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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALEJANDRO JUAREZ, MARIA JUAREZ,)	Case No. 09-3495 SC
LUIS A. ROMERO and MARIA PORTILLO,)	
individually and on behalf of all)	ORDER DENYING PLAINTIFFS'
others similarly situated,)	<u>MOTION TO CERTIFY THE CLASS</u>
)	
Plaintiffs,)	
)	
v.)	
)	
JANI-KING OF CALIFORNIA, INC., a)	
Texas corporation, JANI-KING,)	
INC., a Texas corporation, JANI-)	
KING INTERNATIONAL, INC., a Texas)	
corporation, and DOES 1 through)	
20, inclusive,)	
)	
Defendants.)	

I. INTRODUCTION

Before the Court is an Amended Motion to Certify the Class by Plaintiffs Alejandro Juarez, Maria Juarez, Luis A. Romero, and Maria Portillo ("Plaintiffs"). ECF No. 96 ("Mot."). Defendants Jani-King of California, Inc., Jani-King, Inc., and Jani-King International, Inc. (collectively, "Jani-King") filed an Opposition, and Plaintiffs filed a Reply. ECF Nos. 109 ("Opp'n"), 113 ("Reply"). Pursuant to Civil Local Rule 7-1(b), the Court finds the Motion suitable for determination without oral argument. For the following reasons, the Court DENIES Plaintiffs' Motion.

1 **II. BACKGROUND**

2 **A. Factual Background**

3 Jani-King provides cleaning and janitorial services to
4 commercial clients in California and other states. First Amended
5 Complaint, ECF No. 32 ("FAC") ¶ 16. It specializes serving larger
6 commercial clients, including commercial office buildings,
7 healthcare facilities, and retail outlets. ECF Nos. 97-99 ("Pls.'
8 Evidence") Vol. 4 Tab T Ex. 10 ("Jani-King Presentation") at 5701.

9 Jani-King's business model involves selling franchises to
10 individuals or entities, who then perform janitorial work for Jani-
11 King's clients. FAC ¶ 20. Jani-King claims to have more than
12 twelve thousand franchisees throughout the United States. See
13 Jani-King Presentation; Pls.' Evidence Vol. 2 Tab S Ex. 2 ("Jani-
14 King Franchise Disclosure Document").

15 Under the franchise agreement between Jani-King and its
16 franchisees, franchisees pay an Initial Franchise Fee and an
17 Initial Finder's Fee. Id. at 21. Both fees are paid in
18 installments over the life of the franchise agreement, with a down
19 payment due on purchase. Id. In return, Jani-King must offer each
20 franchisee a certain amount of centrally generated business -- the
21 "Initial Business Offering" -- during the franchisee's "Initial
22 Offering Period." Jani-King Presentation at 5715. The amount of
23 business Jani-King is obligated to offer is proportional to the
24 size of the Initial Finder's Fee paid by the franchisee. Id.
25 Jani-King offers fifteen franchise plans which are identical in all
26 respects except the amount of initial investment required by the
27 franchisee and the amount of centrally generated business promised
28 by Jani-King. Id. at 5719. These franchise plans range in cost

1 from \$8,600 to \$46,500. Id.

2 Franchisees do not receive an exclusive territory; rather,
3 each franchise agreement designates a specific non-exclusive
4 geographic territory. Id. at 5749. Franchisees agree to clean,
5 interact with clients, and perform other business tasks according
6 to standardized procedures established by Jani-King. For example,
7 franchisees must purchase specific cleaning equipment, carry
8 insurance, and report customer complaints to Jani-King. Id. at
9 5731-34. Franchisees also solicit clients directly, although they
10 must comply with Jani-King's procedures in doing so. Id. In
11 addition to the two above-mentioned fees, franchisees must pay
12 Jani-King a number of other fees, including an accounting fee and
13 an advertising fee. See Jani-King Presentation.

14 In addition to centralized bidding, Jani-King centrally
15 performs accounting, data management, and franchise training. Mot.
16 at 5. As a franchiser, Jani-King is subject to California's
17 franchise regulations, as well as the regulations of other states.
18 It must provide each prospective franchisee with a Franchise
19 Disclosure Document ("FDD") disclosing, among other things, its
20 litigation history, its business experience, the fees the
21 franchisee is required to pay under the agreement, and the
22 estimated total investment that the franchisee must make to open
23 the franchise. Cal. Corp. Code § 31114; Cal. Code. Regs. tit. X, §
24 310.114.1.

25 Plaintiffs are four individuals who purchased franchises from
26 Jani-King and have performed janitorial work under the Jani-King
27 franchise agreement. FAC ¶ 2. Alejandro and Maria Juarez jointly
28 purchased a Plan "D" franchise for \$13,500. Pls.' Ev. Vol. 1 Tabs

1 A ¶ 5, B ¶ 5. Maria Portillo and Luis A. Romero both purchased
2 Plan "C" franchises for \$12,000. Id. Tabs C ¶ 4, D ¶ 4.

3 In their FAC, Plaintiffs claim that they have limited or no
4 fluency in English and no formal education, and that they were
5 "induced by Jani-King with promises of guaranteed income and
6 entrepreneurial opportunity" to purchase the franchises. FAC ¶¶ 2,
7 22. Plaintiffs allege that the "franchise contracts are replete
8 with unconscionable terms of which Plaintiffs and others have no
9 understanding, and the enforcement of which creates a cycle of debt
10 for Plaintiffs and others from which they cannot free themselves."
11 Id. ¶ 2.

12 Plaintiffs bring fourteen claims against Jani-King. Six
13 claims allege violations of California's Labor Code ("Plaintiffs'
14 Labor Code claims"). These claims rely on a singular theory of
15 liability: that Jani-King's franchise system is a "scheme to evade
16 responsibility for janitorial workers' wages and job benefits by
17 purporting to hire them indirectly (through the 'franchises') as
18 'independent contractors' while, in fact, retaining control over
19 the work that Plaintiffs and other janitorial workers perform."
20 Id. ¶ 3. Plaintiffs argue that Jani-King so tightly controls and
21 oversees the janitorial work done by its franchisees as to create
22 an employer-employee relationship between Jani-King and the
23 franchisees, triggering the numerous employee protections provided
24 by California's Labor Code, such as payment of overtime wages,
25 payment of California's minimum wage, and itemized wage statements.
26 Id. ¶¶ 3, 193-220.

