Honorable Patrick Oishi
Hearing Date: January, 31, 2019, 9:00 a.m.
Oral Argument Requested

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

ANGELA KELLY; and JANYCE L. MACKENZIE,

Plaintiffs,

v.

COOPER TIRE & RUBBER COMPANY, a Delaware corporation; TBC CORPORATION, a Delaware corporation; MEINEKE CAR CARE CENTERS, LLC, a North Carolina corporation; MCCC 4333, INC. d/b/a MEINEKE CAR CARE CENTERS #4333, a Washington corporation; and SEARS, ROEBUCK AND CO., d/b/a SEARS AUTO CENTER and/or SEARS, ROEBUCK AND CO. #2049 a New York corporation,

Defendants.

ANGELA KELLY,

Cross-Claimant,

v.

JANYCE L. MACKENZIE,

Cross-Claim Defendant.

NO. 18-2-17249-7 SEA

DEFENDANT MEINEKE CAR CARE CENTERS, LLC'S MOTION FOR SUMMARY JUDGMENT

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I. RELIEF REQUESTED

Defendant Meineke Car Care Centers, LLC, a North Carolina corporation (hereinafter "Meineke"), and a franchisor of Defendant MCCC 4333, Inc. ("4333"), the franchisee, respectfully moves the Court for an Order dismissing Plaintiffs' direct negligence claim and vicarious liability claim against Meineke because it owed no duty to Plaintiffs for any acts or omissions committed by its franchisee, 4333. Under the Franchise and Trademark Agreement ("Franchise Agreement") and undisputed facts, Meineke's relationship with 4333 is purely contractual and is governed exclusively by the Franchise Agreement – it had no ownership, authority, control or right to control 4333's daily operations; nor did it have any agency or fiduciary relationship with 4333. With no duty, and therefore, no corresponding liability, Plaintiffs' claims against Meineke must be dismissed as a matter of law.

II. UNDISPUTED MATERIAL FACTS

A. Background Facts

According to Plaintiffs, this matter arises from a roll-over incident that occurred on August 4, 2016. Plaintiffs Janyce MacKenzie and Angela Kelly were traveling eastbound along Interstate 90 through central Montana in MacKenzie's 1998 Ford Explorer. *Second Amended Complaint*, Dkt. No. 93 at 18.[1] Around milepost 93.1, near Missoula, the tread on the rear driver's side tire separated from the tire, causing the driver, MacKenzie, to lose control and leave the roadway.[2] MacKenzie and Kelly both suffered injuries from the rollover incident.

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[1] Meineke does not agree with or concede any of the following, but as it must in a motion for summary judgment, all facts are stated in a light most favorable to the non-moving party.
[2] *Second Amended Complaint*, Dkt. No. 93 at 18.

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Two days before the incident, on August 2, 2016, MacKenzie took the Explorer to 4333, an independently owned and operated Meineke franchise location in Everett, Washington, for an oil change and courtesy inspection service.[3] Plaintiff MacKenzie took her vehicle into 4333 on at least one prior occasion, April 22, 2016, for work on the exhaust manifold.[4] All work done at 4333 was performed and completed by 4333 employees.[5] No Meineke personnel were involved in inspecting or servicing the vehicle on April 22, 2016 or August 2, 2016.

Significantly, the subject tire was nine years old at the time of the accident.[6] Defendant Cooper Tire and Rubber Company, the manufacturer of the failed tire, recommends that tires are removed from service if they are 10 years old, regardless of wear.[7]

On July 12, 2018, Kelly sued six defendants—the manufacturer of the subject tire, Cooper Tire and Rubber Company and TBC Corporation (collectively, "Cooper Tire")[8]; 4333; Meineke; Sears, Roebuck and Company and Sears, Roebuck and Co. #2049 (collectively, "Sears").[9] *Complaint for Damages*, Dkt. No. 1. Eight days later, Plaintiff MacKenzie joined in the suit against these defendants.[10]

Plaintiffs allege that Meineke owed them an affirmative and direct duty to "inspect the condition of the Subject Tire for defects and dangerous conditions" and "to replace the Subject Tire and to warn of the defects and dangers that existed while operating the Subject Vehicle with

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[3] *Declaration of Amanda D. Daylong ("Daylong Decl.")*, **Exhibit A** (Deposition of Janyce MacKenzie), at 62:14-18.
[4] *Daylong Decl.*, **Ex. D** *(Invoices, 4/22/2016 and 8/2/2016).*
[5] *Id.*
[6] *Second Amended Complaint* ¶ 14, Dkt. 93.
[7] *Daylong Decl.*, **Ex. E** *(Cooper Tire Service Life).*
[8] Cooper Tire, the manufacturer of the subject tire, unilaterally settled with Plaintiffs in November 2019.
[9] Sears has not participated in this litigation as it has been in Chapter 11 bankruptcy receivership since 2018, and is not permitted to take any affirmative litigation steps or actively participate.
[10] *First Amended Complaint*, Dkt. No. 9.

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a tire that contained an imminent and foreseeable tread separation."[11] Plaintiffs also allege that Meineke is vicariously liable for 4333's pre-accident tire inspection, and/or that 4333 is an "agent" of Meineke.[12]

Meineke had no direct duty, whatsoever, to these Plaintiffs, and it is neither vicariously liable for 4333's vehicle/tire inspection, nor is it an agent of 4333. Since the filing of this action, a significant amount of discovery has occurred. The documents and uncontroverted deposition testimony demonstrate that (1) Meineke has absolutely no authority, control, or right to control 4333's operations, including the conducting of courtesy vehicle inspections and vehicle services recommended or provided to Plaintiff MacKenzie prior to the collision; and (2) Meineke and 4333's relationship is solely and exclusively contractual pursuant to the Franchise Agreement, which expressly states that 4333 is an independent contractor and not an agent of Meineke. As such, this matter is wholly ripe for summary judgment in Meineke's favor.

