

UNITED STATES DISTRICT COURT  
DISTRICT OF RHODE ISLAND

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IRWIN J. BARKAN and D&D BARKAN LLC, :  
 :  
 Plaintiffs/Counterclaim Defendants, :  
 :  
 v. : C.A. 05-50-L  
 :  
 DUNKIN' DONUTS, INC. and BASKIN-ROBBINS :  
 USA, CO., :  
 :  
 Defendants/Counterclaim Plaintiffs. :  
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FIRST AMENDED VERIFIED COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiffs Irwin J. Barkan and D&D Barkan LLC for their First Amended Verified Complaint and Demand for Jury Trial against defendants Dunkin' Donuts, Inc. and Baskin-Robbins USA, Co. allege as follows:

PARTIES

1. Plaintiff Irwin J. Barkan ("Barkan") is a resident of the State of Vermont having an address at 184 Bragg Hill Road, Fayston, Vermont.

2. Plaintiff D&D Barkan LLC ("D&D Barkan") is a Rhode Island limited liability company with a principal place of business at 5358 Main Street, Waitsfield, Vermont. Barkan is the principal owner of D&D Barkan LLC.

3. Barkan and D&D Barkan are collectively referred to herein as the "Barkan Plaintiffs."

4. Defendant Dunkin' Donuts, Inc. ("Dunkin'") is a Delaware corporation with a principal place of business at 130 Royall Street, Canton, Massachusetts.

5. Defendant Baskin-Robbins USA, Co. ("Baskin-Robbins") is a California corporation with a principal place of business at 130 Royall Street, Canton, Massachusetts.

6. Dunkin' and Baskin-Robbins are collectively referred to herein as the "Dunkin' Defendants."

#### JURISDICTION AND VENUE

7. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332 because the amount in controversy exceeds \$75,000.00 exclusive of interest and costs, and plaintiffs and defendants are citizens of different states.

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1391.

#### GENERAL ALLEGATIONS

9. During early to mid-2001, the Barkan Plaintiffs and the Dunkin' Defendants were in negotiations for the purchase and sale of four Dunkin' Donuts shops in Providence, Rhode Island. The Barkan Plaintiffs were also in negotiations for the purchase of an additional shop

which would be developed by the Dunkin' Defendants and later sold to the Barkan Plaintiffs.

10. Commencing in January 2002, the Dunkin' Defendants entered into franchise agreements for the five Dunkin' Donuts shops with the following entities: DDB Westminster LLC DDB Fountain LLC, DDB Empire LLC, DDB Dorrance LLC and DDB Weybosset.

11. The Barkan Plaintiffs also acquired rights to develop other Dunkin' Donuts shops in Rhode Island pursuant to Store Development Agreements ("SDA") entered into with the Dunkin' Defendants in 2002 and 2003.

12. The purchase price by the Barkan Plaintiffs was financed through a loan provided by CIT, a lender associated with and introduced to the Barkan Plaintiffs by the Dunkin' Defendants. The Dunkin' Defendants helped arrange and guaranteed the loan for the Barkan Plaintiffs from CIT.

13. During that time, pursuant to their SDAs, the Barkan Plaintiffs identified three new sites for shops to expand with an objective of increasing store profitability by exercising economies of scale. One new shop to be operated by DDB Burrilville LLC, opened in the summer of 2004. Also around that time the Barkan Plaintiffs developed plans and sought municipal permits in order to build the

other two shops. Pursuant to the SDAs, the Barkan Plaintiffs had the right to build six stores, and under the original acquisition the Barkan Plaintiffs could build three stores in Providence, Rhode Island. Stores were built in Burrilville and the Warwick Mall. Of the seven remaining SDAs, the Barkan Plaintiffs had a binding purchase and sale agreement for East Greenwich, and binding leases for stores in Providence and Cranston.

14. In September 2003, the Barkan Plaintiffs presented a plan to the Dunkin' Defendants to restructure the debt so as to bring them to a positive cash flow. Between September 2003 and March 2004, the Barkan Plaintiffs presented at least four other re-financing proposals for approval by the Dunkin' Defendants. All of the Barkan Plaintiffs' proposals were rejected by the Dunkin' Defendants. Furthermore, the Dunkin' Defendants threatened to terminate Barkan Plaintiffs' franchises and SDA agreements.

15. On June 15, 2004, the Dunkin' Defendants and Barkan Plaintiffs entered into a settlement agreement ("the Agreement") to resolve all disputes between them regarding, among other things, monies owed by the Barkan Plaintiffs to CIT under loans that were guaranteed by the Dunkin'

Defendants. A true and accurate copy of the Agreement is attached hereto as Exhibit 1.

