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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CONSTRUCTION LABORERS TRUST  
FUNDS FOR SOUTHERN CALIFORNIA  
ADMINISTRATIVE COMPANY,

Plaintiff,

v.

GEORGE ANDREW DOMINGUEZ, et  
al.,

Defendants.

CASE NO. CV 17-7164 AB (SSx)

**MEMORANDUM DECISION AND ORDER**

**GRANTING PLAINTIFF'S**

**APPLICATION FOR RIGHT TO**

**ATTACH ORDER AND WRIT OF**

**ATTACHMENT**

[Dkt. No. 13]

I.

**INTRODUCTION**

On September 28, 2017, Plaintiff Construction Laborers Trust Funds for Southern California Administrative Company ("CLTF" or "Plaintiff") filed a civil complaint against Defendants George Andrew Dominguez ("Dominguez"), Hudson Insurance Company ("Hudson"), and Suretec Insurance Company ("Suretec").<sup>1</sup>

<sup>1</sup> "Defendant" in the singular shall refer to Dominguez only. "Defendants" in the plural shall refer to Dominguez, Hudson and Suretec collectively.

1 ("Complaint," Dkt. No. 1). The Complaint asserts claims for  
2 contributions to employee benefit plans, specific performance,  
3 preliminary and permanent injunctive relief, breach of settlement  
4 agreement, recovery against license bond, and recovery against  
5 labor and material payment bonds. (Id. at 4-16).

6  
7 Two weeks later after Plaintiff filed the Complaint, on  
8 October 12, 2017, Plaintiff filed an Ex Parte Application for a  
9 Right to Attach Order and Writ of Attachment, and for a Temporary  
10 Protective Order.<sup>2</sup> ("Application" or "Appl.," Dkt. No. 13). The  
11 Application was supported by a Memorandum of Points and Authorities  
12 ("Memo.") and the declarations of Marsha M. Hamasaki ("Hamasaki  
13 Decl.") and Yvonne Higa ("Higa Decl."). (Id.). Defendant filed  
14 an Opposition on October 16, 2017, ("Opp."), including the  
15 declaration of George Andrew Dominguez ("Dominguez Decl."). (Dkt.  
16 No. 17). That same day, the Court held a telephonic hearing and  
17 issued an Order denying the Ex Parte Application without prejudice  
18 on the procedural ground that Plaintiff had not shown that it would  
19 suffer irreparable harm if the matter were heard as a regularly  
20 noticed motion. (Dkt. No. 19). On October 17, 2017, Plaintiff  
21 filed a Notice of Hearing setting the hearing on the merits of its  
22 Application for November 7, 2017, (Dkt. No. 20), which the Court  
23 continued to November 21, 2017. (Dkt. No. 33).

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26  
27 <sup>2</sup> This Order addresses only the request for a right to attach order  
28 and writ of attachment. Plaintiff's request for a "temporary  
protective order" is not within the scope of the Magistrate Judge's  
authority.

1 On October 27, 2017, Defendant filed a Supplemental  
2 Opposition, ("Supp. Opp."), including another declaration of George  
3 Andrew Dominguez ("Dominguez Supp. Decl."). (Dkt. No. 26).  
4 Plaintiff filed a Reply on November 3, 2017, ("Reply," Dkt. No.  
5 29), including additional declarations by Marsha M. Hamasaki,  
6 ("Hamasaki Supp. Decl.," Dkt. No. 30), and Yvonne Higa. ("Higa  
7 Suppl. Decl.," Dkt. No. 31). The Court held a hearing on November  
8 21, 2017. For the reasons discussed below and at the hearing,  
9 Plaintiff's Application for a Right to Attach Order and Writ of  
10 Attachment is GRANTED.

## 11 II.

### 12 ALLEGATIONS OF THE COMPLAINT

13 Plaintiff is an administrator and agent for collection of  
14 several employee benefit plans, and a fiduciary as to those plans.  
15 (Complaint ¶ 3). The plans were created by written agreements,  
16 and qualify as "employee benefit plans" and "multi-employer plans"  
17 within the meaning of the relevant provisions of the Employee  
18 Retirement Income Security Act of 1974 ("ERISA"). (Id.).  
19

20  
21 Defendant is an individual doing business as G.A. Dominguez.  
22 (Id. at ¶ 4). Defendant is a party to written collective bargaining  
23 agreements with Plaintiff and its affiliated local unions. (Id.  
24 ¶ 11). Pursuant to these agreements, Defendant is required to pay  
25 fringe benefit contributions for each hour worked by his employees  
26 performing services covered by the agreements, and to deliver to  
27 Plaintiff monthly contribution reports that identify the employees,  
28

1 the hours worked by each employee, and the amount of the  
2 contributions due. (Id. ¶ 13). The contributions are to be paid  
3 monthly. (Id.). In the event that Defendant fails to pay the  
4 contributions timely, he is liable for interest on the unpaid  
5 amounts, plus liquidated damages in a sum equal to the greater of  
6 \$25.00 or 20% of the unpaid contributions. (Id. ¶¶ 16-17). The  
7 agreements empower Plaintiff to audit Defendant's payroll and  
8 business records, with resulting costs charged to Defendant. (Id.  
9 ¶ 18).

