

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

IRWIN J. BARKAN and D&D BARKAN LLC :	:	
	:	
Plaintiffs,	:	
v.	:	C.A. No. 05-50/L
	:	
DUNKIN’ DONUTS, INC. and	:	
BASKIN-ROBBINS USA, CO.	:	
	:	
Defendants.	:	

**DEFENDANTS’ OBJECTION TO REPORT AND RECOMMENDATION
OF MAGISTRATE JUDGE LINCOLN D. ALMOND**

Defendants Dunkin’ Donuts, Inc. and Baskin-Robbins USA, Co. (together, “Dunkin’”) object to Magistrate Judge Almond’s Report and Recommendation (“Report”) (Docket No. 140) that concluded that Dunkin’s Motion for Summary Judgment (“Dunkin’s Motion”) should be denied. Pursuant to Rule 72(b)(2) of the Federal Rules of Civil Procedure, Dunkin’s specific objections are:

1. The Report errs by finding that issues of material fact exist regarding Dunkin’s alleged breach of the Settlement Agreement (Report at 16-18), including improperly crediting hearsay statements and unsupported *ipse dixit* as creating factual disputes where none exist;

2. The Report errs by finding that issues of material fact exist regarding Irwin Barkan and D&D Barkan’s (“Barkan”) claim of breach of the implied covenant of good faith and fair dealing (*id.*, pp.18-19), based upon, *inter alia*, the same erroneous basis as the contractual count, namely hearsay and allegations without factual record support;

3. The Report errs by finding that issues of material fact exist regarding whether Barkan’s undisputed breach of the Settlement Agreement renders that agreement unenforceable

by it (id., pp. 19-20), thereby ignoring that as a matter of law Barkan's admitted non-performance deprives it of any claim for consequential damages;

4. The Report errs by finding that issues of material fact exist regarding whether Barkan would have received financing from CIT "but for" Dunkin's alleged breach of the Settlement Agreement (id., p. 20), in part by incorrectly relying upon inadmissible hearsay statements that Barkan attributes to CIT and irrelevant statements that have nothing to do with CIT's refinancing approval process;

5. The Report errs by finding that issues of material fact exist regarding whether Barkan would have been able to finance and develop new locations under the SDAs (id., pp. 20-21) concluding, without analysis or discussion, that the supposed existence of issues of material fact related to the breach of the Settlement Agreement creates similar triable issues related to Barkan's alleged ability to finance and develop new store locations under the SDAs; and,

6. The Report errs by concluding that judicial determination of the sufficiency of Barkan's theory and proof of damages is premature (id., pp. 21-23), thereby ignoring Barkan's duty, in the first instance, to prove its damages with reasonable precision and to submit admissible evidence in opposition to Dunkin's Motion for Summary Judgment which demonstrate a triable factual issue on the issue of damages, and that Barkan's theory of lost profits damages are wholly speculative.

Dunkin relies on its supporting Memorandum of Law, filed herewith, and its previously submitted Statement of Undisputed Material Facts ("SUF") (Document No. 111), Memorandum of Law Supporting Its Motion for Summary Judgment ("Dunkin' Summ. J. Memo.") (Document No. 110), and its Reply Brief (Document No. 125), all of which are incorporated by reference herein.

Defendants,

DUNKIN' DONUTS, INC. and
BASKIN-ROBBINS USA, CO.,
By their attorneys,

/s/ Jeffrey S. Brenner

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Dated: June 9, 2009

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, Richard M. Gelb, Esq., at rgelb@gelbgelb.com, Daniel K. Gelb, Esq. at dgelb@gelbgelb.com, and Kevin Bristow, Esq., at KJBristowlaw@verizon.net, identified on the Notice of Electronic filing (NEF), on this 9th day of June 2009.

/s/ Jeffrey S. Brenner

“work with CIT to attempt to refinance [Barkan’s] existing debt...,” Magistrate Almond credited, without support, that:

1. According to Barkan, Dunkin’ “failed to request the financing from CIT.” (Report at 17). This allegation has no evidentiary support whatsoever, is contradicted by overwhelming evidence that Barkan himself participated in the flow of information to CIT as part of Dunkin’s request that CIT refinance his debt, and most significantly, is directly contradicted by Barkan’s own testimony that he has no idea “whether or not [the] request [to CIT] was made.” (SUF ¶ 80).

