IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALEJANDRO JUAREZ, MARIA JUAREZ, LUIS A. ROMERO and MARIA PORTILLO, individually and on behalf of all others similarly situated, Plaintiffs, v. JANI-KING OF CALIFORNIA, INC., a Texas corporation, JANI-KING, INC., a Texas corporation, JANI-KING INTERNATIONAL, INC., a Texas corporation, and DOES 1 through 20, inclusive, Defendants.	Case No. 09-3495 SC ORDER RE: DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

Before the Court are two motions for summary judgment brought by Defendants Jani-King of California, Inc., Jani-King, Inc., and Jani-King International, Inc. (collectively, "Jani-King"). ECF No. 149 ("MSJ"). First, Jani-King moves for summary judgment on all claims brought by Plaintiffs Alejandro and Maria Juarez ("the Juarezes") and Maria Portillo ("Portillo") (collectively, "Plaintiffs"). Second, Jani-King moves for partial summary judgment on its counterclaims against the Juarezes. Plaintiffs filed an Opposition, and Jani-King filed a Reply. ECF Nos. 159

("Opp'n"), 164 ("Reply"). Pursuant to Civil Local Rule 7-1(b), the Court finds the Motion suitable for determination without oral argument. For the following reasons, the Court GRANTS in part and DENIES in part Jani-King's motion for summary judgment on Plaintiffs' claims and DENIES Jani-King's motion for partial summary judgment on its counterclaims.

II. BACKGROUND

A. Factual Background

The Court has already set forth much of the factual background of this case in its prior order denying class certification. ECF No. 130 ("Class Cert. Order"). Jani-King provides cleaning and janitorial services to commercial clients in California and other states. Id. at 2. It specializes in serving larger commercial clients, including commercial office buildings, healthcare facilities, and retail outlets. Id.

Jani-King's business model involves selling franchises to individuals or entities, who then perform janitorial work for Jani-King's clients. Id. Jani-King claims to have more than twelve thousand franchisees throughout the United States. Id.

Under the franchise agreement between Jani-King and its franchisees, franchisees pay an Initial Franchise Fee and an Initial Finder's Fee. Id. Both fees are paid in installments over the life of the franchise agreement, with a down payment due on purchase. Id. In return, Jani-King must offer each franchisee a certain amount of centrally generated business -- the "Initial Business Offering" ("IBO") -- during the franchisee's "Initial Offering Period." Id. The amount of business Jani-King is

obligated to offer is proportional to the size of the Initial Finder's Fee paid by the franchisee. Id. Jani-King offers fifteen franchise plans which are identical in all respects except the amount of initial investment required by the franchisee and the amount of centrally generated business promised by Jani-King. Id. These franchise plans range in cost from $8,600 to $46,500. Id. at 2-3.

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

In addition to centralized bidding, Jani-King centrally performs accounting, data management, and franchise training. Id. As a franchiser, Jani-King is subject to California's franchise regulations, as well as the regulations of other states. It must provide each prospective franchisee with a Franchise Disclosure Document ("FDD") disclosing, among other things, its litigation history, its business experience, the fees the franchisee is required to pay under the agreement, and the estimated total investment that the franchisee must make to open the franchise.

Cal. Corp. Code § 31114; Cal. Code. Regs. tit. X, § 310.114.1.

Plaintiffs in this case are four individuals who purchased franchises from Jani-King and have performed janitorial work under the Jani-King franchise agreement. Id. Plaintiffs are Spanish speakers and have limited proficiency in speaking or reading English. The Juarezes jointly purchased a Plan "D" franchise for $13,500 in May 2005. Id. Portillo and Luis A. Romero ("Romero") both purchased Plan "C" franchises for $12,000. Id. at 4. The Juarezes and Portillo have testified that they used employees to perform cleaning work on many of their accounts. See JK Ex. 5 at 89-91, 94-97, 104; Ex. 6 at 111-13; Ex. 7 at 57-59.[1] The Juarezes and Portillo also operated their own independent cleaning businesses while they operated their Jani-King franchise. The Juarezes founded Nano's Janitor ("Nano's") in 2007, and Portillo owned Tidy Maids for several years before she bought her Jani-King franchise. JK Ex. 20; Ex. 9 ("A. Juarez 2nd Dep.") at 55-72; Ex. 7 at 10-13; 57-59.

B. Procedural Background

This action was initially filed as a putative class action in California Superior Court and was removed to federal court by Jani-King on July 30, 2009. ECF No. 1. The Court granted Jani-King's motion to dismiss certain claims in the Initial Complaint on

[1] Eileen Hunter ("Hunter"), Jani-King's attorney, submitted two declarations in support of Jani-King's motions for summary judgment. ECF Nos. 149-2 ("Hunter Decl."); 164-2 ("Hunter Supp. Decl."). Exhibit numbers 1 through 37 were attached to the Hunter Declaration and exhibit numbers 38 through 50 were attached to the Hunter Supplemental Declaration (hereinafter, "JK Exs. 1-50"). Shannon Liss-Riordan ("Liss Riordan"), Plaintiffs' attorney, submitted a declaration in opposition to Jani-King's motion. ECF No. 157 ("Liss-Riordan Decl."). Forty-nine exhibits were attached to the Liss-Riordan Declaration (hereinafter, "Pls.' Exs. 1-49").

