1 SUPERIOR COURT OF NEW JERSEY
MORRIS COUNTY : CIVIL PART
2 DOCKET NO. MRS-L-377-02
A.D. NO.
3
4 FRANK K. COOPER REAL)
ESTATE INC, ET AL)
5)
Plaintiff,)
6) TRANSCRIPT
vs.) OF
7) PROCEEDINGS
CENDANT CORPORATION,)
8 ET ALL,)
)
9 Defendants.)
-------------------------)
10
Place: Washington & Court Sts.
11 Morristown, NJ 07963

12 Date: August 17, 2010

13 BEFORE:

14 THE HONORABLE ROBERT J. BRENNAN, J.S.C.

15 TRANSCRIPT ORDERED BY:

16 Joshua Kincanno, Esq. (KeefeBartels)

17 A P P E A R A N C E S:

18 (See attached)

19

20

21

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1 (On record)

2 THE COURT: This is Judge Brennan. Hello.

3 MR. BARTELS: Good morning, Your Honor.

4 THE COURT: Counsel on the telephone please

5 hang on and we'll have appearances entered.

6 MR. BARTELS: Okay.

7 THE COURT: This is the matter of Frank K.

8 Cooper Real Estate #1, Inc. vs. Cendant Corporation.

9 The Docket Number is MRS-L-377-02.

10 If we may first have appearances entered by

11 Counsel in the courtroom, please.

12 MR. DRACHLER: Good morning, Your Honor, Dan

13 Drachler, Zwerling, Schachter and Zwerling, for the

14 Plaintiffs.

15 MR. KINCANNON: Good morning, Your Honor,

16 Josh Kincannon from Keefe Bartels, also for the

17 Plaintiffs.

18 THE COURT: Thank you.

19 MR. LaFIURA: Dennis LaFiura from Day Pitney

20 on behalf of Defendants.

21 THE COURT: Thank you.

22 MR. BROWN: James Brown, Skadden Arps, also

23 for the Defendant.

24 THE COURT: Very well. Any other appearances

25 to be made?

1 MR. KINCANNON: He's a law clerk from my
2 office.
3 THE COURT: All right. And now if we may
4 have appearances by Counsel on the telephone, please.
5 MR. BARTELS: Yes, Your Honor, Patrick J.
6 Bartels, Keefe Bartels, for the Plaintiff.
7 THE COURT: Thank you.
8 MR. KLEIDMAN: Good morning, Your Honor Paul
9 Kleidman, Zwerling, Schachter and Zwerling, for
10 Plaintiffs as well.
11 THE COURT: Thank you. Anyone else on the
12 telephone? Counsel, please be seated, thank you.
13 MS. CAMPBELL: Good morning, Your Honor,
14 Robin Campbell and Kristen Cardoso with Adorno and
15 Yoss, Counsel for Plaintiff.
16 MR. SCHACHTER: Also Robert Schacter from
17 Zwerling, Schachter and Zwerling, Counsel for
18 Plaintiffs.
19 THE COURT: All right, thank you. All right,
20 has everyone entered an appearance then who would care
21 to? All right.
22 My apologies to Counsel and the parties for
23 the amount of time this has taken.
24 Before the Court this morning three motions
25 and a cross notice of motion and the purpose of today's

1 proceeding is for the Court to put on the record it's
2 statements of -- statement of reasons for orders that
3 will be entered on these applications.
4 The first motion was filed on January 20th of
5 2009 and that was the Defendant's notice of renewed
6 Motion to Strike the Plaintiff's class demand. On
7 February 19 of 2009, the Plaintiffs filed their Notice
8 of Cross Motion to strike the Defendant's renewed
9 Motion to Strike the class demand. On the same day the
10 Plaintiffs filed their renewed Notice of Motion for
11 Class Certification and on July 30th of 2009, the
12 Defendants filed their Notice of Motion to dismiss the
13 pre-1998 claims and all of those applications will be
14 the subject of this morning's decision and statement of
15 reasons by the Court.
16 The fourth amended complaint -- in terms of a
17 procedural background, the fourth amended complaint in
18 this matter was filed on April 6 of 2004. The original
19 complaint having been filed on January 30th of 2002.
20 In the fourth amended complaint there were four -- I'm
21 sorry, five Plaintiffs asserting that they represented
22 a class of franchisees of Defendant Century 21 as of
23 January 1st, 1995 and those who became franchisees
24 thereafter.
25 The named Defendants in the matter then, as

1 now, are Century 21 Real Estate Corporation or Century
2 21, which had been acquired in 1995 by the Defendant
3 Cendant Corporation, which had formerly been known as
4 Hospitality Franchise Systems Inc., which we'll refer
5 to as Cendant today.
6 There are three current Plaintiffs, after
7 motion practice, dismissal along the way, but at the
8 moment there are three and that would be Frank K.
9 Cooper Real Estate #1, Inc. or Cooper, Silm (phonetic)
10 Enterprises, doing business as Century 21 Property Mart
11 Inc. or Property Mart, as well as David Nichols and Kim
12 Combs Inc., doing business as Century 21 Sunland Realty
13 or Sunland.
14 These three Plaintiffs seek certification of
15 a class that has now been re-defined from the original
16 class -- proposed class that I mentioned. Redefined by
17 the Plaintiffs as follows, quote:
18 "All Century 21 franchisees who were
19 franchisees at any time during the period August 1st,
20 1995 through April 17, 2002 inclusive, and whose
21 franchise agreements contain a New Jersey choice of law
22 and a New Jersey venue and jurisdiction clause and who
23 have not executed releases which release or waive the
24 claims asserted in this litigation."
25 That would be referred to as the class.

1 "Also included in the class are those
2 franchisees whose release or waiver is a provision of a
3 franchise renewal agreement."
4 Now the class certified may be different from
5 the one proposed in the complaint in that regard.
6 "The Court has the inherent power to modify
7 the class definition, depending on facts and issues
8 that are learned through the discovery and potentially
9 resolved prior to trial."
10 Eliades vs. Wal-Mart Stores, Inc., 191 NJ 88
11 at 119, a 2007 decision of our Supreme Court.
12 On October 1st, 2004, continuing with the
13 procedural background, the Plaintiffs first move for
14 certification of the original -- originally defined
15 class, that is to say those franchisees as of January
16 1st, 1995 and thereafter, as per the fourth amended
17 complaint.
18 On January 31st, 2006, the Defendants filed
19 opposition to that motion and a cross Notice of Motion
20 to strike the class demand. On June 30 of 2006 a prior
21 Judge issued an order, entered an order denying the
22 Plaintiff's Notice of Motion for class certification
23 and also denying Defendant's Cross Notice of Motion to
24 strike the class demand, the latter of which was denied
25 as premature.

1 The -- in terms of the class certification
2 motion, the Court found that a choice of law and forum
3 selection clauses in the franchise agreements would
4 implicate the law of numerous states, as well as the
5 fora of various states and that the Plaintiffs could
6 not establish lost profits on a class wide basis as
7 that claim had been presented to the Court at that
8 time.
9 On August 1st of 2006, the Plaintiffs filed a
10 Notice of Motion for Leave to Appeal, which the
11 Defendants opposed. On August 24th of 2006, the
12 Appellate Division denied the Motion for Leave to
13 Appeal.
14 That brings us back to the current
15 applications. To -- to recap January 20th of 2009, the
16 Defendant renewed their Motion to Strike the class
17 certification. February 19 of 2009, the Plaintiff
18 filed their cross Notice of Motion to strike -- to
19 strike the Defendants' Notice of Motion to strike the
20 class demand and a renewed Notice of Motion for class
21 certification positing the redefined class that I've
22 already mentioned and offering the report of an expert,
23 Gordon Rausser on lost profits, which the Plaintiffs
24 had not previously done.
25 On July 30th of 2009, the -- again the

1 Defendants filed their Motion to Dismiss the pre-19 --
2 what they denominate or what they term the pre-1998
3 claims, which is before the Court this morning.
4 On October 23rd of 2009, the Court heard a
5 first round of oral argument, asked Counsel to return,
6 which they tried to do, I think it was January 15, but
7 it was in a cold weather month and we were stymied by a
8 snow storm and so the second round of oral argument was
9 unfortunately delayed until April 9th of this year.
10 Now in terms of the factual background,
11 according to the fourth amended complaint, and that
12 fourth amended complaint is annexed to the
13 certification of Patrick Bartels at Exhibit 1. That
14 certification was the original certification of Mr.
15 Bartels filed in support of the motion, the renewed
16 Motion for Class Certification at Exhibit -- Exhibit 1.
17 Prior to 1995, Century 21 was a franchisor of
18 real estate brokerages around the United States.
19 Pursuant to franchise agreements, franchisees, which on
20 this application are estimated to exceed 1,000
21 according to Plaintiff's brief -- original brief in
22 support of the Motion for Class Certification to page
23 39. And these franchisees, according to these
24 agreements, had the right to use certain Century 21
25 marks, trademarks and systems to marketing support and

1 to various support services, all in exchange for
2 payment of certain fees to Century 21.
3 In 1995, Cendant, then known as Hospitality
4 Franchise Systems, Inc., acquired Century 21 as a
5 wholly owned subsidiary (see paragraph 36 of the fourth
6 amended complaint).
7 These paragraph references that I give in the
8 next couple of moments will be to the fourth amended
9 complaint.
10 As part of the agreement between the two,
11 Cendant became the franchise service manager of the
12 Century 21 franchise system (paragraph 36). Also as
13 part of the acquisition, Cendant took over Century 21's
14 national advertising fund, which I will refer to as the
15 NAF, F as in Frank, a trust funded by franchisees who
16 paid in about $40,000,000 a year at that time to
17 advertise and to build the Century 21 branch (paragraph
18 38, fourth amended complaint).
19 After the acquisition, Cendant began a
20 program to purchase certain independently owned Century
21 21 regional franchisors. New and renewing franchisees
22 then entered into franchise agreements with Century 21
23 (paragraphs 39 and 41).
24 The franchise agreements provided that
25 Cendant would provide the following services to the

1 franchisees. And I think I might have mis-spoken. New
2 and renewing franchisees entered in franchise
3 agreements, I believe it was Cendant 21. And that is
4 described in paragraph 39 and 41 of the complaint.
5 There might be a typo in my notes.
6 The franchise agreements provided that
7 Cendant would provide the following services to the
8 franchisees. A, in part it's real estate brokerage
9 selling, promotional and merchandising methods and
10 techniques to the franchisees. B, maintain a staff to
11 provide assistance and services to the franchisees. C,
12 operate sales training programs including seminars and
13 conferences of special interest relating to market
14 conditions, sales motivation, sales aids, advertising
15 and financing.
16 I think I said B was maintaining the staff to
17 provide assistance and services to the franchisees. C,
18 I just read. D, establish procedures for referrals
19 between franchisees and E, contribute to the NAF, that
20 is to say again the National Advertising Fund, as
21 amount equal to 10 percent of the service fees Century
22 21 received from the franchisees. That being set forth
23 at the fourth amended complaint (paragraph 42).
24 In return for these services -- excuse me one
25 moment. In return for these services, the franchisees

1 agreed to pay a service fee, which was later called a
2 royalty fee equal to six percent of the franchisee's --
3 the individual franchisee's gross revenue and a
4 contribution to the NAF equal to two percent of their
5 gross revenue, subject to certain limitations. So the
6 total was eight percent of gross revenue.
7 The NAF was to fund advertising and public
8 relations for all of the franchisees, (paragraphs 43 to
9 45 of the fourth amended complaint), according to a
10 formula for expenditures set forth in the franchise
11 agreements (paragraph 47).
12 After acquiring Century 21, Cendant acquired
13 Coldwell Banker, a Century 21 competitor. Cendant also
14 acquired 370 Coldwell Banker real estate offices and
15 created and by 2000 fully owned the National Realty
16 Trust or NRT to own them. In 1996 Cendant acquired
17 ERA, another national franchisor of real estate
18 services and a Century 21 competitor.
19 By 2002 NRT, converted from a trust to NRT,
20 Inc., owned approximately 500 real estate offices, 85
21 percent as Coldwell Banker and the remaining as ERA.
22 That's set forth at paragraphs 50 to 69 of the fourth
23 amended complaint.
24 Through acquisition of an entity known as
25 PHH, Cendant developed a relocation service known as

1 Cendant Mobility Services or CMS and merged with CMS
2 Cendant's own Western Relocation, a network system that
3 had been used to refer new customers to Century 21
4 franchisees (paragraph 70 to 71).
5 Plaintiffs allege that Cendant redirected
6 funds and resources generated by Century 21 franchisees
7 to the benefit of Cendant's subsidiaries, such as
8 Coldwell Banker, ERA, CMS and NRT. As a result,
9 Plaintiffs allege, Century 21 lost its top ranking as
10 the leading real estate service firm in the United
11 States, dropping to sixth while NRT surged to the top.
12 As part of what the Plaintiffs allege was a
13 scheme by Cendant, Cendant diminished and redirected
14 advertising and marketing for Century 21 franchisees,
15 thus, the Plaintiffs allege, that the money the Century
16 21 franchisees paid into the NAF was used by Cendant to
17 promote other corporate interests (paragraphs 72 to
18 90).
19 Plaintiffs also allege that Cendant withdrew
20 or diminished other services to the franchisees that
21 Cendant had undertaken to provide in the franchise
22 agreements, including such things as yellow page ads,
23 recruitment, referral and sales and management training
24 programs, sales leads, thereby driving up the
25 franchisee's costs.

1 Plaintiffs also allege that Cendant degraded
2 an internal referral directory and that Cendant
3 directed most relocation business to Coldwell Banker
4 and ERA. Plaintiffs assert that Cendant, quote,
5 "destroyed, unquote, Century 21 support staff that had
6 provided administrative assistance to the franchisees,
7 (paragraphs 91 through 105).
8 The Plaintiffs allege that by using the
9 franchisees' payments of eight percent of gross revenue
10 and by reducing or eliminating resources previously
11 available. And that's the total of eight percent, the
12 six percent plus two percent. And by reducing or
13 eliminating resources previously available to the
14 franchisees, Cendant has impaired the ability of the
15 franchisees to compete, thrown up barriers to the
16 franchisees' ability to enter certain markets, caused
17 the franchisees to lose revenue and profits and forced
18 them to incur additional expenses (paragraphs 106 to
19 113).
20 As to both Century and Century 21, the
21 Plaintiffs, as putative class representatives, as they
22 set forth at paragraphs 115 to 125, they allege a
23 breach of contract in count one of the fourth amended
24 complaint, breach of the implied covenant of good faith
25 and fair dealing in count two. Count three alleges

1 violation of the New Jersey Consumer Fraud Act, NJSA
2 56:2-1 at sec. Count four alleges breach of expressed
3 fiduciary duty. Count five breach of implied fiduciary
4 duty.
5 As to Cendant only, the Plaintiffs allege
6 tortious interference with contract in paragraph six;
7 tortious interference with prospective economic
8 advantage in count seven; and breach of guarantee at
9 count eight.
10 As remedies the Plaintiffs demand
11 compensatory damages, punitive damages, conjunctive
12 relief, interest, attorney's fees and costs.
13 Additional facts will be developed in the course of the
14 discussion to ensure.
15 The Court will address first issues arising
16 from Plaintiff's Notice of Motion to certify the class,
17 that is defined at page seven of their initial
18 memorandum in support of the Notice of Motion to
19 certify the class.
20 Now the standard applicable to the analysis
21 this morning, quoting from Eliades vs. Wal-Mart Stores,
22 Inc., 191 NJ 88 at 106 (2007):
23 "To obtain class status, the party seeking
24 certification must establish that the four pre-
25 requisites of Rule 4:32-1A are satisfied. Class

1 certification is appropriate only if first the class is
2 so numerous that joinder of all members is impractical.
3 Second, there are questions of law or fact common to
4 the class. Third, the claims or defenses of the
5 representative parties are typical of the claims or
6 defenses of the class. And four, the representative
7 parties will fairly and adequately protect the interest
8 of the class. All that at Rule 4:32-1A."
9 "In addition to those general prerequisites,
10 the class application must also satisfy the
11 requirements of one of the three alternative types of
12 class actions described in Rule 4:32-1B."
13 This matter implicates Rule 4:32-1B(3) which
14 requires that, quote:
15 "Questions of law or fact common to the
16 members of the class predominate over any questions
17 affecting only individual members and that a class
18 action is superior to other available methods to the
19 fair and efficient adjudication of the controversy."
20 End quote.
21 "The Court must undertake a quote, 'rigorous
22 analysis', unquote, to determine if the rule's
23 requirements have been satisfied. That scrutiny
24 requires a Court to look beyond the pleadings to
25 understand the claims, defenses, relevant facts and

1 applicable substantive law. Although class
2 certification does not occasion an examination of the
3 disputes's merits, a cursory review of the pleadings is
4 nonetheless insufficient. The rigorous analysis
5 requirement means that a class is not maintainable
6 merely because the complaint parrots the legal
7 requirements of the class action rules."
8 Eliades, 191 NJ at 106, 107.
9 "However in deciding a motion to certify a
10 class, the Court is accept as true all of the
11 allegations of the complaint."
12 International Union of Operating Engineers,
13 Local Number 68 Welfare Fund vs. Merck and Co., 192 NJ
14 372 at 376 (2007). The parties -- and the Court will
15 today, refer to that case as quote/unquote "Vioxx".
16 Also citing Delgazzo vs. Kenney, 266 NJ Super
17 169 at 180 to 81 Appellate Division (1993).
18 The Court turns to its analysis of this
19 matter pursuant to that standard. To repeat, the first
20 requirement of Rule 4:32:1A is that the -- is that,
21 quote:
22 "The class -- insert the word 'be' -- so
23 numerous that joinder of all members is impracticable."
24 Close quote.
25 "Generally speaking, Rule 32-1A(1) is

1 satisfied if a potential number of class members
2 exceeds 40."
3 Stewart vs. Abraham, 275 F. Third 220, 226-
4 27, Third Circuit (2001).
5 There's no dispute here that the putative
6 class is sufficient numerous to warrant certification,
7 as the number of Century 21 Real Estate brokers in the
8 proposed class is estimated to surpass 1,000. The
9 Court -- the Court finds that Rule 4:31-1A(1) has been
10 satisfied. That estimate is set forth in the -- I
11 believe it's the opening brief that the Plaintiff's
12 filed. I will have the specific page site later in
13 this decision, but that's the source of that particular
14 estimate.
15 The second, third and fourth requirements of
16 Rule 4:32-1A are that -- are that, two, quote:
17 "There are questions of law or fact common to
18 the class."
19 Unquote. Third, quote:
20 "The claims of the representative parties are
21 typical of the claims of the class."
22 Unquote. And fourth, the representative
23 parties, quoting:
24 "Will fairly and adequately protect the
25 interest of the class."