10  
11 Plaintiff alleges that Defendant employed workers covered by  
12 the agreements but failed to pay benefits for certain periods from  
13 January 2014 through July 2017. (Id. ¶¶ 19 & 23). Defendant  
14 previously entered into a settlement agreement concerning amounts  
15 owed for the period from March 2016 to September 2016, (id. ¶¶ 41-  
16 42), but failed to make all the payments. (Id. ¶ 44). Defendant  
17 has also failed to permit Plaintiff to conduct a complete audit of  
18 his payroll and business records. (Id. ¶¶ 20-21).

19  
20 **III.**

21 **THE ATTACHMENT APPLICATION AND THE PARTIES' CONTENTIONS**

22  
23 By the instant Application, Plaintiff "seeks to attach funds  
24 owed to [Defendant] by his prime contractor and by the public  
25 agencies pending final judgment[,], which may partially secure  
26 recovery of the funds owed by [Defendant,] and to record the writ  
27 of attachment against [Defendant's] business property prior to its  
28 sale." (Memo. at 2). Plaintiff calculated in its opening brief

1 that as of September 27, 2017, Defendant owed Plaintiff at least  
2 \$158,832.85. (Id. at 10). However, Plaintiff sought to attach  
3 only \$130,000.00 of Defendant's assets in light of the possibility  
4 that it might prevail on its Sixth Claim for Relief against Suretec  
5 for unpaid compensation guaranteed by a payment bond. (Id.; see  
6 also Complaint at 20-21). Plaintiff further revised its  
7 calculations in its Reply to reflect adjustments made after the  
8 Application was filed. Plaintiff determined that the revised total  
9 amount owed by Defendant, including unpaid fringe benefits,  
10 liquidated damages, audit fees, and interest as of October 27,  
11 2017, was \$139,576.26. (Id.; see also Higa Supp. Decl. ¶ 9).  
12 Plaintiff further conceded that the amount it is now seeking from  
13 Suretec could reduce Defendant's liability to \$102,185.95. (Reply  
14 at 11). Plaintiff presently seeks to attach only \$75,000.00 of  
15 that amount in order to "free some \$27,000.00 to [Defendant] for  
16 the expenses and legal fees pending final judgment" of this matter.  
17 (Id.).

18  
19 The specific assets owned by Defendant which Plaintiff seeks  
20 to attach are:

21  
22 A) Lien against real property commonly known as 535  
23 537 W. Grand Avenue, Escondido, CA 92025;

24  
25 B) Proceeds of the sale of real property commonly  
26 known as 535-537 W. Grand Avenue, Escondido, CA  
27 92085 [sic];  
28

1 C) All contract earnings, right to payments,  
2 retention, for work performed by Defendant for the  
3 San Diego Unified School District;

4  
5 D) All contract earnings, right to payments, retention  
6 for work performed for the Whittier Union High  
7 School District;

8  
9 E) All Defendant's accounts receivables, payments,  
10 right to payments, owed by JTS Modular Inc., and  
11 all funds payable thereto up to [\$75,000.00] in JTS  
12 Modular Inc.'s possession, custody and/or control,  
13 including subcontract earnings for work performed  
14 for JTS Modular Inc., for the Pomona Unified School  
15 District and/or any other subcontract work by  
16 Defendant for JTS Modular, Inc.

17  
18 F) Funds held in bank accounts with City National  
19 Bank.

20  
21 (Appl., Exh. A at 6).

22  
23 Plaintiff argues that it is entitled to attach Defendant's  
24 assets for at least three reasons. First, Plaintiff contends that  
25 Defendant evidently does not have the funds on hand to pay the  
26 amounts owed, as demonstrated by his failure to pay monies due  
27 under the settlement agreement and his alleged submission of  
28 "unpaid false reports as confirmed by the audit of payroll records,

1 and certified payroll records on public works projects.” (Memo.  
2 at 10). Plaintiff believes that Defendant owes “substantial debt”  
3 not only to Plaintiff, but also to the IRS, as evidenced by tax  
4 liens levied by the IRS. (Reply at 3; Hamasaki Decl. ¶ 8 & Exh.  
5 3). Second, Plaintiff is concerned that Defendant may be shutting  
6 down his business because his commercial property is for sale by  
7 owner. (Memo. at 10). Plaintiff argues that further evidence of  
8 Defendant’s potential imminent departure from the business is  
9 suggested by Defendant’s failure to submit monthly contribution  
10 reports since May 2017, even though other records confirm that he  
11 has had employees on his payroll since that time, and by his failure  
12 to pay the contributions due. (Id.). Third, Plaintiff maintains  
13 that Defendant’s unwillingness to communicate indicates that  
14 Plaintiff will recover nothing unless it obtains contributions from  
15 Defendant’s known projects for which Defendant will receive  
16 payment, or from the proceeds of the sale of his commercial  
17 property. (Id. at 11).

