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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. Manuel L. Real

REPLY 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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I. INTRODUCTION

In its moving papers, Defendant and Counterclaimant Windermere Real Estate Services Company ("WSC"), established a *prima facie* case for all of its breach of contract claims against Plaintiffs and Counter Defendants Bennion & Deville Fine Homes, Inc. ("B&D Fine Homes") and Bennion & Deville Fine Homes SoCal, Inc. ("B&D Fine Homes SoCal") and Counter Defendants Robert L. Bennion ("Bennion") and Joseph R. Deville ("Deville").[1] In establishing the probable validity of those claims, and in meeting the other procedural requirements set forth in the California Code of Civil Procedure (which are contained in the court-mandated form applications), WSC met its burden of showing that it was entitled to the requested right to attach orders.

Liable Parties have opposed WSC's applications by employing the well-known technique of "throw as much stuff on the wall as possible and hope the Court is overwhelmed and simply denies the motion." Boiled down to its essence, the Liable Parties' opposition relies on what appears to be a misunderstanding of the attachment procedures and another inadmissible declaration from Deville as well as other inadmissible evidence.[2] However, none of the arguments or admissible evidence submitted by the Liable Parties warrants the denial of WSC's applications.

First, Liable Parties raise a number of contentions that WSC has not complied with the statutory requirements for issuance of the right to attach orders because (1) WSC's claim is not for a fixed or readily ascertainable amount; (2) the applications as to Bennion and Deville do not properly identify the property to be attached; and

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[1] B&D Fine Homes, B&D Fine Homes SoCal, Bennion, and Deville are referred to herein collectively as the "Liable Parties."

[2] As the Court will recall, the Court granted WSC's motion for partial summary judgment after sustaining WSC's voluminous objections to the Deville declaration submitted in opposition to the motion. (Document # 66.) As set forth in the evidentiary objections filed here with, Deville's current declaration is only slightly less objectionable.

(3) the attachment is sought for an improper purpose. None of these arguments have any merit.

Initially, the amounts sought to attachment are liquidated sums that are easy to calculate. In this case, the amounts are validated by the Exhibits to the Declarations of Mark Oster and Jeffrey A. Feasby filed in support of WSC's applications,[3] and the total amounts sought are set forth in the applications as to each of the Liable Parties. Moreover, the Liable Parties' contention that WSC is seeking to attach $5,574,887.55 demonstrates a fundamental misunderstanding of the realities of the attachment statutes and procedures. The total amount of damages established in WSC's moving papers is $1,777,323.76, which includes costs and attorneys' fees. That is the total amount that WSC would be entitled to attach upon the Court's order granting all of WSC's applications. However, because Bennion and Deville are jointly and severally liable for the amounts owed by B&D Fine Homes and B&D Fine Homes SoCal, WSC can seek to attach the assets of any of the Liable Parties up to the total amount of the Right to Attach Order for each, so long as the total amount attached does not exceed $1,777,323.76.

In terms of the applications as to Bennion and Deville, the description of the property WSC seeks to attach is consistent with California case law regarding attachment of assets of natural persons.

Finally, the Liable Parties' contention that the attachments WSC seeks are from an improper purpose is wholly unsupported. Deville's speculative declaration is inadmissible on this point (and others). Moreover, the fact that WSC has waited until the completion of discovery to seek its attachments is prudent and permissible. Finally, WSC has learned that Bennion and Deville are seeking to sell B&D Fine

[3] In an effort to avoid confusion, these declarations filed with WSC's moving papers are referred to herein by their Document Numbers – e.g. Document 72-7 (Oster) and Document 72-9 (Feasby). The three declarations filed concurrently herewith are referred to as "Oster Decl.," "Drayna Decl.," and "Teather Decl."

Homes and B&D Fine Homes SoCal, which could leave WSC without an opportunity to collect on a judgment against these defendants in the event the sale goes through.

Second, Liable Parties argue that WSC has not demonstrated the probable validity of its claims in light of the contract claims B&D Fine Homes and B&D Fine Homes SoCal have asserted and based on the Liable Parties' affirmative defenses. However, WSC's moving papers established a *prima facie* case on its contract claims. To the extent Liable Parties contend that their affirmative claims and defenses preclude WSC's claims, the burden was on them to submit ***admissible evidence*** supporting those claims and defenses. Liable Parties failed to meet this burden. Moreover, to the extent Liable Parties did submit admissible evidence, the relative merits of the parties' positions leaves no question that the probable outcome will be that WSC prevails on its claims. Therefore, WSC is entitled to the Right to Attach Orders it seeks against each of the Liable Parties.

For these reasons, and for those set forth below and in WSC's moving papers, WSC's applications should be granted.

