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Windermere Real Estate Services Company

12

13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**

15 BENNION & DEVILLE FINE
HOMES, INC., a California
16 corporation, BENNION & DEVILLE
FINE HOMES SOCAL, INC., a
17 California corporation, WINDERMERE
SERVICES SOUTHERN
18 CALIFORNIA, INC., a California
corporation,

19 Plaintiffs,

20 v.

21 WINDERMERE REAL ESTATE
22 SERVICES COMPANY, a Washington
corporation; and DOES 1-10

23 Defendant.

24

25

26

27 **AND RELATED COUNTERCLAIMS**

28

Case No. 5:15-CV-01921 R (KKx)

Hon. Manuel L. Real

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
COUNTERCLAIMANT
WINDERMERE REAL ESTATE
SERVICES COMPANY'S
APPLICATIONS FOR RIGHT TO
ATTACH ORDERS AND ORDERS
FOR ISSUANCE OF WRITS OF
ATTACHMENT**

Date: December 19, 2016

Time: 10:00 a.m.

Courtroom: 8

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1 Defendant and Counterclaimant Windermere Real Estate Services Company
2 (“WSC”) respectfully submits the following points and authorities in support of its
3 Applications for Right to Attach Orders and Orders for Issuance of Writs of
4 Attachment.

5 **I. INTRODUCTION**

6 Through the applications and supporting papers filed concurrently herewith,
7 WSC seeks right to attach orders and orders for issuance of writs of attachment
8 permitting it to attach the assets of Plaintiffs and Counter Defendants Bennion &
9 Deville Fine Homes, Inc. (“B&D Fine Homes”) and Bennion & Deville Fine Homes
10 SoCal, Inc. (“B&D Fine Homes SoCal”) and Counter Defendants Robert L. Bennion
11 (“Bennion”) and Joseph R. Deville (“Deville”).¹ The requested orders are proper
12 under Federal Rule of Civil Procedure 64 and relevant California statutes.

13 Pursuant to the relevant statutes, the issuance of a writ of attachment is proper
14 upon the showing that several factors have been met. As set forth more fully below,
15 each of those elements are met as to the Liable Parties. Filed concurrently herewith
16 are the court-mandated applications setting forth that (1) WSC’s claims are claims
17 upon which attachment may be issued, (2) the amount owed sought to be secured by
18 the attachment, which is readily ascertainable amount, and (3) the attachment is not
19 sought for a purpose other than recovery on the claims upon which the attachments
20 are based. Finally, as set forth below, WSC has established the probable validity of
21 its claims against the Liable Parties.

22 For these reasons, WSC’s applications should be granted.

23 ///

24 ///

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26 _____
27 ¹ B&D Fine Homes, B&D Fine Homes SoCal, Bennion, and Deville are referred to
28 herein collectively as the “Liable Parties.”

1 **II. FACTUAL BACKGROUND**

2 WSC is a real estate franchisor. B&D Fine Homes and B&D Fine Homes
3 SoCal were franchisees of WSC. Bennion and Deville are principals of these former
4 franchisees.

5 B&D Fine Homes became a franchisee in 2001 pursuant to the terms set forth
6 in the parties' Windermere Real Estate License Agreement dated August 1, 2001
7 (the "Coachella Valley Agreement"). Pursuant to Section 5 of that agreement, B&D
8 Fine Homes was required to pay certain fees, including a monthly license fee and a
9 monthly technology. (Drayna Decl., ¶ 4, Ex. A, § 5.) By 2014, WSC had agreed to
10 limit B&D Fine Homes' license fee to \$5,000 per branch office. (Drayna Decl., ¶
11 4.) WSC had also agreed to limit B&D Fine Homes' technology fee to \$25.00 per
12 agent per month. (*Id.*) Section 5 also provides that the failure to remit the monthly
13 license fees within ten days of the due date triggered a late fee of ten percent (10%)
14 of the delinquent amount. (Drayna Decl., ¶ 4, Ex. A, § 5.) Payments that were
15 more than twenty days late were subject to interest at the rate of ten percent (10%)
16 per annum.² Pursuant to seven subsequent addenda to the Coachella Valley
17 Agreement and two subsequent agreements, Bennion and Deville both personally
18 guaranteed all amounts owed by B&D Fine Homes under the Coachella Valley
19 Agreement. (*See* Drayna Decl., ¶¶ 6-8, Exs. C-E.)

