



**CERTIFICATE OF SERVICE**

I hereby certify this document filed through the ECF system will be sent electronically to the registered participants, Elizabeth M. Noonan, Esq., at [enoonan@apslaw.com](mailto:enoonan@apslaw.com), Richard M. Gelb, Esq., at [rgelb@gelbgelb.com](mailto:rgelb@gelbgelb.com), Daniel K. Gelb, Esq. at [dgelb@gelbgelb.com](mailto:dgelb@gelbgelb.com), and Kevin Bristow, Esq., at [KJBristowlaw@verizon.net](mailto:KJBristowlaw@verizon.net), identified on the Notice of Electronic filing (NEF), on this 29<sup>th</sup> day of September, 2008.

/s/ Jeffrey S. Brenner



Without refinancing by CIT (or anyone else, for that matter), Barkan claims that its five (5) poorly performing Dunkin' Donuts shops ended up in bankruptcy. (Id. ¶ 41). While bankruptcy was, indeed, the fate of Barkan's existing Dunkin' Donuts shops, any claims relating to their bankruptcy are not in issue and have been dismissed from this case. Barkan v. Dunkin' Donuts, Inc., 520 F. Supp. 2d 333, 339 (R.I. 2007). Following the bankruptcy, Barkan retained its ownership interest in the SDAs, and sued Dunkin' for the "lost ... value of the SDAs." Id. Barkan's final supposition, voiced by its expert, is that Barkan has suffered "lost profits" exceeding \$18 Million that it would have earned, albeit "not in the real world," from the additional Dunkin' Donuts shops which were and remain unbuilt, and in three (3) instances, not even associated with an identifiable piece of real estate.<sup>1</sup> With respect to the issue framed by Barkan's Amended Complaint, the "lost... value of SDAs," the expert candidly says he has no opinion, and does not know what the phrase means. (Dunkin' Statement of Undisputed Material Facts ("SOF") ¶¶ 130-31).

Barkan's support for these wild speculations is not even reed-thin. Throughout Irwin Barkan's deposition and the arguments asserted by Barkan throughout this case, sophistry substitutes for proof. While Irwin Barkan's disingenuous personal belief that Dunkin' breached its Settlement Agreement obligation to "work with" CIT and Barkan in "an attempt to refinance" has fueled countless motions, at the end of the day Barkan's belief is as empty as its pocket was when it came time to meet its obligations under the Settlement Agreement, much less its pre-existing obligations to CIT (see, infra, for discussion of Barkan's breaches of the Settlement Agreement, and SOF ¶¶ 81, 104 & 124).

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<sup>1</sup> The opinions of Barkan's putative expert, Kenneth Gartrell, will be the subject of a separate Motion to Exclude, should that Motion become necessary.

In light of the arguments which follow, and based on the undisputed facts, this Court should grant Dunkin's Motion for Summary Judgment and dismiss all of the remaining counts of Barkan's Amended Complaint for lack of competent evidentiary support.

### **Background**

This matter is familiar to the Court by virtue of its previous opinion on Dunkin's motions to dismiss some of Barkan's claims, Barkan v. Dunkin' Donuts, Inc., 520 F. Supp. 2d 333 (R.I. 2007), and the numerous motions that the Court has addressed during the case's pendency (see, e.g., Court Docket Nos. 18, 29, 36, 56, 57, 67, 70, 71, 83-85, 96, 104 & 107). Dunkin' has filed with its Memorandum an exhaustive Statement of Undisputed Material Facts, supported by record references, which itemize in careful chronological order the facts that are relevant to its Motion for Summary Judgment. Rather than repeat those facts here, Dunkin' incorporates its Statement of Undisputed Material Facts and the exhibits that are attached to that Statement.

### **Standard of Review**

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). To secure summary judgment, the moving party must show that "there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the moving party meets this burden, the burden shifts, and "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." National Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 735 (1st Cir. 1995).

Rule 56(c) mandates an entry of summary judgment against a party who fails to make a sufficient showing to establish an element essential to that party's case. Celotex Corp., 477 U.S. at 322. The test is whether or not, as to each essential element, there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. DeNovellis v. Shalala, 124 F.3d 298, 306 (1st Cir. 1997).

Significantly for this case, the "evidence illustrating the factual controversy cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve." Mack v. Great Atl. & Pac. Tea Co., 871 F.2d 179, 181 (1st Cir. 1989)). "Even in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely on conclusory allegations, improbable inferences, [or] unsupported speculation." Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990).

Therefore, to defeat a properly supported motion for summary judgment, the nonmoving party must establish a trial-worthy issue by presenting "enough competent evidence to enable a finding favorable to the nonmoving party." Goldman v. First Nat'l Bank of Boston, 985 F.2d 1113, 1116 (1st Cir. 1993). This Court may not consequently consider hearsay evidence on summary judgment. See Vazquez v. Lopez-Rosario, 134 F.3d 28, 33 (1st Cir. 1998); Garside v. Osco Drug, Inc., 895 F.2d 46, 49 (1st Cir. 1990); see also Fed. R. Civ. P. 56(e).

This Court must also "disregard improbable or overly attenuated inferences, unsupported conclusions, and rank speculation." Abbott v. Bragdon, 107 F.3d 934, 938 (1st Cir. 1997), vacated on other grounds, 524 U.S. 624 (1998); see also Pegano v. Frank, 983 F.2d 343, 347 (1st Cir. 1993) (to defeat a motion for summary judgment, the evidence offered by the adverse party

cannot be "merely colorable" or speculative). Rather, the evidence "must be significantly probative of specific facts." Perez v. Volvo Car Corp., 247 F.3d 303, 317 (1st Cir. 2001).