18  
19 Defendant does not challenge Plaintiff’s allegations that he  
20 is delinquent in making required contributions, or even the amounts  
21 that Plaintiff alleges that he owes.<sup>3</sup> Instead, Defendant argues  
22 that the “scope” of the proposed attachment is “problematic” and  
23 that there is no danger that funds will not be available if  
24 Plaintiff prevails in this action. (Supp. Opp. at 1). Defendant  
25 asserts four challenges to the “scope” of the proposed attachment,

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26 <sup>3</sup> Defendant does summarily assert, however, without citation to  
27 statutory or case law or further discussion, that Plaintiff’s  
28 liquidated damages claim is “arguably impermissible given the  
punitive nature of the damages.” (Supp. Opp. at 2, 8).

1 which he contends impermissibly encompasses exempt property.  
2 Defendant notes first that "it could be argued" that Plaintiff is  
3 seeking to attach assets held "in trust" by Defendant in which he  
4 has no ownership interest. (Id.). According to Defendant, the  
5 rights of his bond issuers (and co-Defendants), Hudson and Suretec,  
6 create a "trust relationship" in which payments by third parties  
7 to Defendant for work covered by the bonds should be construed as  
8 monies held "in trust" by Defendant for the benefit of Hudson and  
9 Suretec. (Id.). Second, Defendant claims that his assets are  
10 community property, and that attachment would infringe the property  
11 rights of his non-debtor spouse. (Id.). Third, Defendant  
12 maintains that as an individual, he is "entitled to assert certain  
13 exemptions" under California Code of Civil Procedure §§ 703.010-  
14 704.995, although he does not identify the specific exemptions that  
15 he believes may apply.<sup>4</sup> (Id.). Fourth, Defendant asserts that  
16 Plaintiff is not permitted under California Code of Civil Procedure  
17 § 487.020(b) to attach property that is necessary to support  
18 Defendant and his family, including funds needed to pay for  
19 attorney's fees so that Defendant may meaningfully defend the  
20 instant action on the merits. (Id.) (citing Randone v. Appellate  
21 Dep't, 5 Cal. 3d 536, 562 (1971)).

22  
23 As to the contention that there is no risk that funds will  
24 not be available to make Plaintiff whole should Plaintiff prevail

---

25 <sup>4</sup> The Sections cited by Defendant in connection with this argument  
26 specifically concern exemptions that may be claimed in post-  
27 judgment proceedings. However, California Code of Civil Procedure  
28 Section 487.020 specifically provides that "[a]ll property exempt  
from enforcement of a money judgment" is also "exempt from [pre-  
judgment] attachment." Cal. Code Civ. Proc. § 487.020(a).



1 in this action, Defendant argues that “[t]he issuance of payment  
2 and performance bonds on each of the projects upon which  
3 [Plaintiff] has filed its lawsuit, as well as all other public  
4 works projects, ensures that, should [Plaintiff] prevail, funds  
5 will be available to satisfy [Plaintiff’s] claim.” (Supp. Opp. at  
6 2). According to Defendant, “[p]ractically speaking, the presence  
7 of such bonds already secure[s] [Plaintiff’s] claim,” thereby  
8 satisfying the purpose of prejudgment attachments. (Id. at 6).  
9 Finally, Defendant states in his declaration that although he  
10 listed real property for sale by owner with an asking price of  
11 \$585,000.00, he has received no reasonable offer in the year that  
12 the property has been on the market, and he does not anticipate  
13 that a sale will be finalized “in the near future.” (Dominguez  
14 Supp. Decl. ¶ 10).

15  
16 Plaintiff refutes each of the defenses raised by Defendant.  
17 With respect to Defendant’s challenges to the “scope” of the  
18 proposed attachment, Plaintiff argues that sums owed by third  
19 parties to Defendant are Defendant’s “accounts receivable” and are  
20 not held “in trust” for the benefit of Defendant’s bond issuers.  
21 (Reply at 5). Plaintiff further contends that community assets  
22 are subject to attachment. (Id.) (citing, inter alia, Century  
23 Surety Co. v. Polisso, 139 Cal. App. 4th 922, 942 (2006), and  
24 California Family Code § 910(a)). To the extent that Defendant is  
25 entitled to any statutory exemptions from attachment, which he does  
26 not identify, Plaintiff notes that the California Code of Civil  
27 Procedure sets out procedures for claiming exemptions after levy.  
28 (Reply at 7) (citing Cal. Code Civ. Proc. §§ 703.510 et seq.).