II. WSC'S APPLICATIONS COMPLY WITH ALL PROCEDURAL PREREQUISITES

As noted above, Liable Parties have asserted three procedural arguments in opposing WSC's applications. None of those warrant the denial of WSC's applications. First, WSC has established that the amount it seeks to attach is fixed or readily ascertainable. Second, WSC has adequately described the property of Bennion and Deville that it seeks to attach. Third, WSC's attachment is to collect on debts owed, not for an improper purpose. For these reasons, the Court should reject Liable Parties' procedural arguments.

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A. WSC Has Established that the Amount it Seeks to Attach is Fixed or Readily Ascertainable

Liable Parties first argue that WSC's claim is not for a fixed or readily ascertainable amount. This argument is wholly without merit. First, as set forth in the Oster and Feasby declarations:

- As of November 21, 2016, B&D Fine Homes owed WSC $741,546.98 in outstanding license fees, technology fees, late fees, and interest. (Document # 72-7, ¶ 4, Ex. 1.)
- B&D Fine Homes owes WSC a total of $337,281.47 due to its early termination of the Coachella Valley Agreement on September 30, 2015. (Document # 72-7, ¶9.)
- As of November 21, 2016, B&D Fine Homes SoCal owed WSC $228,372.95 in outstanding license fees, technology fees, late fees, and interest. (Document # 72-7, ¶ 5, Ex. 2.)
- B&D Fine Homes SoCal owes WSC a total of $47,206.09 due to its early termination of the SoCal Agreement. (Document # 72-7, ¶ 9.)
- As of September 30, 2016, WSC had incurred and been billed for $405,860.52 in attorneys' fees for this matter. (Document # 72-9, ¶ 3.)
- As of September 30, 2016, WSC had incurred $17,055.75 in court reporter and videographer fees for the depositions that have been taken in this case. (Document # 72-9, ¶ 4.)

Importantly, Liable Parties have not objected to these amounts as being inaccurate. Based on these numbers, B&D Fines Homes owes WSC a total of $1,501,744.72, which includes $17,055.75 in deposition costs and $405,860.52 in attorneys' fees through September 30, 2016. (*See* Document # 72-3.) B&D Fines Homes SoCal owes WSC a total of $698,495.31, which includes $17,055.75 in deposition costs and $405,860.52 in attorneys' fees through September 30, 2016. (*See* Document # 72-4.) Both Bennion and Deville, as guarantors, are jointly and

severally liable for all amounts owed by both B&D Fine Homes and B&D Fines Homes SoCal. *See DKN Holdings LLC v. Faerber*, 61 Cal.4th 813, 821 (2015) ("Each joint and several obligor is separately responsible for breach of the contract; the basis of each one's liability is independent, although all have contributed to the same loss."). Therefore, Bennion and Deville each owe WSC $1,777,323.76, which also includes $17,055.75 in deposition costs and $405,860.52 in attorneys' fees through September 30, 2016. (*See* Document #s 72-1, 72-2.) Thus, these numbers are fixed (the amounts owed under the Modification Agreement) or readily ascertainable, and they are supported by admissible evidence.

Moreover, the Liable Parties' contention that WSC is seeking to attach the total amount of $5,754,887.55 demonstrates a misunderstanding of the applicable attachment procedures. The Forms employed by this Court require a separate application for each debtor, each of which sets forth the amount owed and sought to be attached for that debtor. (*See* CV-4F.) Because all of the contracts at issue have attorneys' fees clauses, all of the defendants are potentially liable for WSC's costs and attorneys' fees. That is why each of the four applications include those amounts. Further, because Bennion and Deville guaranteed the amounts owed by B&D Fine Homes and B&D Fine Homes SoCal, they are each potentially liable for the full amount of damages established by WSC in its moving papers – $1,777,323.76.

However, that does not mean that WSC can attach assets of each of the Liable Parties up to the amount set forth in each of their Right to Attach Orders, which is how Liable Parties come up with $5,754,887.55. Rather, WSC is only entitled to attach assets worth up to $1,777,323.76, which it established as a part of the

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probable validity of its claims.[4] In fact, that is the total amount WSC seeks to attach:

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

(Document # 72-5, p. 16, ll. 9-12.) To the extent WSC attaches property worth more than $1,777,323.76, it could be liable for wrongful attachment. *See White Lighting Co. v. Wolfson*, 68 Cal.2d 336, 350-351 (1968) (defendant attached property worth $19,500 to recover $850 debt). However, Liable Parties have failed to rebut the probable validity regarding the amount WSC seeks to attach.

Nevertheless, to the extent the Court is concerned about the amount WSC seeks to attach, it can restrict the amount of the property to be levied upon. *See* Cal. Code of Civ. Proc. § 482.120.[5]

B. <u>WSC Has Properly Identified the Property of Bennion and Deville that it Seeks to Attach</u>

Liable Parties next argue that WSC's applications fail to properly identify the property to be attached as to Bennion and Deville. However, pursuant to *Bank of America v. Salinas Nissan, Inc*., 207 Cal.App.3d 260 (1989), WSC's description of the property to be attached is legally sufficient.