2. According to Barkan, Dunkin’ employee Blowers failed to give “recourse letters” to CIT. (Report at 17). This allegation, while literally true, is legally irrelevant because CIT’s testimony is unchallenged that “recourse letters” were not necessary to its consideration of any refinance and had been sent to Blowers in error. (SUF ¶ 69 and 80). Barkan admits he has “no basis to dispute” CIT’s testimony, through its employee Sneed, that she had sent the letters in error. (SUF ¶ 80).

3. According to Barkan, Dunkin’s Finance Committee had not “approved” Dunkin’s agreement to “work with CIT to attempt to refinance [Barkan’s] existing debt.” (Report at 17). This allegation has no evidentiary support whatsoever, and the only evidence is that Dunkin’s Finance Committee had approved Dunkin’s undertaking to seek refinancing for Barkan from CIT. (SUF ¶ 25).

4. According to Barkan, Dunkin’ had failed to forward Barkan’s narrative business plan to CIT as it had requested. (Report at 17). Again, this allegation has no evidentiary support, and the only evidence is that Blowers forwarded to CIT exactly what Barkan had

forwarded to her -- garbled, unformatted materials which Barkan had assembled and requested that she forward to CIT. (SUF ¶ 84).

5. According to Barkan, CIT's Sneed told him that CIT had declined to refinance his existing debt because "Dunkin' failed to submit necessary paperwork." (Report at 17). Barkan's attribution to Sneed of this out-of-court statement is unchallenged hearsay that Magistrate Judge Almond incorrectly accepted as creating a genuine issue of material fact, without any analysis of its admissibility or acknowledgment that the alleged out-of-court declarant swears she never said it (SUF ¶ 105 & Ex. 74).

Most striking, however, is the Report's willingness to allow causation and damages to survive summary disposition in the face of Barkan's failure to offer any evidence on the very subject matter of the dispute – the "lost value of SDAs" (Store Development Agreements) allegedly suffered as a result of Dunkin's failure to "work with CIT to attempt to refinance" Barkan's debt. Not only did Barkan's expert undisputedly fail to offer any opinion on the "lost value of SDAs," but Barkan produced no evidence that "but for" Dunkin's alleged breach of the Settlement Agreement, Barkan would have been refinanced by CIT, or anyone else.

The Report further missteps when it fails to consider rigorously the dispositive effect of other material facts that Barkan admits:

- Barkan never complied with the terms of the Settlement Agreement that it seeks to enforce against Dunkin';
- Barkan serially breached its SDAs by failing to make installment payments, meet development deadlines, or cure noticed defaults;
- Barkan had no location for three of its prospective stores, and no control over any sites for prospective SDA development with the exception of Burrillville.

Based on the undisputed facts, this Court should sustain Dunkin's objection, reverse the Report, 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.

Standard of Review

A district court determines *de novo* any part of a Magistrate Judge's determination of a dispositive motion to which a proper objection has been filed. Fed. R. Civ. P. 72(b)(3); Conetta v. Nat'l Hair Care Ctrs., Inc., 236 F.3d 67, 73 (1st Cir. 2001).

Because review is *de novo*, the role of this Court when weighing Dunkin's Motion for Summary Judgment is the same as that of the Magistrate Judge – it is to “pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.” Kearney v. Town of Wareham, 316 F.3d 18, 21 (1st Cir. 2002). 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 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, sufficient evidence favors 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 trialworthy 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).

Background

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 the alleged "loss of value of 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 339.¹ Therefore, Barkan must prove that Dunkin's alleged breach of the Settlement Agreement caused Barkan to lose the value of its SDAs, and it must establish the value of that loss to prevail on its claims against Dunkin'. Barkan can do neither.

Dunkin's summary judgment submission consisted of a Statement of Undisputed Material Facts ("SUF") (Document No. 111), Memorandum of Law ("Dunkin' Summ. J. Memo.") (Document No. 110), and its Reply Brief (Document No. 125). Rather than repeat the facts and arguments that those submissions contain, Dunkin' incorporates those submissions herein by reference.