20 B&D Fine Homes SoCal became a franchisee in 2011 pursuant to the terms
21 set forth in the parties' Windermere Real Estate Franchise License Agreement dated
22 March 29, 2011 (the "SoCal Agreement"). Pursuant to Section 7(b) of that
23 agreement, B&D Fine Homes SoCal was required to pay a monthly license fee.
24 (Drayna Decl., ¶ 9, Ex. F, § 7(b).) Pursuant to section 7(c) and Appendix 1, B&D
25 Fine Homes SoCal was required to pay a monthly technology fee.

26 _____
27 ² The agreement provides that interest is to be charged at the highest lawful rate or
28 18%, whichever is higher. Pursuant to California Constitution Article XV, §1(2),
the highest lawful rate is 10%.

1 (Drayna Decl., ¶ 9, Ex. F, § 7(b), Appendix 1.) By 2014, WSC had agreed to limit
2 B&D Fine Homes SoCal’ license fee to \$5,000 per branch office and to limit its
3 technology fee to \$25.00 per agent. (Drayna Decl., ¶ 9.) Section 7(e) of the SoCal
4 Agreement provides that the failure to remit the monthly license fees within ten days
5 after the month in which they accrued triggered a late fee of ten percent (10%) of the
6 delinquent amount. (Drayna Decl., ¶ 9, Ex. F, § 7(e).) Any payments later than ten
7 days were subject to interest at the rate of ten percent (10%) per annum.³ (*Id.*)
8 Bennion and Deville also personally guaranteed all amounts owed by B&D Fine
9 Homes SoCal under the SoCal Agreement. (*See* Drayna Decl., ¶ 9, Ex. F, Appendix
10 2.)

11 On December 18, 2012, WSC, B&D Fine Homes, and B&D Fine Homes
12 SoCal entered into an Agreement Modifying Windermere Real Estate Franchise
13 License Agreement (the “Modification Agreement”). (Drayna Decl., ¶ 11, Ex. H.)
14 Under that agreement, WSC forgave a \$399,960 promissory note issued by
15 B&D Fine Homes and \$357,575 in additional fees owed by B&D Fine Homes.
16 (Drayna Decl., ¶ 11, Ex. H, § 3(B), Exhibit A.) WSC also forgave \$106,025 in fees
17 owed by B&D Fine Homes SoCal. (*Id.*) Pursuant to Section 3(F) of the
18 Modification Agreement, if B&D Fine Homes and B&D Fine Homes SoCal did not
19 remain as franchisees of WSC for a period of five years (1,826 days) after all parties
20 had executed the agreement (December 21, 2012), the waiver and forgiveness of
21 fees was to be pro-rated against the total elapsed years from the date of termination
22 of their franchises on a straight-line basis without the addition of interest or any
23 other fees. (Drayna Decl., ¶ 9, Ex. H, § 3(F); Declaration of Mark Oster [“Oster
24 Decl.”], ¶ 8.)

25 ///

26
27 ³ This agreement also provides that interest is to be charged at the highest lawful
28 rate or 18%, whichever is higher.

1 **III. LEGAL ANALYSIS**

2 Federal Rules of Civil Procedure 64(a) provides that “[a]t the commencement
3 of and throughout an action, every remedy is available that, under the law of the
4 state where the court is located, provides for seizing a person or property to secure
5 satisfaction of the potential judgment.” “The effect of Rule 64 is to incorporate state
6 law to determine the availability of prejudgment remedies for the seizure of property
7 to secure satisfaction of a judgment ultimately entered.” *Pos-A-Traction, Inc. v.*
8 *Kelly-Springfield Tire Co., Div. of Goodyear Tire & Rubber Co.*, 112 F.Supp.2d
9 1178, 1181 (C.D. Cal. 2000). Rule 64(b) specifically references attachment as one
10 of the remedies included under the rule.

11 California Code of Civil Procedure section 481.010, *et seq.*⁴ governs
12 attachment in the State of California.

13 Before an attachment order is issued, the court must find all of the
14 following: (1) the claim upon which the attachment is based is one
15 upon which an attachment may be issued; (2) the applicant has
16 established ‘the probable validity’ of the claim upon which the
17 attachment is based; (3) the attachment is not sought for a purpose
other than the recovery on the claim upon which the request for
attachment is based; and (4) the amount to be secured by the
attachment is greater than zero.

