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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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CENTURY 21 REAL ESTATE LLC, a
Delaware Limited Liability
Company formerly known as
Century 21 Real Estate
Corporation,

NOS. CIV. 2:10-2751 WBS GGH
2:10-2846 WBS GGH
2:11-2497 WBS GGH
CONSOLIDATED

Plaintiff,

v.

MEMORANDUM & ORDER RE: CENTURY
21'S MOTION FOR SUMMARY
ADJUDICATION

ALL PROFESSIONAL REALTY, INC.,
a California corporation doing
business as CENTURY 21 ALL
PROFESSIONAL; STEVEN M.
WRIGHT, an individual; and
CAROL WRIGHT, an individual,

Defendants.

_____ /

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Century 21 Real Estate LLC ("Century 21") filed an
action against All Professional Realty, Inc. ("All
Professional"), Steven M. Wright, and Carol Wright arising from
All Professional's continued use of Century 21's trademarks
following the terminations of real estate brokerage franchise

1 agreements for unpaid fees. (No. 2:10-2751.) Steve Wright,¹
2 Carol Wright, and All Professional filed a related action against
3 Century 21 arising from the franchise agreements. (No.
4 2:10-2846.) Century 21 filed a third action against All
5 Professional Hawaii Realty Inc. ("All Professional Hawaii"), John
6 Sherman, Steve Wright, and Carol Wright arising from All
7 Professional Hawaii's allegedly wrongful use of Century 21's
8 trademarks following the termination of another real estate
9 brokerage franchise agreement. (No. 2:11-2497.) All three of
10 these cases have been consolidated. Presently before the court
11 is Century 21's motion for summary adjudication pursuant to
12 Federal Rule of Civil Procedure 56.

13 I. Factual and Procedural Background

14 In 1994, Steve and Carol Wright formed All
15 Professional, a real estate brokerage company. (Compendium of
16 Exhibits Ex. 42 ("Steve Wright Dep. I") at 12:13-22 (Docket No.
17 106)²; Steve Wright Decl. in Opp'n to Century 21's Mot. for
18 Prelim. Injunction ("Steve Wright Decl.") ¶ 2 (Docket No. 18-2).)
19 All Professional signed its first franchise agreement with
20 Century 21 in 1995, which allowed it to operate an office under
21 the name "Century 21 All Professional." (Steve Wright Dep. I at
22 20:3-23; Steve Wright Decl. ¶ 3.) Century 21 is a franchisor of
23 real estate brokerages. (Bertet Decl. ¶ 3 (Docket No. 88-4).)
24

25 ¹ The parties use "Steve Wright" and "Steven M. Wright."
26 Because he is captioned as Steve Wright in the action initiated
by him, the court will use Steve Wright.

27 ² Except where otherwise noted, all citations to the
28 docket refer to case number 10-2751, into which all three cases
were consolidated.

1 A. Franchise Agreements

2 All Professional³ operates multiple offices and each
3 office is governed by a separate franchise agreement with Century
4 21. In November of 2005, All Professional signed three ten-year
5 franchise agreements with Century 21 for two offices in
6 Sacramento⁴ and one office in Folsom, California, with an
7 effective date of December 1, 2005, for each franchise agreement.
8 (Bertet Decl. Exs. A-C §§ 1.5, 1.7.) The Wrights also signed a
9 personal guaranty of All Professional's obligations under the
10 three California franchise agreements. (Id. Exs. A-C at 43-44.)

11 Shortly after signing the franchise agreements for the
12 California franchises, the Wrights and their business partner
13 John Sherman, on behalf of All Professional Hawaii, signed a ten-
14 year franchise agreement with Century 21 for the operation of an
15 office in Honolulu, Hawaii. (Id. ¶ 6, Ex. D.) The Wrights,
16 together with Sherman, again signed a personal guaranty for All
17 Professional Hawaii's obligations under the Hawaii franchise
18 agreement. (Id. Ex. D at 43-44.)

19 All four franchise agreements include the same relevant
20 language. Section 4.1 of the franchise agreements granted All
21 Professional a nonexclusive license to use Century 21's "Marks"
22 and "System." (Id. Exs. A-D § 4.1.) "Marks" meant Century 21's
23 trademarks, service marks, and trade dress. (Id. Exs. A-D

24
25 ³ The court will refer to All Professional, All
26 Professional Hawaii, Steve Wright, and Carol Wright collectively
as "All Professional."

27 ⁴ When referring to the Sacramento franchise agreements
28 individually, the court will reference the franchise by the
street on which it is located -- River Park and Florin Road.

1 § 3.1.8.) "System" meant, inter alia, "policies, procedures, and
2 techniques designed to enable [] offices to compete more
3 effectively in the real estate sales market." (Id. Exs. A-D
4 § 3.1.14.) Century 21's "system" also included "common use and
5 promotion of certain Marks, copyrights, trade secrets,
6 centralized advertising programs, recruiting programs, referral
7 programs and sales management training programs." (Id.)

8 Century 21 has numerous registered trademarks. (See
9 Iuliano Decl. ¶ 3, Ex. A (Docket No. 88-3).) According to
10 Century 21, it uses the trademarks on goods and in
11 advertisements, education, training manuals, newsletters, global
12 computer networks, and residential, commercial, and mortgage
13 brokerage services. (Id. ¶ 5.) The trademarks have become well
14 recognized because of advertisements and promotions of goods and
15 services offered by Century 21. (Id.)

16 In exchange for the rights granted under the franchise
17 agreements, All Professional agreed to pay royalty fees of six
18 percent of gross revenue, with an initial monthly minimum fee of
19 \$500.00. (Bertet Decl. Exs. A-D §§ 7-8.) All Professional also
20 agreed to pay two percent of its gross revenue to a National
21 Advertising Fund ("NAF") for advertising expenses, with an
22 initial monthly minimum fee of \$562.00.

23 Section 16.2.3 of the franchise agreements provided
24 that Century 21 could terminate the agreement for good cause,
25 including curable and non-curable defaults by All Professional.
26 (Id. Exs. A-D § 16.2.3.) Section 16.2.4, governing termination
27 for curable defaults, provided that Century 21 could terminate
28 the agreement with 30 days notice of the "proposed termination

1 and the opportunity to cure the breach during the entire notice
2 period, or such longer or shorter notice as is required or
3 permitted by the law of the state where the Office is located,"
4 if the curable breach was the failure to pay financial
5 obligations. (Id. Exs. A-D § 16.2.4.) Section 16.2.5 provided
6 that Century 21 could terminate the agreement without notice if
7 termination was based on any non-curable defects. (Id. Exs. A-D
8 § 16.2.5.) Non-curable defects included abandonment of an office
9 demonstrated by, among other things, a franchisee's failure to
10 operate at an approved location for five consecutive business
11 days. (Id. Exs. A-D § 16.2.5.4.)

12 The agreements also contained language stating that
13 they were integrated agreements and that the franchisee should
14 not sign the agreement if any representative of Century 21
15 promised something that was not part of the agreement, an
16 attached addendum, or the offering circular. (Id. Exs. A-D
17 § 22.15.) The agreements further stated that the success of the
18 franchise was dependant on the efforts of the franchise owners
19 and that neither Century 21 nor any other person "guaranteed or
20 warranted that you will succeed in the operation of the
21 Franchise, or has provided any sales or income projections of any
22 kind to you." (Id. Exs. A-D § 23.9.) Finally, the agreements
23 provided that Century 21 would "have no right to regulate or
24 participate in the recruitment, selection, engagement, retention,
25 discipline or termination of your sales associates or employees,
26 except as may be necessary to protect the Marks and goodwill" and
27 that defendants were "solely responsible for the conduct of the
28 Business operated under this Agreement according to [their] own

1 judgment, and in accordance with the provisions of this Agreement
2 and the P&P Manual" (Id. Exs. A-D § 21.2.)

3 B. Development Advance Promissory Note

4 In addition to entering into the California franchise
5 agreements in November of 2005, All Professional borrowed
6 \$75,000.00 from Century 21 pursuant to a Development Advance
7 Promissory Note ("DAN" or "Note") for which the Wrights signed a
8 personal guaranty. (Bertet Decl. Ex. D.) The Note provided for
9 a long-term, annual repayment plan and provided that if All
10 Professional was not in breach of its franchise agreements, the
11 yearly amount due would be forgiven if All Professional reached
12 certain gross revenue annual thresholds. (Id.) If the revenue
13 thresholds were not met, the Note stated that "an amount of
14 Principal equal to the Yearly Principal shall become due and
15 payable." (Id.) In the event that All Professional terminated
16 its business or defaulted on "any other agreement or note"
17 between the parties, the DAN provided for an acceleration of the
18 unpaid principal. (Id.) In addition to the Note, All
19 Professional and the Wrights signed a Security Agreement in which
20 they granted Century 21, as security for the prompt payment of
21 the Note, a security interest in certain specifically described
22 collateral. (Id. ¶ 20, Ex. F.)

23 The Wrights state that they executed the Note relying
24 on statements by Dale Omer, Century 21's Western Regional Vice
25 President, that "everything would be wonderful." (Steve Wright
26 Dep. I at 62:1-6.) According to the Wrights, Omer told them "not
27 to worry" about repaying the DAN because the new "tools and
28 systems" that Century 21 would provide would "revolutionize

1 [Century 21] offices compared to the competition" and make All
2 Professional more profitable. (Id. at 59:19-60:2; 62:13-15.)
3 Despite these representations, Steve Wright concedes that he does
4 not "believe they ever said that we would be profitable. They
5 said we would be more productive and sell more houses." (Id. at
6 67:11-15.)

7 C. Addenda to Franchise Agreements and Waiver of Claims

8 All Professional signed an addendum to the River Park
9 franchise agreement, effective January 3, 2006, which amended the
10 franchise agreement to include section 25.4 pertaining to the
11 DAN. (Bertet Decl. ¶ 22, Ex. G § 25.4.) The addendum provided
12 that "in the event of any termination of this agreement for any
13 reason prior to the expiration of the Term . . . any and all sums
14 due and owing (and/or not otherwise previously forgiven) under
15 the Development Advance Note may be accelerated (at Franchisor's
16 discretion) and shall be immediately payable." (Id.)

17 All Professional also signed addenda to the other two
18 California franchise agreements that did not relate to the DAN.
19 All three addenda contained a limited waiver of claims from which
20 All Professional and the Wrights agreed to expressly release
21 Century 21 from, and forever waive and relinquish, any and all
22 claims they might have against Century 21, as well as a waiver of
23 All Professional and the Wrights' rights under section 1542 of
24 the California Civil Code. (Id. ¶ 22, Ex. G at 115.) All
25 Professional and the Wrights also signed an addendum to the
26 Hawaii franchise, effective February 1, 2006, which contains a
27 similar waiver of claims. (Id. ¶ 24, Ex. H at § 5.)

28 D. Improper Recruiting Practices

1 Beginning in late 2006, All Professional argues that
2 Century 21 All Islands, another Century 21 franchise office
3 located in Hawaii, was engaged in an aggressive campaign to
4 recruit All Professional Hawaii's agents in violation of Century
5 21's "Code of Conduct."⁵ Steve Wright informed Sandy Persky,
6 Century 21's Regional Director assigned to Hawaii, about All
7 Islands' recruiting violations in an email dated December 19,
8 2006. (Compendium of Exhibits Ex. 16 at CENT002539 (Docket No.
9 104).)⁶ On July 20, 2007, Steve Wright sent a second email to
10 Persky, Omer, and Bob Popp at Century 21 complaining about All
11 Islands' recruiting practices.⁷ (Id. Ex. 16 at CENT002538.)
12 This second email specified that All Professional did not expect
13 Century 21 to take any actions based on the complaint. (Id.)
14 The email chain following Steve Wright's second complaint
15 suggests that as of July 25, 2007, Century 21 had not done

17
18 ⁵ Century 21's Policies and Procedures Manual stated that
19 franchisees "should avoid" recruiting sales associates of other
20 franchisees and "advised that aggressive sales associates
21 recruiting practices may subject the broker involved to claims of
22 business interference by other brokers under applicable state
23 law." (Steve Wright Decl. Ex. 2.)

24 ⁶ The court notes that although All Professional did
25 inform Century 21 about the alleged recruiting violations, the
26 email also stated that All Professional was "OK with [the
27 recruiting violation] being 'OK'," that it did not expect the
28 practice to stop given All Islands' past recruiting practices,
and that All Professional would be "actively recruiting All
Island agents" in retaliation. (Compendium of Exhibits Ex. 16 at
CENT002539.)

26 ⁷ Although this email contained complaints regarding All
27 Islands practices, it also specifically stated that All
28 Professional would "remove any restrictions Century 21 All
Professional has against All Island's [sic] recruiting [its]
agents" and had "added All Island agents into our recruiting
pool." (Compendium of Exhibits Ex. 16 at CENT002538.)

1 anything regarding All Islands' alleged recruiting violations.

2 (Id.)

3 On April 18, 2008, Steve Wright sent Persky an
4 additional email with attachments documenting All Islands'
5 recruitment efforts. (Id. Ex. 17.) Persky forwarded the email
6 to Popp. (Id.) Popp contacted the All Islands broker and
7 suggested that he stop recruiting All Professional Hawaii's
8 agents. (Compendium of Exhibits Ex. 46 ("Popp Dep. I") at 59:9-
9 60:18 (Docket No. 108).) On May 7, 2008, Steve Wright notified
10 Persky and Popp that he was resigning from the Hawaii Broker
11 Counsel because of All Islands' recruitment practices.
12 (Compendium of Exhibits Ex. 18 (Docket No. 104).)

13 Beginning in 2008, a number of All Professional's
14 agents from its California franchises left to work at Century 21
15 Select. (Steve Wright Dep. I at 142:21-143:14.) Based on
16 conversations with the agents, Steve Wright believed that Select
17 was improperly recruiting his agents, in part by offering them
18 commissions that would result in a net loss to Select. (Id. at
19 146:11-147:18; see also Compendium of Exhibits Ex. 40 (agent
20 compensation information from Century 21 Select).) Steve Wright
21 also claims that at least two of All Professional's former agents
22 stole commission checks from All Professional and cashed them
23 after they transferred to Select. (Steve Wright Dep. I at 155:5-
24 16, 157:5-22.) Steve Wright informed Century 21 that other
25 franchisees were "openly competing with All Professional and
26 stealing its business and employees" in violation of Century 21's
27 "Code of Conduct." (Steve Wright Decl. ¶ 9.) Popp acknowledges
28 receipt of an email from All Professional complaining about

1 stolen commissions, but did not take any action regarding the
2 complaint. (Popp Dep. I at 72:16-73:3.)

3 On August 4, 2008, Steve Wright informed Century 21
4 that he would no longer participate in Broker Council activities
5 for the Sacramento area due to Century 21's "policy of allowing
6 Select, All Islands, Homefinders to recruit our agents/staff
7" (Compendium of Exhibits Ex. 19 (Docket No. 104).)

8 E. Protection of Century 21 Trademark

9 All Professional also argues that Century 21 allowed
10 other businesses to dilute the Century 21 trademark in All
11 Professional's area when two real estate offices not affiliated
12 with Century 21, moved into the Folsom area operating as "21st
13 Century Realty" and "First Century." (Steve Wright Dep. I at
14 116:6-117:16, 234:14-235:23.) Steve Wright states that he
15 petitioned Popp to have Corporate take action against the
16 trademark infringement in 2004 or 2005.⁸ (Id. at 235:13-25.)
17 Steve Wright reports that Popp responded that "there was nothing
18 he was going to be able to do, that we just had to deal with it."
19 (Id. 116:17-23.)

20 All Professional argues that Century 21 took no
21 substantive action on the trademark issue until after All
22 Professional moved out of the Folsom office and Century 21 Select
23

24 ⁸ Popp states that he was not working for Century 21 in
25 2004 or 2005, but actually began his position as Vice President
26 with Century 21 in 2006. (Rudin Decl. Ex. F. ("Popp Dep. II") at
27 9:4-25, 17:14-16 (Docket No. 88-10).) Popp does not recall
28 meeting the Wrights until 2007. (Id. at 23:19-23.) In Steve
Wright's second deposition, held six months after the first, he
clarifies that he probably first spoke with Popp regarding the
trademark issue in 2006. (Compendium of Exhibits Ex. 43 ("Steve
Wright Dep. II") at 33:20-22 (Docket No. 107).)

