

1 B&D Fine Homes and WSC entered into a Windermere Real Estate License Agreement
2 (“Coachella Valley Franchise Agreement”). That agreement required B&D Fine Homes to pay an
3 initial \$15,000 franchise fee and various technology and administrative fees. In return, WSC was
4 to provide B&D Fine Homes with the license to the Windermere trademarks as well as support
5 and services. Then, in 2011, B&D Fine Homes SoCal entered into a Windermere Real Estate
6 Franchise License Agreement (“SoCal Franchise Agreement”) as a franchise servicing the San
7 Diego area. The terms of the SoCal Franchise Agreement were effectively the same as the
8 Coachella Valley Franchise Agreement. During the course of the parties’ relationship, the B&D
9 Parties began to have problems with negative advertising campaigns organized by a disgruntled
10 former client operating a campaign named Windermere Watch. In order to address this problem,
11 and others, the parties entered into the Modification Agreement in December 2012. Under the
12 Modification Agreement, WSC agreed to make “commercially reasonable efforts” to combat
13 Windermere Watch, waive past-due franchise and technology fees, and cap future fees owed by
14 the two franchises. In exchange, the B&D Parties agreed to remain with WSC for five years,
15 repay a portion of the waived fees if the B&D Parties left before five years, and pay a lump sum of
16 the past due fees.

17 A plaintiff in federal court shall have available “every remedy . . . that, under the law of the
18 state where the court is located, provides for seizing a person or property to secure satisfaction of
19 the potential judgment.” Fed. R. Civ. P. 64. In California, writs of attachment are governed by
20 California Code of Civil Procedure sections 481.010-493.060. “Attachment . . . is a remedy by
21 which a plaintiff with a contractual claim to money (not a claim to a specific item of property)
22 may have various items of a defendant’s property seized before judgement and held by a levying
23 officer for execution after judgment.” *Waffer Int’l. Corp. v. Khorsandi*, 69 Cal. App. 4th 1261,
24 1271 (Cal. Ct. App. 1999). Given the severity of such a remedy prior to a final determination of
25 the merits of the case, “the requirements for the issuance of a writ of attachment are strictly
26 construed against the application.” *Blastrac, N.A. v. Concrete Solutions & Supply*, 678 F. Supp.
27 2d. 1001, 1004 (C.D. Cal. 2010).

28 Attachment may be issued on “a claim or claims for money . . . based upon a contract,

1 express or implied, where the total amount of the claim or claims is a fixed or readily ascertainable
2 amount not less than five hundred dollars exclusive of costs, interest and attorney's fees." Cal.
3 Civ. Proc. Code §483.010(a). If the action is against a natural person, an attachment may issue
4 "only on a claim which arises out of the conduct by the defendant of a trade, business, or
5 profession." Cal. Civ. Proc. Code §483.010(c). Before issuing an attachment order, a court must
6 find that: (1) the claim upon which the attachment is based is one upon which an attachment may
7 be issued; (2) the applicant has established "the probable validity" of the claim upon which the
8 attachment is based; (3) the attachment is not sought for a purpose other than recovery on the
9 claim upon which the request for attachment is based; and (4) the amount to be secured by the
10 attachment is greater than zero. Cal. Code Civ. Proc. §484.090(a). The burden is on the moving
11 party to establish sufficient grounds for an order of attachment. *Loeb and Loeb v. Beverly Glen*
12 *Music, Inc.*, 166 Cal. App. 3d 1110, 1116 (1985).

13 WSC has satisfied the §483.010(a) and (c) requirements for issuance of an order of
14 attachment. The claims are for money damages based upon the alleged breach of the Coachella
15 Valley Franchise Agreement, the SoCal Franchise Agreement, and the Modification Agreement.
16 WSC seeks attachment of \$1,777,323.76, which is greater than \$500. Additionally, the claims
17 against Bennion and Deville as individuals are based on their conduct as business owners. Having
18 satisfied these initial requirements, the Court turns to the four requirements of §484.090(a).

19 First, the claim upon which attachment is based is one upon which attachment may be
20 issued. As discussed above, WSC seeks attachment based on the B&D Parties' alleged breach of
21 the Coachella Valley Franchise Agreement, the SoCal Franchise Agreement, and the Modification
22 Agreement.

23 The primary issue in dispute is whether WSC has established "the probable validity" of the
24 claim upon which the attachment is based. A claim is probably valid when "it is more likely than
25 not that the plaintiff will obtain a judgment against the defendant on the claim." Cal. Civ. Proc.
26 Code §481.190. "In determining the probable validity of a claim where the defendant makes an
27 appearance, the court must consider the relative merits of the positions of the respective parties
28 and make a determination of the probable outcome of the litigation." *Loeb & Loeb*, 166 Cal. App.