27 Plaintiffs bring two claims concerning the standard franchise
28 agreement between Jani-King and the franchisees: Plaintiffs allege

1 breach of contract and breach of California's covenant of good
2 faith and fair dealing ("Plaintiffs' good faith claim"). Id.
3 Under the standard Jani-King franchise agreement, Jani-King is
4 obligated to offer each franchisee a certain dollar amount of
5 cleaning accounts to service; Plaintiffs allege that Jani-King has
6 breached the franchise agreement by failing to satisfy this
7 requirement. Id. ¶ 182. Plaintiffs also allege that Jani-King
8 breached the covenant of good faith and fair dealing by adopting
9 practices to frustrate franchisees' ability to receive the benefits
10 under the agreement. Id. Plaintiffs allege that Jani-King offers
11 cleaning accounts to franchisees without giving the franchisees the
12 opportunity to review them and determine whether accepting the
13 account would be profitable, and that it takes away accounts from
14 franchisees at will, making these offers illusory. Mot. at 9.
15 Plaintiffs also allege that Jani-King breaches this covenant by
16 bidding so competitively on cleaning accounts that "after all the
17 Jani-King fees and the costs of doing business . . . are taken into
18 account, class members are deprived of any profit from the
19 accounts." Id.

20 Four claims involve alleged representations or omissions made
21 by Jani-King to would-be franchisees ("Plaintiffs' fraud claims").
22 These causes of action are: violation of sections 31201 and 31202
23 of California's Corporations Code (prohibiting the making of any
24 untrue statement of material fact or omission of material fact
25 during the offer or sale of a franchise contract and prohibiting
26 persons from willfully making an untrue statement or omitting a
27 material statement that must be disclosed in writing,
28 respectively); deceit by intentional misrepresentation; deceit by

1 negligent misrepresentation; and deceit by concealment. See FAC.

2 Finally, Plaintiffs allege that Jani-King violated
3 California's Unfair Competition Law by engaging in unlawful,
4 unfair, or fraudulent acts ("Plaintiffs' UCL claim"). See FAC.

5 **B. Procedural Background**

6 This action was removed from California Superior Court by
7 Jani-King on July 30, 2009. ECF No. 1. The Court granted Jani-
8 King's motion to dismiss certain claims in the Initial Complaint on
9 October 5, 2009. ECF No. 25. On November 4, 2009, Plaintiffs
10 filed their FAC, which Jani-King answered. ECF No. 35.

11 At the January 22, 2010 status conference, the Court
12 bifurcated discovery, with discovery relating to class
13 certification commencing immediately and merits discovery beginning
14 if and once the Court certified the class. ECF No. 40. On July 8,
15 2010, Jani-King sought leave from the Court to file a counterclaim
16 against Plaintiffs Alejandro and Maria Juarez ("the Juarezes"),
17 which the Court granted. ECF Nos. 47, 112.

18 In its counterclaim, Jani-King alleges that without first
19 seeking termination of their Jani-King franchise, the Juarezes
20 formed a competing cleaning firm, Nano's Janitors, and induced
21 Jani-King customers to terminate their cleaning agreements and
22 transfer their business to the competing firm. ECF No. 115
23 ("Defs.' Countercl."). Jani-King brings action for breach of
24 contract, tortious interference with contract, and tortious
25 interference with prospective economic advantage. Id.

26 On July 16, 2010, Plaintiffs filed their first Motion to
27 Certify the Class. ECF No. 52. The Court denied this motion,
28 ruling that it violated Civil Local Rule 7-4(b)'s page limit, and

1 instructed Plaintiffs to refile their motion in conformity with the
2 local rules. ECF No. 93. Plaintiffs now bring the present motion,
3 and move to certify the following class under Rule 23(a) and (b)(3)
4 of the Federal Rules of Civil Procedure:

5 All persons who have performed janitorial work
6 on cleaning accounts as Jani-King "franchisees"
7 within the State of California at any time from
8 June 22, 2005 up to and through the time of
9 judgment.

10 Mot. at 1.

11 Of the fourteen claims stated in the FAC, Plaintiffs seek
12 class certification for eight. Plaintiffs seek certification for
13 five of their six Labor Code claims: failure to pay a minimum wage
14 in violation of California Labor Code §§ 1182.11-1182.13, 1194(a),
15 1194.2, 1197 and Wage Order 5-2001; failure to provide accurate
16 itemized wage statements and maintain adequate records in violation
17 of California Labor Code §§ 1182.11-1182.13, 1194(a), 1194.2, 1197
18 and Wage Order 5-2001; failure to indemnify employees for expenses
19 in violation of California Labor Code § 2802; unlawful deductions
20 from wages in violation of California Labor Code § 221; and
21 compelling employees to patronize in violation of California Labor
22 Code § 450. FAC ¶¶ 200-20. Plaintiffs seek certification of their
23 good faith claim, but not their breach of contract claim; their
24 concealment claim, but not their other fraud claims; and their UCL
25 claim. Id.

26 In opposing Plaintiffs' Motion, Jani-King argues that class
27 treatment is improper because individual issues predominate over
28 common issues, individual actions are superior to class action, the
named Plaintiffs are inadequate class representatives, and the
named Plaintiffs' claims are not typical of the class. See Opp'n.