1 moved into the office. (Steve Wright Dep. I at 235:2-12.) After
2 All Professional's franchise was terminated on October 8, 2010,
3 Century 21's legal counsel sent Henry Ung from 21st Century
4 Network, one of the non-affiliated offices, written notification
5 that 21st Century Network was in violation of Century 21's
6 trademark and demanded that it cease using the marks or face
7 further legal action. (Compendium of Exhibits Ex. 39 (Docket No.
8 105).)

9 F. Folsom Office

10 In late August 2009, All Professional ceased doing
11 business out of its Folsom office. (Steve Wright Dep. I at 201:6-
12 11.) The office closure occurred after the building was
13 foreclosed upon, either due to a partnership break-up between All
14 Professional and a separate entity, (Steve Wright Dep. II at
15 27:14-29:5), or because All Professional was struggling
16 financially after agents left and its income dropped, (Steve
17 Wright Dep. I at 201:12-21). All Professional did not seek
18 approval from Century 21 prior to closing the Folsom office.
19 (Id. at 201:22-202:2.)

20 On October 27, 2009, Century 21 inquired as to the
21 status of All Professional's Folsom office. (Compendium of
22 Exhibits Ex. 24 (Docket No. 104).) All Professional responded
23 that it was relocating the Folsom office and "expect to be fully
24 operational the first of the year." (Id.) All Professional also
25 stated that it would advise Century 21 when the new address was
26 finalized. (Id.)

27 In February 2010, Mike Bainbridge, a Century 21
28 business consultant, suggested that All Professional merge its

1 Folsom office with its Sacramento office in order to avoid paying
2 minimum monthly fees on the Folsom office that was not currently
3 operating. (Compendium of Exhibits Ex. 48 ("Bainbridge Dep.") at
4 106:16-107:8 (Docket No. 110); Steve Wright Dep. I at 203:19-
5 204:13.) All Professional did not elect to consolidate the
6 offices.

7 On February 5, 2010, Dan Jacuzzi, the owner of Century
8 21 Select, emailed Marc Fischman at Century 21 about opening up a
9 Century 21 Folsom office at the same location that All
10 Professional had abandoned. (Compendium of Exhibits Ex. 25 at
11 CENT004385 (Docket No. 104).) Before opening up a Folsom
12 location, however, Jacuzzi wanted to "insure [sic] that the prior
13 (now closed) franchise of All Professional be terminated." (Id.)
14 On February 11, 2010, Bainbridge sent Jacuzzi an application for
15 the new Folsom office and stated that he was "working on the
16 other half of the request and will keep you posted as to how that
17 progresses." (Id. at CENT004275.)

18 On May 24, 2010, Century 21 sent All Professional
19 notice that it had terminated All Professional's Folsom office on
20 the grounds of abandonment. (Compendium of Exhibits Ex. 31
21 (Docket No. 105).) On May 26, 2010, Century 21 approved
22 Jacuzzi's application to open an office in Folsom using the
23 building that All Professional had vacated. (Compendium of
24 Exhibits Ex. 47 ("Popp Dep. III") at 13:24-14:15, 22:5-10 (Docket
25 No. 109).) All Professional argues that Century 21's termination
26 of its Folsom office was the result of Century 21 favoring Select
27 over All Professional.

28 G. Failure to Pay Century 21 Franchise Fees

1 Beginning in May of 2009, All Professional stopped
2 paying many of its franchise fees. (Bertet Decl. ¶ 25.) All
3 Professional was aware that it had failed to pay the fees.
4 Century 21's online system provides its franchisees with
5 "detailed summaries of their account balances owed to Century 21,
6 including specific information detailing the amounts owed by that
7 franchisee, when the amounts are due, and the type of amount due
8 (i.e., royalty fee, national advertising fee fund fee,
9 Development Advance Note, etc.)[" (Id. ¶ 30.)

10 During and prior to this period, All Professional also
11 failed to meet its annual thresholds requirement and thus annual
12 DAN payments for 2007, 2008, and 2009 were not forgiven. When
13 Century 21 approached All Professional regarding payment of the
14 DAN fees, Century 21 offered to waive the payment in exchange for
15 a one-year extension of each franchise agreement and a general
16 release of claims. (Compendium of Exhibits Ex. 23 (Docket No.
17 104).) All Professional rejected Century 21's proposal and
18 instead offered a counterproposal of a 15-day extension of the
19 franchise agreement. (Id.) Steve Wright later also proposed
20 that Century 21 have "Select fire the 8 agents he [Jacuzzi] has
21 bought and Homefinders fire the 5 agents they have allowed John
22 Sherman to recruit." (Id.) Century 21 rejected the
23 counteroffers. (Id.) Thereafter, All Professional failed to
24 make any payments on the Note.

25 H. Termination of Franchises

26 In four separate letters dated April 5, 2010, Century
27 21 notified All Professional of its intent to terminate the four
28 franchise agreements and of All Professional's opportunity to

1 cure. (Bertet Decl. Exs. I-L.) The notice pertaining to the
2 River Park Drive office stated in pertinent part:

3 Century 21 has advised you on numerous occasions that you
4 are delinquent in the payment of your account. Upon
5 review, we have determined that you are in default of the
6 above-referenced Agreement for failing to pay fees when
due. Your default constitutes a material breach of the
franchise, for which Century 21 may terminate the
franchise.

7 As of February 24, 2010, your account balance for this
8 office was \$59,327.41.

9 In order to avoid termination, you must pay the balance
in full no later than May 10, 2010.

10 (Id. Ex. I.) The notice also provided contact information for
11 Jacqueline Bertet, Century 21's Senior Director of Financial
12 Services, and informed All Professional that failure to pay the
13 balance would result in immediate termination of the franchise,
14 which would require All Professional to pay the amount past due
15 at the time of termination, sums assessed in a post-termination
16 audit, the remaining balance of the Note, and lost profits.

17 (Id.) The notice pertaining to the Florin Road, Sacramento,
18 office contained similar language and stated that the balance was
19 \$23,492.69 as of February 24, 2010. (Id. Ex. K.) The notice
20 pertaining to the Folsom office contained similar language and
21 stated that the balance was \$13,274.34 as of February 24, 2010.

22 (Id. Ex. J.) The notice pertaining to the Honolulu office
23 contained similar language and stated that the balance was
24 \$14,813.76. (Id. Ex. L.) All four notices required payment by
25 May 10, 2010.

26 In the month following receipt of the April 5, 2010,
27 notices, neither Steve nor Carol Wright called representatives of
28 Century 21. Carol Wright initially called Shalina Rodriguez, a

1 Director of Financial Services for Century 21, on May 6, 2010.
2 (Compendium of Exhibits Ex. 44 ("Carol Wright Dep.") at 201:22-
3 203:21, 206:4-16 (Docket No. 107).) Carol Wright states that in
4 the telephone call she asked for an accounting and "disputed
5 certain discrepancies I saw in the notices of default." (Carol
6 Wright Decl. ¶ 12.) Carol Wright "specifically asked what would
7 be required to resolve the claimed default":

8 [Rodriguez] informed me that we would need to pay
9 \$124,432.20 and that Corporate would want a promissory
10 note since the figure was greater than \$100,000. Our
11 discussion revealed that Corporate was including the
12 outstanding amount allegedly owed under [the Note],
even though payment was not required under any of the
Franchise Agreements. The pay-off amount included the
Hawaii office even though that franchise was owned by a
separate entity.

13 (Suppl. Carol Wright Decl. in Supp. Of Pls.' Mot. for P.I.
14 ("Suppl. Carol Wright Decl.") ¶ 4 (No. 2:10-2846, Docket No.
15 13).)

16 The day after the phone conversation, Carol Wright
17 emailed a letter to Rodriguez identifying the following "items we
18 need to address before proceeding": (1) removing minimum royalty
19 and NAF fees from the Folsom office account balance because it
20 had been closed since August 31, 2009; (2) determining the cutoff
21 date for "final payment calculations," with a possible date of
22 March 31, 2010;⁹ (3) "handling" the Hawaii office separately; (4)
23 removing minimum royalty and NAF fees from January, February, and
24 March of 2010; (5) separating the Note amount owed because of a
25 "separate issue" as to why All Professional was not paying it;

26
27 ⁹ This appears to be in reference to a possible payment
28 plan for the amounts owed, with March 31, 2010, being the cutoff
date for determining the total amount owed under the payment
plan.

1 and (6) crediting \$304.50 because of a Century 21 error.
2 (Compendium of Exhibits Ex. 29 (Docket No. 104).) Lastly, Carol
3 Wright stated that the "totals will obviously have to be
4 recalculated before we can talk about payment arrangements," and
5 said that she would make payments on "April 2010 transactions to
6 start anew."¹⁰ (Id.)

7 Century 21 accounting guidelines allowed for account
8 managers and directors to arrange alternative payment plans with
9 Century 21 franchisees who were behind on their payments.

10 (Compendium of Exhibits Ex. 45 ("Bertet Dep.") at 26:17-28:14
11 (Docket No. 108).) Under these guidelines, franchises with less
12 than \$100,000 in debt could be offered a deal point agreement (a
13 type of note) and franchises with over \$100,000 in debt could be
14 offered an interest bearing note to help them pay off their
15 debts. (Id. at 26:17-28:25.) Based on their course of dealings
16 with Century 21, the Wrights believed that they would be offered
17 a payment plan to cure their default. (Carol Wright Dep. at
18 200:7-201:4.)

19 On June 16, 2010, the Wrights participated in a
20 conference call with account managers Rodriguez and Shawn
21 Holland. (Id. at 22:4-14.) During the call, the parties
22 discussed changing the official closing date for the Folsom
23 office in order to reduce minimum fees during that period. (Id.
24 at 222:5-8.) In an email dated June 17, 2010, Holland reported
25

26 ¹⁰ While All Professional may have resumed paying royalty
27 fees on current transactions beginning in April of 2010, it still
28 continued to fail to pay NAF fees on current transactions.
(Carol Wright Dep. at 208:17-25.) Thus, All Professional
continued to fall behind on its franchise fee payments.

1 that during the call "we managed to resolve her dispute except
2 for the DAN money. We are hoping to resolve that matter soon and
3 prepare 2 separate Deal Point Agreements (one for the Hawaii
4 office)." (Compendium of Exhibits Ex. 32 (Docket No. 105).) An
5 agreement on DAN payments was never reached and Deal Point
6 Agreements were not issued.

7 In letters dated July 7, 2010, Century 21 terminated
8 the franchise agreements governing the two Sacramento offices and
9 the Hawaii office, effective July 9, 2010.¹¹ (Bertet Decl. Exs.
10 N-P.) The letter regarding the River Park Drive office stated
11 that the account balance was \$72,407.97 as of July 6, 2010, an
12 additional \$41,667.00 was owed under the Note, and an additional
13 \$250,029.34 was owed for lost profits, pursuant to calculations
14 prescribed by the franchise agreement. (Id. Ex. N.) The letter
15 regarding the Florin Road office stated that the account balance
16 was \$33,934.30 as of July 6, 2010, and an additional \$155,671.48
17 was owed for lost profits. (Id. Ex. O.) The letter regarding
18 the Hawaii office stated that the account balance was \$21,898.08
19 as of July 6, 2010, and an additional \$80,541.98 was owed for
20 lost profits. (Id. Ex. P.) All Professional was instructed to
21 follow post-termination procedures and cease using Century 21's
22 trademarks. (See id. Exs. N-P.) The procedures were more fully
23 described in section 16.4 of the franchise agreements.¹² Upon
24

25 ¹¹ The Folsom franchise had previously been terminated for
26 abandonment pursuant to Century 21's May 24, 2010, letter.
(Compendium of Exhibits Ex. 31.)

27 ¹² Section 16.4 requires, inter alia, that franchises (1)
28 return Century 21's property, (2) discontinue use of Century 21's
Marks, (3) discontinue use of signs or cross arm signposts
displaying Century 21's logo, colors, color patterns and designs

1 termination of the franchise agreements, Century 21 denied All
2 Professional access to Century 21's server, email accounts,
3 databases, and the Preferred Client Club. (Steve Wright Decl.
4 ¶ 14; Carol Wright Decl. ¶ 13.)

5 The Wrights claim not to have anticipated the
6 terminations. Carol Wright states that, based on her
7 communications with Rodriguez and Holland of Century 21:

8 I was lead [sic] to believe that we would receive an
9 accounting of the actual amounts owed and that we would
10 be able to work out a payment plan. I was ready to cure
11 any default once we were provided with a proper
12 accounting. I waited for this accounting. However, I
13 never received an accounting or an adjustment of the
14 amounts owed as I had requested.

15 (Carol Wright Decl. ¶ 13.) Steve Wright claims that they were
16 prepared to pay off their debts with Century 21 as soon as a
17 number was finalized. (Steve Wright Dep. at 222:10-223:7.) The
18 Wrights' willingness to pay off their account balance appears
19 limited to their willingness to sign a new promissory note with
20 Century 21. (See, e.g., id. at 222:14 ("We were prepared to sign
21 a Note.")) During the court's January 11, 2011, evidentiary
22 hearing on a preliminary injunction for this matter, both Carol
23 and Steve Wright stated that they did not have the cash on hand
24 to pay off their account balance. (See, e.g., Jan. 11, 2011, Tr.
25 at 61:1-3, 70:11-14 ("THE COURT: And the reason you didn't pay
26 for those earlier months is because you didn't have that kind of
27 money, right? THE WITNESS: Not in that volume, no sir."), 80:10-

28 _____
or Marks, (4) take any affirmative action necessary to remove any
use of Century 21's Marks, (5) "de-identify[]" from Century 21 in
a manner that does not confuse the public about the fact that
they are no longer associated with Century 21, and (6) remove
Century 21's Marks from their web pages.

1 81:17.) All Professional now presents bank statements suggesting
2 that it had approximately \$150,000 in its bank accounts in May
3 2010. (Compendium of Exhibits Ex. 30 (Docket No. 104).)

4 All Professional also argues that the termination of
5 its franchises took Century 21 employees by surprise. A July 12,
6 2010, email from Popp states that he "thought we were getting
7 close on a deal." (Compendium of Exhibits Ex. 34 (Docket No.
8 105).) In response, however, Bainbridge replied, "We're only
9 close on a deal if we're willing to forgive the DAN payments due
10 because he lost those agents to Select." (Id.)

11 Following receipt of the July 7, 2010, termination
12 letters, the Wrights sent Century 21 a letter dated July 16,
13 2010, asking that Century 21 reconsider the termination. The
14 letter stated "It was never our intention not to pay Century 21
15 the royalty fees and NAF fees due. The only part that was in
16 contention was the repayment of the Development Advance Note.
17 And it was at that point that communications failed." (Id. Ex.
18 35.) Century 21 subsequently denied All Professional's request
19 for reinstatement in a letter dated July 29, 2010. (Id. Ex. 38.)
20 In an August 2, 2010, letter, the Wrights wrote that they were
21 "perplexed" by the denial of their request for reinstatement and
22 were "curious as to what this denial of [their] reinstatement was
23 based on since our message to [Rodriguez] was that we were
24 willing to pay what was due Century 21 and that we were willing
25 to sign [Century 21's] note." (Steve Wright Decl. Ex. 5.)

26 I. Continuing Use of Century 21 Trademarks

27 In late August, Century 21 conducted inspections of the
28 Sacramento offices to determine whether All Professional had

1 complied with what it believed were All Professional's post-
2 termination obligations under the franchise agreements. The
3 reports indicated that All Professional continued to use Century
4 21's trademarks. (Bertet Decl. Exs. V-X.) In a September 17,
5 2010, letter, Century 21's counsel informed Steve and Carol
6 Wright of the results of the post-termination inspections and
7 demanded that they comply with the post-termination franchise
8 agreement obligations, (Steve Wright Decl. Ex. 6), to which the
9 Wrights responded with a September 21, 2010, letter, proposing
10 terms under which All Professional would continue to be a
11 franchisee of Century 21. (Id. Ex. 7.)