October 5, 2009. ECF No. 25. On November 4, 2009, Plaintiffs filed their FAC, which Jani-King answered. ECF Nos. 32 ("FAC"), 35 ("Answer").

The FAC alleges fourteen causes of action: (1) & (2) violations of California Corporations Code §§ 31201, 31202; (3) & (4) deceit by intentional misrepresentation and concealment; (5) negligent misrepresentation, (6) breach of contract; (7) breach of the implied covenant of good faith and fair dealing ("breach of the implied covenant"); (8) failure to pay overtime in wages; (9) failure to pay minimum wage for all hours worked; (10) failure to provide accurate itemized wage statements; (11) failure to indemnify employees for expenses; (12) unlawful deductions for wages; (13) compelling employees to patronize employer; (14) unfair competition in violation of California Business and Professions Code § 17200.

On July 8, 2010, Jani-King sought leave from the Court to file a counterclaim against the Juarezes, which the Court granted. ECF Nos. 47, 112. In its counterclaim, Jani-King alleges that, without first seeking termination of their Jani-King franchise, the Juarezes formed Nano's and induced Jani-King customers to terminate their cleaning agreements and transfer their business to the competing firm. ECF No. 115 ("Countercl."). Jani-King brings action for (1) breach of contract, (2) tortious interference with contract, and (3) tortious interference with prospective economic advantage. Id.

The Court denied Plaintiffs' amended motion for class certification on March 4, 2011 and ordered that the case proceed as an action on behalf of the Juarezes, Portillo, and Romero. ECF No.

130 ("Class Cert. Order"). On September 27, 2011, Romero and Jani-King stipulated to the entry of judgment against Jani-King and in favor of Romero in the amount of $50,000. ECF No. 148.

Jani-King now moves for summary judgment on all fourteen claims brought by the remaining plaintiffs. Jani-King argues that it is entitled to summary judgment on Plaintiffs' labor code claims because Plaintiffs are independent contractors, not employees. MSJ at 4-5. As to Plaintiffs' contract and fraud-based claims, Jani-King argues that it disclosed all required information and fulfilled its obligations under the franchise agreements. Id. at 8-22. Jani-King also moves for partial summary judgment on its contract counterclaim against the Juarezes because the Juarezes purportedly used Nano's to siphon business away from Jani-King in violation of the franchise agreement. Id. at 23-24.

III. LEGAL STANDARD

Entry of summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Summary judgment should be granted if the evidence would require a directed verdict for the moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251 (1986). Thus, "Rule 56[] mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his

favor." Anderson, 477 U.S. at 255. However, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Id. at 252. "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." Scott v. Harris, 550 U.S. 372, 380 (2007). "Where the moving party will have the burden of proof on an issue at trial, the movant must affirmatively demonstrate that no reasonable trier of fact could find other than for the movant." Dias v. Nationwide Life Ins. Co., 700 F. Supp. 2d 1204, 1214 (E.D. Cal. 2010). "Where the non-moving party will have the burden of proof on an issue at trial, the movant may prevail by presenting evidence that negates an essential element of the non-moving party's claim or by merely pointing out that there is an absence of evidence to support an essential element of the non-moving party's claim." Id.

IV. DISCUSSION

A. Plaintiffs' Labor Code Claims (Claims 8-13)

The legal theory underlying Plaintiffs' labor code claims (claims 8-13) is that Jani-King's common policies and practices so tightly controlled the franchisees' actions as to create an employer-employee relationship between Jani-King and Plaintiffs. Jani-King argues that no trial is required to decide these labor claims because the undisputed facts show that Plaintiffs were independent contractors. The Court agrees.

In California, "[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." S. G. Borello & Sons, Inc. v. Department of Indus. Relations, 48 Cal. 3d 341, 350 (Cal. 1989) (internal quotations and citations omitted). While the principal's right to control is the most important consideration, California courts consider a number of additional factors, including: the right of the principal to discharge at will, without cause; whether the one performing services is engaged in a distinct occupation or business; whether the work is usually done under the direction of the principal; whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; the length of time for which the services are to be performed; the method of payment; whether the work is a part of the regular business of the principal; and whether the parties believe they are creating an employer-employee relationship. Id. at 351.