B. As a Franchisor, Meineke Has No Day-to-Day Control Over 4333's Operations, Including Inspections, and Meineke Has Never Held 4333 out as an Agent.

1. <u>Meineke's "Business Format" Franchise Model.</u>

Meineke employs a "business format" franchise model for use by its franchisees across the nation.[13] Under this model, Meineke and its franchisees enter into contractual agreements wherein franchisees agree to pay Meineke royalties and fees for the right to sell products and services under Meineke's name and trademarks.[14]

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[11] *Second Amended Complaint* ¶ 35, Dkt. No. 93.
[12] *Second Amended Complaint*, Dkt. No. 93 at 10-13, ¶¶ 35-40. Kelly filed a Second Amended Complaint on June 5, 2019, adding cross-claims against MacKenzie as the owner and operator of the vehicle. *See Second Amended Complaint*, Dkt. No. 93 at 13-14.
[13] *Declaration of Noah Pollack ("Pollack Decl.")* at ¶ 2.
[14] *Id.* at ¶ 2; *see also Pollack Decl.*, **Ex. B** *(Franchise Agreement, 2014)* & **Ex. C** *(Transfer Agreement and Owners Personal Guarantee).*

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As a result of franchising agreements with independent businesses, those businesses are able to access Meineke's "investment of time, skill, effort, and money, [from which Meineke has] developed comprehensive business methods and systems" associated with its marks and brand.[15] All of Meineke's franchise relationships and the provisions of the Franchise Agreement are based on the "guiding principles" that (1) Meineke respects its franchisee's "interest in the going-concern value" of its business, and (2) the franchisee respects Meineke's "ownership of the System, including the Marks, trade secrets, confidential information and the associated goodwill, and [Meineke's] rights to determine the nature and quality of the products and services sold under the Marks, to control the manner in which the Marks are used and to enforce System standards and to manage the System."[16]

Under this cooperative agreement and understanding, Franchisees are provided a model that Meineke has developed for all of its stores and a system of standards and procedures that, pursuant to the Franchise Agreement, the franchisees are required to follow (the "System").[17] It is through the System that Meineke provides its franchisees with resources, suggestions, and recommendations on how to run a successful business.[18]

Part of the System is Meineke's "playbook" *i.e.*, a model of procedures, policies, and practices—a "best practice guide"—for successfully operating a franchise location.[19] Thus, as part of the System and based on its experience in building goodwill toward its brand and marks and developing profitable customer service standards and practices, a/k/a "The Meineke Way,"

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[15] *Pollack Decl.*, **Ex. B**, §1.1.
[16] *Id.*, §1.2.
[17] *Pollack Decl.*, at ¶ 2; **Ex. B** at §1.3(29).
[18] *Pollack Decl.*, at ¶ 2; *See Daylong Decl.*, **Ex. F** *(30(b)(6) Deposition of Meineke, John Price)* at 71:7 – 12; 182:12 – 183:2.
[19] *Daylong Decl.*, **Ex. F**, at 62:13-24.

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Meineke has provided its franchise owners with materials and resources for best practices in customer service, including a system by which to conduct inspections. However, Meineke does not control or place any requirements on the actual performance of inspection services that the franchisees offer.[20]

> We don't hold the inspections. We don't instruct on how to do an inspection. We – what we do is say this is the best way to do it. If you want to succeed and do brand standards, this is the best way to do it. **Franchisees can elect to do that or not.**

Daylong Decl., **Ex. B**, at 75:14-20 (emphasis added). In providing resources to franchisees, and to support high customer service standards, Meineke has formatted a vehicle inspection report form for its franchisees to use.[21]

Notably, the form is simply a distillation of automotive industry standards used by most automotive repair shops. For example, 4333's industry standard form is overwhelming similar to the form used by Sears.[22]

This model and arrangement, including the playbook and "The Meineke Way" roadmap and standards, provides Meineke with the contractual ability to raise capital and grow its business while supporting national systemwide brand standards and controls to protect its trademarks.[23] In addition, the "business format" model contractually gives franchisees access to resources that, as small business owners, they would not generally have outside of the franchise model, including

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[20] See id. at 63:1 – 64:3, 140:2-4; *see Daylong Decl.*, **Ex. G** *(Deposition of Brett Harrison, Sept. 25, 2019)*, at 192:3 – 10, 195:3 – 6; **Ex. L** *(Continuation Deposition of Brett Harrison, Nov. 15, 2019)*, at 219:11 – 23, 294:18 – 21.
[21] *Daylong Decl.*, **Ex. H** *(Vehicle Inspection Report, Blank)*.
[22] *Daylong Decl.*, **Ex. F**, at 101:25 – 102:8, 104:10 – 20; **Ex. G**, at 28:3 – 19; *Compare* **Ex. H** with **Ex. I** *(Sears Intake/MPI Form)* and **Ex. J** *(April 22, 2016 Vehicle Inspection Report)*.
[23] *Pollack Decl.* at ¶ 3; *Daylong Decl.*, **Ex. F**, at 54:14 – 19.