12 All Professional continued to use Century 21's trade
13 dress until after the court issued its preliminary injunction
14 order on January 24, 2011. On February 11, 2011, All
15 Professional filed a Notice of Appeal of the court's order.
16 (Docket No. 34.) On February 23, 2011, the court denied All
17 Professional's Request for Stay and in open court encouraged the
18 parties to agree to a time table for All Professional to de-mark
19 its offices. (Docket No. 41.) In a stipulation dated March 8,
20 2011, the parties agreed that All Professional would have until
21 April 1, 2011, to cease using Century 21's marks on buildings and
22 would cover up Century 21's marks on yard signs by May 1, 2011.
23 (Compendium of Exhibits Ex. 41 (Docket No. 105).)

24 J. Present Litigation

25 On September 30, 2010, Steve Wright, Carol Wright, and
26 All Professional filed an action in state court against Century
27 21 for violation of a termination provision of the California
28 Franchise Relations Act ("CFRA"), Cal. Bus. & Prof. Code § 20020,

1 violation of California's Unfair Competition Law ("UCL"), Cal.
2 Bus. & Prof. Code §§ 17200-17210, intentional interference with
3 business advantage, breach of contract, breach of the implied
4 covenant of good faith and fair dealing, fraud, negligent
5 interference with business advantage, and interference with
6 contract. (Notice of Removal Ex. A (No. 2:10-2846, Docket No.
7 1).) On October 6, 2010, the state court denied Steve Wright,
8 Carol Wright, and All Professional's ex parte application for a
9 temporary restraining order. (Id. Ex. J.) With a pending motion
10 for a preliminary injunction against it, Century 21 removed the
11 action to federal court on October 21, 2010.

12 On October 12, 2010, Century 21 filed a separate action
13 in this court against All Professional, Steve Wright, and Carol
14 Wright for claims of federal trademark infringement, 15 U.S.C.
15 § 1114, common law trademark infringement, federal unfair
16 competition, 14 U.S.C. § 1125, California statutory trademark
17 infringement, Cal. Bus. & Prof. Code § 14340, violation of the
18 UCL, breach of contract, breach of guaranty, breach of promissory
19 note, account stated, quantum meruit, and accounting. (Docket
20 No. 1.)

21 On December 22, 2010, Century 21 filed an additional
22 action against Steve Wright, Carol Wright, and All Professional
23 Hawaii in Morris County, New Jersey, for claims of trademark
24 infringement, 15 U.S.C. § 1114, false designation of origin/
25 false advertising, 15 U.S.C. § 1125(a), trademark dilution, 15
26 U.S.C. § 1125(c), common law unfair competition, breach of
27 contract, breach of guaranty, accounting, and unjust enrichment.
28 (No. 11-2497, Docket No. 1-1.) All Professional removed the

1 action to federal court on the basis of diversity jurisdiction
2 and Century 21 later stipulated to transferring the matter to
3 this court. The court consolidated all three actions in orders
4 issued on April 6, 2011, and October 11, 2011. (See No. Docket
5 Nos. 49, 62.)

6 On November 1, 2010, Century 21 filed a motion for a
7 preliminary injunction requesting that the court enforce All
8 Professional's post-termination obligations under the franchise
9 agreements. (Docket No. 8.) Prior to issuing a ruling on the
10 preliminary injunction motion, the court held an evidentiary
11 hearing in which it heard testimony from the parties on January
12 11, 2011. On January 24, 2011, the court granted Century 21's
13 motion for preliminary injunction and enjoined All Professional
14 from further unauthorized use of Century 21's marks. (Docket No.
15 28.)

16 Presently before the court is Century 21's motion for
17 summary judgment on its trademark infringement/unfair
18 competition, breach of contract, and breach of guaranty claims,
19 as well as all of All Professional's claims.¹³

20 II. Requests for Judicial Notice/Evidentiary Objections

21 Century 21 requests that the court take judicial notice
22 of a number of documents previously filed in this case as well as
23 the transcript from the court's January 11, 2011, evidentiary
24 hearing. All Professional additionally requests that the court

25
26 ¹³ Century 21 represents that if the present motion for
27 summary adjudication is granted in its entirety, it will dismiss
28 its remaining claims against All Professional. (Mem. of P. & A.
in Supp. of Pl.'s Mot. for Summ. Adjudication at 1 n.1 (Docket
No. 88-2).) This would effectively render the present motion for
partial summary adjudication a motion for summary judgment.

1 take judicial notice of a filed stipulation and agreement in the
2 California Department of Real Estate matter In re: Idalia
3 Lizzette Lombera & Franki Halloran, No. H-5325 SAC, and its
4 notice of appeal from the court's order granting Century 21's
5 preliminary injunction motion. Because this is a motion for
6 summary judgment, the court may consider these documents without
7 taking judicial notice of them.

8 On a motion for summary judgment, "[a] party may object
9 that the material cited to support or dispute a fact cannot be
10 presented in a form that would be admissible in evidence." Fed.
11 R. Civ. P. 56(c)(2). "[T]o survive summary judgment, a party
12 does not necessarily have to produce evidence in a form that
13 would be admissible at trial, as long as the party satisfies the
14 requirements of Federal Rules of Civil Procedure 56." Fraser v.
15 Goodale, 342 F.3d 1032, 1036-37 (9th Cir. 2003) (quoting Block v.
16 City of Los Angeles, 253 F.3d 410, 418-19 (9th Cir. 2001))
17 (internal quotation marks omitted). Even if the non-moving
18 party's evidence is presented in a form that is currently
19 inadmissible, such evidence may be evaluated on a motion for
20 summary judgment so long as the moving party's objections could
21 be cured at trial. See Burch v. Regents of the Univ. of Cal.,
22 433 F. Supp. 2d 1110, 1119-20 (E.D. Cal. 2006).

23 All Professional raises eight objections to portions of
24 two declarations submitted by Century 21 on the grounds of lack
25 of personal knowledge, improper opinion testimony, lack of
26 foundation, improper legal conclusions, and inadmissible hearsay.
27 Century 21 raises eleven objections to portions of Steve Wright's
28 Declaration, (Docket No. 112-3), and twenty objections to

1 portions of All Professional's Statement of Additional Material
2 Facts, (Docket No. 112-2), on the grounds of lack of foundation,
3 relevance, speculation, lack of personal knowledge, inadmissible
4 hearsay, and that the statements are conclusory.

5 Objections to evidence on the ground that the evidence
6 is irrelevant, speculative, argumentative, vague and ambiguous,
7 or constitutes an improper legal conclusion are all duplicative
8 of the summary judgment standard itself. See Burch, 433 F. Supp.
9 2d at 1119-20. A court can award summary judgment only when
10 there is no genuine dispute of material fact. It cannot rely on
11 irrelevant facts, and thus relevance objections are redundant.
12 Instead of objecting, parties should argue that certain facts are
13 not material. Similarly, statements based on speculation,
14 improper legal conclusions, personal knowledge, or argumentative
15 statements are not facts and can only be considered as arguments,
16 not as facts, on a motion for summary judgment. Instead of
17 challenging the admissibility of this evidence, lawyers should
18 challenge its sufficiency. Objections on any of these grounds
19 are superfluous, and the court will overrule them.

20 In the interest of brevity, as the parties are aware of
21 the substance of their objections and the grounds asserted in
22 support of each objection, the court will not review the
23 substance or grounds of the individual objections here. The
24 parties' objections are all overruled.

25 III. Choice of Law

26 As an initial matter, the parties dispute whether New
27 Jersey or California law applies to this dispute. The contracts
28 at issue each contain a choice of law provision stating: "This

1 Agreement will be governed by the laws of the state of New
2 Jersey, except that the New Jersey Franchises Practice Act shall
3 not apply to agreements with the Offices located outside of New
4 Jersey.” (Bertet Decl. ¶ 17, Exs. A-D § 22.7, at 35.) All
5 Professional argues that the court should hold that the choice of
6 law provision is unenforceable and instead apply California law
7 in this case.

8 Both parties agree that California choice of law
9 analysis should govern the enforcement of the choice of law
10 provision. Under California law, the enforceability of choice of
11 law provisions is governed by the Restatement of Conflicts of
12 Laws and the California Supreme Court’s decision in Nedlloyd
13 Lines B.V. v. Superior Court, 3 Cal. 4th 459 (1992). It’s Just
14 Lunch Int’l v. Polar Bear, Inc., No. Civ. 03-2485, 2004 WL
15 3406117, at *2 (S.D. Cal. Apr. 29, 2004). “In determining the
16 enforceability of arm’s-length, contractual choice-of-law
17 provisions, California courts shall apply the principles set
18 forth in Restatement section 187, which reflects a strong policy
19 favoring enforcement of such provisions.” Nedlloyd, 3 Cal. 4th
20 at 464-65.

21 Under Nedlloyd, California will apply the law indicated
22 by the choice of law provision where: “(1) the chosen state has a
23 substantial relationship to the parties or their transaction,” or
24 where “(2) there is any other reasonable basis for the parties’
25 choice of law.” Id. at 466. “If neither of these tests is met,
26 that is the end of the inquiry, and the court need not enforce
27 the parties’ choice of law.” Id. Where either test is met, the
28 court proceeds to the second step and “determine[s] whether the

1 chosen state's law is contrary to the fundamental policy of
2 California." Id. If there is no conflict of this nature, the
3 choice of law provision must be enforced. Id.

4 Where "there is a fundamental conflict with California
5 law," the court proceeds to the third step and "determine[s]
6 whether California has a materially greater interest than the
7 chosen state in the determination of the particular issue. If
8 California has a materially greater interest than the chosen
9 state, the choice of law shall not be enforced, for the obvious
10 reason that in such circumstance we will decline to enforce a law
11 contrary to this state's fundamental policy." Id. (internal
12 citations and quotations marks omitted).

13 A. Substantial Relationship

14 Applying the Nedlloyd test here, the court must first
15 determine "whether the chosen state has a substantial
16 relationship to the parties or their transaction" Id.
17 This requirement is satisfied because Century 21 has a
18 substantial relationship with New Jersey because it is a limited
19 liability company with its principal place of business and
20 headquarters in New Jersey. See Nedlloyd, 3 Cal. 4th at 467
21 (citing Restatement of Conflicts of Laws § 187 cmt. f); It's Just
22 Lunch Int'l LLC v. Island Park Enter. Grp., Inc., No. EDCV 08-
23 367-VAP, 2008 WL 4683637, at *2 (C.D. Cal. Oct. 21, 2008).

24 Moreover, Century 21's New Jersey residence provides a
25 "reasonable basis" for a contractual provision requiring
26 application of New Jersey Law. "If one of the parties resides in
27 the chosen state, the parties have a reasonable basis for their
28 choice." Consul Ltd. v. Solide Enters., Inc., 802 F.2d 1143,

1 1147 (9th Cir. 1986).

2 B. Fundamental Policy

3 The court next considers whether application of New
4 Jersey law would be contrary to "a fundamental policy" of
5 California. There is no bright-line definition of a "fundamental
6 policy." Restatement of Conflict of Laws § 187 cmt. g. A
7 fundamental policy must be "substantive," and "may be embodied in
8 a statute which makes one or more kinds of contracts illegal or
9 which is designed to protect a person against the oppressive use
10 of superior bargaining power." Id.

11 Here, All Professional's eighth cause of action is
12 based on the CFRA, which "serves to protect California
13 franchisees, typically small business owners and entrepreneurs,
14 from abuses by franchisors in connection with the nonrenewal and
15 termination of franchises." 1-800-Got Junk? LLC v. Superior
16 Court, 189 Cal. App. 4th 500, 516 (2d Dist. 2010). Courts are
17 required to construe "the CFRA broadly to carry out legislative
18 intent, that intent . . . is to protect franchise investors, i.e.
19 those who 'pay for the right to enter into a business.'" Thueson
20 v. U-Haul Int'l, Inc., 144 Cal. App. 4th 664, 673 (1st Dist.
21 2006). The CFRA's provisions "apply to any franchise where
22 either the franchisee is domiciled in this state or the
23 franchised business is or has been operated in this state." Cal.
24 Bus. & Prof. Code § 20015.

25 The legislature was so concerned that the CFRA
26 statutory protections be provided to all franchisees that it
27 created an antiwaiver provision, which states that "[a]ny
28 condition, stipulation or provision purporting to bind any person

1 to waive compliance with any provision of this law is contrary to
2 public policy and void." Cal. Bus. & Prof. Code § 20010.
3 Section 20010 though "only voids a choice of law provision which
4 requires a franchisee to 'waive compliance' with the protections
5 of the CFRA." 1-800-Got Junk?, 189 Cal. App. 4th at 518. The
6 critical inquiry is therefore whether the enforcement of the New
7 Jersey choice of law provision would diminish the rights that All
8 Professional would otherwise have under the CFRA.

9 In this case, All Professional brings a claim under the
10 CFRA provision that prohibits termination of a franchise without
11 good cause and requires that the franchisee be given a reasonable
12 opportunity to cure. See Cal. Bus. & Prof. Code § 20020. It is
13 true that there is similar New Jersey statute, but it would not
14 provide such protections in this case because the New Jersey
15 Franchise Act does not cover franchisees that do not maintain a
16 franchise location in New Jersey. See N.J. Stat. 56:10-4.
17 Application of New Jersey law, however, would not effectuate a
18 waiver of All Professional's protections under the CFRA because
19 the CFRA provision's good cause and opportunity to cure
20 requirements are incorporated into All Professional's franchise
21 agreements with Century 21. (See Bertet Decl. Exs. A-D
22 § 16.2.4.) Application of the CFRA would thus provide no greater
23 protection of All Professional than the franchise agreements
24 themselves. Application of New Jersey law would therefore not
25 diminish All Professional's rights because any claims that All
26 Professional may have under the CFRA can be pursued as breach of

1 contract claims under the franchise agreements.¹⁴ Accordingly,
2 the choice of law provision is enforceable and the court will
3 apply the laws of New Jersey.¹⁵

4 IV. Discussion

5 Summary judgment is proper "if the movant shows that
6 there is no genuine dispute as to any material fact and the
7 movant is entitled to judgment as a matter of law." Fed. R. Civ.
8 P. 56(a).¹⁶ A material fact is one that could affect the outcome
9 of the suit, and a genuine issue is one that could permit a
10 reasonable jury to enter a verdict in the non-moving party's
11 favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
12 (1986). The party moving for summary judgment bears the initial

14 ¹⁴ All Professional additionally claims, without providing
15 any analysis or authority, that the limited waivers in the 2006
16 addenda violate the antiwaiver provision in the CFRA. These
17 limited waivers do not serve to reduce any of All Professional's
18 rights under the CFRA, however, because the CFRA provisions
19 remain incorporated in the franchise agreements so breach of
20 contract claims may still be brought. Furthermore, the only
21 claims that All Professional raises under the CFRA, namely
22 regarding the termination of the franchises, occurred after All
23 Professional signed the limited waivers.

20 ¹⁵ All Professional does not suggest that application of
21 New Jersey law would violation a fundamental California public
22 policy for any claims other than its CFRA claim. Absent
23 interference with a fundamental public policy, "[t]he mere fact
24 that the chosen law provides greater or lesser protection than
25 California law would, are not reasons for applying California
26 law." Medimatch Inc. v. Lucent Techs. Inc., 120 F. Supp. 2d 842,
862 (N.D. Cal. 2000). Application of New Jersey law will
undermine All Professional's statutory claim under California's
UCL, however, courts have held that application of a choice-of-
law provision that bars a UCL claim does not violate a
fundamental California public policy. See, e.g., Abat v. Chase
Bank USA, N.A., 738 F. Supp. 2d 1093, 1096 (C.D. Cal. 2010); It's
Just Lunch, 2008 WL 4683637, at *4.

27 ¹⁶ Federal Rule of Civil Procedure 56 was revised and
28 rearranged effective December 1, 2010. However, as stated in the
Advisory Committee Notes to the 2010 Amendments to Rule 56,
"[t]he standard for granting summary judgment remains unchanged."