1 With respect to Defendant's claim that the assets Plaintiff seeks  
2 to attach are needed to support his family and his defense in this  
3 litigation, Plaintiff states that such a claim requires a full  
4 disclosure of Defendant's assets. (Reply at 7). As to Defendant's  
5 contention that funds will be available through bond issuers Hudson  
6 and Suretec, Plaintiff argues that it is not clear that the bond  
7 amounts will be sufficient as "[p]ayment bonds on projects only  
8 cover the contributions owed to the employees for their work on  
9 the bonded project, and do not cover [Plaintiff's] claim for  
10 liquidated damages[] and audit fees." (Id. at 4). Finally, with  
11 respect to Defendant's claim that liquidated damages are "arguably  
12 impermissible" given their punitive nature, Plaintiff emphasizes  
13 that both the written agreements and ERISA, 29 U.S.C. § 1132(g)(2),  
14 provide for liquidated damages, which the Ninth Circuit has  
15 "repeatedly held . . . are mandatory elements of any court award."  
16 (Reply at 2) (citing cases; emphasis in original).

#### 17 18 IV.

#### 19 DISCUSSION

#### 20 21 **A. California Law Applies To Plaintiff's Application For Right** 22 **To Attach Order And Writ Of Attachment**

23  
24 Plaintiffs in federal court may invoke whatever remedies are  
25 provided under the law of the state in which the federal court is  
26 located for "seizing a person or property to secure satisfaction  
27 of the potential judgment." Fed. R. Civ. P. 64; Reebok Int'l, Ltd.  
28 v. Marnatech Enters., Inc., 970 F.2d 552, 558 (9th Cir. 1992)

1 (discussing Rule 64); NML Capital, Ltd. v. Spaceport Sys. Int'l,  
2 L.P., 788 F. Supp. 2d 1111, 1116 (C.D. Cal. 2011). These remedies  
3 may include a writ of attachment. Fed. R. Civ. P. 64; see also  
4 VFS Fin., Inc. v. CHF Express, LLC, 620 F. Supp. 2d 1092, 1094-95  
5 (C.D. Cal. 2009) (Rule 64 "provides for prejudgment attachment[]  
6 and other prejudgment remedies . . ." authorized under state law).  
7 Because attachment is sought against Defendant in the state of  
8 California, California law determines whether and under what  
9 conditions a writ of attachment may issue. In California, the  
10 procedures and grounds for obtaining orders for prejudgment writs  
11 of attachment are codified at California Code of Civil Procedure  
12 §§ 481.010-493.060.

#### 13 14 **B. Overview Of California Law Governing Attachment**

15  
16 Attachment "is a remedy by which a Plaintiff with a  
17 contractual claim to money (not a claim to a specific item of  
18 property) may have various items of a defendant's property seized  
19 before judgment and held by a levying officer for execution after  
20 judgment." Waffer Int'l Corp. v. Khorsandi, 69 Cal. App. 4th 1261,  
21 1271 (1999) (emphasis omitted). California allows prejudgment  
22 attachments under limited circumstances as "a provisional remedy  
23 to aid in the collection of a money demand." Kemp Bros. Constr.  
24 Inc. v. Titan Elec. Corp., 146 Cal. App. 4th 1474, 1476 (2007).  
25 It is "a harsh remedy because it causes the defendant to lose  
26 control of his property before the plaintiff's claim is  
27 adjudicated." Martin v. Aboyan, 148 Cal. App. 3d 826, 831 (1983).  
28 Therefore, the requirements for the issuance of a writ of

1 attachment are strictly construed against the applicant. Pos-A-  
2 Traction, Inc. v. Kelly-Springfield Tire Co., 112 F. Supp. 2d 1178,  
3 1181 (C.D. Cal. 2000) ("Attachment is a purely statutory remedy,  
4 which is subject to strict construction."). The burden is on the  
5 applicant to establish each element necessary for an attachment  
6 order by a preponderance of the evidence. Loeb & Loeb v. Beverly  
7 Glen Music, Inc., 166 Cal. App. 3d 1110, 1116 (1985).