In the Report Magistrate Judge Almond made six specific findings that issues of material fact exist regarding whether (1) Dunkin' breached the Settlement Agreement (Report at 16-18); (2) Dunkin' breached the implied covenant of good faith and fair dealing (id., pp.18-19); (3)

¹ 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 id. 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 Document No. 77).

Barkan's undisputed breach of the Settlement Agreement precludes its claim to enforce Dunkin's obligation under it (id., pp. 19-20); (4) "but for" Dunkin's alleged breach of the Settlement Agreement, CIT would have refinanced Barkan's debt (id., p. 20); (5) "but for" Dunkin's alleged breach, Barkan would have been able to finance and develop new locations under the SDAs (id., pp. 20-21); and (6) despite Barkan's expert's failure to offer any opinion on the "lost value of the SDAs," a jury could have a reasonable basis on which to award damages (id., pp. 21-23). For the reasons that follow, Dunkin objects to each of these findings.

Argument

1. The Magistrate Judge Erroneously Found Issues of Material Fact Regarding Dunkin's Alleged Breach of the Settlement Agreement.

There are no triable issues of fact related to Dunkin's alleged breach of the Settlement Agreement. Magistrate Judge Almond understood correctly that Barkan's sole theory of breach was that Dunkin' allegedly failed to "work with" CIT "to attempt to refinance" Barkan's debt, as Paragraph 4 of the Settlement Agreement required. (Report at 17), while not representing that CIT would refinance Barkan – "FRANCHISOR [Dunkin] makes no representation that CIT will provide such financing." (SUF ¶ 84 & Ex. 54).

Magistrate Judge Almond erroneously concluded, however, that Barkan demonstrated material issues of fact solely upon consideration of Barkan's allegation of breach of the Settlement Agreement, without requiring any supporting proof :

Barkan ... alleges that Dunkin' failed to "request the financing from CIT" and that this omission was a breach of the Settlement Agreement. Barkan also alleges that Blowers failed to give "recourse" letters to CIT, notification that the Dunkin' finance committee had approved refinancing, Barkan's narrative business plan, and other information to Rush regarding Barkan's closed stores. Finally, Barkan claims Sneed told him that CIT denied refinancing because Dunkin' failed to submit necessary paperwork.

(Report at 17) (citations omitted) (emphasis added). Based upon this recitation of bald allegations, Magistrate Judge Almond concluded that “the Court need not further delve into the factual quagmire presented by the parties. The Court’s brief recitation of the parties’ factual presentations demonstrates that there are multiple disputed issues of material fact.” (Id. at 18)

Magistrate Judge Almond erroneously determined that these allegations presented issues of material fact. Taking them one at a time, Barkan’s claim that Dunkin’ “failed to request the financing from CIT” lacks any factual support. Irwin Barkan himself 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.

(SUF ¶ 80).

Barkan’s claimed uncertainty is of no probative worth, and no match for the multiple emails between Blowers, Sneed, Connelly and Barkan that support the conclusion that Dunkin’ had made the refinance request. (See, e.g. SUF ¶¶ 28, 30-32, 39, 44 & 49). Barkan did not dispute any of these uncontested facts (see, Opposition to Motion for Summary Judgment (Docket No. 115)) and has no support, as a matter of law, for its claim that that Dunkin’ breached the Settlement Agreement by failing to make a refinancing request. The basis for Magistrate Judge Almond’s conclusion that there was an issue of fact on this point is unknown, as the Report does not discuss or cite to any admissible factual support for Barkan’s allegation as

Rule 56 requires. It appears that the Magistrate Judge blindly accepted Barkan's allegation irrespective of their (lack of) factual foundation.

Next, Barkan's allegation that Dunkin's so-called "failure" to return signed recourse letters to CIT breached the Settlement Agreement has no evidentiary support. The undisputed testimony from CIT's Sneed is that she sent the recourse letters to Dunkin' prematurely and in error, as the recourse letters should not have gone out until CIT had given final approval for refinancing. (SUF ¶ 69). This is confirmed by CIT's Rush who testified that executed recourse letters from Dunkin' was not a prerequisite, or even a consideration, to her approval of refinancing. *Id.* For his part, Irwin Barkan concedes that he has "no basis to dispute" that Sneed sent the recourse letters in error (SUF ¶ 80), or that submission of recourse letters was immaterial to CIT's refinancing decision (*see*, Opposition to Dunkin's Motion for Summary Judgment). Again, the Report simply recites Barkan's allegation that Blowers' failure to execute and return the recourse letters could show that Dunkin' breached its obligation to "work with CIT." As the return, or not, of these letters played no role in CIT's refinancing decision (SUF ¶ 69), Magistrate Judge Almond's conclusion that Barkan's allegation presented a triable issue of fact is reversible error.