1 burden of establishing the absence of a genuine issue of material
2 fact and can satisfy this burden by presenting evidence that
3 negates an essential element of the non-moving party's case.
4 Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

5 Alternatively, the moving party can demonstrate that the
6 non-moving party cannot produce evidence to support an essential
7 element upon which it will bear the burden of proof at trial.

8 Id.

9 Once the moving party meets its initial burden, the
10 burden shifts to the non-moving party to "designate 'specific
11 facts showing that there is a genuine issue for trial.'" Id. at
12 324 (quoting then-Fed. R. Civ. P. 56(e)). To carry this burden,
13 the non-moving party must "do more than simply show that there is
14 some metaphysical doubt as to the material facts." Matsushita
15 Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).
16 "The mere existence of a scintilla of evidence . . . will be
17 insufficient; there must be evidence on which the jury could
18 reasonably find for the [non-moving party]." Anderson, 477 U.S.
19 at 252.

20 In deciding a summary judgment motion, the court must
21 view the evidence in the light most favorable to the non-moving
22 party and draw all justifiable inferences in its favor. Id. at
23 255. "Credibility determinations, the weighing of the evidence,
24 and the drawing of legitimate inferences from the facts are jury
25 functions, not those of a judge . . . ruling on a motion for
26 summary judgment" Id.

27 A. Century 21's Claims

28 1. Breach of Contract

1 To state a claim for breach of contract under New
2 Jersey law, there must be proof of "(1) a contract between the
3 parties, (2) a breach of that contract, (3) damages flowing
4 therefrom; and (4) that [the plaintiff] performed its own
5 contractual obligations." Frederico v. Home Depot, 507 F.3d 188,
6 203 (3d Cir. 2007). Century 21 brings its claim for breach of
7 contract on the basis that All Professional and All Professional
8 Hawaii defaulted under the terms of the franchise agreements by
9 failing to pay their franchise fees. All Professional does not
10 dispute that it failed to pay franchise fees pursuant to the
11 franchise agreements, but argues that it was excused from fully
12 performing in the face of Century 21's breaches of the
13 agreements. The court will address the terms of the franchise
14 agreements and then will consider each of Century 21's alleged
15 breaches in turn.

16 a. Interpreting the Franchise Agreement

17 "The primary standard governing the interpretation of
18 an integrated agreement is to use 'the meaning that would be
19 ascribed to it by a reasonably intelligent person who was
20 acquainted with all the operative usages and circumstances
21 surrounding the making of the writing.'" YA Global Invs., L.P.
22 v. Cliff, 419 N.J. Super. 1, 11 (App. Div. 2011) (quoting
23 Deerhurst Estates v. Meadow Homes, Inc., 64 N.J. Super. 134, 149
24 (App. Div. 1960)). On a motion for summary judgment, a court may
25 properly interpret a contract as a matter of law only if the
26 meaning of the contract is unambiguous. Miller v. Glenn Miller
27 Prods., Inc., 454 F.3d 975, 990 (9th Cir. 2006) (citation
28 omitted).

1 Under New Jersey law, "[e]vidence of the circumstances
2 is always admissible in aid of the interpretation of an
3 integrated agreement. This is so even when the contract on its
4 face is free from ambiguity." Halper v. Halper, 164 F.3d 830,
5 840 (3d Cir. 1999) (quoting Alt. N. Airlines v. Schwimmer, 12
6 N.J. 293, 301 (1953)). Although extrinsic evidence is permitted
7 to determine the meaning of contractual terms, after the meaning
8 of the contract is discerned the parol evidence rule "prohibit[s]
9 the introduction of extrinsic evidence to vary the terms of the
10 contract." Conway v. 287 Corporate Ctr. Assocs., 187 N.J. 259,
11 270 (2006). Summary judgment is inappropriate if the court
12 cannot determine the parties' intent at the time of contracting
13 without judging the credibility of the extrinsic evidence. See
14 City of Hope Nat. Med. Ctr. v. Genentech, Inc., 43 Cal. 4th 375,
15 395 (2008).

16 In this case, All Professional does not dispute that
17 the franchise agreements are integrated agreements. (See Bertet
18 Decl. Exs. A-D § 22.15.) The only provision of the agreements
19 that All Professional suggests is ambiguous is section 4.1, which
20 states, in pertinent part:

21 **License, Policy and Procedure Manual.** As of the
22 Effective Date, we grant you a nonexclusive license (i)
23 to use the Marks for the Business at and from the Office
24 and to hold the Business out to be a participant in the
25 System, and (ii) to use the System for the operation of
26 the Business at and from the Office. You accept the
nonexclusive license granted by us, subject to the terms
and conditions of this Agreement and the P&P Manual as
amended from time to time. . . . The P&P Manual contains
our recommended methods, specifications and procedures
relating to the use and protection of the System.

27 (Id. Exs. A-D § 4.1.) The agreements define "System" to mean
28 the business format and methods developed or licensed by

1 us for the promotion and assistance of independently
2 owned and operated real estate brokerage offices,
3 including policies, procedures, and techniques designed
4 to enable such offices to compete more effectively in the
5 real estate sales market. The System includes common use
6 and promotion of certain Marks, copyrights, trade
secrets, centralized advertising programs, recruiting
programs, referral programs and sales and management
training programs. We may update the System at any time
and expect to continue to do so as we deem advisable in
our sole judgment and discretion.

7 (Id. Exs. A-D § 3.1.14.)

8 All Professional contends that Century 21's use of the
9 term "System" is ambiguous and argues that "[a] reasonable
10 interpretation of the Century 21 drafted Agreement is that the
11 'System' includes a promise to prevent intra family recruiting,
12 preserve the financial privacy of a franchisee and to protect the
13 Century 21 service mark." (Opp'n to Summ. Adjudication at 27:27-
14 28:1 (Docket No. 93).) All Professional does not explain why
15 application of the definition provided in the agreements for the
16 term "System" would produce an ambiguous result, nor why its
17 proposed interpretation is reasonable.

18 The plain and clear language of section 4.1 grants the
19 franchisee a non-exclusive license to use Century 21's marks and
20 system. The definition of "system" provided in the agreements,
21 which encompasses use of Century 21's marks, copyrights, trade
22 secrets, and advertising programs, is consistent with the plain
23 purpose of section 4.1. All Professional's proposed definition
24 of "System," which would obligate Century 21 to prevent intra
25 family recruiting, preserve financial privacy, and protect
26 Century 21's service mark, is inconsistent with the plain meaning
27 of section 4.1 in defining the scope of the non-exclusive license
28 because it places affirmative obligations upon Century 21, rather

1 than defining All Professional's rights under the non-exclusive
2 license.

3 All Professional's proposed definition of "System" also
4 contradicts other provisions in the franchise agreements.
5 Section 4.4.1 provides that "You shall be responsible for, and
6 supervise all of your Affiliates in order to assure, the proper
7 use of the Marks and the System in compliance with this
8 Agreement." (Bertet Decl. Exs. A-D § 4.4.1.) Section 21.2
9 further provides that Century 21 has "no right to regulate or
10 participate in the recruitment, selection, engagement, retention,
11 discipline, or termination of your sales associates or
12 employees." (Id. Exs. A-D § 21.2.) These terms place the
13 obligation to enforce compliance with Century 21's proposed
14 recruiting practices on All Professional and suggest that
15 inserting an obligation into the term "System" for Century 21 to
16 manage a franchisee's employment practices is inconsistent with
17 other terms in the agreement.

18 Finally, nothing All Professional has submitted
19 regarding the circumstances surrounding the franchise agreements
20 supports their proposed definition or claims that the agreements
21 are ambiguous. Based on the evidence submitted, section 4.1 of
22 the franchise agreements is not susceptible to more than one
23 meaning and is therefore not ambiguous. The court can thus
24 interpret the contracts as a matter of law.

25 b. All Professional's Allegations that Century
26 21 Breached the Contract and Excused All
27 Professional's Performance Under the
28 Franchise Agreements

1 All Professional submits a number of ways in which it
2 alleges that Century 21 breached the franchise agreements in a
3 manner that excused its performance.¹⁷ The court will address
4 each alleged breach in turn.

5 1. Improper Recruiting

6 The Century 21 Code of Conduct states that "[t]he
7 Franchisee and its Office Personnel should avoid recruiting
8 (which shall include, but shall not be limited to, personal
9 solicitations, mass mailings, personal mailings, and/or
10 advertising), other CENTURY 21 Franchisees' Sales Associates
11 unless the other CENTURY 21 Franchisee first consents to such
12 recruiting activities." (Compendium of Exhibits Ex. 15 ("Code of
13 Conduct") at 24 (Docket No. 103).) All Professional argues that
14 Century 21 breached the franchise agreements when it failed to
15 stop other franchises from recruiting its agents. As a result of
16 this breach, All Professional claims that its revenues dropped,
17 rendering it unable to, and therefore excused from, paying its
18 franchise fees.

19 With respect to Steve Wright's complaints to Century
20 21, Century 21 had no obligation under the agreements to prevent
21 other franchisees from recruiting All Professional's agents. To
22 the contrary, Century 21 did not have the right to do so. As
23

24 ¹⁷ Of the eight ways that All Professional stated in its
25 interrogatory responses that Century 21 breached the franchise
26 agreements, All Professional does not discuss three alleged
27 breaches in its opposition. (See Rudin Decl. ¶¶ 5-6, Exs. D-E.)
28 Specifically, All Professional does not address Century 21's
alleged failure to: (1) utilize NAF fees to promote All
Professional, (2) provide relocation referrals, or (3) prevent
All Professional Hawaii partner John Sherman from leaving All
Professional and joining a competing franchise. The court
accordingly does not address these claims.

1 discussed above, section 21.2 provided:

2 [Century 21] will have no obligation to pay your
3 commissions, taxes, wages or other expenses, and will
4 have no right to regulate or participate in the
5 recruitment, selection, engagement, retention, discipline
or termination of your sales associates or employees,
. . . except as may be necessary to protect the Marks and
goodwill.

6 (Bertet Decl. Exs. A-D § 21.2.) This provision applied to all of
7 Century 21's franchise agreements, and therefore also governed
8 its relationship with Select and All Islands. The remedy, as
9 this court explained previously, was for All Professional to sue
10 Select, the Century 21 franchisee that allegedly recruited All
11 Professional's agents and moved into the same Folsom office that
12 All Professional vacated.¹⁸

13 Century 21 did not have the right to run either All
14 Professional's or Select's business. It was at best in the
15 position of mediator, with no authority to enforce sanctions
16 against either party. Regardless of Century 21's actions,
17 Select's alleged recruiting of All Professional's agents was no
18 excuse for All Professional to stop paying fees to Century 21.

19 _____
20 ¹⁸ All Professional suggests that under section 10.3 of
21 the franchise agreements, Century 21 had the discretion to
22 terminate franchises that engaged in unethical recruiting
23 behavior. (See Bertet Decl. Exs. A-D § 10.3.) As an initial
24 matter, it is unclear whether this provision applies to
25 recruiting violations based on Century 21's Code of Conduct,
26 which is discussed in section 10.2. Section 10.3 discusses
27 compliance with the Code of Ethics of the National Association of
28 Realtors, local, state, and federal law. A reasonable
interpretation of the termination provision is that Century 21's
discretion to terminate franchises is limited to transactions
violating these provisions, and not Century 21's internal code.
Even if Century 21 had the discretion to terminate franchises for
violations of recruiting practices, the provision does not
obligate Century 21 to take any action, rather it may do so "at
[its] option." (Id.) All Professional's reliance on this
provision therefore fails to demonstrate a material fact
suggesting breach of contract.

1 2. Divulging of Confidential Information

2 All Professional alleges that Century 21 released
3 confidential information regarding its finances that undermined
4 its agents' confidence in the franchise and encouraged other
5 franchises to recruit All Professional's agents.¹⁹ (See Steve
6 Wright Dep. II at 72:16-73:24.) The only provision in the
7 franchise agreements that addresses Century 21's obligations
8 regarding All Professional's confidential information is section
9 13.5. Section 13.5 provides that "no information supplied to us
10 shall be considered confidential by the parties." (Bertet Decl.
11 Exs. A-D § 13.5.)

12 All Professional argues instead that the term "System"
13 in section 4.1 should be construed to place an obligation on
14 Century 21 to protect All Professional's information from
15 disclosure. As the court discussed above, such an interpretation
16 is inconsistent with the plain meaning of section 4.1 and would
17 flatly contradict section 13.5. Because Century 21 had no duty
18 to protect All Professional's confidential information under the
19 franchise agreements, any information allegedly divulged cannot
20 be used to establish a breach of contract or as an excuse for All
21 Professional to stop paying its franchise fees.

22 3. Failing to Protect the Century 21 Name

23 _____
24 ¹⁹ The only evidence supporting All Professional's claim
25 that its confidential information was divulged by Century 21 is
26 hearsay testimony in the form of Steve Wright's uncorroborated
27 deposition. Steve Wright acknowledged that he never heard any
28 Century 21 agent reveal the information nor did he ever see the
statements in writing, but stated that it must have been
Bainbridge who divulged the information. (Rudin Decl. Ex. A
("Steve Wright Dep. III") at 254:23-259:17 (Docket No. 88-9).)
Bainbridge denied having shared All Professional's financial
information. (Bainbridge Dep. at 191:20-195:23.)

1 All Professional alleges that Century 21's failure to
2 protect its name and marks violated the franchise agreement and
3 that the resulting consumer confusion caused All Professional to
4 lose business. All Professional fails to direct the court's
5 attention to any provision in the franchise agreements that
6 imposes an obligation on Century 21 to protect the Century 21
7 name from infringement by third parties. Once again, All
8 Professional relies on its reinterpretation of the term "System"
9 in section 4.1 to impose such an obligation on Century 21.
10 Section 4.1 cannot be reasonably interpreted to impose an
11 affirmative obligation on Century 21 to initiate third-party
12 lawsuits based on All Professional's complaints.

13 Instead, section 4.4.2 provides that Century 21
14 "reserve[s] the right to approve any and all public uses of the
15 Marks At our sole option, we or an affiliate will obtain
16 and maintain its registrations for the Marks and exercise the
17 rights against infringement or unauthorized use of the Marks."
18 (Id. Exs. A-D § 4.4.2.) The language of section 4.4.2 suggests
19 that Century 21 retains the discretion to decide when to take
20 action against infringers. All Professional's interpretation of
21 section 4.1 contradicts the discretion that Century 21 is given
22 under section 4.4.2 and would therefore be an unreasonable
23 interpretation. Because Century 21 has no affirmative duty to
24 prosecute entities that infringe upon its Mark, Century 21's
25 alleged inaction cannot be used to establish that it breached the
26 franchise agreements.

27 4. Facilitating Select's Move to Folsom

28 Section 5.2 of the franchise agreements provides that

1 "during the term of this agreement, [Century 21] shall not grant
2 another franchised CENTURY 21 office at a location which is
3 within .25 mile . . . of [All Professional's] Office." (Id. Exs.
4 A-D § 5.2.) All Professional argues that Century 21 breached the
5 franchise agreement when it allowed Select to move into the
6 Folsom office that All Professional had previously used.²⁰ At
7 the time that Century 21 approved Select's application to move to
8 Folsom, All Professional's Folsom franchise had already been
9 terminated on the grounds of abandonment. Therefore, Century 21
10 did not violate section 5.2 of the franchise agreement. All
11 Professional points to no other provisions in the franchise
12 agreements that suggest that Century 21 was barred from
13 permitting Select's move to Folsom.

14 5. Failing to Provide the "Tools and
15 Systems" Promised

16 All Professional alleges that Century 21's failure to
17 provide "tools and systems" excused All Professional's
18 performance under the franchise agreements. It is unclear to the
19 court what "tools and systems" All Professional is referring to,
20 but it appears that All Professional believes that the "tools and
21 systems" would increase its productivity. Once again, All
22 Professional fails to cite the provision of the franchise
23 agreement it is relying on for this claim.