In *Salinas Nissan*, Bank of America sued two corporations for breaches of various contracts. Bank of America also sued four individual guarantors on those

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[4] This is similar to an instance in which multiple writs are issued under California Code of Civil Procedure section 482.090(a) in order to levy upon property located in different counties. *See* Law Revision Commission Comments. In that case, several writs are issued under the same Right to Attach Order and in the same amounts. However, the plaintiff is only entitled to levy on property worth up to the amount of the probable judgment.

[5] As in WSC's moving papers, all Section references are to the California Code of Civil Procedure unless otherwise noted.

contracts. In seeking right to attach orders, Bank of America sought to attach the following types of property owned by the defendants:

> real property, personal property, equipment, motor vehicles, chattel paper, negotiable and other instruments, securities, deposit accounts, safe deposit boxes, accounts receivable, general intangibles, property subject to pending actions, final money judgments, and personalty in estates of decedents.

Id. at 264. Like Bennion and Deville, the individual guarantors contended that Bank of America's application "did not adequately specify which of their property plaintiff sought to attach." *Id*. at 267. In analyzing Section 484.020, upon which Liable Parties rely in making their argument, the California Court of Appeal held that Bank of America's application, though all-inclusive, satisfied the requirements of Section 484.020. *Id*. at 267-268.

Here, WSC copied an abbreviated form of the property description used by Bank of America in *Salinas Nissan*, and seeks to attach Bennion and Deville's "real property, personal property, equipment, motor vehicles, chattel paper, negotiable and other instruments, securities, deposit accounts, safe deposit boxes, accounts receivable, and general intangibles." (*See* Document #s 72-1, 72-2, Item 9.)

In addition, Liable Parties' argument regarding the potential for attachment of out-of-state property is a red herring. As Liable Parties point out in their opposition, property outside California cannot be attached. (Document # 73, p. 22, ll. 12-19.) Accordingly, once the Court issues the requested Right to Attach Orders, WSC can only seek to attach the Liable Parties' property in California. Thus, this is a non-issue.

C. <u>There is No Admissible Evidence of Improper Purpose</u>

Finally, Liable Parties contend that WSC seeks attachment for an improper purpose. Initially, Liable Parties argue that the attachment sought is improper because WSC seeks to attach $5,754,887.55. As established above, however, this is the result of Liable Parties' misunderstanding of the attachment procedures. As a matter of fact, WSC only seeks to attach assets worth $1,777,323.76. WSC has

established its right to attach assets up to this amount with admissible evidence. Therefore, there is nothing improper about the amount WSC seeks to attach.

Liable Parties next rely on the speculative, conclusory and argumentative Deville Declaration to contend 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." (Document # 73, p. 23, l. 28 – p. 24, l. 3 citing Deville Decl., ¶¶ 4-8.) However, there is absolutely no admissible evidence supporting this contention.

In reality, WSC seeks the requested Right to Attach Orders to obtain amounts it believes are rightfully owed to it. WSC brought its applications at the completion of discovery, when it knew that it could meet its burden of establishing the probable validity of its claims. In addition, WSC has recently learned that Bennion and Deville have been trying to sell B&D Fine Homes and B&D Fines Homes SoCal to a competitor, Better Homes and Gardens Real Estate, and that a potential sale may be closing on or about February 1, 2017.[6] (Teather Decl., ¶ 7.) Once this sale goes through, WSC may no longer be able to collect on its probable judgment against B&D Fine Homes and B&D Fines Homes SoCal.

As noted in WSC's verified applications, "Attachment is not sought for a purpose other than the recovery on a claim upon which the attachment is based." (*See* Document #s 72-1, 72-2, 72-3, 72-4, Item 4.) WSC's moving papers established the probable validity of its claims against Liable Parties. WSC's actions in seeking to attach amounts it has established it is owed is not an improper purpose. *See Aliya Medcare Finance, LLC v. Nickell*, 2015 WL 11089594 *15 (C.D. Cal. 2015) ("it is not clear that [plaintiff's] applications for writs of attachment were

[6] Such statements from third parties are not hearsay because they are not being offered for the truth of the matter asserted. *See* FRE 801. Rather, the statements are being offered to show the effect on the listener – WSC seeking to attach the Liable Parties' assets.