1 Unquote.

2 As presented by Defendants, a closely related
3 point is set forth in Rule 4:32-1B(3), quote:

4 "That the questions of law or fact common to
5 the members of the class predominate over any questions
6 affecting only individual members."

7 Close quote. Because the parties have
8 conflated these points in their papers, the Court will
9 address together.

10 The Plaintiffs assert that their claims arise
11 from the same legal and factual issues related to the
12 Defendant's allegedly unlawful diversion of funds and
13 resources from the franchisees for the benefit of
14 Cendant and the Defendant's failure to provide the
15 support services called for in the franchise agreement.

16 According to the Plaintiffs, Defendant's
17 actions affected all of the franchisees. For example
18 Plaintiff's claim that Defendants did not use NAF funds
19 for the exclusive benefit of the franchisees and
20 Century 21. Instead, the Plaintiffs allege, Cendant
21 used NAF money to promote Cendant's own website
22 Move.com and to pay -- and to pay various corporate
23 expenses in contravention of paragraph nine of the
24 franchise agreement.

25 When Cendant sold move.com for $760,000,000,

1 according to the Plaintiffs, it did not return any of
2 the proceeds of sale to the NAF for benefit of the
3 franchisees.
4 Another example of franchisee' common claims,
5 as asserted by the Plaintiffs, is Cendant's elimination
6 of support services. After Cendant acquired Century
7 21, it reduced Century 21's nationwide support staff
8 from over 5,000 employees to fewer than 500. I'm
9 sorry, I mis-speak, to fewer than 300, according to the
10 Plaintiffs. This meant that the franchisees had to do
11 more administrative work at more cost while service
12 fees remained the same.
13 Cendant also eliminated the Recruitment
14 Director position, which had provided franchisees with
15 monthly reports on new business, new applicants and new
16 listings at no charge.
17 A third example of what Plaintiffs describe
18 as common claims is Cendant's abolition of nearly all
19 of the referral programs available to franchisees,
20 including Western Relocation and the International
21 Relocation Directory. Moreover, according to the
22 Plaintiffs, Cendant's replacement relocation directory,
23 Cendant Global Referral Network, CGRN, diverted
24 relocation leads from the franchisees to Coldwell
25 Banker and ERA, real estate systems owned by Cendant

1 and competitive with the franchisees, as I've already
2 mentioned.
3 Plaintiffs also state that Cendant also
4 diverted sales leads from 800-4-HOUSES, that's clearly
5 a telephone number, an 800 line, 800-4-HOUSES, a
6 telephone site connecting franchisees to a referral
7 service that had been previously used for the benefit
8 of Century 21 franchisees, resulting in few referrals
9 to franchisees from the Defendants.
10 Plaintiffs cite to the deposition testimony
11 of Dave Nichols of Sunland, one of the proposed class
12 representatives, that is to say his franchise, Sunland.
13 According to Mr. Nichols, who was located in
14 Arizona, TV advertising was reduced in 1997 and
15 recruitment and training programs, quote, "no longer
16 existed", unquote. As a result, his agency started,
17 quote, "shrinking", unquote. This is from the
18 deposition of Mr. Nichols at pages -- at page 46, line
19 one -- lines one to 21, again at page 15, lines nine to
20 14. I'm sorry, page 59, if I didn't say that, lines
21 nine to 14.
22 Another class representative, Jeffrey Silm of
23 Michigan, the Property Mart franchisee, cited a loss of
24 prior services once Cendant purchased NRT and Coldwell
25 Banker. Silm at page 76, line 22 to page 77, line two:

1 Gwendolyn Johnson, a Florida franchisee, that
2 being the Cooper franchise, a named Plaintiff,
3 describes Century 21's support of, quote,
4 "infrastructure", unquote for the franchisees that
5 changed once Cendant purchased Century 21. She cited
6 in particular elimination of the school. When reading
7 her deposition, apparently a school for young
8 franchisee owners, but the source there is Johnson,
9 page 14, line 21 to page 15, line 12.
10 Plaintiffs point to the quote, "uniform",
11 unquote, franchise agreements between them and Cendant
12 that called for support services, including advertising
13 and training, in exchange for payment of fees that were
14 the same for all franchises, that is, six percent of
15 gross revenue for royalty or service fees and two
16 percent for the NAF.
17 Citing to the causes of action set forth in
18 their complaint that I've already described, Plaintiffs
19 contend that every putative class member has the same
20 legal claims arising from the common nucleus of
21 operative facts just discussed. Defendants contend
22 that the numbers of the proposed class are, quote,
23 "hopelessly in conflict", (see the Defendants' initial
24 brief in opposition to the Motion for Class
25 Certification at page 10), because their claims are

1 based upon a, quote, "patchwork of differing contracts,
2 differing law, differing facts and differing damages."
3 Close quote.
4 First Defendants argue that former and
5 current franchisees have competing goals for the
6 litigation. They cite to deposition testimony of one
7 current franchisee who said that an award of money is
8 not the most important goal in the litigation, that
9 would it be, quote, "fine", unquote, but, quote,
10 "secondary", unquote. Quote, "more beneficial",
11 unquote, would be, quote, "restoration", unquote, of
12 the Century 21 system to what it was. This is the
13 deposition of David Nichols from Sunland at page 112,
14 lines four to 19; page 160, lines 20 -- I'm sorry, line
15 20 to page 161, line three; again at page 176, line 20
16 to page 177, line 22.
17 In contrast, the Defendants assert, is the
18 testimony of a former franchisee representing Quality,
19 who testified to have no interest in seeing Century 21
20 change in the future the way it is doing business or
21 treating current franchisees. The deposition of a
22 representative of that -- from the deposition of the
23 representative of Quality at page 148, line 14 to line
24 21.
25 In fact, Quality, which is no longer a party

1 or who is the subject of an undisputed Motion to
2 Dismiss that we'll resolve today, sought to recover --
3 seeks to recover the full -- or sought when a named
4 Plaintiff, to recover the full value of its business,
5 perhaps 200,000 to $300,000. That at the Quality
6 deposition, the deposition of the representative of
7 quality at page 145, line three, to 148, line nine.
8 Defendants point out that the Plaintiffs
9 allege that the former Century 21 Referral and
10 Relocation Networks were disbanded and replaced with
11 CGRN, which later became Mobility Services.
12 CGRN/Mobility Services are also known to Coldwell
13 Banker -- I'm sorry, are also open to Coldwell Banker
14 and ERA. So services once available exclusively to
15 Century 21 franchisees are now provided to members of
16 the new system.
17 According to the Defendants there is a
18 conflict between franchisees who did not join CGN --
19 I'm sorry, CGRN/Mobility Services, it's CGRN slash
20 Mobility Services, and therefore lost referral business
21 and those who did join for the benefits. They also
22 argue that former franchisees want only money while the
23 primary motive of the present franchisees is to change
24 the way Cendant treats them.
25 For any alleged conflict between current and

1 former franchisees to be significant, as to the issue
2 of remedy, that is to say money or injunctive relief, a
3 monetary damages award against the Defendants would
4 have to threaten their financial viability, thereby
5 affecting the ability of the current franchisees to
6 carry on their businesses.
7 No such showing has been made here by the
8 Defendants. In fact, in a letter dated May 13, 2009,
9 in the midst of the real estate turn down of recent
10 years, the Defendant's successor, Realigy touted its
11 financial performance and resources and its inclusion
12 in the Fortune 500 list of America's top companies for
13 the third consecutive year. This honor was based on
14 2008 revenues of 4.7 billion dollars. That at Exhibit
15 32 to Mr. Bartels certification that was filed on
16 September 25th of 2009. I believe that was his reply
17 -- that certification filed in support of the
18 Plaintiff's reply to the Defendant's opposition.
19 An earlier letter to brokers, Exhibit 33 to
20 the same certification, described the Defendants as,
21 quote, "the largest residential real estate company in
22 the world with the most powerful brands, the most
23 prominent brokers, the greatest network of sales
24 associates and incredibly loyal corporate clients. Not
25 a single company compares to us in size, scale or

1 prominence." Close quote.

2 In any event, the fact that class members may

3 have somewhat differing interest in the remedy that

4 could ultimately be awarded by a Court, and that is to

5 say monetary damages perhaps appealing more to former

6 franchises and injunctive relief appealing more to

7 current franchisees would not defeat class

8 certification.

9 For example, in Eliades, the Supreme Court

10 certified a class of current and former hourly

11 employees of Wal-Mart to be represented by former

12 employees only. Although the Court did not expressly

13 analyze whether a potential conflict existed between

14 the current and former employees, one notes that the

15 former employees would have no interest in proceeding

16 cautiously as to damages, so as not to endanger Wal-

17 Mart's economic viability and inability to pay its

18 employees.

19 The authority offered by the Defendants on

20 this point is not persuasive. For example, an AAMCO

21 Automatic Transmissions Inc. vs. Taylo (phonetic), 67

22 FRD, that is to say Federal Rules Decision, 440,

23 Eastern District of Pennsylvania (1975), the Court

24 denied certification of a class of current and former

25 franchisees to be represented only by former

1 franchisees because for current franchisees, quote,
2 "the continued economic viability and public good will
3 of AAMCO is a legitimate and real concern." Unquote.
4 While former franchisees do not share these concerns.
5 67 FRD at 446.
6 The Court's reasoning in AAMCO is not well
7 developed on this point, rather the Court simply cited
8 -- simply cited to 10 cases, all decided between 1972
9 and 1974, that stood for the proposition that a former
10 franchisee could not represent a class of former and
11 present franchisees. 67 FRD at 445.
12 To repeat, in deciding whether to certify a
13 class, the Court must undertake a rigorous analysis of
14 the facts of a given case. The facts here are
15 different from the facts in the cases upon which the
16 Defendants rely in support of their argument that there
17 is an inherent conflict between former and current
18 franchisees for purposes of class certification. They
19 cite to Delgazzo vs. Kenney, 266 NJ Super 169,
20 Appellate Division (1993) in which the Court found,
21 quote, "nothing in the record to suggest that the named
22 Plaintiffs' claims are not typical of those of the
23 class or that they would not adequately represent the
24 interest of the remaining class members." Close quote.
25 Id. at 187, 188.

1 Delgazzo went on to quote from In Re Asbestos
2 School Litigation, 104 FRD 422, 430, Eastern District
3 of Pennsylvania. I'm sorry, I don't have the year for
4 that particular decision. For the acknowledge
5 proposition that the Plaintiff must not have interest
6 antagonistic to the class.
7 The Defendants also rely on a number of cases
8 from the 1970's, none of which is on point. In
9 Southern Snack Foods vs. Jane Jay Snack Foods
10 Corporation, 79 FRD 679, District of New Jersey (1978),
11 the Plaintiff was a former franchisee who alleged that
12 its -- its franchisor, in violation of the federal
13 antitrust laws, engaged in illegal tying arrangements,
14 territorial and customer restrictions and an exclusive
15 dealing arrangement. Id. at 679.
16 The Court noted that:
17 "The action threatened the existing
18 contractual relationship between the franchisor and its
19 -- I'm sorry, and its present franchisees, which
20 operated to their benefit because exclusive dealing
21 arrangements may be economic value to buyers as well
22 sellers, for it assures the buyer of its source of
23 supply."
24 Id. at 680.
25 The present franchisees in Southern Snack

1 Foods could benefit from the restrictions due to
2 reduced intrabrand competition. Also they might fear
3 that elimination of the restrictions might provide
4 incentives for the franchisor to vertically integrate
5 its distribution system, thereby eliminating the need
6 for franchisees.
7 Defendants do not relate the facts of
8 Southern Snack -- Southern Snack Food to this
9 particular case.
10 They also rely on Van Allen vs. Circle K.
11 Corp, 58 FRD 562, Central District of California
12 (1972). In which the Plaintiffs sought certification
13 apparently of three different classes. Id. at 563.
14 Former franchisees, present franchisees, and
15 present franchisees who had been given notice of
16 termination. The Defendant franchisor licensed grocery
17 stores as franchisees.
18 Plaintiffs apparently alleged, quote, "an
19 antitrust -- I'm sorry, an antitrust violation",
20 unquote, but the Court does not elaborate on that
21 particular allegation in its opinion. The Court denied
22 the Motion for Class Certification for many reasons,
23 including quote, "unmanageability", close quote, id. at
24 563 and again at 565; absence of numerosity, id. at
25 564; lack of commonality, id.; lack of typicality, id.

1 at 565; lack of predominance, id.; lack of superiority,
2 id.
3 It was also important to the Court that,
4 quote, "more than half", unquote, of the current and
5 former franchisees were located outside of California
6 in Arizona and New Mexico. Id. at 564, 65.
7 The Court also noted that the record interest
8 of former and present franchisees would be, quote,
9 "adverse", id. at 564, but mentioned only the interest
10 of the present franchisees and the strong Defendant and
11 the indifference of former operators to anything other
12 than financial gain.
13 The record in the present case is different
14 from that of Van Allen, because there's no showing that
15 Cendant or Century 21 would be financially threatened
16 by a monetary award. Also the Court in Van Allen cited
17 many other factors in denying class certification.
18 The Defendants cite to Celexan (phonetic) vs.
19 Plum Tree Inc., 61 FRD 343, Eastern District of
20 Pennsylvania (1973), an action brought by former
21 franchisees against their former franchisor.
22 The Court wrote of the, quote, "concern",
23 insert of some Courts, "with the possible conflicting
24 interest of former and present franchisees", close
25 quote, id. at 345.

1 The Court relied heavily on Van Allen, which
2 was just discussed, which this Court has already
3 determined to be distinguishable from the present
4 action. In Celexan, other than the, quote, "problem",
5 unquote of former franchises adequately representing
6 the interests of present franchises, the Court did not
7 develop a factual analysis to illustrate the precise
8 nature of the problem.
9 The Defendant cited Bukowsky vs. Ralston
10 Purina Co., 68 FRD 443, Middle District of Georgia
11 (1975) in which the putative class consisted of all who
12 obtained credit or loans from the Defendant in the last
13 four years, who purchased farm animal feed from
14 Defendants in the period and parties to agreements
15 with, I think it's singular Defendant, sorry, that
16 Plaintiffs alleged were illegal tying arrangements, in
17 violation of sections one and two of the Sherman Act,
18 15 USC Sections one and two, and Section two of the
19 Clayton Act, 15 USC Section 15, id. at 445.
20 From a review of the -- from a review of the
21 Court's opinion, it is apparent that the principal
22 reason for the denial of class certification was the
23 predominance of individual issues over common issues,
24 id. at 448, 452.
25 There were also, quote, "individual problems

1 of affirmative defenses and counterclaims", close
2 quote, id. at 452. The Court discussed the conflict
3 between Plaintiff, a former customer, and current
4 customers of the Defendant at pages 452 and 453 of the
5 opinion. Noting that, unlike the Plaintiff, a former
6 customer, many members of the proposed class have,
7 quote, "continuing and harmonious relationships with
8 the Defendant", close quote, id. at 453. That is they
9 buy products from the Defendant and do not find the
10 arrangement to be troublesome.
11 In the present case, the current franchisees
12 have an interest in changing the way they are treated
13 under the franchise agreements, as well as an interest
14 in recovering money, albeit a, quote, "secondary",
15 unquote, interest in the case of Sunland.
16 As I will discuss in a moment, all of the
17 Century 21 franchisees have an interest in restoring
18 the system -- all the current Century 21 franchisees
19 have an interest in restoring the system to what it
20 once was. The Defendants are especially reliant on the
21 conflict point as set forth in Broussard, B-R-O-U-S-S-
22 A-R-D, vs. Meineke, M-E-I-N-E-K-E, Discount, 155 F.
23 Third 331, Fourth Circuit (1998). In which Meineke
24 offered its franchisees a, quote, "enhanced dealer
25 program", unquote, or EDP, during the pendency of the

1 class action lawsuit in exchange for a release. This
2 immediately created friction among the class members.
3 The Plaintiffs urged their fellow class members not to
4 accept the deal, but more than half of them did, id. at
5 336.
6 That half was then entitled only to the
7 remedy of restitution of funds to an advertising
8 account, while Plaintiffs non-EDP franchisees, that is
9 they didn't take the deal, sought only an award of
10 compensatory damages and actually, quote, "disavowed"
11 any claim for restitution, id. at 339.
12 Meineke's offer of settlement in the form of
13 the EDP had created an irreconcilable conflict between
14 EDP and non-EDP class members. That conflict does not
15 exist in the present case, because the franchisees who
16 signed a release are not in the class.
17 This Court acknowledges the testimony of
18 David Nichols of Sunland, a current franchisee, who
19 testified that a monetary award would be, quote,
20 "fine", unquote, but, quote, "secondary", unquote. And
21 I've already set forth the sites to his deposition
22 testimony for those quotes.
23 However, he also testified that, quote, "I
24 believe that it's going to be necessary for Century 21/
25 Cendant to provide some monetary relief to the

1 franchisees", close quote. That's Nichols at page 177,
2 lines 13 to 15.
3 Responding to a question that seemed to imply
4 that a monetary award in a class action would be,
5 excuse me one moment, sorry, let me start again.
6 Responding to a question that seemed to imply
7 that a monetary award in a class action would be
8 financially detrimental to Century and Cendant --
9 Century 21/Cendant, he said that he did not think that
10 Century 21 would quote, "go under", unquote. That's
11 112 -- page 112, line 17. There is -- and it may be
12 lines 14 to 17. But it is at page 112.
13 There is no testimony from a representative
14 of former franchisees who might express the desire to
15 destroy Century 21 or Cendant financially. More
16 importantly, Cendant does not argue that any potential
17 award in this action or the class to be certified would
18 threaten its economic viability.
19 Importantly, the Plaintiffs in this case do
20 not seek to change the franchise agreement, they simply
21 want Cendant to abide by the terms of the agreement and
22 to deliver the full panoply of benefits that it
23 undertook to supply. No former franchisee has
24 disavowed this goal. Both present and former
25 franchisees see a monetary award. That present

1 franchisees also focus on injunctive relief is no bar
2 to class certification.
3 The Defendants also argue that there is a
4 conflict between current franchisees, perhaps a
5 conflict among current franchisees, because some,
6 quote, "joined", unquote, the referral system in the
7 form of CGRN by paying a fee and some did not.
8 For this proposition the Defendants cite to
9 the deposition testimony again of David Nichols of
10 Sunland at page 214 lines 19 to 21. And the Defendants
11 memo in opposition to the class certification motion at
12 page 13. That memo was filed 6/24/09.
13 However when reviewing the testimony one
14 finds that that is not exactly so. The question and
15 answer at that point were as follows. At Nichols page
16 214, line 14 to 21.
17 Question -- it starts out with a statement by
18 Counsel, "I don't know." Then the question.
19 "Q But how much of that 75 percent --
20 [insert in brackets reduction in referral business] --
21 how much of it do you know was a result of the removal
22 of the directory?
23 A It was pretty closely tied together. We now
24 see other Century 21's starting to go back to the
25 referral and avoid CGRN, because what Century 21 --