In most cases, "once a plaintiff comes forward with evidence that he provided services for an employer, the employee has established a prima facie case that the relationship was one of employer/employee." Narayan v. EGL, Inc., 616 F.3d 895, 900 (9th Cir. 2010) (applying California law). However, this presumption does not apply in the franchise context. A franchisee must show that the franchisor exercised "control beyond that necessary to protect and maintain its interest in its trademark, trade name, and good will" to establish a prima facie case of an employer-employee relationship. Cislaw v. Southland Corp., 4 Cal. App. 4th 1284,

1296 (Cal. Ct. App. 1992).[2]

The Court finds that Jani-King did not exercise sufficient control over Plaintiffs to render them employees. Plaintiffs had the discretion to hire, fire, and supervise their employees, as well as determine the amount and manner of their pay. See JK Ex. 5 21-26, 89-108; Ex. 7 at 10-13, 60-61, 65-66. Plaintiffs had the contractual right to decline accounts and, in practice, they did so. JK Ex. 1 at 7506; Ex. 5 at 101; Ex. 7 at 82-89. Jani-King could not terminate Plaintiffs' franchise without cause. See Cal. Bus. & Prof. Code. § 20020. Plaintiffs purchased their own cleaning supplies and equipment. JK Ex. 5 at 116-19; Ex. 7 at 77-80. Plaintiffs could bid their own accounts and sell their businesses. See JK Ex. 6 at 114-115; 148-149. Plaintiffs decided when to service certain accounts, subject to timeframes set forth by their clients. JK Ex. 5 at 88-89; Ex. 7 at 126-27. Instead of an hourly wage, Plaintiffs' compensation came in the form of gross revenues, less fees paid to Jani-King. JK Ex. 5 at 126-127; Ex. 7 at 112-13. Finally, Plaintiffs' franchise agreements expressly state that franchisees are independent contractors. JK Ex. 3 § 12.7; Ex. 4 § 12.7.

As Plaintiffs point out, Jani-King imposed a number of controls on franchisees. See Opp'n at 7-11. However, these controls were no more than necessary to protect Jani-King's trademark, trade name, and good will and, accordingly, did not create an employer-employee relationship between Jani-King and

[2] Plaintiffs argue that Cislaw is inapposite and that the Court should instead apply the standard enunciated in Narayan. Opp'n at 4-6. This argument was addressed and rejected in the Court's prior order denying class certification. See Class Cert. Order at 18-23.

Plaintiffs. For example, to protect its customer relationships, Jani-King retains sole ownership of all contracts with cleaning clients. See Pls.' Ex. 9 § 14.9.2. While all contracts for provision of services are drafted by Jani-King, id., franchise owners may "freely set [their] own prices for services and products . . . provided such actions do not affect the business of the franchisor," id. § 12.1. Jani-King also protects its goodwill by retaining the power to terminate a franchisee's right to service a particular client when the franchisee fails to comply with Jani-King's policies and procedures. Id. § 4.17.2. Jani-King performs billing and accounting for franchisees' cleaning services to maintain consistency across the franchise. Id. § 4.7. There is no evidence that this practice limited the business opportunities available to franchisees. Jani-King also communicated directly with some of Plaintiffs' clients to address complaints and ensure customer satisfaction.[3] Pls.' Ex. 6 at 90, 140-141; Ex. 7 at 95-96.

Plaintiffs make much of the fact that Jani-King collected payments directly from customers and then remitted "what resembles a paycheck to workers." Opp'n at 8. Regardless of how payments were collected and distributed, it remains undisputed that Plaintiffs were entitled to the revenues generated by their franchises, less franchise fees. Plaintiffs also argue that "[w]orkers are not free to choose their own clients; they may only accept or reject a proposed assignment." Opp'n at 7. Plaintiffs offer no facts to support this conclusion and their own deposition

[3] Jani-King did not have a monopoly on such communications, Plaintiffs often talked directly with clients about their accounts. See JK Ex. 6 at 41; Ex. 7 at 85-87.

testimony indicates that they were permitted and encouraged to seek out and bid their own commercial cleaning accounts, independent of Jani-King's sales staff. See JK Ex. 6 at 148-49; Ex. 7 at 84-89.

Plaintiffs have failed to raise a triable issue that Jani-King exercised control beyond that necessary to protect and maintain its interest in its trademark, trade name, and good will. Accordingly, the Court GRANTS Jani-King's motion for summary judgment with respect to Plaintiffs' labor code claims.

B. Plaintiffs' Fraud and CFIL Claims (Claims 1-5)

Jani-King argues that Plaintiffs claims for fraud and violations of the California Franchise Investment Law ("CFIL") fail because (1) they are time-barred; and (2) Plaintiffs could not have reasonably relied on Jani-King's alleged misrepresentations. The Court agrees.

Plaintiffs' claims for fraud and CFIL violations are predicated on nine categories of fraudulent actions. Specifically, Plaintiffs allege that Jani-King: (1) made false earnings promises; (2) misrepresented the amount of work available for franchisees; (3) misrepresented the geographic location of available accounts; (4) failed to fully disclose Jani-King's fees and costs; (5) failed to provide Plaintiffs with the Uniform Franchise Offering Circular ("UFOC") before they signed their franchise agreements; (6) misrepresented that Plaintiffs' franchise down-payment was the exclusive purchase price; (7) failed to disclose Plaintiffs' right to seek a refund if their franchise failed to secure a certain amount of business within the "Initial Offering Period"; (8) misrepresented that Plaintiffs were required to purchase supplies from Cole Supplies, which is owned by Jani-King; and (9) failed to

provide Plaintiffs with Spanish language translations of key documents, including their franchise agreements.

