

UNITED STATES DISTRICT COURT
FOR THE 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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PLAINTIFFS/COUNTERCLAIM DEFENDANTS' RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS

Plaintiffs/counterclaim defendants Irwin J. (“Barkan”) and D&D Barkan LLC (“D&D”) hereby respond to the correspondingly numbered paragraphs of “Defendants’ Statement of Undisputed Material Facts”(“SOUMF”) submitted by defendants/counterclaim plaintiffs Dunkin’ Donuts, Inc. (“Dunkin”) and Baskin-Robbins USA, Co. (“Baskin”) (collectively referred to as “Dunkin”) as set forth below. Barkan and D&D have filed concurrently herewith “Plaintiffs/Counterclaim Defendants’ Motion to Strike the Entire Record Offered by Defendants/Counterclaim Plaintiffs in Support of Their Motion for Summary Judgment and Their Statement of Undisputed Material Facts Supported by Such Evidence for Failure to Comply with the Federal Rules of Civil Procedure, Federal Rules of Evidence and Local Rules of Court and Request for a Hearing” (“Motion to Strike”), and by submitting this

response they are not waiving and are expressly reserving their objections to Dunkin' and Baskin's exhibits and the paragraphs of their SOUMF which rely upon such exhibits¹.

1. Admit. Further responding, Barkan graduated from Brandeis University, was a Senior Vice President for the Beal Companies, and formed I.J. Barkan, Inc. in 1984 which continues to operate. [Affidavit of Plaintiff/Counterclaim Defendant Irwin J. Barkan in Support of His Opposition to Defendants' Motion for Summary Judgment ("Barkan Aff.") ¶¶ 2-3].

Barkan is experienced in real estate development, retail and franchise business operations, real estate and investment management, and real estate analysis and consulting [Barkan Aff. ¶ 4-8].

2. Admit.

3. Admit. Further responding, Barkan commenced his relationship with Dunkin' in 2001 by the acquisition of four stores and a fifth store that was to be developed by Dunkin. [Barkan Aff. ¶ 11]. The stores that Barkan acquired were underperforming. [Barkan Aff. ¶¶ 16-17]. During his relationship with Dunkin', Barkan attempted to turn things around in order to eventually develop a profitable network. [Barkan Aff. ¶ 17]. His efforts included renovating and rebuilding stores, hiring employees, opening new store locations, closing unprofitable stores, and investing personally in his business. Dunkin' was aware of and approved Barkan's activities. [Barkan Aff. ¶¶ 18-24].

4. Admit.

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 "Connely"; 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".

5. Admit. Further responding, Exhibit 6 reflects on BARKAN 03614-15 and 03627 that Barkan had a right to develop additional units. In addition, Barkan through a competitive process with other Dunkin' franchisees obtained three SDAs. [Barkan Aff. ¶¶ 25-26]. The SDAs gave Barkan the right to develop Dunkin' stores within specified geographic areas. [Barkan Aff. ¶¶ 26-30]. Barkan, pursuant to the SDAs, developed or was in the process of developing various store locations in order to increase his network profitability. [Barkan Aff. ¶¶ 31-40]. Barkan worked with his consultant in connection with site location and development. [Barkan Aff. ¶ 5].

6. Deny. Further responding, Dunkin' and Baskin fail to cite to an exhibit included in the summary judgment record as required by Fed. R. Civ. P. 56 and Local Rule Cv 56.

7. Admit the first sentence, except further responding Baskin was also a party to the SDA as reflected in Exhibit 7. Deny the second sentence since Dunkin' and Baskin fail to cite to an exhibit included in the summary judgment record as required by Fed. R. Civ. P. 56 and Local Rule Cv 56.

8. Admit, except further responding Baskin was also a party to the SDA. In addition: Exhibit 8 was amended by the settlement agreement between the parties as reflected in Exhibit 54, paragraph (5)(A)(iii).

- Burrillville was a higher sales volume location in relation to Barkan's other stores as a result of the quality of the location. [Gabellieri, Vol. I, Tr. 49, ls. 13-14, ls. 17-24; Tr. 50, l.1 (Ex. F to Transmittal Affidavit of Daniel K. Gelb, Esquire in Support of Plaintiffs/Counterclaim Defendants' Opposition to Defendants' Motion for Summary Judgment ("Gelb Aff."))]

9. Admit, except further responding Baskin was also a party to the SDA.

10. Admit.

11. Admit.

12. Admit.

13. Deny. Exhibit 6 does not refer to an “SDA fee.”

14. Deny. Further responding, paragraph 12 of the Amended Complaint states: “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.” In addition, Barkan, through Dunkin’, obtained financing from CIT after submitting a loan application and business plan. [Barkan Aff. ¶¶ 13-14]. In connection with this financing, Dunkin’ agreed to guarantee the CIT loans. [Barkan Aff. ¶ 14]. However, immediately prior to the acquisition and loan closing, Dunkin’ insisted that he sign a statement acknowledging that the stores had a negative cash flow. [Barkan Aff. ¶ 16].

15. Deny. Barkan was not a sender or recipient of Exhibit 10 and said exhibit is not authenticated by a witness with personal knowledge. Further responding,

- Section 1.4 of page DUNK 02153 of Exhibit 10 sets forth the procedure concerning CIT’s credit decision. Dunkin’ has not entered any evidence into the record as to whether Barkan’s restructuring constituted a credit decision.
- Notably, Exhibit 10 provides that: “CIT shall advise Dunkin’, in writing or in such other manner as agreed to by the parties from time to time, of CIT’s decision to accept or reject a proposed transaction.”

- Exhibit 10 also states: “Upon Dunkin’s request, CIT shall notify Dunkin’ and Dunkin’s Customer of CIT’s decision whether or not CIT would be willing to enter into the requested proposed transaction.”
- Inasmuch as Dunkin’ has failed to introduce into the record any written communications between it and CIT regarding Barkan’s proposed restructuring, a reasonable inference drawn in Barkan’s favor is that CIT did not process Barkan’s proposed transaction and reach a credit decision. As discussed below, this is consistent with the testimony of Rush who maintains that Blowers did not provide information to her which would permit her to assess Barkan’s loan restructuring.

16. Deny. Barkan was not a sender or recipient of Exhibit 10 and said exhibit is not authenticated by a witness with personal knowledge.

17. Deny. Barkan was not a sender or recipient of Exhibit 10 and said exhibit is not authenticated by a witness with personal knowledge.

18. Deny. Further responding, DDB Fountain LLC was the party to Exhibit 11. In addition, deny the assertion that Exhibit 11 is a “representative CIT/Barkan form security agreement” since Dunkin’ and Baskin fail to cite to an exhibit included in the summary judgment record as required by Fed. R. Civ. P. 56 and Local Rule Cv 56.

19. Deny. Further responding, Barkan is not the Debtor in Exhibit 11 and said exhibit at paragraph 9(c) does not reflect that the Debtor had to conduct business at a specific location.

20. Deny. Further responding, Barkan is not the Debtor in Exhibit 11 and said exhibit at paragraph 4 does not reflect that the Debtor provide advance notice if the Debtor intended to remove any collateral.

