

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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IRWIN J. BARKAN and D&D BARKAN LLC, :
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Plaintiffs/Counterclaim Defendants, :
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v. : C.A. 05-50-L
 :
DUNKIN' DONUTS, INC. :
and BASKIN-ROBBINS :
USA, CO., :
 :
 :
Defendants/Counterclaim Plaintiffs. :
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**PLAINTIFFS/COUNTERCLAIM DEFENDANTS' MEMORANDUM OF LAW IN
SUPPORT OF THEIR OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT**

Pursuant to Fed. R. Civ. P. 56 and LR Cv 56(a), plaintiffs/counterclaim defendants Irwin J. Barkan and D&D Barkan LLC (collectively "Barkan") respectfully submit to this Honorable Court Plaintiff/Counterclaim Defendants' Memorandum of Law in Support of Their Opposition to Defendants' Motion for Summary Judgment (the "Opposition to Summary Judgment").

As discussed below, there are substantial material facts in dispute in the above-captioned litigation, and therefore, Barkan should be entitled to a full adjudication before a jury on the merits of his claims against defendants/counterclaim plaintiffs Dunkin' Donuts, Inc. and Baskin-Robbins USA, Co. (collectively "Dunkin").

**I.
FACTUAL BACKGROUND¹**

¹ The principle individuals referred to herein are identified as follows: Irwin J. Barkan as "Barkan" and D&D Barkan LLC as "D&D" (sometimes collectively referred to as "Barkan"); Dunkin' Donuts, Inc. as "Dunkin'" and Baskin-Robbins USA, Co. as "Baskin" (sometimes collectively referred to as "Dunkin"). Dunkin' employees are as follows: Betheny Blowers as "Blowers"; William Bode as "Bode"; Daniel Connelly as "Connelly"; Steven W. Gabellieri as "Gabellieri"; David Harrington as "Harrington"; and Lionel J. Remillard, Jr. as "Remillard". Connelly reported to Harrington, and Harrington reported to Gabellieri. Bode was at the same level with Harrington and also reported to Gabellieri. CIT employees are as follows: Shelly Rush as "Rush" and Laura Lynn Sneed as "Sneed".

Dunkin' would have the Court believe that what transpired between Barkan and Dunkin' and the consequences to Barkan of what occurred are either undisputed or should be disregarded by the Court. As explained below, the material facts in this case are clearly in dispute, and it is the jury who must act as the fact finder.

Barkan has submitted concurrently herewith "Plaintiffs/Counterclaim Defendants' Response to Defendants' Statement of Undisputed Material Facts" ("BR") which describes the events that occurred which are the subject of this litigation. In addition, Barkan has submitted concurrently herewith "Affidavit of Plaintiff/Counterclaim Defendant Irwin J. Barkan in Support of His Opposition to Defendants' Motion for Summary Judgment which, among other evidence, supports the statements in Barkan's response. The Barkan affidavit addresses in great detail Barkan's background, the formation of his relationship with Dunkin', the financing and operation of his stores, his SDAs and the opening and development of stores, his Settlement Agreement with Dunkin', his communications with Dunkin' concerning its representation that CIT denied his restructuring and the consequences thereof. Barkan's statement also addresses the communications between Dunkin' and CIT. The purpose of the following statement herein is to provide a roadmap for the Court to give context to Barkan's legal arguments:

- Barkan has knowledge and experience in real estate development, retail and franchise business operations, real estate and investment management, and real estate analysis and consulting. [BR ¶ 1]
- Barkan initially acquired from Dunkin' four underperforming stores and a fifth store that was to be developed. [BR ¶ 3]

- Barkan’s efforts included renovating and rebuilding stores, hiring employees, opening new store locations, closing unprofitable stores, and investing personally in his business. [BR ¶ 3]
- Through a competitive bidding process with other Dunkin’ franchisees, Barkan obtained SDAs in Rhode Island which gave him the right to develop stores, and he opened and pursued development of store locations. [BR ¶ 5]
- Barkan obtained financing through CIT which had a close relationship with Dunkin’. Notably, when Barkan initially acquired his stores and the loan closed Dunkin’ insisted that he sign a statement acknowledging that the stores had a negative cash flow. [BR ¶¶ 14 and 45]
- Barkan and Dunkin’ entered into a Settlement Agreement in June 2004 which contemplated that Barkan’s loans with CIT would be restructured. The Settlement Agreement was intended to resolve any existing issues between Barkan and Dunkin’ and permit them to have a long term relationship. [BR ¶¶ 45 and 74]
- Among other things, the Settlement Agreement provided for Dunkin’s guarantees of Barkan’s loans and no additional credit was to be provided by CIT. Dunkin’ evaluates its own economic risk prior to furnishing guarantees and obtains prior approval from its finance committee. [BR ¶¶ 45, 74 and 82]
- Under the Settlement Agreement, Dunkin’ was obligated to use its best efforts to request that CIT restructure the loans and “work with” Barkan and CIT with respect to the restructuring. [BR ¶ 82]

