

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

Pursuant to Fed. R. Civ. P. 72(b) and LR Cv 32(c), Plaintiffs/Counterclaim Defendants Irwin J. Barkan and D&D Barkan LLC (collectively referred to herein as “Barkan”) respectfully submit to this Honorable Court Plaintiffs’/Counterclaim Defendants’ Response to Defendants’ Objection to Report and Recommendation of Judge Lincoln D. Almond.

**STANDARD OF REVIEW**

A party that files a timely objection is entitled to a de novo determination only of “those portions of the report or specified proposed findings or recommendations to which specific objection is made.” Sylva v. Culebra Dive Shop, 389 F.Supp.2d 189, 191-92 (D.P.R. 2005) (citing United States v. Raddatz, 447 U.S. 667, 673 (1980)).

Consequently, the Court may accept those parts of the report and recommendation to which the Defendants did not object. See LaCedra v. Donald W. Wyatt Detention Facility, 334 F.Supp.2d 114, 125-126 (D.R.I. 2004). Any argument or available evidence

not raised before the magistrate judge is deemed waived. See Guzman-Ruiz v. Hernandez-Colon, 406 F.3d 31, 36 (1<sup>st</sup> Cir. 2005); see also Borden v. Sec. of Health and Human Svcs., 836 F.2d 4, 6 (1<sup>st</sup> Cir.1987). In Sackall v. Heckler, the District Court of Rhode Island succinctly set forth the purpose of this rule:

[I]f the magistrate system is to be effective, and if profligate wasting of judicial resources is to be avoided, the district court should be spared the chore of traversing ground already plowed by the magistrate except in those areas where counsel, consistent with the latter's Fed.R.Civ.P. 11 obligations, can in good conscience complain to the district judge that an objection to a particular finding or recommendation is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law...

104 F.R.D. 401, 402-03 (D.R.I. 1984) (Selya, J.).

So long as the Court reviews the report and recommendation de novo, it need not enter further findings or opinions but may simply adopt the report and recommendation as its own. 28 USC section 636 (b)(1), see United States v. Wihbey, 75 F.3d 761, 766-67 (1<sup>st</sup> Cir. 1996). Although the review is de novo, the Court "should be slow to reverse a magistrate's careful conclusions, thoughtfully reviewed." Forcucci v. United States Fidelity and Guaranty Company, 11 F.3d 1 (1<sup>st</sup> Cir. 1993).

The summary judgment standard is well know to this Honorable Court and need not be repeated here. It is important to note, however, that "[a]n *indispensable 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 Perez v. Volvo Car Corp., 247 F.3d 303, 317 (1<sup>st</sup> Cir. 2001) (emphasis added).

**ARGUMENT**

**Magistrate Judge Almond Correctly Denied Dunkin’s Motion For Summary Judgment In All Respects In A Well-Reasoned, Carefully Considered, Twenty-Three Page Report And Recommendation.**

1. Breach of Contract

Magistrate Judge Almond correctly noted that “one of the primary points of contention between the parties is whether Dunkin’ complied with its obligation under paragraph 4 of the Settlement Agreement to ‘work with’ CIT to aid Barkan in attempting to refinance its debt.” See R&R at p. 17. Not surprisingly, Magistrate Judge Almond found that “[w]hether Dunkin’ complied with the language which required it to ‘work with’ Barkan to obtain refinancing with CIT is **rife with factual disputes.**” Id. (emphasis added). Magistrate Judge Almond’s use of the word “rife” was not an accident. Magistrate Judge Almond wanted to make it crystal clear to the parties that genuine issues of material fact are “prevalent, widespread, abundant, plentiful and numerous” throughout the summary judgment record. See Webster’s College Dictionary, p. 1159.

The record is replete with substantial evidence that Dunkin’ breached the Settlement Agreement. For example, Barkan submitted emails between Barkan and Dunkin’ – as well as deposition testimony from a Dunkin’ representative – that proves that Dunkin’ did not facilitate Barkan’s refinancing request. See ¶ 49 of the Plaintiffs/Counterclaim Defendants’ Response to Defendants’ Statement of Undisputed Material Facts and Exhibits referenced therein (hereinafter referred to as “BR at ¶ \_\_\_\_”). Indeed, the summary judgment record supports the conclusion that Dunkin’ did just the opposite and actually undermined Barkan’s efforts to refinance. Id.