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access to a model uniform system of operation.[24]

2. Meineke and 4333 Are Two Separate and Distinct Corporate Entities.

Meineke and 4333 each have distinct legal identities and corporate structures.[25] Neither business holds any ownership or partnership stake in the other, and have no officers or directors in common.[26] Meineke is a North Carolina limited liability company with its principal place of business in Charlotte, North Carolina.[27] In contrast, 4333 is a Washington corporation with its principal place of business located in Everett, Washington.[28]

As Brandon Cruz, MCCC Group's corporate representative testified, 4333 is owned by the "MCCC Group," which owns approximately two dozen franchisee locations in Washington, Oregon, and California.[29] Each company maintains its own, separate, independent financial accounts, and files their own tax returns.[30] While 4333 pays Meineke a royalty fee and other costs and fees, the two companies do not share any profits or losses.[31] The franchisee, 4333, alone obtains all necessary business licenses and operating permits, and maintains property and liability insurance at its own expense.[32] Meineke and 4333 (under different ownership) originally executed the Franchise Agreement in October 2014.[33] In 2015, MCCC Group acquired 4333 and 12 other franchisee locations in Washington.[34]

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[24] *Pollack Decl.*, at ¶ 3.
[25] *Pollack Decl.*, at ¶ 4.
[26] *Id.* at ¶ 5.
[27] *Id.*
[28] *Id.*
[29] *See Daylong Decl.*, **Ex. K** *((30(b)(6) Deposition of MCCC 4333, Brandon Cruz)* at 28:9 – 29:2.
[30] *Pollack Decl.*, at ¶ 6.
[31] *Id.*
[32] *Id.* at ¶ 7.
[33] *Pollack Decl.* at ¶ 8, **Ex. B** at 46.
[34] *Pollack Decl.*, **Ex. C**; *Daylong Decl.*, **Ex. K**, at 35:6 – 10.

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The original Agreement with 4333's prior owner, and all of the terms and obligations of the Agreement, were transferred to MCCC Group and 4333 in July 2015.[35] At the time that it acquired 4333, MCCC Group was an experienced franchisee and was operating approximately 20 franchisee locations in California and Oregon.[36]

3. Under the Franchise Agreement, 4333 Is Strictly an Independent Contractor, and Not Meineke's Agent.

Section 16.1 of the Franchise Agreement expressly states that 4333 is an independent contractor, and there is no agency or fiduciary relationship between Meineke and 4333.

> You and we are independent contractors. Neither this Agreement, the nature of the relationship of the parties nor the dealings of the parties pursuant to this Agreement will create, directly or indirectly, any fiduciary or similar relationship between the parties hereto.
>
> Nothing contained in this Agreement, or arising from the conduct of the parties hereunder, is intended to make either party a general or special agent, joint venturer, partner or employee of the other for any purpose whatsoever.

Pollack Decl., **Ex. B** at §16.1. It is undisputed that at the time of the 2016 accident, 4333 was—and remains—an independently owned and operated franchisee of Meineke; it is independently owned by the Yungs.[37] Franchisee employees—Kyle Johnson, Jeremy Crick, and Craig Hallgren—were all aware and understood that they worked for the independent franchisee, 4333, and were not Meineke employees.[38]

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[35] *Pollack Decl.* at ¶9; **Ex. C** at 1, ¶3; at 2 §4.
[36] *See Daylong Decl.*, **Ex. K**, at 28:24 – 25.
[37] *Pollack Decl.* at ¶¶ 5 – 10; **Ex. B** at §§4.2, 6.2, 7.9, 10.2, and 16.1; **Ex. C**; *see also Daylong Decl.*, **Ex. F**, at 21:19-22:8; **Ex. K**, at 28:11 – 31:7, 35:13-16, 63:10 – 13, 257:14-19.
[38] *Daylong Decl.*, **Ex. M** *(Deposition of Kyle Johnson)*, at 126:24 – 127:11; **Ex. N** *(Deposition of Jeremy Crick)*, at 124:16 – 125:4; **Ex. O** *(Deposition of Craig Hallgren)*, at 25:11 – 16.

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4. Meineke Has No Control Nor Right to Control the Day-to-Day Operations of 4333.

While the Franchise Agreement requires Meineke's franchisees to follow its contractual System, Meineke has no authority or control over 4333's day-to-day operations, and the franchisee retains sole responsibility "for developing and operating your Center and for all associated expenses."[39] It is uncontroverted that, as 4333's general manager, Kyle Johnson[40] was responsible for 4333's day-to-day operations, including:

- employee training;
- overseeing vehicle inspections;
- determining how the inspections were performed; and
- whether they were performed.[41]

Kyle Johnson was the only individual present and on site at 4333 five to six days per week who had the power and authority to require any employee or technician at 4333 to perform any task, including the method and manner of conducting a courtesy inspection of a vehicle.[42]

Johnson further assigned work to every technician and monitored the quality of the work that the technicians performed.[43] According to 4333 employee Jeremy Crick—Johnson or the shop foreman, another 4333 employee—would watch him perform inspections and repairs frequently.

> Q: [D]uring the time that you worked for 4333, was your quality of work monitored by anyone?
> A: Kyle Johnson and my . . . shop foreman.
> . . . .

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[39] *See Pollack Decl.*, **Ex. B** at §§2.1, 4.2.
[40] Mr. Johnson has been employed at 4333 location since 2009/2010, and was a general manager of that location prior to MCCC Group's acquisition of the franchisee location. *See Daylong Decl.*, **Ex. H**, at 18:19 – 20:6.
[41] *Daylong Decl.*, **Ex. K**, at 248:20 – 249:8, 260:24 – 261:15, 263:18 – 264:10; **Ex. M**, at 82:14 – 22.
[42] *Daylong Decl.*, **Ex. G**, at 202:7 – 13; **Ex. M**, at 150:16 – 22.
[43] *See Daylong Decl.*, **Ex. N**, at 46:25 – 50:12; **Ex. O**, at 29:19 – 23; 32:8 – 33:5; 61:5 – 10.

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Q: And what did the shop foreman and Kyle Johnson do to monitor the quality of your work?
A: They watched how I did my work. My procedures and how to repair cars.
Q: How often did they watch how you did your work?
A: **Regularly. Probably every other car or every third car or something like that.**

Daylong Decl., **Ex. N**, at 47:14 – 48:2. Similarly, 4333 employee Craig Hallgren testified that Johnson would regularly double-check his inspection forms to make sure that he was completing them correctly.

