MULCAHY LLP
James M. Mulcahy (SBN 213547)
jmulcahy@mulcahyllp.com
Kevin A. Adams (SBN 239171)
kadams@mulcahyllp.com
Douglas R. Luther (SBN 280550)
dluther@mulcahyllp.com
Four Park Plaza, Suite 1230
Irvine, California 92614
Telephone: (949) 252-9377
Facsimile: (949) 252-0090

Attorneys for Plaintiffs and Counter-Defendants

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendant.

AND RELATED COUNTERCLAIMS

Case No. 5:15-CV-01921 R (KKx)
Hon. Manual L. Real

MEMORANDUM OF BENNION & DEVILLE FINE HOMES, INC., BENNION & DEVILLE FINE HOMES SOCAL, INC., ROBERT L. BENNION, AND JOSEPH R. DEVILLE IN OPPOSITION TO WINDERMERE REAL ESTATE SERVICES COMPANY'S APPLICATIONS FOR WRITS OF ATTACHMENT

Date: December 19, 2016
Time: 10:00 a.m.
Courtroom: 8

[Concurrently filed with Declarations of Joseph R. Deville, Robert Sunderland, and Kevin A. Adams]

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Plaintiffs/Counter-Defendants Bennion & Deville Fine Homes, Inc. ("B&D Fine Homes") and Bennion & Deville Fine Homes SoCal, Inc. ("B&D SoCal"), along with Counter-Defendants Robert L. Bennion ("Bennion") and Joseph R. Deville ("Deville") (collectively, the "B&D Parties"), hereby file this Memorandum in Opposition to Defendant/Counterclaimant Windermere Real Estate Services Company's ("WSC") Application for Right to Attach Orders and Orders for Issuance of Writs of Attachment (the "Application").

I. INTRODUCTION

WSC's Application is more gamesmanship than a legitimate pursuit of writs of attachment. This lawsuit was commenced more than 14 months ago. Without any explanation for the delay or prior notice of its intended Application, WSC filed its Application after 7 p.m. on Monday, November 21, 2016, providing the B&D Parties less than one week – *during the week of Thanksgiving* – in which to respond. More importantly, the Application is conclusory, unsubstantiated, and falls far short of the strict statutory prerequisites that must be met for a court to order the extraordinary remedy of pre-judgment attachment. As set forth in more detail in the Legal Argument section, below, the Application should be denied on each of the following independent grounds:

First, WSC's Application fails to consider the B&D Parties' affirmative claims – along with those of co-Plaintiff Windermere Services Southern California, Inc. ("Services SoCal")[1] – for breach of the franchise agreements and Area Representation Agreement, and the resulting damages to these parties in excess of $4.2 million. [*See* D.E. 31; Declaration of Kevin A. Adams ("Adams Decl."), Ex. L, Ex. A, pp. 1, 3.] Not only do the B&D Parties' contract claims completely offset the amounts WSC seeks to attach through its Application, but the B&D Parties' claims also operate as complete defenses to WSC's contract claims. WSC's failure

[1] B&D Fine Homes, B&D SoCal, and Services SoCal are collectively referred as "Plaintiffs" herein.

to account for the B&D Parties' affirmative claims is fatal to WSC's requested relief.

Second, WSC fails to show, as it must, that the amount alleged is a fixed and readily ascertainable sum. A cursory review of WSC's proposed attachment orders shows that the amount WSC seeks to attach far exceeds its claimed (but unsubstantiated) damages in the case. According to the declaration testimony of WSC's CFO, Mark Oster, WSC is only claiming damages in the amount of $1,354,407.49 plus attorneys' fees and costs. [D.E. 72-7, p. 16.] However, WSC has asked the Court to enter attachment orders against (1) B&D SoCal in the amount of $698,495.31 [D.E. 72-4, p. 2], (2) B&D Fine Homes in the amount of $1,501,744.72 [D.E. 72-3, p. 2], (3) Bennion in the amount of $1,777,323.76 [D.E. 72-1, p. 2], and (4) Deville in the amount of $1,777,323.76. [D.E. 72-2, 2.] Thus, notwithstanding its pursuit of only $1.3 million in damages in this case, ***WSC is asking the Court to secure the astronomical amount of $5,754,887.55***. The requested amount simply cannot be ascertained or justified based upon the claims in his case.

Likewise, WSC seeks to attach its entire attorneys' fees and costs ($422,916) against each of the B&D Parties, thereby multiplying the alleged debt of the B&D Parties by 400% to more than $1.6 million. Again, this requested attachment amount cannot be readily ascertained and must be rejected.

Third, WSC has failed to show, as it must, that the B&D Parties cannot prevail on their defenses to WSC's counterclaims. The B&D Parties have asserted the affirmative defenses of offset and justification based on the dealings of the parties and the constructive termination of the Area Representation Agreement without cause, notice, or opportunity to cure. Additionally, the B&D Parties have other defenses excusing their performance under the franchise agreements, in particular, WSC's surreptitious sale of its flagship technology, TouchCMA, to competitors of the B&D Parties in Southern California notwithstanding its

representation that no such sale to a competitor would occur within the B&D Parties' geography.

Fourth, the Application must be denied because WSC has failed to adequately describe the property it seeks to attach as to Bennion or Deville. [*See* D.E. 72-1, p. 2; D.E. 72-2, p. 2.] The Application asks the Court to issue attachment orders for: "All property owned by Counter Defendant: real property, personal property, equipment, motor vehicles, chattel paper, negotiable and other instruments, securities, deposit accounts, safe deposit boxes, accounts receivable, and general intangibles." (*Id*.) This overbroad description lacks sufficient specificity required by the California Code of Civil Procedure to place Bennion and Deville on notice as to what property WSC seeks to attach. *See* CCP § 484.020) ("Where the defendant is a natural person, the description of the property shall be reasonably adequate to permit the defendant to identify the specific property sought to be attached."). Thus, the Application as to Bennion and Deville must be rejected.