As Defendants argue, these alleged omissions and oral misrepresentations are directly contradicted by written agreements received and signed by Plaintiffs. Accordingly, evidence of these misrepresentations is barred by the parol evidence rule. See Duncan v. McCaffrey Grp., Inc., 200 Cal. App. 4th 346, 369 (Cal. Ct. App. 2011) ("[A]n integrated contract establishes the terms of the agreement between the parties, and evidence suggesting the terms are other than those stated in the agreement is irrelevant."). Plaintiffs argue that, under the fraud exception to the parol evidence rule, they are permitted to introduce evidence of oral promises to show that their agreements with Jani-King were induced by fraud. Opp'n at 11-13. However, the fraud exception does not apply where, as here, the alleged oral promises directly contradict the terms of a written agreement. See Cobbs v. Cobbs, 53 Cal. App. 2d 780, 784 (Cal. Ct. App. 1942). To be admissible, parol evidence "must tend to establish some independent fact or representation, some fraud in the procurement of the instrument or some breach of confidence concerning its use, and not a promise directly at variance with the promise of the writing."[4] Bank of Am. Assn. v. Pendergrass, 4 Cal. 2d 258, 263 (Cal. 1935).

Specifically, the omissions and oral misrepresentations alleged by Plaintiffs are contradicted by the Franchise Agreement, UFOC, and various other documents signed by Plaintiffs. The

[4] "This interpretation has been widely criticized, but has never been overruled." Scott v. Minuteman Press Int'l, No. 94-15140, 1995 U.S. App. LEXIS 30130 (9th Cir. Oct. 13, 1995).

Franchise Agreement included terms concerning profits and earnings, the down-payment and total purchase price, the geographic location of accounts, fees and costs, and refund rights, among other things. See JK Ex. 3 at 1, §§ 4.3, 6.1.1, 6.5, 6.8; Ex. 4 §§ 6.1.1, 6.5., 6.8; Ex. 11 at 45. When Plaintiffs purchased their franchises, they signed a written form acknowledging that they had not received any representation regarding any "sales, income, or profit levels." JK Ex. 10; Ex 11. Plaintiffs also signed written documents acknowledging that they received the UFOC before signing their franchise agreements and Portillo subsequently testified that she received the UFOC.[5] Id.; JK Ex. 7 at 42-43. The UFOC expressly states that Jani-King does not promise any amount of profits or earnings. JK Ex. 1 at Item 19; 2 at Item 19. The UFOC also states that franchise owners "may purchase" supplies and equipment from Jani-King, but they have "no obligation to purchase or lease" required items "from any designated supplier." Id. at Item 8. Pre-contractual oral representations concerning any of these terms are inadmissible. Accordingly, Plaintiffs' statutory fraud claims must fail.

Plaintiffs' statutory fraud claims are also time barred as Plaintiffs should have discovered the truth or falsity of most of the alleged misrepresentations before the statute of limitations had run. The limitations period for an "untrue statement" under CFIL is two years after the violation or one year "after the

[5] Alejandro Juarez testified that Jani-King gave him a "big white book to read over the rules" during his first meeting at the Jani-King office, but does not remember whether that book was the UFOC. JK Ex. 9 at 137-38. In light of his testimony and his signed acknowledgment, the Court finds there is no issue of triable fact as to whether the Juarezes received the UFOC before signing the franchise agreement.

discovery by the plaintiff of the facts constituting such violation," whichever is sooner. Cal. Corp. Code. §§ 31201, 31304. For willfully untrue statements, the period is four years after the violation or one year after its discovery, whichever is sooner. Id. §§ 31300, 31303. The limitations period for Plaintiffs' remaining statutory fraud claims is three years from discovery. Cal. Civ. Proc. Code § 338. "The statute commences to run only after one has notice of circumstances sufficient to make a reasonably prudent person suspicious of fraud, thus putting him on inquiry." Briskin v. Ernst & Ernst, 589 F.2d 1363, 1367 (9th Cir. 1978) (quoting Schaefer v. Berinstein, 140 Cal. App. 2d 278, 294-95 (Cal Ct. App. 1956)).

Plaintiffs' suit was not filed until June 22, 2009, and Plaintiffs should have discovered the facts constituting the violation soon after they opened their franchises in 2005. During that time, they had "notice of circumstances sufficient to make a reasonably prudent person suspicious" based on their earnings, the amount of work made available to them, the geographic location of their clients, and the fees and costs charged by Jani-King. These are fundamental aspects of Plaintiffs' businesses. Accordingly, it is implausible that Plaintiffs were unaware of these facts before the statute of limitations had run.[6]

[6] Plaintiffs argue that they were unaware of Jani-King's misrepresentations until after this suit was filed. This argument is unpersuasive. Opp'n at 14-15. First, the relevant inquiry is not whether Plaintiffs had knowledge of the fraud, but whether a reasonably prudent person would have been put on notice. Second, the deposition testimony relied on by Plaintiffs is too vague to support their assertion. See Pls.' Ex. 5 at 121; Ex. 7 at 90; Ex. 21 at 170-73. Third, Plaintiffs concede in their opposition brief that they were aware of some of the alleged misrepresentations before the statute had run. See, e.g., Opp'n at 14 ("Mr. and Ms.