1 **III. LEGAL STANDARD**

2 Federal Rule of Civil Procedure 23(a) provides four
3 requirements for class certification: (1) numerosity ("the class is
4 so numerous that joinder of all members is impracticable"); (2)
5 commonality ("there are questions of law or fact common to the
6 class"); (3) typicality ("the claims or defenses of the
7 representative parties are typical of the claims or defenses of the
8 class"); and (4) adequacy of representation ("the representative
9 parties will fairly and adequately protect the interests of the
10 class"). Fed. R. Civ. P. 23(a). In addition, the court must also
11 find that the requirements of Rule 23(b)(1), (b)(2), or (b)(3) are
12 satisfied. Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 580 (9th
13 Cir. 2010). Rule 23(b)(3) requires a finding by the court "that
14 questions of law or fact common to class members predominate over
15 any questions affecting only individual members, and that a class
16 action is superior to other available methods for fairly and
17 efficiently adjudicating the controversy." Fed. R. Civ. P.
18 23(b)(3). Courts refer to the requirements of Rule 23(b)(3) as its
19 "predominance" and "superiority" requirements. Amchem Prods., Inc.
20 v. Windsor, 521 U.S. 591, 615 (1997).

21
22 **IV. DISCUSSION**

23 In its Opposition, Jani-King does not contest that numerosity
24 or commonality is satisfied for these claims, and Jani-King makes
25 only a brief challenge to Rule 23(a)'s typicality requirement. See
26 Opp'n. Rather, Jani-King focuses on two main arguments. Jani-King
27 argues that the named Plaintiffs cannot adequately represent the
28 proposed class because their experiences are atypical of the class

1 as a whole and because there are fundamental potential conflicts of
2 interest within the proposed class. Jani-King also argues that
3 Plaintiffs' claims cannot be established with common proof, and
4 thus individual issues predominate and class treatment is inferior
5 to individual actions. Id. at 5-24.

6
7 **A. Preliminary Matters**

8 1. Motions to File Documents Under Seal

9 Plaintiffs filed an administrative motion to file documents
10 under seal in support of their Motion, which the Court granted on
11 October 18, 2010. ECF No. 104. Jani-King also filed an
12 administrative motion to file documents in opposition under seal.
13 ECF No. 108. Having reviewed Jani-King's unopposed administrative
14 motion and the relevant documents, the Court GRANTS Jani-King's
15 motion with respect to the following exhibits:

- 16 • Exhibits IV-A through VII of Exhibit 6 to the Declaration
17 of Eileen Hunter ("Hunter") in Support of Jani-King's
18 Opposition; and
- 19 • Exhibits 29, 30, and 31 to the Hunter Declaration.

20 Plaintiffs and Jani-King must comply with Civil Local Rule 79-
21 5 and General Order 62 and e-file these documents under seal
22 according to the procedures outlined on the ECF website.

23 2. Evidentiary Issues

24 While neither party raises specific evidentiary objections in
25 their briefs, Jani-King takes issue with Plaintiffs' reliance on
26 the declarations of twelve Jani-King franchisees. Opp'n at 4.
27 Jani-King alleges that the parties agreed that a randomly selected
28 sample of ten percent of the putative class would represent the

1 class. Id. Jani-King argues that Plaintiffs ignored this random
2 sample, and have instead relied on "hand-picked declarations" from
3 a handful of franchisees as common proof. Id. These declarations
4 are nearly identical in wording. See Pls.' Ev. Vol. 1 Tabs A-D,
5 F-M ("Franchisees' Decls."). Jani-King argues that these
6 declarations do not prove common experiences because they are not
7 representative of the class as a whole, because they rely on
8 indefinite terms like "sometimes" and "often," and because the
9 declarants' deposition testimony conflicts with their declarations.
10 Opp'n at 4. Plaintiffs do not directly respond to this challenge
11 in their Reply.

12 The Court finds merit in Jani-King's arguments. These twelve
13 declarations -- hand-picked by Plaintiffs, written in vague
14 language, short on factual assertions, and contradicted by
15 deposition testimony -- do not provide a trustworthy representation
16 of the class as a whole. As such, the Court accepts these
17 declarations for what they are -- the statements of twelve
18 franchisees within a putative class of nearly two thousand --
19 rather than a reliable representation of the class as a whole.

20 **B. Numerosity**

21 Rule 23(a)(1) provides that a class action may be maintained
22 only if "the class is so numerous that joinder of all parties is
23 impracticable." Fed. R. Civ. P. 23(a)(1). However,
24 "impracticable" does not mean impossible; it refers only to the
25 difficulty or inconvenience of joining all members of the class.
26 Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909, 913-14
27 (9th Cir. 1964).

28 Plaintiffs claim that at least nineteen hundred persons fall

1 within the class description, and Defendants do not dispute this.
2 Mot. at 6; see Opp'n. The Court thus finds the numerosity
3 requirement to be satisfied.

4 **C. Commonality**

5 Rule 23(a)(2) requires that there be "questions of law or fact
6 common to the class." Fed. R. Civ. P. 23(a)(2). The commonality
7 requirement must be "construed permissively." Hanlon v. Chrysler
8 Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). "All questions of fact
9 and law need not be common to satisfy the rule. The existence of
10 shared legal issues with divergent factual predicates is
11 sufficient, as is a common core of salient facts coupled with
12 disparate legal remedies within the class." Id. "The commonality
13 test is qualitative rather than quantitative -- one significant
14 issue common to the class may be sufficient to warrant
15 certification." Dukes, 603 F.3d at 599 (internal quotations
16 omitted).

17 Plaintiffs argue that commonality is satisfied for their Labor
18 Code claims because Jani-King's liability "rests primarily on
19 whether Jani-King lawfully treats class members as independent
20 contractors rather than employees." Mot. at 8. Plaintiffs argue
21 that commonality is satisfied as to their good faith claim because
22 Jani-King's relationship with its franchisees is governed
23 substantially by standardized agreements and policy manuals. Id.
24 Plaintiffs assert that their concealment claim is common to the
25 class because it arises from "standardized and scripted disclosures
26 about the details of purchasing and owning a franchise and thus are
27 made to all class members." Id. at 9. Finally, Plaintiffs contend
28 that their UCL claim is common to the class. They allege that

1 classifying the franchisees as independent contractors rather than
2 employees serves as a predicate unlawful act, and that the non-
3 compete provision in the franchise agreements and the allegedly
4 excessive franchise fees also serve as predicate unfair acts. Id.
5 at 11. Jani-King does not dispute that the commonality requirement
6 is satisfied. See Opp'n.