- However, Blowers refused to provide information to Rush and failed to send signed recourse letters to CIT upon the signing of the Settlement Agreement and does not know why she did not send the letters. [BR ¶¶ 49, 69 and 74]
- In addition, Dunkin' never presented the Settlement Agreement to its Finance Committee for approval even though its business practices and the agreement itself required it to do so. Finance committee approval would appear in the committee's minutes. [BR ¶ 74]
- Dunkin' never requested that CIT restructure Barkan's loans which Dunkin would have done in writing based on its business practice. Rush never spoke to Blowers about a restructure. [BR ¶¶ 82 and 105]
- Dunkin' did not work with Barkan and CIT as it was required to do under the Settlement Agreement. Dunkin' was obligated to CIT to repurchase stores that had been permanently closed. The Settlement Agreement did not provide for two of Barkan's stores which had closed, and the store closings was the deciding issue Rush and Sneed broached with Blowers. Blowers refused to provide information Rush request, and therefore, Rush could not evaluate the restructure. This left Barkan's situation in limbo. [BR ¶¶ 88, 89 and 105]
- Barkan was forced to attempt to sell his Dunkin' network when he was informed by Blowers that CIT would not do the restructuring. Rush understood that as of August 2004, the Barkan loans were in a liquidation mode which was caused by the store closings. Notably, Gabellieri testified that Barkan was in good standing with Dunkin' but does not know why this changed thirty days later when Remillard made the decision to terminate Barkan. Gabellieri would have known if a long, protracted series of events had

occurred with respect to a franchisee escalating to the point where they culminated in someone like Remillard making such a decision. [BR ¶¶ 74, 105 and 111]

- Barkan was informed by Blowers after she told him falsely that CIT had denied the restructuring that while his situation was in flux he should not make monthly payments to CIT because Dunkin' would continue to cure payments until a new financing was in place. [BR ¶ 104]
- There is nothing in an SDA which would inform a franchisee as to how they are valued, and the way Dunkin' values SDAs could be different than how the franchisees do so. Dunkin' separately assesses an SDA and development site, and Bode acknowledged that he believed that Barkan had three stores in development. When Dunkin' receives numbers from a franchisee, the franchisee's site assessment may be based on a projection of profits whereas Dunkin' may use a break even. [BR ¶ 129]
- Bode (Dunkin's designated witness) has no basis for disputing Dr. Gartrell's (Barkan's designated witness)² conclusion as to what he believed the reasonable expectations of the parties were under the Settlement Agreement. Moreover, Bode agrees with Gartrell's methodology but not his application to Barkan's case. Bode's dispute of Gartrell's assumptions should be decided by a jury. [BR ¶ 131]

II. **LEGAL STANDARD**

Fed. R. Civ. P. 56(c) provides that summary judgment is proper only:

...if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

² Dr. Gartrell provided a detailed report and was deposed. Barkan wishes to inform the Court that Dr. Gartrell has passed away. Dunkin' has not moved for summary judgment as to damages but raises issues in its motion which are disputed as discussed above. Barkan intends to raise the consequences of Gartrell's death at a future point in the litigation.

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A fact is material if its resolution has the ability to affect the outcome of the case under the controlling law. Calvi v. Knox County, 470 F.3d 422, 426 (1st Cir. 2006); Cochran v. Quest Software, Inc., 328 F.3d 1, 6 (1st Cir. 2003). An issue is genuine as to a material fact if it could be resolved in favor of either party at trial. Calvi v. Knox County, 470 F.3d at 426; Cochran v. Quest Software, Inc., 328 F.3d at 6.

In Sartor et al. v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944), the United States Supreme Court stated the following:

The [Fifth Circuit Court of Appeals] below heretofore has correctly noted that Rule 56 authorizes summary judgment ***only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.*** (Emphasis added).