1 what Cendant/Century 21 did was create a profit base by
2 creating CGRN and the charged the franchises for that."
3 What Mr. Nichols was saying, consistent with
4 paragraph 100 of the fourth amended complaint, is that
5 all the franchisees were charged for a system that was
6 of no benefit to the franchisees who used it, because
7 referrals were down following the charges imposed on
8 the franchise system by Cendant after it acquired
9 Century 21.
10 See also Mr. Nichols' testimony at page 253,
11 lines five to seven.
12 "The referrals that we got from CGRN, none of
13 them triggered and resulted in a sale in any manner,
14 way, shape or form."
15 Plaintiff Jeffrey Silm, well, he's not the
16 Plaintiff, but he's the proprietor of Property Mart,
17 the Plaintiff, submitted a certification dated January
18 14, 2004 in connection with the prior class
19 certification motion in which he stated that, quote:
20 "In particular relocation referrals, which
21 are supposed to provided by the Defendants, have
22 virtually disappeared."
23 Close quote. On this record, Mr. Silm's
24 certification is attached as Exhibit 34 to Mr. Bartels
25 certification filed September 25, 2009. At -- and see

1 in particular paragraph three of Mr. Silm's
2 certification.
3 The Defendants offer no other record
4 references that would tend to indicate that CGRN was a
5 useful source of referrals for franchisees. The Court
6 would engage in baseless speculation were it to
7 conclude that, as the Defendants argue, certain
8 franchisees, quote, "enjoy the benefit of referral
9 business", unquote, from CGRN. And that at the
10 Defendant's opposition brief to the class certification
11 motion at 54.
12 There is nothing in the record to support
13 such a notion. The Court discerns no conflict between
14 two groups of current franchisees based on CGRN as the
15 Defendants argue. Although the Defendants contend that
16 it was necessary to join CGRN in exchange for a fee,
17 the record does not bear that out. Rather the record
18 appears to support the conclusion that all Plaintiffs,
19 all of the franchisees, were disadvantaged by CGRN
20 because they all paid for and they all received fewer
21 referrals. Why would any franchise want to pay more
22 for less? That's not a conflict, that's a unified
23 position.
24 The Plaintiffs want Cendant to abide by the
25 terms of the franchise agreement by providing workable

1 procedures for referrals as part of the services to be
2 provided by Cendant. See paragraph 6C of the franchise
3 agreements in exchange for the payment of the service
4 or royalty fees at paragraph eight of the franchise
5 agreements. Because there's no conflict among current
6 franchisees arising from CGRN. The case cited by the
7 Defendants in support of their arguments on this point,
8 Danvers Motor Co. vs. Ford Motor Co, 543 F. Third 141,
9 Third Circuit (2008), where there was a conflict is an
10 apposite.
11 In any event, should conflicts between former
12 and current franchisees develop, sub classes could be
13 created. For authority see for example Eliades, 191 NJ
14 at 119.
15 The Defendants also contend that Plaintiff's
16 Counsel stated publically, quote, "years ago", that the
17 Plaintiffs would, quote, "probably", unquote, request
18 two subclasses of Plaintiffs, current and former
19 franchisees. However, because this statement was made
20 in 2002 and the class definition has been changed, it
21 does not appear -- it does not appear to have much
22 relevance today.
23 The Defendants also base their arguments
24 against commonality, typicality, and predominance on
25 what they contend are differences in the franchise

1 agreements executed by members of the proposed class.
2 Much of this argument is based on the prior definition
3 of the class that was at issue with the Court denied
4 the Plaintiff's class certification motion in 2006.
5 See the Defendant's brief in opposition to the new
6 Notice of Motion for class certification and in further
7 support of the Motion to Strike the class demand filed
8 6/24/09. The Defendant's opposition brief at 14 to 16.
9 That particular argument is mooted by the
10 amended definition of the class offered by the
11 Plaintiffs.
12 The Defendants submit with the answering
13 certification of William F. Clark, Jr., transmitting
14 exhibits, that was file June 24, '09, franchise
15 agreements between Cendant and the -- between Cendant
16 and the three representative Plaintiffs. These would
17 be Exhibits 29, 30, 31 and 36 of the Clark
18 certification filed on 6/24/09.
19 Other older contracts signed by the
20 representative Plaintiffs are excluded from the
21 definition of the class, because of choice of law
22 provisions calling for the application of the law of a
23 state other than New Jersey. See for example the Clark
24 certification I'm referring to at Exhibits 28, 34 and
25 35.

1 The Court's review of Exhibits 29, 30, 31 and
2 36 to the Clark certification reveals consistency that
3 would not pose a conflict and no such inconsistency has
4 been pointed out by the Defendants. All of the
5 contracts require a six percent franchise service or
6 royalty fee, but only the name, service or royalty, is
7 different. The substantive provision does not change.
8 And a two percent contribution to the NAF.
9 The initial franchise for Cooper in the 1999
10 contract was zero. For Property Mart in 1998, it was,
11 quote, "N/A assignment", close quote. I take it, it's
12 not applicable, there was an assignment. But the quote
13 is "N/A assignment". For Property Mart in 2001 it was
14 zero, but $10,000 per additional office. And for
15 Sunland in 1998, it was $17,500.
16 The Defendants have not suggested why the
17 difference in initial franchise fees here would
18 interfere with the commonality, typicality, and
19 predominance requirements and the Court sees no reason
20 why they would. Each of the agreements contains the
21 same integration clause and the same choice of law and
22 venue clause. The Defendant's argument that the
23 Plaintiff's expert cited differing monthly minimum
24 royalty fees is irrelevant in the face of the uniform
25 provision among the cited contracts that the minimum is

1 in fact $500.

2 Further the Defendants argue about
3 differences in contracts that are not included in the
4 proposed class. See the Defendants opposing memo to
5 the Motion for Class Certification filed 6/24/09 at
6 page 20.

7 As for the, quote, "State Addenda", unquote,
8 that are required by the franchise practice statutes in
9 the various states, they contain varying provisions,
10 but none that would preclude class certification. The
11 New Jersey Franchise Practices Act, NJSA 56:10-1 at
12 Sec. applies only to franchises performed within New
13 Jersey, NJSA 56:10-4.

14 The Plaintiffs do not allege violations of
15 the NJFPA or any other state's FPA, Franchise Practices
16 Act and the Defendants do not contend that the
17 Plaintiff's claims would implicate the Franchise
18 Practices Acts of all the states where Century 21
19 Franchisees are located.

20 The Defendants observe in their brief in
21 opposition to the class certification at page 66, note
22 44, that the current Property Mart agreement contains
23 state addenda, but they do not explain and the Court
24 does not apprehend how the State addenda would result
25 in the application of the laws of numerous states to

1 the present controversy. Although many states void
2 choice of venue clauses, the franchisees are free to
3 file suit in the forum of their choice.
4 The Defendants assert that the choice of law
5 provision in the contracts, see paragraph 25 in each of
6 the contracts that I've cited above of the present
7 Plaintiffs, the representative Plaintiffs, does not
8 avoid conflicts of law problems for Plaintiff's tort
9 claims. Each of the relevant contracts contains the
10 following at paragraph 25, quote?
11 "This agreement shall be construed according
12 to the laws of the State of New Jersey, provided that
13 the New Jersey Franchise Practices Act shall not apply
14 to any Century 21 franchised brokerage office whose
15 approved location is outside the State of New Jersey."
16 Close quote. In addition, the franchisee
17 agrees to the, quote, "non-exclusive", unquote,
18 personal jurisdiction of Courts in New Jersey.
19 Although neither party cites it, for purposes
20 of the conflict of law analysis. Paragraph 21 of each
21 -- of each of these agreements is relevant and provides
22 as follows, under the heading integration:
23 "A, except as expressly provided in paragraph
24 21B hereof, this agreement contains all agreements,
25 understandings, conditions, warrantees and

1 representations of any kind, oral or written, between
2 the parties hereto and constitutes the entire and final
3 agreement between them with respect to the subject
4 matter addressed herein. Accordingly, all prior and
5 contemporaneous agreements, understandings, conditions,
6 warrantees and representations of any kind, oral or
7 written, are hereby superceded and cancelled by this
8 agreement, except as to any monies due and unpaid
9 between the parties to disagreement at the time of the
10 execution hereof."
11 "There are no implied agreements,
12 understandings, conditions, warrantees or
13 representations of any kind. No officer, employee or
14 agent of franchisor has any authority to make any
15 representation or promise not contained in this
16 agreement.
17 Subsection B, notwithstanding the provisions
18 of paragraph 21A hereof, this agreement shall not
19 supercede or cancel the following: i) information and
20 representations submitted by franchisee to franchisor
21 and franchise application for the grant of this
22 franchise, including but not limited to financial
23 statements and references which accompanied
24 franchisee's application, and ii) information and
25 representations in the, initial caps, Franchise

1 Disclosure Documents, end initial caps, which
2 franchisee has received in connection with the
3 franchise, which is the subject of this agreement."
4 The, quote, "franchise disclosure documents",
5 unquote, referred to in paragraph 21B, are the Federal
6 Trade Commission Uniform Franchise Offering circular in
7 effect at the time each of the relevant contracts was
8 executed. Each contained the following statement at
9 page two:
10 "The franchise agreement states that New
11 Jersey law governs the franchise agreement."
12 Offering circles -- I'm sorry, offering
13 circulars for the years relevant to the class period
14 are attached as exhibit nine to Mr. Bartels'
15 certification filed February 19, 2009.
16 In light of the integration clause, the
17 contractual choice -- and also Mr. Bartels signed that
18 certification that same day. To continue or to repeat
19 slightly, in light of the integration clause, the
20 contractual choice of law provision must be expanded to
21 provide that the franchise agreement will be construed
22 according to and governed by New Jersey law.
23 The Defendants argue based on the contractual
24 choice of law clause, that the provision does not apply
25 to, quote, "all disputes", but only to construction of

1 the agreement. Defendants opposing brief to the class
2 certification motion at 21.
3 But this argument is based on only one half
4 of the choice of law clause as it exists in light of
5 the integration clause and the disclosure statement.
6 The issue is whether New Jersey law will apply to all
7 claims here in light of the fact that the parties have
8 agreed that the franchise agreement will be construed
9 according to and governed by New Jersey law. To
10 emphasize, construed according to and governed by New
11 Jersey law.
12 Courts have treated choice of law clauses
13 that call for construction and governance or clauses
14 that utilize similar language by the law of the a
15 particular state as broad enough to capture disputes
16 arising under the contract and related tort claims.
17 See for example In Re Allegheny International Inc., 954
18 F. Second 167 at 178, Third Circuit (1992). There the
19 contract was to be -- quote, "to be governed by",
20 unquote, Pennsylvania law in -- I'm sorry.
21 Let me give you this description of Allegheny
22 again. A contract to, quote, "be governed by",
23 unquote, Pennsylvania law encompass both fraud and
24 negligent misrepresentation claims in an employment
25 contract dispute between the parties. It is unclear

1 form the opinion whether the contract also provided
2 that it was to be construed in accordance with
3 Pennsylvania law.
4 See also Goldwell of New Jersey, Inc. vs.
5 KPSS Inc., 622 F. Sub. Second 168 at 177, District of
6 New Jersey (2009), where a Maryland law was applied to
7 action involving breach of contract and tort claims
8 where the contractual choice of law provision stated
9 the contract, quote, "shall be governed by, subject to
10 and interpreted in accordance with the laws of the
11 State of Maryland", close quote.
12 Bishop vs. GMC Franchising LLC, 403 F. Sub.
13 411 at 414, 416, Western District of Pennsylvania
14 (2005), where Pennsylvania Law was applied in an action
15 arising from a franchise agreement in which the
16 Plaintiff asserted federal and state statutory causes
17 of action and state common law, contract and tort
18 causes of action and the contract was to be quote, "was
19 to, quote, 'be interpreted and construed according to
20 the laws of the Commonwealth of Pennsylvania', closed
21 quote.
22 Based on this analysis, by agreement of the
23 parties, New Jersey law applies to Plaintiffs claims.
24 The issues of law are common to the class because they
25 will all be resolved by New Jersey Law.

1 Further in light of the foregoing discussion,
2 the Court finds that the commonality requirement is
3 satisfied in this regard. As part of their agreement
4 that the Plaintiffs -- I'm sorry -- as part of their
5 argument that the Plaintiffs have not satisfied the
6 typicality prong of the class certification standard,
7 the Defendants contend that none of the three
8 representative Plaintiffs has a claim for the period
9 1995 through 1997 in that all three entered into their
10 franchise agreements in 1998 or thereafter.
11 The Defendants have also filed a Notice of
12 Motion to Dismiss all, quote, "pre-1998 claims". Here
13 the Court addresses the merits of the arguments
14 Defendants raise as to typicality and on their Motion
15 to Dismiss the pre-1998.
16 In light of the timing of the execution of
17 their contracts by the representative Plaintiffs, the
18 Defendants argue the three Plaintiffs knew, before they
19 signed their agreements, that Cendant had acquired
20 Century 21, Coldwell Banker, NRT, PHH and ERA and that
21 Cendant had eliminated Century 21's system of regional
22 sub-franchisor in favor of centralized management.
23 According to the Defendants, this fact would
24 make these Plaintiffs not only atypical, but also
25 incredible. The Defendants also assert that the named

1 Plaintiffs do not share a claim with the absent members
2 of the proposed class and that a conflict exists
3 between class members who were under contract in 1995
4 through -- I'm sorry, let me start this sentence again.
5 The Defendants also assert that the named
6 Plaintiffs do not share a claim with the absent members
7 of the proposed class and that a conflict exists
8 between -- because -- conflict exists because class
9 members who were under contract in 1995 through 1997
10 will prove that the Defendants conduct in that period
11 caused the greatest harm, while the representatives
12 will strive to prove that losses occurred thereafter.
13 Defendants arguments on the typicality and on
14 the motion point are not persuasive. Class
15 representatives need not have claims spanning the
16 entirety of the class period to be deemed typical.
17 See Six William B. Rubenstein, et all,
18 Newburg on Class Actions, Section 18:9, Fourth Edition
19 2009 where it is stated, quote:
20 "The typicality requirement can be met even
21 though there were many products sold at varied prices
22 and conditions and the Plaintiffs did not purchase from
23 the Defendant throughout the entire class period."
24 Unquote. McDonough vs. Toys R Us, Inc., 638
25 F. Sub. Second 461 at 476, Eastern District of

1 Pennsylvania, 2009 where the Court found typicality,
2 quote, "although one manufacturer might have used many
3 methods to insulate the Defendant from competition",
4 close quote, and class members, quote, "bought
5 different models at different times", close quote.
6 In Re Linerboard Anti Trust Litigation, 203
7 FRD 197 at 208 to 211, Eastern District of Pennsylvania
8 (2001) finding varied methods of purchases,
9 procurement, differing damages and presence in only
10 portion of a class period insufficient to defeat
11 typicality.
12 DeLaFuente vs. Stokely Van Camp, Inc., 713 F.
13 Second 225, 232, Seventh Circuit (1983) finding
14 typicality even though none of the named Plaintiffs
15 were employed by the Defendant for the first two years
16 of a three years class period.
17 Lockwood Motors Inc. vs. General Motors Corp,
18 162 FRD 569 at 579, District of Minnesota (1995)
19 finding no conflict where representative, quote, "sells
20 in a different market does not exclusively GM brands,
21 is only licensed to sell Cadillac and Oldsmobile
22 products and is not familiar with GM's various
23 marketing initiatives and programs." Close quote.
24 Turning first to the Defendant's argument
25 against typicality based on pre-1998 claims, which is

1 set forth at their opposition brief at 56 -- pages 56
2 to 58. The Defendants refer to what they term a,
3 quote, "critical period", unquote, in this litigation.
4 And that is at point heading three in the Defendant's
5 opposing brief at page 56.
6 However the, quote, "primary grievance",
7 unquote, here does not merely concern Defendant's
8 purchase of Century 21 and Coldwell Banker or its
9 elimination of regional subfranchisors in favor of
10 centralized management. Defendant's opposition brief
11 at 56.
12 Rather it also pertains to Defendant's
13 misappropriation and diversion of NAF and royalty and
14 service fees, failure to replace reduced or eliminated
15 support services, and promotion of Cendant competitors
16 at the expense of the franchisees. That's at the
17 complaint, paragraphs 72 to 112.
18 That misconduct was perpetrated through the
19 class period. It was not, as the Defendants suggest,
20 limited to any, quote, critical period, unquote.
21 The Defendants further argue that Plaintiffs
22 are atypical because they had, quote, "full knowledge",
23 unquote, of the facts underlying their claims before
24 they entered into or renewed their franchise agreement.
25 Defendant's opposing brief at 56, 57.