7 In light of the evidence and the permissive nature of the
8 commonality inquiry, the Court finds the commonality requirement to
9 be satisfied.

10 **D. Typicality and Adequacy of Representation**

11 Because Jani-King's arguments against typicality and adequacy
12 of representation are tightly woven, the Court addresses both
13 requirements together.

14 Rule 23(a)(3) requires that the representative parties' claims
15 be "typical of the claims . . . of the class." Fed. R. Civ. P.
16 23(a)(3). "Under the rule's permissive standards, representative
17 claims are 'typical' if they are reasonably co-extensive with those
18 of absent class members; they need not be substantially identical."
19 Hanlon, 150 F.3d at 1020. Rule 23 "does not require the named
20 plaintiffs to be identically situated with all other class members.
21 It is enough if their situations share a common issue of law or
22 fact and are sufficiently parallel to insure a vigorous and full
23 presentation of all claims for relief." Cal. Rural Legal Assist.,
24 Inc. v. Legal Servs. Corp., 917 F.2d 1171, 1175 (9th Cir. 1990).
25 Rule 23(a)'s commonality and typicality requirements "tend to
26 merge" in practice. Gen. Tel. Co. of the Southwest v. Falcon, 457
27 U.S. 147, 157 n.13 (1982). However, they serve different purposes:
28 "Commonality examines the relationship of facts and legal issues

1 common to class members, while typicality focuses on the
2 relationship of facts and issues between the class and its
3 representatives." Dukes, 603 F.3d at 613 n.37.

4 Rule 23(a)(4) requires a showing that "the representative
5 parties will fairly and adequately protect the interests of the
6 class." Fed. R. Civ. P. 23(a)(4). "Adequate representation
7 'depends on the qualifications of counsel for the representatives,
8 an absence of antagonism, a sharing of interests between
9 representatives and absentees, and the unlikelihood that the suit
10 is collusive.'" Crawford v. Honig, 37 F.3d 485, 487 (9th Cir.
11 1994) (quoting Brown v. Ticor Title Ins. Co., 982 F.2d 386, 390
12 (9th Cir. 1992). "This factor requires: (1) that the proposed
13 representative Plaintiffs do not have conflicts of interest with
14 the proposed class, and (2) that Plaintiffs are represented by
15 qualified and competent counsel." Dukes, 603 F.3d at 614.

16 Plaintiffs argue that typicality is satisfied because all
17 class claims "arise out of Jani-King's standardized policies and
18 procedures" and "Plaintiffs and the class are thus in a materially
19 identical position vis-à-vis Jani-King with respect to those
20 practices." Mot. at 12-13. Plaintiffs contend that both elements
21 of Rule 23(a)(4) are satisfied, alleging that "both the class and
22 the named Plaintiffs share an interest in requiring Jani-King to
23 operate in compliance with California law" and that Plaintiffs'
24 counsel has "extensive expertise in prosecuting complex cases and
25 the resources to represent the class effectively." Id. at 13.

26 Jani-King counters that the named Plaintiffs' claims and
27 experiences are not typical of the class, arguing that "each
28 owner's claim arises out of events unique to that owner." Opp'n at

1 25. Jani-King argues that the Juarezes are inadequate
2 representatives because they are subject to counterclaims and lack
3 credibility. Id. at 23-34. Jani-King additionally argues that the
4 class cannot be adequately represented because "[t]here is a
5 conflict of interest between owners who manage multiple employees
6 and owners who mostly perform the labor themselves." Id. at 23-24.

7 The Court finds that the typicality and adequacy requirements
8 fail for three reasons. First, the named Plaintiffs' experiences
9 as Jani-King franchisees do not appear to be typical of the class.
10 While Plaintiffs seek certification of eight claims, named
11 Plaintiffs still bring fourteen claims. Among these claims are
12 Plaintiffs' allegations that Jani-King representatives made oral
13 promises regarding the profitability of the franchises, which
14 Plaintiffs relied on in choosing to purchase a franchise. Id. at
15 14; see Franchisees' Decls. Plaintiffs' FAC makes numerous
16 references to the fact that the named Plaintiffs were not native
17 English speakers and had little or no fluency in English. The FAC
18 provides a compelling narrative: Jani-King entered into franchise
19 agreements with recent immigrants to the United States with little
20 or no fluency in English, who signed the agreements without
21 understanding them and on the basis of representations made by
22 Jani-King representatives; by doing so, Jani-King performed an end-
23 run around California's Labor Code, extracting below-minimum wage
24 labor from workers who were "franchisees" in name only.

25 These allegations are fleshed out in named Plaintiffs'
26 declarations. Alejandro Juarez states that his first and primary
27 language is Spanish, and that "at the time that I signed the
28 Franchise Agreement with Jani-King and paid for the franchise, I

1 could not read, write, or speak with ease in English." Pls.' Ev.
2 Vol. 1 Tab A ¶ 7. Alejandro further declares that despite the fact
3 that Jani-King's representatives spoke to him in Spanish, he was
4 never given a Spanish-language franchise agreement or a translation
5 of the franchise agreement. Id. The other named Plaintiffs --
6 Maria Juarez, Portillo, and Romero -- make identical allegations in
7 their declarations. Id. Tab B ¶ 7, B ¶ 6, D ¶ 6. The declarations
8 of the other franchisees do not contain these allegations. See
9 Franchisees' Decls.

10 These are serious allegations, and Plaintiffs are entitled to
11 attempt to prove them in court and, if they are successful, collect
12 the appropriate relief. However, Plaintiffs do not allege in their
13 Motion that these allegations are typical of the class, and they
14 submit no evidence of a common scheme to mislead prospective
15 franchisees through oral promises of franchise profitability. On
16 the contrary, Jani-King's promotional materials and required
17 franchise documentation clearly state that Jani-King does not make
18 profit predictions.