### Argument

Barkan constructs its case upon layers of speculation unconnected to evidentiary foundation. For Barkan to succeed on its claim, it must show that: (1) Dunkin' breached the Settlement Agreement; (2) but for Dunkin's alleged breach, CIT would have refinanced Barkan; (3) had CIT refinanced Barkan's existing loan, it would have been able to otherwise develop, finance, build and successfully operate new Dunkin' Donuts locations under its SDAs; (4) Dunkin's breach of the Settlement Agreement caused Barkan to suffer a "loss of value of the SDAs," and (5) the "loss of value of the SDAs" is measured by lost profits over an anticipated 20 years of operations of Dunkin' Donuts shops that were, in fact, never built, developed or operated, on sites that were not secured or in some cases, even identified, by a franchisee (Barkan) with an abysmal track record of performance as a Dunkin' operator. As this Memorandum demonstrates, Barkan is unable offer any competent evidence in support of its claims as a matter of law.

#### **A. Barkan's Claim is Limited to the Alleged Lost Value of SDAs.**

This Court previously determined, in ruling on Dunkin's Rule 12(b)(6) Motion to Dismiss, that Barkan's claim is limited to damages related to Barkan's alleged loss of value of its SDAs. This Court specifically found:

Although Plaintiffs make some statements concerning the demise of the existing donut shops in their Complaint, a close examination of the Complaint indicates that its primary focus is the lost value of the SDAs. In paragraph 41 of the Complaint, Plaintiffs assert: "Because of the Dunkin' Defendants' above-described wrongful actions which resulted in the improper termination of the SDAs, the Barkan Plaintiffs lost the value of the SDAs which were in an amount of at least \$3,000,000.00." This dollar amount is the

estimated damages amount consistently sought in all portions of the Complaint. The Court accepts this as the accurate articulation of Plaintiffs' claim, and will consequently analyze the Plaintiffs' causes of action only as they relate to Plaintiffs' rights under the SDAs.

Barkan, 520 F. Supp. 2d at 339.<sup>2</sup>

**B. Dunkin' Did Not Breach the Settlement Agreement.**

**1. Dunkin' Complied with Paragraph 4 of the Settlement Agreement.**

Paragraph 4 of the Settlement Agreement obligated Dunkin' to "work with" CIT and Barkan "to attempt to refinance" Barkan, and to request that CIT issue refinancing to Barkan. (SOF ¶ 82). As explained below, Dunkin' did just that for months before the Settlement Agreement was finally executed, and then continued to do so after its June 2004 execution. Indeed, the entire process of helping Barkan to attempt to re-finance, first with GE Franchise Finance and then with CIT, began in September 2003 and continued through and beyond the execution of the June 15, 2004 Settlement Agreement. (See SOF ¶¶ 24-106). While negotiation of the Settlement Agreement began in December 2003 (and was prolonged chiefly by Barkan), the language requiring that Dunkin' "work with" CIT "to attempt to refinance" had been fixed since December, and Dunkin' had acted consistently for months beforehand to achieve this goal. (SOF ¶ 39). At each step of the way, Barkan was an active participant in, and subscriber to, Dunkin's efforts. (See, e.g. SOF ¶¶ 27, 32, 41 & 57). That neither Dunkin' nor Barkan was able to achieve the goal is a reflection, first and foremost, of Barkan's uncreditworthiness, which was evidenced most graphically by his refusal to pay CIT in June 2004 (much less for many months

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<sup>2</sup> In that same decision, this Court dismissed Count IV, violation of Massachusetts Ch. 93A, and Count V, tortious interference with contract, of Barkan's Amended Complaint. See 520 F. Supp. 2d at 340 & 342. Barkan later filed a Motion for Leave to File a Second Amended Complaint, but withdrew that Motion upon receipt of Dunkin's opposition. (See Court Docket No. 77).

before and after) at the very time he was asking it to refinance his loans, and buttressed by his inability to obtain any other financing, before or after the CIT rejection, by any other lender. (SOF ¶¶ 26, 71 & 104).

Beginning with GE Franchise Finance's rejection of Barkan's refinancing application (which was also supported by Dunkin') in mid-September 2003, (SOF ¶ 26), Dunkin' continuously "worked with" CIT and Barkan "to attempt to refinance" Barkan's existing loans. On October 28, 2003, Barkan made a presentation to multiple Dunkin' employees, in which he told them that monthly cash flow losses for its existing shops were \$1,686,000, its net operating loss exceeded \$2 Million, and it wanted to reduce its current CIT debt service as part of "getting to profitability." (SOF ¶ 27). Immediately following the presentation, Dan Connelly, Dunkin' strategic asset manager, told his supervisor David Harrington that "Betheny [Blowers] and I will work with Irwin to start the CIT refinancing process." (SOF ¶ 28). In fact, Blowers, who was the Dunkin' employee responsible for the day-to-day relationship with CIT, had already called Barkan to suggest that he and his in-house accountant Gary Urso "move ahead with Jackie L. [Lombardi, the CIT business person responsible for Barkan's account] to put the CIT refinance in place...." (SOF ¶ 29).

As part of her efforts to move Barkan's refinance forward, on October 30, 2003, Blowers contacted Laura Sneed, her counter-part at CIT, to obtain updated balances, days past due and details of cure payments that Dunkin' (then known as Allied Domecq PLC) had made on Barkan loans, and on October 31, 2003 provided the information from CIT to Connelly and Harrington. (SOF ¶ 30).

During early November 2003, Connelly, as part of his effort to help with Barkan's refinancing, worked on various scenarios, including sale of the Providence stores, to address

Barkan's financial difficulties, which he presented to Barkan. (SOF ¶ 31). In response, Barkan agreed that sale of the Providence stores should be pursued, and that "in its absence..., or more cash flow relief from ADQSR we will find ourselves in an untenable situation which could be unwelcome for both D&D Barkan and Allied." (SOF ¶ 32). Connelly interpreted Barkan's message as a threat of legal action against Dunkin', and so advised Harrington. (SOF ¶ 33). On November 13, 2008, Barkan expressly threatened to sue Dunkin'. (SOF ¶ 34).