21. Deny. Further responding, Exhibit 11 reflects that it pertains only to DDB Fountain LLC.

22. Deny. Further responding, Exhibit 11 refers to “Irwin Barkan’s network.” In addition, after the close of discovery Dunkin’ produced documents entitled “Resource Appropriation and Investment Decision System” (“RAPID”) which are the subject of “Plaintiff/Counterclaim Defendants’ Motion For Sanctions Against Defendants/Counterclaim Plaintiffs Pursuant To Fed. R. Civ. P. 26(g) and 37 and Request For A Hearing” (“Motion for Sanctions”). Without waiving any of the remedies Barkan seeks, Barkan wishes to call to the Court’s attention the following information contained in the RAPID documents even though he was prevented from fully exploring this information during discovery:

- On June 16, 2003, a RAPID was approved. This RAPID contains the following information: Dunkin’ must request the approval of the finance committee prior to guaranteeing loans; Barkan’s Empire and Fountain stores had an “A” rating; Barkan’s Weybossett store was relocated; Barkan’s Warwick store was opened on May 12, 2003; the overall plan for Barkan was to get all of his stores remodeled, lower his operating costs, do a full producer or kitchen to support his network, and remodel; and, the plan would be to refinance all of his guaranteed debt and finance the kitchen. [Ex. K to Gelb Aff.]

- On August 5, 2003, a RAPID was approved. This RAPID contains the following information: Barkan was a new franchisee that purchased several underperforming locations from Dunkin' and was in the process of trying to transform the shops and downtown Providence market; Barkan's profit and loss statements from the stores were not strong since they were small downtown locations; Dunkin' envisioned a win-win situation since Barkan would get the production he needed and the marquee shop with strong cash flows, and Dunkin' would get tremendous rental income and returns that Dunkin' would not normally get in a prime market; Barkan's situation strained his entire network as evidenced by his higher than average food and labor costs; and refinancing Barkan's debt would solve operational issues for him and make his network self-sustaining. [Ex. L to Gelb Aff.]

23. Deny. Further responding, Exhibit 12 does not reflect who prepared the document and the source of the purported information, does not refer to "Dunkin's standards of operation," and does not reflect record support for the assertions set forth in paragraph 23 which constitute arguments and opinions (e.g. "multiple respects," "multiple occasions," "critical standards relating to food safety"). In addition, Exhibit 13 precedes the Settlement Agreement between the parties, and a reasonable inference drawn in Barkan's favor based on Exhibit 12 is any such issues did not arise after 2003.

24. Deny. Further responding, Dunkin' and Baskin fail to cite to an exhibit included in the summary judgment record as required by Fed. R. Civ. P. 56 and Local Rule Cv 56.

25. Deny. Exhibit 14 is not qualified by a witness with personal knowledge including whose handwriting appears on the exhibit and what was “approved.” In addition, Exhibit 14 is the subject of Barkan’s Motion for Sanctions.

26. Deny. Further responding, Exhibit 15 does not reflect that Barkan sought credit from GE Capital.

27. Deny. Further responding, Exhibit 16 does not reflect what occurred at an alleged presentation, and notably, the alleged presentation took place on the day before the date of the document.

28. Deny. Further responding, Exhibit 17 reflects a communication between Connelly and Harrington the day after the alleged presentation. See also the response to paragraph 27 above.

29. Deny. Exhibit 17 does not reflect that a “Jackie L” was the CIT person responsible for Barkan’s account.

30. Deny. Further responding, Exhibit 18 does not reflect that Blowers contacted Sneed, that Blowers and Sneed were “counterparts,” inquiries about “the Irwin Barkan network,” does not define “the information” provided to Connelly and Harrington, and only reflects that an email from Sneed to Blowers was purportedly forwarded by Blowers to Connelly, Harrington and others named in the email. In addition:

- Sneed’s job responsibility as a portfolio specialist in connection with a restructure request was to review the information she received, make sure the packet was complete, see if there was anything else that needed to be followed

up upon, and then make a determination if she thought it was yes or no and put it into writing for the correct credit authority. [Sneed, Tr. 85, ls. 11-15, 18-23 (Ex. J to Gelb Aff.)] The SOUMF does not contain such a writing, and therefore, the reasonable inference drawn in Barkan's favor is that his restructuring was not processed by CIT.

- Blowers had been Sneed's contact at Dunkin' since approximately February 2002. [Sneed, Tr. 59, l. 22-Tr. 60, l.8 at (Ex. J to Gelb Aff.)]
- Barkan had never spoken to Sneed prior to the restructuring. [Sneed, Tr. 66, ls. 2-10 (Ex. J to Gelb Aff.)]
- Sneed does not recall for how long cure payments were being made, the number of cure payments or the dollar volume prior to March 31, 2004. [Sneed, Tr. 73, ls. 4-13 (Ex. J to Gelb Aff.)]

31. Deny. Further responding, Exhibit 19 does not refer to scenarios, reflect what Connelly did himself, when anything was done, and that Barkan had "financial difficulties" which Connelly "addressed."

32. Admit.

33. Deny. Further responding, Exhibit 20 states: "I am convinced that he is threatening legal action against ADQSR if the sale does not go through."

34. Admit.

35. Deny. Further responding, Exhibit 22 does not refer to Barkan and addresses “D&D Barkan Network getting to profitability” which issue is addressed in the Settlement Agreement between the parties.

36. Deny. Further responding, notices to cure were sent by Dennis R. Glannon, Esquire to DDB Westminster, LLC, DDB Fountain, L.L.C., DD Empire, L.L.C., DDB Dorrence, L.L.C., DDB Weybossett, L.L.C., and DDB Warwick Mall, L.L.C. which issue is addressed in the Settlement Agreement between the parties.

37. Admit.

38. Admit.

39. Admit that Barkan received Exhibit 25 which speaks for itself and contains language in addition to the assertions in paragraph 30. For example, Exhibit 25 states: “Please remember that this proposal is subject to the approval of ADQSR’s finance committee.” Deny that a draft agreement was included since the exhibit does not contain such an agreement.

40. Deny, except admit there are documents contained in Exhibit 27 which speak for themselves except for handwritten notes whose author(s) has not been identified.

41. Admit.

42. Admit.

43. Deny. Further responding, Exhibit 29 does not reflect what transaction actually took place between Dunkin’ and CIT. Further responding, Exhibit 29 states: “If we have to continue to cure all of his loans, CIT will begin to pressure us for repurchase.” Notably, repurchase of store closings by Dunkin’ is not referred to in Exhibit 29 which creates a reasonable

inference drawn in Barkan's favor that prior to execution of the Settlement Agreement Dunkin' did not take into account this financial obligation it had to CIT.

44. Admit.

45. Deny. Further responding, Dunkin' and Baskin fail to cite to an exhibit included in the summary judgment record as required by Fed. R. Civ. P. 56 and Local Rule Cv 56. In addition, Barkan was very anxious to conclude a Settlement Agreement with Dunkin' so that his loans with CIT could be restructured. [Barkan Aff. ¶ 41]. Barkan was led to believe through his communications with Dunkin' that the Settlement Agreement would resolve any existing issues he had with Dunkin' and result in a long-term relationship with it. [Barkan Aff. ¶ 42]. In executing the Settlement Agreement, Barkan relied upon Dunkin's promises to "work with" him and CIT in connection with the restructuring, and at no time did he ask Blowers to withhold information from CIT. [Barkan Aff. ¶ 43]. Barkan was shocked when the restructuring did not take place since he was not requesting any additional credit, Dunkin' was guaranteeing the loans, and Blowers led me to believe that CIT would approve the refinancing. [Barkan Aff. ¶¶ 42-45]. In fact, Jon Luther ("Luther"), who is the CEO of Dunkin', in a telephone conversation informed Barkan directly that CIT does what he tells them to do. Luther's description of Dunkin's relationship with CIT was consistent with representations to Barkan by Harrington, Connelly and Blowers that in their experience CIT had never denied a loan which Dunkin' guaranteed. Barkan Aff. ¶ 46].