Q: Did someone at 433 monitor the quality of your work while you were working there?
A: They would inspect it before the car would leave, yeah.
Q: Any then you say, "they," who are you referring to?
A: The manager.
Q: Kyle?
A: Yeah.
Q: And what was he inspecting?
A: To make sure everything was done correctly.

Daylong Decl., **Ex. O**, 32:14 – 24.

In addition to having no control or authority over 4333's day-to-day operations, Meineke does not monitor its franchisees' daily operations.[44] Meineke's "inspection" of 4333—and other franchisee locations—is focused on and limited to maintaining brand standards—ensuring that franchisees display correct signage, ensuring that buildings are clean and have a well-maintained appearance, that technicians are in uniform, and that people answer the phone and interact with the customers properly, which includes observing whether the franchise is conducting

[44] *Daylong Decl.*, **Ex. F**, at 178:13-15; **Ex. K**, at 248:20-249:14, 264:5-10; **Ex. L**, at 222:13 – 226:6, 238:24 – 239:19; **Ex. M**, at 29:1 – 8.

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inspections in order to provide the best customer service under Meineke's brand—*i.e.* "enhancing customer goodwill toward the Marks."[45]

This is particularly apparent regarding the role of the Franchise Business Consultant ("FBC"), a Meineke employee. FBCs are tasked with ensuring that franchisee locations are following the terms of the Franchise Agreement, following the System, upholding brand standards, and assisting franchisee locations with their sales and profitability.[46] Brett Harrison[47] was Meineke's FBC in 2016, working with over 80 stores in Washington, Oregon, Idaho, and Alaska, including 4333.[48]

In 2016, 4333 was open and operating six to seven days per week.[49] Harrison testified that, *at most*, he visited 4333 four times a year for two to three hours each visit.[50] During those visits, he primarily focused on retail sales and phone training with Kyle Johnson, 4333's general manager, to assist in improving 4333's profitability.[51]

While Harrison testified that he would observe technicians performing inspections at 4333 during his visits, he never saw anything "out of nature," and his interactions with 4333 employees were limited to Johnson and the assistant manager, Brock Robinson.[52] Notably, Johnson recalled that he had one interaction with Harrison while Harrison was an FBC.[53] That

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[45] *See Daylong Decl.*, **Ex. F**, at 47:12 – 23; 55:14 – 23; *see* **Ex. G**, at 32:12 – 24, 36:7 – 37:21; **Ex. L**, at 216:24 – 217:14; *see also Pollack Decl.*, **Ex. B** at §1.2.

[46] *See Daylong Decl.*, **Ex. F**, at 12:22 – 13:25, 20:24 – 21:18; **Ex. K**, at 95:18 – 24; 97:11 – 13; **Ex. G**, at 32:11 – 16, 37:24 – 38:1; **Ex. L**, at 216:17 – 217:2; 220:22 – 221:1.

[47] Harrison was employed as Meineke's FBC in August 2016, approximately eight months later in April/May 2017, he was terminated and then began working as a group manager for the MCCC Group where he was employed until July 2019.

[48] *Id.*, **Ex. G**, at 47:7 – 21; 186:21 – 187:3.

[49] *See Daylong Decl.*, **Ex. H**, at 150:16 – 22

[50] *Daylong Decl.*, **Ex. G** at 57:3 – 4, 66:9 – 11; **Ex. L**, at 220:14 - 21.

[51] *Daylong Decl.*, **Ex. G**, at 66:23 – 67:20.

[52] *See Daylong Decl.*, **Ex. G**, at 69:7 – 19, 75:10-21.

[53] *Daylong Decl.*, **Ex. M**, at 27:15 – 28:25.

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interaction was limited solely to phone skills training.[54] However, if he had seen anything concerning, he would have informed Brandon Cruz, MCCC Group's vice president, or Jonathan Young, MCCC Group's President, to remedy the matter, but would not correct any issues himself, as MCCC Group was responsible for the operations and management of 4333.[55]

If Cruz or Young did not remedy Harrison's concerns or requests, he had no ability to force them to comply in any way.[56] Similarly, if a store manager, service manager/writer, or technician did not follow the suggested phone script templates provided by Harrison, did not adopt his suggestions on the use of the vehicle inspection report, or failed to perform an inspection, **he had no power or authority to require any of 4333's employees or personnel to comply and had no disciplinary authority against those employees, 4333, or the MCCC Group.**[57] Harrison's testimony and experience is consistent with John Price, Meineke's CR 30(b)(6) designee's testimony that Meineke is "**not able to force our franchisees to do something specifically.**"[58]

It is also uncontroverted that 4333 was solely responsible for the record-keeping relating to its daily operations (inspections and repairs), finances, and personnel matters. Any documents and reporting provided to Meineke relates to 4333's sales performance in order for Meineke to ensure that it receives the proper percentages of contractual royalty payments from 4333 pursuant to the Franchise Agreement.[59] Thus, while Harrison recommended a method of record keeping to 4333 and other franchisees, the "customer packet," during his visits, Harrison could only

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[54] *Id.*
[55] *Daylong Decl.*, **Ex. G,** at 38:13 – 39:7, 201:10-15; *Daylong Decl.*, **Ex. L**, at 217:6 – 219:15; *Pollack Decl.*, **Ex. B** at § 4.2.
[56] *Daylong Decl.*, **Ex. L**, at 219:22 – 220:6, 281:15 – 282:4.
[57] *Id.*, at 222:24 – 226:22.
[58] *Daylong Decl.*, **Ex. F**, at 55:14-15; **Ex. L**, at 294:1 – 295:2.
[59] *See Pollack Decl.*, **Ex. B**, §9.1; *see also Daylong Decl.*, **Ex. G**, at 36:7 – 36:15, 62:1 – 12.