motivated by an improper purpose; it appears [plaintiff] filed the applications to obtain monies it believes rightfully belong to it."); *First National Insurance Co. v. Geo Grout, Inc.*, 2010 WL 4722496 *4 (N.D. Cal. 2010) ("Defendants provide no authority to support the argument that a potential result of attachment, namely, financial impairment of an indemnitor, establishes proof of improper purpose. Also, Defendants fails to provide any evidence, beyond speculation, that Geo Grout will, in fact, suffer financial impairment as a result of attachment. Finally, Defendants presents no evidence whatsoever that First National has any knowledge of what effect an attachment will have upon Defendants"); *Travelers Casualty and Surety Company of America v. J.K. Merz Construction, Inc*., 2007 WL 4468680 * 4 (N.D. Cal. 2007) ("Defendants have presented no evidence or argument that would support an inference that the attachment here sought is for any improper purpose …. Plaintiff, in sharp contrast, has proffered substantial evidence to support its contention that … the sole purpose of the attachment would be to provide a basis for collecting amounts already owed or foreseeably collectable …."). Therefore, WSC's applications should be granted.

III. LIABLE PARTIES HAVE FAILED TO ESTABLISH ANY OF THEIR CLAIMS OR AFFIRMATIVE DEFENSES WITH ADMISSIBLE EVIDENCE

Liable Parties rely on *Blastrac, NA v. Concrete Solutions and Supply*, 678 F.Supp.2d 1001 (C.D. Cal. 2010) to argue that WSC had the burden rebutting all of the Liable Parties' affirmative claims and defenses in its moving papers. This is not the procedure under California attachment statutes. As set forth in *Blastrac*, WSC only had the burden of rebutting "factually-supported" claims and defenses. *Id*. at 1005. However, it was Liable Parties' burden to establish those claims and defenses with admissible evidence, which the defendant did in Blastrac. *Id*. at 1003-1004. Only then can the Court consider the relative merits of the parties' respective positions in order to determine the probable outcome of the litigation. *Id*. at 1005

quoting *Loeb & Loeb v. Beverly Glen Music, Inc.*, 166 Cal.App.3d 1110, 1120 (1985).

As set forth in California's attachment statutes, an opposition to an application for a right to attach order and/or a claim of exemption must be accompanied by a declaration supporting any factual issues raised. Sections 484.060(a), 484.070(d). The facts in those declarations must be set forth with particularity. Section 482.040. "This means that the affiant or declarant must show actual, personal knowledge of the relevant facts, rather than the ultimate facts commonly found in pleadings, and such evidence must be admissible and not objectionable." *Lydig Construction, Inc. v. Martinez Steel Corp.*, 234 Cal.App.4th 937, 944 (2015). "The Court, in considering an application for right to attach order and writ of attachment, must apply the same evidentiary standard to an attachment hearing decided on affidavits and declarations as to a case tried on oral testimony." *VFS Financing, Inc. v. CHF Express, LLC*, 620 F.Supp.2d 1092, 1096-1097 (C.D. Cal. 2009) (internal quotes omitted). "At a minimum, this means that the affiant or declarant must show actual, personal knowledge of the relevant facts, rather than the ultimate facts commonly found in pleadings, and such evidence must be admissible and not objectionable." *Pos–A–Traction, Inc. v. Kelly–Springfield Tire Co.*, 112 F.Supp.2d 1178, 1182 (C.D.Cal.2000). In this regard, the evidentiary standards on right to attach orders are the same as those for motions for summary judgment. *See, e.g. Bowden v. Robinson*, 67 Cal.App.3d 705, 721 (1977) (under California's former summary judgment law, declaration consisting of inadmissible hearsay, conclusion and opinion are not "competent").

With regard to documentary evidence, it "must be presented in admissible form, generally requiring proper identification and authentication, and admissibility as nonhearsay evidence or under one or more of the exceptions to the hearsay rule, such as the business records exception." *VFS Financing*, 620 F.Supp.2d at 1097 citing *Pos–A–Traction, Inc.*, 112 F.Supp.2d at 1182.

As they did in opposition WSC's prior motion for partial summary judgment, Liable Parties rely heavily on a declaration from Deville that is almost entirely inadmissible. As set forth in the written objections filed concurrently herewith, not only do large portions of Deville's declaration lack proper foundation under Federal Rules of Evidence 602, it is also wrought with improper conclusions and argument. *See Nigro v. Sears, Roebuck & Co*., 784 F.3d 495, 497-498 (9th Cir. 2015) (court may disregard self-serving declaration in if it states conclusions rather than admissible evidence). This "evidence" cannot defeat WSC's applications.

With regard to the expert reports upon which Liable Parties rely, those are inadmissible hearsay. *See Fowle v. C & C Cola*, 868 F.2d 59, 67 (3d Cir.1989) (expert's report attached to the declaration of plaintiff's counsel not admissible since "[t]he substance of th[e] report was not sworn to by the alleged expert"). *See also Carson Harbor Village, Ltd. V. Unocal Corp*., 2003 WL 22038700, *7 (C.D. Cal. 2003) ("Because neither a declaration nor the deposition testimony of [expert] has been submitted stating that the conclusions in the report are true and correct, defendants' objection is sustained.").