Likewise, Barkan's claim that Dunkin's finance committee had not approved the Settlement Agreement is another contrivance, unfortunately accepted by Magistrate Judge Almond, to produce a material issue where none exists. There is no evidence from CIT that finance committee approval or non-approval would have effected CIT's consideration of the refinancing request either way. Finance committee approval was 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”). The undisputed evidence is that Dunkin’s desire to assist Barkan to refinance pre-dated the Settlement Agreement execution by many months, and that course was approved by Dunkin’s finance committee. (SUF ¶ 25). Barkan’s Opposition to Dunkin’s Motion for Summary Judgment does not dispute any of these points. Yet, again, the Report erroneously concludes that the question of finance committee approval presents an issue of material fact without addressing the immateriality of the issue.

Lastly, Barkan’s claim that Dunkin’s failure to submit Barkan’s narrative business plan (SUF ¶ 107) to CIT creates a material issue of fact is likewise without substance. Irwin Barkan admits that he never provided anyone at Dunkin’ with an actual copy of his narrative business plan. (SUF ¶ 98). Rather, Barkan attempted to transmit this narrative along with financial spreadsheets via e-mail to Blowers for forwarding to CIT, which she did. Unfortunately, Barkan attached two sets of spreadsheets and no narrative to his email, despite his message that it was attached, and when Blowers forwarded exactly what Barkan had sent her, there was no narrative business plan. (SUF ¶¶ 98-99). For Barkan to claim that Dunkin’ failed to “work with” CIT because Blowers did not catch and remedy Barkan’s error, and for Magistrate Judge Almond to conclude that this presents an issue for trial, ignores the overwhelming evidence that it was Barkan, not Blowers, who created the error. As neither Barkan nor his accountant (to whom Barkan also sent the email and attachments) corrected his error, that Blowers may have also failed to do so creates too slender a reed upon which a jury may rest a finding that Dunkin’ breached its Settlement Agreement obligation to “work with CIT.”

Barkan’s more generalized complaints that Dunkin’ failed to provide Rush with information regarding Barkan’s stores also fails to create a triable issue. Barkan’s specific 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. In the conversation at issue (indeed, the only conversation between Rush and Blowers) Rush asked Blowers the financial status of Barkan's franchises, and learned that two of the locations for which Barkan was seeking refinancing had closed. (SUF ¶ 88). Rush continued to push for additional detail regarding Barkan's financial picture, but Blowers was reluctant to disclose anything beyond the information that two stores had closed. In her view, additional information about Barkan's precarious financial position would hurt, rather than help, Barkan's refinancing request (SUF ¶ 91), and was expressly contrary to Barkan's instructions to her that he did not want CIT to become "leary [sic] of a distressed network." (SUF ¶ 54). Moreover, such disclosure is directly contrary to Barkan's claim that Dunkin' was obligated "to advocate for the loan." (SUF ¶ 107).

Significantly, it was Barkan, and not Blowers or Dunkin', who was to make full disclosure to CIT if any of its stores closed. Pursuant to loan documents with CIT, Barkan was obligated not to close the financed businesses, or remove the collateral. (SUF ¶ 103). Had Barkan so informed CIT of its violations of security agreement obligations, Sneed would not have had to ask Blowers for this information. 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.

It bears repeating that Dunkin's contractual obligation to Barkan was to "work with CIT to attempt" to obtain potential refinancing for Barkan – the dissemination of negative financial information regarding Barkan hardly advances that goal. Barkan has not produced any

admissible evidence that Dunkin was obligated to provide negative information to CIT as part of its contractual commitment to Barkan pursuant to the Settlement Agreement. The Report fails to acknowledge this point, and as a result, erroneously finds an issue of material fact regarding Dunkin's interactions with Rush.