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observe and comment if documents were missing or incomplete—*i.e.* a missing vehicle inspection report **--but had no power or authority to take any action against 4333, its employees, or the MCCC Group itself.**[60] In addition, Johnson confirmed that Meineke never directed him to maintain records in any specific way—MCCC Group's district manager gave him the directive to keep the customer invoice, work order/estimate, and vehicle inspection report in binders for reference.[61]

Other than Harrison's general observations and suggestions of good practices and the requirement to maintain financial records under Section 9.1 of the Franchise Agreement, Meineke does not control how the franchisee keeps and maintains its service records, and Meineke does not request collection or inspection of the 23-point inspection forms.[62]

5. Meineke Has Absolutely No Authority or Control Over 4333 Employees or Personnel Matters.

It is further uncontroverted that Meineke has no authority or control over any of its franchisee's personnel matters. Meineke does not, and has never, hired any of 4333's technicians, store managers, regional managers, and/or corporate employees and officers.[63] Per the franchise agreement, Meineke cannot—and does not—require 4333 to hire and employ technicians possessing certain qualifications or skills—who 4333 hires and what qualifications they require are at their sole discretion.[64]

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[60] *See Daylong Decl.*, **Ex. G**, at 62:1 – 12.
[61] *Daylong Decl.*, **Ex. M**, 142:19 – 143:23.
[62] *See Daylong Decl.*, **Ex. F**, at 152:22-153:5; **Ex. K**, 263:18 – 264:10.
[63] *Pollack Decl.* at ¶ 10.
[64] *Pollack Decl.*, **Ex. B** at §7.9; *Daylong Decl.*, **Ex. F**, at 76:5-8; 77:9-16; *see also* 87:17-19 (regarding steps to make sure franchisees hire certified technicians: "we can't take those steps. That's not part of our agreement. The franchisee is responsible for that. There is nothing we can do. **Legally, we're not allowed to do that.**"); **Ex. G**, at 63:24 – 64:6, 193:13 – 20; **Ex. L**, 243:14 – 245:25, 246:1-3.

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Meineke does not monitor or evaluate the performance of any of 4333's employees, including technicians, does not have access to any franchisee's employee/personnel files at any franchisee's store location, and does not know how, why, or where its franchisees keep and maintain any records, including personnel records.[65] Hiring, discipline, and termination of 4333's employees is the sole responsibility of the franchisee, in which Meineke has no involvement.[66] All of 4333's payroll matters are handled by the franchisee—none of 4333 employees receive their paychecks from Meineke.[67]

Kyle Johnson further confirmed that he makes new hiring decisions, and that 4333 does not provide Meineke with any employee personnel files or decisions, including discipline and terminations—those are all handled by 4333 and the MCCC Group.[68] Johnson was the only individual at 4333 who had the authority to hire, fire, train, and discipline technicians and employees.[69]

a. 4333 Is Responsible for Training Its Employees

4333 is solely responsible for the training of its employees and technicians. As stated in the Franchise Agreement, 4333 is solely

> responsible for hiring all employees of your center and are **exclusively responsible** for the terms of their employment, **including their compensation and training. [4333's owners] are solely responsible for all employment decisions for [their] Center, including those related to hiring, firing, remuneration, personnel policies, benefits, record keeping, supervision and discipline, and <u>regardless of whether you received advice from us on these subjects.</u>**

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[65] *Daylong Decl.*, **Ex. F**, at 72:11-25; *see id., Daylong Decl.*, **Ex. G**, at 64:3 – 6, 65:1 – 6; **Ex. K**, 259:13 – 260:21.
[66] *Daylong Decl.*, **Ex. F**, at 85:5 – 7; 85:17 – 18, 87:14 – 20; **Ex. K**, at 258:15 – 260:21; **Ex. G**, at 193:13 – 24, 194:14 – 20, 195:3 – 6; **Ex. L**, 241:4 – 20; 244:25 – 245:1; 282:5 – 8; **Ex. M**, 128:25 – 129:18.
[67] *See Daylong Decl.*, **Ex. M**, at 12:10-13; 132:9 – 18.
[68] *Daylong Decl.*, **Ex. M**, at 128:24 – 130:6.
[69] *Id.* at 128:24 – 129:18; 135:20 – 136:3.

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Pollack Decl., **Exhibit B** at §7.9 (emphasis added). Thus, while Meineke provides its franchisees with *resources* to train its employees and technicians in Meineke's "System," all other technical and day-to-day training, certifications, and qualifications of employees—including technicians—are entirely conducted and monitored by 4333 and its management.[70]

Technicians at 4333 are trained by managers on site on how to perform a 23-Point Vehicle Inspection.[71] 4333's responsibility and role in training its employees is confirmed by the testimony of Kyle Johnson, Craig Hallgren, and Jeremy Crick.

Johnson testified that he, or another manager or senior technician at 4333, trained technicians on how to complete courtesy inspection, and he trained both Crick and Hallgren how to complete inspections.[72] Crick confirmed that Johnson and the shop foreman were the **only persons** who provided him any training on 4333's procedures and how to complete the inspection form, but not the "actual mechanics" of how to perform the inspection or repairs.[73] Likewise, Hallgren testified that Johnson was the individual who trained him how to complete courtesy inspections.[74] In contrast, neither Johnson, Hallgren, or Crick recalled that they were ever given any training materials by Meineke or that Meineke itself trained them on how to conduct inspections—at most, Harrison provided Johnson with "phone skills" training.

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[70] *See Pollack Decl.*, **Ex B** at §7.9

[71] *Daylong Decl.*, **Ex. K**, at 260:24-261:15 (No knowledge that technicians received training from Meineke); **Ex. L**, at 239:17 – 19; **Ex. M**, at 133:16 – 21; **Ex. N**, at 71:10 – 72:16; **Ex. O**, at 27:15 – 28:4, 29:24 – 30:10; 34:20 – 36:11; 42:23 – 43:2; *see also Pollack Decl.*, **Ex. B** at §7.9.