For the foregoing reasons, the Court GRANTS Jani-King's motion for summary judgment with respect to Plaintiff's causes of action for fraud and violations of CFIL.

C. Plaintiffs' Claim for Breach of Contract (Claim 6)

In the FAC, Plaintiffs allege that Jani-King breached its Franchise Agreements with the Juarezes and Portillo in a variety of ways. See FAC ¶¶ 74, 81, 119, 112, 182. In responding to Jani-King's motion for summary judgment, Plaintiffs appear to abandon all of these claims but one -- that Jani-King failed to meet its IBO requirement and provide Plaintiffs with refunds required by the contract. See Opp'n at 15-16. The Court finds that triable issues of fact exist as to Portillo's claim for breach, but Jani-King is entitled to summary judgment on the Juarez's claim for breach.

Under the franchise agreement, Jani-King was required to offer Portillo $2,000 in business during a 120-day initial offering period, which began on May 4, 2005. JK Ex. 3 at 1. If Jani-King failed to meet its IBO, it was required to refund three times the amount of the shortfall. Id. § 4.3.3. Jani-King concedes that, considering the facts in a light most favorable to Portillo, it satisfied only $686.29 of Portillo's $2000 IBO during the initial offering period. MSJ at 16. Jani-King also concedes that Portillo is entitled to $3,941 -- three times the unsatisfied amount.[7] Id.

Juarez complained to [Jani-King] about the fact that documents were not translated into Spanish . . . . [Portillo] did not know, until after she attended training, that more fees were to be charged.").

[7] Plaintiffs argue that there are factual disputes about the exact amounts Portillo would be owed under the refund provision. Opp'n at 16. Portillo disputes which accounts Jani-King offered and whether those accounts were actually offered to satisfy the IBO. Id. In light of these and other factual disputes, Portillo may be entitled to more or less than $3,941.

In its Motion, Jani-King offers, apparently for the first time, to pay the refund amount of $3,941, in compliance with the Franchise Agreement. Id.

Jani-King argues that it is not liable for breach because Portillo never requested a refund and because the Franchise Agreement does not specify that a refund must be made within a specified time period. Id. The Court disagrees. First, the Franchise Agreement does not require that Portillo request a refund in order to trigger a breach. Second, Jani-King's delay is sufficient to constitute a breach. Jani-King failed to meet its IBO as of September 2005 and, over six years later, it has yet to provide Portillo with a refund. While the Franchise Agreement is silent as to the time-frame for refunds, it is highly unlikely that either party contemplated a six-year period at the time of contract formation. Third, in light of Jani-King's delay, it is uncertain that Portillo would ever receive her refund absent Court action. Finally, if Portillo was to prevail on her contract claim at trial, she may be entitled to additional relief, including interest and costs.

Plaintiffs also claim that Jani-King fell $190 short of meeting its $3000 IBO requirement for the Juarezes. Opp'n at 16. The Court finds Plaintiffs' argument unpersuasive. Maria Juarez testified that Jani-King met its initial business obligation and Alejandro Juarez signed a statement acknowledging the same.[8] JK

[8] Jani-King also argues that Plaintiff's calculation of Jani-King's IBO is based on mistaken initial business period. Reply at 11. The Franchise Agreement provides that the initial business period begins on the date after the franchisee (1) obtains all required equipment, (2) completes all required training, and (3) obtains the required insurance. JK Ex. 4 § 6.1.1. Plaintiffs contend that the

Ex. 9 at 140-41; Ex. 45. In light of these facts, Plaintiffs cannot plausibly contend that Jani-King failed to satisfy its IBO requirement for the Juarezes.

For the foregoing reasons, the Court DENIES in part Jani-King's motion for summary judgment with respect to Plaintiffs' breach of contract claim. Plaintiffs' claim that Jani-King breached the Franchise Agreement by failing to provide Portillo with an IBO refund may proceed to trial. Jani-King's motion for summary judgment on Plaintiffs' breach of contract claim is GRANTED in all other respects.

D. Plaintiffs' Claims for Breach of the Implied Covenant (Claim 7)

Plaintiffs assert that Jani-King breached the implied covenant by, among other things, offering Plaintiffs accounts that generate little or no income due to underbidding. Opp'n at 17-18. The Court agrees and finds that Plaintiffs' claim for breach of the implied covenant may proceed to trial.

"There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." Kransco v. American Empire Surplus Lines Ins. Co., 23 Cal. 4th 390, 400 (2000) (quotations omitted). This covenant exists to "prevent one contracting party from unfairly frustrating

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initial business period began to run after the Juarezes completed their training on June 23, 2005. Opp'n at 16. Jani-King responds that the initial business period did not commence until one month later, when the Juarezes obtained all required equipment. Reply at 11 (citing JK Ex. 46). It is unclear from the documentation submitted by the parties when the initial business period actually commenced.

the other party's right to receive the benefits of the agreement actually made." Guz v. Bechtel Nat'l, Inc., 24 Cal. 4th 317, 349-50 (2000). However, "the scope of the conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract." Carma Developers v. Marathon Dev. Cal., Inc., 2 Cal. 4th 342, 373 (1992). The implied covenant may not be read "to prohibit a party from doing that which is expressly permitted by an agreement." Id. at 374.