Most egregiously, Magistrate Judge Almond accepted as admissible Barkan's hearsay allegation that CIT's Sneed said that CIT denied refinancing because Dunkin' failed to provide CIT with "necessary paperwork." Barkan is the sole source for this self-serving, inadmissible hearsay statement which he attributes to Sneed, and which she categorically denied making. (SUF ¶ 107; BR ¶107; SUF ¶ 105). Neither Magistrate Judge Almond nor Barkan offers any rationale for why Sneed's out-of-court statement is admissible, and Barkan only says, without analysis or support, that "[t]he statement does not constitute hearsay." (See BR ¶ 134). Sneed's out-of-court statement is inadmissible hearsay without exception that cannot be considered in the summary judgment context. See, e.g., Vazquez, 134 F.3d at 33, and Magistrate Judge Almond has committed clear error by accepting Barkan's allegation of Sneed's hearsay statement as creating an issue of material fact.

2. The Magistrate Judge Erroneously Found Issues of Material Fact Regarding Barkan's Good Faith and Fair Dealing Claim.

The Report denied Dunkin's Motion with respect to Barkan's Good Faith and Fair Dealing claim on the same basis as the contractual count, *i.e.* the supposed existence of issues of material fact regarding whether Dunkin' fulfilled its obligation to "work with" CIT, again without consideration of the insufficient factual foundation that besets Barkan's breach of contract claim. (Report at.19). That failing is error.

Magistrate Judge Almond also apparently misconceived Barkan's claim as seeking recovery related to its existing businesses that it lost in bankruptcy -- Barkan's claim "provides

that by engaging in the wrongful conduct alleged in the Amended Complaint (including refusing, or indicating that they would refuse, to approve a sale of Barkan's business), Defendants acted with 'improper motive in bad faith' when they exercised their contractual discretion to terminate." (Report at 18). This Court dismissed that portion of Barkan's claim related to its (then) existing businesses, so that Barkan may only prevail on its Good Faith and Fair Dealing claim if it can show that Dunkin' "had no intention of helping [Barkan] obtain refinancing." Barkan, 520 F. Supp. at 339. Barkan's theory of recovery is consistent with this Court's earlier ruling, in that its Opposition to Dunkin's Motion for Summary Judgment describes its claim as one whereby Dunkin' allegedly "never intended to fulfill its contractual obligation to Barkan" (Barkan Memo. Opp. Summ. J., p. 14).

On this latter issue, the Report ignores the multitude of efforts that Dunkin' made to secure refinancing for Barkan (See Dunkin' Sum J. Memo, pp. 6-11), and Barkan's abject failure to offer any admissible evidence that Dunkin' had "no intention" of fulfilling its Settlement Agreement obligations. Rather, the Magistrate Judge appears to have accepted Barkan's argument that questions of intent and motive are jury determinations which absolve Barkan from putting forward any evidence of Dunkin's alleged bad faith. (Report at 18). The Magistrate Judge's finding in this respect is clear error -- "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, 896 F.2d at 8.

If Barkan's theory is based on its non-specific allegation that Dunkin acted in bad faith "by exercising contractual discretion to terminate," (see Amended Compl. ¶ 56), that claim is also unsustainable as a matter of law. It is unclear whether Barkan's allegation refers to the

Settlement Agreement, the SDAs, or both. Regardless, 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, including cancellation.

Lifespan/ Physicians Professional Services Organization, Inc. v. Combined Ins. Co. of America, 345 F. Supp. 2d 214, 225 (D.R.I. 2004) (Lagueux, J.); see also Hord Corp. v. Polymer Research Corp. of America, 275 F. Supp. 2d 229, 238 (D.R.I. 2003) (Lagueux, J.) (“[a] party’s actions ... do not violate the covenant of good faith and fair dealing when they were contemplated by the parties at the time of contract formation.”).

3. The Magistrate Judge Erroneously Found Material Issues of Fact Regarding Barkan’s Undisputed Breach of the Settlement Agreement.

Barkan undisputedly did not comply with its obligations under the Settlement Agreement. (See SUF ¶¶ 116-121; BR ¶¶ 116-121). Barkan agreed that it would “timely pay all rents and other charges under the leases” pursuant to Paragraph 2 of the Settlement Agreement, and did not do so. 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. (SUF ¶¶ 122 & 124). Paragraph 4 committed Barkan “not to further default under [the current] financing and to make timely payments thereunder,” and yet Barkan failed to make a single payment on its existing CIT financing after June 15, 2004, including July 2004 while negotiations were still on-going with CIT. (SUF ¶ 104).

