along.

10 MR. ALLEN: And it would be used against --

11 THE COURT: But if that were true, then we'd have a
12 very different jurisprudence here, wouldn't we?

13 MR. ALLEN: Well, I don't think you -- I don't think
14 these facts have ever really been presented on an appellate
15 level, but that's not my only argument, Your Honor. Because
16 it --

17 THE COURT: But the question of whether a final
18 judgment is the standard, that -- that actually has been
19 presented many times.

20 MR. ALLEN: Yes. But it's fact driven in -- in each
21 case. And that's why this is inappropriate at this stand --
22 at this time. But even, let's go -- so it's fact driven.
23 What are the facts and what -- what did he lead to believe
24 in who? And all that will come out in this case. That's
25 why it's not a Rule 12 motion. It's a Rule 56 motion. It

1 should be. But let's go one step further here. Let's
2 accept the finality of his judgment isn't necessary. We
3 still don't have how, caused by the negligence of the
4 lawyer. The negligence of the lawyer has to be what causes
5 the appreciable, not contingent.

6 THE COURT: Didn't the -- didn't the advice of the
7 lawyer lead to the violation of the pledge agreement?
8 Because the lawyer essentially said, fear not.

9 MR. ALLEN: Right. And the --

10 THE COURT: It will not -- it will not result in
11 default, because that agreement is unenforceable.

12 MR. ALLEN: But if her -- if her -- if her opinion of
13 the law was correct, the same --

14 THE COURT: But you're -- but you're chasing your tail,
15 then.

16 MR. ALLEN: No.

17 THE COURT: In other words, what you're saying is, if
18 -- if the ultimate savings point, is that the lawyer might
19 turn out to be correct. If that is the key fact, that's the
20 key fact you've stressed all arguments. The lawyer might
21 turn out to be correct. And you can see I'm bothered by it
22 in one respect. So it's not a ridiculous point. But if
23 that's the key point, that the lawyer might turn out to be
24 correct, then what you are saying is, the law must have a
25 rule of finality.

1 MR. ALLEN: No.

2 THE COURT: Because --

3 MR. ALLEN: There could be -- no. Because I'm only
4 saying that on the issue of harm. There could -- in -- in
5 any case, without finality, there could be other harm.
6 There could have been -- but in this case, the only harm set
7 forth is the incurring of legal fees.

8 THE COURT: No, that's not true. It's the incurring of
9 legal fees and the restrictions on the license. Those harms
10 were creatures of court rulings.

11 MR. ALLEN: But the --

12 THE COURT: That rejected the legal advice that is the
13 subject of the malpractice claim.

14 MR. ALLEN: I would suggest that you -- you made my
15 point why we need that this is, or should be Rule 56.
16 Because we have no idea if -- if there was any real harm in
17 -- in -- in holding the license, not allowing him to sell it
18 or pledge it. He -- he may testify --

19 THE COURT: It's harm on its face. I mean, that's --
20 to me that's -- there -- there is no discussion on that. A
21 court says you cannot pledge this, you cannot transfer it,
22 you cannot take loans against it.

23 MR. ALLEN: But isn't that --

24 THE COURT: I don't need to, what evidence do I need?

25 MR. ALLEN: But it can't -- isn't that contingent as to

1 the circumstances? What -- what harm that flowed from that?

2 THE COURT: Your own client said this would be --

3 MR. ALLEN: Harmful.

4 THE COURT: -- severe harm. If you tell us we can't --
5 we can't do what we want with our license, that is severe
6 harm.

7 MR. ALLEN: Right.

8 THE COURT: I mean, I'm not -- I'm not trying to say,
9 got you. But the reality is, to me, that -- that admission
10 is consistent with -- with what seems pretty clear on its
11 face. A restriction from a court of what you can do with
12 your own property is the definition of harm.