Barkan's financial position continued to worsen. By November 17, 2003, Barkan's negative cash flow was \$40,000-\$50,000 per month, and its cumulative net loss exceeded \$2.1 Million and was growing. (SOF ¶ 35). On November 25, 2003, Dunkin' sent Barkan six (6) notices of default under its franchise agreements, which demanded payment of more than \$90,000 in unpaid franchise and advertising fees, rents and other charges. (SOF ¶ 36). Thereafter, on December 3, 2003, Barkan's current pro hac vice counsel, Richard M. Gelb, wrote to Dunkin's in-house counsel Lionel J. "Bud" Remillard, seeking to meet for a discussion of the notices and issues related to store performance. (SOF ¶ 37). Attorney Remillard replied to Gelb, advising that there would be no meeting, and that Barkan would soon hear from Dunkin's business people. (SOF ¶ 38).

On December 5, 2003, Connelly wrote Barkan, offering that Dunkin' [then ADQSR] would "agree to work with CIT to attempt to re-finance your existing debt." (SOF ¶ 39). Connelly's letter contained a draft Settlement Agreement draft, asked Barkan to "sign a settlement agreement in the form attached," and returned a counter-signed copy of the letter by December 16, 2003, so that the parties could finalize the necessary documentation by December 23, 2003, including extension of the cure deadlines in the November 25, 2003 notices. Id.

In reply to Connelly's draft Settlement Agreement, Barkan and his lawyers began a series of negotiations over the term of the Settlement Agreement that extended from December 2003 through June 15, 2004. (SOF ¶ 40). By March 2004, Barkan's lawyers were sending stand-still agreements to Dunkin', but Barkan had refused to sign the Settlement Agreement. (SOF ¶ 48).

Throughout this entire October 2003-March 2004 period, Blowers monitored the status of the settlement agreement, and provided information to CIT and Barkan to facilitate Barkan's re-financing efforts. (SOF ¶ 49).

On April 1, 2004, Barkan thanked Blowers "for putting the CIT mechanics in motion," and asked her to attempt to negotiate a reduced fee for the refinancing from CIT on his behalf. (SOF ¶ 53). According to Blowers' hand-written notes on her file copy of Barkan's April 1, 2004 email to her, Barkan asked if CIT would waive its usual re-write fee, and also told her that he did not want CIT to contact its suppliers and "make anyone leary [sic] of a distressed network."<sup>3</sup> (SOF ¶ 54).

Barkan only signed the Settlement Agreement in June 2004 when Dunkin' refused to sign a subordination agreement for real estate in Burrillville unless he did so. (SOF ¶ 72). Barkan was extremely angry that Dunkin' "held him up" over the subordination agreement and made him sign the Settlement Agreement. Id. Dunkin' signed the Settlement Agreement on or about June 17, 2004. (SOF ¶ 74).

Throughout this entire period from late October 2003 through and following June 15, 2004, Dunkin' continued to "work with" CIT and Barkan "to attempt to refinance" his CIT debt,

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<sup>3</sup> Later, when she had her discussion with Shelly Rush, CIT Portfolio VP, Blowers acted consistently with Barkan's expressed desire for confidentiality concerning its "distressed network" when Rush pressed her for detail about Barkan's store closures. (SOF ¶¶ 54 & 91).

notwithstanding Barkan's escalating debts to Dunkin' under the franchise agreements, failures to pay fees and develop under the SDAs, continuing failures to pay CIT and threats of suit.

By June 16, 2004 (and on or about June 17, when Dunkin' counter-executed), Blowers had already communicated multiple times with CIT and Barkan in an effort to assist in CIT's refinancing. (See, e.g. SOF ¶¶ 30, 49 & 50). By that time, "interest only" for 6 months was the most CIT would do, and then only if Barkan paid a \$7,000 fee, which he never paid. (SOF ¶ 66). Barkan was involved in every step of Blowers' efforts and communications with CIT, and at Blowers' invitation, communicated directly with Laura Sneed. (See SOF ¶ 49).

The end of Barkan's attempt to refinance with CIT came in late July 2004. By that time Barkan himself had submitted an application for refinancing directly to Sneed at CIT in April 2004, but Sneed (if she ever received it) did not provide it to her supervisor Rush. (SOF ¶¶ 59-63). By that time, Sneed had not seen the financial statements that Barkan says accompanied his April application (if he ever sent it). (SOF ¶ 61). By that time, Barkan failed to send a narrative business plan as requested by CIT, and instead sent two (2) copies of indecipherable, minutiae laden financial print outs that neither Sneed or Rush could read. (SOF ¶¶ 84-86). By that time, Barkan had expressed concern to Blowers that CIT not contact suppliers for fear of learning of a "distressed network." (SOF ¶ 54). And last, by that time, Barkan had failed to pay CIT since October 2003, and continued not to pay it at the same time he was asking it to refinance. (SOF ¶ 104).

Dunkin's obligation was to "work with" CIT and Barkan "to attempt to refinance" Barkan's existing debt with CIT. (SOF ¶ 82). Dunkin' had no obligation to do the impossible, or even an obligation to succeed in getting CIT to refinance, and Barkan acknowledged as much by the Settlement Agreement's express words that "FRANCHISOR makes no representation that

CIT will provide such refinancing.” Id. In the face of all this evidence, and in the absence of competent evidence to the contrary, Barkan’s claim that Dunkin’ did not “work with” CIT is unmitigated and unsupported gall.

**2. Barkan Admits That He Has No Competent Proof that Dunkin’ Failed to Request CIT to Refinance.**

Despite Irwin Barkan’s direct participation in CIT’s review of the refinancing request, Barkan alleges that Dunkin’ breached the Settlement Agreement by “failing to request the financing from CIT ....” (Amended Complaint at ¶ 50). Barkan’s basis for this allegation is non-existent, as he testified that he does not know if a request was made or not:

Q. And is it your view that a request was made but it was not a serious request?

A. I don’t know.

Q. Well, let’s break that down. Was a request made, serious or otherwise?

A. I don’t know.

Q. Okay. You don’t know whether or not a request was made?

A. I don’t know for certain.

(SOF ¶ 80).