24 Section 23.9 of the franchise agreements states that
25 All Professional "acknowledge[s] that neither [Century 21], nor
26

27 ²⁰ The court addresses below whether Century 21's
28 termination of All Professional's Folsom franchise was proper
under the franchise agreement.

1 any other person has guaranteed or warranted that you will
2 succeed in the operation of the Franchise" Similarly,
3 section 23.10 of the franchise agreements states that All
4 Professional acknowledges that Century 21 "neither orally or in
5 writing represented any specified level of sales or profit." As
6 discussed above, reading a obligation into section 4.1 that
7 Century 21 provide "tools and systems" to ensure profitability is
8 incompatible with the section's clear meaning and other
9 provisions of the agreement.

10 Assuming that the franchise agreements did require
11 Century 21 to provide All Professional with "tools and systems,"
12 All Professional has failed to raise a genuine issue of material
13 fact showing that Century 21 failed to provide the required
14 "tools and systems." Rather, All Professional's argument and
15 evidence relies on the circular reasoning that because it was not
16 profitable, Century 21 must have failed to provide it will
17 sufficient "tools and systems." Such tautology is not enough to
18 defeat a motion for summary adjudication. It is clear from the
19 evidence that All Professional was provided with various tools
20 and systems, such as the lead router, which All Professional
21 found important enough to move this court for a preliminary
22 injunction requiring Century 21 to allow it continued access to
23 the Century 21 system.

24 6. Preventing All Professional from Curing
25 its Defaults

26 All Professional argues that Century 21 prevented it
27 from curing its defaults by not properly accounting for All
28 Professional's overdue fees, failing to provide it with a payment

1 plan, and then terminating the franchises without notice.

2 All Professional's Folsom franchise was terminated
3 under the franchise agreement's abandonment clause, section
4 16.2.5.4, for failure to operate the office for more than five
5 consecutive business days. Abandonment is a non-curable default
6 for which Century 21 can terminate a franchise without notice.
7 (Bertet Decl. Exs. A-D § 16.2.5.) It is unclear how Century 21
8 could have acted to prevent All Professional from curing its
9 breach since it was within All Professional's sole control to
10 reopen its Folsom office -- Century 21 did not own the premises
11 or evict All Professional. If anything, by waiting more than six
12 months to terminate All Professional's Folsom franchise, Century
13 21 gave All Professional more time to cure its abandonment breach
14 than it was required to under the franchise agreement.

15 The Sacramento and Hawaii franchises were terminated
16 after All Professional failed to cure its defaults by the May 10,
17 2010, deadline set in the April 5, 2010, notice of default
18 letters. As the court discussed in its preliminary injunction
19 order, All Professional's negotiations with Century 21 to create
20 an alternative payment plan did not relieve All Professional of
21 its obligation to pay its default in full by the cure date.²¹
22 Century 21 was under no obligation to enter into such discussions
23 or provide a payment plan.

24
25 ²¹ The fact that the Wrights did not even attempt to
26 contact Century 21 until May 6, 2010, four days before the cure
27 date, to set up a payment plan and dispute the account totals is
28 further evidence that All Professional's failure to act before
the cure date is its own fault. With the exception of the
Wright's' initial discussions with Century 21 on May 6 and May 7,
all of the discussions that All Professional relies upon occurred
after the cure date.

1 Since the preliminary injunction hearing All
2 Professional has provided additional details regarding the terms
3 of its negotiation with Century 21. None of this evidence though
4 suggests that All Professional ever reached a deal with Century
5 21 regarding a payment plan or that Century 21 made any
6 representations to All Professional that it should wait to pay
7 off any portion of its default until after an agreement was
8 reached. The evidence does suggest that the majority of the
9 overdue franchise fees were undisputed and that All Professional
10 failed to pay even the undisputed fees.

11 It was unequivocally clear from the testimony of the
12 Wrights during the evidentiary hearing on the preliminary
13 injunction motion that the primary reason they did not pay the
14 franchise fees they owed to Century 21 was that they did not have
15 the money to do so. It was not because All Professional did not
16 know the amount to pay nor was it because Century 21 had
17 defaulted on its obligations.

18 The Wrights now present evidence that suggests that
19 they did have adequate funds to pay the franchise fees that they
20 owed. (Compendium of Exhibits Ex. 30.) This new evidence
21 directly contradicts the Wrights' repeated sworn assertions
22 during the evidentiary hearing that they did not have the funds
23 available to pay off their default and their claim that the
24 Folsom office was closed due to cash flow problems. Regardless
25 of this new evidence, All Professional provides no evidence
26 showing that Century 21 prevented it from paying off its accounts
27 directly with cash. All Professional has failed to provide any
28 material facts suggesting that Century 21 prevented it from

1 curing its breach and excusing its obligation to perform under
2 the franchise agreements.

3 7. Terminating Franchise Agreements in Bad
4 Faith

5 Finally, All Professional argues that Century 21
6 terminated the franchise agreements in bad faith because the
7 terminations for non-payment and abandonment were actually
8 "pretext" for Century 21's ulterior motives. All Professional's
9 argument appears to be premised on the assumption that if Century
10 21 terminated the contracts in bad faith, Century 21 was in
11 breach of contract. It is not clear how this would function to
12 otherwise excuse All Professional's performance under the
13 franchise agreements. In support of its argument that
14 termination of a franchise agreement pursuant to its express
15 terms is invalid if there is some pretextual motive, All
16 Professional cites section 20020 of the CFRA²² and JRS Products,
17 Inc. v. Matsushita, Electric Corp. of America, 115 Cal. App. 4th
18 168, 173 (2004).

19 Section 20020 of the CFRA prohibits termination of a
20 franchise without good cause and requires that the franchisee be
21 given a reasonable opportunity to cure. See Cal. Bus. & Prof.
22 Code § 20020. All Professional's argument appears to rely on the
23 interpretation of "good cause" as including a "good faith," as
24

25 ²² Application of New Jersey law in this case technically
26 bars consideration of claims under the CFRA. However, the
27 protections in section 20020 of the CFRA also appear in sections
28 16.2.3 and 16.2.4 of the franchise agreements. Interpretation of
All Professional's argument based on the specific provisions in
the franchise agreements would therefore produce the same
analysis and conclusion.

1 opposed to "bad faith," requirement. "Good cause" is defined in
2 section 20020 of the CFRA to "include, but not be limited to, the
3 failure of the franchise to comply with any lawful requirement of
4 the franchise agreement after being given notice thereof and a
5 reasonable opportunity, which in no event need be more than 30
6 days, to cure the failure." Id. The CFRA makes no mention of a
7 "good faith" requirement and All Professional fails to cite any
8 caselaw suggesting such a requirement. Under section 20020,
9 Century 21's termination of All Professional's franchises was in
10 good faith because Century 21 provided All Professional with more
11 than 30 days to cure its default. All Professional's reliance on
12 JRS Products is similarly of no help as the decision does not
13 discuss pretextual termination at all.

14 "If a party has a legal right to terminate the contract
15 . . . , its motive for exercising that right is irrelevant. The
16 party can seize on a ground for termination given it by the
17 contract to terminate the contract for an unrelated reason." Tuf
18 Racing Prods., Inc. v. Am. Suzuki Motor Corp., 223 F.3d 585, 589
19 (7th Cir. 2000). It is entirely possible that if All
20 Professional's relationship with Century 21 had been better,
21 Century 21 may have been inclined to work harder to maintain or
22 restore All Professional's franchises. Regardless of Century
23 21's motives leading up to the termination of All Professional's
24 franchises, though, the terminations were properly conducted
25 under the franchise agreements and therefore Century 21's motive
26 is irrelevant.

27 All Professional further claims that the termination of
28 its Folsom franchise was "patently a pre-text" because the

1 termination violated the terms of the franchise agreement's
2 abandonment clause. (Opp'n to Mot. for Summ. Adjudication at
3 29:13-14.) Section 16.2.5 of the franchise agreements provides
4 that:

5 Abandonment of your Office(s), demonstrated by removal of
6 the Marks or by your not operating the Business for five
7 consecutive business days or any shorter period when,
8 under the facts and circumstances, it would not be
unreasonable for use to conclude that you do not intend
to continue to operate the Business.

9 (Bertet Decl. Exs. A-D § 16.2.5.) All Professional argues that
10 it was not reasonable for Century 21 to conclude that they no
11 longer intended to operate the Folsom office and therefore they
12 did not abandon the franchise.

13 All Professional interprets section 16.2.5 to require
14 proof that the franchisee does not intend to continue to operate
15 the business when the office has not been operational for five
16 business days or more. A plain reading of section 16.2.5 only
17 requires a determination of whether the franchise intends to
18 continue operation of the business where the office has not been
19 operational for less than five days. To interpret the section as
20 stating otherwise would render the provision's distinction
21 between a business that has not operated for five consecutive
22 business days and one that has not operated for a shorter period
23 meaningless because Century 21 would always be required to
24 undergo analysis of the "facts and circumstances." All
25 Professional's interpretation thus fails to give meaning to the
26 entirety of the provision and is not reasonable.

27 Century 21 properly terminated the Folsom franchise
28 after All Professional failed to conduct business out of the

1 office, or any other Folsom office, for over six months. The
2 termination was therefore not "patently a pre-text."

3 The court further notes that even if the termination of
4 All Professional's Folsom franchise was improper under the
5 franchise agreement's abandonment clause, the termination would
6 have been proper had Century 21 relied on All Professional's
7 failure to cure its default on the Folsom franchise. The April
8 5, 2010, notice of default on the Folsom franchise specified a
9 cure date of May 10, 2010. (Bertet Decl. Ex. J.) Century 21 did
10 not terminate All Professional's Folsom office on abandonment
11 grounds until May 24, 2010, (Compendium of Exhibits Ex. 31), well
12 after the cure date.

13 All Professional has failed to demonstrate that Century
14 21 was in breach of the franchise agreement in any manner. All
15 Professional's performance under the agreements was therefore not
16 excused. Accordingly, the court will grant Century 21's motion
17 for summary adjudication of its claim that All Profession was in
18 breach of contract with respect to the four franchise agreements.

19 c. Breach of the DAN Agreement

20 Century 21's breach of contract claim also includes
21 breach of the DAN agreement by All Professional for failure to
22 make required payments. Under the DAN agreement, All
23 Professional received a \$75,000 loan, repayment of which would be
24 waived in each year that All Professional reached a minimum
25 threshold in gross revenues. All Professional did not reach the
26 minimum threshold in gross revenue for three separate years, yet
27 it never made any of the required payments under the DAN. All
28 Professional does not dispute these facts, but instead argues

1 that its failure to make the required payments under the DAN
2 should be excused or were otherwise not required.

3 Under New Jersey law, a written contract is considered
4 integrated "when the parties intend it to constitute the complete
5 and final expression of their agreement. When a contract lacks
6 an express integration clause the district court must determine
7 whether the parties intended their agreement to be an integrated
8 contract by reading the writing in light of the surrounding
9 circumstances." Rite Aid of N.J., Inc. v. United Food &
10 Commercial Workers, Civ. No. 11-00374, 2011 WL 5920939, at *6
11 (D.N.J. Nov. 28, 2011) (quoting Starter Corp. v. Converse, Inc.,
12 170 F.3d 286, 295 (2d Cir. 1999)).

13 The parties dispute whether the DAN is an integrated
14 contract. The agreement does provide that All Professional
15 "acknowledges and agrees that neither [Century 21] nor any of its
16 affiliates has made any representations or warranties, nor
17 furnished any information to them concerning any aspect of the
18 Franchise Agreements or [All Professional's] business." (Bertet
19 Decl. Ex. E at CENT000294.) This provision, however, is included
20 in a paragraph that begins by limiting its applicability to
21 situations where the "Note is being executed in connection with
22 the acquisition or consolidation (by merger, acquisition or
23 otherwise) of a real estate brokerage business." (Id. Ex. E at
24 CENT000293-CENT000294.) Although the specific sentence that
25 Century 21 relies upon does not specifically contain this
26 limitation, it appears at the end of a paragraph that repeatedly
27 limits its contents to DANs signed in connection with an
28 acquisition or consolidation. The DAN agreement in this case was

1 not signed in connection with the acquisition or consolidation of
2 a franchise, therefore it would be reasonable to read the
3 limitation on the effect Century 21's representations as not
4 applying in this case. The court will thus consider the
5 surrounding circumstances.²³

6 All Professional points to statements made by Omer,
7 Century 21's Western Regional Vice President, at the time it
8 signed the DAN suggesting that the Wrights were "not to worry"
9 about repaying the DAN because of the new "tools and systems"
10 that Century 21 was developing. All Professional argues that
11 after it signed the DAN, Century 21 began to provide less
12 support, never provided the "tools and systems" promised, and
13 began to allow other franchises to steal All Professional's
14 agents. The court has already addressed these complaints --
15 Century 21 met its obligations under the franchise agreements and
16 did not guarantee that All Professional would be profitable. As
17 Steve Wright himself conceded, Omer never "said that we would be
18 profitable. They said we would be more productive and sell more
19 houses." (Steve Wright Dep. I at 67:11-15.)

20 Aside from All Professional's evidence regarding Omer's
21 representations, the surrounding circumstances support the direct
22 application of the DAN provision that failure to meet gross
23 revenue thresholds would require DAN payments. At the time that
24 All Professional and the Wrights signed the DAN agreement, they
25 also executed a Security Agreement and an Amendment to the River

26
27 ²³ As the court noted above, even if the DAN were an
28 integrated agreement, review of the surrounding circumstances
would be appropriate under New Jersey law. See Halper, 164 F.3d
at 840-41.

1 Park franchise agreement that contained provisions specifically
2 pertaining to repayment of the DAN. These agreements, which do
3 contain integration clauses, and the plain language in the DAN
4 agreement regarding the circumstances under which DAN payments
5 would be required suggest that there would be circumstances under
6 which a franchise would not meet its gross revenue threshold and
7 would be required to repay a portion of the DAN. All
8 Professional's proposed interpretation of the DAN as placing an
9 affirmative obligation on Century 21 to provide "tools and
10 systems" so that All Professional would always meet the gross
11 revenue threshold, or to waive the DAN payments, is inconsistent
12 with this evidence. Because Century 21 had no obligation to
13 ensure that All Professional never had to repay the DAN, All
14 Professional's failure to perform under the DAN agreement is not
15 excused.

16 Accordingly, the court will grant Century 21's motion
17 for summary adjudication for its claim that All Professional was
18 in breach of contract with respect to the DAN agreement.

19 d. Actual Damages

20 Consideration of damages is appropriate because the
21 court has found that All Professional was in breach of contract
22 of both the franchise agreements and the DAN and has granted
23 Century 21's motion for summary adjudication. The parties
24 dispute the amount of damages that Century 21 is entitled to in
25 compensation for All Professional's breach of the franchise
26 agreements. Century 21 claims that All Professional currently
27 owes past due franchise and advertising fees totaling
28 \$196,954.90. All Professional raises a number of objections to

1 the charges. The court will address each objection in turn.

2 First, All Professional objects to Century 21's
3 accounting for the River Park, Florin Road, and Hawaii franchises
4 because it alleges that it was prevented from paying past due
5 service fees after Century 21 terminated support services.
6 (Steve Wright Decl. in Supp. of Defs.' Opp'n to Mot. for Summ.
7 Adjudication ("Steve Wright Decl. II") ¶¶ 4, 6-7 (Docket No.
8 95).)²⁴ The fact that All Professional no longer had access to
9 Century 21's online payment system after its franchises were
10 terminated neither excuses its failure to pay its past-due
11 franchise fees nor constitutes a disputed material fact regarding
12 the amount ultimately due.

13 All Professional next objects to any portion of the DAN
14 being due on account of Century 21 "withholding services
15 essential to maintain production." (Id. ¶ 4.) The court has
16 already dismissed this objection above.

