



Smarter Discovery™

## Coffee, Donuts and a Meet & Confer on Electronically Stored Information

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Dunkin' Donuts sued to terminate a franchise agreement on the basis the Defendants breached their contract by erroneously reporting employee wages on an IRS W-2 Form and trademark infringement. *Dunkin' Donuts Franchised Rests. LLC v. Grand Cent. Donuts, Inc.*, 2009 U.S. Dist. LEXIS 52261, 4-5 (E.D.N.Y. June 19, 2009). The Defendants in turn alleged counterclaims for breach of contract and breach of the implied covenant of good faith and fair dealings. *Dunkin' Donuts*, 5.

### Factual Overview

The Defendants originally contracted with the Plaintiffs to develop Dunkin' Donuts and Baskin-Robbins stores on 2002. *Dunkin' Donuts*, 4.

Dunkin and Baskin-Robbins Franchised Shops LLC attempted to re-acquire some of the Defendant's stores in 2006. After the Defendants refused, the Plaintiffs sent a notice of default and franchise termination notice in 2007. *Dunkin' Donuts*, 4. The lawsuit followed.

The Defendants brought a motion to compel Discovery and Interrogatory Answers. *Dunkin' Donuts*, 3.

### Discovery 101: Defendants' Arguments for Production

The Defendants sought pursuant to Federal Rule of Civil Procedure Rule 26(b)(1) documents relevant to the Plaintiffs' alleged breach of the implied covenant of good faith and fair dealings. The Defendants argued the Plaintiffs manufactured reasons for the Defendant's "default" of the franchise agreement and thusly sought discovery support those claims. *Dunkin' Donuts*, 6-7.

The Defendants specifically sought documents related to the Plaintiffs approving store expansions where a franchise was performing below performance levels. *Dunkin' Donuts*, 7. The Defendants also wanted "Dunkin's policies and practices regarding franchise terminations." *Dunkin' Donuts*, 7.

The Plaintiffs took the position their motive for terminating the agreement was irrelevant, because they had the express contractual right to terminate the franchise. *Dunkin' Donuts*, 7.

### Good Faith & Fair Dealings: Not Just for Boy Scouts

The case was governed by Massachusetts law, which states that "a covenant of good faith and fair dealing is implied in every contract." *Dunkin' Donuts*, 7.



Making life factually interesting, a party might not breach any express contract terms, but could still breach the implied covenant of good faith and fair dealings. *Dunkin' Donuts*, 8. As such, "...a party to a contract is not free to terminate it according to its terms." *Dunkin' Donuts*, 8, citing *Zapatha v. Dairy Mart, Inc.*, 381 Mass. 284, 408 N.E.2d 1370, 1379 (Mass. 1980).

### **Implied Covenant of Good Faith & Discovery Rules**

Federal Rules of Civil Procedure Rule 26(b)(1) allows a party to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." *Dunkin' Donuts*, 6-7, citing Rule 26.

Documents pertaining to the Plaintiffs motivations on the termination of the franchise agreement were clearing within the purview of Rule 26(b)(1). The Court reasoned that the Defendants were entitled to discovery of their counterclaims, because the issue of the lawsuit was whether the Plaintiffs acted with ulterior motives to terminate the contract. *Dunkin' Donuts*, 11.

The Court granted almost all of the Defendant's discovery requests, with some being limited by time and scope. *Dunkin' Donuts*, 12-15.

The Court reasoned that if the Defendants could show the Plaintiffs acted in bad faith regarding the termination of the agreement, the Plaintiffs could be liable for the breach of the implied covenant of good faith. *Dunkin' Donuts*, 11.

### **The Federal Rule of Civil Procedure Rule 26(f) Conference**

Things got a little more interesting with the Plaintiffs' email.

The Court ordered the parties to meet and confer on a search protocol for the Defendants' requests. *Dunkin' Donuts*, 15. The Court justified the order on Federal Rule of Civil Procedure Rule 26 (f) to formulate a discovery plan and the Sedona Conference Cooperation Proclamation, citing in part the need to avoid discovery cost increases. *Dunkin' Donuts*, 14-15.

The Defendants were to provide a list of individuals whose emails they wanted searched, along with "specific search terms" for each person's email to be searched. *Dunkin' Donuts*, 15. This order is a little different then some of the other recent search term orders, because the search terms were to be specific to each individual. Perhaps this was to avoid any "donut holes" in proposed search terms.

### **Bow Tie Thoughts**

I could see an exchange of email messages being very important to showing a party's "bad faith" to breach the implied covenant of good faith and fair dealings.

While there might not be a smoking gun email of "let's act in bad faith and breach the implied covenant," I can envision a party reviewing many email threads for deposition exhibits and their case in chief.

I would also be disappointed if the meet and confer did not have some coffee or ice cream.