Barkan’s claimed lack of certainty is no match for the multiple emails between Blowers, Sneed, Connelly, and Barkan that all support the conclusion that Dunkin’ had made, and that Barkan knew of and supported, a refinance request. (See, e.g. SOF ¶¶ 28, 30-32, 39, 44 & 49). Barkan consequently has no factual basis, as a matter of law, to support its claim that that Dunkin’ breached the Settlement Agreement by failing to make a refinancing request.

**3. No Competent Facts Support Barkan's Allegation That Dunkin' Did Not "Work With" CIT.**

Barkan's allegation that Dunkin's breached the Settlement Agreement because Dunkin' failed to "work with" CIT similarly fails for lack of proof. (Amended Complaint at ¶ 50). Barkan specifically points to Dunkin's alleged failure to submit information to CIT on a timely basis and Blowers' alleged failure to provide full responses to Rush's request for information. (SOF ¶ 107). Barkan identifies only four (4) pieces of information that he contends Dunkin', and more specifically Blowers, allegedly failed to submit to CIT, namely "recourse" letters, notification that the Dunkin' finance committee had approved the refinancing, Barkan's narrative business plan, and information to Rush regarding Barkan's closed stores. Id. Barkan also summarily claims that Dunkin' "did not make a positive effort," and failed "to advocate for the loan," without factual support or detail other than those alleged shortcomings that Barkan attributes to Blowers. Id.

The undisputed facts demonstrate that Barkan's allegations regarding Dunkin's actions or inactions are insufficient as a matter of law to demonstrate that Dunkin' breached the Settlement Agreement. Blowers' so-called "failure" to return executed copies of recourse letters to CIT is not a breach of the Settlement Agreement.<sup>4</sup> The undisputed testimony from CIT's Sneed is that she sent the recourse letters (by which Dunkin' would have guaranteed the new terms of the prospective Barkan refinancing) to Dunkin' prematurely and in error, as the recourse letters should not have gone out until CIT had given final approval for that refinancing. (SOF ¶ 69).

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<sup>4</sup> Barkan's effort to make hay out of the recourse letter issue is emblematic of its approach to this case. There is no question that Sneed was not authorized to send out recourse letters, and had Blowers improvidently signed them in the short window between Dunkin's execution of the Settlement Agreement and CIT's request for a business plan, the recourse letters would have been immaterial to CIT's decision to approve a refinance. Nonetheless, Barkan attempts to make something out of nothing in the absence of proof of a real failure to "work with" CIT. (SOF ¶ 69).

Shelly Rush, then CIT's Vice-President – Portfolio and the person with approval authority for the Barkan refinancing request, testified that the receipt of executed recourse letters from Dunkin' was not a prerequisite, or even a consideration, to her approval of the refinancing. Id. For his part, Irwin Barkan concedes that he has “no basis to dispute” that Sneed sent the recourse letters in error. (SOF ¶ 80). The submission *vel non* of the errantly sent recourse letters consequently cannot constitute a breach of the Settlement Agreement as a matter of law, as those letters played no role in CIT's refinancing decision.

Barkan also chides Blowers for her purported failure to tell CIT that the Dunkin' finance committee had approved the loan. (SOF ¶ 107). There is no proof on this record that CIT required or expected such notification, or that such notification would have effected CIT's consideration of the refinancing request positively. Rather, CIT had extensive interactions with Blowers regarding the proposed Barkan refinancing, (see, e.g., SOF ¶ 49), and never once raised a concern regarding Blower's authority to make the request. Moreover, finance committee approval is not a contractual prerequisite for CIT to refinance Barkan, and even if it were, Dunkin' could have waived this requirement, as it benefited only Dunkin'. See, e.g., Fracassa v. Doris, 876 A.2d 506, 510 (R.I. 2005) (“party may waive condition precedent if the condition is only for the benefit of the waiving party”).

As with its contrived recourse letters argument, Barkan appears to conjure this issue out of thin air. Moreover, the evidence is clear that Dunkin's desire to assist Barkan to refinance pre-dated the Settlement Agreement execution by many months, and that those efforts were approved by Dunkin's finance committee. (SOF ¶ 25).

Barkan's claim that Blowers failed to submit Barkan's narrative business plan, (SOF ¶ 107), is likewise without substance. Irwin Barkan admits that he never provided Blowers or

anyone else at Dunkin' with an actual copy of his narrative business plan. (SOF ¶ 98). Rather, Barkan attempted to transmit this narrative along with financial spreadsheets via e-mail to Blowers for forwarding to CIT, but erred by attaching two sets of the financial data and omitting the narrative. (SOF ¶¶ 98-99). For Barkan to base a claim that Dunkin' failed to "work with" CIT because Blowers did not remedy an error that he created, and that his own accountant (who also received a copy of the email and attachments from Barkan) did not correct, is disingenuous in the extreme.

Barkan's more generalized complaints about the alleged failure of Dunkin' to "work with" CIT also lack any competent evidentiary support. Barkan premises these allegations entirely on an inadmissible, hearsay statement that Barkan attributes to Sneed and on the deposition testimony of Shelly Rush. (SOF ¶ 107). Barkan's sole source for Sneed's alleged statement, to the effect that CIT denied the refinancing request due to Dunkin's failure to submit all of the necessary paperwork, is his own self-serving testimony as to what Sneed allegedly told him. *Id.* For her part, Sneed expressly denies making this statement. (SOF ¶ 105). Barkan's proffer of Sneed's out of court (and expressly denied) statement is inadmissible hearsay without exception that cannot be considered in the summary judgment context. *See, e.g., Vazquez*, 134 F.3d at 33.