Fifth, the attachment also may not issue because it the Application was filed for an improper purpose. In addition to the WSC's attempt to squeeze the B&D Parties' counsel in having to respond to the Application on the short Thanksgiving week, WSC has filed its Application seeking to attach an amount that far exceeds WSC's claimed damages in this case. A writ of attachment is sought for an improper purpose where the applicant seeks an amount that is excessive. *See Pimentel v. Houk*, 101 Cal.App.2d 884, 886-888 (1951) (suggesting that an allegation of an attachment of an excessive amount would constitute a sufficient allegation of use of the process for an improper purpose); *see also Fairfield v. Hamilton* 206 Cal.App.2d 594, 603 (1962) (noting in dicta that cases alleging attachment for a greatly excessive amount have been treated as actions for abuse of process). Thus, the Application should be summarily denied.

Finally, in the unlikely event that the Court issues any right to attach order,

WSC should be required to post a substantial bond to cover the damages that the B&D Parties would suffer as a result of attachment. If the attachment were to issue, the bond required by WSC should be in an amount at least equivalent to the total amount that WSC seeks to attach – *i.e*. of $5,754,887.55.

II. LEGAL ARGUMENT

A. A Writ Of Attachment Is Subject To Strict Statutory Requirements

Statutory regulations relating to attachment proceedings "must be strictly followed[.]" *Sousa v. Lucas*, 156 Cal. 460, 463 (1909). No attachment procedure may be ordered by the court other than in accordance with what is specifically provided in the statutes. *Nakasone v. Randall*, 129 Cal. App. 3d 757, 761 (1982). In order to obtain a writ of attachment, California Code of Civil Procedure ("CCP") requires that the applicant (1) demonstrate that the claim is one upon which an attachment may be issued, that is, a claim for money that is fixed or readily ascertainable (CCP § 483.010); (2) establish the probable validity of the claim; and (3) show that the attachment is not sought for a purpose other than the recovery on the claim. CCP § 484.090(a)(1-3).

Each of the above elements must be shown by a preponderance of the evidence. CCP § 484.050(b); *Blastrac, N.A. v. Concrete Solutions & Supply*, 678 F. Supp. 2d 1001, 1004 (C.D. Cal., 2010) (citing *Loeb & Loeb v. Beverly Glen Music, Inc*., 166 Cal.App.3d 1110, 1116 (1985)). Given that it is such a harsh remedy, the requirements for an attachment are "strictly construed against the applicant." *Blastrac, supra*, 678 F. Supp. 2d at 1004.

As explained below, WSC has not (*and cannot*) satisfy its burden to obtain a writ of attachment.

B. WSC's Application Should Be Denied Because It Fails To Demonstrate "Probable Validity" Of Its Claims

In order to establish the "probable validity" element, WSC must show that it is more likely than not it will obtain a judgment against each of the B&D Parties for the amount claimed to be attached. *Blastrac, supra*, 678 F. Supp. 2d at 1005. A court, in evaluating a motion for writ of attachment is to consider "the relative merits of the positions of the respective parties and make a determination of the probable outcome of the litigation." *Id*. (citation omitted). Moreover, "[i]f an applicant fails to rebut a factually supported defense that would defeat its claims, the applicant has not established the 'probable validity' of those claims." *Id*. (manufacturer was denied writ of attachment because purchaser presented defenses to manufacturer's claims, including breach of contract by manufacturer, and manufacturer did not dispute defenses); *see Plata v. Darbu Enterprises, Inc*, 2009 WL 3153747 (S.D. Cal. Sept. 23, 2009) (holding that applicant had not produced sufficient information to rebut the opposing party's defense and therefore had failed to establish the probable validity of its claim); *see also Furth v. Furth*, 2011 WL 2149038, *8 (N.D. Cal. May 31, 2011) (finding applicant had not satisfied burden of demonstrating probable validity of his claims by a preponderance of the evidence based on applicant's failure to address "basic tenets of contractual interpretation combined with the limited factual record thus far"). In other words, WSC must do more here than establish a *prima facie* case for breach of contract; **it** "**must also show that the defenses raised are 'less than fifty percent likely to succeed.'"** *Blastrac, supra*, 678 F.Supp.2d at 1005 (internal citations omitted, emphasis added).

Here, WSC's Application is fatally flawed as it attempts to establish a *prima facie* claim for breach of contract by the B&D Parties without addressing the B&D Parties' factually supported affirmative claims or defenses. WSC contends that it has "established the probable validity" of its counterclaims against the B&D

Parties for breach of the Coachella Valley Franchise Agreement (Count 1) and breach of the SoCal Franchise Agreement (Count 3) by showing that the B&D Parties ceased paying franchise fees and technology fees to WSC after July 2014.[2] [Application, pp. 9:20-23, 7:17-19.] WSC further contends that it has shown the probable validity of its counterclaim for breach of the Modification Agreement (Count 4) because the B&D Parties exited the Windermere franchise system before the five-year term had expired. [Application, pp. 7:1-7, 8:1-6.] However, WSC makes no real effort to rebut the B&D Parties' legal justification for discontinuing their payments to WSC and leaving the Windermere system early.

As explained in detail below, the B&D Parties have asserted several affirmative claims and defenses that legally (and understandably) excused their continued performance under the agreements with WSC. WSC's utter failure to rebut these affirmative claims and defenses defeats the "probable validity" element needed for a writ to issue. Accordingly, WSC's Application must be denied.

1. WSC's breaches identified in the B&D Parties' contract claims excused the B&D Parties' performance

Plaintiffs – *and <u>not</u> WSC* – initiated this breach of contract action in September of 2015. [D.E. 1.] B&D SoCal and B&D Fine Homes are pursuing contract claims against WSC for WSC's (1) failure to take contractually required action against Windermere Watch, (2) termination of Services SoCal as the area representatives thereby negating Plaintiffs' 50% reduction in franchise fees, and (3) termination of Services SoCal as the area representative without providing a comparable replacement. [D.E. 31, *see* Counts 1-2, 5-6.] As explained below, these actions by WSC were material breaches of the Coachella Valley Franchise

[2] All payments of franchise fees and technology fees were due on the 25th of the following month. (Adams Decl., Ex. G (Oster Depo.), pp. 46:1-47:6.) Thus, the July 2014 payment was ***<u>not</u>*** past due until after August 26, 2014. (*Id*., Ex. G, pp. 46:25-47:13.)