19 As such, named Plaintiffs' experiences and claims are not
20 typical of the class as a whole. If they were to serve as class
21 representatives, named Plaintiffs would likely be called on to
22 subjugate their interest in the litigation of their uncertified
23 fraud claims to serve their representational duty owed to the
24 class, and it is unclear whether the named Plaintiffs are aware of
25 this sacrifice. Each named Plaintiff has submitted a sworn
26 declaration stating: "I have agreed to serve as a representative of
27 the proposed Class in this case. I understand that I am
28 responsible for acting in and for the best interests of the Class,

1 and not just my own interests. I am not aware of any conflicts or
2 reasons why I cannot represent the interests of the Class." Pls.'
3 Ev. Tabs A - D ("Named Pls.' Decls.") ¶ 2. While this statement
4 evidences named Plaintiffs' willingness to serve as class
5 representatives, it does not show that named Plaintiffs understand
6 the obligations of the position. In fact, the statement that named
7 Plaintiffs are "unaware" of any conflicts with the class suggests
8 that counsel has not adequately disclosed to them that such
9 conflicts exist.

10 The second issue is Jani-King's counterclaim against the
11 Juarezes for breach of contract and tortious interference. Jani-
12 King alleges that the Juarezes -- without seeking to terminate
13 their Jani-King franchise -- formed a competing cleaning firm,
14 Nano's Janitors, and induced Jani-King customers to terminate their
15 cleaning agreements and transfer their business to the competing
16 firm. See Defs.' Countercl. While the existence of a counterclaim
17 does not automatically render a named plaintiff inadequate to
18 represent a class, the Court finds the dangers of inadequate
19 representation to be particularly strong here due to a lack of
20 alignment of interests between named Plaintiffs and the class as a
21 whole.

22 The third issue is the potential for conflict within the
23 proposed class. Plaintiffs have chosen to define the class
24 extremely broadly, and essentially capture all Jani-King California
25 franchisees in their class definition. Several prospective
26 conflicts exist within this class. As Jani-King notes, there is a
27 conflict between Jani-King franchisees who perform janitorial
28 services themselves and those that hire employees to perform the

1 labor. Plaintiffs' Labor Code claims hinge on proof that Jani-King
2 so controls the actions of its franchisees as to make the
3 franchisees Jani-King employees, making the franchise itself a
4 fraudulent scheme to avoid employment regulations. Similarly,
5 franchisees who are still in the Initial Offering Period may prefer
6 injunctive relief over rescission or damages, while those who have
7 terminated their franchise agreements with Jani-King will receive
8 no benefit from injunctive relief. While these potential conflicts
9 could arise at trial, they could also arise during settlement
10 negotiations.

11 For these reasons, the Court finds the typicality and
12 adequacy-of-counsel requirements to be unsatisfied.

13 **E. Predominance and Superiority**

14 As with the typicality and adequacy-of-representation
15 requirements, because Jani-King's predominance and superiority
16 arguments are tightly intertwined, the Court discusses them
17 together.

18 Rule 23(b)(3) requires the court to find that "the questions
19 of law or fact common to class members predominate over any
20 questions affecting only individual members." Fed. R. Civ. P.
21 23(b)(3). Predominance "tests whether proposed classes are
22 sufficiently cohesive to warrant adjudication by representation," a
23 standard "far more demanding" than the commonality requirement of
24 Rule 23(a). Amchem, 521 U.S. at 623-24. However, "[w]hen common
25 questions present a significant aspect of the case and they can be
26 resolved for all members of the class in a single adjudication,
27 there is clear justification for handling the dispute on a
28 representative rather than an individual basis." Hanlon, 150 F.3d

1 at 1022. If the plaintiff advances a theory of liability in its
 2 motion for class certification, the court should determine whether
 3 common issues predominate under this theory without evaluating the
 4 theory itself. United Steel, Paper & Forestry, Rubber, Mfg.
 5 Energy, Allied Indus. & Service Workers Int'l Union, AFL-CIO, CLC
 6 v. ConocoPhillips Co., 593 F.3d 802, 808 (9th Cir. 2010) ("United
 7 Steel"); see also Dukes, 603 F.3d at 588 ("it is the plaintiff's
 8 theory that matters at the class certification stage, not whether
 9 the theory will ultimately succeed on the merits") (emphasis in
 10 original).

11 Rule 23(b)(3) also requires that the class action be "superior
 12 to other available methods for fairly and efficiently adjudicating
 13 the controversy." Fed. R. Civ. P. 23(b)(3). The factors relevant
 14 to assessing superiority include:

15 (A) the class members' interests in
 16 individually controlling the prosecution or
 17 defense of separate actions; (B) the extent and
 18 nature of any litigation concerning the
 19 controversy already begun by or against class
 members; (C) the desirability or undesirability
 of concentrating the litigation of the claims
 in the particular forum; and (D) the likely
 difficulties in managing a class action.

20 Fed. R. Civ. P. 23(b)(3).

21 Because Plaintiffs' seven claims demand individual attention,
 22 the Court discusses them separately.

23 1. Plaintiffs' Labor Code Claims

24 The legal theory underlying Plaintiffs' Labor Code claims is
 25 that Jani-King's common policies and practices so tightly control
 26 the franchisees' actions as to create an employer-employee
 27 relationship between Jani-King and the putative class. Mot. at 14.

28 Under California law, "the principal test of an employment

1 relationship is whether the person to whom service is rendered has
2 the right to control the manner and means of accomplishing the
3 result desired." S.G. Borello & Sons, Inc. v. Dept. of Indus. Rel.
4 48 Cal. 3d 341, 349, (1989). While the principal's right to
5 control is the most important consideration, California courts
6 consider a number of additional factors, including: the right of
7 the principal to discharge at will, without cause; whether the one
8 performing services is engaged in a distinct occupation or
9 business; whether the work is usually done under the direction of
10 the principal; whether the principal or the worker supplies the
11 instrumentalities, tools, and the place of work for the person
12 doing the work; the length of time for which the services are to be
13 performed; the method of payment; whether the work is a part of the
14 regular business of the principal; and whether the parties believe
15 they are creating an employer-employee relationship. Id. at 351.