Reliance on Rush's testimony is perhaps more problematic for Barkan. Rush testified that she "couldn't analyze all the information in front of me [contained in Barkan's self-prepared financial spreadsheets] because I didn't know what I had the way it was presented." (SOF ¶ 86). Because of Rush's difficulties deciphering Barkan's submission, Rush testified that she and Sneed called Blowers. (SOF ¶ 87). During that conversation, Rush attempted to elicit from Blowers the financial status of Barkan's franchises, and learned that two (2) of the locations for

which Barkan was seeking refinancing had closed. (SOF ¶ 88). Rush continued to push for additional detail regarding Barkan's full financial picture, but Blowers was understandably chary about disclosing anything beyond the fact that two stores had closed, given that additional information disclosing Barkan's precarious financial position would likely be inimical to Barkan's refinancing request, (SOF ¶ 91), and was expressly contrary to Barkan's instructions to her that he did not want CIT to contact his suppliers for fear it or they (the suppliers) would become "leary [sic] of a distressed network." (SOF ¶ 54).

Barkan's claim is that Rush's testimony demonstrates that Dunkin' breached the Settlement Agreement by not fully responding to CIT's probing requests for full, "warts and all" financial information. That position ignores that these disclosures were contrary to Barkan's interests, and expressly contradicted Barkan's instructions to Blowers that he did not want "to make anyone leary [sic] of a distressed network." Id. Moreover, such disclosure is directly contrary to Barkan's position that Dunkin' was obligated "to advocate for the loan." (SOF ¶ 107). In an ocean of cooperation, this conversation is, at best, a drop in the bucket, and cannot sustain a conclusion that Dunkin' failed to "work with" CIT.

Moreover, it was Barkan, and not Blowers or Dunkin', who was supposed to make full disclosure to CIT if any of its stores closed. Pursuant to its loan documents with CIT, Barkan was obligated not to close the financed businesses, or remove the collateral. (SOF ¶ 103). Had Barkan so informed CIT of its violations of its security agreement obligations, Sneed would not have had to ask Blowers for this information. And, Barkan's failure to notify CIT of store closures strongly signals its acknowledgement that such notification would have undermined Barkan's ability to refinance, and reinforces the wisdom of Blowers' decision to protect Barkan's confidences. After all, if Barkan had not told CIT of his store closures, and expressly told

Blowers that he did not want to make “anyone leary [sic] of a distressed network,” (SOF ¶ 54), the person to provide the detail Rush was seeking was Barkan, and not Blowers.

Most significantly in the summary judgment context, Barkan has not elicited any evidence, from an expert or otherwise, to the effect that Dunkin’ failed to “work with” CIT in an attempt to refinance Barkan. Barkan has not adduced any evidence as to what Dunkin’ should have allegedly done differently, other than those items discussed above, in order to satisfy Dunkin’s obligation to work with CIT. Barkan’s inability to create a material issue of fact on this point is dispositive. See, e.g., Celotex Corp., 477 U.S. at 322.

#### **4. Barkan’s “Best Efforts” Standard Is Unenforceable.**

Barkan's attempt to enforce an elevated “best efforts” standard is unrecognized by Rhode Island law and extra-contractual. (See Amended Complaint at ¶ 52). Under Rhode Island law, “a party’s diligent, reasonable, good faith effort to fulfill the obligations imposed by the contract is good enough to qualify as ‘best.’” Reyelt v. Danzell, 509 F. Supp. 2d 156, 165 (D.R.I. 2007) (Lagueux, J.). Barkan apparently believes that Dunkin' was obligated to exhaust all options, whether reasonable or not, to ensure that CIT provided refinancing (options Barkan is unable to identify). This position ignores the express disclaimer in the Settlement Agreement that “FRANCHISOR makes no representation that CIT will provide such financing.” (SOF ¶ 82). And, as discussed above, Barkan has failed to adduce any competent evidence that Dunkin’ was not diligent or reasonable, or failed to exercise good faith.

#### **C. Dunkin’ Did Not Breach the Implied Duty of Good Faith and Fair Dealing.**

Barkan’s breach of the implied duty of good faith and fair dealing count incorporates by reference the same insufficient factual allegations supporting its breach of contract count. (See Amended Complaint at ¶ 56 (incorporating the “wrongful conduct described herein”)). “[A]

claim for breach of the duty of good faith and fair dealing is precluded where the claim arises from the same factual allegations as a breach of contract claim.” Roy v. General Elec. Co., 544 F. Supp. 2d 103, 109-10 (D.R.I. 2008); see also Hord Corp. v. Polymer Research Corp. of America, 275 F. Supp. 2d 229, 237 (D.R.I. 2003) (Lagueux, J.). This Court should therefore dismiss Barkan’s breach of the implied duty of good faith and fair dealing count for being duplicative of its breach of contract cause of action. See id. (“Given that Plaintiff’s claim for breach of duty of good faith and fair dealing essentially ‘incorporates by reference’ the allegations in the previous claim of breach of contract, it must be dismissed.”).

Barkan’s claim also founders legally and factually. The duty of good faith and fair dealing obligates a party to act consistently with the purpose of the contract, so that there is no breach of that duty where a contract contemplates a specific action by a party.

Lifespan/Physicians Servs. Org., Inc. v. AON Risk Servs. of Mass., Inc., 345 F. Supp. 2d 214, 225 (D.R.I. 2004) (Lagueux, J.). In this case, Dunkin’ performed as the Settlement Agreement required by working directly with CIT to attempt to secure refinancing for Barkan. Barkan has failed to articulate any substantive factual basis for his contention that Dunkin’ did not do so. Barkan’s breach of the implied duty of good faith and fair dealing claim consequently fails as a matter of law, and should be dismissed.