17 Third, All Professional disputes the accounting for NAF
18 advertising fees for the River Park franchise. Specifically, All
19

20 ²⁴ Century 21 objects to the evidence presented by All
21 Professional to dispute the amounts owed under the franchise
22 agreements. The only evidence submitted by All Professional is
23 paragraphs four through seven of Steve Wright's July 16, 2012,
24 declaration. (Docket No. 95.) In Steve Wright's June 11, 2012,
25 deposition testimony he stated that other than All Professional's
26 objection to the DAN charges, he did not know which accounting
27 charges All Professional disputed but that Carol Wright might
28 know about the specific charges All Professional contested.
(Rudin Decl. in Supp. of Century 21's Reply Ex. C ("Steve Wright
Dep. IV") at 38:1-39:12 (Docket No. 112-1).) Although it is true
that a party may not create an issue of fact by submitting an
affidavit contradicting prior deposition testimony, see Kennedy
v. Allied Mut. Ins. Co., 952 F.2d 262, 266-67 (9th Cir. 1991),
that does not appear to be the case here. It is a perfectly
reasonable inference to draw that after his deposition, Steve
Wright talked to Carol Wright and learned of the specific
additional accounting disputes.

1 Professional argues that it was overcharged by \$1,359 in
2 advertising fees that were first charged in January 2007 and
3 previously waived by Century 21 as an erroneous charge. (Id.)
4 The only evidence that All Professional presents in support of
5 this disputed charge is Steve Wright's conclusory deposition
6 statement that the charge had been waived. (Id.) Century 21's
7 alleged waiver of the charge appears to be connected to its 2008
8 proposal to waive All Professional's 2007 DAN and NAF fees in
9 exchange for All Professional signing a one-year extension on its
10 franchise fees. (Rubin Decl. Ex. B ("Carol Wright Dep. II") at
11 159:16-161:8.) Because All Professional did not agree to the
12 proposal, Century 21's offer to waive the NAF fees is not
13 binding. Steve Wright's conclusory statement arguing otherwise
14 is not sufficient.²⁵ All Professional has thus failed to present
15 evidence establishing a materially disputed fact regarding this
16 charge.

17 Fourth, All Professional disputes a \$1,500 charge for a
18 lead router charged to the River Park franchise's account.
19 (Steve Wright Decl. II ¶ 4.) According to Steve Wright, All
20 Professional never agreed to pay for the router. (Id.) During
21 oral arguments, Century 21 was unable to point to any evidence
22

23 ²⁵ In All Professional's response to Century 21's
24 statement of undisputed facts, it also states that in a June 16,
25 2010, phone conversation the parties reached an agreement to
26 waive \$304.50 in advertising fees. (Defs.' Resp. to Statement of
27 Undisputed Facts ¶ 63 (Docket No. 95).) That agreement, however,
28 was part of the parties' negotiations that were never finalized.
Moreover, the evidence submitted by All Professional to support
this claim does not discuss the advertising fees at all. All
Professional does not rely on this evidence to support its
dispute on the \$1,359 charge and given the deficiencies in the
evidence the court will not do so either.

1 disputing this claim. Without knowing the circumstances under
2 which the lead router was provided to All Professional, the court
3 is unable to determine whether the charge is proper. All
4 Professional has thus presented evidence sufficient to establish
5 a materially disputed fact regarding this charge.

6 Fifth, All Professional disputes the minimum royalty
7 fees and advertising fees assessed after August 31, 2009, when it
8 closed its Folsom office. (Id.) All Professional cites to no
9 provision of the franchise agreement that permits a franchise to
10 unilaterally close its franchise office and not pay the minimum
11 royalty fees, while still technically retaining its status as a
12 Century 21 franchise. Under the contract, therefore, All
13 Professional was required to pay the minimum royalty fees until
14 the franchise agreement was terminated. The court also notes
15 that All Professional's argument discussed above that Century 21
16 was not entitled to terminate the Folsom franchise because All
17 Professional still intended to reopen the office directly
18 contradicts its claim that it should not be responsible for any
19 fees during that period. All Professional thus fails to provide
20 a materially disputed fact suggesting that it was not responsible
21 for the minimum royalty fees assessed on the Folsom franchise
22 after August 31, 2009.

23 Finally, All Professional objects to Century 21's
24 accounting for the Florin Road and Hawaii franchises on the
25 grounds that it "disputes the accuracy of the fees claimed by
26 Century 21." (Id. ¶¶ 6, 7.) This conclusory statement is
27 insufficient to create a genuine issue of material fact as to the
28 amounts owed under either franchise agreement. See Anheuser-

1 Busch, Inc. v. Natural Beverage Distribs., 69 F.3d 337, 345 (9th
2 Cir. 1995) (noting that "conclusory or speculative testimony is
3 insufficient to raise a genuine issue of fact to defeat summary
4 judgment").

5 Accordingly, with respect to the damages that All
6 Professional owes Century 21 for breach of the franchise
7 agreements, the court finds that there is no genuine dispute as
8 to \$195,454.90 of the \$196,954.90 Century 21 claims. There is,
9 however, a genuine dispute as to the remaining \$1,500.00 claimed
10 by Century 21.

11 e. Future Lost Profits

12 Section 16.7.2 of the franchise agreements provides
13 that in the event of early termination of the agreements, All
14 Professional shall immediately become obligated to pay Century 21
15 "lost future profits" that "shall be equal to the combined
16 monthly average of Royalty Fees, NAP contributions, and any other
17 fees under this Agreement . . . payable from the Effective Date
18 of this Agreement through the date of early termination,
19 multiplied by the number of months (or partial months) remaining
20 in the term of this Agreement" discounted to present value at a
21 rate of eight percent. (Bertet Decl. Exs. A-D § 16.7.2.) As a
22 result of the early termination of All Professional's franchises,
23 Century 21 claims that All Professional owes it lost future
24 profits in the amount of \$250,029.34 on the River Park franchise,
25 \$88,757.77 on the Folsom franchise, \$155,671.48 on the Florin
26 Road franchise, and \$80,541.98 on the Hawaii franchise. (Id.
27 ¶¶ 42-45, Exs. R-U.)

28 "Generally, a liquidated damage clause is enforceable

1 in New Jersey where actual damages which would be sustained upon
2 a breach are difficult to project and are not readily susceptible
3 of proof under the rules of evidence. The agreed upon sum must
4 not, however, be disproportionate to the presumable loss." Cent.
5 Steel Drum Co. v. Gold Cooperage, Inc., 491 A.2d 49, 54 (N.J.
6 App. Div. 1985), overruled on other grounds by Kutzin v. Pirnie,
7 591 A.2d 932 (N.J. 1991). The party challenging a liquidated
8 damages clause bears the burden of proving its unreasonableness.
9 See id. "Thus, the party challenging a stipulated damages clause
10 'must establish that its application amounts to a penalty.'" Wasserman's Inc. v. Twp. of Middletown, 137 N.J. 238, 253 (1994)
11 (quoting Haromy v. Sawyer, 98 Nev. 544, 654 (1982)).

13 The purpose of a stipulated damages clause is to
14 compensate the promisee for non-performance, and not to compel
15 the promisor to perform. Id. Accordingly, provisions for
16 liquidated damages are enforceable only if "the amount so fixed
17 is a reasonable forecast of just compensation for the harm that
18 is caused by the breach." Westmount Country Club v. Kameny, 82
19 N.J. Super. 200, 206 (App. Div. 1964). A liquidated damages
20 clause is therefore unreasonable if "it does more than compensate
21 plaintiffs for their approximate actual damages caused by the
22 breach." Wasserman's Inc., 137 N.J. at 254. When considered at
23 the time of contracting, the liquidated damages calculation in
24 the franchise agreements, basing Century 21's expected lost
25 profits on an average of All Professional's monthly revenue
26 appears reasonable.

27 The New Jersey Supreme Court has suggested that
28 consideration of the reasonableness of a liquidated damages

1 clause at the time of breach, or actual damages, is also
2 appropriate in determining the reasonableness of the parties'
3 prediction of damages.²⁶ Id. at 252. "It is to be observed that
4 hindsight is frequently better than foresight, and that, in
5 passing judgment upon the honesty and genuineness of the
6 pre-estimate made by the parties, the court cannot help but be
7 influenced by its knowledge of subsequent events." Id. (quoting
8 Corbin on Contracts § 1063 (1951)). The court will therefore
9 consider the circumstances at the time of termination to
10 determine whether the liquidated damages clause is enforceable in
11 this case.

12 Here, All Professional presents evidence that it argues
13 suggests that at the time Century 21 terminated All
14 Professional's three franchises in Sacramento in Hawaii, it did
15 not expect that it would suffer any significant loss of profits.
16 In an email sent July 12, 2010, Bainbridge, a Century 21 business
17 consultant, told Popp, "I believe if we terminate we would get
18 most of the producing agents who are loyal to C21"
19 (Compendium of Exhibits Ex. 34.) After the terminations, in a
20 second email sent August 3, 2010, Bainbridge told Popp,
21 "Fortunately, we will more than replace [All Professional's]
22 production in this area with the Select ERA conversion this month
23
24
25

26 ²⁶ In this respect, consideration of liquidated damages
27 claims under New Jersey law differs from California law, which
28 requires the party seeking to invalidate a liquidated damages
clause to show that the provision is "unreasonable under the
circumstances existing at the time the contract was made." Cal.
Civ. Code § 1671(b).

1"²⁷ (Id. Ex. 36.) While these emails suggest that at
2 least Bainbridge did not believe that Century 21 would suffer
3 major losses after terminating All Professional, it falls far
4 short of establishing that the liquidated damages clause would be
5 disproportionate with Century 21's actual losses. All
6 Professional continues to operate offices at all three locations
7 which would otherwise have resulted in franchise and advertising
8 fees for Century 21. All Professional presents no evidence
9 concerning it or Century 21's past or current revenues in these
10 locations. As the party with the burden of proof on this issue,
11 the two emails presented by All Professional is insufficient to
12 establish that Century 21 suffered no actual damages or that the
13 liquidated damages clause would be disproportionate with Century
14 21's losses.

15 The court is more sympathetic to All Professional's
16 arguments concerning the unfairness of applying the liquidated
17 damages clause to the Folsom franchise because All Professional
18 no longer operates an office at that location. The court
19 nevertheless may not substitute its own intuition for the lack of
20 evidence presented by All Professional in this case, but must
21 instead look to the evidence presented by the parties. As All
22 Professional pointed out in oral arguments, the emails from
23 Bainbridge were sent after the Folsom franchise was terminated
24 and therefore were not in reference to Century 21's profits in
25

26 ²⁷ Read in context, this second email only suggests that a
27 new franchise was moving into the area and that because of this
28 Century 21's net commissions would remain the same, not that
Century 21 suffered no lost profits as a result of All
Professional's termination.

1 Folsom. All Professional presents no evidence regarding Century
2 21's losses in connection with the Folsom location.

3 Citing California law, All Professional further argues
4 that application of the liquidated damages clause would be
5 inappropriate in this case because Century 21 was the party that
6 chose to terminate the franchise agreement. (Opp'n to Mot. for
7 Summ. Adjudication at 42:7-10 (citing Postal Instant Press, Inc.
8 v. Sealy, 43 Cal. App. 4th 1704, 1711 (2d Dist. 1996).) The
9 California appellate court in Sealy found that where termination
10 of the franchise agreement was for failure to pay franchise fees,
11 the breach did not proximately cause the lost future profits and
12 therefore the liquidated damages provision was unenforceable.²⁸
13 Sealy, 43 Cal. App. 4th at 1713. Sealy's proximate cause
14 analysis has since been persuasively challenged in Radisson
15 Hotels Int'l, Inc. v. Majestic Towers, Inc., 488 F. Supp. 2d 953,
16 963 n.10 (C.D. Cal. 2007). Absent compelling New Jersey
17 authority on the matter, the court will apply New Jersey's
18 presumption in favor of liquidated damages clauses. See Cent.
19 Steel Drum, 491 A.2d at 54.²⁹

20 Because there is not sufficient evidence showing that
21

22 ²⁸ Sealy is not applicable to the liquidated damages
23 clause for the Folsom franchise because that franchise agreement
24 was terminated based on abandonment, not merely for failure to
pay franchise fees.

25 ²⁹ Even if the Sealy holding were applicable under New
26 Jersey law, Sealy is distinguishable from the facts of the
27 current case because the franchise agreement in Sealy only
28 vaguely stated that the franchisor would be entitled to the
"benefit of the bargain." In this case, the franchise agreements
expressly make All Professional liable for lost future profits
when early termination is "for cause," which includes failure to
pay franchise fees. See Radisson, 488 F. Supp. 2d at 962.

1 the liquidated damages provision will compensate Century 21 far
2 in excess of its actual damages, the court finds that the
3 provision is enforceable. Accordingly, the court will grant
4 Century 21's motion for summary damages as it relates to its
5 liquidated damages request in the amount of \$575,001.57.

6 2. Breach of Guaranty

7 "The liability of a guarantor is measured by that of
8 the principal, unless the agreement explicitly provides
9 otherwise." Nat'l Westminster Bank N.J. v. Lomker, 277 N.J.
10 Super. 491, 498 (App. Div. 1994). The Wrights signed guarantees
11 on all four franchise agreements that cover all of All
12 Professional and All Professional Hawaii's obligations under the
13 franchise agreements. (See Bertet Decl. Exs. A-D at 43-44.)
14 Because the court found that All Professional breached the
15 franchise agreements and because no payments have been made by
16 the Wrights, it follows that the Wrights are also in breach of
17 the guarantees. Accordingly, the court will grant Century 21's
18 motion for summary adjudication with respect to its breach of
19 guaranty claim.

20 3. Trademark Infringement and Unfair Competition

21 A federal claim for trademark infringement pursuant to
22 section 32 of the Lanham Act requires (1) ownership of a
23 registered trademark; (2) use of that mark beginning before the
24 alleged infringer's use; (3) the alleged infringer's use without
25 the alleged owner's consent; and (4) that the alleged infringer's
26 use is likely to cause confusion, or to cause mistake, or to
27 deceive. See 15 U.S.C. § 1114(a); Century 21 Real Estate v.
28 Sandlin, 846 F.2d 1175, 1178 (9th Cir. 1998); Intel Corp. v.

1 Americas News Intel Pub., LLC, No. C 09-05085, 2010 WL 2740063,
2 at *2 (N.D. Cal. July 12, 2010). The elements of a federal
3 unfair competition claim for false designation of origin of
4 services under section 43(a) of the Lanham Act is identical to
5 the federal trademark infringement claim, with the exception that
6 the trademark need not be registered. See 15 U.S.C. § 1125(a);
7 Intel Corp., 2010 WL 2740063, at *2. The only elements the
8 parties dispute are whether the agreements were properly
9 terminated and whether Century 21 has met its burden to show
10 likelihood of confusion.

11 The merits of Century 21's claims depend in part on
12 whether Century 21 properly terminated the franchise
13 agreements.³⁰ See McDonald's Corp. v. Robertson, 147 F.3d 1301,
14 1308 (11th Cir. 1998) ("[W]e find that the Lanham Act's
15 requirement that a franchisor demonstrate that unauthorized
16 trademark use occurred to prevail on the merits of a trademark
17 infringement claim against a franchisee necessitates some type of
18 showing that the franchisor properly terminated the contract
19 purporting to authorize the trademarks' use, thus resulting in
20 the unauthorized use of trademarks by the former franchisee."); S
21 & R Corp. v. Jiffy Lube Int'l, Inc., 968 F.2d 371, 375 (3d Cir.
22 1992) ("Once a franchise is terminated, the franchisor has the
23 right to enjoin unauthorized use of its trademark under the
24 Lanham Act. Thus, Jiffy Lube will merit preliminary injunctive
25

26 ³⁰ Because All Professional was no longer operating the
27 Folsom office, and therefore did not continue to use Century 21's
28 trademarks at that office, the court does not consider whether
Century 21 properly terminated All Professional's Folsom
franchise under this claim.

1 relief if it can adduce sufficient facts indicating that its
2 termination of Durst's franchises was proper."); see also Re/Max
3 N. Cent., Inc. v. Cook, 272 F.3d 424, 430 (7th Cir. 2001).
4 Termination of a franchise agreement may be improper under either
5 the terms of the agreement or state franchise laws. See Re/Max
6 N. Cent., 272 F.3d at 430.