1 However, knowing that the Defendants
2 purchased Coldwell Banker or centralized the
3 operations, does not impute knowledge of the
4 Defendant's alleged misconduct, including diversion of
5 funds for the promotion and benefit of the franchisee's
6 competitors.
7 Plaintiffs allege that the full extent of
8 Defendant's conduct was not completely exposed until
9 April 17 of 2002, the end of the proposed class period.
10 Thus the hypothetical concern in Carroll vs. Selco
11 Partnership, 313 NJ Super 448 at 507, Appellate
12 Division (1998) about the credibility of a, quote,
13 "Plaintiff who claimed to be defrauded but was renewed
14 the contract for the next year", unquote, is of no
15 import here.
16 The Defendants argue that the Plaintiffs will
17 attempt to, quote, "maximize their individual damages
18 recovery", unquote, by trying, quote, "to prove that
19 the greatest harm occurred after 1998", unquote, and
20 thus are in conflict with class members seeking to
21 maximize damages for a different period. That's the
22 Defendant's opposing brief at page 57.
23 In addition to the absence of any factual
24 support for this argument, Courts have rejected such
25 arguments as a matter of law. The Court in In Re

1 Linerboard addressed the argument made here by the
2 Defendants as follows:
3 "Defendants argue that the timing of the
4 named Plaintiff's purchases distort their incentives in
5 pursuing the case. On that issue they say that because
6 not all of the Plaintiffs made purchases during the
7 entire class period, Plaintiff's incentive --
8 incentives to pursue the class will be antagonistic to
9 each other and to other potential class members.
10 In essence the Defendants contend that each
11 Plaintiff will want to show that the period in which it
12 purchased corrugated products was the period most
13 effected by the conspiracy. They argue that an
14 individual Plaintiff has no incentive to show that the
15 conspiracy had any effect on the time period in which
16 it did not purchase corrugated products.
17 Plaintiffs contend that Defendants
18 allegations and evidence do not make the interests o
19 the named Plaintiffs antagonistic to the interest of
20 each other or the proposed classes and the Court
21 agrees. It is well settled that a named Plaintiff need
22 not have made purchases from the Defendants throughout
23 the class period. See for example -- see for example
24 Paper Systems Inc. vs. Mitsubishi Corp, 193 FRD 601 at
25 610, Eastern District Wisconsin (2000), which certified

1 a class in an anti-trust price fixing action against
2 the sellers of heat sensitive facsimile paper where one
3 of three named Plaintiffs purchased thermal facsimile
4 paper from the Defendants for part of the class
5 period."
6 "In Re Wirebound Boxes Anti-trust Litigation,
7 124 FRD 268 at 269, 70, District of Minnesota (1989)
8 certifying 28 year class period where four or five
9 named Plaintiffs did not purchase boxes throughout the
10 entire class period."
11 That is the end of the quotation from In Re
12 Linerboard, which is found at 203 FRD 208 to 209.
13 Defendants cite to Gilpin (phonetic) vs.
14 American Federation of State, County Municipal
15 Employees, 875 F. Second 1310, Seventh Circuit (1989),
16 but that case does not support their argument. Gilpin
17 did not involved the issue of whether representative
18 Plaintiffs must maintain claims for the entire class
19 period. Rather, the named Plaintiffs sought to, quote,
20 "destroy", unquote, the entity that other class members
21 wanted to preserve.
22 875 F. Second at 1313 where the Court
23 described the two types of employees at issue, noting
24 that, quote, "the first wants to weaken and possibly
25 destroy the union, the second, a free rider, wants

1 merely to shift as much of the cost of representation
2 as possible to other worker, that is union members."
3 Close quote. Such diametrically opposed goals are not
4 at issue here.
5 The Defendants citation to Liberty Lincoln
6 Mercury Inc. vs. Ford Marketing Corp, 149 FRD 65,
7 District of New Jersey (1993) does not support their
8 position. Typicality was not met in Liberty due to,
9 quote, "the lack of commonality and highly
10 individualized facts among proposed class members."
11 Close quote. Id. at 77 to 78. Explaining that, quote,
12 "the claims of each dealer in the proposed class are
13 dependent upon highly specific factual circumstances
14 and require individual determinations of liability",
15 close quote.
16 In contrast, there's no need for
17 individualized showings here. As in In Re Cadillac,
18 the Plaintiffs claims, quote, "have the essential
19 characteristics common to the claims of the class", 93
20 NJ at 425.
21 There is no support for the notion that
22 Plaintiffs will or even had reason to seek anything
23 short of the maximum recovery for every class member.
24 Defendants arguments on this branch of the typicality
25 issue are rejected.

1 On a related subject of the Defendant's
2 Motion to Dismiss the pre-1998 claims which was filed
3 July 30, 2009, the Defendants contend that none of the
4 three current Plaintiffs has any claim for wrongdoing
5 that occurred before 2/1/98. The Defendants point out
6 that the Cooper franchisee first entered into a
7 franchise agreement with Century 21 on 3/1/94 and that
8 that agreement contained a Florida choice of venue
9 provision. That is at Exhibit 28 to the Clark
10 certification filed 6/24/09 at paragraph 25 of the
11 agreement.
12 This agreement expired 2/28/99, thereafter
13 Cooper executed the agreement upon which it proceeds in
14 this action and which became effective on 2/28/99 with
15 a New -- 2/28/99 with a New Jersey choice of venue
16 provision. That at Exhibit 29 to the same Clark
17 certification.
18 Property Mart, by contrast, entered into its
19 first franchise agreement effective 2/1/98 with an
20 expiration date of 3/31/01. That's at Exhibit 30,
21 paragraph two. Exhibit 30 to the Clark cert.
22 Property Mart executed a second franchise
23 agreement effective 3/30/01 for a period of 10 years.
24 Exhibit 31 at paragraph two. Excuse me. New Jersey is
25 the choice of venue in both Property Mart agreements.

1 And that at paragraph 25 in both of them.
2 Sunland, the third named Plaintiff, entered
3 into two prior agreements that were effective
4 consecutively from 1/1/91 to 1/16/01. That at exhibits
5 34 and 35. Both of those agreements contained Arizona
6 choice of venue clauses at paragraph 25. Both of those
7 agreements were a 4A franchise located in Sun City,
8 Arizona, see paragraph 5A of both agreements, under the
9 respective names of, quote, "Sunland Realty and
10 Investment", unquote, and, quote, "Sunland Realty",
11 unquote. Paragraph 4A of both agreements.
12 The form of franchisee ownership entity --
13 yes. The form of the franchisee ownership entity
14 changed from the first agreement to the second, but
15 both appear to involve David Nichols and Kim Combs.
16 Sunland, in the same corporate form as
17 executed the second agreement, then signed a third
18 franchise agreement effective 9/1/98 with a New Jersey
19 venue clause. This franchise was located in Surprise,
20 Arizona.
21 The motion first seeks dismissal of claims
22 asserted by Quality Associates II, this is what -- I
23 alluded to this earlier, together with all
24 counterclaims against it and a third party claim
25 against Steven Gomez, all pursuant to a settlement

1 agreement among those parties.

2 Because this point is not dispute, the Court

3 will grant that part of the motion and will dismiss

4 these claims with prejudice. So although I believe

5 Quality may be showing up in certain of the captions,

6 Quality Associates II, it is now officially a former

7 party, at least once I enter the order that I have just

8 alluded to.

9 Continuing. In 2004 the Court dismissed,

10 that is to say the prior Judge, dismissed all of

11 Sunland's claims relating to his Sun City franchise.

12 See Exhibit F -- Exhibits F to Clark certification in

13 support of the Notice of Motion to Dismiss the pre-1998

14 claims and similarly argue the Defendants, the impact

15 of the order filed on June 30, '06, June 30, 2006, was

16 to dismiss all of Cooper's claim arising prior to

17 February 28, 1999, the effective date of Cooper's

18 second agreement and the Defendants seek a specific

19 order to that effect.

20 Because the Court agrees with the Defendant's

21 assessment of the order filed on June 30 of 2006 and

22 with the order itself, which does moot -- the fact that

23 the Court agrees with the substance of the order moots

24 the, quote, "law of the case", unquote, argument raised

25 by Plaintiffs in their brief cited in opposition to the

1 Motion to Dismiss the pre-1998 claims. The signature
2 page on that brief was signed -- that was dated
3 8/20/09. See pages 10 to 12 of that particular brief.
4 So because of that the Court grants so much
5 of the Defendant's motion on the pre-1998 claims, that
6 is the second prayer for relief as seeks dismissal of
7 Cooper's claims based on wrongdoing allegedly occurring
8 prior to 2/28/99.
9 The third and final prayer for relief in the
10 Defendants, quote, "Notice of Motion to Dismiss the
11 Pre-1998 Claims", filed again on 7/30/09, is dismissal
12 of the fourth amended complaint, quote, "based upon
13 wrongdoing allegedly occurring prior to 2/1/98", close
14 quote.
15 The Defendants point out that none of the
16 three representative Plaintiffs has a cause of action
17 against Defendants that arises prior to 2/1/98 and the
18 Court agrees with that observation. This is a
19 different angle on Defendant's argument that the
20 Plaintiffs are not typical, because they have no
21 individual claims for the period prior to 2/1/98.
22 The Court parenthetically notes the
23 Plaintiffs, quote, "request that they be permitted to
24 seek leave to amend the complaint to add a Plaintiff
25 who is a member of the proposed class and has entered

1 into a franchise agreement for the class period prior
2 to February 1998", close quote. That at the
3 Plaintiff's brief in opposition to this motion at page
4 10, but the Plaintiffs filed no cross motion on this
5 point and the Court does not address it, ending that
6 parenthetical reference.
7 Continuing. The Plaintiff's arguments that
8 the motion is procedurally deficient are unavailing.
9 See their brief at pages two through four. The motion
10 is clearly one to dismiss under Rule 4:6-2E. See the
11 Defendant's brief at pages two to four. Additionally
12 there's no dispute about dismissing Quality II.
13 Defendants frame the issue as quote, "whether
14 absent class members have or even can have in this
15 action claims which the named Plaintiffs do not have
16 and which are based upon entirely different acts,
17 occurrences and theories of liability than the named
18 Plaintiff's claims". See their reply -- Defendant's
19 reply brief at page 10 on the particular motion.
20 The Defendants argue that the fact that
21 Cooper and Sunland contracted away their rights to
22 assert claims arising out of their prior franchise
23 agreements in any jurisdiction other than Florida or
24 Arizona respectively is significant. However, the
25 Court sees it as no different from the fact that these

1 two parties simply had no such claims. Just as
2 Property Mart has no such claims, because it did not
3 become a franchisee before 2/1/98 or until 2/1/98.
4 The Defendants rely on Zimmerman vs. HBO
5 Affiliate Group, 834 F. Second 1163 at 1169, Third
6 Circuit (1987). The Defendants reply brief at page 11.
7 In Zimmerman putative class Plaintiffs allege
8 that cable telephone companies violated the Fair Debt
9 Collection Practices Act, 15 USC 1692 at Sec and the
10 Racketeer and Corrupt Organizations Act, 18 USCA,
11 Sections 1971 to 1968 -- 1978 I believe, that's a typo,
12 when the Defendants sent a threatening letter to
13 individuals whom the Defendants believed were pirating
14 cable television microwave signals, id. at 1164, 834 F
15 Second at 1164, 1165.
16 The District Court dismissed the compliant
17 with prejudice and the Plaintiffs appealed. The
18 Appellate Court first affirmed the lower Court's
19 ruling, but the complaint failed to state a cause of
20 action under the debt -- the Fair Debt Collection
21 Practices Act, id. at 1169.
22 Next the Court ruled the Plaintiff had no
23 cause of action of RICO because the alleged -- he
24 alleged -- because he alleged only injury of, quote,
25 "mental distress", unquote, id. And because he had no

1 cause of action, he could not meet the typicality
2 requirements of Fed R. -- P23. The Court stated,
3 quote:
4 "To be a class representative on a particular
5 claim, the Plaintiff must himself have a cause of
6 action on that claim." Close quote. Quote from Haas,
7 H-A-A-S, vs. Pittsburgh National Bank, 526 F. Second
8 1083, Third Circuit (1975).
9 That is of course an accurate statement of
10 the law, but it does not -- it does not assist in
11 determining whether the pre-1998 claims should be
12 dismissed. That is because the three named Plaintiffs
13 in the present case do have causes of action against
14 the Defendants, as set forth in the complaint, albeit
15 not for any time prior to 2/1/98. They simply do not
16 have such causes of action that span the entire class
17 period.
18 Unlike Zimmerman, Mr. Zimmerman, in the
19 Zimmerman case, who had absolutely no cause of action
20 at any time, the Plaintiffs here do have causes of
21 action, eight of them as described earlier, and so
22 Zimmerman is not precisely on point.
23 The Defendants cite to Haas vs. Pittsburgh
24 National Bank, 526 F. Second 1083, Third Circuit (1975)
25 in which class Plaintiffs challenge the method by which

1 the three Defendant banks computed service charges on
2 customer's revolving charge, id. at 1085. After
3 entering an order that certified a class, the lower
4 Court entered summary judgment on the merits against
5 the Plaintiffs who appealed, id. at 1086.
6 After the District Court's Summary Judgment
7 order, the Circuit decided a case, Acker, A-C-K-E-R,
8 versus Provident National Bank, 512 F. Second 729,
9 Third Circuit (1979), that established that the
10 Plaintiffs had no claim against the banks for credit
11 charges on, quote, "consumer", unquote transactions,
12 id. at 1087. However, they argue that they had claims
13 as to, quote, "commercial", unquote, transaction, id.
14 The Appellate Court stated that summary
15 judgment as to one of the banks, that is Mellon was not
16 appropriate because the lower Court had not yet
17 determined whether the Plaintiff, Haas, quote, "may
18 represent a class of Mellon Bank cardholders who were
19 charged interest on commercial transactions,", close
20 quote, id.
21 Thus the Circuit Court was not faced with a
22 Rule 4 -- I'm sorry, Rule -- a Fed. R. -- P23 issue and
23 it's observations at 526 F. Second 1096, note 18, that
24 quote, "it is well settled that a class action may not
25 be maintained unless the Plaintiff representative is a

1 member of the class he or she purports to represent",
2 close quote, was simply that, an observation.
3 Here the Plaintiffs are class members. The
4 issue is whether the class period extends from 8/1/95
5 or 2/1/98.
6 Now on remand in Haas, the District was --
7 the District Court was faced with the issue of whether
8 the named Plaintiffs in Haas, who did not use their
9 cards for commercial purposes, quote, "may nonetheless
10 represent a class of Plaintiffs who do have standing on
11 this issue", close quote. Hass vs. Pittsburgh National
12 Bank, 72 FRD 175, Western District of Pennsylvania
13 (1976).
14 So this is the decision after the case came
15 back from the Third Circuit, to which I have already
16 alluded. Even though the Court found that the named
17 Plaintiffs lacked personal standing as to the claims of
18 commercial cardholders, id. at 179, which they were not
19 because they used their cards as consumers and the
20 distinction between consumers and commercial users was
21 important to the merits, the Court ruled that the named
22 Plaintiffs could represent a class of commercial credit
23 card users. Id. at 180.
24 This decision would tend to support the
25 Plaintiff's arguments in the present case. The

1 Defendant's arguments that it would -- argument that it
2 would quote, "eviscerate", unquote, the choice of forum
3 clauses to certify the class as defined is mistaken.
4 The Court acknowledges the Plaintiffs have no claims
5 for the period before 2/1/98, that is to say the named
6 Plaintiffs, the representative Plaintiffs, the three
7 I've discussed.
8 However, they have claims for the period
9 thereafter. The Defendant's assertion that the
10 Plaintiff's inability to raise pre-2/1/98 claims, that
11 is to say claims arising from actions that occurred
12 before February 1, 1998, and that that would disable
13 the entire class is not correct in light of the
14 District Court decision in Haas.
15 There is a controversy between the Plaintiffs
16 and the Defendants arising out of uniform, for purposes
17 of this class action, franchise agreements. The legal
18 theories are the same. Plaintiffs allege that their
19 services were reduced and money was diverted from the
20 NAF all during their contract periods. Those are the
21 claims of the class as well. That these breaches
22 occurred at different times is not a reason that the
23 Plaintiffs cannot represent the class.
24 The Court will address Defendant's arguments
25 under Thiedemann -- the Thiedemann, T-H-I-E-D-E-M-A-N-

1 N, Weinburg and Laufer in a moment. And I'll give the
2 full citations at that time. And those arguments are
3 set forth in the Defendant's brief in support of this
4 motion at pages 12 and 13. I will address those cases
5 in just a moment.
6 Although it is true that, quote, "standing is
7 not dispensed in gross", unquote, Louis vs. Casey, 518
8 US 343, 358, note six (1996, the Plaintiffs here have
9 standing to litigate against the Defendants. The
10 Defendants rely on Holmes vs. Pension Plan of Bethlehem
11 Steel Corp, 213 F. Third 124, Third Circuit 19 -- I'm
12 sorry (2000), in which the Circuit Court affirmed the
13 District Court's denial of Plaintiff's class
14 certification motion because at the time he filed the
15 motion, the claim was moot. Id. at 136.
16 That is not the case here, because the
17 Plaintiffs have claims that would withstand a Motion to
18 Dismiss on this record. Again, the issue is whether
19 the Plaintiffs may act as a class representative, may
20 act as class representatives while not possessing
21 claims for the entire class period. Holmes does not
22 answer that question.
23 The Defendants cite to Kaufman vs. Dreyfuss
24 Fund Inc., 434 F. Second 722, Third Circuit (1970), in
25 which the Plaintiff shareholder in four mutual funds,

1 sought to represent as a class -- I'm sorry, let me
2 start that again.
3 The Defendants cite to Kaufman vs. Dreyfuss
4 Fund, I've given the cite, in which the Plaintiff
5 shareholder in four mutual funds sought to represent as
6 a class, representatives of all similarly situated
7 shareholders of 65 mutual funds and by virtue of that
8 status, derivatively on behalf of the 65 funds and
9 further derivatively on behalf of the four funds of
10 which he was a shareholder and derivatively on behalf
11 of the four mutual funds as a class action on behalf of
12 the 61 other funds similarly situated. Id. at 732.
13 Because the Plaintiff had no standing to
14 maintain an action in his own right as shareholder for
15 harm to the corporation, he could not represent a class
16 of those allegedly similarly situated. Id. at 734.
17 Kaufman had no right to sue, while the
18 Plaintiffs in the present case do.
19 The Defendants cite to the Weiner Family
20 Trust vs. Queen, 403 F. Third 319, Third Circuit
21 (2007). A private securities fraud class action in
22 which the Court ruled that Weiner had standing to
23 pursue fraudulent conduct that occurred on or before
24 the date the Weiner purchased stock. Id. at 326. That
25 analysis is not relevant to the present dispute.

1 The Defendants cite to Allee, A-L-L-E-E vs.
2 Medrano, 416 US 802, (1974), Chief Justice Berger
3 concurring and dissenting, in which union members
4 sought to represent a class -- I'm sorry, to represent
5 a civil rights class arising in part from enforcement
6 of five Texas criminal statutes, three of which, by the
7 time of the decision, had been repealed. Id. at 828.
8 According to Chief Justice Berger there was
9 an issue as to Plaintiff's standing to challenge the
10 constitutionality of the these two remaining statutes
11 and that would depend whether the claimant would be
12 subject to prosecution or threatened with prosecution
13 under the challenge statute.
14 Chief Justice Berger stated that a Plaintiff
15 cannot acquire standing by brining an action on behalf
16 of others who would have standing, id. For the Chief
17 Justice it was important to determine whether the named
18 Plaintiffs had standing, that is whether they were
19 subject to or threatened with prosecution under the
20 challenged statutes.
21 Again, that has nothing to do with whether a
22 class representative with claims for part of a class
23 period can represent absent class members who have
24 claims for a period that the representatives do not
25 have claims.

1 The Defendants cite to <u>International Primate</u>
2 <u>Protection League vs. Administrators of Tulane</u>
3 <u>Educational Fund</u>, <u>500 US 72</u> (1991), which determined,
4 among other things, that the Plaintiffs, who were
5 organizations seeking the humane treatment of monkeys,
6 id. at page 574, had standing to seek protection of
7 certain monkeys who were threatened with euthanization.
8 Justice Marshall ruled that the Plaintiffs had standing
9 at least to challenge the removal of their action from
10 state to Federal Court for reasons having no bearing on
11 the present case.
12 The Defendants cite to <u>Miller vs. Nissan</u>
13 <u>Motor Acceptance Corp</u>, <u>362 F. Third 209</u>, Third Circuit
14 204, arising from allegations under the Consumer L
15 Leasing Act, 15 USC Sections 1667 to 1667(e) as they
16 apply to automobile leases. The Court rejected
17 Plaintiff's argument that because they had standing to
18 bring an action under one section of the statute, they
19 had standing to bring to an action under another
20 separate section. Because standing to assert claims
21 under one section of the statute did not establish the
22 injury required to assert substantive claims under
23 another section. <u>Id. at 225</u>. And so <u>Miller</u> is not on
24 point.
25 The authority presented by the Plaintiffs on

1 this point is more persuasive. The United States
2 Supreme Court has held that in class actions, named
3 Plaintiffs, quote, "must allege and show that they
4 personally have been injured, not that injury has been
5 suffered by other unidentified members of the class to
6 which they belong and which they purport to represent",
7 unquote.