46. Deny. Further responding, Dunkin' and Baskin fail to cite to an exhibit included in the summary judgment record as required by Fed. R. Civ. P. 56 and Local Rule Cv 56.

47. Admit the first sentence. Deny the second sentence. Further responding, Exhibit 31 reflects only a reservation of rights.

48. Admit that Barkan's attorney sent a Stand Still Agreement to Dunkin' and Baskin's attorney. Further responding, Exhibit 32 does not support the allegation that "but still no signed Settlement Agreement," and therefore, that assertion is denied.

49. Deny. Further responding, Exhibit 33 concerns certain communications by Blowers, but does not reflect the conclusion that Blowers monitored the status of the Settlement Agreement and provided information to CIT and Barkan to facilitate Barkan's refinancing efforts. Moreover, such assertions are not facts but rather opinions and conclusions. It is significant that in an email to Barkan from Blowers on April 7, 2004 which is contained in Exhibit 33, Blowers states: "Once you have returned all documentation required by CIT to Laura Sneed and the interest portion check I mentioned below, the rewrite of the loans should be done within a couple of weeks, is my estimate. I do not foresee any major mishaps and the Field team is on board with the plan." Notably, Exhibit 33 reflects a communication on May 3, 2004 from Blowers to Barkan as follows: "Laura Sneed at CIT has received and reviewed your paperwork. She has sent me all new recourse letters for your seven loans. Each letter addresses the refinance terms of each loan. I have not signed these recourse letters because I am waiting until the settlement agreement has been agreed upon and executed by you. Once the settlement agreement is completed, then I can execute the recourse letters and send them back to CIT." Prior to this communication, as reflected in an email from Blowers to Remillard on April 30, 2004 which is also included in Exhibit 33, Blowers states: "Just wanted to follow-up on the settlement agreement status with Irwin Barkan. I am writing to sign off on the seven recourse letters for his refinancing to take place and I was hesitant to do so prior to the settlement being

signed. Please let me know where we stand.” It is undisputed based on Dunkin’ and Baskin’s interrogatory answers that Blowers never signed and transmitted to CIT signed recourse letters, and it is also undisputed that Blowers does not know why she did not do so. [Ex. A to Gelb Aff.]; [Blowers, Tr. 45, l. 24-Tr.46, l. 21 (Ex. B to Gelb Aff.)]; [Blowers, Tr. 49, l.13-Tr. 51, l. 4 (Ex. B to Gelb Aff.)]. Therefore, the reasonable inference in favor of Barkan is that Dunkin’ and Baskin through Blowers did not facilitate Barkan’s refinancing efforts. In fact, the record supports that Blowers did just the opposite by undermining Barkan’s efforts to obtain CIT financing.

50. Deny the first sentence which has no record support. Admit the second and third sentences. Further responding, the testimony cited reflects that Sneed does not “remember the specifics.” Deny the fourth sentence which has no record support. Admit the fifth sentence. Deny the sixth sentence which has no record support of what may have been sent by Blowers to Sneed.

51. Deny the first sentence which Exhibit 36 does not support. Deny the second sentence which does not accurately set forth the deposition testimony.

52. Deny. Further responding, the statement does not accurately set forth the deposition testimony in Exhibit 37.

53. Deny. Further responding, the statement does not accurately set forth what is stated in Exhibit 38 except for the phrase “Thanks for putting the CIT mechanics in motion.”

54. Deny. Further responding, Exhibit 39 does not reflect that the handwritten notes are Blowers, the source of the information is Barkan, and the statement does not accurately set forth Exhibit 39.

55. Deny. Further responding, the statement does not accurately set forth Exhibit 40.

56. Admit. Further responding:

- Rush did not have to report to anyone else on her decision since the restructuring was within her credit limits. [Sneed, Tr. 179, ls. 6-7, 9-10 (Ex. J to Gelb Aff.)]

57. Deny. Further responding, the deposition testimony cited does not reflect how Rush became aware of the Barkan loans. In addition:

- Barkan's account with CIT was current since Dunkin' was curing it. [Sneed, Tr. 71, ls. 6-13 (Ex. J to Gelb Aff.)]
- Rush does not have a specific recollection of noting that Barkan's account appeared on a monthly past due statement. [Rush, Tr. 26, l. 22-Tr. 27, l.2 (Ex. I to Gelb Aff.)]
- As of June 24, 2004, Sneed had not reported to Rush that there were Barkan loans past due because they were being cured. [Sneed, Tr. 217, ls. 10-17 (Ex. J to Gelb Aff.)]
- Sneed informed Rush that Dunkin' would be making cure payments on the Barkan accounts and things were getting worked out. [Rush, Tr. 34, ls. 12-17 (Ex. I to Gelb Aff.)]
- Loans for which Dunkin' was making cure payments would not appear on CIT's past due list. [Rush, Tr. 35, ls. 12-15 (Ex. I to Gelb Aff.)]
- Cure payments signify that there is some workout possibly in process or some extenuating circumstances or just something happening that is forcing the

customer to have difficulties paying CIT. [Rush, Tr. 38, ls. 3-17, 19-23 (Ex. I to Gelb Aff.)]

58. Deny. Further responding, the deposition testimony cited does not concern cure payments. Admit that Rush and Sneed spoke about Dunkin' and Barkan (i.e. "they") wishing to restructure the loans.

59. Deny. Further responding, Exhibit 42 does not reflect what Barkan faxed.

60. Deny. Further responding, Exhibit 43 does not reflect what is asserted in the statement. In addition:

- Rush learned from Sneed that Dunkin' and Barkan were looking to restructure their notes. [Rush, Tr. 38, l. 25; Tr. 39, ls. 1-5, 7, 9, 11-13 (Ex. I to Gelb Aff.)]

61. Deny. Further responding, Exhibit 44 does not reflect any assertions by Barkan, and reflects that Sneed remembers receiving financials at a later date.

62. Deny that Barkan has "no proof." Admit that he does not have a fax transmission sheet.

63. Deny. Further responding, the record cited does not reflect what documents Rush was reviewing. In addition:

- Rush could not review Barkan's financial spreadsheets after they were reformatted because they were a stack of detailed information and she could not find any summary information. [Rush, Tr. 46, ls. 7-15 (Ex. I to Gelb Aff.)]
- Rush believes that Dunkin' furnished Barkan's financial spreadsheets to CIT. [Rush, Tr. 46, ls. 19-22 (Ex. I to Gelb Aff.)]

64. Deny. Further responding, Exhibit 47 does not reflect that Barkan, D&D and the Franchise Entities were in default and reflects that all but one loan will be taken care of in the refinance deal. Admit the last sentence.

65. Admit.

66. Admit the first sentence except to the extent it does not accurately restate the record. Deny the second sentence which is not supported by the record.

67. Admit.

68. Deny. Further responding, Dunkin' and Baskin fail to cite to an exhibit included in the summary judgment record as required by Fed. R. Civ. P. 56 and Local Rule Cv 56.

69. Admit that Sneed sent recourse letters to Blowers, but deny that they were sent on May 3, 2004 since Exhibit 51 only reflects when the email was sent. Admit that the second sentence reflects Sneed's position. Deny the third sentence since the record does not reflect the assertion as to Sneed's authority. Admit the last sentence. Further responding, a reasonable inference that can be drawn in favor of Barkan based on Exhibit 51 that Barkan was anxious to have the Settlement Agreement with Dunkin' completed and was led to understand from Blowers that Sneed had received and reviewed all of his paperwork, the loan would be refinanced, and the last step was Blowers' execution and transmittal to Sneed of the recourse letters. In addition:

- Rush does not know whether CIT ever furnished recourse letters to Dunkin' in connection with the Barkan restructuring, and CIT did not have a policy as to when those letters should be furnished. [Rush, Tr. 92, ls. 7-9, 11, 13-14, 16 (Ex. I to Gelb Aff.)]