7 a. Use of Trademark Without Consent

8 As the court previously found, the evidence establishes
9 that Century 21 properly terminated All Professional's franchises
10 under the terms of the franchise agreements. Century 21 notified
11 All Professional of its intent to terminate the franchise
12 agreements and the opportunity to cure in April 5, 2010, letters,
13 following prior informal notices of failure to pay amounts due
14 that All Professional had ignored. Having not received payment
15 of even the undisputed fees, Century 21 terminated the Sacramento
16 office agreements effective July 9, 2010. Century 21 thus
17 properly waited more than 30 days after the notices of default
18 were sent as required under section 16.2.4 before it terminated
19 the agreements for All Professional's failure to cure.

20 b. Likelihood of Confusion

21 The court previously found that All Professional's
22 continued use of the Century 21 marks was sufficient to establish
23 a likelihood of confusion. (See Jan. 24, 2011, Order at 22:21-
24 24:27 (Docket No. 28).) All Professional now argues that Century
25 21 has failed to show "actual confusion" by an appreciable number
26 of people and that its holdover infringement was not "willful"
27 because it desired to remain a Century 21 franchise and
28 subsequently de-marked after the court's preliminary injunction

1 order.

2 Evidence of actual confusion is not required to prevail
3 on a motion for summary judgment of a trademark infringement
4 claim. See J.L. Williams Co. v. Le Conte Cosmetics, 523 F.2d
5 187, 191 n.5-6 (9th Cir. 1975) ("Although the trial court found
6 no evidence of actual confusion, this fact does not preclude this
7 Court from concluding that there is a 'likelihood of confusion',
8 as actual confusion is merely one factor to be considered by the
9 Court when it makes its determination."). All Professional's
10 reliance on the decisions in Entrepreneur Media Inc. v. Smith,
11 279 F.3d 1135 (9th Cir. 2002), and KP Permanent Make-Up, Inc. v.
12 Lasting Impression I, Inc., 543 U.S. 111 (2004), to establish
13 that Century 21 has the burden to present proof of actual
14 confusion is misplaced. These decisions only establish that
15 Century 21 bears the burden of proving likelihood of confusion
16 for an appreciable number of people, not actual confusion. See
17 KP Permanent Make-Up, 543 U.S. at 121-22; Entrepreneur Media, 279
18 F.3d at 1151. As the court described in detail in its
19 preliminary injunction order, Century 21 has met this burden.
20 (Jan. 24, 2011, Order at 22:21-24:27.) All Professional has
21 presented no new facts suggesting that the court's prior order
22 was mistaken.

23 All Professional's underlying intent when it used the
24 Century 21 marks without authorization is irrelevant to the
25 question of willfulness. It is undisputed that All Professional
26 was informed upon termination that it needed to de-identify. The
27 fact that "All Professional desired to avoid disrupting their
28 relationships with their clients and their agents while this

1 dispute was litigated," (Opp'n to Mot. for Summ. Adjudication at
2 45:2-3), does not excuse its violation of Century 21's trademark.
3 There is no recognized exception to the Lanham Act that allows
4 infringers to continue using a mark during a legal dispute. All
5 Professional has thus failed to provide material facts suggesting
6 that its infringement was not willful. All Professional's remedy
7 if it believed that its franchises were wrongfully terminated was
8 to sue for damages and seek a preliminary injunction, not to
9 continue to use Century 21's marks without paying franchise fees.

10 All Professional's infringement of Century 21's marks
11 began in July 2010, when it failed to de-identify after its
12 franchises were terminated. All Professional's argument that it
13 is not liable for trademark infringement because it de-marked
14 after the court issued its preliminary injunction order in
15 January 2011, lacks legal support. All Professional was no
16 longer authorized to use Century 21's trademarks after its
17 franchises were terminated, and the fact that the court did not
18 issue a preliminary injunction for several months after the
19 termination did not give All Professional the right to use
20 Century 21's marks without Century 21's authorization. All
21 Professional has thus failed to present material facts suggesting
22 that it did not violate Century 21's trademark.

23 In conjunction with its trademark claims, Century 21
24 also requests injunctive relief. The Lanham Act gives courts the
25 "power to grant injunctions, according to the principles of
26 equity and upon such terms as the court may deem reasonable, to
27 prevent the violation" of a registrant's rights. 15 U.S.C.
28 § 1116(a). Injunctions are especially appropriate where the

1 infringing use is for a similar service. See Century 21 Real
2 Estate Corp. v. Sandlin, 846 F.2d 1175, 1181 (9th Cir. 1988).
3 The standard for a permanent injunction is essentially the same
4 as for a preliminary injunction, with the exception that the
5 plaintiff must show actual success, rather than a likelihood of
6 success. See Amoco Prod. Co. v. Village of Gambell, 480 U.S.
7 531, 546 n.12 (1987). Since Century 21 has succeeded on its
8 trademark infringement claim, it is entitled to a permanent
9 injunction. Accordingly the court will grant Century 21's motion
10 for summary adjudication of its trademark infringement and unfair
11 competition claims and will permanently enjoin All Professional
12 from further use of Century 21's marks.

13 c. Damages

14 Having found that All Professional infringed upon
15 Century 21's trademarks, the court next determines the
16 appropriate damages. The damages provision of the Lanham Act
17 states:

18 When a violation of any right of the
19 registrant of a mark . . . shall have been
20 established in any civil action arising under
21 this chapter, the plaintiff shall be entitled
22 . . . to recover (1) defendant's profits, (2)
23 any damages sustained by the plaintiff, and
24 (3) the costs of the action.

25 15 U.S.C. § 1117(a). Century 21 requests treble damages of
26 \$86,022.00.

27 Century 21 claims that it was damaged in an amount
28 equal to the minimum franchise fees that All Professional would
29 have been required to pay to continue using Century 21's marks
30 for its three operational offices under the franchise agreements.
31 The minimum franchise fees total \$3,186.00 per month for the

1 three franchises. This estimation of damages is reasonable
2 because it represents the minimum amount that Century 21 would
3 have received if All Professional had been authorized to use
4 Century 21's marks, and, if anything, Century 21's actual damages
5 could have been higher than this figure. Because All
6 Professional continued to take advantage of the franchise
7 agreements' benefits, enforcement of All Professional's
8 obligations under the agreements is appropriate.

9 As the court discussed above, All Professional's use of
10 Century 21's mark was willful. When the infringer's use of a
11 counterfeit mark is willful, section 1117(b) requires the court
12 to award treble damages unless the court finds extenuating
13 circumstances. 15 U.S.C. § 1117(b). There are no such
14 extenuating circumstances in this case. All Professional's
15 infringement was willful and it refused to de-mark until the
16 court issued an order enjoining its use of the marks.

17 All Professional argues that treble damages may only be
18 applied to provide compensation and not punishment, however the
19 cases that it relies upon discuss the award of treble damages
20 under § 1117(a) and not § 1117(b). Under § 1117(a), a court may
21 enhance actual damages to a level, not to exceed three times
22 actual damages, when the award of actual damages would not be
23 sufficient to adequately compensate the trademark holder. Id.
24 § 1117(a). Under § 1117(b), the court shall award treble damages
25 unless there are extenuating circumstances, suggesting that the
26 purpose of § 1117(b) is punishment and not compensation. The
27 court is therefore not prohibited from awarding treble damages
28 under § 1117(b) that may serve primarily to punish All

1 Professional.

2 All Professional continued to use Century 21's marks
3 for more than nine months after it was informed of the
4 termination of its franchises and instructed to discontinue use
5 of the marks. All Professional has presented no material facts
6 suggesting that an award of actual damages equal to its minimum
7 franchise fees is not proper. It is additionally beyond dispute
8 that All Professional's use of Century 21's marks was willful
9 during this period. Accordingly, the court will grant Century
10 21's motion for summary adjudication of damages on its trademark
11 infringement and unfair competition claims in the amount of
12 \$86,022.00.

13 B. All Professional's Claims

14 1. Breach of Contract

15 All Professional relies on the same arguments to
16 support its breach of contract claim as it did in defense of
17 Century 21's breach of contract claim. As the court discussed
18 above, All Professional fails to raise a genuine issue of
19 material fact suggesting that Century 21 breached the franchise
20 agreements or the DAN. Accordingly, the court will grant
21 Century 21's motion for summary adjudication as to All
22 Professional's claims for breach of contract.

23 2. Unfair Competition

24 All Professional and the Wrights assert a claim for
25 violation of California's Unfair Competition Law ("UCL"). See
26 Cal. Bus. & Prof. Code § 17200, et seq. The court has found,
27 however, that New Jersey law is applicable in this action and
28 the parties have not suggested that New Jersey has an analogous

1 UCL claim. See Medimatch, Inc. v. Lucent Techs., Inc., 120 F.
2 Supp. 2d 842, 861-62 (N.D. Cal. 2000) (dismissing California UCL
3 claim on basis that claim fell within scope of New Jersey
4 choice-of-law provision). Accordingly, the court will grant
5 Century 21's motion for summary adjudication with respect to All
6 Professional's UCL claim.

7 3. Implied Covenant of Good Faith and Fair Dealing

8 Under New Jersey law, there is an implied covenant of
9 good faith and fair dealing in every contract. Onderdonk v.
10 Presbyterian Homes, 85 N.J. 171, 182 (1981). The implied
11 covenant prohibits a party to the contract from doing anything
12 that "will destroy or injure the right of the other party to
13 receive the fruits of the contract." Feldman v. U.S. Sprint
14 Commc'ns Co., 714 F. Supp. 727, 731 (D.N.J. 1989). However, the
15 "function of the court is to enforce the [agreement] as written,
16 not to write for the parties a different or a better contract."
17 Liqui-Box Corp. v. Estate of Elkman, 238 N.J. Super. 588,
18 599-600 (App. Div. 1990). "Although the implied covenant of
19 good faith and fair dealing cannot override an express term in a
20 contract, a party's performance under a contract may breach that
21 implied covenant even though that performance does not violate a
22 pertinent express term." Wilson v. Amerada Hess Corp., 168 N.J.
23 236, 244 (2001) (citing Sons of Thunder, Inc. v. Borden, 148
24 N.J. 396, 419 (1997)). The New Jersey Supreme Court has
25 cautioned, however, that "an allegation of bad faith or unfair
26 dealing should not be permitted to be advanced in the abstract
27 and absent an improper motive." Id. at 251.

28 All Professional argues in conclusory fashion that

1 Century 21 breached the implied covenant of good faith and fair
2 dealing for the same reasons that it alleges Century 21 breached
3 the franchise agreements. As the court discussed above,
4 adopting All Professional's interpretation of the franchise
5 agreements would be either inconsistent with or contrary to the
6 express provisions of the agreements. All Professional provides
7 no justification for why any of these alleged breaches should be
8 considered differently under the implied covenant than under All
9 Professional's breach of contract claim.³¹

10 In addition to the alleged contract breaches that All
11 Professional presented, All Professional argues two additional
12 ways in which Century 21 breached the implied covenant. The
13 first claim is that Century 21 engineered the termination of All
14 Professional's franchises because of pressure from competing
15 Century 21 brokers. All Professional fails, though, to provide
16 any explanation of how Century 21 was able to engineer the
17 terminations. Indeed, given that it was All Professional's
18 decision to close its Folsom franchise, stop paying its
19 franchise fees, and not cure its defaults during the cure period
20 it would seem unlikely that Century 21 would have been able to
21 do so. All Professional similarly fails to provide any
22 authority in support of its claim.

23 Second, All Professional argues that Century 21
24

25 ³¹ All Professional additionally argues that under
26 California law, Century 21 was obligated to exercise its
27 discretion in good faith. (See Opp'n to Mot. for Summ.
28 Adjudication at 32:19-26.) It is unclear to the court what
discretionary decision All Professional refers to. As the court
has found throughout its order, there is no evidence that Century
21 acted outside the authority granted to it under the franchise
agreements or that its actions were taken in bad faith.

1 breached the implied covenant of good faith and fair dealing
2 when it disregarded its own policy by terminating All
3 Professional's franchises despite its "good faith attempts to
4 pay the service fees and restructure the DAN note." (Opp'n to
5 Mot. for Summ. Adjudication at 33:13-14.) Century 21 though was
6 not obligated to provide All Professional a payment plan, nor
7 was it obligated to continue negotiations with All Professional
8 on reaching a payment agreement when the cure date had passed
9 over two months before. All Professional has not produced any
10 evidence other than the franchise agreements that would suggest
11 that All Professional had a legitimate reason to expect that its
12 good faith efforts should have forestalled termination. Nor has
13 All Professional presented any authority suggesting that
14 franchisors may not terminate franchises for failure to meet
15 financial obligations when franchisees act in good faith under
16 the implied covenant of good faith and fair dealing.

17 All Professional's laundry list of Century 21's
18 alleged violations of the implied covenant of good faith and
19 fair dealing fails to establish any material facts suggesting
20 that Century 21 acted in a manner that injured All
21 Professional's right to receive the benefits of the franchise
22 agreements. Accordingly, the court will grant Century 21's
23 motion for summary adjudication on All Professional's claim for
24 breach of the implied covenant of good faith and fair dealing.

25 4. Fraud

26 Under New Jersey law, the essential elements of fraud
27 are (1) a material representation pertaining to a presently
28 existing or past fact; (2) made with knowledge of the falsity of

1 the representation and with an intention that the other party
2 rely on the representation; and, (3) justifiable reliance on the
3 representation which results in actual damage. *Gennari v.*
4 *Weichert Co. Realtors*, 148 N.J. 582, 610 (1997) (citing *Jewish*
5 *Ctr. of Sussex Cnty. v. Whale*, 86 N.J. 619 (1981)). All
6 Professional identifies two alleged misrepresentations that it
7 argues are actionable under its fraud claim: (1) Omer's comment
8 that Century 21 would provide "tools and systems" to increase
9 All Professional's productivity; and (2) Popp's representation
10 that he would "take care of the issues" with Corporate after All
11 Professional defaulted under its franchise agreements.³²

12 Under New Jersey law, "[t]he fraud must be in the
13 original contract or transaction and not in the nonfulfillment
14 of the contract." *Anderson v. Modica*, 4 N.J. 383, 392 (1950)
15 (citing *Ebert v. Givas*, 158 A. 412, 413-14 (N.J. Err. & App.
16 1931)). "It is the general rule that fraud cannot be predicated
17 upon statements which are promissory in their nature at the time
18 they are made and which relate to future actions or conduct.
19 Thus fraud cannot be predicated upon the mere non-performance of
20 a promise." *Barry by Ross v. N.J. State Highway Auth.*, 245 N.J.
21 *Super.* 302, 310 (1990). A failure to fulfill a promise may
22 constitute a breach of contract, but it is not fraud and the
23 non-performance of that promise does not make it so. *Anderson*,

24
25 ³² In its interrogatory response regarding this claim, All
26 Professional actually identified eleven separate representations
27 that it would rely upon for its fraud claim. In its motion for
28 summary adjudication Century 21 addressed all eleven claims. All
Professional only mentioned one of these alleged
misrepresentations in its opposition papers and acknowledged
during oral arguments that it was not pursuing claims under the
representations that it did not address.

1 4 N.J. at 392. "Such conduct is a misrepresentation only if the
2 promisor knew when he made it that the promise could not or
3 would not be fulfilled." Barry by Ross, 245 N.J. at 310 (citing
4 Ocean Cape Hotel Corp. v. Masefield Corp., 63 N.J. Super. 369,
5 380-81 (App. Div. 1960).

6 First, All Professional argues that in 2005, at the
7 time it was signing franchise renewals and the DAN, Omer falsely
8 represented that Century 21 was going to develop tools and
9 systems that would keep All Professional productive so that they
10 would not have to pay back the DAN. This representation is not
11 actionable under New Jersey law because it does not relate to a
12 past or present fact, but is rather a prediction about what
13 Century 21 would do in the future. See Anderson, 4 N.J. at 391-
14 92. All Professional does not present any evidence suggesting
15 that when Omer made these representations he knew that Century
16 21 would not be developing such tools and systems.