**D. Barkan’s Breach of the Settlement Agreement Prevents Barkan From Seeking Enforcement of It.**

Barkan undisputedly committed multiple breaches of the Settlement Agreement. Barkan agreed that it would “timely pay all rents and other charges under the leases” pursuant to Paragraph 2 of the Settlement Agreement. Barkan defaulted on its leases on multiple occasions after execution of the Settlement Agreement. Barkan was also obligated to make SDA installment payments under the Settlement Agreement, and made none. Specifically, Barkan

failed to pay SDA installments for the Burrillville/Wayland Square SDA, the East Greenwich SDA, and the Cranston SDA, each for \$33,333, and further failed to develop and open the required units under those SDAs. (SOF ¶¶ 122 & 124). The payment of these amounts and the development and opening of these shops were an express obligation of Barkan under the Settlement Agreement. (SOF ¶ 81). Most astoundingly, given Barkan's and Dunkin's efforts since October 2003 to obtain CIT's consent to refinance, and Barkan's commitment in Paragraph 4 "not to further default under [the current] financing and to make timely payments thereunder," Barkan's failure to make a single payment on its existing CIT financing after June 15, 2004, including failing to make any payments in July 2004 while negotiations were still on-going with CIT, demonstrates Barkan's hubris and complete disregard of its contractual obligations. (SOF ¶ 104). Additionally, Barkan had also failed to pay January 2005 rent for the Dorrance and Westminster properties, and real estate taxes for both locations due in January 2005, and the water bill for the Westminster property for October 2004. (SOF ¶¶ 119 & 121).

Barkan's failure to abide by its obligations under the Settlement Agreement prevents Barkan from seeking enforcement of it. See, e.g. Independent Fin. Servs., Inc. v. CCI Group, Inc., 459 F. Supp. 2d 138, 143 (D.R.I. 2006) (Lagueux, J.) ("It is basic contract law that a party cannot recover under a contract unless it has substantially performed its promised obligations."). Otherwise, Barkan would be able to enjoy the benefits of the Settlement Agreement while avoiding all of its burdens. Among those benefits, in addition to Dunkin's help with his CIT refinance efforts, were multiple adjustments of SDA payment and development dates. Such a result is contrary to settled principles of law, equity and justice.

**E. Barkan Cannot Show That It Would Have Received Refinancing But For Dunkin's Alleged Breach of the Settlement Agreement**

Barkan's theory is that CIT would have approved refinancing for all of its underperforming stores, if only Dunkin' had disclosed that two of these stores had closed, and that the network of other stores were heading rapidly towards closure. Barkan's position is risible. Barkan has not adduced any competent evidence that CIT would have funded Barkan's refinancing but for Dunkin's alleged breach of the Settlement Agreement. Rather, the undisputed evidence demonstrates that CIT would have never approved the Barkan refinancing because of Barkan's grave financial condition, irrespective of what Dunkin' did or did not do.

Rush testified that the fact that two of Barkan's stores had closed provided her with grave concern regarding the status of Barkan's other active stores:

Q. Did the information that two stores were closed have any significance to the – your consideration of the restructuring request?

A. Yes.

Q. And what significance did it have?

A. Well, it raises red flags that there's a lot of activity happening out there that hasn't been defined or shared and that I would need more information to understand the reason for the store closings in assessing what to do with the other accounts.

(SOF ¶ 90). The closure of the two stores also meant that CIT would absolutely not provide refinancing for those locations: “[W]e would not refinance funds on permanently closed stores, because there's no revenue coming in on those stores, so there's no – we wouldn't refinance those particular stores at that point going forward, no matter what.” (SOF ¶ 105).

Further reflecting negatively on Barkan is the fact that Dunkin' had been carrying Barkan financially with respect to his CIT loans since October 2003 and had made cure payments to

prevent Barkan from defaulting on those loans in October, November, and December 2003, and January, March, April, May, June, and July 2004 before Barkan was unable to obtain refinancing of its loans from CIT. (SOF ¶ 104). CIT was aware Dunkin' had been making these payments on behalf of Barkan. (SOF ¶ 105).

Barkan's only evidence regarding what CIT would have allegedly done if Dunkin' had hypothetically provided CIT with full financial information regarding Barkan is the hearsay conversation with CIT's Sneed referenced above that Sneed denies. (See supra, pp. 14-15; SOF ¶¶ 105 & 107). This inadmissible hearsay cannot create an issue of material fact in the context of a Motion for Summary Judgment. See, e.g., Vazquez, 134 F.3d at 33.

Barkan also points to irrelevant conversations that it allegedly had with certain Dunkin' personnel as supporting his position on this point. Barkan cites a conversation that he allegedly had with Dunkin' CEO Jon Luther, wherein Luther allegedly told Barkan that "CIT does what I tell them to do." (SOF ¶ 107). Barkan further recounts conversations with Blowers, Dave Harrington and Dan Connolly of Dunkin' to the effect that CIT had never turned down a loan that Dunkin' was guarantying pursuant to the Loan Program. Id. None of these conversations has any relevance to the question of whether CIT, and not Dunkin', would have approved the Barkan refinancing request had CIT been provided with exhaustive detail regarding Barkan's financial travails.

Barkan acknowledged that no one from CIT ever told him that CIT would have refinanced Barkan's debt had Dunkin' submitted the necessary documents with the exception of the hearsay statement that Barkan attributes to Sneed. (SOF ¶ 135). Barkan consequently cannot succeed, as a matter of law, on its claims against Dunkin' because Barkan is unable to prove that it would have received financing from CIT but for Dunkin's alleged breach of the Settlement

Agreement. See, e.g., Wells v. Uvex Winter Optical, Inc., 635 A.2d 1188, 1191 (R.I. 1994) (“a fundamental requirement ... [is] that the breach of contract be the cause of the loss”).

**F. Barkan Cannot Show That It Would Have Been Able to Finance and Develop New Locations Under the SDAs.**

Barkan’s case also fails as a matter of law because it cannot show a nexus between CIT’s denial of refinancing for Barkan’s existing stores and Barkan’s inability to finance development of new SDA store locations. Barkan speculates that Dunkin’s “breach of the Settlement Agreement prevented [Barkan] from obtaining the financing necessary to open new stores.” Barkan, 520 F. Supp. 2d at 339. There is no evidence in this record, and Barkan has offered none, to the effect that Dunkin’s alleged breach of the Settlement Agreement or CIT’s unwillingness to refinance had an effect on Barkan’s attempts to develop new locations.