18 *Lydig Construction, Inc. v. Martinez Steel Corp.*, 234 Cal.App.4th 937, 944 (2015)
19 citing section 484.090. Attachment may be issued on “a claim or claims for money
20 ... based upon a contract, express or implied, where the total amount of the claim or
21 claims is a fixed or readily ascertainable amount not less than five hundred dollars
22 (\$500) exclusive of costs, interest and attorney’s fees.” Section 483.010(a). The
23 damages need not be liquidated, but they must be measurable by reference to the
24 contract itself and the basis for computing damages must be reasonable and certain.
25 *See CIT Group/Equipment Financing, Inc. v. Super DVD, Inc.*, 115 Cal.App.4th

26
27 ⁴ All “Section” references are to the California Code of Civil Procedure unless
28 otherwise noted.

1 537, 541 (2004) (master lease and corresponding lease schedules provided clear
2 formula for computation of damages: monthly rent multiplied by unexpired term).
3 “If the action is against a defendant who is a natural person, an attachment may be
4 issued only on a claim which arises out of the conduct by the defendant of a trade,
5 business, or profession.” Section 483.010(c).

6 Pursuant to section 484.010, upon the filing of a complaint or at any time
7 thereafter, a plaintiff may apply for a writ of attachment. Section 484.020 provides
8 that an application for issuance of a writ of attachment shall be executed under oath
9 and shall include the following:

10 (a) A statement showing that the attachment is sought to secure
11 recovery on a claim upon which an attachment may be issued.

12 (b) A statement of the amount to be secured by the attachment.

13 (c) A statement that the attachment is not sought for a purpose other
14 than the recovery on the claim upon which the attachment is based.

15 (d) A statement that the applicant has no information or belief that
16 the claim is discharged in a proceeding under Title 11 of the United
17 States Code (Bankruptcy) or that the prosecution of the action is stayed
18 in a proceeding under Title 11 of the United States Code (Bankruptcy).

19 (e) A description of the property to be attached under the writ of
20 attachment and a statement that the plaintiff is informed and believes
21 that such property is subject to attachment. Where the defendant is a
22 corporation, a reference to ‘all corporate property which is subject to
23 attachment pursuant to subdivision (a) of Code of Civil Procedure
24 Section 487.010’ satisfies the requirements of this subdivision. Where
25 the defendant is a partnership or other unincorporated association, a
26 reference to “all property of the partnership or other unincorporated
27 association which is subject to attachment pursuant to subdivision (b)
28 of the Code of Civil Procedure Section 487.010’ satisfies the
requirements of this subdivision.

23 WSC’s First Amended Counterclaim (“FACC”) asserts claims for breach of contract
24 against all of the Liable Parties. (FACC, ¶¶ 112-126, 142-164.) As noted above, this
25 is a claim upon which attachment may be issued. Section 483.010(a). In addition,
26 filed concurrently herewith are WSC’s Applications for Right to Attach Orders and
27 Orders for Issuance of Writs of Attachment, and the Drayna, Oster, Teather, and
28 Feasby declarations. These documents meet the requirements of section 484.020.

1 In addition, in order to be entitled to a writ of attachment, a plaintiff must
2 establish the “probable validity of the claim upon which the attachment is based.”
3 Section 484.090(a)(2). Probable validity is defined as “[a] claim has ‘probable
4 validity’ where it is more likely than not that plaintiff will obtain a judgment against
5 the defendant on that claim.” Section 481.190. “In determining the probable
6 validity of a claim where the defendant makes an appearance, the court must
7 consider the relative merits of the positions of the respective parties and make a
8 determination of the probable outcome of the litigation.” *Loeb and Loeb v. Beverly
9 Glen Music, Inc.*, 166 Cal.App.3d 1110, 1121 (1985). The court must consider all
10 declarations in support of and in opposition to the motion, and review the evidence
11 before it. *Id.*

12 As set forth below, WSC has established the probable validity of its breach of
13 contract claims against B&D Fine Homes, B&D Fine Homes SoCal, Bennion, and
14 Deville.