Moreover, Barkan submitted evidence that 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. See BR at para. 74. Equally as important, Barkan submitted evidence that Dunkin's representative, Betheny Blowers ("Blowers"), never spoke to CIT's representative, Shelley Rush ("Rush") about a restructure of the CIT debt. See BR at para. 82 and 105. Indeed, Blowers refused to provide Rush with information that she requested and, therefore, Rush was unable to evaluate the proposed restructure. See BR at para. 88, 89 and 105.

It was critical for Dunkin' to provide whatever information Rush requested because Rush was the sole individual at CIT who had the authority to refinance Barkan's loans. See BR at ¶¶ 88, 89 and 105. Rush did not report to anyone else regarding the decision to refinance. See Affidavit of Daniel Gelb, Esquire in Support of Plaintiffs/Counterclaim Defendants' Opposition to the Defendants' Motion For Summary Judgment at Ex. I. In the course of the attempted refinance, Rush found that Dunkin' was "vague" and "not forthcoming" with information to assist her with the refinance. Id. Indeed, Blowers, Dunkin's representative, told Rush that she could not even share information with Rush regarding Barkan during the refinance attempt. Id. Because of Dunkin's vague answers and failure to provide Rush with requested information, Rush felt that Blowers specifically was avoiding answering Rush's questions. Id. Admittedly, Dunkin' never asked Rush to issue a new note for the current balance of the refinance as specifically required under the Settlement Agreement. Id.

Based on the abundant evidence contained in the summary judgment record, Magistrate Judge Almond was correct in finding that Dunkin' was not entitled to summary judgment on Barkan's breach of contract claim.

2. Breach of the Implied Covenant of Good Faith and Fair Dealing

Dunkin's motion for summary judgment relative to Barkan's breach of the implied covenant of good faith and fair dealing claim rests on the erroneous proposition that Dunkin' is entitled to summary judgment with respect to Barkan's breach of contract claim. As Magistrate Judge Almond correctly concluded, and as is supported above, genuine issues of material fact persist with respect to Barkan's breach of contract claim. Therefore, Magistrate Judge Almond correctly denied Dunkin's motion for summary judgment with respect to Barkan's claim for breach of the implied covenant of good faith and fair dealing.

3. Barkan's Failure to Perform Under the Agreement

Dunkin' and Barkan each claim that the other materially breached the Settlement Agreement. Magistrate Judge Almond correctly found, as noted above, that there are genuine issues of material fact as to whether Dunkin' and Barkan materially breached the Settlement Agreement. Moreover, Barkan maintains that any failure on its part to perform under the Settlement Agreement is directly attributable to Dunkin's breach of its obligations under the Settlement Agreement. As explained, infra, had Dunkin' assisted in securing the necessary financing as it promised to do, then Barkan would have performed fully all its obligations under the Settlement Agreement.

The summary judgment record, at least, reveals that there is a dispute of material fact as to whether Dunkin's breach caused any failure to perform on the part of Barkan.

As such, summary judgment on the basis of Barkan's failure to perform clearly would be improper. Dunkin' cannot benefit from the fact that it prevented Barkan's performance through its own breach of the Settlement Agreement. Therefore, Magistrate Judge Almond's denial of Dunkin's motion for summary judgment on the issue of whether Barkan failed to perform under the Agreement is correct.

4. Whether Barkan Would Have Received Financing But For Dunkin's Breach

Dunkin' was obligated to "work with" Barkan "to attempt to re-finance" the CIT debt. Dunkin' also was obligated "to request that CIT issue a new note for the current balance of the finance." The summary judgment record proves that (1) Dunkin' did not work with Barkan and (2) Dunkin' never requested that a new note issue from Rush at CIT. Moreover, Barkan submitted evidence that (1) CIT informed him that Barkan's request for refinancing was denied because Dunkin' failed to submit required paperwork to CIT; (2) Dunkin's CEO informed Barkan that CIT does what he tells them to do and (3) Barkan was informed that CIT never turned down a loan request that Dunkin' guaranteed.

Barkan's evidence is more than enough to create a genuine issue of material fact as to whether Dunkin's breach of the Settlement Agreement prevented Barkan from obtaining refinancing. This is especially true because causation is a "classic, fact-specific jury question." See Hodges v. Brannon, 707 A.2d 1225, 1228 (R.I. 1998); see also Notarantonio v. Damiano Bros. Welding Co., Inc., 221 A.2d 473, 475 (R.I. 1966) ("The issue of causation was one of fact"). As such, it was proper for Magistrate Judge Almond to deny Dunkin's motion for summary judgment on the issue of causation.