16. Paragraph 4 of the Agreement provides is pertinent part:

FRANCHISOR hereby agrees to work with FRANCHISEES and CIT to attempt to re-finance such existing debt. Specifically, FRANCHISOR will request that CIT issue a new note for the current balance of the financing, including interest and cure payments, with interest only payments for 18 months, except for reimbursement to FRANCHISOR for the above cure payments, such reimbursement to be made at the time of refinancing. After that 18-month period the note would have a 10-year term and amortization. In addition to all documents required by the CIT group, such refinancing shall be secured by one or more security agreements substantially in the form of Exhibit A and cross-guarantee among all FRANCHISEES to FRANCHISOR, as well as all UCC and other filings as FRANCHISOR in its discretion may require. The interest rate would be determined by CIT. FRANCHISOR makes no representation that CIT will provide such refinancing.

17. The promise contained in the Agreement that the Dunkin' Defendants would work with the Barkan Plaintiffs and CIT to refinance existing debt was a material inducement to the Barkan Plaintiffs to enter into the Agreement pursuant to which they granted a release to the Dunkin' Defendants.

18. On information and belief, at the time the parties executed the Agreement, the Dunkin' Defendants did

not intend to work with the Barkan Plaintiffs to attempt to refinance the existing debt to CIT. On information and belief, the Dunkin Defendants did not intend to exercise best efforts or even good faith reasonable efforts to satisfy their obligations under paragraph 4 of the Agreement. Had the Barkan Plaintiffs known this at the time the parties executed the Agreement, the Barkan Plaintiffs would not have executed the Agreement.

19. Prior to entering into the Agreement, the Barkan Plaintiffs were told the following by the Dunkin' Defendants: (a) the Dunkin' Defendants were a good source of business for CIT and CIT wanted to maintain that relationship; (b) CIT had never turned down a guaranteed financing proposal by the Dunkin' Defendants; and (c) CIT should re-finance the debt if asked by the Dunkin' Defendants because the Dunkin' Defendants were the guarantors of the debt.

20. Believing that the Dunkin' Defendants would, as they had in the past, use their considerable resources, influence and reasonable efforts to cause CIT to refinance the CIT loan, the Barkan Plaintiffs reasonably relied on the Dunkin' Defendants' representation that they would work with them to re-finance the existing CIT debt as they had agreed to do under the Agreement.

21. On June 3, 2004, prior to the execution of the Agreement, Bethany Blowers of the Dunkin' Defendants informed the Barkan Plaintiffs that in order for the CIT refinancing to take place, the following things needed to occur: (a) the Barkan Plaintiffs were required to execute the Agreement and pay to CIT \$11,561.83 for one of the existing loans and pay a fee of \$7000.00 to CIT for re-writing the debt; (b) the Dunkin' Defendants needed to sign recourse letters; (c) and CIT needed to amend the debt agreements.

22. After execution of the Agreement, the Barkan Plaintiffs paid \$13,011.85 to CIT, which represented the payment on the requested loan and interest. The Barkan Plaintiffs intended to pay the \$7000.00 at the time that CIT amended the debt agreement. The Barkan Plaintiffs never received confirmation that the Dunkin' Defendants signed the recourse letters nor did they receive documents from CIT amending the debt agreements.

23. At the end of July 2004, the Dunkin' Defendants notified the Barkan Plaintiffs that CIT was not re-financing the debt.

24. The Barkan Plaintiffs subsequently learned from Laura Sneed, an employee of CIT, that CIT did not re-finance the loans because despite the Agreement, the

Dunkin' Defendants did not request the financing from CIT and furnish CIT with the necessary paperwork in a timely fashion. According to Ms. Sneed, CIT has a policy or practice that loans such as the one with the Barkan Plaintiffs are to be removed from CIT's books if not satisfactorily resolved within one year's time. In this case, according to Ms. Sneed, Ms. Blowers did not get the necessary updates and papers to CIT within that period.

25. The Dunkin' Defendants did not exercise reasonable efforts and did not work with the Barkan Plaintiffs and CIT in an effort to cause CIT to refinance their debt with CIT. The Barkan Plaintiffs assert that the Dunkin' Defendants never intended to do so within the meaning of the Agreement.

26. Since June 15, 2004, the Barkan Plaintiffs sought and were approached by entities interested in purchasing their shops, franchise agreements and related assets. In July 2004, the Barkan Plaintiffs entered into negotiations with a potential purchaser (Mr. Guido Petrosinelli), who is a Dunkin' Donuts franchisee. The Dunkin' Defendants were provided a copy of the initial letter of intent and then, at its request, a copy of the draft purchase and sale agreement.