16 As common proof of their Labor Code claims, Plaintiffs offer
17 Jani-King's franchise manuals and other documents, which they claim
18 show that Jani-King directs the franchisees' method of cleaning,
19 their cleaning schedule, their contact with customers, and their
20 manner of dress, as Jani-King requires franchisees to wear uniforms
21 with the Jani-King logo. Mot. at 3. Plaintiffs submit, as
22 evidence of "control," that franchisees must be reachable by Jani-
23 King within four hours of contact and must notify Jani-King before
24 going on vacation; that franchisees are not permitted to handle
25 customer complaints without notifying Jani-King and following
26 specific procedures; that franchisees must obtain Jani-King's
27 approval before they establish an office location, use a trade or
28 business name, or create a vehicle display; and that franchisees

1 must "always use Jani-King's name and Jani-King's phone number with
2 clients." Id. Plaintiffs cite Jani-King's advertising material --
3 which touts the company's "quality control" over its franchisees --
4 as evidence of an employer-employee relationship. Id. Plaintiffs
5 argue that because it is undisputed that the class members
6 "performed janitorial work" for Jani-King, Jani-King should have
7 the burden of rebutting the existence of an employer/employee
8 relationship. Reply at 2 (citing Narayan v. EGL, Inc., 616 F.3d
9 895, 900 (9th Cir. 2010)).

10 Jani-King responds that many of the above-mentioned franchise
11 agreement terms are policies Jani-King must abide by under
12 California's law governing franchises. Opp'n at 8. Section 20001
13 of California's Business and Professions Code defines the term
14 "franchise" as "a contract or agreement, either expressed or
15 implied, whether oral or written, between two or more persons by
16 which:"

17 (a) A franchisee is granted the right to engage
18 in the business of offering, selling or
19 distributing goods or services under a
marketing plan or system prescribed in
substantial part by a franchisor; and

20 (b) The operation of the franchisee's business
21 pursuant to that plan or system is
22 substantially associated with the franchisor's
23 trademark, service mark, trade name, logotype,
advertising, or other commercial symbol
designating the franchisor or its affiliate;
and

24 (c) The franchisee is required to pay, directly
25 or indirectly, a franchise fee.

26 Cal. Bus. & Prof. Code § 20001(b); Cal. Corp. Code § 31005(a).

27 Jani-King argues that Plaintiffs' common proof "shows nothing
28 more than that which makes the owners franchisees." Id. at 7-8.

1 Jani-King also argues that Plaintiffs, not Jani-King, should have
2 the burden of establishing an employer-employee relationship. Id.

3 The Court agrees with Jani-King. It is true that under
4 California law, in determining whether a plaintiff is an employee
5 or an independent contractor, "once a plaintiff comes forward with
6 evidence that he provided services for an employer, the employee
7 has established a prima facie case that the relationship was one of
8 employer/employee." Narayan, 616 F.3d at 900. However, Plaintiffs
9 cite no authority suggesting that this rebuttable presumption
10 applies to franchisees. There are substantial public policy
11 reasons for the rule provided in Narayan: with the hiring of
12 employees comes the additional expenses of compliance with
13 California's Labor Code, and employers have a strong motive to
14 avoid these costs through creatively classifying their workers as
15 independent contractors. This is why California does not permit
16 circumvention of the Labor Code through "label" or "subterfuge."
17 S.G. Borello, 48 Cal. 3d at 349. Franchisors, however, are subject
18 to a considerable amount of regulation that does not apply to
19 independent contractors or employees. For instance, franchisors
20 are compelled by state and federal law to make detailed disclosures
21 to prospective franchisees, and must provide a fourteen-day waiting
22 period between provision of the disclosure document and the sale of
23 the franchise. See 16 C.F.R. § 436. Thus the above policy
24 concerns do not weigh as heavily in the franchise context.

25 In support of its argument that the rebuttable presumption
26 does not apply to franchisees, Jani-King cites to a number of cases
27 discussing the problem of agency in the franchisor-franchisee
28 relationship. In Cislaw v. Southland Corp., 4 Cal. App. 4th 1284,

1 1292 (Ct. App. 1992), the court held that a "franchisor's interest
2 in the reputation of its entire system allows it to exercise
3 certain controls over the enterprise without running the risk of
4 transforming its independent contractor franchisee into an agent."
5 For this reason, California courts have consistently held that a
6 principal-agent relationship exists only when the franchisor
7 retains complete or substantial control over the daily activities
8 of the franchisee's business. Id. at 1296.

9 Cislaw's test for principal-agent liability in the franchisor-
10 franchisee context has been found helpful by other courts in
11 addressing the employee-independent contractor question. In Singh
12 v. 7-Eleven, Inc., No. C-05-4534, 2007 WL 715488, *7 (N.D. Cal.
13 Mar. 8, 2007), a federal district court granted summary judgment in
14 the franchisor's favor on the plaintiff's Labor Code claims,
15 finding that the franchisor 7-Eleven failed to exercise control
16 beyond that which was necessary to protect and maintain its
17 trademark, trade name, and goodwill, despite the fact that the
18 franchisor paid the franchisee's lease and utilities, shared in the
19 store's profits, and sent a field consultant to the store for
20 weekly visits to evaluate the condition of the store and provide
21 advice on increasing sales and profits. Id. at *1.

22 Plaintiff argues that Cislaw and the other cases cited by
23 Jani-King are inapposite because they do not discuss the employee-
24 independent contractor distinction. Reply at 4. But Plaintiffs
25 offer no competing law; they merely continually cite to Narayan as
26 the appropriate test. Id.