Agreement (as amended by the Modification Agreement) and the SoCal Franchise Agreement (as amended by the Modification Agreement), thereby excusing the B&D Parties subsequent obligations to pay fees and to remain in the Windermere system for the full five-year term.

a. WSC failed to take "Commercially Reasonable" efforts to combat Windermere Watch as required by the Modification Agreement

During the course of the parties' contractual relationships, a disgruntled former Windermere client named Gary Kruger initiated an anti-marketing campaign – under the name "Windermere Watch" – specifically designed to direct defamatory statements, materials, and focused conduct against Windermere, its franchisees, and real estate agents. (*See e.g.*, Adams Decl. Ex. C (Baur Depo.), pp. 50:23-51-12, Ex. B (Drayna Depo., Vol. I), pp. 93:19-22; Declaration of Joseph R. Deville ("Deville Decl."), ¶¶ 12-16.) Mr. Kruger's website (at windermerewatch.com) would regularly appear as a top internet search result for customers (existing and potential) when searching Google, Yahoo, or any other search engine for the term "Windermere." (Adams Decl., Ex. C (Baur Depo.), p. 52:1-20; Deville Decl., ¶¶ 13-14.) In the real estate industry, it is routine for potential clients to select their real estate broker and/or agent based upon information that is made available on the internet. (Deville Decl., ¶ 14.) The prominent placement of Windermere Watch – and its anti-Windermere marketing campaign – in the internet search results often diverted potential clients away from Windermere's brokers and agents. (*Id.*)

In addition to the website's high search engine visibility expressing strong anti-Windermere rhetoric, Mr. Kruger also regularly sent out mass mailings of postcards and other materials containing anti-Windermere propaganda to residents and potential clients in areas where new Windermere franchise locations were scheduled to open. (Adams Decl., Ex. B (Drayna Depo.), pp. 174-175; Deville

Decl., ¶ 16.) The existence of Windermere Watch and its damaging effect on the Windermere franchises in Southern California is not in dispute. (Adams Decl., Ex. D (Teather Depo., Vol. I), pp. 72:9-82:11.) The loss of actual and potential clients as a result of Windermere Watch's negative marketing campaign ultimately forced many agents to disassociate themselves from Windermere. (Deville Decl., ¶ 17.)

Although the executives and General Counsel of Windermere considered Mr. Kruger to be "nuts," "crazy," and his anti-marketing campaign unflattering, they did not consider Windermere Watch to be "far-reaching" or "damaging" to the Windermere brand. (Adams Decl., Ex. B (Drayna Depo.), pp. 172:17-177:20, Ex. A (Wood Depo.), p. 99:18-24; Ex. N (Jacobi Depo.) p. 145.) Because of this, Windermere ultimately announced to its franchisees that the best course of action was to "ignore" Mr. Kruger and Windermere Watch. (Adams Decl., Ex. B (Drayna Depo.), pp. 104:5-114:15, Ex. 8.)

In 2012, the Windermere Watch website began to systematically list all of the Windermere offices by name and address, the names of all Windermere agents in those office, and the agents' Department of Real Estate and/or California Bureau of Real Estate numbers. (Adams Decl., Ex. H (Forsberg Depo.), pp. 57:6-58:9.) Because of this, any internet searches for those agents or offices would bring up the Windermere Watch website and its negative treatment of the Windermere brand and its agents. (Adams Decl., Ex H (Forsberg Depo.), pp. 57:6-58:9, 72:11-19; Adams Decl., Ex. J (Fanning Depo.), pp. 76:14- 79:10, Ex. 148.) The attacks by Mr. Kruger were becoming more personal over time causing public relations issues and the loss of agents, clients, and listings for the B&D Parties. (Adams Decl., Ex. K (Bennion Depo.), pp. 144-145, 169:18-24, 170:10-20; Deville Decl., ¶ 19.)

By late 2012, the harm caused by the growing Windermere Watch anti-marketing campaign nearly forced Bennion and Deville to leave the Windermere system. (Adams Decl., Ex. B (Drayna Depo.), pp. 181:19-25, Exs. 24, 25; Deville

Decl., ¶ 20.) To keep Bennion and Deville (and their entities) in the Windermere system, WSC offered to make several financial and operational concessions to the parties' existing contractual relationships. These concessions are memorialized in the December 18, 2012 Modification Agreement. [D.E. 72-6, Ex. H; Adams Decl., Ex. B (Drayna Depo.), pp. 181:19-201:9; Deville Decl., ¶ 20.] In particular, WSC promised to "make ***commercially reasonable efforts***[3] to actively pursue counter-marketing, and other methods seeking to curtail the anti-marketing activities undertaken by Gary Kruger, his Associates, Windermere Watch and/or the agents of the foregoing persons."[4] [D.E. 72-6, Ex. H, § 3(A) (emphasis added).] Notwithstanding this contractual promise to make commercially reasonable effort in order to keep the B&D Parties in the Windermere system, the evidence shows that WSC made virtually no effort for nearly a year, and the commercial reasonableness of the effort WSC made thereafter is suspect at best – thereby breaching a material term of the Coachella Valley Franchise Agreement and SoCal Franchise Agreement, as amended by the Modification Agreement.