When considering the admissible evidence submitted by the parties and the relative merits of the parties' claims, it is clear that the probable outcome in this case will be WSC prevailing on its breach of contract claims against Liable Parties.

A. <u>Liable Parties Have Failed to Submit Sufficient Admissible Evidence from Which the Court Could Determine that it Was Probable that WSC Breached of the Modification Agreement</u>

As set forth in WSC's moving papers, Liable Parties agreed that WSC was not in breach of the Modification Agreement in exchange for WSC's agreement to extend Bennion and Deville's payment obligations under a promissory note and to reimburse Liable Parties for $85,280 in expenses they claimed to have incurred in relation to Windermere Watch. (*See* Document # 72-6, ¶ 15, Ex. K; Document # 72-8, ¶ 6.) In an attempt to obfuscate the issue, Liable Parties rely on another inadmissible Deville declaration and hundreds of pages of exhibits and dedicate

seven pages of their opposition brief to its argument that WSC failed to meet its obligations under the Modification Agreement to make "commercially reasonable efforts" to combat Windermere Watch. To the extent they do address WSC's evidence regarding the parties' agreement on this issue, the admissible evidence submitted does not establish the probable result that Liable Parties will prevail on their claims. *See Blastrac*, *supra*, 678 F.Supp.2d at 1005.

Liable Parties address Mr. Teather's June 3, 2014 letter through Deville's declaration and a declaration from their attorney, Robert Sunderland ("Sunderland Decl."). However, the Liable Parties' contention that they never received the June 3 letter is contradicted by the facts and their own testimony. As set forth in WSC's moving papers, when first asked, Deville admitted that the June 3 letter accurately reflected the agreement between the Liable Parties and WSC. (Document # 72-5, pp. 14-15; Document # 72-9, ¶ 6, Ex. B, Deville Dep. pp. 373-375.) Only after having the opportunity to speak with his attorney over lunch did Deville change his testimony and say the letter did not accurately reflect the parties' agreement. (Document # 73-6, ¶ 14, Ex. I, Deville Dep. pp. 377-379.) Nevertheless, and critically important, Deville admitted that he remembered seeing the letter at or about that time: "I think I did get this …. But as far as this document, I -- I think I remember seeing it." (*Id.*) Now, for the first time, Liable Parties are claiming they never received the letter until it was produced in discovery. (Document # 73, p. 12.) Not only is this refuted by Deville's deposition testimony, but it is also belied by the subsequent email correspondence between Mr. Sunderland, Mr. Drayna and Mr. Teather.

Mr. Drayna typed the initial draft of June 3, 2014 letter on May 30, and finalized it on June 3, shortly before he emailed it to Mr. Sunderland. (Declaration of Paul Drayna ("Drayna Decl.") ¶¶ 2-4, Exs. 1-2.) Mr. Drayna and Mr. Teather sent multiple follow up emails asking if there were any questions about the letter and the promissory note extension. (Drayna Decl. ¶¶ 5-7, Ex. 3; Teather Decl. ¶ 5,

Ex. A) Specifically, on June 10, 2014, one week after he sent the original email, Mr. Drayna sent a follow up to ensure Mr. Sunderland received the letter. (Drayna Decl., ¶ 5, Ex. 3.) Two weeks later, Mr. Teather sent an email following up regarding the promissory note amendment attached to his June 3 letter. (Teather Decl., ¶ 5, Ex. A.) On June 24, Mr. Sunderland responded and said he would work on the paperwork when Deville and Bennion returned to town. (Drayna Decl., ¶ 7, Ex. 5; Teather Decl., ¶ 6, Ex. B.) Clearly, Mr. Sunderland received the June 3 letter and the attached promissory note extension and was working with his clients to finalize the loan extension. Liable Parties cannot change the facts and their agreement regarding Windermere Watch at this late stage simply to save their claim. The Court should ignore the Liable Parties' fabricated facts and evidence and find that the probable outcome in this case will be a determination that the Liable Parties agreed as reflected in the June 3 letter that WSC did not breach the Modification Agreement.

Additionally, Liable Parties did not offer any admissible evidence establishing a factual basis for their claim that WSC breached the Modification Agreement. The Liable Parties' claim for breach of the Modification Agreement rests on WSC's alleged failure to make "commercially reasonable efforts" to counteract of a negative marketing campaign: Windermere Watch. Liable Parties fail, however, to present any admissible expert testimony regarding what constitutes "commercially reasonable efforts" under the circumstances. Liable Parties retained an expert, Marvin Storm, to offer his opinions regarding the parties' performance under the Franchise Agreements, and submitted a report in opposition to the present application. (Document # 73-3, ¶ 18, Ex. M). That expert report is inadmissible hearsay and cannot be considered for purposes of the determination of WSC's applications. *See Huezo v. Los Angeles Community College Dist.*, 2007 WL 7289347 *2, FN 18 (C.D. Cal. 2007) (citing *Fowle*, *supra*, 868 F.2d at 67 and holding expert reports are only admissible if accompanied by an affidavit from the

expert swearing to the substance of the report); *see also Carson Harbor Village, supra*, 2003 WL 22038700 at *6 (an expert report is inadmissible hearsay absent a declaration from the expert attesting to the report's authenticity).