27 While the answer is not entirely clear, the Court finds it
28 likely that under California law, a franchisee must show that the

1 franchisor exercised "control beyond that necessary to protect and
2 maintain its interest in its trademark, trade name and goodwill" to
3 establish a prima facie case of an employer-employee relationship.
4 Cislaw, 4 Cal. App. 4th at 129. As such, the Court can safely
5 exclude from the employee-employer relationship analysis facts that
6 merely show the common hallmarks of a franchise -- those that
7 constitute a "marketing plan or system" under which the
8 franchisee's operation is "substantially associated with the
9 franchisor's trademark, service mark, trade name," or goodwill.
10 Cal. Bus. & Prof. Code § 20001(b). Jani-King's franchisees are
11 required to follow specific methods of cleaning and handle customer
12 complaints a certain way because that is part of Jani-King's
13 required franchise system. Franchisees must wear uniforms, use
14 Jani-King's name and phone number in client communication, and
15 receive approval before they create marketing and advertising tools
16 because the system must be substantially associated with the
17 franchise's service mark.

18 Once it sets aside the policies required to protect Jani-
19 King's service mark and goodwill, the Court finds very little -- if
20 any -- common evidence tending to prove an employer-employee
21 relationship between Jani-King and its franchisees. For these
22 reasons, the Court finds that individual questions predominate over
23 common questions, and that class treatment of Plaintiffs' Labor
24 Code claims is not superior to individual actions.

25 2. Plaintiffs' Good Faith Claim

26 Plaintiff alleges that Jani-King breached its covenant of good
27 faith and fair dealing with all class members in the same manner.
28 Mot. at 9. Plaintiffs claim that although Jani-King is required

1 under the franchise agreement to offer a certain volume of cleaning
2 accounts to each franchisee, Jani-King frustrates the franchisee's
3 opportunity to benefit from this promise by (1) crediting an
4 offered account, regardless of whether the franchisee accepts the
5 account; (2) withdrawing offers before a franchisee has the
6 opportunity to review the account, inspect the account property,
7 and accept; and (3) taking away accounts from franchisees at will.
8 Mot. at 9. Plaintiffs additionally argue that "Jani-King's uniform
9 bidding process and formulas are such that, after all the Jani-King
10 fees and the costs of doing business that class members must incur
11 are taken into account, class members are deprived of any profits
12 from the accounts." Id.

13 Jani-King argues that whether it breached a duty to its
14 franchisees requires "an individual inquiry into whether each owner
15 had a chance to respond to offers, to accept offers, to review
16 accounts, or to inspect the property." Opp'n at 11. Jani-King
17 argues that the evidence cited by Plaintiffs are "hand-picked
18 declarations." Opp'n at 4. Jani-King argues that these
19 declarations are not representative of the class as a whole; that
20 "the declarations are filled with qualifications showing that the
21 events were not uniform even for the individual declarants but
22 happened only 'sometimes' or, at most, 'often,'" and that the
23 declarants' deposition testimony contradicts their declarations.
24 Id.

25 Having reviewed the evidence, the Court finds Plaintiffs have
26 failed to establish that Jani-King's allegedly breaching activity
27 can be shown through common proof. The "common proof" cited -- a
28 handful of nearly identical declarations picked from a putative

1 class of nearly two thousand -- shows only that a dozen franchisees
2 had similar experiences, and does not tend to show that common
3 issues predominate through the class as a whole.

4 Plaintiffs additionally argue that they can establish lack of
5 good faith through expert testimony showing that Jani-King lacks
6 sufficient accounts to fulfill all of its obligations owed to its
7 franchisees. Mot. at 19. Jani-King argues that this alleged
8 breach can only be proved with individual evidence. Opp'n at 10.
9 Jani-King provides a chart in its Opposition, which it claims shows
10 that the fourteen deponents and Plaintiffs entered into agreements
11 with Initial Business Obligations ranging from \$1000 to \$11,000;
12 that some accepted all or nearly all of the accounts offered, while
13 others accepted eighty percent or less of the accounts offered.
14 Id. at 11. Jani-King also argues that even if Plaintiffs could
15 prove that Jani-King lacked the funds to meet all its obligations,
16 this would only affect the franchises who were not offered
17 sufficient accounts. Id. at 12. Jani-King asserts that this would
18 require individual inquiries to determine whether any transferred
19 account was transferred due to Jani-King's bad faith or a valid
20 reason, such as a franchise owner's non-performance or the
21 cancellation by a client. Id. Jani-King claims that even if
22 there were a common bidding system, good faith would require each
23 franchisee to prove that it was wrongfully denied benefits of the
24 contract, citing Newell v. State Farm Gen. Ins. Co., 118 Cal. App.
25 4th 1094, 1103 (2004). Id. at 13.

26 In light of these arguments, the Court finds the issue of
27 breach of good faith to be highly factual, and to be dependent on
28 individual proof. As such, it finds that common issues do not

1 predominate and that class action would not be superior to
2 individual actions.

3 3. Plaintiffs' Concealment Claim

4 To prevail on its concealment claim, Plaintiffs must show that
5 Jani-King has concealed or suppressed a material fact, Jani-King
6 was under a duty to disclose the fact to Plaintiffs, Jani-King
7 intentionally concealed the fact to defraud Plaintiffs, Plaintiffs
8 were unaware of the fact and would not have acted as they did with
9 knowledge of the fact, and Plaintiffs suffered damage as a result
10 of the concealment. Marketing West, Inc. v. Sanyo Fisher (USA)

11 Corp., 6 Cal. App. 4th 603, 612-13 (Ct. App. 1992).

12 Plaintiffs claim that Jani-King concealed from prospective
13 franchisees Jani-King's bidding practices, the amount of business
14 it has to offer, how it offers accounts, and how it prices
15 accounts. Mot. at 21-22. Plaintiffs claim: "Jani-King's
16 fraudulent omissions arise in the context of standardized and
17 scripted disclosures about the details of purchasing and owning a
18 franchise and thus are made to all class members. Jani-King
19 follows a standard, detailed protocol when it sells a franchise."
20 Id. at 11.