On February 11, 2013, just weeks after entering into the Modification Agreement, Bennion and Deville and their legal counsel participated in a conference call with representatives of WSC to discuss the efforts that WSC planned to undertake to combat Windermere Watch's anti-marketing campaign. (*See e.g.*, Adams Decl., Ex. B (Drayna Depo., Vol. I), pp. 202-205; Deville Decl., ¶ 23.) Notwithstanding this new contractual obligation "to make commercially

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[3] WSC's General Counsel, Paul Drayna, testified that the term "commercially reasonable efforts" meant "a level of effort that would be reasonable -- considered reasonable by prudent business people in --under the circumstances." (Adams Decl., Ex. B (Drayna Depo.), pp. 199:9-201:4)

[4] Prior to the existence of the Modification Agreement, the parties' franchise agreements already required WSC to take certain action (legal or otherwise) to prevent infringement of the Windermere trademark or the related unfair competition faced by the B&D Parties in the Southern California region. [*See* D.E. 72-6, Ex. A (Section 4), Ex. F (Section 6).]

reasonable efforts," the testimony of WSC's executives and corporate representatives revealed that WSC did nothing until October of 2013.

For instance, WSC's CEO, Geoff Wood, testified that shortly after the February 11, 2013 meeting, WSC's executives concluded there was nothing else they could do "and that the next step was to engage an SEO expert." (Adams Decl., Ex. A (Wood Depo.), pp. 293:2-20, 222:1-13.) However, it was not until October of 2013 that WSC's SEO expert made contact with the B&D parties with respect to Windermere Watch. (Adams Decl., Ex. C (Baur Depo.), pp. 61:22-25, 201:16-17, 206:7-25, Exs. 130, 132.) Likewise, WSC's Vice-President, Michael Teather, testified that WSC made no new efforts to combat Windermere Watch in 2013 from those efforts the previous year. (Adams Decl., Ex. E (Teather Depo. Volume II), pp. 80:19-81:17.) Mr. Teather explained that WSC did not meet with legal counsel during the 2013 year to discuss what could be done about the Windermere Watch website (*Id*.), and there were no communications between representatives of WSC and Mr. Kruger during the 2013 year in an effort to put an end to the website. (Adams Decl., Ex. E (Teather Depo., Vol. II), p. 82:12-83:1.) In fact, when asked to "identify a single thing that [he] did after December 18, 2012 to combat Windermere Watch," Mr. Teather openly acknowledged that he could not identify anything. (Adams Decl., Ex. D (Teather Depo., Vol. I), pp. 95:17-96:3.) WSC's director of marketing and designated corporate representative, Noelle Bortfeld, testified that she could not recall any request by Mr. Wood that her department undertake any effort with respect to Windermere Watch in 2013. (Adams Decl., Ex. F (Bortfeld Depo.), p. 76:20-25.) In fact, Ms. Bortfeld could not recall any proactive efforts undertaken by WSC with respect to Windermere Watch after 2010. (*Id*., pp. 74:2-75:24.) WSC's general counsel, Paul Drayna, waited for more than 13 months to contact outside counsel to evaluate potential legal action against Windermere Watch. (Adams Decl., Ex. B (Drayna Depo., Vol. I), pp. 299:8-306:16, Ex. 50.) Incredibly, outside of some purported preliminary discussions

with an "SEO expert," WSC's executives and corporate representatives could not attest to anything that WSC did to combat Windermere Watch until mid-October 2013, nearly a year after the Modification Agreement was signed.

Moreover, instead of communicating their effort (or lack thereof) to the B&D Parties, WSC's executives simply ignored numerous emails from Bennion and Deville requesting updates on WSC's plan to combat Windermere Watch. (Deville Decl., ¶¶ 24-37, Exs. 1-6; *see also*, Adams Decl., Ex. B (Drayna Depo., Vol. I), pp. 227:4-228:17, Ex. 27 (did not respond to the B&D Parties' request for an update on March 29, 2013), pp. 231:13-233:1, Ex. 28 (ignored the B&D Parties' request for an update on April 20, 2013), pp. 233:4-234:5, Ex. 29 (ignored the B&D Parties' request for an update on June 12, 2013), pp. 234:20-239:10, Ex. 30 (ignored the B&D Parties' request for an update on July 31, 2013), pp. 293:12-296:13, Ex. 48 (ignored the B&D Parties' request for an update on August 10, 2013).) Tellingly, WSC's representatives refused on the basis of attorney/client privilege to explain why they simply ignored the B&D Parties' pleas for information and support with respect to Windermere Watch. (*See e.g.*, Adams Decl., Ex. B (Drayna Depo., Vol. I), pp. 231:13-233:1, 295:19-20; Deville Decl., ¶¶ 24-37.)

Additionally, the B&D Parties' have retained franchise industry expert Marvin Storm to serve as an expert witness in the case. (Adams Decl., Ex. M.) After reviewing all of the depositions and files, Mr. Storm provided a report outlining his opinions in the case. (*Id.*) Among other things, he concluded that WSC "[f]ailed in trademark, brand and reputation management by not more aggressively pursuing a resolution to the Windermere Watch public relations crisis experienced by its franchisees." (*Id.*, p. 6.) This represents a clear breach of the franchise agreements.

Ultimately, WSC's failure to take action breached both of the parties' franchise agreements as amended by the Modification Agreement and left the

B&D Parties with no choice but to absorb a significant expense in combatting Windermere Watch on their own. For instance, the B&D Parties, among other things, hired several internet programmers and bloggers and devoted their time to increasing Windermere's internet search engine rankings in an attempt to bury Windermere Watch's online presence. (Deville Decl., ¶ 38.) The B&D Parties' damages expert, Peter Wrobel, has identified more than $146,954 in unreimbursed expenses to the B&D Parties for their efforts in combatting Windermere Watch. (Adams Decl. Ex. L, Ex. A, pp. 1, 3.) This amount should now be reimbursed by WSC. Additionally, WSC's express promise to take action against Windermere Watch's anti-marketing campaign kept the B&D Parties in the Windermere system beyond the 2012 year. (Deville Decl. ¶¶ 20-22.) During 2013, the B&D Parties opened up two additional offices that they never would have opened had they known that WSC was going to ignore its contractual agreement to combat Windermere Watch. (Deville Decl., ¶ 46.) These locations resulted in a loss to the B&D Parties of more than $1.4 million that they are seeking under their breach of contract claims. (Adams Decl. Ex. L, Ex. A, pp. 1, 3.)