In the instant action, there is a triable issue of fact as to whether Jani-King breached the implied covenant by underbidding accounts serviced by Plaintiffs. The Jani-King policies and procedures manual shows that Jani-King exerted a substantial amount of control over bids made to clients. See Pls.' Ex. 31 at 8183-84. Plaintiffs have testified that a significant number of these bids were too low and that Jani-King often underestimated the amount of time necessary to service an account. For example, Portillo testified that she spent 24 hours per month servicing a Jani-King account which only paid $86 per month after Jani-King fees were deducted. Pls.' Ex. 7 at 102-04. Portillo also testified that another account took significantly longer to service than Jani-King had represented, id. at 94-95, that she was forced to turn down several accounts because they were underbid, id. at 88-89, and that Jani-King underbid almost all of the accounts she serviced, id. at 98. The Juarezes offered similar testimony. Alejandro Juarez stated that Jani-King miscalculated the time it would take to clean "the vast majority of accounts" and that only "three or four" of his accounts were profitable. Pls. Ex. 21 at 166. Maria Juarez stated that some of her accounts paid only $5 to $6 per hour.

Pls.' Ex. 6 at 132.

Jani-King argues that this evidence fails to show that Jani-King's bids fell below an "objective standard" that would identify a properly bid account. Reply at 12. The Court disagrees. Plaintiffs' testimony suggests that Jani-King often underestimated the time it would take to service an account and that Plaintiffs serviced certain Jani-King accounts for $3.58 to $6 per hour. This evidence, which Defendants do not dispute, is sufficient to create a genuine issue of material fact for trial.

Jani-King also argues that Plaintiff's claim for breach of the implied covenant fails because "Plaintiffs identify no contractual provisions that were frustrated by Jani-King's bidding practices[.]" MSJ at 17. The Court is unaware of any authority that would require a plaintiff to identify "contractual provisions that were frustrated" in order to state a claim for breach of the implied covenant. As Jani-King states, "the [implied] covenant prohibits one party from injuring the other's right to receive 'the benefits of the agreement.'" Id. (quoting Barrous v. BP P.L.C., No. 10-CV-2944-LHK, 2010 U.S. Dist. LEXIS 108933, at *15 (N.D. Cal. Oct. 13, 2010)). In the instant action, Plaintiffs assert that Jani-King interfered with their right to receive the benefits of the Franchise Agreement by offering them unprofitable accounts. This is sufficient to state a claim for breach of the implied covenant.

Accordingly, the Court DENIES Jani-King's motion for summary judgment with respect to Plaintiffs' claim for breach of the implied covenant.

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E. Plaintiffs' UCL Claim (Claim 14)

The UCL prohibits businesses from engaging in "any [1] unlawful, [2] unfair or [3] fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. Plaintiffs bring claims under all three prongs of the UCL. The Court addresses each in turn.

1. Unlawful Practices

The parties agree that Plaintiffs' claims under the unlawful prong of the UCL rise and fall with Plaintiffs' labor code, statutory fraud, and contract claims, addressed in Sections IV.A-D above. See MSJ at 21; Opp'n at 20. Accordingly, Plaintiffs' UCL claim for unlawful acts fails to the extent it is derivative of Plaintiffs' labor code and statutory fraud claims, but may proceed to trial to the extent it is derivative of Plaintiffs' undisturbed claims for breach of contract and breach of the implied covenant.

2. Fraudulent Practices

Plaintiffs now assert that their claim for fraudulent practices under the UCL is predicated on Jani-King's "practice of not providing translations of documents - even when there is repeated, ongoing need for such translations - and of having [Jani-King] agents 'describe' the contents of these documents in a cursory, incomplete, and misleading manner[.]" Opp'n at 21. As Defendants point out, Plaintiffs' position is inconsistent with California law. "The care and diligence of a prudent man in the transaction of his business would demand an examination of the instrument before signing, either by himself or by someone for him in whom he had the right to place confidence." Hawkins v. Hawkins, 50 Cal. 558, 560 (1875). The California legislature has not required franchisors to provide translations of disclosure

documents or agreements to prospective franchisees. See generally Cal. Corp. Code § 31000 et seq. Accordingly, the Court declines to impose such a requirement on Jani-King.

3. Unfair Business Practices

In the FAC, Plaintiffs allege that Jani-King engaged in eight unfair business practices. FAC ¶ 24. The Court has already found that no triable issues of fact exist as to the five unfair business practices alleged in paragraphs 24c and 24e through 24h of the FAC. Specifically, the Court has already addressed and rejected Plaintiffs' contention that Jani-King violated the California Labor Code by improperly classifying Plaintiffs as independent contractors rather than employees. See Section IV.A supra. The Court has also addressed and rejected Plaintiffs' contention that Jani-King was required to provide them with Spanish language translations of various disclosure documents. See Section IV.E.2 supra. Accordingly, these practices cannot form the basis of Plaintiff's UCL claim.