21 Jani-King argues that Plaintiffs must prove that Jani-King had
22 a duty to disclose this information, and "Plaintiffs cannot provide
23 this duty on a classwide basis without overriding California's
24 franchise regulations." Opp'n at 18. Jani-King also argues that
25 Plaintiffs must prove justifiable reliance, which is "an individual
26 issue." Id. Jani-King writes: "Plaintiffs must prove that each
27 owner would have acted differently had the omitted information been
28 disclosed This will require an individual inquiry to

1 determine what each owner already knew, whether he or she would
2 have received any disclosure, and whether it would have caused him
3 or her to act differently." Id. at 18-19. Jani-King notes that
4 deposition testimony shows that while some franchisees read Jani-
5 King's disclosures, some did not, and argue that this shows that
6 for some would-be class members, additional disclosures would have
7 made no difference. Id. at 19.

8 The Court finds that individual issues will predominate in
9 determining questions of the duty owed by Jani-King and justifiable
10 reliance by franchisees. Plaintiffs cite no authority for the
11 argument that this Court is in a position to augment the detailed
12 disclosure requirements California and the federal government place
13 on sellers of franchises. Therefore, the franchisee-franchisor
14 relationship alone cannot give rise to these additional disclosure
15 requirements, and if any additional duty exists, it is created by
16 the details of the relationship between Jani-King and the specific
17 franchisee owed the duty. Plaintiffs do not produce evidence
18 suggesting that the class members are all so similarly situated
19 that they would all be owed an additional disclosure duty. The
20 Court thus finds this issue is heavily factual, and that Plaintiffs
21 have failed to show that common issues predominate over individual
22 issues such that class treatment would be superior.

23 4. Plaintiffs' UCL Claim

24 The UCL prohibits businesses from engaging in "any unlawful,
25 unfair or fraudulent business act or practice." Bus. & Prof. Code
26 § 17200; Cel-Tech Commc'ns Inc. v. L.A. Cellular Tel. Co., 20 Cal.
27 4th 163, 180 (1999).

28 Plaintiffs allege the above-mentioned claims -- the Labor Code

1 claims, good faith claim, and concealment claim -- serve as
2 predicates satisfying the UCL's unlawful and fraudulent prongs.
3 Mot. at 17. Plaintiffs admit that "[t]here is no substantive
4 difference in the analysis of these claims under the UCL unlawful
5 prong." Id. Because the Court finds individual issues predominate
6 each of these claims, it finds that a UCL claim predicated on these
7 claims also fails the predominance and superiority requirements.

8 Plaintiffs also argue that the UCL's unfairness prong is
9 satisfied through Jani-King's practice of charging franchise fees
10 which are "excessive and unfair;" through the inclusion of a non-
11 compete clause in the franchise agreement; and through the
12 franchise agreement's refund policy, which Plaintiffs claim rewards
13 Jani-King for failing to satisfy its contractual obligations. Mot.
14 at 11-12.

15 Plaintiffs and Jani-King agree that the question of what
16 constitutes an unfair consumer practice is unsettled in California.
17 See Mot. at 10-11; Opp'n at 21-22. Some California courts of
18 appeal balance the impact of the allegedly unfair conduct "against
19 the reasons, justifications and motives of the alleged wrongdoer."
20 S. Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th
21 861, 886 (1999). Others require a showing of "conduct that
22 threatens an incipient violation of [a] law, or violates the policy
23 or spirit of one of [the] laws because its effects are comparable
24 to or the same as a violation of the law." Cel-Tech, 20 Cal. 4th
25 at 187. Others adopt the approach of the Federal Trade Commission
26 and require plaintiffs to prove three elements: (1) the consumer
27 injury must be substantial; (2) it must not be outweighed by any
28 countervailing benefits to consumers or competition; and (3) it

1 must be an injury that the consumer himself could not reasonably
2 have avoided. See, e.g., Davis v. Ford Motor Credit Co. LLC, 179
3 Cal. App. 4th 581, 597-98 (2009). Plaintiffs argue that the third
4 test is the appropriate test. Mot. at 11.

5 Under any of these tests, including Plaintiff's preferred
6 test, Plaintiffs have failed to show common proof of their UCL
7 claim. For the fees charged to be unfair under this test,
8 Plaintiffs must prove that they caused a substantial injury to the
9 class. Aside from citing to handpicked declarations -- some of
10 which are contradicted by the franchisees' deposition testimony --
11 there is no evidence, let alone common evidence, of such an injury.
12 Similarly, Plaintiffs have introduced no evidence that the non-
13 compete provision caused injury. Indeed, Plaintiffs have
14 introduced no evidence that the non-compete provision was enforced,
15 or that the non-compete provision affected the franchisees'
16 behavior in any way. As to the third argument -- that the
17 franchise agreement's terms rewarded Jani-King for failing to meet
18 its contract obligations -- Plaintiffs do not fully flesh out this
19 argument and cite to no California case law suggesting that such a
20 refund policy could constitute an unfair practice under
21 California's unfair competition law. The Court cannot bind a class
22 on so novel a theory and so bare an evidentiary record.

23 In summary, class certification is inappropriate for all eight
24 of the claims Plaintiffs seek to be certified, because individual
25 issues predominate over common issues, because the named
26 Plaintiffs' claims are not typical of the class as a whole, and
27 because the named Plaintiffs and their counsel have not established
28 that they are capable of adequately representing the class.

1 **V. CONCLUSION**

2 For the foregoing reasons, the Court DENIES Plaintiffs'
3 Amended Motion for Class Certification. The case shall proceed as
4 an action on behalf of Alejandro Juarez, Maria Juarez, Luis A.
5 Romero, and Maria Portillo individually. A Case Management
6 Conference is scheduled for April 29, 2011, at 10:00 a.m. in
7 Courtroom 1, on the 17th floor, U.S. Courthouse, 450 Golden Gate
8 Avenue, San Francisco, CA 94102. Parties shall file a Joint Case
9 Management Statement no later than seven (7) days before the Case
10 Management Conference.

11
12 IT IS SO ORDERED.

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14 Dated: March 4, 2011



15 SAMUEL CONTI
16 UNITED STATES DISTRICT JUDGE
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