- Rush would not look at whether or not the recourse letters were signed as a matter of course when deciding to do a restructure because she would look at the situation of the customer. [Rush, Tr. 92, ls. 18-24 (Ex. I to Gelb Aff.)]
- Blowers never told Barkan that she had not sent in the recourse letters, but told him they had been signed. [Blowers, Tr. 107, l. 6-Tr. 108, l. 8 and ls. 10-18 (Ex. B to Gelb Aff.)]
- Sneed never had any discussions with Dunkin' as to whether or not the recourse letters should be sent back. [Sneed, Tr. 180, ls. 14-15, 17-19 (Ex. J to Gelb Aff.)]
- No one at CIT told Sneed that recourse letters should not be sent out prior to approval of a loan. [Sneed, Tr. 249, ls. 1-4 (Ex. J to Gelb Aff.)]
- Sneed never told Blowers the recourse letters were sent in error. [Sneed, Tr. 206, ls. 9-12; Tr. 245, ls. 5-7, 15-17, 20 (Ex. J to Gelb Aff.)]
- Blowers never signed new recourse letters. [Sneed, Tr. 208, l. 16-Tr. 209, l.5 (Ex. J to Gelb Aff.)]
- Blowers understood that she would sign the recourse letters once the settlement agreement was signed. [Blowers, Tr. 45, ls. 7-10 (Ex. B to Gelb Aff.)]
- As far as Remillard knows, word was given to Blowers when the settlement agreement was signed because she stopped calling about it. [Remillard, Tr. 20, l.21-Tr. 21, l.6 (Ex. H to Gelb Aff.)]
- Blowers never sent CIT signed recourse letters, and she does not remember why she did not. [Blowers, Tr. 45, l. 24-Tr.46, l. 21 (Ex. B to Gelb Aff.)]

- Blowers understood that the recourse letters were to be signed upon the execution of the settlement agreement, she knew the settlement agreement was signed, she sent an email to Remillard to confirm that the settlement agreement had been executed so that she could sign the recourse letters, she knew the loan could not go forward if she did not sign the recourse letters, the recourse letters were never signed, and she does not remember why. [Blowers, Tr. 49, l.13-Tr. 51, l. 4 (Ex. B to Gelb Aff.)]

70. Admit. Further responding, Baskin is included in the term “Franchisor.

71. Deny. Further responding, Barkan’s email contained in Exhibit 55 speaks for itself.

72. Deny. Further responding, Exhibit 56 does not reflect when the Settlement Agreement was signed or that Barkan refused to sign the settlement agreement. In addition:

- Remillard believes the settlement agreement was signed on June 15, 2004. [Remillard, Tr. 50, l. 13-Tr. 51, l. 6 (Ex. H to Gelb Aff.)]

73. Deny. Further responding, Exhibit 50 does not support the statement, and CIT was willing to extend the interest only period for six months and a payment of \$7,000.00 was due to CIT.

74. Deny. Further responding, Exhibit 57 reflects that as of June 16, 2004, Barkan had already signed the Settlement Agreement. Exhibit 57 does not reflect when Dunkin’ and Baskin signed the Settlement Agreement (i.e. the last email is dated June 16th, and there is nothing in the record to reflect what occurred thereafter.) In addition:

- It was anticipated that all the elements of disputes and issues between Barkan and Dunkin' would be incorporated into the settlement agreement.
[Harrington, Tr. 101, l.14-Tr. 102, ls. 1-6, 9-11 (Ex. G to Gelb Aff.)]
- Connelly got the Settlement Agreement signed and delivered it to Harrington.
[Connelly, Tr. 27, ls. 3-12 (Ex. E to Gelb Aff.)]
- The individuals who would want to know that the Settlement Agreement was signed were Harrington, Blowers and Remillard. [Connelly, Tr. 28, ls. 5-7, 9-11 (Ex. E to Gelb Aff.)]
- Dunkin's settlement agreements typically require finance committee approval.
[Gabellieri, Vol. I, Tr. 177, l.6-Tr. 178, L.1 (Ex. F to Gelb Aff.)]
- If Dunkin's finance committee was asked to approve a settlement agreement, it would be the usual business practice to fill out a Rapid document in connection with their deliberations. [Dunkin' Designated Expert (Bode), Tr. 214, ls. 8-14, 16-20 (Ex. D to Gelb Aff.)]
- Bode would be surprised if Dunkin' entered into a settlement agreement without finance committee approval when the agreement has such a provision.
[Dunkin' Designated Expert (Bode), Tr. 218, ls. 10-14 (Ex. D to Gelb Aff.)]
- Gabellieri sat on the finance committee when settlement agreements were approved, and the terms of the settlement would be presented to the committee, the committee would discuss it, approve or disapprove of the settlement, and record its decision in the minutes. [Gabellieri, Vol. I, Tr. 178, ls. 6-15 (Ex. F to Gelb Aff.)]

- Harrington did not submit the Settlement Agreement to Dunkin' finance committee and believes Connelly did so. [Harrington, Tr. 30, ls. 14-21 (Ex. G to Gelb Aff.)]
- Connelly does not know whether the Settlement Agreement was presented to Dunkin's finance committee. [Connelly, Tr. 72, ls. 16-20 (Ex. E to Gelb Aff.)]
- Connelly or Harrington would have been responsible for submitting the settlement agreement to the finance committee. [Remillard, Tr. 54, ls. 18-22 (Ex. H to Gelb Aff.)]
- If a settlement agreement had been presented to the finance committee for its approval that would have been reflected in the minutes of the committee. [Gabellieri, Vol. I, Tr. 173, ls. 21-Tr. 174, l.1 (Ex. F to Gelb Aff.)]
- Bode and Harrington who was Bode's counterpart in Rhode Island both reported to Gabellieri. [Rule 30(b)(6) (Bode), Tr. 25, ls. 3-8 (Ex. C to Gelb Aff.)]
- Before it agrees to guaranty a franchisee's loan, Dunkin' evaluates the economic risk. It does cash flow analysis to project what the cash flow of that business is and the ability to repay debt. [Dunkin' Designated Expert (Bode), Tr. 210, ls. 11-21 (Ex. D to Gelb Aff.)]
- Bode believes that it is likely that Harrington and Gabellieri evaluated the risk to Dunkin' before the Settlement Agreement was signed. [Dunkin' Designated Expert (Bode), Tr. 211, ls. 13-24; Tr. 212, ls. 1-3, 6-7 (Ex. D to Gelb Aff.)]

- In signing the Settlement Agreement, Dunkin' and Barkan intended to move on, and Barkan's history with Dunkin' is relevant to knowing about his operations but puts termination away. [Dunkin' Designated Expert (Bode), Tr. 111, l. 16-Tr. 112, l. 2 (Ex. D to Gelb Aff.)]
- At the time of the Settlement Agreement, Bode believes Dunkin' intended to enter into a long term contract with Barkan. [Dunkin' Designated Expert (Bode), Tr. 166, ls. 17-22 (Ex. D to Gelb Aff.)]
- Under the Settlement Agreement, Barkan intended to remain a franchisee, and decided to sell some franchises after he did not obtain the refinancing. [Harrington, Tr. 64, ls. 2-5, 7-17, 19-24, Tr. 65, l.1 (Ex. G to Gelb Aff.)]
- The impact to Barkan when he did not obtain the restructuring was he began looking to sell off some of his assets. [Harrington, Tr. 60, ls. 3-10 (Ex. G to Gelb Aff.)]