Barkan’s failure to perform its obligations under the Settlement Agreement prevents Barkan from seeking its enforcement against Dunkin’. 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.

Barkan’s defense to its failure to perform is its argument that Dunkin’s alleged breach of the Settlement Agreement relieved Barkan of its obligation to perform. (See Barkan Memo. Opp. Summ. J., pp. 10-12). Without discussion of any applicable legal principle, Magistrate Judge Almond found that issues of material fact as to breach of the Settlement Agreement precluded summary judgment, despite Barkan’s confessed non-performance. (See Report. 19-20).

Contrary to Barkan’s position and the Magistrate Judge’s conclusion, Barkan’s election to avoid its performance obligations because of Dunkin’s alleged breach is Barkan’s election to rescind the Settlement Agreement – an election which bars Barkan from recovering consequential damages from Dunkin’ as a matter of law. Reccko v. Criss Cadillac, Inc., 551 A.2d 20, 22 (R.I. 1988) (“It is often said that the injured party may ‘elect to rescind’, but that by such an ‘election’ he deprives himself of his right to compensatory damages for the breach”) (quoting 5A Corbin on Contracts, § 1237 at 546-47 (1964)). See also Eastman v. Dunn, 34 R.I. 416, 83 A. 1057, 1069 (1912) (“When a party injured by the stoppage of a contract elects to rescind it, then, it is true, he cannot recover for a breach of contract, either for outlay or for loss of profit”); Restatement (Second) Contracts, § 244 (“A party’s duty to pay damages for total breach by non-performance is discharged if it appears after the breach that there would have been a total failure by the injured party to perform his return promise.”).

The Report misses this point of law entirely. The legal consequence of Barkan’s non-performance -- irrespective of whether or not Dunkin’s alleged breach excused that performance -- is the non-availability of consequential damages. Had Barkan wanted the benefits of the Settlement Agreement, it should have fulfilled its obligations under that agreement. Its admitted

failure to do so renders consequential damages unavailable to it as a matter of law. See Independent Fin. Servs., Inc., 459 F. Supp. 2d at 143. The Magistrate Judge's conclusion otherwise is erroneous.

4. The Magistrate Judge Erroneously Found Issues of Material Fact Regarding Whether Barkan Would Have Received Financing “But For” Dunkin’s Alleged Breach of the Settlement Agreement.

Without discussion, the Report summarily and erroneously found that a jury could reasonably conclude that Barkan would have received refinancing from CIT “but for” Dunkin’s alleged breach of the Settlement Agreement (Report at 20). This finding is without any basis. Even if one accepts the truth of Sneed’s alleged (and denied) inadmissible hearsay statement that CIT denied refinancing because Dunkin’ failed to submit necessary paperwork, and irrelevant statements attributed to Dunkin’ senior management that CIT had previously always approved other financing requests by Dunkin’ franchisees (Report at 20), those allegations fail to create a triable issue.

Sneed’s alleged inadmissible hearsay statement cannot create an issue of material fact as a matter of law. See, e.g., Vazquez, 134 F.3d at 33. Barkan’s recitation of irrelevant conversations that it allegedly had with certain Dunkin’ personnel also fails to create an issue of material fact. 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.” (SUF ¶ 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 which Dunkin’ guaranteed pursuant to the Loan Program. Id. None of these conversations has any relevance to the question of whether CIT would have approved the Barkan refinancing request had Dunkin’ submitted recourse letters, discussed more detail about Barkan’s stores’ deepening insolvency, and

provided CIT with finance committee approval. These are Barkan's allegations of Dunkin's missteps "but for" which CIT would have refinanced, but not a scintilla of evidence suggests that any of this would have influenced, much less, changed CIT's decision. It is these allegations alone (without any finding of evidentiary support or materiality) upon which Magistrate Judge Almond rests his conclusion that material issues of fact preclude summary judgment.

Other than Sneed's denied and inadmissible out-of-court statement, Barkan acknowledges that CIT never told him that it would have refinanced its debt had Dunkin' submitted "necessary paperwork." (SUF ¶ 135). Barkan consequently cannot succeed, as a matter of law, on its claims because Barkan is unable to prove that it would have received refinancing 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"). Magistrate Judge Almond's finding of an issue of material fact regarding Barkan's refinancing is therefore erroneous.