15 **A. WSC Will Likely Obtain a Judgment Against B&D Fine Homes**

16 Under the FACC’s First Cause of Action, WSC has asserted a claim against
17 B&D Fine Homes for breach of the Coachella Valley Agreement. (FACC, ¶¶ 112-
18 126.) As set forth above, B&D Fine Homes owed WSC monthly license fees and
19 technology fees under the Coachella Valley Agreement. (Drayna Decl., ¶ 4, Ex. A,
20 § 5.) B&D Fine Homes breached that agreement and a representative of plaintiff
21 and counter defendant Windermere Services Southern California, Inc. (“WSSC”)
22 has *admitted* that B&D Fine Homes has not paid either of these fees since July,
23 2014. (Declaration of Jeffrey A. Feasby [“Feasby Decl.”], ¶ 5, Ex. A [Deposition of
24 Patrick Robinson (“Robinson Depo.”), p. 33, l. 25 – p. 34, l. 18.] As of
25 November 21, 2016, B&D Fine Homes owed WSC \$741,546.98 in outstanding
26 license fees, technology fees, late fees, and interest. (Oster Decl., ¶ 4, Ex. 1.)

27 Under the FACC’s Fourth Cause of Action, WSC has asserted a claim against
28 B&D Fine Homes for breach of the Modification Agreement. (FACC, ¶¶158-164.)

1 On March 27, 2015, B&D Fine Homes terminated its franchise agreement. (*See*
2 *Drayna Decl.*, ¶ 5, Ex. B.) By agreement of the parties, those terminations were
3 effective September 30, 2015. (*Drayna Decl.*, ¶ 5.) At that time, only 1,031 days
4 had elapsed on B&D Fine Homes commitment to remain a WSC franchisee for five
5 years from the date of the execution of the Modification Agreement. As a result,
6 B&D Fine Homes owes WSC a total of \$337,281.47 due to its early termination of
7 the Coachella Valley Agreement on September 30, 2015. (*Oster Decl.*, ¶9.)

8 Therefore, WSC has established the probable validity of its breach of contract
9 claims against B&D Fine Homes in the amount of \$1,078,828.45, plus attorneys'
10 fees⁵ and costs in the amounts set forth in the *Feasby Decl.* and the Applications
11 filed concurrently herewith.

12 **B. WSC Will Likely Obtain a Judgment Against B&D Fine Homes SoCal**

13 Under the FACC's Third Cause of Action, WSC has asserted a claim against
14 B&D Fine Homes SoCal for breach of the SoCal Agreement. (FACC, ¶¶ 142-157.)
15 As set forth above, B&D Fine Homes SoCal owed WSC monthly license fees and
16 technology fees under the SoCal Agreement. (*Drayna Decl.*, ¶ 9, Ex. F, § 7(b), (c),
17 Appendix 1.) B&D Fine Homes SoCal breached that agreement and an agent for
18 WSSC has *admitted* that B&D Fine Homes SoCal has not paid either of these fees
19 since July, 2014. (*Feasby Decl.*, ¶ 5, Ex. A [*Robinson Depo.*, p. 33, ll. 13-24].) As
20 of November 21, 2016, B&D Fine Homes SoCal owed WSC \$228,372.95 in
21 outstanding license fees, technology fees, late fees, and interest. (*Oster Decl.*, ¶ 5,
22 Ex. 2.)

23 Under the FACC's Fourth Cause of Action, WSC has asserted a claim against
24 B&D Fine Homes SoCal for breach of the Modification Agreement. (FACC,
25 ¶¶ 158-164.) B&D Fine Homes SoCal terminated the SoCal Agreement on
26

27 ⁵ Section 11 of the Coachella Valley Agreement provides for an award of attorneys'
28 fees to the prevailing party on any suit for breach or to enforce that agreement.
Section 7 of the Modification Agreement also contains an attorneys' fees provision.

1 March 27, 2015, effective September 30, 2015. (Drayna Decl., ¶ 10, Ex. G.) As of
2 September 30, 2015, only 1,031 days had elapsed on B&D Fine Homes SoCal’s
3 commitment to remain a WSC franchisee for five years from the date of the
4 execution of the Modification Agreement. (Oster Decl., ¶ 9 Ex. 3.) Therefore,
5 B&D Fine Homes SoCal owes WSC a total of \$47,206.09 due to its early
6 termination of the SoCal Agreement. (Oster Decl., ¶ 9.)