75. Admit. Further responding:

- Remillard believes that Connelly was the person at Dunkin' who was going to inform Blowers when the settlement agreement was signed since he was the one dealing with Barkan to get it signed. [Remillard, Tr. 46, ls. 4-13 (Ex. H to Gelb Aff.)]
- Blowers did not read the settlement agreement prior to the litigation. [Blowers, Tr. 39, l. 20-Tr. 40, l. 14 (Ex. B to Gelb Aff.)]

76. Admit.

77. Deny. Further responding, Exhibit 77 does not support the statement made.

78. Admit. Further responding, the term “franchisor” includes Baskin.

79. Deny. Further responding, Exhibit 54 does not support the statement made.

80. Admit.

81. Deny. Further responding, Exhibit 54 does not support the statement made.

82. Admit the agreement contains the language quoted. Deny the language preceding the quoted statement which constitutes an opinion. Further responding, in Defendants’ Answers and Objections to Plaintiffs’ Interrogatories [Ex. A to Gelb Aff.], Dunkin’ admits the following which, for purposes of summary judgment, constitute undisputed facts in favor of Barkan including all reasonable inferences that can be drawn therefrom:

- In response [to Blowers’ request], CIT proposed “reimbursed cures, INT only for four months, keep same terms overall,” subject to UCC filings (commodity checks). On March 31, Ms. Blowers relayed these terms to Connelly, and received rewrite forms from Sneed. (Notably, the two closed stores are not mentioned.)
- On April 22, Sneed asked Blowers when she expected to sign the recourse letters that were to be part of the refinance.
- On April 30, Blowers asked Remillard who was negotiating the settlement with Barkan when the agreement would be signed because she would not sign the recourse letters until after the Settlement Agreement was signed.
- On May 3, Blowers advised Barkan that Sneed had sent new recourse letters which she would return to CIT once the Settlement Agreement was signed.
- The Settlement Agreement was signed by June 15, 2004.

In addition, Dunkin through the declaration of its counsel made a judicial admission that, as of February 14, 2005, CIT did not know the actual reason it denied Barkan's refinance request and would require retrieving the file from storage and reviewing it. Notably, the communications were with CIT's in house and outside counsel in connection with the preparation of a declaration by Sneed which was obtained for litigation purposes. [Ex. M to Gelb Aff.]

The following further support that there are genuine issues of material fact in this litigation:

- Connelly recalls that under the Settlement Agreement Dunkin' would make best efforts to assist. [Connelly, Tr. 26, ls. 5-7 and 10-16 (Ex. E to Gelb Aff.)]
- Dunkin' was obligated under the Settlement Agreement to work with Barkan's financing efforts to restructure the debt. [Harrington, Tr. 62, ls. 5-12 (Ex. G to Gelb Aff.)]
- Under paragraph 4 of the Settlement Agreement, CIT was to restructure the loans but was not to extend further credit so there would not be additional draws. [Harrington, Tr. 43, ls. 23-24; Tr. 44, ls. 1-2, 8-14 (Ex. G to Gelb Aff.)]
- In connection with guaranteeing financing, in order to ascertain economic risk to it Dunkin' does a 20 year pro forma. [Dunkin' Designated Expert (Bode), Tr. 212, l. 16-Tr. 213, l.4 (Ex. D to Gelb Aff.)]
- Connelly does not know whether Dunkin' ever requested of CIT that the loans be restructured. [Connelly, Tr. 72, ls. 12-15 (Ex. E to Gelb Aff.)]
- Dunkin' never made a request to Rush that CIT issue a new note with the current balance of the financing, and Rush does not recall discussing this with

Sneed or anyone else at CIT. [Rush, Tr. 157, ls. 4-13, 16-24; Tr. 158, ls. 2-3 (Ex. I to Gelb Aff.)]

- Connelly does not recall undertaking any activities on behalf of Dunkin' in connection with paragraph 4 of the Settlement Agreement from June 15, 2004 through August 31, 2004. [Connelly, Tr. 74, ls. 5-17, 19-24; Tr. 75, ls. 1-6 (Ex. E to Gelb Aff.)]
- Harrington does not know what communications took place between Dunkin' and CIT in connection with paragraph 4 of the settlement agreement. [Harrington, Tr. 32, ls. 19-22 (Ex. G to Gelb Aff.)]
- Based on Gabellieri's experience, a request from Dunkin' that CIT refinance the Barkan loans would be in writing. [Gabellieri, Vol. I, Tr. 162, ls. 22-24; Tr. 163, ls. 1-22 (Ex. F to Gelb Aff.)]. Dunkin's SOUMF does not contain a written request, and therefore, a reasonable inference can be drawn in Barkan's favor that Dunkin' did not make a request in accordance with paragraph 4 of the Settlement Agreement.

83. Deny. Further responding, Exhibit 54 does not support the statement made.

84. Deny the first sentence. Admit the second and third sentences.

85. Admit the first sentence. Deny the second sentence. Further responding, Exhibit 62 does not support the statement made.

86. Deny. Further responding, Exhibit 62 does not support the statement made. In addition:

- Rush did not feel it was her obligation or necessarily in the best interests of the customer [Barkan] to sort through a lot of detail and perhaps draw erroneous conclusions. [Rush, Tr. 104, ls. 24-25; Tr. 105, ls. 3-13 (Ex. I to Gelb Aff.)]

87. Deny. Further responding, Exhibit 62 does not support the statement made.

88. Deny. Further responding, Exhibit 62 does not support the statement made. In addition:

- Once the stores were closed Dunkin' had an obligation to repurchase the accounts from CIT. [Rush, Tr. 56, ls. 18-23 (Ex. I to Gelb Aff.)]
- Rush considers store closings to raise a red flag because of a lot of activity is happening that has not been defined or shared and Rush would need more information to understand the reason for the store closures in assessing what to do with all the other accounts. [Rush, Tr. 59, ls. 11-20 (Ex. I to Gelb Aff.)]
- Rush did not ask for more information after she heard that two stores were closed because Blowers said she could not share any more information. The gist of the conversation between Rush and Blowers was Rush asking questions and Blowers avoiding straight answers. [Rush, Tr. 60, ls. 1-10 (Ex. I to Gelb Aff.)]

- Whether the fact stores were closed would impact on the decision to restructure the loans would depend on the circumstances of the closures. [Rush, Tr. 69, ls. 18-21, 23-25 (Ex. I to Gelb Aff.)]
- After she learned that the stores were closed, Rush did not do anything to determine from any source the circumstances of the closings because the first time it came up to her was when she was speaking with Blowers and Rush had such a negative feel from that conversation that information was being withheld purposefully from her. Rush left the issue at that point to see if information would be more forthcoming and it never was. [Rush, Tr. 70, ls. 5-14 (Ex. I to Gelb Aff.)]
- No one reported back to Rush as to the circumstances of the two store closing. [Rush, Tr. 70, ls. 21-24 (Ex. I to Gelb Aff.)]
- Rush wanted to know why the stores were being closed in the context of all of the accounts. If CIT is being asked to do a restructure, Rush needs to understand all of the business issues. Sometimes store closures are a very negative and sometimes they are not so negative. It depends upon the particular situation. [Rush, Tr. 70, l. 25; Tr. 71, ls. 1, 4-10 (Ex. I to Gelb Aff.)]
- Factors which Rush would look at to determine if store closings were a negative would be lack of revenues, change in market share, a major tenant in the center moving out, and a lot of variables beyond just the immediate business; but, understanding the variables was necessary to

even begin to make an assessment. [Rush, Tr. 71, ls. 12-16, 18-22 (Ex. I to Gelb Aff.)]