Notably, in Camerlin v. New York Cent. R. Co., 199 F. 2d 698, 703 (1st Cir. 1952), the United States Court of Appeals for the First Circuit relied on the aforementioned precedent established by the United States Supreme Court in Sartor concerning the impropriety of entering summary judgment where there are substantial questions of fact in dispute, especially wherein an issue of credibility is live and the nonmoving party seeks to have such evidence weighed by the jury.

The moving party has the initial burden of demonstrating that it is entitled to summary judgment, there is no material issue of fact and it is entitled to judgment as a matter of law. See Hon. Solomon Oliver, Jr., “Summary Judgment,” *Business and Commercial Litigation in Federal Courts*, § 27:6 (Robert L. Haig, 2nd Edition). The moving party must make the showing that no material issue of fact exists and that it is entitled to judgment as a matter of law, even where the movant would not have the burden of persuasion at trial. Id. (citing interState Net Bank v. NetB@nk, 348 F. Supp. 2d 340, 348 (D.N.J. 2004)) (“The moving party always bears the burden of showing that no genuine issue of material fact exists, regardless of which party

ultimately would have the burden of persuasion at trial.”)). Therefore, to prevail on summary judgment, the moving party must establish that if the matter were to proceed to a jury trial, the nonmoving party would be subject to a directed verdict, and that all the evidence in the case should not be considered by the jury.

The movant bears the initial burden of proving that he is entitled to a judgment as a matter of law by establishing the absence of evidence supporting the nonmovant’s case. Fenoglio v. Augat, Inc., 50 F. Supp. 2d 46, 51 (D. Mass. 1999). Once the movant has established this burden, the nonmovant must present specific evidentiary facts demonstrating a genuine issue for trial in order to defeat a summary judgment motion. Calvi v. Knox County, 470 F.3d at 426; Fenoglio v. Augat, Inc., 50 F. Supp. 2d at 51.

To defeat a motion for summary judgment, evidence offered by the nonmovant “must be significantly probative of specific facts.” Pérez v. Volvo Car Corp., 247 F.3d 303, 317 (1st Cir. 2001) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). An *indispensible predicate* to the granting of summary judgment is for the Court to find that not a *single* genuine issue of material fact is in dispute, and should genuine issues of material facts remain, the matter must proceed to trial. See Id.

In applying the summary judgment standard, the court must draw all reasonable inferences from the facts in the light most favorable to the nonmovant. Calvi v. Knox County, 470 F.3d at 426 (1st Cir. 2006); Cochran v. Quest Software, Inc., 328 F.3d at 6. However, this does not mean that the court “must swallow the predicate for the nonmovant’s opposition hook, line, and sinker. . .” Cochran v. Quest Software, Inc., 328 F.3d at 6. The nonmovant’s burden is not established through “conclusory allegations, improbable inferences, and unsupported speculation.” Id. citing Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir.

1990); Calvi v. Knox County, 470 F.3d at 426. Summary judgment should only be granted if the facts taken in the light most hospitable to the nonmovant show that there is no genuine issue of material fact and that the movant is entitled to a judgment as a matter of law. Calvi v. Knox County, 470 F.3d at 426.

III. ARGUMENT

A. Barkan's Business Performance Was Satisfactory To Dunkin', But In Any Event, Is A Disputed Issue Of Fact.

As discussed above, Barkan has a long history of business successes which are the result of the knowledge, skill and experience he has acquired. Dunkin' acknowledged that Barkan could perform successfully by selling him underperforming stores, arranging financing with CIT, guaranteeing his obligations to CIT, and entering into a settlement agreement which contemplated an ongoing relationship between Dunkin' and Barkan. In any event, it is the province of a jury to decide these disputed issues of fact.

B. A Reasonable Inference Should Be Drawn That Barkan Was Creditworthy.

As set forth above, Dunkin' concluded that Barkan was creditworthy when it entered into the Agreement because a reasonable inference can be drawn in Barkan's favor that Dunkin's business practices required it to evaluate its economic risk prior to guaranteeing loans. In any event, no additional credit was to be extended to Barkan by CIT as a result of the Agreement. Certainly these are disputed issues of fact which should go to a jury.