The three remaining unfair business practices alleged by Plaintiffs are: (1) Jani-King induced Plaintiffs to purchase illusory franchise contracts using high pressure sales tactics and failing to disclose material information; (2) Jani-King uses a variety of tactics to keep Plaintiffs from leaving their employment with Jani-King, including underbidding accounts, charging excessive fees, and taking accounts from Plaintiffs without notice or justification; and (3) Jani-King's franchise agreements are filled with unconscionable terms. FAC ¶¶ 24a, b, d. Jani-King's motion for summary judgment does not coherently address the first of these allegedly unfair business practices. With respect to the second

set of practices, the Court has already found that triable issues of fact exist as to whether Jani-King underbid accounts. See Section IV.D supra. Accordingly, Plaintiffs' UCL claim for unfair practices may proceed to trial to the extent it is based on these unfair practices.

With respect to the third practice, Plaintiffs claim that the Franchise Agreement is unconscionable because of its "unfair" noncompetition provisions, "oppressive" and "confusing" IBO refund provision, and "excessive" and "unfair" fee provisions. Opp'n at 22-23. As discussed in Section IV.F infra, the noncompetition provision is overly restrictive and contrary to California law. Accordingly, Plaintiffs' UCL claim for unfair practices may proceed to trial with respect to this claim.[9] However, Plaintiffs may not state a claim for unfair practices based on the Franchise Agreement's IBO refund and fee provisions. Plaintiffs have cited no authority to suggest that these provisions constitute unfair practices under the UCL. Further, Plaintiffs could have reasonably avoided the alleged injuries by not entering the Franchise Agreement. See Davis v. Ford Motor Credit Co. LLC, 179 Cal. App. 4th 581, 597-98 (Cal. Ct. App. 2009).

For the foregoing reasons, the Court GRANTS in part and DENIES in part Jani-King's motion for summary judgment with respect to Plaintiffs' UCL claims.

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[9] Jani-King argues that Plaintiffs cannot base their unfairness claim on the noncompetition provision because Plaintiffs have introduced no evidence that the non-compete provision was enforced. Reply at 14. This argument lacks merit as Jani-King has filed a counterclaim to enforce the noncompetition provision against the Juarezes. Countercl. ¶ 6.

F. Jani-King's Counterclaim for Breach of Contract

Jani-King argues that the Juarezes violated their Franchise Agreement by secretly creating their own cleaning company, Nano's, and using it to siphon business away from Jani-King. MSJ at 23.

Jani-King's argument turns on the noncompetition provisions of the Franchise agreement. The Franchise Agreement provides, in relevant part:

> Franchisee . . . agrees during the term of this Agreement [20 years] not to engage in or have any financial interest in, either as an officer, agent, stockholder, employee, director, owner, or partner, any other business which performs cleaning management services franchising or contracting cleaning management sales or any related business anywhere, except as otherwise approved in writing by Franchisor.

Pls.' Ex. 9 § 4.14.1. In the event that the franchise is sold, assigned, or terminated, the non-competition provision remains in force for two years within the territory covered by the agreements and for one year in any other territory covered by a Jani-King Franchise agreement. Id. § 4.14.2. The Franchise agreement also provides that the Juarezes would pay Jani-King a fee equal to ten percent of monthly gross revenues by the fifth day of each month. Id. § 4.5.1. Gross revenues are defined as:

> All revenue invoiced by anyone for any contract services . . . and any other revenue related to or derived from the provision of any cleaning and maintenance services . . . in connection with the conduct and operation of Franchisee's business or otherwise directly or indirectly . . . performed . . . for the benefit of you . . . regardless of the entity or business name used.

Id. (emphasis added). Owners must pay a non-reported business fee of $25 for "each day [the] Franchisee fails to report all gross revenue," and also pay the missing royalty, advertising, and

accounting fees when the hidden revenue is discovered. Id.

Jani-King contends that, under the express terms of the Franchise Agreement, it is entitled to a percentage of all revenues earned by Nano's as well as non-reported business fees of $25 per day. MSJ at 24. Jani-King points specifically to the Juarezes' deposition testimony. Id. The Juarezes admitted that they formed Nano's and that Nano's serviced at least three clients that Jani-King had bid on or that the Juarezes had first serviced as Jani-King franchise owners. See, e.g., JK Ex. 6 at 10-15; Ex. 5 at 18-29. The Juarezes also admitted not reporting revenue earned by Nano's and not sharing Nano's gross revenue with Jani-King. See JK Ex. 6 at 13, 20.