7 Therefore, WSC has established the probable validity of its breach of contract
8 claims against B&D Fine Homes SoCal in the amount of \$275,579.04, plus
9 attorneys’ fees⁶ and costs in the amounts set forth in the Feasby Decl. and the
10 Applications filed concurrently herewith.

11 **C. WSC Will Likely Obtain a Judgment Against Bennion and Deville**

12 As set forth above, although original Coachella Valley Agreement did not
13 contain any personal guarantees, through seven addenda to that agreement and two
14 subsequent agreements, Bennion and Deville personally guaranteed B&D Fine
15 Homes’ performance of the Coachella Valley Agreement. Specifically, paragraph 2
16 of each of the seven addenda provides that “All terms of the [Coachella Valley
17 Agreement] are hereby incorporated by reference, and shall apply to the operation of
18 the new branch.” (Drayna Decl., ¶ 6, Ex. C.) The addenda go on to state that “This
19 Addendum is conditioned upon its execution by [Bennion and Deville], in their
20 personal capacities, confirming their agreement to be personally bound by the terms
21 of the license agreement and personally liable for any breach by [B&D Fine
22 Homes].” (*Id.*) Bennion and Deville signed under the heading “PRINCIPALS OF
23 LICENSEE,” “The following individuals are Shareholders, Partners or Members of
24 [B&D Fine Homes]. (*Id.*) By signing below, each individual acknowledges that he
25 or she is a party to this Agreement, is personally bound by its terms, and shall be
26 ///

27 _____
28 ⁶ Section 13 of the SoCal Agreement also contains an attorneys’ fees provision.

1 personally responsible for performance of this Agreement by [B&D Fines Homes].”
2 (*Id.*)

3 Moreover, at the end of the Agreement for Forgiveness of Franchise Fees –
4 2006, Bennion and Deville signed under the heading “PERSONAL GUARANTEE
5 BY PRINCIPALS OF LICENSEE,” affirming:

6 The following individuals are Shareholders, Partners or Members of
7 [B&D Fine Homes]. Each has a financial interest in [B&D Fine
8 Homes], has had the opportunity to read the Agreement to which this
9 Personal Guarantee is attached, and acknowledges that he/she will
10 personally benefit from it.

11 By signing below, each individual acknowledges that he or she is a
12 party to this Agreement, is personally bound by its terms, and hereby
13 unconditionally personally guarantees performance of the [Coachella
14 Valley Agreement] and this Agreement by [B&D Fine Homes].

15 (Drayna Decl., ¶ 7, Ex. D.) Similarly, at the end of the Agreement for Deferral of
16 Franchise Fees – 2007, Bennion and Deville signed under the heading “PERSONAL
17 GUARANTEE BY PRINCIPALS OF LICENSEE,” affirming:

18 The following individuals are Shareholders, Partners or Members of
19 [B&D Fine Homes]. Each has a financial interest in [B&D Fine
20 Homes], has had the opportunity to read the Franchise Fee Deferral
21 Agreement to which this Personal Guarantee is attached, and
22 acknowledges that he/she will personally benefit from it.

23 By signing below, each individual acknowledges that he or she is a
24 party to this Agreement, is personally bound by its terms, and hereby
25 unconditionally personally guarantees performance of the [Coachella
26 Valley Agreement] and this Agreement by [B&D Fine Homes],
27 including the full repayment of all deferred fees with interest, on the
28 terms set forth herein.

29 (Drayna Decl., ¶ 8, Ex. E.) Thus, Bennion and Deville have repeatedly personally
30 guaranteed B&D Fine Homes’ obligations under the Coachella Valley Agreement.
31 Consequently, Bennion and Deville are liable for B&D Fine Homes’ breaches of the
32 Coachella Valley Agreement.

33 Bennion and Deville also personally guaranteed B&D Fines Homes SoCal’s
34 obligations under the SoCal Agreement. Specifically, Appendix 2 of the SoCal
35 Agreement, entitled “Personal Guaranty,” states that Bennion and Deville
36 “absolutely and irrevocably guarantee[] to and for the benefit of WSC ... the full,

1 prompt and complete payment and performance” of B&D Fine Homes SoCal’s
2 obligations under the SoCal Agreement. (Drayna Decl., ¶ 9, Ex. F, Appendix 2.)
3 Accordingly, Bennion and Deville are personally liable for Fine Homes SoCal’s
4 breach of the SoCal Agreement.