8 Warth, W-A-R-T-H, vs. Seldon, 422 US 490 at
9 502 (1975). See also Fallick, F-A-L-L-I-C-K, vs.
10 Nationwide Mutual Insurance Co., 162 F. Third 410 at
11 423, Sixth Circuit (1998), Newburg on Class Actions,
12 Section 2.7. All cites to Newburg are to the Fourth
13 Edition 2009.

14 Here the Defendants do not contend that the
15 named Plaintiffs doe not have Article III standing to
16 bring their claims for wrongdoing occurring after
17 February 1st -- February 1st, 1998. In fact, the
18 Defendants don't seek to dismiss post 2/1/98 claims.

19 Each Plaintiff entered into a franchise
20 agreement with the Defendant Century 21 Real Estate
21 Corporation and their claims are based upon -- and/or
22 Cendant. And their claims are based upon a course of
23 conduct dating back to the acquisition of Century 21 by
24 Cendant Corporation.

25 Moreover, quote, "whether or not the named

1 Plaintiff who meets individual standing requirements
2 may assert the rights of absent class members is
3 neither a standing issue nor an Article II case or
4 controversy issue, but depends rather on meeting the
5 requisites, the prerequisites of Rule 23, Federal Rule
6 of Civil Procedure 23 governing class actions. Newburg
7 on Class Actions, seven -- I'm sorry, Section 2:7.
8 See also In Re Prudential Insurance Company
9 of America Sales Practice Litigation Agent Action, 148
10 F. Third 283 at 307, Third Circ (1998). Osgood vs.
11 Harrah's Entertainment Inc., 202 FRD 115, 120 to 121,
12 District of New Jersey (2001).
13 If the named class representatives have
14 individual standing to bring their claims which
15 encompass a portion but not all of the proposed class
16 period, they can act as representatives of the entire
17 class, provided they meet the requirements for class
18 certification. See for example In Re Dyangee
19 (phonetic) Inc. Securities Litigation, 226 FRD 263, 274
20 to 275, Southern District (2005) -- Southern District
21 of Texas (2005), where it was found -- determined that
22 in a securities class action, names Plaintiffs who had
23 individual standing, who were not required -- were not
24 -- I'm sorry, who had individual standing were not
25 required to show standing of absent class members who

1 purchased stock at the end of the class period. Excuse
2 me.
3 Lockwood Motors Inc. vs. General Motors Corp,
4 162 FRD 569 at 574, District of Minnesota (1995), which
5 I'll discuss in a moment. Haas vs. Pittsburgh National
6 Bank, the District Court decision previously cited and
7 discussed.
8 In Lockwood Motors, the General Motors
9 Corporation automobile dealer brought a class action on
10 behalf of such dealers who were required to contribute
11 to GM's advertising fund. The Defendant initially
12 challenged the Plaintiff's lack of, quote, "standing to
13 pursue claims on behalf of the class", unquote, because
14 the Plaintiff did not seel certain makes of GM cars and
15 made payments to GM at different times from the
16 proposed class members.
17 The Court rejected this challenge stating,
18 quote:
19 "The fact that other dealers were required to
20 pay the charge at a different time were based on a
21 different brand of GM vehicle does not affect the
22 existence of Plaintiff's injury. Insofar as Lockwood
23 as a personal stake in this litigation based on actual,
24 quote, "case of controversy", unquote, with GM which is
25 redressable by the -- by a favorable decision, he

1 unquestionably has quote, "standing", unquote and the
2 end of the quotation from the case. That is found at
3 162 FRD at 574.
4 Thus the Court went on to find that GM's
5 argument that Lockwood's injury is not similar atypical
6 -- is not similar or typical to the purported injury of
7 the other dealer members was not an issue of threshold
8 standing, but rather is properly assessed under the
9 criteria set forth in Rule 23, quoting from the
10 decision at id.
11 I find that the named Plaintiffs have
12 standing and that the claims they assert in the fourth
13 amended complaint are typical of the class dating to
14 8/1/95. The law does not require that the named
15 Plaintiffs possess claims that span the entire class
16 period.
17 The Defendants contend -- excuse me one
18 moment. The Defendants contend that the Plaintiffs
19 claims are not typical, as they argue in their
20 opposition brief at pages 58 to 59, and do not
21 predominate, see that same brief at pages 72 to 75,
22 that's the brief in opposition to the class action
23 certification motion, because the proposed
24 representatives have not shown an ascertainable loss
25 caused by any alleged wrongdoing on the part of the

1 Defendants. Thus the Defendants -- let me say that
2 again, so I'm sure that it makes some sense.
3 The Defendants contend that the Plaintiff's
4 claims are not typical, I cited to the brief at 58 and
5 59, and do not predominate, brief 72 to 75, because the
6 proposed representatives have not shown an
7 ascertainable loss caused by any alleged wrongdoing on
8 the part of the Defendants.
9 The Defendants also argue that every class
10 member would have to prove an ascertainable loss and
11 causation, see their brief at page 72. In count three
12 of the complaint, Plaintiffs set forth claims under New
13 Jersey's Consumer Fraud Act, NJSA 56:8-1 at Sec, which
14 requires proof of a ascertainable loss in order to
15 recover on a statutory cause of action, NJSA 56:8-19.
16 The Defendants argue that the Plaintiffs have
17 offered no specifics of a calculated ascertainable loss
18 and their economic expert, Gordon Rausser, R-A-U-S-S-E-
19 R, has performed no analysis of damages as to any
20 Plaintiff and does not even know if the named
21 Plaintiffs are representative of the class, see their
22 opposition brief at 59.
23 The Defendants also assert that their alleged
24 wrongdoing occurred over a period of seven years. That
25 support services provided by Century's 21 regional --

1 Century 21's former regional sub-franchisors differed
2 around the country and were withdrawn unevenly. The
3 franchisees decided differently about how to proceed in
4 the face of Cendant's wrongdoing and that real estate
5 markets are unique and small.
6 For these propositions legally the Defendants
7 rely primarily on Thiedemann vs. Mercedes Benz USA,
8 LLC, 183 NJ 234 (2005); Weinburg vs. Spring Corp, 173
9 NJ 233 (2002); Laufer vs. US Life Insurance Co., 385 NJ
10 Super 172, App. Div. (2006); Daubash (phonetic) vs.
11 Mercedes Benz USA, LLC, 378 NJ Super 105, App. Div.
12 (2005); Saldano vs. Camden, 252 NJ Super 188, App. Div.
13 (1991); and Pope vs. Intermountain Gas Co., 646 P.
14 Second -- I'm sorry, 988 -- 646 P. Second 988, Idaho
15 (1982).
16 Defendants cite to Daubash for the
17 proposition that each member of the class would have to
18 prove an ascertainable loss, their opposing brief at
19 72. Daubash does not support that contention. In
20 Daubash a class had been previously certified, but the
21 lower Court granted summary judgment because the
22 Plaintiff did not prove the Defendant's intent to
23 mislead or knowing omission and because the Plaintiff
24 offered no proof of ascertainable loss. 378 NJ Super
25 at 113.

1 Plaintiff appealed the summary judgment
2 order, which the Appellate Division affirmed after
3 discussing ascertainable loss, id. at 114 to 24. The
4 Appellate Division was not phased with the issue of
5 whether each and every member of the class action must
6 prove an ascertainable loss and made no such
7 determination.
8 In Thiedemann and Weinburg, the Supreme Court
9 of New Jersey analyzed the concept of ascertainable
10 loss. In Thiedmann, the Plaintiff proved -- I'm sorry,
11 the Plaintiff moved for class certification, but the
12 trial Court granted Defendant's Cross Motion for
13 Summary Judgment, because the Plaintiff could not prove
14 an ascertainable loss or any damages. 183 NJ at 243,
15 44.
16 In Weinburg, the Court granted Plaintiff's
17 motion for class certification, limited to Sprint's
18 residential long distance customers, but later granted
19 Defendant's Motion for Summary Judge. Again for the
20 reason the Plaintiff could not prove ascertainable loss
21 or any damages. Id -- I'm sorry, 173 NJ at 240.
22 Although it is clear from Thiedmann and
23 Weinburg, the Plaintiffs here must prove ascertainable
24 loss and damage, neither of these Supreme Court cases
25 resolved whether every class member must prove

1 ascertainable loss and damages. See Laufer, 385 NJ
2 Super at 187, stating that Thiedmann and Weinburg
3 provide, quote, "no support for the argument that a
4 putative class representative must allege that the
5 unnamed class members suffered ascertainable loss to
6 maintain a class action under the Consumer Fraud Act".
7 Defendants cite to Thiedmann and Weinburg in
8 support of their contention that Plaintiffs, as the
9 proposed class representatives, have not demonstrated
10 an ascertainable loss, quote, "calculated within a
11 reasonable degree of certainty", unquote. Thiedmann,
12 183 NJ at 248, 49.
13 However, the Defendants incorrectly recite
14 the standard that these cases require to prove an
15 ascertainable loss, excuse me, under the Consumer Fraud
16 Act. Plaintiffs have submitted sufficient evidence to
17 prove an ascertainable loss under the NFCFA. In
18 Thiedmann, the New Jersey Supreme Court describes the
19 ascertainable loss requirement as follows, quote:
20 "To give effect to the legislative language
21 describing their requisite loss for private standing
22 under the CFA, and to be consistent with Weinburg, a
23 private Plaintiff must produce evidence from which a
24 fact finder could find or infer that the Plaintiff
25 suffered and actual loss. At the time of summary

1 judgment, that evidence must be sufficient to present a
2 genuine issue for the fact finder."
3 The Court in Thiedmann further stated, quote:
4 "Ascertainable loss must be presented with
5 some -- I'm sorry, if I didn't give the citation -- I
6 cited from Thiedmann at page 248 above. And then
7 continuing with the decision, the Court in Thiedmann
8 further stated, quote:
9 "Ascertainable loss must be presented with
10 some certainty, demonstrating that it is capable of
11 calculation though it need not be demonstrated in all
12 its particularity to avoid summary judgment. The
13 certainty implicit in the concept of a quote/unquote
14 "ascertainable loss" is that of quantifiable or -- is
15 that is quantifiable or measurable." Close quote, id.
16 at 248.
17 The Court recognized that there is a, quote,
18 "low threshold for determining the existence of an
19 ascertainable loss and that the requirement of proving
20 of an ascertainable loss has been broadly defined in
21 embracing more than a monetary loss. An ascertainable
22 loss occurs when a consumer receives less than what was
23 promised." Close quote. 183 New Jersey at 244, citing
24 to Union Ink Co., Inc. vs. AT&T Corp, 352 NJ Super 617
25 at 646, App. Div. (2002).

1 The Court anticipated the use of an expert to
2 support a claim of ascertainable loss stating, quote:
3 "We can envision the possibility that an
4 expert may be able to speak to a loss in value of real
5 or personal property due to market conditions with
6 sufficient precision to withstand a Motion for Summary
7 Judgment."
8 Close quote. 183 NJ at 249.
9 To that end, Plaintiffs have provided the
10 report of -- again of Gordon Rausser who articulates
11 multiple methodologies for the calculation of damages
12 as I will discuss in a few moments. Thus the Plaintiff
13 demonstrate an ascertainable loss that is capable of
14 calculation, quote, "quantfiable", end quote, and
15 quote, "measurable", end quote and they need go no
16 further. Id. at 248.
17 The Plaintiffs need not provide a precisely
18 calculated dollar amount of damage -- damages for each
19 of the named Plaintiffs at this juncture. The New
20 Jersey Supreme Court in Eliades held that the existence
21 of individualized damage issues, among others, are
22 insufficient to defeat class certification. 191 NJ at
23 112.
24 Plaintiffs have brought a claim and allege an
25 ascertainable loss with sufficient proof to create a

1 genuine issue of material fact and accordingly have
2 standing to pursue their claims under the New Jersey
3 Consumer Fraud Act.
4 The Defendant's reliance on the Supreme
5 Court's decision in what we're calling Vioxx is
6 misplaced. There the Court was critical of Plaintiff's
7 singular reliance on its expert to demonstrate
8 ascertainable loss and prove a causal nexus for its New
9 Jersey Consumer Fraud Act claims. 192 NJ at 392.
10 Plaintiffs allegations in this matter do not
11 rely upon assumed causation or ascertainable loss
12 solely through expert testimony. Instead the
13 Plaintiffs will seek to prove both ascertainable loss
14 and a causal nexus through direct testimony and
15 evidence of Defendant's course of conduct -- course of
16 misconduct affecting their contractual relationship as
17 well as documents provided -- produced by the
18 Defendants during further discovery.
19 Plaintiffs cite examples of their proofs.
20 They'll seek to prove ascertainable loss in part by
21 evidence that the Plaintiffs and class members continue
22 to contribute to the NAF and make royalty payments to
23 Defendants. These contributions and fees would amount
24 to ascertainable losses, because the Plaintiffs receive
25 less that what had been promised in the franchise

1 agreement when Defendant's diverted payments and
2 eliminated services, according to the Plaintiffs. See
3 In Re Mercedes Benz, Tele-aid Contract Litigation, 257
4 FRD at 73, 74, where it was stated that the fact that,
5 quote, "each class member got something less than he or
6 she was promised", unquote, is quantifiable at trial
7 and can be easily calculated using common proof.
8 And accord is Thiedmann, 183 NJ at 244,
9 quote: "An ascertainable loss occurs when a consumer
10 receives less than what was promised." Unquote.
11 From this same basis, Plaintiff's could also
12 seek to prove a causal nexus between Defendant's
13 wrongful acts and their ascertainable loss. See
14 Mercedes Benz, 257 FRD at 73, 74, where it was
15 explained that the Plaintiffs were not required to
16 establish reliance and that causal nexus is established
17 because had the Defendant warned of discontinued
18 service, the Plaintiffs would have become aware that
19 Tele-Aid systems would be rendered obsolete.
20 Unlike the expert in Vioxx, Gordon Rausser's
21 opinions are not proffered to establish ascertainable
22 loss but to quantify the amount of that loss on a class
23 wide basis. See his rebuttal report at paragraphs two
24 to three, indicating that the quantum of damages can be
25 proven using common -- a common set of data and shared

1 evidence in Defendant's possession and that workable
2 methodology exists for eliminating damages -- for
3 estimating, I'm sorry, for estimating damages on a
4 class wide basis.
5 The Defendants also argue that common issues
6 do not predominate, because the Court would have to
7 apply the laws of all 50 states. As we have already
8 seen that is not so. New Jersey law applies to all
9 legal issues in this case, because the parties agreed
10 that it would.
11 The Defendants -- Jack --
12 (The Court speaking to the Clerk)
13 THE COURT: The Defendant's point to, quote,
14 "the express finding in the June 2006 order that
15 Plaintiff's damages were incapable of class wide
16 determination by expert testimony". See their brief in
17 opposition to the class certification motion at page
18 68.
19 A review of the order and the attached
20 statement of reasons reveals no such finding. In any
21 event, the Defendants contend that the Plaintiffs
22 claims of damages and their causation require
23 individual proofs that would destroy commonality,
24 typicality and predominance.
25 The Court begins its analysis of this

1 argument by quoting from Alipata (phonetic) Services
2 Inc. vs. Exxon Corp, 188 FRD 667 Southern District of
3 Florida (1999), affirmed at 333 F. Third 1248, 11th
4 Circuit (2003) at follows, quote?
5 "Numerous Courts have recognized that the
6 presence of individualized damage issues does not
7 prevent a finding that the common issues in the case
8 predominate."
9 Close quote. That's id. at 1261 in the
10 Circuit case or opinion.
11 Here in New Jersey, a Court may certify a
12 class, quote, "even though individual questions such as
13 the degree of damages due a particular class members or
14 reliance by individual class members on Defendant's
15 alleged misrepresentations may remain following
16 resolution of the common questions."
17 Close quote. For that proposition see
18 Delgazzo, 266 NJ Super -- for that quote, I should say,
19 266 NJ Super at 181. Also Strom vs. Canuso, 40 NJ 4367
20 (1995) -- 43 at page 67 (1995).
21 The Court in Delgazzo went on to hold that,
22 quote:
23 "The overwhelming weight of authority holds
24 that the need for individualized damages calculations
25 does not diminish the appropriateness of class action

1 certification or common questions as to liability
2 predominate."
3 266 NJ Super at 190.
4 In Klay vs. Humana Inc., that's K-L-A-Y.
5 Excuse me. 382 F. Third 1241, 11th Circuit (2004), the
6 Court described that, quote:
7 "Particularly where damages can be computed
8 according to some formula, statistical analysis or
9 other easy or essentially mechanical methods, the fact
10 that damages must be calculated on an individual basis
11 is no impediment to class certification."
12 Close quote. Id. at 1259 60.
13 As it reiterated, quote, Plaintiffs need only
14 come forward with plausible statistical or economic
15 methodologies to demonstrate impact on a class wide
16 basis."
17 Close quote. Id. at 1259. See also In Re
18 Visa Checkmaster Money Anti-Trust Litigation, 280 F.
19 Third 124 at 139, 40, Second Circuit (2001), where the
20 Court rejected Defendant's arguments that the
21 requirement of individualized proof of damages is in
22 itself insufficient -- is in itself sufficient to
23 preclude class treatment. Certification was denied
24 there under the heading Visa USA, Inc. vs. Wal-Mart
25 Stores, Inc., 536 US 917 (2002).

1 The Plaintiff's expert, Gordon Rausser, sets
2 forth two methodologies for the determination of class
3 wide damages. The first method involves examining the
4 two specific areas of Defendant's contract -- conduct
5 attributable to the class's damages. First the
6 misappropriation of NAF funds and second, the
7 elimination of support services.
8 The second method of computation -- so those
9 are two subcategories in the first approach. The
10 second method is the computation that relates to the
11 separate and independent analysis of the class's lost
12 profits. Because these proposed methodologies provide
13 a means by which Plaintiff's damages can be calculated
14 on a class wide basis, any individual proof of damages
15 does not preclude class certification.
16 The Defendants correctly contend that there
17 can be no class certification in cases which would
18 require individualized proof of causation, citing for
19 example to Saldano vs. City of Camden, 252 NJ Super
20 188, App. Div. (1991). See their opposing brief at 73
21 to 74.
22 However in Saldano, the Appellate Division
23 did not adopt a per se or bright line rule that
24 requires certification -- I'm sorry, that prevents, I
25 should say, bright line rule that prevents

1 certification when a matter involves individual
2 questions of causation or damages. Rather the Court
3 found that the claims of the class of property owners
4 in that case who sought damages caused by fires in
5 Camden owned -- that is to say city owned abandoned
6 buildings. Those claims raise unique issues of
7 liability, causation and damages. 252 NJ Super at 197.
8 In Straun, which was decided after Saldano,
9 the New Jersey Supreme Court certified a class
10 consisting of 150 families who purchased homes within a
11 residential development. The Plaintiffs contended that
12 the developers knew of a landfill but did not disclose
13 the information. 140 NJ at 61.
14 Rejecting Defendant's position that a trial
15 Court would need to examine the unique characteristics
16 of each property and the knowledge of its owners, the
17 Court found, quote:
18 "Plaintiffs seek to address a common legal
19 grievance based on the effect of a nearby landfill.
20 Unknown to the Plaintiffs on the value or desirability
21 of property purchased by the Plaintiffs from developers
22 and brokers who knew of the landfill. Despite
23 potential issues of causation, reliance and damages
24 particular to the individual actions, the core of these
25 case concerns common issues of fact and law."