8  
9 A writ of attachment may be issued "only in an action on a  
10 claim or claims for money, each of which is based upon a contract,  
11 express or implied, where the total amount of the claim or claims  
12 is a fixed or readily ascertainable amount not less than five  
13 hundred dollars." Cal. Code Civ. Proc. § 483.010(a) (emphasis  
14 added). For damages to be "readily ascertainable," the contract  
15 "must furnish a standard by which the amount due may be clearly  
16 ascertained and there must exist a basis upon which the damages  
17 can be determined by proof." CIT Group/Equipment Financing, Inc.  
18 v. Super DVD, Inc., 115 Cal. App. 4th 537, 540 (2004) (internal  
19 quotation marks omitted); see also Pet Food Express, Ltd. v. Royal  
20 Canin USA Inc., 2009 WL 2252108, at \*5 (N.D. Cal. July 28, 2009)  
21 ("lost profits" that plaintiff sought to attach were not "certain,  
22 fixed, or even readily ascertainable" and thereby failed to "meet  
23 the threshold requirement for this court to even consider issuing  
24 a writ of attachment"). Attachment is permitted on unsecured  
25 claims or claims secured by personal property, but not on claims  
26 secured by real property. Cal. Code Civ. Proc. § 483.010(b).  
27 Attachment lies on any claim against a partnership or corporation  
28 or on claims against individuals that arise out of the conduct by

1 the individual of a trade, business, or profession. Id.  
2 § 483.010(c).

3  
4 A court must find all of the following before an attachment  
5 order may issue: (1) the claim upon which the attachment is based  
6 is one upon which an attachment may be issued; (2) the plaintiff  
7 has established the probable validity of the claim upon which the  
8 attachment is based; (3) the attachment is not sought for a purpose  
9 other than recovery of the claim upon which the attachment is  
10 based; and (4) the amount to be secured by the attachment is greater  
11 than zero. Id. § 484.090(a). To establish the “probable validity”  
12 component, the plaintiff must show that it is more likely than not  
13 that it will obtain a judgment against the defendant. Id.  
14 § 481.190; see also Pos-A-Traction, 112 F. Supp. 2d at 1182. “In  
15 determining the probable validity of a claim where the defendant  
16 makes an appearance, the court must consider the relative merits  
17 of the positions of the respective parties and make a determination  
18 of the probable outcome of the litigation.” Loeb & Loeb, 166 Cal.  
19 App. 3d at 1120.

20  
21 California law restricts the availability of pre-judgment  
22 attachments in part by providing the defendant with an opportunity,  
23 prior to a ruling on an attachment application, to establish that  
24 the property sought to be attached is exempt. As summarized in  
25 one California practice guide,

26  
27 The state cannot properly withdraw the essentials a  
28 defendant needs to live, to work, to support a family,

1 or to litigate a pending action before an impartial  
2 confirmation of the actual validity of the creditor's  
3 claim after a hearing on that issue. [Randone v.  
4 Appellate Department, 5 Cal. 3d 536, 96 Cal. Rptr. 709,  
5 488 P.2d 13 (1971)] Therefore, the Attachment Law:

6  
7 (1) requires before levy either an opportunity for the  
8 defendant to claim exemptions or a showing by the  
9 plaintiff that the property sought to be attached  
10 is not exempt [Code Civ. Proc., § 484.070  
11 (exemptions)];

12  
13 (2) generally, subjects only business property to levy  
14 [Code Civ. Proc., § 487.010, subds. (a) and (b)  
15 (corporate or partnership or association property  
16 otherwise subject to levy)];

17  
18 (3) requires, when the defendant is a natural person,  
19 that the plaintiff's claim arise out of the  
20 defendant's conduct of a trade, business, or  
21 profession, and not run to money or property used  
22 primarily for family or household purposes  
23 [Nakasone v. Randall, 129 Cal. App. 3d 757, 181  
24 Cal. Rptr. 324 (2d Dist. 1982)];

25  
26 (4) provides a nonseizure form of levy in many  
27 circumstances [Code Civ. Proc., § 488.315  
28

1 (attachment of real property by recordation of  
2 writ)];

3  
4 (5) authorizes the court to issue a temporary  
5 protective order in lieu of a writ in the  
6 exceptional circumstances where a writ might be  
7 issued ex parte [Code Civ. Proc., § 486.030];

8  
9 (6) authorizes the court to review issuance of an ex  
10 parte writ, if based on defendant's alleged  
11 insolvency, within 5 court days after plaintiff is  
12 served with defendant's request to do so [Code Civ.  
13 Proc., § 485.010, subd. (c)];

14  
15 (7) permits defendant to apply to set aside a right to  
16 attach order and quash a writ of attachment [Code  
17 Civ. Proc., § 485.240];

18  
19 (8) permits defendant to substitute an undertaking for  
20 the property seized [Code Civ. Proc., § 489.310];  
21 and

22  
23 (9) requires that property of an individual sought to  
24 be attached be described so that the specific  
25 property can be identified [Code Civ. Proc.,  
26 § 484.020, subd. (e)].