5 Bennion and Deville may argue that the Modification Agreement relieved
6 them from liability for their personal guarantees. As set forth above, under the
7 Modification Agreement, WSC agreed to, *inter alia*, forgive and/or waive certain
8 license and other fees B&D Fine Homes and B&D Fine Homes SoCal owed under
9 their franchise agreements. (Drayna Decl., ¶ 11, Ex. H, § 3; Oster Decl. ¶¶ 7-6.) In
10 addition to forgiving fees owed by B&D Fine Homes and B&D Fine Homes SoCal,
11 WSC agreed that neither Bennion or Deville would be personally liable for the
12 amounts *forgiven* under the Modification Agreement. (*Id.*, § 3(G).) Importantly,
13 this modification of the personal guarantee applied *only to amounts owed under the*
14 *franchise agreements prior to April 1, 2012*. (*Id.*, § 3(G).) “The personal
15 guarantees set forth in the [Coachella Valley Agreement and SoCal Agreement], and
16 prior addenda thereto, shall continue to apply to amounts that become due and
17 owing under the [Coachella Valley Agreement and SoCal Agreement] *on or after*
18 *April 1, 2012*. (*Id.*, § 3(G) [emphasis added].)

19 Therefore, WSC has established the probable validity of its claims that
20 Bennion and Deville are personally liable for the amounts owed by B&D Fines
21 Homes and B&D Fine Homes SoCal. As set forth above, B&D Fines Homes owes
22 WSC \$1,080,204.82 under the Coachella Valley Agreement and the Modification
23 Agreement, plus recoverable costs and attorneys’ fees. B&D Fine Homes SoCal
24 owes WSC \$275,771.68 under the SoCal Agreement and the Modification
25 Agreement, plus recoverable costs and attorneys’ fees. All of these amounts were
26 incurred after April 1, 2012. Consequently, Bennion and Deville are each
27 personally liable in the amount of \$1,354,407.49, plus recoverable costs and
28 ///

1 attorneys' fees in the amounts set forth in the Feasby Decl. and the Applications
2 filed concurrently herewith.

3 **D. The Liable Parties Cannot Establish the Probable Validity of Any of**
4 **Their Claims that Might Offset the Amounts They Owe to WSC**

5 The Liable Parties will likely argue that they are entitled to an offset of the
6 amounts owed to WSC based on the claims asserted by B&D Fine Homes and B&D
7 Fine Homes SoCal in their complaint. To the extent Liable Parties raise these
8 arguments, they have the burden of establishing the probable validity of any
9 offsetting claims. *See Lydig Construction, supra*, 234 Cal.App.4th at 945. Here, the
10 Liable Parties cannot meet this burden.

11 In their First Amended Complaint ("FAC"), B&D Fine Homes and B&D Fine
12 Homes SoCal allege that WSC breached the Coachella Valley Agreement and the
13 SoCal Agreement by (1) failing to provide the "variety of services" designed to
14 enhance their "profitability"; (2) failing to provide a viable "Windermere System"
15 (which included technology); (3) failing to take necessary action to prevent
16 infringement of the Windermere trademark and related unfair competition as a result
17 of the Windermere Watch websites;⁷ and (4) breaching the Modification Agreement
18 by failing to "commercially reasonable efforts" to curtail Windermere Watch.
19 (FAC, ¶¶ 151, 175. *See also* Proposed Final Pretrial Conference Order, Doc. # 57,
20 p. 12, l. 6 – p. 15, l. 3, p. 18, l. 25 – p. 19, l. 8.) B&D Fine Homes and B&D Fine
21 Homes SoCal cannot establish the probable validity of any of these alleged
22 breaches.

23 First, in granting WSC's Motion for Partial Summary Judgment (Doc. # 66),
24 the Court disposed of B&D Fine Homes and B&D Fine Homes SoCal's claims that
25 WSC failed to provide the "variety of services" designed to enhance their

26 _____
27 ⁷ Windermere Watch is an anti-marketing campaign "designed to direct defamatory
28 statements, materials, and focused conduct against Windermere, and its franchisees
and real estate agents." (FAC, ¶ 45.)

1 “profitability” or a viable “Windermere System.” Therefore, these claims no longer
2 exist and cannot provide a basis to offset the amounts of the attachments that WSC
3 seeks.