5. Whether Barkan Would Have Been Able to Finance and Develop New Locations Under the SDA's

In 2001, Barkan purchased the Dunkin' store network for \$1.5 million dollars. See Affidavit of Plaintiff/Counterclaim Defendant Irwin J. Barkan in Support of His Opposition to Defendant's Motion For Summary Judgment at para. 11. Barkan has 32 years of commercial real estate development experience. Id. at para. 3. Through initial financing with CIT, Barkan was able to grow the network's sales and, eventually, sell the network for \$4,025,000 (\$2.5 million dollars more than his initial purchase price).<sup>1</sup>

There is plenty of evidence to suggest, and the jury could so find, that if Dunkin' had not breached the Settlement Agreement (and Barkan received the refinancing through CIT) that Barkan would have been able to finance and develop new locations under the SDA's. As stated in section 4 above, the jury should decide the issue of causation. Consequently, Magistrate Judge Almond was correct to deny Dunkin's motion for summary judgment on this issue.

6. Damages

On Tuesday, June 16, 2009, Barkan served on Dunkin' an expert report from Barkan's substitute damages expert, Frank Torchio ("Torchio"). In Torchio's opinion, Barkan has suffered \$13.4 million dollars in damages as a result of Dunkin's wrongful conduct. Torchio's expert damages report, exactly like that of Barkan's previous expert, gives a precise calculation of Barkan's damages using generally accepted, well tested

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<sup>1</sup> Barkan's network of stores was sold through an auction conducted in the United States Bankruptcy Court for the District of Rhode Island. See In re DDB Dorrance, Docket No. 1:05-bk-10427, at Docket Entry 253.

economic analysis. Torchio's expert report – as well as his expert testimony at trial – will allow the jury to calculate Barkan's damages with reasonable certainty.<sup>2</sup>

“[W]here the existence of a loss is established, absolute certainty in proving its quantum is not required.” Smith Development Corp. v. Billow Enterprises, Inc., 112 R.I. 203, 214 (1973) (quoting 1 Sedgwick, Damages s. 170A (9<sup>th</sup> ed. 1912). What is required is that the court or the jury be guided by some rational standard. Id. (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). As Magistrate Judge Almond correctly found, Dunkin' is not entitled to summary judgment as to Barkan's damages.

### **CONCLUSION**

Magistrate Judge Almond has been actively involved in this litigation for almost two years.<sup>3</sup> Throughout the course of this litigation, Magistrate Judge Almond heard and decided several key motions and became intimately familiar with the facts and claims in this litigation. Before deciding Dunkin's motion for summary judgment, Magistrate Judge Almond reviewed the voluminous summary judgment record that included, among other things, the deposition testimony of every Dunkin' and CIT representative involved in Barkan's attempt to refinance as well as Barkan's affidavit.

For seven months, Magistrate Judge Almond carefully considered the issues raised in Dunkin's motion for summary judgment. After long and considered

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<sup>2</sup> To the extent that Dunkin' believes it can challenge Torchio's economic theory and damages analysis, such a challenge is more appropriate at the time of trial. See Narragansett Elec. Co. v. Carbone, 898 A.2d 87, 96 (R.I. 2006) (“This Court noted that in certain circumstances, it is necessary for a trial justice, in exercising his or her gate keeping function in determining evidence admissibility, to hold a preliminary hearing to determine whether expert testimony is reliable and appropriate.”)

<sup>3</sup> This Honorable Court has been involved with this litigation for more than four years and issued a decision favorable to Barkan on Dunkin's motion to dismiss on October 30, 2007.

deliberation, Magistrate Judge Almond issued a twenty-three page, well-reasoned decision. As such, Barkan respectfully requests that this Honorable Court adopt, in its entirety, Magistrate Judge Almond's report and recommendation.

Respectfully submitted,

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

By their attorneys,

/s/Adam M. Ramos  
Elizabeth McDonough Noonan (#4226)  
enoonan@apslaw.com  
Adam M. Ramos (#7591)  
aramos@apslaw.com  
ADLER POLLOCK & SHEEHAN P.C.  
One Citizens Plaza, 8<sup>th</sup> Floor  
Providence, R.I. 02903-0604  
Tel: (401) 274-7200  
Fax: (401) 351-4607/751-0604

/s/ Ronald W. Dunbar, Jr.  
Ronald W. Dunbar, Jr., (*Pro Hac Vice*)  
DUNBAR LAW P.C.  
10 High Street, Suite 700  
Boston, MA 02110  
Tel: (617) 244-3550  
Fax: (617) 244-6363

Dated: June 23, 2009

CERTIFICATE OF SERVICE

I hereby certify that this document 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 June 23, 2009.

/s/ Adam M. Ramos  
Adam M. Ramos (#7591)