[72] *Daylong Decl.*, **Ex. M**, at 133:16 – 21; **Ex. N**, at 71:10 – 72:16; **Ex. O**, at 27:15 – 28:4, 29:24 – 30:10; 34:20 – 36:11; 42:23 – 43:2.

[73] *Id.*, **Ex. N**, at 127:4 – 18; 139:9 – 22; 164:23 – 165:13.

[74] *Daylong Decl.*, **Ex. O**, at 27:15 – 28:4, 29:24 – 30:10; 34:20 – 36:11; 42:23 – 43:13.

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III. ISSUES PRESENTED

1. Should the Court dismiss Plaintiffs' claim of direct negligence against Meineke, (*i.e.*, that Meineke "owed a duty" to inspect the Subject Tire for alleged defects or dangerous conditions) as a matter of law because: it is a separate, distinct and uninvolved corporate party that has no right to control and did not control the day-to-day operations of 4333; contractually, 4333 is expressly an independent contractor and not Meineke's agent; and 4333 is solely responsible for training its employees to perform vehicle/tire inspections?

2. Should the Court dismiss Plaintiffs' claim against Meineke for vicarious liability because there is no admissible evidence that Meineke was ever 4333's principal, nor did Plaintiffs justifiably rely on any representation of apparent agency?

IV. EVIDENCE RELIED UPON

Meineke relies on the Declaration of Amanda Daylong and exhibits thereto; Declaration of Noah Pollack and exhibits thereto; and the Court's complete files and pleadings.

V. LEGAL AUTHORITY AND ARGUMENT

A. Legal Standard for Summary Judgment.

The Court is familiar with the standard for summary judgment. It is appropriate if the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, show that there is no genuine issue of material fact and, assuming facts most favorable to the non-moving party, establish the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one on which the outcome of litigation depends in whole or part. *Samis Land Co. v. City of Soap Lake,* 143 Wn.2d 798, 803, 23 P.3d 477 (2001). However, when reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law. *Ruff v.*

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King, 125 Wn.2d 697, 703, 887 P.2d 886 (1995).

"One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses." *Celotex Corp v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Thus, summary judgment should be granted if the plaintiffs fail to make a showing sufficient to establish an element essential to their case and on which they will bear the burden at trial. *Briggs v. Nova Servs.*, 166 Wn.2d 794, 811, 213 P.3d 901 (2009).

Plaintiffs' claims fail because they cannot establish a key element to their negligence claim – the existence of a legal duty owed to them by Meineke. *See Folsom v. Burger King*, 135 Wn.2d 658, 671, 958 P.2d 301 (1998) (setting forth requirements for negligence action: duty, breach of duty, injury, and causation); *see Hansen v. Friend*, 118 Wn.2d 476, 479, 824 P.2d 483 (1992) (no negligence action exists without a duty). The existence of a duty is a question of law. *Folsom*, 135 Wn.2d at 671. Here, the claims against Meineke must be dismissed because the undisputed facts clearly demonstrate that Meineke did not owe Plaintiffs any duty of care as a matter of law.

B. <u>As a Matter of Law, Meineke Is Not Vicariously Liable for 4333's Acts or Omissions, Nor Owed Plaintiffs a Direct Duty to Inspect and Replace the Subject Tire or "Hire" 4333's Mechanics.</u>

A franchisor cannot be vicariously liable to a third party for the acts or omissions of its franchisees when the franchisor does not exert day-to-day control over the franchisee's operations. *Folsom*, 135 Wn.2d at 671-673. In *Folsom*, the estates of two Burger King franchise employees brought suit against Burger King stemming from a robbery that resulted in their deaths. *Id.* at 671. Plaintiffs alleged that the franchisor retained control over its franchisee such that it owed duty to the franchisee's employees.

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The court held that "[i]n order to retain sufficient control, a franchisor must retain the ability to make decisions concerning the daily operation of the franchised restaurant." *Id.* at 673 (emphasis added). Not only did Burger King's franchise agreement expressly state that the franchisee was an independent contractor (as Meineke's Franchise Agreement with 4333 expressly states), and that Burger King had no control over the franchisee's employees (as the undisputed facts establish here), but there was no evidence that Burger King retained control over the security at the franchise restaurant. *Id.* The court underscored that "the extent of control is the critical inquiry." *Id.* at 671.

In the case at bar, the extent of control is likewise critical to the inquiry. There is no admissible evidence that Meineke retained control or had the right to retain control over 4333 employees, much less control over the employee's training for vehicle or tire inspections. Nor did Meineke hire 4333 employees. Simply requiring a franchisee to adhere to a "system," as Meineke did here, without retaining or exerting control of daily operations is insufficient to establish a franchisor's liability to a third party. *Folsom,* 135 Wn.2d 672 (citing *Hoffnagle v. McDonald's Co.*, 522 N.W. 2d 808, 814 (Iowa 1994)).

Like Burger King in *Folsom*, Meineke provides 4333 with a "system" and business model under which to operate;[75] it has an explicit independent contractor relationship with 4333;[76] it has no authority or control over the day-to-day operations of 4333;[77] and it has no authority or control over the supervision, training, hiring, or firing of 4333's employees.[78] Under the plain

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[75] *Pollack Decl.* at ¶¶ 2-3; **Ex. B** at §§1.3(29), 2.1.
[76] *Pollack Decl.*, **Ex. B** at §16.1.
[77] *see Pollack Decl.*, **Ex. B.** at §§ 4.2, 9.5, 16.1.
[78] *see Pollack Decl.*, **Ex. B.** at § 7.9.

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language of the binding decision in *Folsom*, Meineke cannot be liable for 4333's negligence.