C. Dunkin' Failed To Use "Best Efforts" In Fulfilling Its Obligation To Barkan Pursuant To The Agreement.

Dunkin' understood that the Agreement contemplated that Dunkin' would use its best efforts in order to fulfill its obligations, as mentioned above. Moreover, Dunkin' was legally obligated to use best efforts. In Reyelt v. Danzell, this Honorable Court held that the duty to use

best efforts as well as good faith and diligence permeated the parties' entire contract. 509 F. Supp. 2d 156, 164 (D.R.I. 2007)(Lagueux, J.). Judge Lagueux noted that it was Judge Cardozo of the New York Court of Appeals in a case entitled Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88 (1917) who originated the concept of an implied duty to use "best efforts" in order to impose mutual obligations in a contract. Id. Judge Lagueux also pointed to a Rhode Island Supreme Court case entitled Bradford Dyeing Ass'n, Inc. v. J. Stog Tech GmbH, 765 A.2d 1226, 1237 (R.I. 2001) which recognized the implied duty to use best efforts. Id. The Court concluded that "a party's diligent, reasonable, good faith effort to fulfill the obligations imposed by the contract is good enough to qualify as 'best.'" Id. at 165. In Bradford Dyeing Ass'n, Inc. v. J. Stog Tech GmbH, the Rhode Island Supreme Court reasoned:

It is both elementary as well as fundamental law that where the parties contract and make performance conditional upon the happening of an occurrence of a particular matter, the contract imposes upon the party required to bring about the happening of that occurrence an implied promise to use **good faith, diligence and best efforts** to bring about that happening. (emphasis added.)

765 A.2d 1226, 1237 (R.I. 2001). The Court in LaCroix v. Walker reasoned that contracts with conditions precedent should be interpreted to "impose [] upon the party required to bring upon the happening of that occurrence an implied promise to use good faith, diligence and best efforts to bring about that happening." 819 A.2d 1244, 1246 (R.I. 2003)(quoting Bradford Dyeing Ass'n, Inc. v. J. Stog Tech GmbH, 765 A.2d 1226, 1237 (R.I. 2001)); see also Brito v. Belvedere Developer, LLC, 2004 WL 877565, *5 (R.I. Super. Ct. March 29, 2004)(no reported in A.2d) (Superior Court of Rhode Island acknowledged that the Rhode Island Supreme Court interprets contracts including conditions precedent to impose an implied promise to use good faith, diligence and best efforts). The First Circuit has stated that "the 'best efforts' standard has been

held to be equivalent to that of good faith.” See Triple-A Baseball Club Associates v. Northeastern Baseball, Inc., 832 F.2d 214, 225 (1st Cir. 1987).

A court should review a contract as a rational business document and should extract the apparent intention of the parties by reviewing the agreement in its entirety. Cosimini v. Atkinson-Kiewit Joint Venture, 877 F. Supp. 68, 72 (D.R.I. 1995). “[T]he provisions of a contract are to be so construed with reference to one another as to make the entire contract a rational business instrument which will effectuate the apparent intention of the parties.” Kagan v. Industrial Washing Machine Corp., 182 F.2d 139, 142 (1st Cir. 1950); see Baladevon, Inc. v. Abbot Laboratories, Inc., 871 F. Supp. 89, 99 (D. Mass. 1994)(“[C]ontracts should be given a construction that will make them rational business documents and effectuate the intent of the parties.”). Furthermore, “[i]f a contract ‘as a whole produced a conviction that a particular result was fixedly desired although not expressed by words, that defect may be supplied by implication and the underlying intention . . . may be effectuated, provided it is sufficiently declared by the entire instrument.’” Baladevon, Inc. v. Abbot Laboratories, Inc., 871 F. Supp. at 99 (quoting Bernard v. Cameron & Colby Co. Inc., 397 Mass. 320, 322 (1986)).

Dunkin’s failure to request the CIT refinancing (or a reasonable inference drawn in Barkan’s favor that it did not) coupled with a refusal to provide information to CIT creates an undisputed issue of material fact in favor of Barkan that Dunkin’ breached its obligations under the Agreement. If the Court does not reach that conclusion, then this issue of fact is disputed and should be decided by the jury.

D. Barkan Was Excused From Performance Under The Agreement As A Result of Dunkin’s Material Breach.

“Material failure of performance under a contract calling for an exchange of performances will suspend or discharge the other party’s duty to perform.” Richard A. Lord, 14

Williston on Contracts § 43:6 (4th ed.). Additionally, whether the nonperformance is material is generally an issue of fact. Id. Moreover, the materiality of a breach which excuses performance by the other party depends on whether “it goes to the root, heart or essence of the contract or is of such a nature as to defeat the object of the parties in making the contract, or, as it has sometimes been said, when the covenant not performed is of such importance that the contract would not have been made without it.” Id. A party is excused from performance and is entitled to substantial damages only where there has been a material breach which is “a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract.” Richard A. Lord, 23 Williston on Contracts § 63:3 (4th ed.). A breach is considered “‘material’ if a party fails to perform a substantial part of the contract or one or more of its essential terms or conditions, the breach substantially defeats the contract’s purpose, or the breach is such that upon a reasonable interpretation of the contract, the parties considered the breach as vital to the existence of the contract.” Id. Generally, a material breach of one aspect of the agreement constitutes a material breach of the entire agreement. Id.