In an attempt to avoid this liability, WSC argues that a June 3, 2014 letter from Mr. Teather to the B&D Parties' attorney, Robert Sunderland, somehow relieved WSC of its obligation to take action against Windermere Watch. (Application, pp. 12-13.) WSC's argument is flawed on several grounds. First, Mr. Teather's phantom letter was never delivered to Mr. Sunderland or made available to the B&D Parties until it was produced by WSC in this litigation. (Declaration of Robert Sunderland ("Sunderland Decl."), ¶¶ 5-11; Deville Decl., ¶¶ 47-49.) Second, even if the letter had been received by the B&D Parties, it is clearly a unilateral, self-serving document that does not comport with the integration clause in the Modification Agreement and therefore could not have amended the parties' express agreement. [*See* D.E. 72-6, Ex. H, § 18 (The integration clause provides that the "Agreement may only be modified if the modification is in writing and is

signed by the Party against whom enforcement is sought.").] Third, the promissory note attached to the June 3, 2014 was never signed by the B&D Parties. (Deville Decl., ¶47.) Fourth, it he June 3, 2014 letter was as important as WSC now represents, the custom and practice was to send it via certified mail. This was not done by WSC for reasons unknown to the B&D Parties. (Deville Decl., ¶ 47.) Finally, even if the Modification Agreement did not contain an integration clause, the overwhelming evidence will show that the parties' discussions prior to June 3, 2014 concerned the B&D Parties' demands that WSC's reimburse them for certain expenses they had incurred in fighting Windermere Watch without WSC's support and the further demand that WSC to comply with the Modification Agreement going forward. (Sunderland Decl., ¶¶ 5-11; Deville Decl., ¶¶ 42-49.) WSC's citation to Deville's deposition testimony to show that some agreement was in place is taken out of context and omits Deville's explanation of the relationship and true understanding of any agreement between the parties and subsequent Errata explanation. [Adams Decl., Ex. I (Deville Depo.), pp. 377:4-379:22, 381:2-5, 383:11-16,, Errata Sheet; Deville Decl., ¶ 48.] In short, Mr. Teather's self-serving June 3, 2014 letter did not excuse WSC from its obligation to make commercially reasonable efforts to combat Windermere Watch.

In sum, the undisputed evidence shows that the B&D Parties were going to leave the Windermere system but for WSC's agreement to take commercially reasonable effort to combat Windermere Watch. (Deville Decl., ¶ 20.) WSC's failure to take any effort until October 2013, and subsequent failure to take commercially reasonable efforts, was a key contributor to the B&D Parties' decision to stop paying fees to WSC and to leave the Windermere franchise system early. (Deville Decl., ¶¶ 50, 78, 85.) Moreover, WSC's failure to take action breached a material provision of the franchise agreements as amended by the Modification Agreement and resulted in significant harm to the B&D Parties. WSC's breach excused the B&D Parties from any further performance under the

agreements. Moreover, even if the B&D Parties' performance was not excused, the damages suffered by the B&D Parties should offset the amount of the writs that WSC now seeks.

b. WSC's termination of the Area Representation agreement excused the B&D Parties' performance under the franchise agreements

Notwithstanding the B&D parties' contract claims for WSC's failure to combat Windermere Watch, as described above, the majority of the damages being sought by the B&D Parties in this action arise from WSC's termination of Bennion and Deville's Area Representation Agreement. (*See* Adams Decl., Ex. L.) Incredibly, WSC's Application ignores this critical issue and the resulting harm to both Services SoCal and the franchisee entities. WSC's failure to address the franchisee's related implied contract claims is fatal to its requested relief. *Blastrac, supra*, 678 F. Supp. 2d at 1005 ("If an applicant fails to rebut a factually supported defense that would defeat its claims, the applicant has not established the 'probable validity' of those claims.").

As the Southern California Area Representative, Bennion and Deville were entitled to a 50% reduction in all monthly license fees owed to WSC by their franchisee entities. [Deville Decl., ¶ 52, Ex. 9.] Moreover, Bennion and Deville's role as Area Representative ensured that their franchisee entities would be serviced and supported by a competent Area Representative as provided for in the franchise agreements.[5] [Deville Decl., ¶ 56.] This local service and support was a substantial consideration for Bennion and Deville because WSC's headquarters was located in Seattle, it did not have a presence in Southern California, and it was not in a

[5] The SoCal Franchise Agreement and addenda to the Coachella Valley Franchise Agreement provided that Services SoCal was the designated "Area Representative" that would be servicing and supporting B&D Fine Homes and B&D SoCal in the Southern California region. [D.E. 72-6, Exs. C, F (*see e.g.*, Recitals B, C.]

position to support the Southern California franchise operations. [*Id*.] Ultimately, Bennion and Deville built their entire franchise system and agent program upon the understanding that they would receive (i) the 50% fee reduction, and (ii) funding as an Area Representative to provide the service and support that WSC could not provide. [Deville Decl., ¶ 57.] Bennion and Deville's positions as both the Area Representative and franchisees created a symbiotic relationship between the Area Representative Agreement and the franchise agreements. [Deville Decl., ¶¶ 59-60.] As explained below, WSC's unlawful termination of the Area Representation Agreement deprived Bennion and Deville of the fee reduction and support that were implied benefits under the Coachella Valley Franchise Agreement and SoCal Franchise Agreement.

In late summer 2014, Bennion and Deville learned of WSC efforts designed to take the Area Representative rights from Bennion and Deville. As explained below and in more detail in the concurrently filed declaration of Deville and deposition testimony of Paul Drayna, this conduct by WSC constructively terminated the Area Representation Agreement and excused the B&D Parties' payment obligations under the franchise agreements.