Even if Mr. Storm's report was not inadmissible hearsay, his opinions regarding whether WSC's efforts were "commercially reasonable" are nevertheless inadmissible. Mr. Strom is a purported franchise expert. However, he has no special training or knowledge in the area of suppression of anti-marketing campaigns. (*See* Document # 73-4, Ex. M, pp. 48-50.) Therefore, his testimony on this issue is inadmissible. *See Avila v. Willits Environmental Remediation Trust*, 633 F.3d 828, 839-840 (9th Cir. 2011) (affirming district court's exclusion of expert despite degree in chemistry because expert did not have any special training or knowledge regarding metal working industries such that he could reliably opine that the activities at the manufacturing site "must" have created dioxins); *Massok v. Keller Industries, Inc*., 147 F.App'x 651, 656 (9th Cir. 2005) (affirming exclusion of expert testimony where the extern had never designed ladders, had never written or lectured on the subject, had produced no peer-reviewed work or independent confirmation of his qualifications, and he was not a Ph.D.); *Hill v. Novartis Pharmaceuticals Corp*., 2012 WL 5451800 *2 (E.D. Cal. 2012) (granting motion to exclude expert testimony where opinions outside the scope of professional knowledge).

Absent any admissible evidence, Liable Parties are unable to prove WSC failed to make commercially reasonable efforts to combat Windermere Watch. Under this record, WSC has clearly established less than a fifty-percent chance that Liable Parties will prevail on their claim. *See Blastrac*, *supra*, 678 F.Supp.2d at 1005 ("the plaintiff must also show that the defenses raised are 'less than fifty percent likely to succeed.' " *Quoting Pet Food Express, Ltd. v. Royal Canin USA Inc*., 2009 WL 2252108, at *5 (N.D. Cal. 2009)).

Finally, even if Liable Parties can prove that WSC failed to take

commercially reasonable efforts to combat Windermere Watch, it only relates to their breach of the Modification Agreement. The Modification Agreement is the only agreement requiring WSC to take any action with respect to Windermere Watch and created a new obligation that does not appear in the Franchise Agreements. Contrary to the Liable Parties' assertion, the Franchise Agreements do not "require" WSC to take any action to protect its trademark. Section 4 of the Coachella Valley Franchise Agreement states "WSC has the right to take any action, in its discretion and consistent with good business judgment to prevent infringement of the Trademark or unfair competition against Windermere licensees." (Document # 72-6, Ex. A § 4.) The SoCal Franchise Agreement contains nearly identical language. (Document # 72-6, Ex. F § 6(e).) Rather than requiring WSC to take any action, it gives WSC the right, "in its discretion," to take the action necessary to protects its intellectual property. WSC could not breach these sections of the Franchise Agreements because they did not create any duty on the part of WSC to act – any action was at its sole discretion. Consequently, if the Court believes that the Liable Parties have demonstrated that they will probably prevail on their claim regarding Windermere Watch, the attachment should be reduced by $384,487.56, the amount of liquidated damages B&D Fine Homes and B&D So Cal owe WSC for their early termination of the Franchise Agreements – $337,281.47 from B&D Fine Homes and $47,206.09 from B&D Fine Homes SoCal. WSC's applications to attach the additional amounts owed by the Liable Parties should still be granted.

B. <u>The Liable Parties' Performance Under the Franchise Agreements Was Not Excused Due to WSC's Lawful Termination of a Separate Agreement with Windermere Services SoCal</u>

Liable Parties claim, contrary to the parties' written agreements, that the Area Representation Agreement between WSC and Windermere Solutions Southern California ("WSSC") was "literally and implicitly" integrated into the Franchise Agreements. (Document # 73, p. 17.) Consequently, they claim, WSC's alleged breach of the Area Representation Agreement "constituted a *de facto* breach" of the

Franchise Agreements. (*Id.*) The only admissible evidence relevant to this issue, the subject agreements themselves, belies this argument.

There is no "literal" integration of the Area Representation Agreement into the Franchise Agreements. To be "literally" integrated into the Franchise Agreements, the Area Representation Agreement the agreements would need to at least reference each other. That is not the case. Neither Franchise Agreement references the Area Representation Agreement. (*See* Document # 72-6, Ex. A [Coachella Valley Franchise Agreement], Ex. D [SoCal Franchise Agreement].) The Area Representation Agreement does not reference the Franchise Agreement. (Document #73-2, Ex. 9 [Area Representation Agreement].)