5. The Magistrate Judge Erroneously Found Issues of Material Fact Regarding Barkan's Ability to Finance and Develop New Locations Under the SDAs.

The Report erroneously finds an issue of material fact as to whether Barkan could have financed and developed new locations under the SDAs. Specifically, the Report finds, without analysis or discussion, that the supposed existence of issues of material fact related to the breach of the Settlement Agreement creates similar triable issues related to Barkan's alleged ability to finance and develop new store locations under the SDAs. (Id., p.21). The only support that the Court musters for its conclusion is Barkan's argument that "Dunkin's [alleged] breach of the Settlement Agreement prevented it from obtaining financing necessary to open new stores." (Id.)

Magistrate Judge Almond's central error is his implicit assumption of a causal nexus between CIT's refusal of refinancing of existing locations and Barkan's ability to secure independent financing for new locations. There is no evidence from Barkan, and the Report cites no record evidence to the effect that Dunkin's alleged breach of the Settlement Agreement or CIT's unwillingness to refinance existing stores had any effect on Barkan's attempts to develop new locations.

To the contrary, Barkan's own inability to meet its obligations under the SDAs was the sole reason why Barkan lost the 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 installment payments due on the SDAs. (SUF ¶¶ 111-114).

Barkan also failed to meet 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. (SUF ¶ 71). Additionally, Barkan agreed to the termination of the Cranston-Oaklawn Avenue SDA as part of the Settlement Agreement. (SUF Ex. 54 at ¶ 5(A)). It is further undisputed that Barkan failed to meet the development schedule deadlines with respect to each of the other SDAs for which Barkan seeks damages in this suit. (SUF ¶ 124).

Dunkin' ultimately terminated Barkan's SDAs as a result of its payment defaults and admitted failure to meet development deadlines, and Barkan may not bring any action to recover for their lost value. (SUF ¶¶ 111-114 & 124). Barkan cannot excuse these defaults by Dunkin's alleged failure to perform under the Settlement Agreement, as those are separate agreements.

Barkan's claim for the "lost value of SDAs" consequently fails as a matter of law because Barkan cannot show that Dunkin's alleged breach of the Settlement Agreement was the proximate ("in fact") cause of Barkan's loss of the SDAs. See, e.g., Wells v. Uvex Winter Optical, Inc., 635 A.2d 1188, 1191 (R.I. 1994) ("There is ... a fundamental requirement, similar to that imposed in tort cases, that the breach of contract be the cause in fact of the loss").

6. The Magistrate Judge Erroneously Found that Dunkin' Has "Prematurely" Challenged Barkan's Theory Of Damages.

The Report erroneously finds that Dunkin's challenge to Barkan's theory of damages is "premature." (Report at 22). The basis on which Magistrate Judge Almond made this determination is somewhat difficult to discern, but it appears that he accepts Barkan's recitation of the generally accepted proposition that "a jury may make a reasonable estimate of damages based upon relevant [and unspecified] data." (Id., p. 21).

While that conclusion is generally correct in the abstract, it entirely ignores that a plaintiff must, in the first instance, prove its damages with reasonable precision. 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."). It also ignores Barkan's responsibility to submit admissible evidence in opposition to Dunkin's Motion for Summary Judgment demonstrating a triable factual issue on the issue of damages. See, e.g. National Amusements, Inc., 43 F.3d at 735 ("the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue").

Barkan undisputedly failed to make such a showing. Rather, Barkan admits that its expert had not offered any opinion on the "lost value of SDAs," its sole claim for damages. (SUF ¶¶ 129-130; BR ¶¶ 129-130). Barkan's inability to prove damages is dispositive of its

case. See, e.g. Chrabaszcz v. Johnston School Comm., 474 F. Supp. 2d 298, 309 (D.R.I. 2007) (damages are an essential element of a breach of contract claim).