1 Close quote. Id. at 67.

2 Accordingly the Plaintiff's claims were
3 entitled to proceed as a class. Similarly in Eliades,
4 the Plaintiff moved to certify a class of approximately
5 72,000 current and former New Jersey employees of Wal-
6 Mart for unpaid work. Wal-Mart argued to the New
7 Jersey Supreme Court that the decisions of the trial
8 court and Appellate Division denying class
9 certification should be affirmed because of numerous
10 individual issues, including but not limited to, quote:

11 "Whether particular employees voluntarily
12 missed rest and meal breaks. Why employees who worked
13 off the clock did not avail themselves of the curative
14 time clock procedures. How much time was worked off
15 the clock. Whether employees worked off the clock with
16 the expectation of compensation and how much in damages
17 employees suffered if any."

18 191 NJ 112.

19 In reversing the lower Courts, the New Jersey
20 Supreme Court focused on Wal-Mart's common course of
21 conduct towards its employees. See id. at 111, 12,
22 describing the common factual, legal and evidentiary
23 issues.

24 It determined that even though there were
25 numerous and material individual causes -- issues of

1 fact, they did not prevent or foreclose a finding of
2 predominance or that class certification was inadequate
3 -- was inappropriate. Id. at 112.
4 In particular the Court relied upon the
5 earlier decision in In Re Cadillac as explained by
6 Chief Justice Zizalle, quote:
7 "The arguments advanced by Wal-Mart implicate
8 our ruling in In Re Cadillac. That case concerned a
9 state wide class of 7,500 purchasers of Cadillac
10 automobiles with a specific engine. The customers
11 alleged that General Motors Corporation, knowing of
12 common design defects, defrauded them into purchasing
13 the vehicles. General Motors urged decertification
14 arguing, as Wal-Mart does here, that individualized
15 questions predominated over common legal and factual
16 contentions."
17 "Summarizing General Motors' assertions,
18 Justice Pollack wrote, [now quoting from In Re Cadillac
19 and Justice Pollack], 'GM vigorously contends that the
20 engine is not defective and that diverse causes
21 unrelated to the design of the V8 64 engine are the
22 source of the common complaints. For example it
23 attributes the various claims, the various problems of
24 the individual owners to defective parts and proper
25 maintenance, alteration of the car or intervening

1 accidents. GM asserts that the need to prove these
2 numerous causes of action -- these numerous causes of
3 engine failure would necessitate thousands of mini
4 trials involving, among others, the issues of causation
5 and damages as to each car owner. Thus GM contends
6 that certification would prevent it from pursuing
7 defenses based on each car's individuals
8 characteristics and use by each owner.'"
9 End of the quotation from <u>In Re Cadillac</u>.
10 Returning to Justice Zizalle's quotation from
11 <u>Eliades</u>.
12 "We rejected General Motors' argument and
13 affirmed the class certification entered by the trial
14 Court. We explained the General Motors, quote,
15 'misconstrued the nature of class action proceedings'.
16 Certification as a class action does not limit a
17 Defendant's rights to pursue any of the Plaintiff's
18 claims. Certification merely permits litigation o
19 common issues on a class basis before litigation of
20 individual issues."
21 Close quote and also close quote from
22 <u>Eliades</u>, <u>191 NJ at 113</u>. And citations were omitted
23 there within the quote.
24 There is nothing in either <u>Straun</u> or <u>Eliades</u>
25 that limits certification to, quote, "single product

1 defect -- single product defect", unquote, cases, as
2 suggested by the Defendants in their opposition brief
3 at 73. Instead the New Jersey Supreme Court in both
4 cases focused on the Defendant's common course of
5 misconduct.
6 Similar to Eliades, the Plaintiffs and the
7 class could prove that they are victims of Defendant's
8 systematic reduction of contracted benefits with
9 ensuing losses. Defendant's wrongful conduct uniformly
10 affected all Century 21 franchisees, including the
11 Plaintiffs.
12 The Defendants do not claim that the
13 franchise agreements contain materially different
14 provisions regarding franchisee's obligations or the
15 benefits that they would receive in return.
16 Consequently any individual issues regarding their
17 causation or damages do not prevent class
18 certification.
19 The remaining cases cited by the Defendants
20 in support of their argument that lost profits damages
21 -- that lost profits damages raise insurmountable
22 predominance issues are distinguishable. Pope vs.
23 Intermountain Gas Co., 646 P. Second 988, Idaho (1982),
24 see the Defendant's opposition at page 74, was not
25 decided under New Jersey Law and did not involved a New

1 Jersey statute. It was an anti-trust case brought
2 under an Idaho statute which specifically required that
3 a Plaintiff establish individual injury. No such
4 requirement exists under our Consumer Fraud Act. See
5 Laufer, 385 NJ Super at 188.
6 Further, the Plaintiffs provided absolutely
7 no evidence to support their claims for lost profits.
8 The Court held, quote:
9 "In sum there is nothing in the record,
10 including the exhibits, to provide a reasonable
11 foundation for calculating lost profits for the
12 Plaintiffs." Close quote. Pope, 646, P. Second at
13 1008.
14 In this case the Plaintiffs have provided
15 reasonable and accepted methodologies, including a
16 regression analysis, to calculate lost profits on a
17 class wide basis. Refer to Gordon Rausser's
18 declaration, his initial declaration at paragraphs 10
19 to 13 and 67 to 68 in his rebuttal declaration, which
20 is annexed as Exhibit A to the rebuttal certification
21 dated September 25, 2009. And the Plaintiff's brief at
22 pages 28 and 30.
23 Gross vs. Johnson and Johnson, Merck Consumer
24 Pharmaceutical Litigation, 303 NJ Super 336, Law Div.
25 (1997), which the Defendants cite in their opposing

1 brief at page 74, note 51. It's in apposite. In Gross
2 the Plaintiffs alleged that they were misled by
3 specific advertisements regarding Pepcid AC, id. at
4 339. The Court reviewed the deposition testimony of
5 the named representatives, none of whom could clearly
6 identify which advertisements they saw and what
7 components of the advertising they specifically relied
8 upon in deciding to purchase the drug. Id. at 345, 46.
9 Finding a lack of predominance, the Court
10 stated, quote:
11 "The question of whether each consumer
12 purchased Pepcid AC in reliance on those three
13 particular advertisements during a massive media,
14 quote/unquote "blitz", would necessarily be highly
15 individualized and complex."
16 Id. at 346. Close quote, id. at 346.
17 Reliance is not an issue in this litigation.
18 Our Supreme Court has stated that, quote:
19 "Problems well down the road which may be
20 pertinent to the procedures which ultimately should
21 govern the allocation of damages, need not and should
22 not provide a road block to the prompt and conditional
23 determination of whether this suit may be properly
24 maintained as a class action."
25 Close quote. Straun, 140 NJ at 68, 69 citing

1 to Herbst vs. International Telephone and Telegraph
2 Corp, 495 F. Second 1308 at 1321, Second Circuit
3 (1974).
4 Accordingly the Court does not accept
5 Defendant's arguments regarding individual damage and
6 causation issues.
7 Now it appears that if monies from the NAF
8 were misappropriated by the Defendants, all of the
9 franchisees suffered an impact in the amount of the
10 misappropriation. However, the Defendants argue, the
11 specific examples of misappropriation contained in
12 Gordon Rausser's report do not actually represent
13 misappropriate monies. See their opposition brief at
14 pages 81 to 83.
15 But as Mr. -- but, Mr. Rausser -- Mr.
16 Rausser's -- I'm sorry, let me start again. But Mr.
17 Rausser's use of expenditures according to the contract
18 between Cendant and the franchisees are provided as
19 examples to show how, assuming misappropriation,
20 improperly diverted monies could be accounted for and
21 class damages calculated. See his declaration -- his
22 initial declaration at paragraphs 53 to 60.
23 After all, discovery is far from complete
24 regarding the expenditures from the NAF. Once those
25 expenditures are identified, their propriety may well

1 be determined. Once the issues regarding the propriety
2 of the expenditure from the NAF and Move.com are
3 resolved, the liability impact will be common to all
4 class members. See Rausser's rebuttal report,
5 paragraphs 28 to 29 and 31 to 32.
6 Thus, assuming monies were misappropriated
7 from the NAF, as Plaintiffs allege, the Plaintiffs
8 could be entitled to a share of those monies. Such
9 misappropriation would represent a set of common
10 questions that predominate over any individual damage
11 allocation issue, hence class treatment of these claims
12 is appropriate.
13 Defendants argue against Mr. Rausser's lost
14 profits damages analysis. To that end that they
15 contend that Mr. Rausser fails to make an allocation of
16 damages between all Century 21 franchises --
17 franchisees and class members, as well as between the
18 individual class members themselves. Sell their brief,
19 Defendant's brief, at 77, 78 in opposition.
20 They further assert that the Plaintiffs have
21 not submitted a, quote, "completed", unquote, damage
22 model and from there argue that the class cannot be
23 certified. See their brief in opposition at 78 to 80.
24 However, Mr. Rausser's report addresses
25 Plaintiff's ability to establish lost profits on a

1 class wide basis. He has demonstrated that there are
2 multiple models that can accomplish this task and that
3 allocation through the execution of the model can be
4 conducted, once discovery is complete and
5 determinations are made as to the propriety of
6 Cendant's actions with respect to the Century 21
7 franchisees. See his declaration at paragraphs 51 to
8 77.
9 What Defendants here argue for is a specific
10 calculation of individual damages. However that is not
11 -- that is not what required at the class certification
12 stage and questions pertaining to the measure of
13 individual damages will not forestall class
14 certification.
15 Quote:
16 "It is clear the New Jersey Courts will
17 permit class certification, even though individual
18 questions such as degree of damages due a particular
19 class member or reliance by individual class members on
20 Defendant's alleged misrepresentations may remain
21 following resolution of the common questions."
22 See Delgazzo, 266 NJ Super at 181. See also
23 Straun, 140 NJ at 67 where a class was certified,
24 quote, "despite potential issues of causation, reliance
25 and damages particular to the individual actions."

1 Close quote.

2 Defendant's contention that the modeling has
3 not been, quote, "performed", unquote. See their brief
4 at 78, 79 in opposition, is not on point.

5 The point is that the models have been
6 identified and described by Mr. Rausser in his
7 declaration at pages -- at paragraphs 51 to 77.
8 Defendants argue that Mr. Rausser's models must fail
9 because he does not specifically identify the source of
10 data he will use and that the required data does not
11 exist. See the opposing brief at 79 to 80.

12 However, Mr. Rausser identifies the factors
13 affecting the model and the Defense expert does not
14 take issue with the appropriateness of the factors.
15 See Rausser's declaration at paragraph 68, 71 and 72,
16 74 and 77 and his rebuttal report at paragraph 38.

17 Further Defendants contend that Mr. Rausser
18 lacks data, but he points out that three peer review
19 journal, the Journal of Real Estate Research, the
20 Journal of Real Estate Financial -- I'm sorry, the
21 Journal of Real Estate Finance and Economics and Real
22 Estate Economics are sources of, quote, "rich and
23 widely used data", unquote. See his rebuttal at
24 paragraph 37.

25 These -- these sources utilize empirical

1 analysis of good industry data, according the Mr.
2 Rausser at paragraphs 36 and 37. I think of his
3 rebuttal declaration.
4 Rausser's report demonstrates that any
5 individual issues can be controlled for and that common
6 issues predominate in the case. Damages stemming from
7 the misappropriation of NAF monies are common to the
8 class, are ascertainable through discovery and can be
9 reimbursed to the class through a simple calculus. The
10 determination of damages on a class wide basis, due to
11 NAF misappropriation can be made if the allegedly
12 improper NAF disbursements are confirmed.
13 Further -- and that will be a subject of
14 discovery on merits. Further, lost profit damages can
15 be calculated using accepted methodologies which
16 identify and control for individual issues. The data
17 necessary to perform this modeling is available. The
18 Defendants do not refute these points and they're
19 expert, and the Court has carefully has reviewed the
20 three expert reports that were submitted. Two by
21 Gordon Rausser and one by Defense expert Daniel Fishel
22 (phonetic).
23 Mr. Fishel cites in his report efficiency
24 gains that were presumably effected by the reduction in
25 overhead expenses, but he does not describe in any

1 detail. He also discusses what he -- what he described
2 as benefits to the franchisees by elimination of
3 services and greater efficiencies, but again he does
4 not describe the efficiencies. And these services had
5 value, an economic value, whether they were
6 specifically used or not. And also the contributions
7 which were made by all were uniform in terms of their
8 proportionate share of gross revenues.
9 In terms of NAF expenditures, Mr. Fishel at
10 paragraph -- paragraphs 30 and 31 of his report, he
11 seems to lose sight of the general overhead to run the
12 NAF marketing on the one hand. He discusses the
13 general overhead that is needed to run NAF, but the
14 franchise agreement, under the NAF section, allows for
15 reduction of only very specific expenses, not for
16 general overhead, but for accounting, collection,
17 bookkeeping, reporting and legal expenses. See for
18 example page 12 of the Property Mart agreement for the
19 period 1998 to 2001.
20 So having balanced the reports of the
21 experts, one against the other, the Court finds that
22 the Plaintiffs have made out a reasonable method,
23 proposed method, of ultimately calculating the class
24 damages by the formulas presented and it is not
25 necessarily -- it is not necessary that those

1 calculations be done at this stage simply to
2 demonstrate that they are possible and the Court is
3 satisfied at this point, based on this showing, that
4 they are.
5 And so the Plaintiffs have demonstrated as to
6 their experts, the common issues predominate in this
7 case, as to comparison of the experts.
8 On November 30th of 2001, Cendant introduced
9 a, quote, "waiver of jury trial" provision. "Waiver of
10 jury trial", end quote, provision into his form
11 franchise agreement. See Exhibit 11 of the
12 certification of Mr. Bartels, the Defendant's response
13 to the Plaintiff's interrogatory number one.
14 With the proposed class definition
15 terminating on April 17 of 2002, the Plaintiffs contend
16 that the jury trial waiver would implicate, quote,
17 "only five percent of the class period", unquote. See
18 their reply brief in support of the class motion at 57
19 -- not 27.
20 According to the Court's calculation, the
21 proposed class embraces 80.567 months and in 4.567 of
22 those months, that is to say 12/1/01 to 4/17/02, the
23 agreement included a jury trial waiver. The percentage
24 is 5.67.
25 However, no one knows at this point how many

1 potential class members that would include. The
2 Defendant's contend that this, quote, "would render a
3 class unmanageable", unquote. See their opposition
4 brief at 85.
5 The Plaintiffs assert that the waiver would
6 have no impact on the trial except that the Court would
7 act as a fact finder for a certain number of Plaintiffs
8 whose identities and number would presumably be known
9 by the time of trial.
10 "The denial of class action status due to
11 manageability concerns is disfavored. And in view of
12 the public interest involved in class actions, should
13 be the exception rather than the rule."
14 Eliades, 191 NJ at 117, quoting from Bristol
15 Bay Alaska Salmon Fishery Anti Trust Litigation, 78 FRD
16 622 and 628, Western District of Washington (1978).
17 In Bates vs. Tenco Services Inc., 132 FRD
18 160, District of South Carolina (1990), a class action
19 was initiated for property damage caused by three
20 Defendants, including the United States, pursuant to
21 the Federal Tort Claims Act, the FTCA. The FTCA
22 required that the claims against the United States be
23 tried before the Court and not a jury. Plaintiffs
24 however made a demand for a jury trial against the
25 remaining Defendants.

1 In his opposition to class certification, the
2 United States argued that trying a case before the
3 Court and a jury would be, quote, "too complicated",
4 unquote. Id. at 164 note seven. The Court rejected
5 that argument and certified the class, citing to United
6 States vs. Yellow Cab Co, 340 US 543 at 555, 56 (1951).
7 The Court ruled that such defects were not
8 insurmountable and were not different from cases where
9 equity issues are tried before the Judge and issues of
10 law before the Jury. Bates, 132 FRD at 164, note
11 seven.
12 Moreover, quote:
13 "It is true that possibly different factual
14 questions may come into play when the Defense of waiver
15 or other defenses are raised as against individual
16 members of the class. This is not a bar to
17 maintainability of the action as a class action."
18 Fiore vs. Hudson County Employees Pension
19 Commission, 151 NJ Super, 524 at 529, App. Div. (1977).
20 Defendants claim that the proposed class
21 would be unmanageable is not supported by law or any
22 evidence of likely management problems. Accordingly
23 the jury waiver provisions do not create a
24 manageability issue and should be preclude class
25 certification.