13 MR. ALLEN: Right. But is it the harm that is
14 appreciable to -- to this individual?

15 THE COURT: You're saying it's not enough? Not enough?

16 MR. ALLEN: Not enough. Not enough. Just like legal
17 fees aren't.

18 THE COURT: Why they -- why they fight -- why did they
19 fight the injunction?

20 MR. ALLEN: Because if --

21 THE COURT: Why -- why they incur -- why did they incur
22 \$5 in legal expense fighting something that was no harm?

23 MR. ALLEN: Because if -- if they -- and we forget, and
24 you said three judges. One of the judges did in the
25 interest of -- the -- the -- so that also is a fact to be

1 considered as to whether he should have known his lawyer was
2 right. Why they fight it, because if they're able to sell
3 the license, it --

4 THE COURT: He doesn't have to know whether his
5 lawyer's wrong, that's what -- that's what Nutt says.

6 MR. ALLEN: No, I know that.

7 THE COURT: That's what Nutt says.

8 MR. ALLEN: Yes, I agree.

9 THE COURT: He doesn't have to know the lawyer's wrong.
10 He doesn't have to believe --

11 MR. ALLEN: But he has to have a reasonable --

12 THE COURT: He has to have a reasonable basis to
13 perceive that he has been harmed. And harm has been defined
14 broadly to --

15 MR. ALLEN: But harmed as causally connected to the
16 lawyer's malpractice or mistake.

17 THE COURT: The harm here is reliance on advice that
18 this is not going to lead you into fault. That's the harm.

19 MR. ALLEN: Well, you -- we don't know that that's what
20 -- but that's why we need the facts, Your Honor.

21 THE COURT: That's what occurred, right?

22 MR. ALLEN: Right. That -- no, she -- that she said --

23 THE COURT: The reliance -- reliance on the -- on -- on
24 Scanlon's advice --

25 MR. ALLEN: -- that the -- that the pledge was against

1 public law.

2 THE COURT: -- produced a -- produced a pledge that
3 violated the pledge agreement and it triggered a default.

4 MR. ALLEN: That is correct.

5 THE COURT: That all of that was the -- when you
6 connect those dots, leads to Judge Krupp's entry of summary
7 judgment.

8 MR. ALLEN: Right.

9 THE COURT: But along the way, there were legal fees
10 incurred and there was an injunction that was affirmed by
11 Judge Justice Kinder. And then there was the same
12 injunction with an explicit rejection of Scanlon's counsel
13 by Justice Wendlandt.

14 MR. ALLEN: Right.

15 THE COURT: How much more clarity do you need?

16 MR. ALLEN: Well, you need -- you need an ultimate --
17 none of those decisions foreclose the issue of whether it
18 was against public policy.

19 THE COURT: As a matter of right and wrong?

20 MR. ALLEN: Right.

21 THE COURT: Right. But again, Counsel, what you're
22 arguing, what you're arguing, and you're doing it well, but
23 what you're arguing is a change in the law. What you're
24 arguing --

25 MR. ALLEN: I'm not sure it's an extension of Eck.

1 THE COURT: Eck -- Eck fits into the paradigm of
2 continuing representation. It's a continuing representation
3 case to a 99 percent degree. Except -- except as a
4 technical matter, at the very end, he jumped out of the
5 representation. Not because this is when the client
6 realized that he was wrong, quite the contrary. The client
7 continued relying on Eck -- you know, on Eck's counsel but
8 to -- to -- to the fullest extent. The only issue was Eck
9 knew that testifying in a case where he was on paper
10 continuing to represent, would land him in trouble with the
11 ethics rules.

12 MR. ALLEN: But we also --

13 THE COURT: That's what that case is about.

14 MR. ALLEN: But if we go to the facts here, we also
15 know that the client knew that the ABCC had approved the
16 pledge. Okay? And so at that point, he has reason to
17 believe it's lawful. But what he didn't know was that the
18 ABCC didn't know about the pledge agreement in the -- in the
19 -- in the lease.

20 THE COURT: You're talking about this case now?

21 MR. ALLEN: Yes.

22 THE COURT: Right. But what he did know, is he was at
23 substantial risk of being found in default.

24 MR. ALLEN: I -- I might disagree only with the word of
25 substantial. There was a risk.

1 THE COURT: Well, not a small risk. right? He got
2 sued.

3 MR. ALLEN: We all get sued.

4 THE COURT: And yet, he did get sued, he did incur
5 legal fees, he did go up to the appeals court twice. And
6 two different judges said --

7 MR. ALLEN: Single Justice. Yes.

8 THE COURT: -- two different judges of that court said
9 that advice was no good.

10 MR. ALLEN: But the -- but the Judge in the Superior
11 Court --

12 THE COURT: And all of that occurred outside -- outside
13 the limitations period.

14 MR. ALLEN: Right. The judge in the Superior Court
15 said that he was okay. So --

16 THE COURT: Well, you know, you're -- you're arguing to
17 the right guy for this point, for this -- for this
18 particular point. I don't blame you for not thinking that
19 the --

20 MR. ALLEN: But you see --

21 THE COURT: -- the judge on the superior court was more
22 likely to have gotten it right. But alas, the law does not
23 work that way.