27  
28 Moore & Thomas, Cal. Civ. Prac. Procedure § 16:4 (2017).

1 **C. Plaintiff Is Entitled To A Writ Of Attachment**

2  
3 **1. The Criteria For An Attachment Order Are Satisfied**

4  
5 a. The Claim Upon Which The Attachment Is Based Is One  
6 Upon Which An Attachment May Issue And The Amount  
7 To Be Attached Is Greater Than Zero  
8

9 Defendant does not challenge that he is bound by contract to  
10 submit fringe benefit contributions to Plaintiff for each hour  
11 worked by his employees who perform work covered by the agreements.  
12 (See Higa Decl. ¶¶ 7, 9, 11, 16 & Exh. 5 (Short Form Agreement  
13 incorporating by reference Construction Master Labor Agreements)).  
14 Accordingly, the claim is one upon which an attachment may be  
15 issued -- it arises from a claim for money, based on contract,  
16 arising "out of the conduct by [Defendant] of a trade, business,  
17 or profession," Cal. Code Civ. Proc. § 483.010(c), in an amount  
18 that is fixed or ascertainable that is over five hundred dollars.  
19 Id. § 483.010(a). Furthermore, the amount to be attached to secure  
20 recovery of the claim is greater than zero. Id. § 484.090(a)(4).  
21

22 b. Probable Validity Of The Claim Favors Plaintiff  
23

24 To establish the "probable validity" component, Plaintiff must  
25 show it is more likely than not that it will obtain a judgment  
26 against the defendant. Cal. Code Civ. Proc. § 481.190; see also  
27 Pos-A-Traction, 112 F. Supp. 2d at 1182. "In determining the  
28 probable validity of a claim where the defendant makes an



1 appearance, the court must consider the relative merits of the  
2 positions of the respective parties and make a determination of  
3 the probable outcome of the litigation." Loeb & Loeb, 166 Cal.  
4 App. 3d at 1120. Thus, it is not enough for the plaintiff to make  
5 out a prima facie case for breach of contract; rather, the plaintiff  
6 must also show that the defenses raised are "less than fifty percent  
7 likely to succeed." Pet Food Express, Ltd. v. Royal Canin USA  
8 Inc., 2009 WL 2252108, at \*5 (N.D. Cal. 2009). If an applicant  
9 fails to rebut a factually-supported defense that would defeat its  
10 claims, the applicant has not established probable validity. See  
11 Interinvest Mortgage Inv. Co. v. Skidmore, 2008 WL 5385880, at \*7  
12 (E.D. Cal. Dec. 19, 2008) ("[Plaintiff] argues that it may not be  
13 required to refute [defendant's] defenses, i.e. that probable  
14 validity on the prima facie case may be sufficient. The court  
15 disagrees. Section 484.090 requires prediction of the probable  
16 outcome of the litigation, and the affirmative defenses and  
17 counterclaims will potentially influence this outcome."); Plata v.  
18 Darbun Enters., Inc., 2009 WL 3153747, at \*7 (S.D. Cal. Sept. 23,  
19 2009) (denying right to attach order because an asserted defense  
20 prevented the plaintiffs from establishing the probable validity  
21 of their claim).

22  
23 Here, Defendant does not even attempt to contest that he owes  
24 benefit contributions under the contract to Plaintiff, or seriously  
25 challenge the validity of Plaintiff's claim. Plaintiff's  
26 Application is based on documentary evidence, including written  
27 contracts, monthly reports, and data strongly suggesting that  
28 Defendant has underreported or entirely failed to report hours

1 worked. In contrast, the Supplemental Opposition is devoid of  
2 evidence or argument suggesting that Defendant might somehow  
3 prevail on the merits at trial, either due to Plaintiff's failure  
4 of proof or to Defendant's affirmative defenses.<sup>5</sup> Accordingly, the  
5 Court concludes that it is more likely than not that Plaintiff will  
6 obtain a judgment against Defendant. See Cal. Code Civ. Proc.  
7 § 481.190.