1 Defendants contend that Plaintiffs and their
2 Counsel are not adequate to represent the class. See
3 Defendant's brief at 85 to 90. That's their opposition
4 brief. Defendants variously allege that the
5 representative Plaintiffs did not choose the lawyers.
6 That the Plaintiffs do not speak among themselves and
7 that they know virtually nothing about the litigation.
8 As to each specific Plaintiff, the Defendants
9 assert that Cooper terminated its franchise but kept
10 trade dress in place and then committed perjury on that
11 point. That the representative of Property Mart
12 provided, quote, "half truths", unquote in the
13 certification on the subject of his ability to appear
14 for a deposition in New Jersey. And that Sunland,
15 quote, "torpedoes", unquote, its profits and now seeks
16 to recoup them in this action.
17 As to Counsel, Defendants allege that they
18 have, quote, "switched sides", unquote. Have taken to
19 themselves a, quote, "veto power" of any settlement.
20 And filed an affidavit constructed from two different
21 documents.
22 Defendants rely on selected deposition
23 passages to support their contentions regarding the
24 Plaintiffs. A broader view, broader review of the
25 testimony persuades the Court that the Plaintiffs are

1 in fact adequate representatives of the class. The
2 Plaintiffs have demonstrated sufficient knowledge of
3 this action and involvement with their attorneys to
4 meet the adequacy requirement.
5 Here the Plaintiff Johnson from Cooper in
6 Florida has expressed an understanding of her
7 responsibilities as a class representative, who has in
8 fact been actively involved in the litigation. This
9 would be Exhibit 31 and Ms. Johnson's deposition
10 testimony at page 97, line 23, to page 101, line one.
11 She has, quote, "reviewed numerous pleadings,
12 including all of the version of the complaint,
13 discovery requests, correspondence and other court
14 documents that I -- I'm quoting from her -- I received
15 from our attorneys to stay informed and to aid in the
16 prosecution of litigation." Close quote.
17 That's the Johnson certification. That quote
18 is from Johnson's certification at paragraph 28. That
19 is exhibit 22, I believe, to the Bartels'
20 certification. So we have deposition of Ms. Johnson as
21 well as her certification and the Court has reviewed
22 both.
23 The same is true for Mr. Silm of Property
24 Mart. Silm testified that he is, quote, "a
25 representative of the class", unquote, who is to,

1 quote, "act in the best interest of the class", close
2 quote. That's his deposition at page 42, lines 17 to
3 22. That's Exhibit 20.
4 He has actively participated in the
5 litigation by, among other things, maintaining, quote,
6 "regular conversations with my attorneys", unquote,
7 and, quote, "reviewing numerous documents that have
8 been filed in this case by both sides", close quote.
9 His certification at paragraph 11, which is Exhibit 19
10 to the larger certification I believe of Mr. Bartels.
11 Likewise it appears that Plaintiff Nichols
12 has taken his duties as a class representative
13 seriously. He testified that he has maintained
14 frequent communication with Counsel, reviewed pertinent
15 documents and met with other franchisees to discuss
16 this litigation. His deposition, which is Exhibit 4 to
17 Mr. Bartels' certification, the transcript pages 123,
18 line seven to 114, line 25, 146 line two to 147 line
19 four, 159 line three to line 14.
20 And also he submitted a certification at
21 Exhibit 21, it's attached as Exhibit 21 to the Bartels'
22 certification. See paragraphs 19 to 21 where he stated
23 he had conversations with Counsel, quote,
24 "approximately every two weeks to keep apprized of
25 developments in the case and to see if I could provide

1 any assistance", unquote. He has, quote, "reviewed the
2 complaints, discovery requests, correspondence from
3 Plaintiff's attorneys and other court documents,
4 unquote, and has discussions with other Century 21
5 franchisees, quote, "to keep them informed and discuss
6 issues relating to this litigation", close quote.
7 He has also stated that he and the other
8 Plaintiffs are involved in the decision making process,
9 testifying that he has previously, quote, "had a lot of
10 discussions with Plaintiff's Counsel, Mr. Drachler."
11 That's Exhibit 24, his deposition at page 158 line 13
12 to 159, line 14.
13 Moreover all of the Plaintiffs attended full
14 day depositions where they testified about issues
15 pertaining to class certification. See Chakegian, C-H-
16 A-K-E-G-I-A-N, vs. Equifax Info Services, LLC, 256 FRD
17 492 at 499, Eastern District of Pennsylvania (2009).
18 Finding adequacy where, despite limited knowledge about
19 the case and his obligations as a representative, Mr.
20 Chakegian submitted to a nearly five hour deposition in
21 this case and testified that he "understood that he had
22 -- that he had a responsibility to look out for the
23 best interest of the class", close quote.
24 Accordingly the Plaintiffs are sufficient
25 knowledgeable and engaged in this litigation and are

1 able and willing to protect the interests of the class.
2 Further, the fact that Plaintiffs rely on Counsel and
3 the Prosecution of this complex action is not
4 disqualifying. The Court in Baffa, B-A-F-F-A, vs.
5 Donaldson, Lovekin and Generette Securities Corp.
6 explain that, quote "the acknowledgment of advice and
7 support from a named Plaintiff's attorneys cannot
8 support a conclusion that Plaintiff is unable to pursue
9 the litigation on behalf of the class. Far from
10 showing the Plaintiff's ignorance of the litigation or
11 his inability to serve as a class representative, it
12 demonstrates his ability to appreciate the limits of
13 his knowledge and rely on those with the relevant
14 experience." 222 F. Third 52 at 61, Second Circuit
15 (2000).
16 See also Nathan Gordon Trust vs. Northgate
17 Exploration Limited, 148 FRD 105 at 107, Seventh
18 District of New York (1993), where it is quoted, "it is
19 the lawyer's task to prepare the case both on the facts
20 and the law", close quote. Supreme Court in Serowitz
21 vs. Hilton Hotels Corp., 383 US 363, 370 to 74 (1966),
22 "disapproved of attacks on the adequacy of a class
23 representative based on the representative's
24 ignorance." Close quote.
25 Baffa, 220 F. Third at 61, quote:

1 "Most Courts have followed the Serowitz
2 rationale in rejecting any challenge to adequacy for
3 class actions under amended -- that's Federal Civil --
4 Federal Civil Procedure 23, based on ignorance of the
5 facts or theories of liability."
6 Newburg on Class Actions, Section 3:34. See
7 also McCall versus Dry (phonetic) Financial Services
8 LP, 236 FRD 246 at 243, Eastern District of
9 Pennsylvania (2006), which followed Serowitz and found
10 that, quote, "the accuracy of putative class
11 representatives does not depend on their legal
12 knowledge, nor are they required to know all the facts
13 about the case as a whole." Close quote.
14 And In Re Universal Services Fund, the Court
15 addressed and rejected Defendant's contention that,
16 quote, "many of the class representative lack personal
17 knowledge regarding their claims and have essentially
18 abdigated their role -- abdicated their role as class
19 representatives to their attorneys." 219 FRD at 670.
20 As to one proposed representative, the Court
21 ruled he was adequate because, quote, "he understands
22 that his role as class representative primarily entails
23 monitoring the litigation, keeping informed regarding
24 the course of the litigation. Asserting -- assisting
25 Counsel with prosecuting the case, reviewing pleadings,

1 responding to discovery, giving deposition testimony
2 and being consulted with respect to the course of
3 litigation." Close quote. Id. at 671.
4 It decided, another proposed representative
5 was adequate, even though he admitted that, quote,
6 "most of his knowledge came from his attorneys", close
7 quote. Finding that he understood his role, quote, "to
8 be -- to represent the class to the best of their
9 interest", close quote and that he had, quote, "read
10 all the documents the attorneys have sent him relating
11 to this case", close quote. Id. I have omitted
12 internal quotes and citations.
13 Two of the five cases relied upon the
14 Defendants are in apposite. See Maywald vs. Parker and
15 Parsely Petroleum Co, 57 F. Third 1072 at 1077, Second
16 Circuit (1995), dealing with the right to discharge
17 class counsel and adequacy of proposed settlement
18 notice. Rand vs. Monsanto Co, 925 F. Second 596 at
19 599, Seventh Circuit (1991), which considered and
20 rejected the assertion that the representative
21 Plaintiff must be willing to bear all costs of the
22 action to satisfy adequacy.
23 The Defendants remaining cases are examples
24 of representatives who clearly demonstrated their
25 inadequacy to represent the class. An example is In Re

1 Monster World Wide Inc., securities litigation, 251 FRD
2 132 at 135. That's a Seventh District of New York case
3 of (2008). There specifically at page 135, reading
4 from the case:
5 Here as part of class certification
6 discovery, Defendants deposed STA-ILA, S-T-A hyphen I-
7 L-A, those are all caps. Witness Horace Austin, co-
8 chair of the fund who testified that he was the person
9 at STA-ILA most knowledgeable about the lawsuit. STA-
10 ILA purported to be a class representative. However
11 Mr. Austin then testified that he did not know the name
12 of the stock at issue in this case, did not know the
13 name of either individual Defendant, did not whether
14 STA-ILA ever owned Monster stock, did not know if an
15 amended complaint had filed.
16 Did not know whether he had ever seen any
17 complaint in the action. Did not know the Defendant
18 McKelvey had moved to dismiss the complaint. And did
19 not know that STA-ILA had moved for pre-discovery
20 summary judgment. He also testified that STA-ILA had
21 hired the Angelos law firm, A-N-G-E-L-O-S law firm to
22 represent it in this litigation. That he would, quote,
23 "guess", unquote that Angelos then hired Labattan,
24 Sucro LLP as lead Counsel. And STA-ILA had granted
25 Counsel at Angelos permission to file any complaint for

1 any reason they deemed necessary and that STA-ILA did
2 not review the complaint in this case before it was
3 filed.
4 Confronted with this, what the Court called
5 appalling testimony, Plaintiff's Counsel sought to
6 mitigate the damage by designating for deposition a
7 second STA-ILA witness, Steven Lakusky (phonetic), a
8 trustee of the fund. But even though Mr. Lakusky
9 seemingly knew substantial more about the case than Mr.
10 Austin, he admitted he had mostly learned about the
11 substance of the litigation only in the week before his
12 deposition and had devoted almost no time to the case
13 before then.
14 "The Court will not be a party to this sham.
15 The foregoing events establish beyond a doubt that STA-
16 ILA has no interest in, genuine knowledge of, and/or
17 meaningful involvement int his case and is simply the
18 willing pawn of Counsel."
19 That is not the case here. Defendants also
20 rely on <u>Scott vs. New York City District Counsel of</u>
21 <u>Carpenter's Pension Plan</u>, <u>224 FRD 353</u>. Where the Court
22 -- that's the Southern District of New York in 2004,
23 where the Court now reads from page 356.
24 "Both Scott and Spillers alarming lack of
25 familiarity with the suit, as well as little or non-

1 existent knowledge of their role as class
2 representatives, is manifest. Scott at his deposition
3 stated he did not know that allegations were contained
4 -- did not know what allegations were contained in the
5 complaint. He has not seen the complaint prior to his
6 deposition on October 14th of 2003. His deposition was
7 held 17 months after the filing of the complaint."
8 "He did not know for sure whether this was a
9 class action suit. He did not know what a class
10 representative was. He was not -- he has not the
11 slightest idea of how many people are in the class. He
12 has personally met with Counsel only once in the three
13 years prior to his deposition. He was unsure what the
14 lawsuit even concerned. He apparently believes the
15 case has something to do with nepotism in the union.
16 He is unable to personally participate in the case at
17 all, since his health prevents him from leaving
18 Virginia. So complete is Scott's abdication of his
19 role to his attorney that Scott stated he would leave
20 every decision up to his attorney and never question
21 his advice."
22 "Spiller's deposition makes equally clear
23 that he is unsuited to be a class representative. He
24 did not know what a class action is nor that his case
25 was such an action. He has no idea what effect a

1 victory for himself would have upon the people he
2 claims to know he represents. He incorrectly stated
3 that the class comprises all of the plant's
4 participants. He further admitted at his deposition
5 that he could not remember reading the complaint before
6 it was filed and that the first time he read the
7 complaint was 15 months after its filing. He also
8 admitted he had not -- he did not even know what a
9 class action is."
10 End of the reading from Scott, which is
11 equally inapplicable to the present matter.
12 As to the Defendant's allegations against
13 Cooper, Silm and Nichols, to the extent such attributes
14 are considered, the inquiry is not, quote, "into the
15 representative's moral righteousness, but rather an
16 inquiry of improper or questionable conduct arising out
17 of a touching upon the very prosecution of a lawsuit."
18 Close quote.
19 German vs. Federal Home Loan Mortgage Corp,
20 168 FRD 145 at 154, Southern District of New York
21 (1996), quote:
22 "To defeat class representation, any
23 allegations concerning the representative's adequacy
24 must be relevant to the claims in the litigation, such
25 that the problems, 'could become the focus of cross

1 examination and unique defenses at trial to the
2 detriment of the class'. Plaintiff's testimony or
3 credibility that is subject to attack -- to attack must
4 be, 'on an issue critical to one of their causes of
5 action'". Close single, close double quotes.
6 See McCall, 236 FRD at 251. Quote:
7 "According to a leading commentator on class
8 actions, most Courts have rejected challenges to class
9 representatives based on allegations of unrelated,
10 unsavory, unethical, or even illegal conduct. This is
11 irrelevant to the issue of adequacy to represent a
12 class for particular claims or issues."
13 Quoting from Newburg on Class Actions,
14 Section 3:36.
15 Also Levy vs. Sears Roebuck and Co., 496 F.
16 Second 944 at 950, Northern District of Illinois
17 (20027), quote:
18 "Rudamonsky was in fact sanctioned by the
19 NASD and whether he properly revealed this to
20 Defendants in discovery bears upon his credibility
21 only, but not on his qualifications to represent the
22 class. Whether or not a Plaintiff is credible is
23 irrelevant to that person's ability to be a class
24 representative."
25 Walters vs. Reno, 145 F. Third 1032 at 1046,

1 Ninth Circuit (1998) where the Court found the adequacy
2 was met for class representatives had a history of
3 committing document fraud, because it, quote, "had no
4 bearing on the class representatives abilities to
5 pursue the class claims vigorously and represent the
6 interests of the absentee class members."
7 Defendants argue that Property Mart is
8 inadequate and atypical in part because of, quote, "two
9 material deviations" from the supposed, quote, "form
10 agreement", close quote. Opposition brief at 88.
11 The Defendants cite to quote, "two material
12 deviations from the supposed, quote, "form", unquote,
13 agreement which Property Mart negotiated, including one
14 terms which Plaintiff's Counsel instructed Property
15 Mart "to not disclose to Defendants or the Court",
16 close quote. Opposition brief at 36. And they cited
17 to Property Mart deposition testimony.
18 In the certification of Jeffrey Silm, who
19 owns Property Mart, dated March 30th of 2006, he states
20 that, quote, "nothing I negotiated, was a, quote
21 'material', unquote, deviation from the standard form
22 franchise agreement, nor did I ever testify to the
23 contrary. In fact, I could not negotiate for reduction
24 -- for a reduction in the service or royalty fees or my
25 contribution to the National Advertising Fund. I

1 couldn't negotiate for a return of the regional offices
2 or any of the restoration of any of the services that
3 Defendants took away from franchisees." Close quote.
4 And that would be Exhibit 19 of the -- to the Bartels'
5 certification. Mr. Silm's certification at paragraph
6 13.
7 Furthermore, there was, quote, "no
8 instruction", unquote to Mr. Silm not to disclose the
9 terms of an agreement, quote, "to Defendants or the
10 Court", close quote. This, quote, "term", unquote was
11 not disclosed -- the reason this term was not disclosed
12 was because the Defendants refused to waive a
13 confidentiality agreement they required Property Mart
14 to enter into in connection with the term as set forth
15 more fully in the Mr. Silm's certification.
16 Defendant's Counsel was asked at the
17 deposition to waive the confidentiality requirement so
18 Mr. Silm could testify about the term, but that waiver
19 was not forthcoming. And that's at Silm's
20 certification, paragraphs 15 through 18.
21 Defendants also argue that Property Mart is
22 inadequate and atypical, because Mr. Silm, quote,
23 "conceded that it did not lose market share to Coldwell
24 Banker as the class is alleged to have, but instead
25 trounced the Coldwell Banker competition in his local

1 market."

2 That at the Defendant's opposing brief at 88.

3 The Defendants base this argument on the

4 following from their opposition brief. Quote:

5 "Property Mart admitted that from the moment

6 it opened its franchise in 1998 until at least 2000 it

7 flourished and simply trounced its Coldwell Banker

8 competition."

9 That's at the brief, page 35 to 36. And they

10 cite deposition testimony wherein the Defense Counsel

11 asks:

12 "Q So if Century 21 brokers somewhere were

13 feeling a squeeze from Coldwell Banker, that certainly

14 wasn't the case for you in your market, correct?"

15 That was the question, the Plaintiff simply

16 replied, "I'd have to agree."

17 However this argument does not acknowledge

18 Mr. Silm's testimony in which he states that he lost

19 market share beginning in approximately 2000 as

20 follows, quote:

21 "We have -- ". I'm sorry, quote:

22 "We used to have roughly 41 percent, 40

23 percent, 36 percent of residential sales in that school

24 district. I think we're down to 31 now."

25 Close quote. Exhibit 20, that's the Silm

1 deposition transcript and page 139 lines 23 to 25.

2 Defendants argue that someone is inadequate

3 and a typical, quote, "in light of owner purposely,

4 quote, 'torpedoing', unquote, the profits of his

5 company." Close quote. And that's opposition brief at

6 88.

7 And so the Defendants contend, quote, some

8 portion of loss profits that it is trying to recover in

9 this action were actually caused by someone's owners

10 intentionally torpedoing the profits of his own

11 business. See the brief at pages 36, 37, citing

12 deposition testimony.

13 Examining the transcript, one finds that it

14 was Defense Counsel at the deposition, that's at page

15 288, line 16, who characterized someone's actions as

16 "torpedoing" in quotes. See also Exhibit 31 -- Exhibit

17 21, the certification of Mr. Nichols at paragraph 25 --

18 paragraphs 25 to 32. That's an exhibit to the Bartels'

19 certification.

20 However Mr. Nichols explains that his partner

21 and other agents were still selling homes and that

22 merely spent a couple of months considering whether he

23 should close his business down as a result of

24 Defendant's actions. Paragraphs 26 and 29 of the

25 certification.

1 Defendants argue that, quote, "the sworn
2 testimony of the named Plaintiffs prove a conflict
3 exists", unquote. And that, quote, "if such a conflict
4 was not palpable, there would have been no reason for
5 Plaintiff's machinations to find or create a
6 representative for them." Close quote. That's from
7 the Defendants' opposition brief at page 51.
8 Defendants argue, quote, "Plaintiff Cooper
9 would pretend to immediately abandon its then current
10 franchise in order to transform itself into the much
11 needed, quote,'former franchisee', unquote. Id. at
12 page eight of the brief.
13 However Gwendolyn Johnson, the owner the
14 Cooper, stated that her, quote, "decision to terminate
15 my affiliation with Century 21 had nothing to do with
16 the fact Plaintiffs of Plaintiffs' attorneys in this
17 action needed a class representative to represent,
18 quote, 'former', unquote, franchisees. It was the
19 result of the Defendant's conduct and mistreatment of
20 Cooper in the Century 21 system that left me with no
21 other alternative." Close quote. Exhibit 22 to the
22 Bartels' certification which in turn is the
23 certification of Gwendolyn Johnson at paragraph 72.
24 Defendants argue that Ms. Johnson is
25 inadequate and atypical because she committed perjury

1 and, quote, "did not even know that Cooper is the
2 subject of counterclaims." Close quote. Defendant's
3 opposing brief at page 87 and 88. Defendants contend
4 that Ms. Johnson continued to utilize a web site as a
5 franchisee, despite her testimony that she was not
6 representing Cooper to the public as a Century 21
7 franchisee. Pages eight and nine of the opposing
8 brief.
9 Furthermore, as of the date of her deposition
10 in 2005, Mr. Johnson, quote, "remained utterly unaware
11 that counterclaims were filed against Cooper as far
12 back as 2002." Close quote. That at pages 42 and 43.
13 Finally, because there was still some Century
14 21 signage with Cooper's name on it, she was -- she,
15 quote, "was forced to admit that her prior sworn
16 testimony concerning the supposed abandonment of her
17 Century 21 franchise was utterly false." Close quote.
18 That at the opposition brief page nine.
19 However, the web sites she was confronted
20 with at her deposition -- I'm sorry. However, of the
21 web sites she was confronted with at her deposition,
22 one was maintained by the Defendants and Ms. Johnson
23 explained that another had not been utilized by Cooper
24 since 2000. Her certification, Exhibit 22 to Bartels'
25 certification, paragraph 75, 76.