Absent an actual incorporation into the Franchise Agreements, Liable Parties must establish that the Area Representation Agreement is implicitly integrated into the Franchise Agreements. However, this argument fails because both Franchise Agreements and the Area Representation Agreement contain integration clauses expressly prohibiting any implicit incorporation of outside agreements. Those clauses are all nearly identical, and state that the contracts "contain[] the entire agreement" between the parties, and can only be amended in writing. (Document # 72-6, Ex. A, § 12; Ex. D, § 14; Document # 73-2, Ex. 9, § 18.) Consequently, there can be no "implied" integration of the Area Representation Agreement into the Franchise Agreements. Further, Bennion and Deville signed the Franchise Agreements on behalf of WSSC, the Area Representative. If the parties meant to integrate the Area Representation Agreement into the Franchise Agreements, they should have done that at the time.

The Area Representation Agreement is a completely separate agreement between WSC and WSSC. The Liable Parties are not parties to that agreement. The Area Representation Agreement was never, either literally or implicitly, integrated into the Franchise Agreements. Thus, any alleged breach of the Area Representation Agreement by WSC exists separate and apart from the Liable

Parties' obligations under the Franchise Agreements and the Modification Agreement.

Therefore, WSC has clearly established less than a fifty-percent chance that Liable Parties will prevail on their attempt to establish that WSC's alleged breach of the Area Representation Agreement excused them from meeting their obligations under the Franchise Agreements. *See Blastrac*, *supra*, 678 F.Supp.2d at 1005 ("the plaintiff must also show that the defenses raised are 'less than fifty percent likely to succeed.' " *Quoting Pet Food Express, supra*, 2009 WL 2252108, at *5).

C. <u>Liable Parties Did Not Establish the Probable Validity of Their Offset or Justification Affirmative Defenses</u>

Finally, Liable Parties set forth three arguments in support of their contention that they affirmative defenses preclude attachment of their assets. None of these arguments have any merit.

First, Liable Parties argue that their offset affirmative defense precludes attachment because they have suffered damages in excess of $2,592,526 due to WSC's alleged breach of the Area Representation Agreement.[7] (Document # 73, p. 18, ll. 7-16.) However, as noted above, Liable Parties are not parties to the Area Representation Agreement – it is between WSC and WSSC. Therefore, even if WSC breached that agreement, which it did not, Liable Parties are not entitled to an offset of WSSC's alleged damages. Moreover, Liable Parties rely on the Wrobel Report to support the amount of damages claimed. As set forth above, however, that report is inadmissible hearsay. *Fowle*, *supra*, 868 F.2d at 67; *Carson Harbor Village*, *supra*, 2003 WL 22038700 at *7. Therefore, Liable Parties have failed to establish the probable validity of their claim for offset.

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[7] As noted in WSC's moving papers, Liable Parties have the burden of establishing probable validity of any claim for offset. *See Lydig Construction, supra*, 234 Cal.App.4th at 945.

Second, Liable Parties argue that attachment is not proper in light of their affirmative defense of justification. This argument is baseless. Initially, Liable Parties have failed to cite any authority supporting their contention that justification is a proper affirmative defense to a claim for breach of contract.[8] Instead, Liable Parties argue that their failure and refusal to pay the amounts owed to WSC was justified "fair and reasonable under all the circumstances based upon a balancing of all factors related to the actions at issue." (Document # 73, p. 18, ll. 23.) But there is no balancing test. Either the parties met their contractual obligations or they did not. WSC has established that Liable Parties did not meet their contractual obligations. Liable Parties have failed to submit sufficient admissible evidence for the Court to determine that WSC did not meet its contractual obligations.

To the extent Liable Parties are rely on their prior arguments regarding Windermere Watch, those contentions fail because of the Liable Parties' previous agreement that WSC was not in breach of the Modification Agreement as reflected in Mr. Teather's June 3, 2014 letter. In light of the conflicting evidence on this issue – based on Deville's changing deposition testimony and the demonstrably false declaration of Mr. Sunderland – the Court cannot find that the probable outcome of this litigation will be a finding in favor of Liable Parties on this issue. *Blastrac, supra*, 678 F.Supp.2d at 1005. Moreover, Liable Parties' claims regarding the fact that Windermere Solutions provided its TouchCMA to other real estate agents in California did not constitute a breach of any of the parties' agreements. In fact, it did not.

Liable Parties' arguments are all the more incredible when one considers that their sister company, WSSC, pocketed hundreds of thousands of dollars in fees from other WSC franchisees in Southern California throughout the time that Liable

[8] WSC has found a number of cases that hold that justification is an affirmative defense to a claim of inducing a breach of contract, but none that hold it is a defense to a claim for breach of contract.