8  
9 c. Attachment Is Not Sought For A Purpose Other Than  
10 Recovery Of The Claim  
11

12 There is no suggestion in the record before the Court that  
13 Plaintiff is seeking attachment for any purpose other than securing  
14 recovery of the claim. Defendant has already breached a settlement  
15 agreement, demonstrating an unwillingness or inability to pay, and  
16 Plaintiff persuasively contends that it has good reason to believe

---

17 <sup>5</sup> Indeed, many of Defendant's so-called "affirmative defenses" in  
18 his Answer to the Complaint are not affirmative defenses at all.  
19 (See Dkt. No. 28 at 8-13). An affirmative defense "plead[s] matters  
20 extraneous to the plaintiff's prima facie case, which deny  
21 plaintiff's right to recover, even if the allegations are true."  
22 Federal Deposit Ins. Corp. v. Main Hurdman, 655 F. Supp. 259, 262  
23 (E.D. Cal. 1987); see also In re Rawson Food Service, Inc., 846  
24 F.2d 1343, 1349 (11th Cir. 1988) ("An affirmative defense raises  
25 matters extraneous to the plaintiff's prima facie case; as such,  
26 they are derived from the common law plea of 'confession and  
27 avoidance.'" (internal quotation marks omitted). However, "[a]  
28 defense which demonstrates that plaintiff has not met its burden  
of proof is not an affirmative defense." Zivkovic v. Southern  
California Edison Co., 302 F.3d 1080, 1088 (9th Cir. 2002); see  
also In re Rawson Food Service, 846 F.2d at 349 (defenses which  
merely "negate an element of the plaintiff's prima facie case . . .  
are excluded from the definition of affirmative defense in Fed. R.  
Civ. P. 8(c)") (internal quotation marks omitted). Regardless,  
Defendant's Supplemental Opposition does not argue that Defendant  
is likely to prevail at trial under any theory.

1 that Defendant has underreported, or entirely failed to report,  
2 employee work hours for which he would be required to make benefit  
3 payments. Defendant's failure to produce monthly reports  
4 documenting his employees' hours suggests that Defendant may be  
5 trying to evade his obligations to Plaintiff. In this context,  
6 and in the absence of any other countervailing evidence, it does  
7 not appear that Plaintiff is seeking an attachment for an  
8 impermissible purpose. As such, all of the criteria for a writ of  
9 attachment are met.

## 11 **2. Defendant's Challenges To The Proposed Attachment Fail**

12  
13 Defendant raises numerous challenges to the Application on  
14 the grounds that the property to be attached is exempt or,  
15 alternatively, that attachment is unnecessary. Defendant's  
16 contentions are not persuasive. Nonetheless, the Court will  
17 briefly address each one.

### 19 a. Defendant's Accounts Receivable Are Not Held "In 20 Trust" For His Bond Issuers

21  
22 Defendant vaguely contends that "it could be argued" that the  
23 funds Plaintiff seeks to attach are actually the property of  
24 Defendant's bond issuers, and that Defendant is holding or will  
25 hold the funds only "in trust" for the benefit of the rightful  
26 owners, Hudson and Suretec. (Supp. Opp. at 1, 6) (citing Richion  
27 v. Mahoney, 62 Cal. App. 3d 604, 609 (1976)). According to  
28 Defendant,

1 [I]t is possible that a Court may find that the funds  
2 held by Defendant are funds in which Defendant only holds  
3 a partial, if any, equitable interest. If a Court came  
4 to such a conclusion, it would follow that until  
5 Defendant satisfies his obligations, any funds that  
6 Defendant receives or has in his possession are funds  
7 that would, effectively, be held in trust by Defendant  
8 for the benefit of the bonding company or claimants.

9  
10 (Supp. Opp. at 6). Plaintiff counters that the funds owed by the  
11 San Diego and Whittier School Districts for Defendant's work on  
12 those projects are owed directly to Defendant, for whom the  
13 promised funds are simply accounts receivable. (Reply at 5).

14  
15 California law provides that "[a]n attaching creditor seeking  
16 to subject the property of a debtor to payment of his debt obtains  
17 a lien only upon the title or interest the debtor has and where no  
18 actual interest is shown[,] the attaching creditor gets  
19 nothing. . . . [P]roperty held by the debtor in trust is not  
20 subject to attachment for his debts." Richion, 62 Cal. App. 3d at  
21 609 (internal citations omitted). However, Defendant has utterly  
22 failed to show that under California law, a party owed money  
23 pursuant to a contract with a third party for work insured by a  
24 bond issuer holds the funds "in trust" for his bond issuer.  
25 Defendant's repeated use of phrases such as "it could be argued,"  
26 "it is possible" and "if the Court came to such a conclusion,"  
27 coupled with the complete lack of citations to relevant case law,  
28 only confirm that Defendant's position is speculative and

1 unsupported. Defendant has not shown that his contract earnings  
2 and accounts receivable are not subject to attachment. This  
3 defense fails.

4  
5 b. Community Property Is Attachable

6  
7 Defendant also argues that the property Plaintiff seeks to  
8 attach is community property subject to the rights of his non-  
9 debtor spouse, who is not a party to this action. (Supp. Opp. at  
10 2, 7) (citing Cal. Code Civ. Proc. § 487.020(b)). Plaintiff  
11 counters that a community estate may be held liable for any debt  
12 incurred by either spouse prior to or during the course of the  
13 marriage. (Reply at 5) (citing Century Surety Co. v. Polisso, 139  
14 Cal. App. 4th 922, 942 (2006)).