The contractual right to offer and sell Windermere franchises (and the financial benefit that the sales derived) was a principal benefit to Services SoCal under the Area Representation Agreement. [Deville Decl., ¶ 56, Ex. 9.] In August 2014, Bennion and Deville learned that WSC was depriving Services SoCal of this right and benefit by failing to register its Southern California franchise application.[6] [Deville Decl., ¶¶ 63-68, Ex. 10.] WSC's failure to register the Southern California franchise application precluded Services SoCal from being

[6]WSC's general counsel, Paul Drayna, admitted that he did not register the Southern California franchise application because he understood that WSC was in the process of reacquiring the Area Representative rights from Bennion and Deville. [Deville Decl., ¶ 67.] As is reflected in parties' email exchanges, this was never relayed to Bennion and Deville. [*Id*., Ex. 10.]

able to offer or sell any Windermere franchises under California's franchise laws. [*Id*., ¶ 63] This right was never restored to Services SoCal. (*Id*.) WSC's unilateral termination of Services SoCal's right and ability to solicit and sell Windermere franchises resulted in the premature, constructive termination of the Area Representation Agreement.

In addition to thwarting Services SoCal's ability to sell new franchises, WSC also engaged in conduct designed to disrupt Bennion and Deville's relationships with existing franchisees and to acquire the information and technology developed by Bennion and Deville before Bennion and Deville left the Windermere system. (Deville Decl., ¶¶ 69-77.]

It was apparent to all in the Windermere System that the technology and services offered by Bennion and Deville were far superior to those made available by WSC. Because of this, WSC knew that it had to acquire – and be able to offer the Southern California franchisees – Bennion and Deville's services and technology before it could take the Area Representative rights from Bennion and Deville. The evidence shows that through late summer and early fall 2014, WSC's Vice President, Michael Teather pushed Bennion and Deville to "combine our tech companies, and put [Bennion and Deville's Director of Technology] in charge of the customer experience and have [WSC] pick up his salary." [Deville Decl., ¶ 71, Ex. 11.] After Bennion and Deville denied this request, Mr. Teather attempted to solicit Bennion and Deville's Director of Technology, Eric Forsberg, to leave Bennion and Deville and to come work for WSC. [*Id*., ¶ 72.]

Further, the evidence shows that by summer 2014, Mr. Teather had begun bypassing Bennion and Deville as the Area Representative for the Southern California region and dealing directly with current and prospective Windermere franchisees. [*Id*., ¶ 73.] As part of his direct communications with the Southern California franchisees, Mr. Teather was telling them that Bennion and Deville were "giving up" their right to serve as Area Representative in the Southern

California region and that all communications involving the region should be directed to WSC. [Deville Decl., ¶¶ 73-75.] Mr. Teather also ingratiated himself to the existing franchisees by approving of franchise locations and expansion plans that Bennion and Deville had already rejected for legitimate business reasons. [*Id*.] Throughout the remainder of Bennion and Deville's short time as Area Representative, Mr. Teather was surreptitiously informing the local franchisees that Bennion and Deville were on their way out and that he, on behalf of WSC, was taking over as the Area Representative. When the area franchisees later learned from Bennion and Deville that they did not have any intention to give up the Area Representative rights, this created tension between the parties. Again, this conduct by WSC frustrated Bennion and Deville's rights as Area Representative and contributed to the early termination of the Area Representation Agreement.

As reflected above, WSC breached the Area Representation Agreement by constructively terminating Bennion and Deville's rights and ability to derive benefits from the agreement. Due to the literal and implied integration of the Area Representation Agreement with franchise agreements, the termination of the Area Representation Agreement also constituted a *de facto* breach of the franchise agreements. WSC's failure to consider its termination of the Area Representation Agreement as part of its Application is fatal to the requested writs.

2. Even without their affirmative claims, the B&D Parties were still excused from performance as a result of WSC's prior material breaches

Before the writ may issue, the court must also find "absence of any reasonable probability that a successful defense can be asserted by the defendant […]." *San Diego Wholesale Credit Men's Ass 'n v. Superior Court*, 35 Cal. App. 3d 458, 460 (1973). WSC fails to show the probable validity of its claims given the B&D Parties' affirmative and other defenses as outlined below.

First, the B&D Parties have asserted the affirmative defense of offset in

defense of WSC's counterclaims. [D.E. 32; *See Jacobson v. Persolve, LLC*, 2014 WL 4090809, at *9 (N.D. Cal. Aug. 19, 2014) (finding offset to be a viable affirmative defense).] As explained above, in the unlikely event that the claims of the franchisee entities are rejected, Bennion and Deville's Area Representative entity, Services SoCal, continues to assert contract claims against WSC in an amount that far exceeds those claimed by WSC. [*See* Adams Decl., Ex. L, Ex. A, p. 1.] The evidence shows that WSC's termination of the Area Representation Agreement – without cause, proper notice, or opportunity to cure – triggered Section 4.2 of the Area Representation Agreement requiring WSC to pay to Bennion and Deville the fair market value of the business. [Deville Decl., ¶ 55, Ex. 9.] The B&D Parties' damages expert, Peter D. Wrobel has identified the fair market value of the Area Representation rights to exceed $2,592,526. [Adams Decl., Ex. L, Ex. A, p. 1.] Thus, even if the B&D Parties' performance under the franchise agreements was not legally excused by WSC's prior breaches, the damages suffered by the B&D Parties' far exceeds that of WSC resulting in an offset and defeating WSC's Application.

Second, the B&D Parties also have asserted the affirmative defense of justification. [D.E. 32.] In short, the B&D Parties contend that WSC's contract claims are barred in full or in part because the B&D Parties' alleged failure to timely pay the franchise fees and departure from the Windermere system before the conclusion of their five-year term were justified and were fair and reasonable under all the circumstances based upon a balancing of all factors related to the actions at issue. [*Id*.] In addition to the issues raised above, the declaration of Deville also explains how the B&D Parties were justified in their conduct after discovery that WSC was selling its preeminent technology to direct competitors in the B&D Parties' geographic region. [Deville Decl., ¶¶ 79-85.] In particular, the B&D Parties learned that WSC and/or its sister company, Windermere Solutions, had entered into an agreement with the California Association of Realtors – the

largest membership of real estate agents in California – and that the TouchCMA technology was sold to non-Windermere brokers in direct competition with the B&D Parties agents and brokers in Southern California. [*Id*., ¶ 82.] This unfair business practice, by itself, justifies the B&D Parties' decisions to stop paying fees to WSC and leave the Windermere system before the end of five years.