27. During the negotiations, the Barkan Plaintiffs and the potential purchaser kept the Dunkin' Defendants informed concerning the parties involved and proposed business terms.

28. On January 13, 2005, both the potential purchaser and the Dunkin' Defendants attended a meeting at the Dunkin' Donuts Center in Providence, Rhode Island. The Barkan Plaintiffs did not attend, as they were not invited. Immediately after the meeting on January 13, 2005, the potential purchaser demanded a \$50,000.00 price reduction from the Barkan Plaintiffs with respect to the proposed sale. Shortly after that meeting this prospect was rejected after he continually demanded additional concessions of the Barkan Plaintiffs.

29. The Barkan Plaintiffs continued to seek potential buyers and so advised the first potential buyer. Soon they received a second proposal that was better than the first, both for them and the Dunkin' Defendants.

30. The second proposal came from an "A" rated (the highest available rating from the Dunkin' Defendants) Dunkin' Donuts franchisee, namely, the Cafua group. Among other things, it provided for payment of all amounts owed by the Barkan Plaintiffs to the Dunkin' Defendants at the time of sale. This would not have occurred under the first

proposal. It provided for the payment of all of the outstanding CIT debt (which had been purchased by the Dunkin' Defendants from CIT). It was a significant improvement over the proposal from the first prospect which had a lower price, did not allow for payment of the entire CIT balance, and required rent concessions from Third Dunkin' Donuts Realty, Inc.

31. As with the first potential purchaser, however, the Dunkin' Defendants acted unreasonably and in bad faith to derail the possible sale so that it could acquire the Barkan Plaintiffs' store assets for next to nothing and resell them at a large profit. For example, the Dunkin' Defendants first told this prospect that if it purchased the Barkan Plaintiffs' six shops, the prospect's entire 150 store network would be re-rated to "B". This would prevent it from future expansion until the rating was changed to "A". Then it told the Barkan Plaintiffs that this buyer would not be approved for the purchase because it lacked adequate capability to supply baked goods to their shops. Both issues were resolvable but they chilled the prospect's interest and slowed negotiations.

32. By notice dated January 31, 2005 and delivered February 1, 2005, after it learned of the second potential buyer and the Barkan Plaintiffs' intention to end

negotiations with the first buyer, the Dunkin' Defendants issued a Notice of Default/Notice to Cure under the Agreement giving the Barkan Plaintiffs seven (7) days to pay \$1,874,122.40 or suffer termination. A copy of this notice is attached as Exhibit 2.

33. After this notice was received by the Barkan Plaintiffs, Dave Harrington, an employee of the Dunkin' Defendants, called Barkan to discourage the Barkan Plaintiffs from concluding a purchase and sale agreement with the second potential buyer. He informed Barkan that he would provide a list of franchisees in Rhode Island acceptable to the Dunkin' Defendants as potential buyers.

34. The Barkan Plaintiffs requested that three additional days be added to the cure period so that they could present a signed purchase and sale agreement from the second potential buyer to the Dunkin' Defendants, which request was rejected.

35. The Dunkin' Defendants have knowingly and wrongfully engaged in activity designed to interfere with the Barkan Plaintiffs' business and advantageous relations with potential buyers.

36. Further, the Dunkin' Defendants intentionally misled the Barkan Plaintiffs about the Dunkin' Defendants'

ability, willingness and effort that they would put forth to have their debt written through CIT.

37. The Dunkin' Defendants refused to work with the Barkan Plaintiffs reasonably and in good faith as required by the Agreement regarding the CIT debt and in approving a mutually advantageous sale of the shops. Instead, the Dunkin' Defendants embarked on a campaign to terminate the Barkan Plaintiffs' franchise agreements and SDAs in order to seize their shops for the Dunkin' Defendants' profit and advantage.

38. On February 7, 2005, Barkan concluded negotiations with the Cafua group, which negotiations resulted in an agreement for the acquisition of the the franchises including the SDAs. That agreement would have provided for, inter alia, the payment of all amounts owed by the franchisees to the Dunkin' Defendants at the closing of the transaction. The documentation was being drafted by the attorney for the Cafua group. See Exhibit 3.

39. However, despite their obligations under the Agreement, the Dunkin' Defendants' motive was to eliminate the Barkan Plaintiffs from the Dunkin' Defendants' franchise system rather than allowing a sale to go forward.