4 Second, B&D Fine Homes relies on Section 4 of the Coachella Agreement in
5 alleging that WSC was required to take necessary action to prevent infringement of
6 WSC’s trademarks or the related “unfair competition” faced by Plaintiffs due to the
7 Windermere Watch websites. B&D Fine Homes SoCal relies on a similar provision
8 in Section 6 of the SoCal Agreement. However, neither of these agreements
9 imposed any such obligations on WSC. Rather, those provisions provide only that
10 WSC has “the right to take any action, *in its discretion and consistent with good*
11 *business judgment*, to prevent infringement of the Trademark or unfair competition
12 against Windermere licensees.” (Drayna Decl., ¶¶ 4, 9, Ex. A, § 4, Ex. F, § 6
13 [emphasis added].) Thus, even if WSC chose not to exercise its discretion to curtail
14 the activities Windermere Watch as B&D Fine Homes and B&D Fine Homes SoCal
15 allege,⁸ that would not breach the parties’ agreements.

16 Third, B&D Fine Homes and B&D Fine Homes SoCal claim that WSC
17 breached the franchise agreements as amended by the Modification Agreement by
18 “failing to make commercially reasonable efforts to curtail Windermere Watch and
19 related attacks on the Windermere brand in Southern California.” (FAC, ¶¶ 151(d),
20 175(d).) However, B&D Fine Homes and B&D Fine Homes SoCal previously
21 agreed that WSC did not breach this contractual obligation.

22 By way of background, over the course of the parties’ relationship, Bennion
23 and Deville had received over \$1 million in personal loans from WSC’s principals.
24 One of those loans had a balloon payment that was due on March 1, 2014. (Drayna
25 Decl., ¶ 12.) In or about late-2013 or early-2014, Bennion and Deville asked that
26

27 ⁸ WSC disputes any contention that it did not do anything to address Windermere
28 Watch.

1 the balloon payment be extended. (*Id.*) In the context of these negotiations, a
2 number of other issues came up, including claims by Bennion and Deville that WSC
3 had breached the Modification Agreement and that WSC had mismanaged funds for
4 its charitable organization, the Windermere Foundation, as well as claims by WSC
5 that B&D Fine Homes and B&D Fine Homes SoCal had improperly classified some
6 of its offices as “satellites” as opposed to “branches” for which license fees would
7 have been due. (Drayna Decl., ¶¶ 12-15, Exs. I, J; Declaration of Michael Teather
8 [“Teather Decl.”], ¶ 4.)

9 Ultimately, WSC had its representative, Michael Teather, negotiate directly
10 with Mr. Sunderland. (Drayna Decl., ¶ 15; Teather Decl., ¶ 4.) As a result of these
11 discussions, Mr. Sunderland and Mr. Teather were able to resolve all of the parties’
12 disputes at that time. (Teather Decl., ¶ 5.) In particular, WSC agreed to extend
13 Bennion and Deville’s balloon payment over time and to credit B&D Fine Homes
14 and B&D Fines Homes SoCal for amounts they claimed to have expended in
15 combatting Windermere Watch. (*Id.*) In exchange, the Liable Parties agreed that
16 WSC was not in breach of the Modification Agreement and that there was nothing
17 more WSC was required to do under that agreement unless Mr. Kruger changed his
18 activity in a material way. (*Id.*) WSC would not have entered into this agreement
19 without the Liable Parties’ agreement in this regard. (*Id.*)

20 On June 3, 2014, Mr. Teather confirmed in writing the parties’ agreements on
21 these issues with B&D Fine Homes and B&D Fine Homes SoCal’s long-time
22 attorney, Robert J. Sunderland. In that letter, Mr. Teather confirmed that “as of the
23 date of this letter WSC is not in breach of any obligations, contractual or otherwise,
24 owed to your clients.” (Drayna Decl., ¶ 15, Ex. K; Teather Decl., ¶ 6.) Mr. Teather
25 further confirmed that “[b]arring any material change in Mr. Kruger’s activities, we
26 have agreed that there is nothing further that WSC can or should be doing with
27 regard to Windermere Watch at this time, and that your clients will bear the expense
28 of any ongoing SEO efforts on their part without taking further credits or offsets

1 from amounts they owe to WSC.” (*Id.*) Mr. Teather concluded his letter by
2 requesting that Mr. Sunderland let him know if anything in his letter was inaccurate.
3 Mr. Sunderland is an extremely diligent attorney who had a practice of carefully
4 detailing and clarifying inaccuracies in written correspondence. (*Id.*) Mr.
5 Sunderland never contested any of the points set forth in Mr. Teather’s letter.
6 (Teather Decl., ¶ 6.)