Plaintiffs do not dispute any of these facts. However, they argue that there is a triable issue of fact as to whether the noncompetition provisions in the Franchise Agreement are enforceable. The Court agrees. Noncompetition clauses are governed by California Business and Professions Code § 16600, which states: "[e]xcept as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."[10] "California courts have repeatedly held that section 16600 should be interpreted as broadly as its language reads." Scott v. Snelling & Snelling, Inc., 732 F. Supp. 1034, 1042 (N.D. Cal. 1990). Accordingly, courts applying Section 16600 have refused to enforce noncompetition clauses, regardless of whether those clauses

[10] The chapter provides exceptions for noncompetition agreements in the sale or dissolution of corporations, Cal. Bus. & Prof. Code § 16601, partnerships, id. § 16602, and limited liability corporations, id. § 16602.5.

are "reasonable." See Aussie Pet Mobile, Inc. v. Benton, NO. SACV 09-1407 AG, 2010 U.S. Dist. LEXIS 65126, *17 (C.D. Cal. June 28, 2010); Snelling, 732 F. Supp. at 1042-43. The California Supreme Court has recognized an exception to Section 16600 where a noncompetition clause is necessary to protect a franchisor's trade secrets or proprietary information. Muggill v. Reuben H. Donnelley Corp., 62 Cal. 2d 239, 242 (Cal. 1965).

Several courts have refused to enforce similar non-competition clauses in the franchise context. For example, in Aussie Pet Mobile, the Court addressed an Exclusive Relationship Clause that prohibited the franchisee from "having any direct or indirect interest as a disclosed or beneficial owner in any Similar Business located anywhere" and "from performing services for any Similar Business located anywhere." 2010 U.S. Dist. LEXIS 65126, at *18 (internal quotations omitted). The Court found that the clause was unenforceable since "[t]he broad language and lack of restrictions on the scope . . . show that the intent was not merely to protect trade secrets, but also to restrict competition." Id. at *18-19; see also Snelling, 732 F. Supp. at 1043-45 (declining to enforce a noncompetition clause in a franchise agreement since franchisee did not utilize franchisor's trade secrets).

Defendants insist that Dayton Time Lock Service, Inc. v. Silent Watchman Corp., 52 Cal. App. 3d 1 (Cal. App. 2d Dist. 1975) is controlling. MSJ at 24. The Court disagrees. In Dayton, the court found that a non-competition provision was enforceable against a franchisor during the term of the franchise agreement. 52 Cal. App. 3d at 6. Relying on federal anti-trust case law, the Court stated that "[exclusive dealing contracts] are proscribed

when it is probable that performance of the contract will foreclose competition in a substantial share of the affected line of commerce." Id. This standard is inconsistent with later court decisions directly applying Section 16600. See, e.g., Aussie Pet Mobile, 2010 U.S. Dist. LEXIS 65126, at *18; Snelling, 732 F. Supp. at 1043-45.

In the instant action, it is unclear how prohibiting Plaintiffs from having any financial interest or employment in any "contract cleaning" or "any related business" "anywhere" is necessary to protect Jani-King's trade secrets or proprietary information. Nor is it clear that the Juarezes misappropriated trade secrets in operating Nano's or in soliciting Jani-King's former clients. The non-competition provision in the Franchise Agreement effectively prevents Plaintiffs from working as janitors for any other company during (and for some time after) the term of the franchise. Even under the more lenient standard enunciated in Dayton, such restrictions may not be unenforceable.

For the foregoing reasons, the Court concludes that triable issues of fact exist as to whether the noncompetition clause in the Franchise Agreement is enforceable. Accordingly, the Court DENIES Jani-King's motion for summary judgment on its counterclaim for breach of contract. At trial, Jani-King may present additional evidence that the non-competition provision in the Franchise Agreement is necessary to protect its trade secrets or proprietary information.

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V. CONCLUSION

The Court GRANTS in part and DENIES in part Defendant Jani-King's motion for summary judgment on claims brought by Plaintiffs Alejandro and Maria Juarez and Maria Portillo. Specifically:

- The Court GRANTS Jani-King's motion for summary judgment with respect to Plaintiffs' labor code claims (claims 8-13).
- The Court GRANTS Jani-King's motion for summary judgment with respect to Plaintiffs' statutory fraud claims (claims 1-5).
- The Court GRANTS in part and DENIES in part Jani-King's motion for summary judgment with respect to Plaintiffs' claim for breach of contract (claim 6).
- The Court DENIES Jani-King's motion for summary judgment with respect to Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing (claim 7).
- The Court GRANTS in part and DENIES in part Jani-King's motion for summary judgment with respect to Plaintiffs' UCL claim (claim 14).

As to Plaintiffs' claims, the following issues may proceed to trial: (1) whether Jani-King breached the Franchise Agreement by failing to provide Portillo with an IBO refund; (2) whether Jani-King breached the implied covenant of good faith and fair dealing; (3) whether Jani-King violated the UCL by engaging in unlawful business practices; (4) whether Jani-King engaged in the actions alleged in paragraph 224a of the FAC and whether those actions constitute unfair business practices under the UCL; (5) whether Jani-King underbid accounts and took accounts away from Plaintiffs without notice or justification and whether those actions constitute unfair business practices under the UCL; and (6) whether

the non-competition provision of the Franchise Agreement constitutes an unfair business practice under the UCL.

Additionally, the Court DENIES Jani-King's motion for summary judgment on its counterclaim for breach of contract. Jani-King's counterclaims for breach of contract, tortious interference with contract, and tortious interference with prospective economic advantage may proceed to trial.

IT IS SO ORDERED, ADJUDGED, AND DECREED.

Dated: January 23, 2012

UNITED STATES DISTRICT JUDGE