40. In order to protect themselves from the actions of the Dunkin' Defendants as described above and to avoid

complete economic ruin, DDB Westminster LLC, DDB Fountain LLC, DDB Empire LLC, DDB Dorrance LLC, DDB Weybosset LLC, DDB Warwick LLC and DDB Burrilville LLC (collectively the "Debtors") filed for bankruptcy protection. As a result of those proceedings, through the bankruptcy court the existing six stores were sold at auction for \$4,025,000.00. The Debtors, as a condition of the sale of the stores, executed releases in favor of the Dunkin' Defendants and their claims against the Dunkin' Defendants in this case were dismissed.

41. The Barkan Plaintiffs, which were not Chapter 11 debtors did not file in bankruptcy, retained the ownership interest in the SDAs which are not assets of the bankrupt estate. 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.

#### COUNT I

#### FRAUD

42. The Barkan Plaintiffs re-allege and incorporate by reference paragraphs 1 through 41 of the First Amended Verified Complaint and Demand for Jury Trial as if fully set forth herein, and in addition make the allegations set forth below.

43. When they entered into the Agreement, the Dunkin' Defendants misrepresented to the Barkan Plaintiffs with the intent to deceive them that they would work with the Barkan Plaintiffs and CIT to attempt to refinance the existing debt. The Barkan Plaintiffs believe and allege that the Dunkin' Defendants did not intend to work with them reasonably, diligently and in good faith for such purpose and that the Dunkin' Defendants' real motive was to eliminate the Barkan Plaintiffs from the Dunkin' Defendants' franchise system.

44. The Barkan Plaintiffs relied reasonably on such representations to their detriment by entering into the Agreement, which included a general release of all of their claims against the Dunkin' Defendants and the provision of termination of franchise agreements which were to be held in escrow by the Dunkin' Defendants counsel.

45. Had the Barkan Plaintiffs known the truth about the Dunkin' Defendants' intentions, they would not have done so and would have preserved the value of their SDAs.

46. As a direct result of the Dunkin' Defendants' fraud, the Barkan Plaintiffs have suffered financial damages in an amount not yet ascertainable but estimated to exceed \$3,000,000.00, together with interest and costs including reasonable attorneys' fees.

COUNT II

BREACH OF THE EXPRESS TERMS OF THE SETTLEMENT AGREEMENT

47. The Barkan Plaintiffs re-allege and incorporate by reference paragraphs 1 through 46 of the First Amended Verified Complaint and Demand for Jury Trial as if fully set forth herein, and in addition make the allegations set forth below.

48. On June 15, 2005, the parties executed the Agreement.

49. Pursuant to the paragraph 4 of Agreement, the Dunkin' Defendants agreed to work with the Barkan Plaintiffs and CIT to refinance the Barkan Plaintiffs' debt with CIT.

50. The Dunkin' Defendants breached paragraph 4 of the Agreement by failing to work with the Barkan Plaintiffs to refinance their debt with CIT by, among other things, failing to request the financing from CIT and failing to timely submit necessary paperwork to CIT that would enable the Barkan Plaintiffs to re-finance their debt with CIT and maintain their SDA agreements with the Dunkin' Defendants.

51. The Dunkin' Defendants further breached the Agreement by failing to exercise best efforts and/or good faith reasonable efforts to satisfy their obligations under paragraph 4 of the Agreement.

52. As a direct and proximate result of the Dunkin' Defendants' breaches of the Agreement, CIT refused to refinance the Barkan Plaintiffs' debt and the Dunkin' Defendants terminated the Barkan Plaintiffs' SDA agreements.

53. As a direct and proximate result of the Dunkin' Defendants' breaches of the Agreement, the Barkan Plaintiffs have suffered damages in an amount not yet ascertainable but estimated to exceed \$3,000,000.00, together with interest and costs including reasonable attorneys' fees.

COUNT III  
BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING IN THE  
AGREEMENT

54. The Barkan Plaintiffs re-allege and incorporate by reference paragraphs 1 through 53 of the First Amended Verified Complaint and Demand for Jury Trial as if fully set forth herein, and in addition make the allegations set forth below.

55. The Agreement contains an implied covenant of good faith and fair dealing.

56. By engaging in the wrongful conduct described herein including refusing (or indicating that they would refuse) to approve a sale of the Barkan Plaintiffs' business to worthy buyers, the Dunkin' Defendants acted (by

exercising contractual discretion to terminate) with improper motive in bad faith. The Dunkin' Defendants violated the implied covenant of good faith and fair dealing.

57. As a direct and proximate result of the Dunkin' Defendants' breaches of the implied covenant of good faith and fair dealing, the Barkan Plaintiffs have suffered damages in an amount not yet ascertainable but estimated to exceed \$3,000,000.00, together with interest and costs including reasonable attorneys' fees.