24 MR. ALLEN: But in the other sense as I -- I brought up
25 to you, had he sued Scanlon then, or within that period of

1 time, it would've been an absolute admission in the
2 underlying case that she created. She cannot benefit from
3 that way.

4 THE COURT: I agree. This is a problem with the rule.
5 It's a problem with the rule that, if the limitations period
6 is running at a point in time when there is no finality, it
7 may be compromising someone's ability to take the position
8 that in fact on the merits they were right. It put -- it
9 does put a client between a rock and a hard place. I agree
10 with you. I agree with that. But -- but what you are
11 arguing, the only rule that produces a complete resolution
12 of that is the rule that you're really arguing for. Which
13 is, we need -- we need finality of decision.

14 MR. ALLEN: And one other point why the facts aren't
15 final here, and why we need that. It is, in our opinion,
16 reasonably likely that through discovery we will find that
17 there was continuing representation here. Despite Counsel's
18 statement here.

19 THE COURT: You haven't argued that at all.

20 MR. ALLEN: No, that is correct

21 THE COURT: At all.

22 MR. ALLEN: Because we don't have the factual basis for
23 it yet. When we filed the complaint, we don't have the
24 factual basis. So that -- that is why that's a fact that
25 more likely than not would be --

1 THE COURT: You actually do have the factual basis.
2 Your one half of the relationship. If there was continuing
3 violation, your client had every incentive at every point
4 along this process to so allege. She hasn't alleged,
5 because I gather it ain't so.

6 MR. ALLEN: I gather it is so, but we wanted to keep --
7 at this juncture to keep the -- to the facts we knew. But
8 we -- we complete that in an instant. But -- that's --

9 THE COURT: There are these pesky Rule 11 requirements,
10 Counsel. I know you can say anything, but there are
11 standards here.

12 MR. ALLEN: Right. And that's why we didn't want to
13 plead it without a factual basis in - in discovery.
14 Exactly. Exactly. So --

15 THE COURT: Again, your client is one half of the
16 relationship. If there was a continuing representation,
17 your client would've known it. It's not -- this isn't a
18 matter of, I need to take discovery to find some otherwise
19 unknowable fact. This fact is almost entirely within your
20 knowledge.

21 MR. ALLEN: Well, that --

22 THE COURT: Your client's knowledge.

23 MR. ALLEN: So can we amend the complaint?

24 THE COURT: Well, to allege something that you had
25 every incentive to allege and haven't, I don't know,

1 Counsel.

2 MR. ALLEN: I don't --

3 THE COURT: Doesn't -- doesn't feel right.

4 MR. ALLEN: Okay.

5 THE COURT: Doesn't feel right.

6 MR. ALLEN: But in any event, it's -- we -- it's
7 opposition, Your Honor. It's our position that the -- that
8 the statute of limitations hasn't even run yet. It's our
9 position that the statute of limitations doesn't run till, I
10 think, April 25th of this year. So it's not like the -- the
11 game's over. But I mean, if the continuing representation
12 is the critical element.

13 THE COURT: Well, let's put it this way, it's the only
14 thing that would even arguably bring you within the reach of
15 Eck. And the thing is, Eck has been distinguished by every
16 case that's come after it.

17 MR. ALLEN: Well, that's why we didn't want to --

18 THE COURT: Every case that's come after Eck's -- by
19 the way, this isn't like Eck.

20 MR. ALLEN: Well, that's why we didn't want to rely on
21 the continuing representation.

22 THE COURT: Well, and I don't blame it, believe it.
23 But the key point is, you didn't rely on Eck because you
24 don't have the -- the essential fact.

25 MR. ALLEN: Okay.

1 THE COURT: And I -- I credit you, respectfully, I -- I
2 credit you for not playing fast and loose and alleging
3 something that's not so, and hoping it might turn out to be
4 so and no. I mean, I gather here the relationship between
5 this client and that lawyer, law firm, was long done. There
6 was a new lawyer entirely.