Instead of offering an opinion on the “lost value of SDAs,” the expert attempted to value lost profits that Barkan would hypothetically derive from successfully operating as yet undeveloped Dunkin’ Donuts stores for 20 years or more as if Barkan had fully developed its SDAs, which it did not. (Gartrell Dep., p. 40, ln. 24 – p. 41, ln. 2; p. 51, ln. 9-10; p. 59, ln. 7-11 (SUF Ex. 87)). Barkan’s expert ignored the undisputed facts that none of these stores had ever operated, had never received zoning approval (with the exception of East Greenwich, which were heavily conditioned), a building permit, a certificate of occupancy, or business permits, or were otherwise anyway near being ready to be built, much less conduct business, to arrive at this conclusion. (SUF ¶ 124).

Barkan’s 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.” (SUF ¶ 132). Noticeably lacking from the methodology that Barkan’s expert employed to determine the start date for his lost profits analysis is any attempt to determine when the prospective stores would start generating a profit.

Even more alarmingly, Barkan’s expert acknowledged that he categorically ignored the effect of subsequent events on his damages calculation. (SUF ¶ 133). Barkan’s damages analysis therefore ignores undisputed and significant events which effect damages, including Barkan’s wholesale default on the 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 fails to identify specific locations at which three of its imagined stores were to operate. (SUF ¶ 124). Barkan further admits that it had no ownership, a ground lease or control over any specific sites for these three stores. (SUF ¶ 124). Given the uncertainty regarding the 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.

With respect to the East Greenwich location, Barkan's inability to get financing and onerous zoning approval conditions undisputedly caused Barkan unilaterally to terminate development of that location. (SUF ¶ 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 prospective store location, given that the only evidence 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. (SUF ¶ 71). Yet, Barkan's damages theory relies directly on its expert's speculation, absent evidence, that Barkan 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. (SUF ¶ 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 (1st 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 device 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.

As discussed above, Barkan has no idea 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 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"); 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.").

The Report also suggests that the death of Dr. Gartrell provided an additional basis for the Court's unwillingness to sustain Dunkin's motion. (Report at 22). Gartrell regrettably died on October 24, 2008. Barkan was aware of this fact, at the latest, on October 31, 2008, as Barkan noted Gartrell's passing in its Memorandum in Opposition to Dunkin's Motion for Summary Judgment:

Dr. Gartrell provided a detailed report and was deposed. Barkan wishes to inform the Court that Dr. Gartrell has passed away. Barkan intends to raise the consequences of Gartrell's death at a future point in the litigation.

(Barkan Memo. Opp. Summ. J., p.5 n.2). Barkan did not seek to stay consideration or introduce a new expert in opposition to Dunkin's summary judgment motion, apparently content to rely on Gartrell's detailed report and deposition testimony.

Five months after Gartrell's death, Barkan sought to amend the Pre-trial Order to designate Frank C. Torchio as its "expert witness for trial." (Barkan Memo. Supp. Am. Pre-trial Order, p.4). Barkan asserted that Torchio "will rely on Gartrell's [*sic*] previously produced expert report. Torchio will not introduce a new damages theory or methodology. Torchio, *exactly* like Gartrell [*sic*], will give his opinion as to the value of the lost profits to Barkan." (Id. at 7 (emphasis added)).

Barkan elected to defend against Dunkin's Motion for Summary Judgment with Gartrell's report and testimony, and represents that Torchio's damages theory will be the same as that of Gartrell. There is consequently no prejudice to Barkan for this Court to decide Dunkin's Motion for Summary Judgment on the record that is already before the Court.

Conclusion

The Magistrate Judge failed to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Kearney, 316 F.3d at 21. The Report consequently finds issues of material fact where none exists by relying erroneously on inadmissible hearsay and on allegations wholly lacking factual support. Rigorous scrutiny of the summary judgment record reveals that Barkan's case is bereft of any meritorious factual issues that requires determination at trial. This Court should therefore sustain Dunkin's objection, reverse the Report and Recommendation of Magistrate Judge Almond, grant Dunkin's Motion for Summary Judgment, and dismiss Barkan's case in its entirety.

Respectfully submitted,

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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, Richard M. Gelb, Esq., at rgelb@gelbgelb.com, Daniel K. Gelb, Esq. at dgelb@gelbgelb.com, and Kevin Bristow, Esq., at KJBristowlaw@verizon.net, identified on the Notice of Electronic filing (NEF), on this 9th day of June 2009.

/s/ Jeffrey S. Brenner