#### COUNT IV

##### VIOLATION OF MASSACHUSETTS G.L. c. 93A

58. The Barkan Plaintiffs re-allege and incorporate by reference paragraphs 1 through 57 of the First Amended Verified Complaint and Demand for Jury Trial as if fully set forth herein, and in addition make the allegations set forth below.

59. The business dealings and transactions between the Barkan Plaintiffs and Dunkin' Defendants described herein occurred in trade or commerce. At all relevant times the Dunkin' Defendants and Barkan Plaintiffs were engaged in trade or commerce.

60. The Dunkin' Defendants employed unfair and deceptive acts and practices in their business dealings

with the Barkan Plaintiffs as described above. These acts and practices occurred primarily and substantially in Massachusetts, where the Dunkin' Defendants conducted business.

61. The unfair and deceptive acts and practices were unlawful under Massachusetts G.L. c. 93A §§ 2 and 11. They were committed knowingly, willfully, intentionally and in bad faith by the Dunkin' Defendants.

62. As a direct and proximate result of the Dunkin' Defendants' unlawful conduct, the Barkan Plaintiffs have suffered damages in an amount not yet ascertainable but estimated to exceed \$3,000,000.00, together with interest and costs including reasonable attorneys' fees.

63. The Barkan Plaintiffs are entitled to their damages incurred as a result of the Dunkin' Defendants' unfair and deceptive acts or practices, trebled, together with interest and costs including reasonable attorneys' fees.

COUNT V  
TORTIOUS INTERFERENCE

64. The Barkan Plaintiffs re-allege and incorporate by reference paragraphs 1 through 63 of the First Amended Verified Complaint and Demand for Jury Trial as if fully set forth herein, and in addition make the allegations set forth below.

65. Without justification and with bad faith intent, as described above, the Dunkin' Defendants tortiously interfered with the Barkan Plaintiffs' advantageous relationships with prospective purchasers of their donut shop businesses.

66. As a direct and proximate result of the Dunkin' Defendants' unlawful conduct, the Barkan Plaintiffs have suffered damages in an amount not yet ascertainable but estimated to exceed \$3,000,000.00, together with interest and costs including reasonable attorneys' fees.\_

PRAYERS FOR RELIEF

WHEREFORE, Plaintiffs Irwin J. Barkan and D&D Barkan LLC pray for relief as follows:

1. For judgment on Count I in favor of plaintiffs Irwin J. Barkan and D&D Barkan LLC against defendants Dunkin' Donuts, Inc. and Baskin-Robbins USA, Co., jointly and severally, in an amount to be determined at trial,

together with interest and costs including reasonable attorneys' fees;

2. For judgment on Count II in favor of plaintiffs Irwin J. Barkan and D&D Barkan LLC against defendants Dunkin' Donuts, Inc. and Baskin-Robbins USA, Co., jointly and severally, in an amount to be determined at trial, together with interest and costs including reasonable attorneys' fees;

3. For judgment on Count III in favor of plaintiffs Irwin J. Barkan and D&D Barkan LLC against defendants Dunkin' Donuts, Inc. and Baskin-Robbins USA, Co., jointly and severally, in an amount to be determined at trial, together with interest and costs including reasonable attorneys' fees;

4. For judgment on Count IV in favor of plaintiffs Irwin J. Barkan and D&D Barkan LLC against defendants Dunkin' Donuts, Inc. and Baskin-Robbins USA, Co., jointly and severally, in an amount to be determined at trial, trebled, together with interest and costs including reasonable attorneys' fees;

5. For judgment on Count V in favor of plaintiffs Irwin J. Barkan and D&D Barkan LLC against defendants Dunkin' Donuts, Inc. and Baskin-Robbins USA, Co., jointly and severally, in an amount to be determined at trial,

together with interest and costs including reasonable attorneys' fees; and

6. For such other and further relief as this Court may deem just and proper.

JURY DEMAND

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

PLAINTIFFS/COUNTERCLAIM DEFENDANTS IRWIN J. BARKAN  
and D&D BARKAN LLC,

By their attorneys,

\_\_\_\_\_  
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Dated:

VERIFICATION

I, Irwin M. Barkan, a plaintiff in this case, hereby swear under oath that I have read the foregoing First Amended Verified Complaint, that I have personal knowledge of the factual matters stated herein (except those alleged on information and belief, which I believe to be true) and that they are true and correct to the best of my knowledge.

Date: \_\_\_\_\_

\_\_\_\_\_  
Irwin J. Barkan