1 With respect to her counterclaims, she had
2 paid the same -- I'm sorry, Ms. Johnson has paid the
3 sums claimed by Defendants to be due and owing two
4 years before her deposition and at the same time had a
5 sent a letter to Defendants demanding that the
6 counterclaim be dismissed, as she said, at paragraphs
7 42 to 57 of her cert.
8 Finally Ms. Johnson submitted photographic
9 evidence over three years ago demonstrating that her
10 store was closed and empty, rendering the presence of
11 any remaining signage moot.
12 Defendants also argue that Ms. Johnson
13 allowed the lawyers to make all the decisions in this
14 case and that she did so with Pat Killen, K-I-L-L-E-N,
15 a former franchisee, who has not appeared in this case.
16 See the Defendant's brief in opposition at 86.
17 The Defendants argue that Mr. Killen
18 controlled decisions regarding the hiring of
19 Plaintiff's Counsel and was the, quote, "architect of
20 this action", unquote, yet, quote, "has chosen to
21 remain in the shadows", unquote at pages five and 40 of
22 the opposition brief.
23 However, Ms. Johnson met with Plaintiff's
24 Counsel prior to their retention and, quote, "had
25 numerous conversations with Killen about the

1 retention", unquote, of Plaintiff's Counsel. Her
2 certification at pages eight to 18.
3 Moreover, Mr. Killen did not, quote,
4 "choose", unquote, to, quote, "remain in the shadows",
5 unquote, but instead, quote, "wanted to serve as a
6 named Plaintiff", unquote, in this action. Exhibit 23
7 to Bartels' certification, which is a certification of
8 Mr. Killen at paragraph 19.
9 However he claims that as a result of
10 Defendant's conduct, he was left with no alternative
11 but to file a Chapter 7 petition in bankruptcy shortly
12 before this lawsuit was to be filed, thus prohibiting
13 his participation in this lawsuit. Paragraph 16 of his
14 certification.
15 The notion that -- I'm sorry. The
16 Plaintiff's assert that the notion that they were
17 discovered by Plaintiff's Counsel and solicited to
18 become parties in this action is incorrect. Citing to
19 Mr. Silm's testimony that he first heard of this
20 lawsuit from Defendants and subsequently called and
21 retained Plaintiff's Counsel. That would be Silm
22 deposition testimony, excuse me, at page 47 line four
23 to page 48, line six.
24 Likewise, Mr. Nichols testified that he first
25 met one of Plaintiff's Counsel following an invitation

1 from, quote, "another Century 21 broker", unquote.
2 That's the Nichols deposition transcript at page 135,
3 line seven to 12, Exhibit 24 to the Bartels'
4 certification.
5 Defendants argue that Property Mart is
6 inadequate and atypical. Their opposition brief at
7 page 88, because Mr. Silm was -- because Mr. Silm,
8 quote, "was willing to mislead the Court", unquote, in
9 order to avoid the inconvenience and hardship of
10 traveling to New Jersey in connection with his
11 deposition and that any hardship he claimed was
12 illusory. Their Defendant opposition brief at 38 to
13 40.
14 However, Mr. Silm attended a full day
15 deposition in New Jersey and testified that he did
16 indeed suffer hardship, that is monetary loss, as a
17 direct result of being out of the office for his
18 deposition. See his deposition transcript at page 90
19 line two to 98 line 22 and his certification at
20 paragraphs 20 and 21 which is Exhibit 19 to the
21 Bartels' deposition.
22 As to Plaintiff's Counsel, it does not appear
23 that they in fact, quote, "switched sides", unquote, as
24 Defendants contend, because they did not receive any
25 confidential information from the Defendants and none

1 of the matters with which Plaintiff's Counsel were
2 previously involved, I believe on behalf of one of
3 Century 21's sub-franchisors, appeared to be, quote,
4 "the same or substantially related to the claims
5 asserted in this litigation", close quote. See the
6 certification of Douglas Paul Saloman, attached as
7 Exhibit 26 to the Bartels' certification at paragraph
8 six.
9 Furthermore the retainer agreement, of which
10 Defendants complain, was superceded and of no force or
11 effect, quote, "before the initial complaint was
12 filed", unquote. Exhibit 22 to Bartels' certification.
13 That is the Johnson certification at paragraph 19.
14 Finally, with respect to certifications filed
15 under her signature, Ms. Johnson unequivocally stated
16 that the, quote, "attorneys have never have attached my
17 signature to a certification without my approval", end
18 quote and goes on to explain why the signature page of
19 a certification may appear different when compared to
20 other pages in a certification, paragraphs 29 to 31.
21 Now for Counsel to be considered adequate, a,
22 quote, "Plaintiff's attorney must be qualified,
23 experienced and generally able to conduct the proposed
24 litigation", unquote. Whitsell vs. Liberty Mutual
25 Insurance Co, 508 F. Second 239 at 247, Third Circuit.

1 -- was denied at 421 US 1011 (1975), citing to Eisen
2 vs. Carlyle and Jacqueline, 391 F. Second 355 -- 55,
3 I'm sorry, at 562, Second Circuit (1968).
4 The legal standard for determining adequacy
5 of class Counsel requires a determination of whether
6 Counsel has vigorously represented the class and
7 whether they have the necessary experience and
8 qualifications to manage the lawsuit. See Goasdone, G-
9 O-A-S-D-O-N-E, vs. American Cyanamid Corp, 356 NJ Super
10 519, Law Div. (2002). See also Gross vs. Johnson and
11 Johnson Merck Consumer Pharmaceuticals Co., 303 NJ
12 Super 336, Law. Div. (1997) holding that class Counsel
13 is adequate where it vigorously represents the class.
14 In Re Prudential, 962 F. Sec at 517, holding
15 that class Counsel is adequate where class Counsel is
16 efficient and has the legal acumen to serve the
17 interest of the class.
18 In evaluating whether class Counsel -- in
19 evaluating whether class Counsel has the necessary
20 competence and experience to represent the class,
21 Courts look to the experience of class Counsel and the
22 litigated subject matter and the size and resources
23 available to the firm.
24 In this case the Defendants do not contest
25 the experience of competence of Counsel to manage their

1 litigation, Counsel's knowledge of the subject matter
2 at issue or the resources available to manage the
3 litigation.
4 The Defendant's accuse the Plaintiff's
5 Counsel, Adorno -- I'm sorry, Adorno and Yoss of
6 impermissibly quote, "switching sides", unquote,
7 because they represented Century 21 in the past. Their
8 opposition brief at six -- page six and 89.
9 However any alleged conflict of interest
10 seems to have been waived by the Defendants. They did
11 not raise this issue during the first four years of the
12 litigation and have never filed a motion to disqualify
13 Adorno and Yoss as class Counsel.
14 A party effectively waives the right to a
15 conflict if there is undue delay in making a motion to
16 disqualify. See Roman Haas Inc. vs. American Cyanamid,
17 187 F. Second 221 at 229, District of New Jersey 221.
18 See also Alexander vs. Primerica (phonetic) Holdings
19 Inc., 822 F. Sep. 1099, 1115, District of New Jersey
20 (1993).
21 Since Defendants have never filed such a
22 motion, they cannot now claim inadequacy.
23 In addition, it appears that the Defendants
24 have waived the issue of disqualification. Defendants
25 do not address the legal standard for disqualifying

1 Adorno and Yoss from this action. Under the law of
2 Florida, where the representation occurred,
3 disqualification of an attorney is an extraordinary
4 remedy that should be resorted to only sparingly.
5 Alexander vs. Tandem Staffing Solutions Inc.,
6 881 Southern Second 607, Florida Fourth District Court
7 of Appeal (2004). Swenson's Ice Cream Co. vs. Voto
8 Inc., 652 Southern Second 961, Fourth Florida DC
9 (1995).
10 In order to disqualify Counsel, when a claim
11 is made that a lawyer has a conflict of interest, a
12 moving party must show that one, there was an attorney
13 client relationship thereby giving rise to an
14 irrefutable presumption that confidences were disclosed
15 to the attorney during the course of the relationship,
16 and two, the current subject matter is the same of is
17 substantially related the matter in which the lawyer
18 represented the former client.
19 Rusikoff vs. State Department of Insurance,
20 724 Southern Second 582, Florida First DCA (1998).
21 In the instant case, the Defendants have not
22 addressed those elements. The Court concludes that
23 Adorno and Yoss is adequate as well, as the local New
24 Jersey firm representing the Plaintiffs, Keefe,
25 Bartels and Clark.

1 Defendants also argue that a class action is
2 not the superior method for resolving these disputes.
3 See their opposition brief at page 09 to 94. They
4 first contend that the laws of all 50 states would have
5 to be applied and that the Jury and Court would be
6 overwhelmed by this prospect.
7 However, as we've already seen, choice of law
8 does not stand in the way of finding -- of a finding of
9 superiority, because the law of New Jersey will govern
10 all issues and claims.
11 The Defendants contend that certification of
12 a class would force the Plaintiffs to quote, "split
13 their claims", unquote. See their opposition brief at
14 92, citing to the forum selection clause and the
15 franchise agreements.
16 Defendants bottom this argument on the notion
17 that those class members whose agreements contain
18 mandatory forum selection clauses pointing to other
19 states would be compelled to litigate some or all their
20 claims in the other state.
21 The simple answer to this argument is that
22 this proposed class is limited to franchisees whose
23 agreements contain a New Jersey venue and jurisdiction
24 clause and the Court rejects Defendant's arguments on
25 this score.

1 In any event, the class representatives are
2 under no obligation to plead and litigate every single
3 cause of action that may have arisen at any time
4 between any franchisee and the Defendants. See for
5 example In Re Universal Services Fund Telephone Billing
6 Practices Litigation, 219 FRD 661 at 669, 70 District
7 of Kansas (2004) certifying action as class action and
8 rejecting the argument that because class Plaintiff did
9 not assert a fraud claim, the Plaintiff engaged in
10 impermissible claim splitting.
11 The Plaintiffs have properly sought class
12 treatment for claims that arose during the class period
13 of the members of the defined class. Defendants also
14 argument -- I'm sorry, Defendants also argue that
15 Plaintiffs are sophisticated parties whose claims are
16 sizeable enough to render them capable of pursuing
17 their claims individually and that the length of time
18 this litigation has taken to date demonstrates that the
19 class mechanism is not efficient. See the opposition
20 brief at 92 to 95.
21 Sophisticated or not, the expense of this
22 litigation makes individual actions prohibitive,
23 foreclosing a viable alternative remedy to the
24 Plaintiffs in the absence of class relief, quote:
25 "Individual actions or a test case may be an

1 inferior alternative to the class action when the
2 economics of the situation make it impossible for the
3 aggrieved members to vindicate their rights by separate
4 actions", close quote.
5 In Re Cadillac, 93 NJ at 437.
6 Here, as in In Re Cadillac, quote, "many of
7 the crucial issues are factual and raise and
8 substantial problems of proof. Those proofs doubtless
9 will require substantial discovery, expert testimony an
10 trial time, all of which would render uneconomical and
11 individual unit -- I'm sorry, an individual suit by a
12 single disgruntled Plaintiff", close quote.
13 Of significance, Plaintiffs are aware of no
14 individual actions based on these facts and claims that
15 they have reported to the Court, nor have the
16 Defendants, pending anywhere in the country and
17 Defendants -- I'm sorry. And Defendants who would
18 know, as I say, have no pointed any out.
19 In any event, the argument that class
20 certification should be denied because class members
21 are, quote, unsophis -- are quote, I beg your pardon,
22 are quote, "sophisticated", unquote, misses the mark.
23 Whether to certify a class depends on meeting the
24 requirements of Rule 4:32, which do not include lack of
25 sophistication on the part of the class.

1 See generally In Re Visa, 280 F. Third 124,
2 certification of a class including the largest
3 retailers in the United States, Wal-Mart, Sears, and
4 the Limited.
5 In Re Relafen, R-E-L-A-F-E-N, Anti-trust
6 Litigation, 281 FRD 337 at 347, District of
7 Massachusetts (2003). Superiority requirements
8 satisfied by Plaintiffs who were described as, quote,
9 "primarily large businesses with presumably large
10 claims", unquote.
11 In Re Cardizem CD, Anti-Trust Litigation, 200
12 FRD 297, 325, Eastern District of Michigan (2001):
13 Quote:
14 "The presence of large claimants in a
15 proposed Anti-Trust class and the possibility that some
16 of them might proceed on their own does not militate
17 against class certification." Close quote.
18 Further, to whatever extent the monetary
19 value of these claims may be characterized as
20 "substantial", it is hardly dispositive of the issue of
21 class certification. "To the contrary, it is well
22 established that large individual claims do not
23 automatically preclude certification. It is important
24 to note that though the existence of small claims may
25 be a strong element in approving a class action, the

1 presence of large claims is not a ground for denial."

2 That's Newburg Section 4:39. See also

3 McMahon Books Inc. vs. Willow Grove Associates, 108 FRD

4 32 at 40 to 41, Eastern District of Pennsylvania (1985)

5 where class certification was granted, even though each

6 Plaintiff had a significant claim.

7 Quote:

8 "That simple fact, however, does not imply

9 that class action is an inferior method of the fair and

10 efficient adjudication of the controversy." Close

11 quote.

12 Hoffman Electric Inv. vs. Emerson Electric

13 Co, 754 F. Sep. 1070, Western District of Pennsylvania

14 (1991) is illustrative on this point. There the Court

15 certified a class of limited partnership investors,

16 holding that even though class members suffered

17 sufficient losses to justify bringing individual law

18 suits, quote, "class actions are a particularly

19 appropriate and desirable means to resolve claims.

20 Requiring the class members to bring separate lawsuits

21 would waste judicial resources, limits judicial access

22 to the Courts and create a problem with inconsistent

23 judgments." Close quote. Id at 1079.

24 The Defendant's argument that amount of time

25 this case has consumed makes it unmanageable is

1 misplaced. When complex cases move from one Judge to
2 another, and there has been one movement in this case,
3 delays to tend to occur. Now that the Court, Counsel
4 and the parties have reached the point of class
5 certification, orderly procedures can be put into place
6 to move merit discovery along.
7 The passage of time does not signal
8 unmanageability. The Defendant's contention that the
9 class is not manageable because, quote, "almost half",
10 unquote of all current franchisees have signed
11 releases, as they argue at page 94 of their opposing
12 brief, is also without merit, because the proposed
13 class definition expressly excludes franchisees who
14 have executed releases.
15 Having addressed all of the Defendant's
16 arguments, the Court returns to the requirements of
17 Rule 4:32. There is no dispute that this class is
18 sufficiently numerous. The questions of law and fact
19 are common, because New Jersey law applies to all
20 claims. The -- factually the Plaintiffs seek to assert
21 common claims arising out of breach of Cendant and
22 Century 21's duties under the franchise agreement,
23 including to provide services and to use the NAF
24 according the agreement.
25 Plaintiffs allege a broad array of misconduct

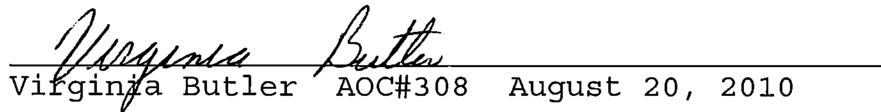
1 designed to shift expenses to Century 21 franchisees to
2 deprive them of anticipated and historically supplied
3 support and divert resources for the benefit of
4 competing brands also owned by Cendant and acquired
5 during the class period.
6 The Plaintiffs contend this course of conduct
7 violated Defendants duty owned to their franchisees.
8 Regardless of which particular act of misconduct is
9 considered, the class members would have suffered a
10 common impact. Each class member paid fees and made
11 contributions based upon a common formula. All of
12 these contributions were pooled for the common benefit
13 of the franchisees. Each class member had access to
14 services on identical terms and was deprived of those
15 services once they were withdrawn.
16 If funds were improperly diverted to other
17 purposes as alleged, the funds remaining for the
18 benefit of class members would have been diminished for
19 all.
20 Similarly to the extent that Cendant chose to
21 strengthen its competing brands and weaken the Century
22 21 Network, that loss of brand recognition and good
23 will would diminish the value of each franchise. And
24 there would have been an economic motive for that as
25 discussed by Gordon Rausser, because the Century 21

1 directly owned those -- those offices. As a result
2 there can be common impact.
3 The Plaintiff's expert has proposed a method
4 for measuring the financial impact of the franchisor's
5 alleged wrongdoing on the class members that controls
6 for individual differences of market competition,
7 location, the franchisees responses to reduce or
8 eliminate its services, efficiency, talent, ability and
9 the like.
10 All of the representative Plaintiffs possess
11 claims that are typical of those asserted in the
12 complaint on behalf of the class as the Court has now
13 discussed at length.
14 For the reasons set forth above, the
15 representative Plaintiffs and Counsel are adequate.
16 The common questions of law or fact predominate here
17 because of their narrow focus and breach of the
18 agreement and related tort claims as I have already
19 discussed at length.
20 Finally a class action is superior to the
21 litigation of numerous claims, again as I have already
22 discussed throughout the portion of the decision
23 dedicated to that topic.
24 And for reasons already stated the class
25 representatives and Counsel are adequate. For all of

1 these reasons, the Court will enter an order certifying
2 the class as defined earlier in the decision.
3 For the same reasons, the Defendant's Motion
4 to Strike the class demand is denied with prejudice.
5 The Defendant's Motion to Strike the pre-1998
6 claims is granted in part, that is to say the first and
7 second prayers for relief and denied in part, that is
8 to say the third prayer for relief in that motion.
9 The Defendant's motion -- yes, and finally,
10 the cross motion to strike the -- the Plaintiff's Cross
11 Motion to Strike the Defendant's Motion to Strike the
12 class demand is dismissed as moot.
13 Would Plaintiff's Counsel agree with me that
14 the order certifying class ought contain the definition
15 of class? It was not submitted that way.
16 MR. DRACHLER: Yes, Your Honor, we do believe
17 so.
18 THE COURT: All right, I changed it to
19 include that. And if everybody would please remain in
20 the area, I imagine a lot of us need to make one stop
21 at least. I will have orders for you right now. So
22 please don't go anywhere, this will only take a moment.
23 Thank you all.
24 (Off record)
25

CERTIFICATION

I, Virginia Butler, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on CD number 1, index number from 09:00:45 to 11:53:42, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded.



Virginia Butler AOC#308 August 20, 2010

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