Third, WSC's pursuit of writs of attachment against Bennion and Deville for amounts allegedly owed to WSC for breach of the Modification Agreement (Counterclaim 4) is flawed on two distinct grounds. First, WSC's counterclaim for breach of the Modification Agreement is asserted against B&D Fine Homes, B&D SoCal, and Services SoCal – ***not*** Bennion or Deville. [D.E. 16, p. 29.] Accordingly, WSC's attempt to attach personal assets of Bennion and Deville in connection with a claim that is not even asserted against them is in error. Second, even if the alleged breach had been asserted against Bennion and Deville, the language of the Modification Agreement makes clear that the amounts WSC is seeking to attach were not personally guaranteed by Bennion or Deville. [D.E. 72-6, p. 80, § G ("neither Robert L. Bennion nor Joseph R. Deville shall be personally liable for any of the amounts forgiven and/or waived pursuant to Sections 3, B (i)-(iii) above").] WSC's attempt to attach Bennion and Deville's personal assets for amounts that they no longer personally guarantee is misplaced. Thus, because WSC's claim for breach of the Modification Agreement is not asserted against Bennion or Deville, and Bennion and Deville were relied of any personal guarantee over the amount WSC is seeking to attach, WSC's Application with respect to Bennion and Deville must be denied.

In light of each of these defenses identified above, WSC's pursuit of writs of attachment as to the B&D Parties should be rejected.

C. WSC's Claim Is Not For A Fixed Or Readily Ascertainable Amount

An attachment can only be issued "in an action on a claim or claims for money, each of which is based upon a contract, express or implied, where the total amount of the claim or claims is a fixed and readily ascertainable amount not less than five hundred dollars […]." CCP § 483.010(a). Here, WSC fails to show, as it must, that the amount alleged is a fixed and readily ascertainable sum.

First, WSC's requested attachments are confusing and far exceed any potential damages it seeks to recover in this case. According to the declaration testimony of WSC's CFO, Mark Oster, the total amount of damages that WSC is seeking in this case is $1,354,407.49 plus attorneys' fees and costs. [D.E. 72-7, p. 16.] However, review of WSC's proposed attachment orders shows that it is asking the Court to secure $5,754,887.55 in assets of the B&D Parties. [*See* D.E. 72-4, p. 2 (proposed attachment order against B&D SoCal in the amount of $698,495.31); D.E. 72-3, p. 2 (proposed attachment order against B&D Fine Homes in the amount of $1,501,744.72); D.E. 72-1, p. 2 (proposed attachment order against Bennion in the amount of $1,777,323.76); D.E. 72-2, 2 (proposed attachment order and against Deville in the amount of $1,777,323.76).] Thus, notwithstanding its pursuit of only $1.3 million in damages, WSC seeks to attach more than $5.7 million from the B&D Parties. This request cannot be justified.

Next, WSC seeks to attach its entire attorneys' fees and costs ($422,916) against each of the B&D Parties, thereby multiplying the alleged debt of the B&D Parties by 400% to more than $1.6 million. Again, the amount WSC seeks to attach is far in excess of the claimed liability in this case.

Third, even without this clear intent to abuse of the writ of attachment remedy, WSC fails to substantiate the attorneys' fees it seeks to attach. To calculate attorneys' fees pursuant to a contract under California or federal law, courts follow the "lodestar" approach, which is calculated by multiplying time

spent by a reasonable hourly rate. *Cataphora Inc. v. Parker*, 848 F. Supp. 2d 1064, 1069 (N.D. Cal. 2012); *see also Signatures Network, Inc. v. Estefan,* 2005 WL 151928 (N.D. Cal. 2005). To allow a court to calculate the appropriate attorneys' fees to be awarded, a party must include itemization of the time spent and hourly rate. *See e.g. First Intercontinental Bank v. AEHCC LLC*, No. CV11-08764, 2013 WL 12061878, at *4 (C.D. Cal. Apr. 25, 2013) (requiring party to submit briefing on lodestar calculation and reasonableness of fees where party only submitted invoices); *see also* Alan M. Ahart, California Practice Guide: Enforcing Judgments and Debts, § 4:183(2012) (declaration should be provided showing the work performed and amounts claimed to be due, as well as factual support showing estimate of fees is reasonable). Here, WSC does not even attempt to substantiate the fees it seeks to attach. In the declaration of WSC's attorney, Jeffery Feasby, Mr. Feasby conclusory states: "As of September 30, 2016, WSC had incurred and been billed for $405,860.52 in attorneys' fees for this matter." (Feasby Decl., ¶ 3.) No invoices or other evidence is provided to substantiate this amount; WSC merely asks the Court to take its attorney's word. This is not sufficient for WSC to carry its burden for the attachment orders.

Finally, as reflected above, WSC's attempt to attach assets of Bennion and Deville in connection with a contract (Modification Agreement) that is not guaranteed by Bennion or Deville, or a claim (breach of the Modification Agreement) that is not asserted against Bennion or Deville lays doubt on the entire amount being sought by WSC.

For each of these reasons, the amounts WSC seeks to attach as to the B&D Parties is not remotely ascertained, thus, the Application must be denied.

D. <u>WSC Fails To Properly Identify The Property To Be Attached As To Bennion And Deville</u>

Under CCP § 484.020, an application for writ of attachment must include:

> A description of the property to be attached under the writ of attachment and a statement that the plaintiff is informed and believes that such property is subject to attachment. […] ***Where the defendant is a natural person, the description of the property shall be reasonably adequate to permit the defendant to identify the specific property sought to be attached***.