7 MR. ALLEN: Well, I -- I -- I'm sure, and I was not
8 involved in the underlying case at all, but I am sure that
9 the litigators depended on the expertise of -- of some of
10 the alcoholic beverage counsels. Whether it was this
11 counsel or not, I'm not sure.

12 THE COURT: That's a very, very different standard.

13 MR. ALLEN: Yes.

14 THE COURT: Right. To say, well, we relied on it,
15 yeah, but I mean, some -- some lawyer may take a position
16 and essentially box future lawyers into that position. And
17 those lawyers may say, well, what do -- what do you want
18 from us? We're going to have to live with this in
19 litigation because we have to live with the facts. And
20 that's the position that this other lawyer took. That
21 doesn't mean that the statute of limitations isn't running
22 against that first lawyer's advice, merely because the
23 succeeding lawyers are stuck with the crummy advice. If
24 that were the standard, God help us all, there'd be --
25 there'd be no statute of limitations ever in malpractice

1 cases.

2 MR. ALLEN: But the -- I go back to the point that, if
3 she had been correct, there would've been no harm as a
4 result of her statements.

5 THE COURT: Well, there would've been. There would've
6 been, because they would've had to defend. They would've
7 had to defend lawsuit. And then of course the whole thing
8 would be moot. Because of course, if she's correct, then
9 there is no malpractice.

10 MR. ALLEN: Right.

11 THE COURT: So we don't have to worry about statute of
12 limitations.

13 MR. ALLEN: But, so that's why there's no harm. If he
14 believes he's correct, and he's paying the legal fees to
15 prove she was correct, he's not being harmed because he
16 would've had to pay him anyways. Because the landlord had a
17 different view. Those legal fees would've been incurred if
18 she was correct and committed no malpractice.

19 THE COURT: Counsel, this just an argument. This is an
20 argument. You're making it well, but it's an argument for
21 re -- for rewriting the law at this point.

22 MR. ALLEN: I don't believe so because that --

23 THE COURT: And saying, look, we need -- until we have
24 a final decision, until we have a final resolution, she has
25 no -- it's unfair to require her to -- to point the finger

1 at her lawyer.

2 MR. ALLEN: Right. You are -- but what I'm saying is,
3 I don't think it's a new standard. Because I think what it
4 is, is not the -- the non-contingent harm required by the
5 current standard. The harm is here, it's contingent on her
6 being wrong.

7 THE COURT: Nope. She's -- she's suffering all kinds
8 of harm that our courts have recognized as harm, namely the
9 incurring of legal fees. The --

10 MR. ALLEN: Right -- right now I'm just talking about
11 the legal fees, that I don't think that that's a -- the harm
12 by the standard. Because had -- had she been correct, he
13 would've still incurred that harm, because he would've had
14 to defend his decision.

15 THE COURT: He would've have incurred the harm in not
16 being able to pledge or borrow against his license.

17 MR. ALLEN: That is correct.

18 THE COURT: There's no good argument against that.

19 MR. ALLEN: There is. That, that is not harm
20 sufficient enough to meet the standard.

21 THE COURT: Wow. To me that seems like more harm than
22 what these other cases that say, look, the minute you -- the
23 minute you're sued, the minute there's a motion filed
24 against you. The, I mean --

25 MR. ALLEN: He had already pledged it. It had already

1 been pledged. So it wasn't a harm. He had already pledged
2 it. That's what caused the default.

3 THE COURT: Right. But the injunction said, no more.

4 MR. ALLEN: No more. No more.

5 THE COURT: No more.

6 MR. ALLEN: But it was already pledged.

7 THE COURT: Well, but the injunction said he can't do
8 it anymore.

9 MR. ALLEN: Anymore.

10 THE COURT: Can't pledge it. Can't sell it.

11 MR. ALLEN: Sell it.

12 THE COURT: Can't encumber it can't -- can't,
13 collateralize it can't do anything. To me, I don't -- if
14 that's not harm, I don't know what is.

15 MR. ALLEN: I don't think it's the appreciable harm as
16 a result of malpractice that is required under the standard,
17 Your Honor. And I just submit that to you. I don't think
18 -- I don't think that the legal fees, because if she was
19 right, he would never -- he would've still incurred the same
20 thing.