To the contrary, Barkan’s own inability to meet its obligations under its SDAs was the sole reason why Barkan lost its SDAs. Under each SDA, Barkan agreed to pay Dunkin’ an SDA fee equal to the number of Dunkin’ Donuts shops covered by the SDA multiplied by the Initial Franchise Fee for each shop. Barkan agreed to pay its SDA fees in installments. After execution of the Settlement Agreement, Barkan failed to make any of its remaining installments payments due on its SDAs. As a consequence, the SDAs terminated by notices on January 31, 2005, and Barkan may not bring any action to recover for their lost value. (SOF ¶¶ 111-114).

Barkan also failed to meet its SDA development schedules. It is undisputed that Barkan unilaterally terminated development of the East Greenwich SDA site on June 6, 2004, prior to execution of the Settlement Agreement, due to a combination of zoning and financing problems. (SOF ¶ 71). Additionally, Barkan agreed to the termination of the Cranston-Oaklawn Avenue SDA as part of the Settlement Agreement. (SOF Ex. 54 at ¶ 5(A)). It is further undisputed that Barkan similarly failed to meet the development schedule deadlines with respect to each of the

other SDAs for which Barkan seeks damages in this suit. (SOF ¶ 124). Dunkin' ultimately terminated Barkan's SDAs as a result of Barkan's failure to meet its development schedules for these SDAs, (SOF ¶¶ 111-114), and Barkan cannot bring any claim to recover their lost value.

Barkan has not and cannot demonstrate that it would have successfully made its installment payments or met the development schedules for these SDAs but for the alleged breach of the Settlement Agreement by Dunkin'. Barkan's case therefore fails, *inter alia*, due to the lack of actual, "but for" causation. See, e.g., Wells, 635 A.2d at 1191.

**G. Barkan Has No Proof of Damages Regarding the Lost Value of the SDAs.**

Barkan's damages are limited to the alleged lost value of its SDAs. Barkan, 520 F. Supp. 2d at 339. Inexplicably, its disclosed testifying expert on damages, Kenneth D. Gartrell, does not offer an opinion as to the loss of value regarding the SDAs:

Q. Do you know the phrase which I'll put in quotes, "loss of value of SDAs"?

A. No. I am not familiar with that.

Q. In the context of this case, are you familiar with that phrase?

A. No.

....

Q. So my question to you is – and you can review your report, if you need it – does your report express an opinion on the "lost value of SDAs"? And you can look at your report, if you would like to.

A. I don't recall any language to that effect.

(SOF ¶¶ 129-130). Barkan's expert, rather than determine the value of the SDAs, as discussed below speculates as to the profits that the undeveloped store locations would have hypothetically generated. Id.

**H. Barkan's Alleged Damages Are Entirely Speculative and Fail as a Matter of Law.**

The calculus by which Barkan arrives at his quantum of damages involves layers of pure speculation (and fantasy), and is accordingly insufficient as a matter of law to satisfy the damages element of its claims. See Rhode Island Laborers' Health & Welfare Fund v. Phillip Morris, Inc., 99 F. Supp. 2d 174, 178 (D.R.I. 2000) (Lagueux, J.) (case dismissed, in part because "ascertaining damages would require layers of hypothetical models").

Barkan claims that it suffered lost profits from six (6) prospective stores for which Barkan had nascent development plans. The entirety of Barkan's lost profit claim turns on forecasted profits by Barkan's putative expert for these hypothetical stores – despite the undisputed fact that none of these stores had ever operated, and had never received zoning approval (with the exception of East Greenwich), a building permit, a certificate of occupancy, or business permits, or were otherwise anyway near being ready to be built, much less conduct business. (SOF ¶ 124).

Barkan's putative expert also selects December 31, 2004 as the start date for his damages calculations, based solely upon his understanding that this date represented "the approximate date of the time at which it was made official that CIT was not going to provide Mr. Barkan with – either CIT or Dunkin' or both were not going to provide Mr. Barkan with his financing." (SOF ¶ 132). Noticeably lacking from the methodology that Barkan's putative expert employed to determine the start date for his lost profits analysis is any attempt to determine when the prospective stores would start making, selling, or generating a profit from coffee and donuts.

Even more alarmingly, Barkan's putative expert acknowledged that he categorically ignores the effect of subsequent events on his damages calculation. (SOF ¶ 133). Barkan's

damages analysis therefore ignores undisputed and significant events in this case including Barkan's wholesale default on its SDAs, leading to termination of those agreements.

Barkan adds an additional layer of speculation into the mix for half of its hypothetical stores, in that Barkan cannot identify a specific location at which three of its imagined stores were to have operated. (SOF ¶ 124). Barkan further admits that he did not have ownership, a ground lease or control over any specific realty to enable it to start the development process for these three stores. (SOF ¶ 124). Given the uncertainty regarding the exact location of these stores, Barkan is wholly unable to relate the respective advantages and disadvantages of these store sites, and the impact of those factors on the relative difficulty in developing and turning a profit at those unidentified sites.

And, with respect to the East Greenwich location, Barkan's inability to get financing and onerous zoning restrictions caused Barkan to terminate unilaterally development of that location. (SOF ¶ 71). Barkan nonetheless persists in seeking damages for the alleged profits that this terminated location would have supposedly generated.

Barkan is also unable to demonstrate that it had the wherewithal to fund this development or obtain investors to contribute towards the development of these stores – investors who would have presumably shared in the hypothetical profits that Barkan alleges, thereby reducing Barkan's alleged damages. Of course, Barkan can only guess at the amount and terms of financing or investor participation at each of Barkan's prospective store locations, given that the only evidence on this record is that Barkan was unable to self-fund development of the East Greenwich location and was rejected by every financing source that it approached, leading Barkan to terminate development of that site. (SOF ¶ 71). Yet, Barkan's damages theory relies directly on its crazed assumption that it would have had sufficient funds to develop six stores,

despite the fact that it could not come up with sufficient cash to develop even one store or to make payments regarding existing stores.