Also informative are the two out-of-state cases upon which *Folsom* relies—*Little v. Howard Johnson Co.*, 183 Mich. App. 675, 455 N.W.2d 390 (1990) and *Hoffnagle,* N.W. 2d 808, *supra.* In *Little,* Plaintiff, a patron of the franchisee restaurant, sued the franchisor under vicarious liability. The *Little* court *rejected* Plaintiff's argument that an agency relationship is created "where the franchisor retains the right to set standards regarding the products and services offered by the franchisee, the right to regulate such items as the furnishings and advertising used by the franchisee, and the right to inspect for conformance with the agreement." 183 Mich. App. at 680. Howard Johnson's agreement gave its franchisee sole and exclusive control over the "method and details" of the day-to-day operations of its restaurant—the franchisor had no power to control the details of the franchisee's day to day operations; had no control over hiring, firing, or supervision of employees; and retained no control over the daily maintenance of the premise other than the general obligation of "clean" and "orderly" condition. *Id.* at 682.

Similarly, in *Hoffnagle*, an employee of a McDonald's franchisee sued the franchisor for an attempted abduction while she was at work. The court affirmed summary judgment because the critical factor of a franchisor's liability to a third party for the torts of its franchisees is whether the franchisor retains control over the day-to-day operations of the business, and mere "retention of the right to inspect the quality of the operation and of control over the work to the extent necessary to implement that right" does not create a legal duty. 522 N.W.2d at 814. In evaluating the "control" element, the *Hoffnagle* court pointed out that the franchisees had the power to control the day-to-day operation of the restaurant, that they owned the business equipment, operated the business, held the operating licenses and permits, determined the wages, provided

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the basic daily training and insurance for employees, and had the sole power to hire, fire, and discipline the franchisee's employees. In contrast, "McDonalds simply [had] the authority to require the franchisee to adhere to the "McDonald's system," to adopt and use McDonald's business manuals, and to follow other general guidelines outlined by McDonald's." *Hoffnagle*, 522 N.W.2d at 814.

Meineke, like the franchisors in *Folsom*, *Little*, and *Hoffnagle*, had no control over or right to control any aspect of 4333's day-to-day operations. The franchise agreement clearly established that 4333 (1) was an independent contractor; (2) retained responsibility for the day-to-day management and operation of the franchisee's business; and (3) was "solely responsible for developing and operating [the] Center and for all associated expenses."[79]

And, like the franchisee in *Hoffnagle*, ***4333 alone*** held the operating licenses and permits for its Center, determined the wages of its employees, provided for the basic daily training of its employees, and retained sole control and authority over hiring, firing, and supervising its employees.[80] Meineke did not train, supervise, or monitor 4333 employees, certify 4333's technicians, hire or terminate 4333's technicians, or require them to perform inspections a certain way.[81] All training, supervision, and monitoring of technicians and their completion of inspections was conducted by 4333's general manager, Kyle Johnson. Meineke did not have access to 4333's personnel records, and *has never collected 4333's 23-point inspection reports*.[82]

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[79] *See Pollack Decl.*, **Exs. B** and **C.**
[8080] *See, e.g., Pollack Decl.*, **Ex. B** at §§7.8, 7.9; *see also* **Ex. B** at §7.3 (maintenance of equipment and fixtures).
[81] *Daylong Decl.*, **Ex. F** at 75:14 – 20, 77:9 – 14; 78:5-24, 85:3-5, 85:17-18;, 176:19-25; **Ex. K**, at 258:15 – 261:15.
[82] *Id.*

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Meineke did not operate 4333's payroll.[83] Further, while Meineke provided 4333 with a system and business plan, it could not—and did not—force their franchisees to operate in accordance with the operation manual, the "playbook," or the steps of the 23-point inspection.[84]

Meineke anticipates that Plaintiffs will argue that Meineke, through Brett Harrison's "observations and suggestions on improvement" somehow transformed this to legally "controlling" the method and means of the courtesy inspection. Not true. Harrison was on site at 4333 *at most* four days *per year for a couple of hours* each visit wherein he observed the technicians performing inspections. If this is the extent of "control" necessary to trigger liability, then *Folsom v. Burger King*, 135 Wn.2d 658, 671, 958 P.2d 301 (1998) could not be right, but instead, it is the controlling precedent that this Court must follow.

4333 employee Kyle Johnson testified that, in 2016, the store was open six to seven days per week, or 312 to 364 days per year. Johnson testified that he supervised and trained the technicians, and Craig Hallgren and Jeremy Crick stated that Johnson—or another 4333 manager—would regularly inspect their work, as many as every other vehicle. Viewing the evidence in the light most favorable to Plaintiffs and presuming Harrison did offer feedback and some guidance or corrections when he observed inspections in the few hours he was on site at 4333, that "feedback" and "coaching" is wholly insufficient to establish the necessary level of authority and right to control to hold Meineke vicariously liable for 4333's actions.

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[83] *Id.*
[84] *Daylong Decl.*, **Ex. F**, at 62:13 – 34:3, 71:7 – 72:8, 173:22-25, 174:1-7, 182:1-4, 185:14-19.

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The *overwhelming and undisputed evidence* is that 4333 manager Johnson— not Meineke's Franchise Business Consultant Brett Harrison— directed the day-to-day operations of the store and the means and methods of inspections. This clearly demonstrates that Meineke had no day-to-day authority or control, or right to control, the operations of 4333. Therefore, under well-established, binding Washington precedent, and the undisputed facts in the record, Meineke did not exert the requisite legal control over 4333 to establish its liability to a third party for 4333's alleged acts or omissions.