21 And I don't think that the injunction is enough to
22 -- to -- I do not believe the case -- this cases that hold
23 interlocutory rules -- rulings are sufficient interlocutory
24 in nature. Because when the judges were doing
25 interlocutory, they were just holding the status quo so that

1 the license would be there if he -- if he loses. So by the
2 -- I -- I honestly don't think that that's sufficient to put
3 him on notice that his lawyer was wrong. Enough so, to --

4 THE COURT: Justice Wendlandt didn't just say we're
5 going to preserve the status quo. She said -- she said that
6 advice was bad.

7 MR. ALLEN: Right. But then for him to, at that point
8 sue her, he might as well push the chips across the table
9 because the underlying case would've been over.

10 THE COURT: Yeah. Well, that is -- that is a problem.
11 I -- I'll grant you that. It's -- it's your best -- it's
12 your best argument.

13 MR. ALLEN: Yeah. He'd have to default, basically.

14 THE COURT: There is --

15 MR. ALLEN: In order to exercise his --

16 THE COURT: -- there is a practical -- there is a
17 practical problem that arises in a standard that allows harm
18 to be measured at points in time, well short of finality.

19 MR. ALLEN: Right.

20 THE COURT: I -- I grant you that.

21 MR. ALLEN: Sure.

22 THE COURT: I don't -- I don't disagree. And I agree
23 it's a problem. And I agree --

24 MR. ALLEN: But it might not be a problem.

25 THE COURT: -- there are -- there are policy reasons

1 why -- why you might draw the line differently for that
2 reason.

3 MR. ALLEN: In this case.

4 THE COURT: All I'm saying is, they've never done it.

5 MR. ALLEN: Because these facts are different. These
6 facts are different. These facts are different. Because in
7 this case, if -- if he had sued her at that point, that was
8 the ultimate issue in an underlying case. That's a
9 different set of facts. That -- that would -- that -- that
10 would've prejudiced him severely in the -- in an underlying
11 case where her legal advice was being tested. Had he turned
12 around and pointing the finger at her, that's an admission.
13 I know if I was in that underlying case, I'd treat it as an
14 admission. And that's a fact unique to this case, not the
15 other cases. So I would leave.

16 THE COURT: Thank you, Counsel.

17 MR. ALLEN: Okay.

18 THE COURT: Lemme think about this.

19 MR. WALTON: Your Honor, may I have 30 seconds?

20 THE COURT: You can have all 30.

21 MR. WALTON: Your Honor, first of all, Attorney Allen
22 is incorrect. I've been representing the professionals for
23 25 years. And the way that this is dealt with, when they
24 get the Single Justice ruling, they reach out to attorney
25 Scanlon and they say, let's do a tolling agreement to

1 preserve the statute of limitations so that we can -- and
2 it's done every day. She was never asked to do that. But
3 most importantly, Your Honor, and -- and again, you --
4 you've already pointed this out, but this is right out of
5 the Mass Electric.

6 THE COURT: By the way, wouldn't that fact be
7 discoverable?

8 MR. WALTON: No.

9 THE COURT: Why not?

10 MR. WALTON: Not necessarily.

11 THE COURT: It's not attorney client.

12 MR. WALTON: Well, but -- but, Your Honor --

13 THE COURT: It's not attorney client. They're
14 adversaries.

15 MR. WALTON: Even if it was -- even if it was, the
16 answer is simple, which is, we're doing this to protect our
17 rights. We think she's right. We're doing this to protect
18 our rights. I mean, tolling agreements are used all the
19 time.

20 THE COURT: Uh-huh.

21 MR. WALTON: So for attorney Allen to say, we -- we
22 would've had to sue her and tank our case, that's just not
23 -- it's not accurate. So -- but this is right out of Mass
24 Electric. I quote, "We conclude that the electric company
25 sustained appreciable harm, at least by the time the home

1 insurance action was commence. Whatever the ultimate result
2 of that case would be, it was then clear that the electric
3 companies would incur substantial legal expenses in the
4 defense of the claim that was based in part -- in part on
5 the alleged negligent conduct of their attorneys in the
6 defense." So Attorney Allen saying, well, it wasn't all
7 about the pledge agreement. Mass Electric says it doesn't
8 have to be all about the pledge agreement. And -- and Your
9 Honor already said it, so I -- but Cantu and Frankston
10 basically repeat what Mass Electric says.

11 Finally, on the appreciable harm, I know I said it, but
12 it's worth -- we have -- the plaintiff's counsel saying
13 there was no appreciable harm. The plaintiff's counsel has
14 said there would be appreciable harm if the injunction was
15 entered in their brief that we've attached. It's a
16 pleading. It's of the record. And -- and the -- the Single
17 Justices affirm that there was a likelihood of success.