The most manifestly implausible portion of Barkan's damages hypothesis is its contention that Barkan would have turned a profit. Barkan ran every Dunkin' location that it owned into the ground, and ultimately lost all of its active stores in bankruptcy. (SOF ¶ 125). Barkan is entirely unable to show why things would have been different this time.

Barkan's damages are consequently entirely speculative. Barkan has no way of proving with any certainty that it would have successfully developed all six of its prospective stores, or would have run these stores profitably. On this point, Barkan's case is directly analogous to Russo v. Baxter Healthcare Corp., 140 F.3d 6 (1<sup>st</sup> Cir. 1998), which was decided applying Rhode Island law. In Russo, the plaintiff claimed to have lost profits from international sales of a catheter product that plaintiff allegedly developed. Id. at 10. The plaintiff further claimed that the defendant's alleged unauthorized disclosure of the catheter design had prevented plaintiff from obtaining foreign patents, thereby preventing him from selling his devise in foreign markets. Id. at 11. The First Circuit upheld this Court's dismissal of plaintiff's claims, holding that:

[Plaintiff's] failure to apply for foreign patents render his damages claim wholly speculative as well. That inaction on his part made it impossible for [Plaintiff] to identify with any specificity the countries in which [it] would have sought (and, but for [Defendant's] conduct, would even presumably have obtained) patents and marketed the catheter.

Relatedly, [Plaintiff] can only ask a jury to guess to what degree his invention would have been accepted commercially in those markets or how he would have profited from that acceptance. In fact, the actual sales performance of [Plaintiff's] device suggests that his product would not be accepted in foreign markets. .... Hence, lacking anything but sheer speculation as to his asserted damages, [Plaintiff's] claims ... fail as a matter of law ....

Id. at 16-17.

Like the Russo plaintiff's failure to identify those markets in which he would have pursued patents or sought business, Barkan's failure to pursue development of its prospective stores or, in three cases, to identify specific store locations, renders a fact finder unable to determine whether Barkan would have been successful at those sites. And, also like Russo, Barkan's uninterrupted track record of failure is highly suggestive of future failure.

Barkan's unmitigated failure as a Dunkin' franchisee also distinguishes this case from Smith Development Corp. v. Bilow Enterprises, Inc., 308 A.2d 477 (R.I. 1973). Smith Development involved attempts by McDonald's Corporation ("McDonald's"), the franchisor, and Smith Development Corporation ("Smith Development"), the franchisee, to develop a McDonald's franchise on West Main Road in Middletown, Rhode Island. Id. at 479. A nearby competitor, Carroll's Hamburgers, delayed development of that restaurant by interposing objections through surrogates to Smith Development's application for zoning approval, which was ultimately granted. Id. Unlike Barkan, Smith Development had financing, a specific restaurant location, a signed lease for that location, and zoning approval. See id.

Smith Development and McDonald's sued the competitor for, *inter alia*, tortious interference with contract, claiming that the competitor's fomenting of opposition to Smith Development's zoning application caused delays in the development of the restaurant. Id. At trial, the presiding judge ordered that testimony from McDonald's witnesses regarding its lost profits as franchisor be stricken. Id. at 482. Smith Development intimates, but does not expressly state, that the trial judge found McDonald's damages evidence overly speculative. See id.

On appeal, the Rhode Island Supreme Court overturned the trial court's ruling on this point. The Rhode Island Supreme Court rejected the defense's suggestion that Rhode Island adopt the "new business rule," which is a *per se* bar on new businesses recovering damages based upon estimated profits. Id. However, of most significance to this case, the Court further found that a new business may seek damages for estimated lost profits only if the party can prove prospective profit loss with "reasonable certainty" by, *inter alia*, "showing the past history of successful and profitable operation of the business," id. at 483, something Barkan is manifestly unable to do.

The Court concluded that McDonald's had submitted sufficient evidence on estimated damages for jury consideration because, at the time of trial sometime prior to August 1973, no McDonald's franchise had ever failed and McDonald's, as franchisor, was to be paid a franchise fee of 9.2% of gross sales, irrespective of the profitability of the underlying franchisee. Id. Barkan's situation is the mirror opposite – Barkan is a failed Dunkin' franchisee who cannot demonstrate a past history of successful operation and who, as a franchisee, would only generate profits if its sales were greater than its overhead. And, as discussed above, Barkan has no clue as to what its overhead would have been for its prospective stores. Barkan's damages are consequently based upon "sheer speculation," and fail as a matter of law. See Nat'l Chain Co. v. Campbell, 487 A.2d 132, 134-35 (R.I. 1985) ("The amount of damages sustained from a breach of contract must be proven with a reasonable degree of certainty, and plaintiff must establish reasonably precise figures and cannot rely on speculation.").

**Conclusion**

This case lacks a single meritorious factual issue that requires determination at trial. Instead, Barkan relies on rank speculation to satisfy each of the elements of its case – breach, causation and damages. This Court should therefore grant Dunkin’s Motion for Summary Judgment and dismiss Barkan’s case in its entirety.

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CERTIFICATE OF SERVICE

I hereby certify this document filed through the ECF system will be sent electronically to the registered participants, Elizabeth M. Noonan, Esq., at [enoonan@apslaw.com](mailto:enoonan@apslaw.com), Richard M. Gelb, Esq., at [rgelb@gelbgelb.com](mailto:rgelb@gelbgelb.com), Daniel K. Gelb, Esq. at [dgelb@gelbgelb.com](mailto:dgelb@gelbgelb.com), and Kevin Bristow, Esq., at [KJBristowlaw@verizon.net](mailto:KJBristowlaw@verizon.net), identified on the Notice of Electronic filing (NEF), on this 29<sup>th</sup> day of September, 2008.

/s/ Jeffrey S. Brenner