CCP § 484.020 (emphasis added). The subject of the attachment application is entitled to claim an exemption from attachment as provided by the CCP. Cal. Code. Civ. P. § 484.070(a). Courts order that applicants specifically identify property sought to be attached to avoid hypothetical analysis of potential claims. *See Platte River Ins. Co. v. Premier Power Renewable Energy, Inc.*, No. 2:14-CV-1666-WBS-EFB, 2015 WL 5474344, at *6 (E.D. Cal. Sept. 17, 2015) (analyzing claims of exemption only after ordering applicant-party to submit supplemental briefing identifying specific property to be attached). Importantly, property outside of California cannot be attached in a California action. *Pacific Decision Sciences Corp. v. Super. Ct.*, 121 Cal.App.4th 1100, 1108 (2004) (court lacks jurisdiction to issue turnover order in aid of writ of attachment for out-of-state property); *Paul H. Aschkar & Co. v. Curtis*, 327 F.2d 306, 310 (9th Cir. 1963) (no district court attachment jurisdiction outside state despite the 1934 Securities Exchange Act provision permitting nationwide service of process to obtain personal jurisdiction).

Here, WSC has failed to adequately describe the property it seeks to attach as to Bennion or Deville. [*See* D.E. 72-1, p. 2; D.E. 72-2, p. 2.] The Applications requests that the Court issue attachment orders for: "All property owned by Counter Defendant: real property, personal property, equipment, motor vehicles, chattel paper, negotiable and other instruments, securities, deposit accounts, safe deposit boxes, accounts receivable, and general intangibles." (*Id.*) This overbroad description lacks sufficient specificity to place Bennion and Deville on notice as to what property WSC seeks to attach. Without specificity, they would be forced to guess as to what property may be attached, leading to the hypothetical analysis of

claims of exemptions that courts seek to avoid. *See Platte River Ins. Co.*, 2015 WL 5474344, at *6. As an example, WSC fails to distinguish between properties located inside and outside California. Because property outside California is not subject to attachment in this California action, this Court would be required to analyze this application for attachment in hypothetical form. *Pacific Decision Sciences Corp.*, 121 Cal.App.4th at 1108; *Paul H. Aschkar & Co.*, 327 F.2d at 310. Accordingly, WSC has not met its burden and the Application should be denied.

E. The Attachment Is Sought For An Improper Purpose

Under CCP § 484.090(a)(3), a party seeking attachment must show that "[t]he attachment is not sought for a purpose other than the recovery on the claim upon which the attachment is based." A writ of attachment is sought for an improper purpose where the applicant seeks an amount that is excessive. *See Pimentel v. Houk*, 101 Cal.App.2d 884, 886-888 (1951) (suggesting that an allegation of an attachment of an excessive amount would constitute a sufficient allegation of use of the process for an improper purpose); *see also Fairfield v. Hamilton* 206 Cal.App.2d 594, 603 (1962) (noting in dicta that cases alleging attachment for a greatly excessive amount have been treated as actions for abuse of process).

In this case, WSC contends that the several B&D Parties are liable for $1,354,407.49 plus $422,916.27 in attorneys' fees and costs, totaling $1,777,323.76. [D.E. 72-5 at 10; Feasby Decl., D.E. 72-9, ¶¶ 3, 4.] However, as reflected above, WSC's applications for attachment orders seek to attach $5,754,887.55 total, or $3,977,563.79 more than the amount to which it claims to be entitled. Surely, seeking to attach over three times the amount sought (and four times the attorneys' fees incurred) is prima facie evidence of an ulterior motive.

The reality is, WSC and the B&D Parties are competitors in a highly competitive industry. [Deville Decl., ¶¶ 4-8.] It is evident by the filing that WSC

seeks to use its filing in its discussions with potentials clients, brokers, and agents to spread the fallacy that the B&D Parties are insolvent or otherwise incapable of paying their debts. [*Id*.] The amount WSC seeks to attach would be crippling to most real estate businesses and is not a true reflection of its total claimed (but unrealistic) damages in this case. WSC should not be allowed to abuse the court process for its publicity objectives.

Because WSC seeks to attach an excessive amount that is not anything near the amount claimed, its Application must be viewed as pursuing an improper purpose. Accordingly, the Application should be summarily denied.

F. WSC Must Post A Substantial Bond If The Writ Of Attachment Is To Issue

The writs of attachment cannot issue for all of the reasons set forth above. In the event, however, that the Court is inclined to grant the requested writs, the writs WSC seeks cannot issue unless it first posts a bond or undertaking. *See* CCP §§ 489.210 & 489.220(a); *see also Vershbow v*. *Reiner*, 231 Cal. App. 3d 879, 882-83 (1991) (writ of attachment void *ab initio* if issued without bond). The purpose of the bond is to secure the damages the B&D Parties may obtain should the attachment later be found to have been improperly issued. The damages covered by a bond include (1) all damages proximately caused by the wrongful attachment (including loss of credit and business losses) and (2) all costs, expenses and attorneys' fees reasonably expended in defeating the attachment. *See* CCP § 489.210 and comment thereto; CCP § 90.020(a)(1-2).

As reflected above, WSC has asked the Court to secure the total amount of $5,754,887.55 notwithstanding its much smaller claim for damages of $1,354,407.49. [D.E. 72-7, p. 16.] The undertaking should reflect the amount WSC seeks to secure – *i.e*., $5,754,887.55. *See* CCP §§ 489.220(b), 490.010(b) (the bond must be increased to account for the applicants failure to recover judgement).

III. CONCLUSION

For the reasons set forth above, the B&D Parties respectfully request that the Court deny WSC's Applications for right to attach orders and writs of attachment.

Dated: November 28, 2016

MULCAHY LLP

By: /s/ Kevin A. Adams
Kevin A. Adams
Attorneys for Plaintiffs/Counter-Defendants Bennion & Deville Fine Homes, Inc., Bennion & Deville Fine Homes SoCal, Inc., Windermere Services Southern California, Inc., and Counter-Defendants Robert L. Bennion and Joseph R. Deville