Parties were not paying their own fees. Specifically, WSSC collected $428,541.49 in license fees and an additional $162,650.00 in technology fees owed by the other Southern California franchisees for July, 2014 through August, 20015. (Oster Decl., ¶¶ 3-4, Ex. 1.) Pursuant to the Area Representation Agreement, WSSC kept half of the license fees that it collected, or $265,891.05. (Oster Decl., ¶¶ 3-5, Ex. 1.) It is disingenuous for Liable Parties to contend that they should not have to pay WSC the fees they owe when WSSC made the other Southern California franchisees pay those same fees.

Finally, Liable Parties argue that Bennion and Deville cannot be liable for B&D Fines Homes and B&D Fines Homes SoCal's breaches of the Modification Agreement because Bennion & Deville's guarantees were forgiven under that agreement. Liable Parties are mistaken. While Liable Parties are correct that WSC forgave Bennion and Deville's personal guarantees for the amounts forgiven under Sections 3, B (i)-(iii) of the Modification Agreement, this forgiveness did not include the liquidated damages B&D Fine Homes and B&D Fines Homes owe for breach of the Modification Agreement. Specifically, the liquidated damages clause is Section 3, F of the Modification Agreement. It is not found in Sections 3, B (i)-(iii). (*See* Drayna Decl. I, ¶ 11, Ex. H.) Moreover, the forgiveness of Bennion and Deville's personal guarantees expressly did not apply to amounts that become due after April 1, 2012. (Drayna Decl. I, ¶ 11, Ex. H, § G.) However, as set forth in WSC's moving papers, B&D Fines Homes and B&D Fines Homes SoCal did not breach the Modification Agreement until they terminated their license agreements on March 27, 2015, which terminations became effective on September 30, 2015. (Drayna Decl. I, ¶¶ 5, 10, Exs. B, G.) Therefore, Bennion and Deville are liable as personal guarantors of all amounts owed by B&D Fines Homes and B&D Fine Homes SoCal.[9]

[9] Although Bennion and Deville are not specifically identified as parties against whom WSC's Fourth Cause of Action is brought (*see* Document # 16, p. 29, l. 21),

If the Court is not inclined to include Bennion and Deville as being liable for breaches of the Modification Agreement, the Court should nevertheless issue the requested Right to Attach Orders against Bennion and Deville based on their guarantees of the remainder of amounts owed by B&D Fines Homes and B&D Fines Homes SoCal. As set forth above, B&D Fine Homes owed WSC $741,546.98 in outstanding license fees, technology fees, late fees, and interest. (Document # 72-7, ¶ 4, Ex. 1.) B&D Fine Homes SoCal owed WSC $228,372.95 in outstanding license fees, technology fees, late fees, and interest. (Document # 72-7, ¶ 5, Ex. 2.) Therefore, including attorneys' fees and costs (Document # 72-9, ¶¶ 3-4), the Court's Right to Attach Orders for Bennion and Deville should each be in the amount of $1,392,836.20.[10]

IV. THE STATUTORY UNDERTAKING IS SUFFICIENT

Liable Parties are correct that a writ of attachment cannot issue until an undertaking is filed. Section 489.210. Liable Parties incorrectly claim, without any factual or legal support, that the undertaking should equal the amount the claim WSC seeks to secure. The applicable statute is clear, unless the Court determines "the probable recovery for wrongful attachment exceeds the amount of the undertaking" the amount of an undertaking "shall be ten thousand dollars ($10,000)." Section 489.220.

Liable Parties offer no evidence that the $10,000 statutory undertaking would be insufficient. In fact, the section of Liable Parties' opposition that addresses the undertaking requirement does not contain a single fact citation. (Document # 73, p.

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they are included in the definition of "Defendants." (Document # 16, ¶ 25.) "Defendants" are referenced through the Fourth Cause of Action. (Document # 16, ¶¶ 159-163.) Nonetheless, to the extent an amendment is necessary to clarify this issue, WSC requests leave to amend pursuant to Federal Rule of Civil Procedure 15(a)(2) according to the proof set forth herein and in WSC's moving papers.

[10] $741,546.98 + $228,372.95 + $405,860.52 (attorneys' fees) + $17,055.75 (costs) = $1,392,836.20.

24). Absent any record evidence that the $10,000 statutory undertaking is insufficient, the Court should not increase the required undertaking.

V. CONCLUSION

For all of these reasons, and for those set forth in WSC's moving papers, WSC respectfully request that this Court issue the requested Right to Attach Orders and Orders for the Issuance of Writs of Attachment against B&D Fine Homes, B&D Fine Homes SoCal, Bennion, and Deville to allow WSC to attach assets sufficient to satisfy the full amount due WSC.

DATED: December 5, 2016 PEREZ VAUGHN & FEASBY Inc.

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