In Women’s Development Corp. v. City of Central Falls, the Rhode Island Supreme Court reasoned that a party’s material breach of contract excuses the other party’s subsequent nonperformance of its contractual obligations. 764 A.2d 151, 158 (2001). The Court suggested that it is effective to weigh the five factors set forth in the Restatement (Second) of Contracts § 241 to determine whether a breach is material.³ Id.

³ Pursuant to the Restatement (Second) of Contracts, the following factors are significant to consider in determining whether a breach is material:

- (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
- (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
- (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;

In Aiello Construction, Inc. v. Nationwide Tractor Trailer Training and Placement Corp., the Rhode Island Supreme Court held that where the defendant's breach went to the essence of the contract, the plaintiffs were excused from performance of the contract. 122 R.I. 861, 865 (1980); see Salo Landscape & Construction Co., Inc. v. Liberty Electric Co., 119 R.I. 269, 274 (1977)("[A]n owner or prime contractor who fails to pay an installment due on a construction contract is guilty of a breach that goes to the essence of the contract and that entitles the injured party to bring an action based on a quantum meruit theory for the fair and reasonable value of the work done."); see also Iannuccillo v. Material Sand and Stone Corporation, 713 A.2d 1234, 1239-40 (1998)(citing to cases in which Rhode Island Supreme Court held that a "failure of a party to pay installment payments on a construction contract is a material breach of the contract and excuses further performance by the nonbreaching party.")

There are material issues of fact in dispute as to whether Dunkin's failure to perform its contractual obligations under the Settlement Agreement was a natural and probable consequence of the harm caused to Barkan's future business opportunities (i.e. developing the SDAs). In Redgrave v. Boston Symphony Orchestra, the First Circuit Court of Appeals held that "...as a matter of Massachusetts contract law, a plaintiff may receive consequential damages if the plaintiff proves with sufficient evidence that a breach of contract proximately caused the loss of identifiable professional opportunities." 855 F. 2d 888, 894 (1st Cir. 1988). The Court of Appeals also found that the jury was given appropriate instructions to assist it in determining whether the plaintiff (Redgrave) had suffered consequential damages through the loss of future professional opportunities and was told to find that the defendant-orchestra's cancellation of plaintiff-actress's contract was a *proximate cause* of harm to plaintiff's professional career only

(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing. Restatement (Second) of Contracts § 241 (1981). The above-referenced approach has been adopted in several jurisdictions. Richard A. Lord, 23 Williston on Contracts § 63:3 (4th ed.).

if it determined that “harm would not have occurred *but for* the cancellation and that the harm was a natural and probable consequence of the cancellation.” (Emphasis added.) Id. at 893.

Redgrave’s “but for” analysis was adopted by this Court in Chrabaszcz v. Johnston School Committee, 474 F. Supp. 2d 298, 314 (D.R.I. 2007). In Chrabaszcz, the Court held that “...the breach of contract will be a proximate cause of the harm if ‘that harm would not have occurred but for [the failure to give [the plaintiff] an evaluation] and that the harm was a natural and probable consequence of the [breach].’” Id. at 314 (quoting Redgrave v. Boston Symphony Orchestra, 885 F.2d at 893

As discussed above, Dunkin’s obligations under the Settlement Agreement were spelled out clearly. Dunkin’ understood that it was required to use its best efforts performing under the Agreement. Dunkin’ did not intend to fulfill its obligations to Barkan, and in fact, did not do so. Dunkin’ was motivated by its own self interest when it breached the Agreement. Dunkin’ knew that its failure to honor the Agreement would cause damages to Barkan, and in fact, Barkan was damaged.

In light of the above, Barkan is entitled to present this factual dispute he has with Dunkin’ to a jury as the plaintiff was properly entitled to do according to the First Circuit Court of Appeals in Redgrave. 885 F.2d at 893 (1st Cir. 1988).

E. Dunkin’ Breached The Covenant Of Good Faith And Fair Dealing Inasmuch As It Never Intended To Fulfill Its Contractual Obligation To Barkan Pursuant To The Agreement.