C. Meineke Has No Agency Over 4333, nor did Plaintiffs Justifiably Rely on Any Representation of Apparent Agency.

Plaintiffs cannot save their case against Meineke by claiming that it was the apparent agent of 4333. Apparent agency occurs where a principal makes an objective manifestation leading a third person to justifiably believe the wrongdoer is an agent of the principal. *D.L.S. v. Maybin*, 130 Wn. App. 94, 98, 121 P.3d 1210 (2005); *see also* Restatement (Second) of Agency §267 (1958). Apparent agency exists when it meets the following three-part inquiry: "[1] the actions of the putative principal must lead a *reasonable* person to conclude the actors are employees or agents; [2] the plaintiff must believe they are agents; [and 3] the plaintiff must, as a result, rely upon their care or skill, to [their] detriment." *Id.*

As an initial matter, it is undisputed that Plaintiff Kelly has no standing to assert any claim of liability against Meineke under apparent agency because, *at minimum*, she cannot establish the third element—she did not rely upon Meineke's "care or skill" as it was not her vehicle serviced at 4333. Nonetheless, Plaintiff MacKenzie cannot establish any of the requisite elements to prove apparent agency.

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First, the record is devoid of any facts that a reasonable person could conclude 4333 was Meineke's agent. Meineke never represented itself to Plaintiff MacKenzie or to the public as 4333's principal, there is no evidence or testimony to infer any apparent agency from *Meineke's* actions. In fact, Meineke specifically disclaimed all agency through the Franchise Agreement—requiring 4333 to clearly identify itself in marketing and at the store as an independently owned and operated business and explicitly stating that the relationship between 4333 and Meineke was as independent contractors.[85] Any liability for failing to adhere to the Franchise Agreement lies with 4333, not Meineke.

Plaintiffs are likely to argue that 4333 failed to identify itself as an independently owned and operated business as required by the Franchise Agreement. However, this is still insufficient to establish apparent agency. Even if a reasonable person believed that 4333 was Meineke's agent due to 4333's failure to properly identify itself as required by the Franchise Agreement, apparent authority can be inferred ***only* by the acts of the principal, not of the actors**. *Id.* at 101; *Cf. Greene v. Rothschild*, 60 Wn.2d 500, 374 P.2d 566 (1962) (Yellow Cab Company made safety and service representations after it allowed markings, colors, and name to remain on cabs sold and used by independent owners without notice that no longer owned the cabs), *overruled on other grounds by Greene v. Rothschild*, 68 Wn.2d 1, 402 P.2d 356 (1965); *Adamski v. Tacoma Gen. Hosp.*, 20 Wn. App. 98, 579 P.2d 970 (1978) (hospital held out independent physician as a hospital employee); *Miller v. D.F. Zee's, Inc.*, 31 F. Supp. 2d 792, 797 (D. Or. 1998) (employees of Denny's franchise were told that they were employees of franchisor and franchisor had control

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[85] *Pollack Decl.*, **Ex. B** at §16.1.

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over employment training and complaints).

Mere belief and "general impression" based upon marketing and advertising is not sufficient to establish apparent agency. *See D.L.S.*, 130 Wn. App. at 102-103. Thus, *while 4333 may have breached the terms of the Franchise Agreement* that required 4333 to identify itself as an independently owned and operated franchisee, the franchisor, Meineke, made no representations to Plaintiffs or the public at large that 4333 was its agent. Further, Kyle Johnson testified that if a customer asked whether 4333 was a franchisee location or a corporate-owned location, he would inform the customer that it was an independently owned and operated franchise. Therefore, Meineke itself engaged in no actions or representations that would cause a *reasonable* person to believe that 4333 was its agent.

Second, there is no evidence that either Plaintiff believed 4333 was Meineke's agent. 4333's price point and location induced MacKenzie to service her vehicle at 4333. MacKenzie's testified that she took her car to be serviced at 4333 *because she saw a sign posted on a sandwich board of a special sale for an oil change service.*[86] She had taken her car to 4333 for service on prior occasions based upon advertisements and signs advertising promotions and sales at 4333. *Id.* MacKenzie's husband testified that he had taken the car to 4333 on prior occasions because he had taken other cars to ***that location*** to be serviced and he was satisfied with the service ***at that location*** which was near their home.[87]

And, *third*, MacKenzie cannot establish that she relied on 4333 based on her purported belief that Meineke was 4333's agent. To the contrary, MacKenzie testified that it was the

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[86] *Daylong Decl.*, **Ex. A**, at 55:3-6; 64:24 – 65:18; 65:21 – 23.
[87] *Daylong Decl.*, **Ex. P** *(Deposition of Dennis MacKenzie)*, at 36:23 – 37:4.

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advertisements of promotions and sales, combined with her experience at 4333 that caused her to take her car to 4333.[88]

Accordingly, any claim of apparent agency by Plaintiff Kelly fails as a matter of law because she cannot establish that she relied on any alleged representations or actions by Meineke—it was not her vehicle that was serviced at 4333. In sum, unable to satisfy the elements of apparent agency, Plaintiffs have no viable theory of liability against Meineke and their negligence claim must be dismissed.

VI. CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' claim for direct liability and vicarious liability against Meineke as a matter of law.

I certify that this memorandum contains less than 8,400 words in accordance with King County Local Rule 56(c)(3).

RESPECTFULLY SUBMITTED this 3rd day of January, 2020.

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[88] *Daylong Decl.*, **Ex. A**, at 55:3-6; 64:24 – 65:18; 65:21 – 23.

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DECLARATION OF SERVICE

Pursuant to RCW 9A.72.085, I declare under penalty of perjury and the laws of the State of Washington that on the below date, I delivered a true and correct copy of DEFENDANT MEINEKE'S MOTION FOR SUMMARY JUDGMENT via the method indicated below to the following parties:

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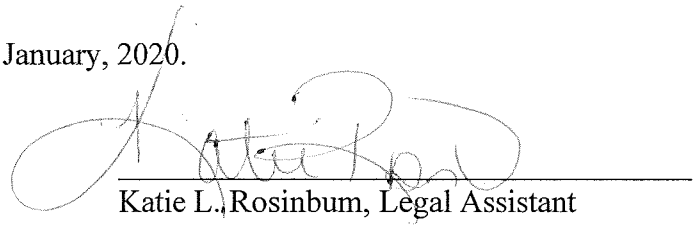
DATED this 3rd day January, 2020.



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