- Rush asked Blowers to give her information regarding the store closings and Blowers basically said no because she could not or would not share information with her. [Rush, Tr. 71, ls. 24-25-Tr. 72, ls. 1, 3-12 (Ex. I to Gelb Aff.)]

89. Deny. Further responding, Exhibit 62 does not support the statement made. In addition:

- Rush was not comfortable with making an assessment of the financial situation and she asked Sneed to speak with someone at Dunkin' to find out what the situation was. [Rush, Tr. 47, l. 21-Tr. 48, l. 5 (Ex. I to Gelb Aff.)]
- Rush and Sneed had a call with Blowers in which Rush took the lead. [Rush, Tr. 48, ls. 6-15; Tr. 52, ls. 21-23 (Ex. I to Gelb Aff.)]
- Rush informed Blowers that she wanted to know what was going on with Barkan because she had lots of financial information she could not decipher, and she needed to know what was going on before she could even begin to make an assessment. Blowers replied with something to the effect that she really could not share information with Rush. Rush then asked if everything was okay with Barkan, and again Blowers gave no detail, was vague, and seemed to be not forthcoming with information. Rush again told Blowers that she had to know what was happening before she could evaluate whether or not CIT could grant a restructure, and she asked Blowers if any of the stores

closed. Blowers was rather evasive and finally said two stores were closed. When Rush asked Blowers whether she was ever going to tell CIT about the store closings she did not respond. Rush said that she had a real problem with being able to give a restructure for a customer when she did not know what the situation was with their existing business, let alone their future plans and how two store closings were impacting this network. Blowers did not provide any additional information and there was really no communication. The conversation was concluded when Rush informed Blowers that she was not really sure what to do now. [Rush, Tr. 53, 1.1-Tr. 55, 1.8 (Ex. I)]

- Rush does not recall anything Sneed said during the conversation. [Rush, Tr. 55, ls. 9-13 (Ex. I to Gelb Aff.)]
- Rush cannot remember if she requested a business plan during the conversation. [Rush, Tr. 55, ls. 14-15 (Ex. I to Gelb Aff.)]
- Rush does not know if anyone at CIT requested a business plan from Barkan. [Rush, Tr. 55, ls. 23-25 (Ex. I to Gelb Aff.)]
- Sneed does not recall requesting a business plan for Barkan. [Sneed, Tr. 107, ls. 11-15 (Ex. J to Gelb Aff.)]
- Sneed does not recall receiving a business plan from Barkan. [Sneed, Tr. 108, ls. 2-4 (Ex. J to Gelb Aff.)]
- Sneed does not recall any conversations with Blowers about requesting a Barkan business plan. [Sneed, Tr. 108, ls. 18-21 (Ex. J to Gelb Aff.)]

- Sneed never had discussions with Barkan or Blowers regarding Barkan's business plan and does not know what it was. [Sneed, Tr. 184, ls. 19-25; Tr. 185, ls. 1, 3 (Ex. J to Gelb Aff.)]
- After the conversation with Blowers, Rush considered the rewrite request to be in limbo. [Rush, Tr. 56, ls. 1-8 (Ex. I to Gelb Aff.)]
- Rush would be the one to make the credit limit decision as to Barkan. [Rush, Tr. 56, ls. 11-14, 16 (Ex. I to Gelb Aff.)]
- Rush expressed her perception to Blowers by saying something to the effect that she really could not make an assessment without knowing what the situation was and Blowers' response was to be pretty quiet. [Rush, Tr. 60, ls. 11-21 (Ex. I to Gelb Aff.)]
- The subject of restricting the Barkan loans was left by Rush in Blowers' court to get her information. [Rush, Tr. 61, ls. 1-3, 5-6 (Ex. I to Gelb Aff.)]
- The type of information Rush was looking for was generalities as to how things were going, anything so that Rush could get her arms around the situation. Rush will typically get that kind of feedback. [Rush, Tr. 61, ls. 8-19 (Ex. I to Gelb Aff.)]
- After speaking with Blowers, Rush concluded that since she was not getting feedback from Blowers she could not do the restructuring because she did not have the confidence level that there was an open line of communication for

one thing, and second she did not have the general facts as to what was happening with the stores. [Rush, Tr. 62, ls. 2-9 (Ex. I to Gelb Aff.)]

- When asked whether in her own mind she rejected the restructuring request, Rush testified that she believed she made it clear to Blowers that she was not happy because she did not have information. [Rush, Tr. 62, ls. 18-19, 22-23 (Ex. I to Gelb Aff.)]

90. Deny. Further responding, Exhibit 62 does not support the statement made.

91. Deny except for the fact Exhibit 63 contains the quoted language. Further responding, Exhibit 63 does not support the statement made. In addition:

- There was no information that Blowers received from Barkan that she believed she was not at liberty to disclose to CIT. [Blowers, Tr. 114, ls. 6-16 (Ex. B to Gelb Aff.)]

92. Admit.

93. Admit that Blowers has made this assertion. Further responding:

- Rush has never seen a business plan prepared by Barkan at CIT's request and she never spoke about a business plan with Sneed. [Rush, Tr. 74, ls. 6-11, 13 (Ex. I to Gelb Aff.)]
- Rush understood that Barkan was interested in restructuring the loans with CIT, but she did not have the information to reach an understanding as to whether Dunkin' was also interested in the restructuring. [Rush, Tr. 163, ls. 5-13, 15-21 (Ex. I to Gelb Aff.)]

- Rush did not have any information about the specifics of the nature of the restructure request at all, and she does not know if anyone at CIT had that information. [Rush, Tr. 163, ls. 22-24; Tr. 164, ls. 1-7 (Ex. I to Gelb Aff.)]
- When Rush terminated her conversation with Blowers she did not have a picture of the situation. Blowers told her that she could not really share any specific information, and based on her experience Rush considered this to be unusual. Rush was concerned that she did not have any information to basically just help her wade through all the detail. She understood that if there were private negotiations between Dunkin' and Barkan not everything could be shared, and that really is not so far outside the norm. But to not have any conversation did not give Rush much of a comfort level. [Rush, Tr. 172, ls. 14-19, 22-24; Tr. 173, ls. 2-3, 6, 8, 11-15, 18, 19-22, 25; Tr. 174, ls. 1-7 (Ex. I to Gelb Aff.)]
- The question Rush asked Blowers for which she said she was unable to provide an answer was a very general one about what was the business plan and how were things going. Rush wanted any sort of feedback to help her. When Rush asked her for the business plan, Blowers did not say anything. [Rush, Tr. 175, ls. 13-22 (Ex. I to Gelb Aff.)]
- Rush did not ask Blowers about Barkan's business plan, but it was more about how is everything and what is happening to the whole business unit. Rush really just wanted to get a conversation going. [Rush, Tr. 176, ls. 16-23 (Ex. I to Gelb Aff.)]

94. Deny. Further responding, Exhibit 66 does not support the statement made. In addition:

- Rush did not tell Blowers that she wanted to be talked out of a request for full repurchase, but she asked for information. She was trying to open the door for conversation and that did not work. [Rush, Tr. 83, ls. 19-21, 24-25; Tr. 84, l.1 (Ex. I to Gelb Aff.)]

95. Deny. Further responding, Exhibit 66 does not support the statement made.

96. Admit.

97. Admit the email was sent to Urso. Further responding, Exhibit 67 does not support the statement that Urso was Barkan's chief inhouse accountant.