1 3d at 1120. A prima facie case for breach of contract is insufficient to establish probable validity
2 of the claim. *Blastrac*, 678 F. Supp. 2d at 1005.

3 Cross-Claimant has not met its burden to prove that its claims for breach of contract are
4 more likely to obtain a judgment than not. WSC claims that B&D Fine Homes breached the
5 Coachella Valley Agreement by failing to pay \$741,546.98 in monthly license fees and technology
6 fees. Additionally, WSC claims that B&D Fine Homes SoCal breached the SoCal Franchise
7 Agreement by failing to pay \$228,372.95 in monthly license fees and technology fees. In
8 opposition, the B&D Parties contend that their failure to make these payments was excused by
9 WSC's breach of the Modification Agreement. The B&D Parties contend that WSC failed to
10 make the required "commercially reasonable efforts" to combat Windermere Watch.

11 As a preliminary matter, it is necessary to address the relationship between the three
12 contracts at issue. The Modification Agreement was created with the explicit purpose of
13 "modify[ing] certain terms and conditions of the License Agreements." Thus, the Modification
14 Agreement added certain obligations and conditions to the underlying franchise agreements.
15 Therefore, a breach of the new terms established in the Modification Agreement would also be a
16 breach of the underlying franchise agreements which it modified.

17 In California, an element of any breach of contract cause of action is the "plaintiff's
18 performance or excuse for nonperformance" *Oasis West Realty, LLC v. Goldman*, 51 Cal,
19 4th 811, 821 (2011). "Normally, the question of whether a breach of an obligation is a material
20 breach, so as to excuse performance by the other party, is a question of fact." *Brown v. Grimes*,
21 192 Cal. App. 4th 265, 277 (2011). The Modification Agreement modified the existing franchise
22 agreements to add various requirements of each party. WSC, in exchange for a longer term
23 guarantee, agreed to take commercially reasonable action to combat Windermere Watch. In its
24 opposition, the B&D Parties provided evidence that WSC failed to take the required action.
25 WSC's Vice-President, Michael Teather, testified that he could not think of a single action that
26 WSC took to combat Windermere Watch after entering the Modification Agreement. (Adams
27 Decl., Ex. D. 82:12-83:1). Additionally, WSC's marketing department did not take any action to
28 counteract Windermere Watch. (Adams Decl., Ex. F. 76:20-25). Finally, although WSC did

1 engage a search engine optimization expert, it was not until ten months after entering the
2 Modification Agreement that the expert contacted the B&D Parties. (Adams Decl., Ex. C. 201:16-
3 17). Taken as a whole, this evidence makes it impossible for this Court to determine that it is
4 more likely than not that WSC will obtain a judgment on its claims for breach of the Coachella
5 Valley Franchise Agreement, the SoCal Franchise Agreement, or the Modification Agreement.

6 In its reply, WSC argues that the B&D Parties failed to produce any admissible evidence
7 regarding what constitutes “commercially reasonable efforts.” However, the evidence shows that
8 WSC took no action to address the Windermere Watch concerns until October 2013 and that only
9 involved one avenue of response, search engine optimization. This Court finds that such minimal,
10 delayed action is unlikely to qualify as a “commercially reasonable effort.” WSC also went to
11 great lengths to dispute the evidence relied upon by the B&D Parties in its opposition. This Court
12 need not address those concerns because it is apparent based solely on the deposition testimony of
13 WSC’s own employees and officers that it did not make a “commercially reasonable effort” to
14 combat Windermere Watch. Furthermore, none of the testimony cited by this Court in its
15 discussion of WSC’s efforts, or lack thereof, was objected to by WSC. Therefore, because the
16 Court has not relied on evidence which was objected to, it need not rule on either of WSC’s
17 Evidentiary Objections. (Dkt. No. 76-4; Dkt. No. 76-5).

18 The standards for orders of attachment are construed strictly against the moving party. The
19 claims between the parties are extensive and complex. They are based upon several contracts,
20 arise across several years, and involve numerous parties. Proving that one party is more likely to
21 obtain a judgment than not against the facts in this case is difficult. WSC failed to meet its burden
22 to prove that it is more likely than not that it will ultimately obtain a judgment on its breach of
23 contract claims.

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IT IS HEREBY ORDERED that Counter-Claimant Windermere Real Estate Services Company’s Applications for the Right to Attach Orders and Orders for Issuance of Writs of Attachment (Dkt. No. 72) is hereby DENIED.

Dated: January 26, 2017.



MANUEL L. REAL
UNITED STATES DISTRICT JUDGE