Barkan asserts that a material issue of fact remains in dispute as to Dunkin’s *motive* not to employ best efforts under the Settlement Agreement. Furthermore, it is for the jury, not the court, to determine Dunkin’s intent to perform under the Agreement and to decipher Dunkin’s motive underlying its conduct. See Velasquez-Garcia v. Horizon Lines of Puerto Rico, Inc., 473

F.3d 11, 17-18 (1st Cir. 2007)(citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)); Fed. R. Civ. P. 56(c). Moreover, Dunkin' acted in bad faith when it thwarted CIT's efforts to obtain information necessary to assess the restructure, and lied to Barkan when it told him the restructuring had been denied thereby causing him damages.

In A.A.A. Pool Service & Supply, Inc. v. Aetna Casualty & Surety Co., the Rhode Island Supreme Court stated that "[it] has indeed long-recognized that parties to a contract have an implied obligation to deal fairly with one another." 395 A.2d 724, 725 (1978). It is Barkan's position that there are material issues of fact in dispute concerning Dunkin's failure to act in good faith, and therefore, such disputed facts preclude summary judgment. See 3 Franchise Distribution Law & Practice s. 17:48 (2008) (citing Learning Express, Inc. v. Ray-Matt Enterprises, Inc., 74 F. Supp. 2d 79 (D. Mass. 1999) (instructive holding from the United States District Court for the District of Massachusetts that franchisor's representation of promises to provide certain business support to generate franchisees' business and its subsequent failure to do so could amount to breach of covenant of good faith and fair dealing)).

In any event, Dunkin's breach of the covenant of good faith and fair dealing should be decided by the jury. See Id.; see also Town & Country Equipment v. Deere & Company, 133 F. Supp. 2d 665, 669 (W.D. Tenn. 2000) (instructive holding from the United States District Court of the Western District of Tennessee that genuine issue of material fact existed precluding summary judgment where evidence in the record supported unreasonable franchisor conduct under a contract and franchisee could show that reasons for termination of the relationship were pretextual).

F. Barkan's Damages Are Not Speculative; However, In Any Event, Dunkin' Should Not Benefit From The Uncertainty It Created.

Even where damages cannot be measured with exactness, a jury could still return a verdict for a plaintiff. Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264 (1946). Although it may not render a verdict based on guesswork, a jury may make a reasonable estimate of damages based on relevant data. Id. The United States Supreme Court reasoned that any other rule “would be an inducement to make the wrongdoer so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain.” Id. The Court concluded that “[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of uncertainty which his own wrong has created.” Id. at 265. Where a wrong has been done, courts tend to find a manner in which damages can be awarded. Id. Furthermore, the difficulty in ascertaining damages should not be confused with the plaintiff’s right of recovery. Id. at 265-66.

“(W)here the existence of a loss is established, absolute certainty in proving its quantum is not required.” Smith Development Corp. v. Bilow Enterprises, Inc., 112 R.I. 203, 214 (1973) (quoting 1 Sedgwick, Damages s. 170A (9th ed. 1912). What is required is that the court or the jury be guided by some rational standard. Smith Development Corp. v. Bilow Enterprises, Inc., 112 R.I. at 214 (Rhode Island Supreme Court held that inasmuch as there was an accepted methodology in place and there was sufficient evidentiary basis in the record, the jury could with reasonable certainty make a determination of the profit loss in this case.)

As set forth above, Barkan’s damages are certainly not speculative. In fact, the very reason Barkan was awarded SDAs and was developing stores is Dunkin’ vetted his business along with those of other franchisees and concluded that he would succeed. Now that it is in defensive posture, Dunkin’s position is that Barkan could not have succeeded. However, the Agreement contemplated a long relationship between Dunkin’ and Barkan which Dunkin’

sabotaged. Dunkin's attempt to avoid the jury's scrutiny of its actions through a motion for summary judgment based on disputed material facts is meritless.

IV.
CONCLUSION

In light of the foregoing, plaintiffs/counterclaim defendants Irwin J. Barkan and D&D Barkan LLC respectfully request that this Honorable Court deny Defendants' Motion for Summary Judgment.

PLAINTIFFS/COUNTERCLAIM DEFENDANTS
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Dated: October 31, 2008

CERTIFICATE OF SERVICE

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on October 31, 2008.

/s/ Elizabeth McDonough Noonan
Elizabeth McDonough Noonan