98. Admit.

99. Deny. Further responding, Exhibit 67 does not support the statement made.

100. Deny. Further responding, Exhibit 67 does not support the statement made.

101. Deny. Further responding, Exhibit 70 does not support the statement made. In addition:

- Blowers forwarded the business plan Barkan sent to her to Sneed. Sneed never opened the attachment, and Sneed and Rush never asked her any questions about it. [Blowers, Tr. 96, l. 11- Tr. 97, l.13 (Ex. B to Gelb Aff.)]
- Blowers has no reason to believe that Barkan did not furnish to CIT all of the information it needed in order to make its decision, and CIT could have contacted Blowers had it required more information. [Blowers, Tr. 78, l. 22- Tr. 79, l. 3 (Ex. B to Gelb Aff.)]

102. Deny. Further responding, Exhibit 71 does not support the statements made. The face of the July 9, 2004 email does not indicate that the attachments were sent and the assertion that it was resent on July 21st is based on an unqualified handwritten note. In addition, if it were resent then there is no explanation why, and resending it again in error creates a reasonable inference that Blowers did not intend to facilitate the refinancing and/or did not use best efforts in doing so.

103. Deny. Further responding, Exhibit 72 does not support the statement made. Paragraph 9(c) states that there is a default if the “Debtor dies, becomes insolvent or ceases to do business as a going concern,” and Sneed’s testimony does not address whether there was a breach.

104. Deny. Barkan was not a sender or recipient of Exhibit 10 and said exhibit is not authenticated by a witness with personal knowledge. Further responding:

- Harrington does not recall if Barkan was in default of any of the provisions of the Settlement Agreement after June 15, 2004. [Harrington, Tr. 27, ls. 14-17, 20 (Ex. G to Gelb Aff.)]
- Harrington does not know whether Barkan defaulted on any obligations he had with Dunkin’ after June 15, 2004. [Harrington, Tr. 59, ls. 20-21, 23-24; Tr. 60, l.1 (Ex. G to Gelb Aff.)]
- Gabellieri does not remember or know whether as of June 15, 2004 Barkan was not meeting Dunkin’s standards, was behind in payments, was in default of the development agreements, disrespected the Dunkin’ trademark, failed to obey laws, or lacked sales integrity. [Gabellieri, Vol. I, Tr. 206, l. 19-Tr. 207, l. 15 (Ex. F to Gelb Aff.)]

- Gabellieri does not remember whether after June 15, 2004 Barkan was in default of any payments that were owed to CIT, was in default of any payments he owed to Dunkin', was in default under any development agreements, disrespected Dunkin's trademark, failed to obey any laws relative to franchises or SDAs, or whether Barkan did anything which would indicated he lacked sales integrity. [Gabellieri, Vol. I, Tr. 207, l. 23-Tr. 208, l. 18 (Ex. F to Gelb Aff.)]
- Gabellieri does not remember if at the time of termination Barkan was amiss in any obligations to Dunkin. [Gabellieri, Vol.II, Tr. 67, ls. 14-17 (Ex. F to Gelb Aff.)]
- If an assessment was going to be made by Dunkin' to determine whether it was taking on risk by guaranteeing a franchisee's network, there would be communications from Gabellieri's group to Blowers' group, and he does not know whether that occurred with respect to Barkan. [Gabellieri, Vol. I, Tr. 213, ls. 5-18 (Ex. F to Gelb Aff.)]
- At the end of July 2004, shortly after signing the Agreement, Dunkin' through Blowers informed Barkan that CIT had denied his request for restructuring the loans. Barkan was shocked by what Blowers told him because he was led to believe that the refinancing would take place because he was not asking for any additional credit, Dunkin' was guaranteeing the loans so that CIT did not have any credit risk, Blowers told Barkan that CIT had all the documents necessary for the rewrite, and she also told Barkan that she would send in the

recourse letters to CIT upon Barkan's signing of the Agreement. While Barkan's situation was in flux, Blowers told Barkan not to make monthly payments to CIT because Dunkin' would continue to make cure payments until a new financing was in place. [Barkan Aff. ¶ 46].

105. Deny the first sentence. Further responding, Exhibit 74 does not support the statement made. The word "decline" is not used. Deny the second sentence. Further responding, Exhibit 74 does not support the statement made. There is no testimony about a "per se" policy. Deny the third sentence. Exhibit 74 does not support the statement made. There is no testimony regarding all of Barkan's loans. Admit the last sentence. In addition:

- Rush does not consider a request for the full repurchase on all accounts to necessarily mean the rejection of a request for restructuring the accounts. [Rush, Tr. 82, ls. 13-16, 19 (Ex. I to Gelb Aff.)]
- As part of the Settlement Agreement, Dunkin' would guarantee the restructuring. [Blowers, Tr. 118, ls. 8-11 (Ex. B to Gelb Aff.)]
- Rush did not know whether Dunkin' was going to guarantee repayment of Barkan's loans. [Rush, Tr. 92, l. 25; Tr. 93, ls. 1-2, 4 (Ex. I to Gelb Aff.)]
- Sneed would have agreed with the financing because there was no potential loss since Dunkin' was guaranteeing the Barkan loans. [Sneed, Tr. 176, ls. 4-15 (Ex. J to Gelb Aff.)]
- Rush never spoke directly with Barkan regarding the refinancing. [Rush, Tr. 95, ls. 2-4 (Ex. I to Gelb Aff.)]

- Rush was not aware of the Settlement Agreement between Barkan and Dunkin'. [Rush, Tr. 100, ls. 13-19 (Ex. I to Gelb Aff.)]
- CIT did not rewrite the Barkan loans because Rush did not have enough information to make an analysis. [Rush, Tr. 122, ls. 3-6 (Ex. I to Gelb Aff.)]
- The only deciding factor that Sneed is aware of as to why CIT did not agree to refinance the loans was the permanent store closings. [Sneed, Tr. 171, ls. 19-20, 22-24; Tr. 172, ls. 2-6 (Ex. J to Gelb Aff.)]
- During the period from April 1, 2004 through February 11, 2005, the only conversation that Rush had with anyone from Dunkin' was the conference call she and Sneed had with Blowers. [Rush, Tr. 145, ls. 21-23, 25; Tr. 146, ls. 1-2 (Ex. I to Gelb Aff.)]
- Rush understood that as of August 17, 2004, the Barkan loans were in a liquidation mode which was caused for the most part by the store closings. Rush does not know what the circumstances were that caused the stores to close since no one shared that information with her. [Rush, Tr. 149, ls. 25-Tr. 150, ls. 1-10 (Ex. I to Gelb Aff.)]
- The only demand for payment that Rush recalls making with respect to the Barkan loans was that Dunkin' had to repurchase with respect to the two closed stores. [Rush, Tr. 161, ls. 20-22, 25; Tr. 162, ls. 1-17 (Ex. I to Gelb Aff.)]

- Rush never spoke to Blowers about a restructure. [Rush, Tr. 177, ls. 17-20 (Ex. I to Gelb Aff.)]

In addition, at the end of July 2004, Blowers told Barkan that CIT had denied his request for restructuring. [Barkan Aff. ¶ 46]. Rather than proceeding with the plan he had formulated with Dunkin' as reflected in the Settlement Agreement, Barkan was forced to pursue the sale of his business. [Barkan Aff. ¶ 47].

106. Deny the first sentence. Exhibit 75 does not support the statement made. The testimony only states that Rush informed Sneed of a decision. Admit that Blowers has made the assertions in her deposition concerning the second and third sentences. Admit the last sentence.

107. Admit.

108. Deny. Further responding, Exhibit 77 does not support the statement made. The testimony reflects that Blowers had a follow up conversation with Barkan and did not put it in writing.