17 All Professional additionally fails to demonstrate
18 that it reasonably relied on Omer's statements and would have
19 acted differently had the alleged misrepresentations not been
20 made. "Reliance is not reasonable where the substance of the
21 alleged misstatement is contradictory of any of the undertakings
22 expressly dealt with by the written contract." Luso Fuel, Inc.
23 v. BP Prods. N. Am., Inc., No. 08-CV-3947, 2009 WL 1873583, at
24 *5 (D.N.J. June 29, 2009) (citing Winonka Village, Inc. v. Tate,
25 16 N.J. Super. 330, 334 (App. Div. 1952)). Here, the alleged
26 representation that repayment would not be required contradicts
27 the repayment provision in the DAN, the Security Agreement
28 setting forth collateral to secure the DAN, and the addendum to

1 the River Park franchise agreement. Given the terms of these
2 contracts, any reliance on Omer's statements was unreasonable.
3 All Professional thus fails to establish material facts
4 suggesting that Omer's statement was a fraudulent
5 misrepresentation.

6 Second, All Professional argues that while it was
7 negotiating an alternate payment plan for its default, Popp
8 affirmatively represented that he would "take care of the
9 issues" with Century 21's corporate team.³³ As an initial
10 matter, the only evidence that All Professional relies upon to
11 suggest that this representation was actually made is Steve
12 Wright's declaration that was attached to All Professional's
13 opposition papers. (See Steve Wright Decl. II, ¶ 13 ("From June
14 18, 2010 until July 9, 2010, I spoke with Mr. Popp several times
15 where he repeatedly assured me that he was working out the
16 payment terms with 'New Jersey' (Century 21's executive
17 team).").)³⁴ The fact that Popp was "working out the payment

18
19 ³³ Century 21 objects to All Professional's reliance on
20 this representation because it was not listed in All
21 Professional's interrogatory response as one of the
22 misrepresentations that All Professional intended to rely upon.
23 The court will nonetheless consider All Professional's argument
24 on the matter.

25 ³⁴ During Steve Wright's deposition, he also talked about
26 two phone calls that he had with Popp that Steve Wright described
27 as "his assurances that this would all work out." (Steve Wright
28 Dep. I at 213:6-7.) When asked to discuss these phone calls in
greater detail, Steve Wright described the first call as Popp
giving him a "one sentence spiel: I'll talk to Corporate, and
we'll see if we can work it out. Just give me a couple of days,
click." (Id. at 213:21-23.) In the second phone call, Popp
"said he was going to call Corporate, and he would call us back,
and he never did." (Id. at 214:4-5.) Neither of these phone
calls support All Professional's argument that Popp said that he
would "take care of issues" with Corporate or provide an
assurance that "this will all work out."

1 terms" is a far cry from All Professional's interpretation of
2 this statement as being that Popp "would take care of issues."

3 Assuming that All Professional did have sufficient
4 evidence to prove that this representation was made, All
5 Professional's claim still fails as a matter of law. It is not
6 clear that the purported statement is a misrepresentation of
7 fact, rather than an ambiguous statement regarding a future
8 action that Popp would take. See Anderson, 4 N.J. at 391-92
9 (stating that a misrepresentation must be about past or present
10 fact).

11 All Professional additionally fails to present
12 evidence that Popp knew that this representation was false at
13 the time he spoke with the Wrights. The only evidence All
14 Professional presents actually establishes the opposite -- in an
15 email sent by Popp to Bainbridge on July 12, 2010, he states
16 that he "thought we were getting close on a deal." (Compendium
17 of Exhibits Ex. 34.) This statement, made at least three days
18 after All Professional argues the alleged misrepresentation was
19 made, strongly suggests the Popp did not know that All
20 Professional's attempt to negotiate an alternative payment plan
21 would be unsuccessful.

22 Finally, All Professional's fraud claim fails because
23 it is unable to show reliance on Popp's statement to its
24 detriment. Any alleged statement by Popp was made after All
25 Professional's missed cure date of May 10, 2010, so reliance on
26 a statement made in either June or July fails to explain why All
27 Professional did not cure its default.

28 There are no material facts supporting All

1 Professional's claim for fraud against Century 21. Accordingly,
2 the court will grant Century 21's motion for summary
3 adjudication as to All Professional's fraud claim.

4 5. Interference with Business Advantage/Contract

5 All Professional brings three causes of action related
6 to Century 21's alleged interference with its business: (a)
7 Intentional Interference with Business Advantage; (b) Negligent
8 Interference with Business Advantage; and (c) Interference with
9 Contract. All of these claims are based on All Professional's
10 allegations that Century 21 deliberately disrupted All
11 Professional's relationships with its own agents, customers, and
12 potential customers in retaliation for Steve Wright's complaints
13 about Century 21's favorable treatment of Century 21 Select.

14 a. Intentional Interference

15 Although torts for interference with contract are
16 separate from interference with business advantage, see Printing
17 Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 750 (1989)
18 (stating "[t]he separate cause of action for the intentional
19 interference with a prospective contractual or economic
20 relationship has long been recognized as distinct from the tort
21 of interference with the performance of a contract"), the
22 elements of each claim are the same. See Jenkins v. Region Nine
23 Hous. Corp., 306 N.J. Super. 258, 265 (App. Div. 1997) ("Whether
24 the tort is denominated as an intentional interference with
25 contractual advantage, or future economic advantage, the import
26 is the same."). To recover under a claim for tortious
27 interference, a plaintiff must prove: "(1) a protected interest,
28 not necessarily amounting to an enforceable contract; (2)

1 defendant[s'] intentional interference without justification;
2 (3) a reasonable likelihood that the benefit plaintiff
3 anticipated from the protected interest would have continued but
4 for the interference; and (4) resulting damage." Id.

5 To succeed on its claims for intentional tortious
6 interference, All Professional must show that Century 21's
7 alleged conduct constituting interference was intentional and
8 with "malice." See Printing Mart, 116 N.J. at 751 (stating a
9 complaint of tortious interference "must allege facts claiming
10 that the interference was done intentionally and with
11 'malice'"). Malice is defined as intentionally inflicted harm
12 without justification or excuse. Id. A determination of malice
13 must focus on a defendant's action as presented by the unique
14 facts of each individual case. Id. at 756-57. "Not only must
15 [a] defendant[']s[] motive and purpose be proper but so also
16 must be the means." Id. at 757 (alterations in original)
17 (internal quotation marks and citation omitted). However,
18 "[c]onduct admittedly spurred by spite and ill-will is not
19 necessarily sufficient to sustain an action for tortious
20 interference with an economic advantage." Lamorte Burns & Co.
21 v. Walters, 167 N.J. 285, 307 (2001). "The line clearly is
22 drawn at conduct that is fraudulent, dishonest, or illegal and
23 thereby interferes with a competitor's economic advantage."
24 Id.; see also Shebar v. Sanyo Bus. Sys. Corp., 218 N.J. Super.
25 111, 118 (App. Div. 1987) (finding an employee who was fired
26 after his employer used deceit to induce him to revoke
27 acceptance of an outside employment offer until a replacement
28 was found satisfied the malicious interference requirement).

1 All Professional fails to specifically address the
2 malice requirement. Instead, it suggests that Century 21's
3 wrongful conduct, engineering the terminations of All
4 Professional's franchises, was motivated largely because of
5 Steve Wright's continuous, unresolved complaints about Select
6 and Century 21's preference toward Select. All Professional
7 then proceeds to repeat the same laundry list of complaints that
8 this court has repeatedly addressed and found not to be breaches
9 of contract or fraudulent.³⁵ Although Steve Wright's contentious
10 behavior may have contributed to feelings of ill will between
11 the parties, in order to show that Century 21's actions rise to
12 the level of malice, All Professional must show that the actions
13 lacked justification or excuse. See Printing Mart, 116 N.J. at
14 751.

15 "A party's actions in its own interest and for its own
16 financial benefit will not rise to the level of malice."
17 Cargill Global Trading v. Applied Develop. Co., 706 F. Supp. 2d
18 563, 575 (D.N.J. 2010). Instead, a business-related explanation
19 can justify a party's actions, so long as the business-related
20 explanation justifies not only the defendant's motive and
21 purpose, but also the means that it employed. See Lamorte Burns
22 & Co., 167 N.J. at 307. In Ideal Dairy Farms, Inc. v. Farmland

23
24 ³⁵ All Professional also argues that "Century 21's sharing
25 of All Professional's business methods to Select was a violation
26 of California Trade Secrets Act." (Opp'n to Mot. for Summ.
27 Adjudication at 38:11-13 (citing Cal. Civ. Code § 3426.1).)
28 Other than alleging that Century 21 shared information regarding
All Professional's financial difficulties, there is no evidence
that Century 21 shared information regarding All Professional's
"business methods." All Professional does not explain how these
undefined methods might qualify as trade secrets or violate the
Trade Secrets Act.

1 Dairy Farms, Inc., 282 N.J. Super. 140, 205 (App. Div. 1995),
2 the New Jersey Appellate Division reversed a trial court's
3 finding of tortious interference, noting that even if the
4 defendant's behavior had been motivated by spite and was
5 directly aimed at hurting the plaintiff's business, this did not
6 rise to the level of tortious interference because defendant had
7 a "legitimate business reason to 'target' [the plaintiff] . . .
8 regardless of any other motivation." Id. at 201; see also Cedar
9 Ridge Trailer Sales, Inc. v. Nat'l Cmty. Bank of N.J., 312 N.J.
10 Super. 51, 67 (App. Div. 1998) ("At worst, the Bank was
11 advancing its 'own interest and financial position,' which is
12 not enough to establish tortious interference.").

13 The court finds that the undisputed evidence shows
14 that Century 21's actions were motivated by a genuine business
15 concern and therefore did not rise to the level of malice
16 required to bring a claim for intentional tortious interference.
17 Accordingly, the court will grant Century 21's motion for
18 summary adjudication of All Professional's claims for
19 intentional interference with business advantage and
20 interference with contract.

21 b. Negligent Interference with Business
22 Advantage

23 All Professional additionally brings a claim for
24 negligent interference with business advantage, although it
25 fails to address the application of New Jersey law to this
26
27
28

1 claim.³⁶ Although there is very little New Jersey caselaw
2 addressing negligent interference claims, the court has located
3 two cases that rely on People Express Airlines to suggest that
4 negligent interference with prospective advantage claims may be
5 brought under New Jersey law. See Eaton v. Tosti, Civ. No. 09-
6 5248, 2010 WL 2483318, at *9 (D.N.J. June 4, 2010) (citing
7 People Express Airlines Inc. v. Consol. Rail Corp., 100 N.J.
8 246, 263 (1985)); Reed Elsevier, Inc. v. Inherent.com, Inc.,
9 Civ. No. 05-4048, 2006 WL 3827414, at *7 (D.N.J. Dec. 27, 2006)
10 (citing People Express Airlines, 100 N.J. at 263). The People
11 Express Airlines court, however, only held that purely economic
12 loss caused by negligence is compensable in tort, not that there
13 is a cause of action for negligent interference. See People
14 Express Airlines, 100 N.J. at 263.

15 The vast majority of New Jersey precedent instead
16 discusses claims for tortious interference, as opposed to
17 intentional or negligent interference. See, e.g., Printing
18 Mart, 116 N.J. at 751; Cargill, 706 F. Supp. 2d at 575; Jenkins,
19 306 N.J. Super. at 265. These decisions suggest that in order
20 to state a claim for tortious interference, the plaintiff must
21 demonstrate that the defendant acted with malice. See Cargill,
22 706 F. Supp. 2d at 575. Malice is traditionally not a required
23 element of a negligent interference claim, thus, these cases
24 suggest that plaintiffs may not bring a claim for negligent
25

26 ³⁶ It is interesting to note that when All Professional
27 answered the complaint that Century 21 filed in New Jersey state
28 court, All Professional's counterclaim alleged a cause of action
for tortious interference and not intentional or negligent
interference.

1 interference under New Jersey law. Given that the overwhelming
2 majority of New Jersey cases only discuss claims for tortious
3 interference, this court finds that there is no cause of action
4 under New Jersey law for negligent interference with business
5 advantage.

6 Even if the court were to find that All Professional
7 could bring a claim for negligent interference under New Jersey
8 law, neither of the New Jersey cases applying the claim suggest
9 what the elements of negligent interference would be. Instead,
10 both cases quote language from People Express Airlines
11 discussing the duty of care that a defendant owes to a
12 plaintiff. See Eaton, 2010 WL 2483318, at *9 (citing People
13 Express Airlines, 100 N.J. at 263); Reed Elsevier, 2006 WL
14 3827414, at *7 (citing People Express Airlines, 100 N.J. at
15 263). The court would therefore apply the four part test from New
16 Jersey's intentional interference claim, with the exception that under
17 the second element -- intentional interference without justification -
18 - All Professional would need only show that Century 21's interference
19 was negligent. A showing of negligence further requires All
20 Professional to demonstrate that Century 21 violated a duty of care
21 that it owed to All Professional. See People Express Airlines, 100
22 N.J. at 263.

23 In support of its claim, All Professional merely asserts
24 the same laundry list of reasons why it believes that Century 21's
25 conduct was wrongful. All Professional does not discuss what duties
26 Century 21 owed to it or how Century 21's actions or inactions
27 constituted a breach of this duty (but not a breach of contract).
28 Century 21's termination of All Professional's franchises may have

1 interfered with its business interests, but the court has already held
2 that the termination was proper and not wrongful. All Professional's
3 other claims largely stem from complaints regarding Century 21's
4 inaction, however All Professional has not suggested that Century 21
5 had a duty to act. All Professional fails to raise material facts
6 establishing a claim for negligent interference.

7 Accordingly, the court will grant Century 21's motion for
8 summary adjudication as to All Professional's claim for negligent
9 interference with business advantage.

10 6. Violation of Franchise Investment Laws

11 Finally, All Professional alleges that Century 21 violated
12 California's Franchise Investment Law, Cal. Bus. & Prof. Code § 20000,
13 et seq., and Hawaii's Franchise Investment Law, Haw. Rev. Stat.
14 § 482(E), by terminating the franchise agreements without cause. As
15 an initial matter, application of either California's or Hawaii's
16 statutory franchise provisions is inappropriate given the franchise
17 agreements' valid New Jersey choice-of-law provision. Even if
18 consideration of All Professional's claim were proper, the court has
19 rejected All Professional's allegation that Century 21 lacked good
20 cause to terminate its franchises. Accordingly, the court will grant
21 Century 21's motion for summary adjudication as to All Professional's
22 claim for violation of franchise investment laws.

23 IT IS THEREFORE ORDERED that:

24 (1) Century 21's motion for summary adjudication of its
25 claim for breach of contract be, and the same hereby is, GRANTED IN
26 PART with respect to Century 21's claim for breach of contract, actual
27 damages totaling \$195,454.90, and future lost profits totaling
28 \$575,001.57, and DENIED IN PART with respect to Century 21's request

1 for \$1,500.00 in actual damages;

2 (2) Century 21's motion for summary adjudication of its
3 claim for breach of guaranty be, and the same hereby is, GRANTED;

4 (3) Century 21's motion for summary adjudication of its
5 claims for trademark infringement and unfair competition be, and the
6 same hereby is, GRANTED and Century 21 is awarded treble damages in
7 the amount of \$86,022.00;

8 (4) Century 21's motion for summary adjudication of all of
9 All Professional and the Wrights' claims be, and the same hereby is,
10 GRANTED; and

11 (5) Steve Wright, Carol Wright, and All Professional are
12 HEREBY PERMANENTLY ENJOINED from further unauthorized use of Century
13 21's Marks, as defined in the franchise agreements.

14 This matter shall remain on calendar for a pretrial
15 conference on September 17, 2012, and bench trial on October 30, 2012,
16 on Century 21's remaining claims, including Century 21's \$1,500.00
17 damages request for breach of contract. If Century 21 files a written
18 statement within 15 days from the date of this Order, dismissing its
19 remaining claims and agreeing to accept judgment in accordance with
20 this Order, the court will vacate the pretrial conference and trial
21 dates enter final judgment in accordance with this Order.

22 DATED: August 7, 2012

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24 

25 WILLIAM B. SHUBB
26 UNITED STATES DISTRICT JUDGE
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