7 Importantly, Deville testified that Mr. Teather’s letter accurately set forth the
8 parties’ agreement and that Mr. Sunderland never contested any of the agreements
9 reflected therein:

10 Q: “It is my understanding that WSC’s agreement to the loan
11 extension and the \$85,280 fee credit resolves all current issues and that
12 as of the date of this letter, WSC is not in breach of any obligations
contractual or otherwise owed to your clients”; do you see that there?

13 A: Yes.

14 Q: And at that time was it the agreement of the parties?

15 A: Yes.

16 Q: It says, “Barring any material change in Mr. Kruger’s activities,
17 we have agreed that there is nothing further that WSC can or should be
18 doing with regard to Windermere Watch at this time and that your
19 clients will bear the expense of any SEO efforts on their part without
taking future credits or offsets from amounts they owe WSC.”

20 Do you see that?

21 A: Yes.

22 Q: And was that the parties agreement at that time?

23 A: Yes.

24 Q: And then it also goes on to says, “We agreed that ongoing SEO
25 expenses will be more than offset by the substantial discounts in both
26 franchise and technology fees granted to your clients.”

27 Was that your understanding at that time?
28

1 A: Yes.

2 Q: And then the last item there, “Reporting of branches and
3 satellites, this discuss, as you mentioned, Mr. Teather reviewing that
4 issue and that the issue had been clarified. It says, “Thank you again for
5 helping us to clarify this issue”; do you see that?

6 A: Yes.

7 Q: And then at the bottom it says, “If this letter does not accurately
8 summarize the status of the issues above or if you believe there are any
9 material issues I have omitted, please let me know.”

10 Do you see that?

11 A: Yes.

12 Q: And Mr. Sunderland never said any letter in response to this
13 letter that you're aware of contesting any of the issues that Mr. Teather
14 set forth herein?

15 A: Not that I'm aware of.

16 (Feasby Decl., ¶ 6, Ex. B [Deville Depo., p. 373, l. 23 – p. 375, l. 19].) Although
17 Deville subsequently changed his testimony, the die has already been cast. For
18 Deville to reverse himself – following a conversation with his attorney during a
19 break in the deposition⁹ – and subsequently claim that the parties did not agree as
20 memorialized in Mr. Teather’s letter only impugns his credibility.

21 Moreover, the Liable Parties were represented by diligent counsel throughout
22 these negotiations with WSC. In fact, on prior occasions, Mr. Sunderland sent
23 detailed correspondence in response to letters from WSC in which he addressed all
24 the inaccuracies he perceived in WSC’s letters. (See Drayna Decl., ¶¶, Exs. H, I.)
25 Mr. Sunderland did not respond to Mr. Teather’s June 3 letter because it accurately
26 reflected the parties’ agreement.

27 ///

28 ⁹ See Feasby Decl., ¶ 6, Ex. B [Deville Depo., p. 377, ll. 4-13].

1 Therefore, the relative merits of the parties' evidence establish that B&D Fine
2 Homes and B&D Fine Homes SoCal cannot demonstrate the probable validity of
3 these claims. *See Loeb and Loeb, supra*, 166 Cal.App.3d at 1121 (“In determining
4 the probable validity of a claim where the defendant makes an appearance, the court
5 must consider the relative merits of the positions of the respective parties and make
6 a determination of the probable outcome of the litigation.”). As a result, the Liable
7 Parties are not entitled to an offset of the amount WSC seeks to attach.

8 **IV. CONCLUSION**

9 Based upon the foregoing, WSC respectfully request that this Court issue the
10 requested Right to Attach Orders and Orders for the Issuance of Writs of
11 Attachment against B&D Fine Homes, B&D Fine Homes SoCal, Bennion, and
12 Deville to allow WSC to attach assets sufficient to satisfy the full amount due WSC.

13
14 DATED: November 21, 2016 PEREZ WILSON VAUGHN & FEASBY

15
16 By: /s/ Jeffrey A. Feasby

17 Jeffrey A. Feasby

18 Attorneys for

19 Windermere Real Estate Services Company
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