109. Deny. Further responding, Exhibit 78 does not support the statement made. The testimony reflects that Blowers followed up with Barkan for workout plans, but does not reflect what if any assistance she provided.

110. Admit.

111. Admit. Further responding:

- Gabelleri does not remember what series of events occurred between Dunkin' and Barkan that resulted in Dunkin' making the decision to terminate him. [Gabelleri, Vol. II, Tr. 67, ls. 6-10 (Ex. F to Gelb Aff.)]

- Remillard made the decision to terminate Barkan as a franchisee. [Gabellieri, Vol. I, Tr. 200, ls. 13-24; Gabellieri, Vol. II, Tr. 65, ls. 1-4 (Ex. F to Gelb Aff.)]
- Gabellieri would know 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 a decision to terminate. [Gabellieri, Vol. II, Tr. 67, l. 18-24; Tr. 68, l. 3 (Ex. F to Gelb Aff.)]
- Gabellieri does not know the issues that occurred or the details of what occurred with Dunkin' and Barkan which formed the reason for Remillard to decide to terminate Barkan. [Gabellieri, Vol. I, Tr. 68, l. 10-Tr. 69, l.3 (Ex. F to Gelb Aff.)]
- Remillard does not know why the restructuring of Barkan's loans did not go forward. [Remillard, Tr. 37, ls. 15-18 (Ex. H to Gelb Aff.)]
- The only thing Gabellieri remembers about Barkan from June 18, 2004 to the present (the date of his deposition which was May 1, 2008) was that Barkan was a franchisee. [Gabellieri, Vol. II, Tr. 77, ls. 16-18, 21-22 (Ex. F to Gelb Aff.)]
- Barkan was in good standing with Dunkin' as of August 24, 2004 but was being compared to another franchise who was not in good standing 30 days later, and Gabellieri does not know why. [Gabellieri, Vol. II, Tr. 82, l. 11-Tr. 84, l. 11 (Ex. F to Gelb Aff.)]

112. Admit.

113. Admit.

114. Admit.

115. Admit.

116. Admit.

117. Admit.

118. Admit.

119. Admit.

120. Admit.

121. Admit.

122. Admit,

123. Admit.

124. Admit.

125. Deny. Further responding, Dunkin' and Baskin fail to cite to an exhibit included in the summary judgment record as required by Fed. R. Civ. P. 56 and Local Rule Cv 56. In addition, Dunkin' sent Barkan termination notices for the store franchises which forced him to seek bankruptcy protection for his operating stores, but not for Barkan personally or D&D Barkan LLC. However, outside the bankruptcy, Barkan was able to retain all the entities that owned the SDAs which included stores under development. [Barkan Aff. ¶ 48].

126. Admit.

127. Deny. Further responding, Exhibits 6-9 do not support the statement made.

Paragraph 16 concerns contract administration and notices.

128. Admit. Further responding:

- An SDA can be transferred without the existing stores also being transferred. [Rule 30(b)(6) (Bode), Tr. 37, l. 22-Tr. 38, l. 1 (Ex. C to Gelb Aff.)]

129. Admit. Further responding:

- There is nothing in the SDA which would inform a franchisee as to how Dunkin' values SDAs. [Rule 30(b)(6) (Bode), Tr. 42, ls. 23-24; Tr. 43, ls. 1-6, 9 (Ex. C to Gelb Aff.)]
- The way franchisees value SDAs could be different from the way Dunkin' values them. [Rule 30(b)(6) (Bode), Tr. 42, l. 23-Tr.43, l.1 (Ex. C to Gelb Aff.)]
- Dunkin' separately assesses an SDA and a development site. [Rule 30(b)(6) (Bode), Tr. 62, l. 20-Tr. 63, l.3 (Ex. C to Gelb Aff.)]
- Dunkin' reviews the site and makes an assessment of the potential sales for that site. [Rule 30(b)(6) (Bode), Tr. 57, ls. 9-16, 19-24; Tr. 58, ls. 1-5 (Ex. C to Gelb Aff.)]
- When Dunkin' predicts sales it may ask the franchisee what he projects. [Rule 30(b)(6) (Bode), Tr. 59, ls.8, 11-14 (Ex. C to Gelb Aff.)]

- When Dunkin' receives numbers from a franchisee, the franchisee may be assessing a site based on projection of a profit and Dunkin' could be using the same numbers to assess break even. [Rule 30(b)(6) (Bode), Tr. 68, ls. 8-12, 15 (Ex. C to Gelb Aff.)]
- Bode has been involved in many disputes between Dunkin' and franchisees, and in order to do a counter valuation he used a discounted cash flow valuation. [Dunkin' Designated Expert (Bode), Tr. 61, ls. 8-12, 14-16; Tr. 63, ls. 5-7 (Ex. D to Gelb Aff.)]
- SDAs provide for the opportunity to develop stores, and you may have a store development within an SDA. [Dunkin' Designated Expert (Bode), Tr. 91, ls. 8-14 (Ex. D to Gelb Aff.)]
- Bode's position is that Barkan had three stores that were in development. [Dunkin' Designated Expert (Bode), Tr. 91, ls. 19-20, 22-23 (Ex. D to Gelb Aff.)]

130. Admit.

131. Admit. Further responding:

- Dr. Gartrell bases his opinion upon what the reasonable expectations of the parties were at the time the Settlement Agreement was signed. Bode has no basis for disputing Dr. Gartrell's conclusion as to what he believed the reasonable expectations of the parties were under the Settlement Agreement, and his objections to Dr. Gartrell's opinion are with respect to his assumptions

and conclusions. [Dunkin' Designated Expert (Bode), Tr. 110, ls. 23-24; Tr. 111, ls. 1-2, 4-8, 10-15 (Ex. D to Gelb Aff.)]

- Bode agreed with Dr. Gartrell's methodology for valuing Dunkin' businesses, and he only disagrees as to whether it was the right methodology for valuing what Barkan owned. [Dunkin' Designated Expert (Bode), Tr. 206, ls. 20-23; Tr. 207, l. 1, 13-14, 16-19 (Ex. D to Gelb Aff.)]

132. Admit.

133. Deny. Further responding, Exhibit 87 does not support the statement made. Dr. Gartrell testified about why he did not incorporate post December 31, 2004 events but he did not state that he “ignored” such events.

134. Deny. The statement does not constitute hearsay. Further responding, in December 2004, Barkan spoke with Sneed who informed him that the processing of my refinancing stopped because Dunkin's paperwork had not been completed and transmitted to CIT. [Barkan Aff. ¶ 46]. Barkan's characterization of his conversation with Sneed creates a reasonable inference drawn in his favor that Dunkin' did not provide necessary information to CIT because Dunkin' itself has put into the record as an undisputed fact that Rush recalls Blowers said she could not really share the information about what was going on with Barkan's stores with her, and that Blowers was not forthcoming with information. [SOUMF ¶¶ 89-90].

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

By their attorneys,

/s/ Elizabeth McDonough Noonan
Elizabeth McDonough Noonan (#4226)
enoonan@apslaw.com
ADLER POLLOCK & SHEEHAN P.C.
One Citizens Plaza, 8th Floor
Providence, RI 02903-1345
Tel: (401) 274-7200
Fax: (401) 351-4607/751-0604

/s/ Richard M. Gelb
/s/ Daniel K. Gelb
Richard M. Gelb (admitted pro hac vice)
rgelb@gelbgelb.com
Daniel K. Gelb (admitted pro hac vice)
dgelb@gelbgelb.com
Gelb & Gelb LLP
84 State Street
Boston, MA 02109
(617) 345-0010
(617) 345-0009

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