18 And, Your honor, I -- I read those docket entries by
19 both Single Justices. I mean, they are, it's not just a
20 granted or denied. I mean, they have a full extensive
21 analysis in there that should have put the plaintiff on
22 notice about the potential plan. And -- and finally, Your
23 Honor, just with regard to the harm, the -- the plaintiff's
24 lease was terminated. I mean, that's harm when you're
25 renting a space and your lease was terminated. So the -- I

1 -- I know these are cumulative facts, but there's a lot of
2 them in favor of the fact that the statute of limitations
3 had begin to run. Thank you very much.

4 THE COURT: Thank you Walton. I'll take it under
5 advisement.

6 MR. ALLEN: Can I just say ten seconds?

7 THE COURT: Ten seconds it is.

8 MR. ALLEN: The lease was terminated. He wasn't using
9 the premises at the time. So that really wasn't harm. And
10 I would simply say Mass Electric; it's a very
11 distinguishable case. It was a -- it was an ethical case.
12 And that's all I'll say. Thank you, Your Honor.

13 THE COURT: Thank you all. Thank you for this.

14 MR. WALTON: Thank you, Your Honor.

15 (Matter concluded at 3:16 p.m.)
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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
DEPARTMENT OF THE TRIAL COURT
C.A. No. 2584CV01657

<p>BRIAN J. LESSER and BURN, LLC</p> <p>Plaintiffs,</p> <p>v.</p> <p>KRISTEN L. SCANLON and SCANLON LAW, LLP</p> <p>Defendants.</p>


JOHN A. PETERS III
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 SUFFOLK SUPERIOR COURT
 CIVIL CLERK'S OFFICE

NOTICE OF APPEAL

Pursuant to Rule 3 of the Massachusetts Rules of Appellate Procedure, Plaintiffs Brian J. Lesser and Burn, LLC hereby provide notice to the Court that they appeal the decision and order by the Honorable Robert B. Gordon dated February 24, 2026 dismissing the plaintiffs' claims and entering final judgment in favor of the defendants.

Respectfully submitted,
BRIAN LESSER AND BURN LLC
By their counsel,

Dated: March 4, 2026

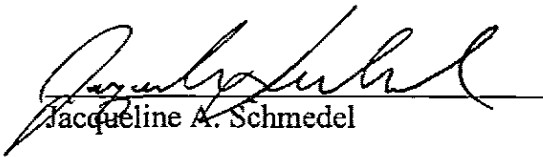


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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice of Appeal was served on this 4th day of March, 2026, by delivering a copy of same by first class mail and e-mail to:

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CHIEF CLERK SUPERIOR COURT
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CLERK SUPERIOR COURT

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

DAR NO. _____
APPEALS COURT DOCKET NO. 2026-P-0674

Brian Lesser and Burn, LLC,
Plaintiffs-Appellants

v.

Kristen L. Scanlon and Scanlon Law, LLP,
Defendants-Appellees

On Appeal from Dismissal Pursuant to Defendants' Motion to
Dismiss of the
Suffolk County Superior Court Case No.: 2584CV01657-C

CERTIFICATE OF SERVICE

I hereby certify that I have served the Appellants' Application for Direct Appellate Review to all counsel of record this 28th day of May, 2026 via first class mail and e-mail:

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COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

DAR NO. _____
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v.

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On Appeal from Dismissal Pursuant to Defendants' Motion to
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Suffolk County Superior Court Case No.: 2584CV01657-C

CERTIFICATION PURSUANT TO MASS. R.A.P. 16(K)

I, Brianna L. Audet, Esq., attorney of record for the Plaintiffs-Appellants hereby certify that this Application for Direct Appellate Review complies with the rules of this court that pertain to the filing of briefs, including, but not limited to: Mass. R.A.P. 16(a)(13)(addendum); Rule 16(e) (references to the record); Rule 18 (appendix to the briefs); Rule 20 (form and length of briefs, appendices and other documents); and Rule 21 (redaction). I further certify that this Application for Direct Appellate Review complies with the applicable length limitation in Rule 11 and Rule 20 because it is in the monospaced font Courier New at size 12, 10 characters per inch, is less than 50 total pages of text with 10 pages of argument.

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