15  
16 The gravamen of Defendant's argument is unclear. However, to  
17 the extent that Defendant is attempting to argue that community  
18 property is exempt from attachment, in whole or in part, simply  
19 because it is community property in which a non-debtor spouse holds  
20 an interest, he is plainly wrong. California Family Code Section  
21 910(a) provides that "the community estate is liable for a debt  
22 incurred by either spouse before or during marriage, regardless of  
23 which spouse has the management and control of the property and  
24 regardless of whether one or both spouses are parties to the debt  
25 or to a judgment for the debt." Cal. Fam. Code § 910(a); see also  
26 United States v. McGrew, 2014 WL 7877053, at \*5 (C.D. Cal. Dec.  
27 19, 2014), aff'd, 669 F. App'x 831 (9th Cir. 2016) ("Under  
28 California law, the entire community is liable for the debts

1 incurred by one of the spouses during the marriage, if the debts  
2 were incurred prior to separation.”) (citing Section 910(a)).<sup>6</sup> The  
3 California Supreme Court has further explained that “the liability  
4 of community property is not limited to debts incurred for the  
5 benefit of the community, but extends to debts incurred by one  
6 spouse alone exclusively for his or her own personal benefit.”  
7 Lezine v. Sec. Pac. Fin., 14 Cal. 4th 56, 64 (1996). Community  
8 property is not exempt from attachment simply because it is  
9 community property. See, e.g., McKnight v. Superior Court, 170  
10 Cal. App. 3d 291, 295 (1985) (noting without comment that plaintiff  
11 had obtained a writ of attachment against real property owned by  
12 defendant and his non-debtor spouse as community property). This  
13 defense fails.

14  
15 c. Defendant Fails To Identify Any Applicable  
16 Statutory Exemptions  
17

18 Defendant states that as an individual, he is entitled to the  
19 protections against attachment provided by Cal. Code Civ. Proc.  
20 §§ 703.010-704.995. (Supp. Opp. at 2; see also id. at 7 (“Defendant  
21 would be entitled to carve out certain assets from a writ that were  
22 part of California’s individual exemption schemes . . . that  
23 Defendant, as an individual, would not be afforded to assert if a  
24 corporation.”)). However, Defendant does not identify any specific  
25 provision or exemption to which he is allegedly entitled.

26  
27 <sup>6</sup> Furthermore, California Code of Civil Procedure  
28 Section 695.020(a) explicitly provides that “[c]ommunity property  
is subject to enforcement of a money judgment as provided in the  
Family Code.”

1 Plaintiff contends that whatever the exemptions Defendant may  
2 believe he is entitled to assert, California Code of Civil  
3 Procedure sets forth procedures to claim exemptions after levy.  
4 (Reply at 7) (citing, inter alia, Cal. Code Civ. Proc. § 703.520  
5 (claim of exemption by judgment debtor is filed with the levying  
6 officer), id. § 703.530 (judgment debtor may be required to submit  
7 financial statement), id. § 703.570 (hearing is held to determine  
8 judgment debtor's right to claimed exemption)). However, Plaintiff  
9 ignores California procedures expressly allowing a defendant to  
10 claim an exemption before a pre-judgment attachment issues.

11  
12 California Code of Civil Procedure section 484.020 requires  
13 an application for a writ of attachment to include, among other  
14 things, "[a] description of the property to be attached under the  
15 writ of attachment and a statement that the plaintiff is informed  
16 and believes that such property is subject to attachment. Cal.  
17 Code Civ. Proc. § 484.020(e). "Where the defendant is a natural  
18 person, the description of property shall be reasonably adequate  
19 to permit the defendant to identify the specific property to be  
20 attached." Id. The purpose of this requirement is to enable an  
21 individual defendant to determine whether to claim an exemption  
22 before the attachment order issues. See Bank of America v. Salinas  
23 Nissan, Inc., 207 Cal. App. 3d 260, 268 (1989). Section 484.070  
24 sets forth the procedure for claiming an exemption to pre-judgment  
25 attachment. It provides in relevant part:

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(a) If the defendant claims that the personal property described in the plaintiff's application, or a portion of such property, is exempt from attachment, the defendant shall claim the exemption as provided in this section. If the defendant fails to make the claim or makes the claim but fails to prove that the personal property is exempt, the defendant may not later claim the exemption except as provided in Section 482.100.

. . .

(c) The claim of exemption shall:  
(1) Describe the property claimed to be exempt.  
(2) Specify the statute section supporting the claim.

(d) The claim of exemption shall be accompanied by an affidavit supporting any factual issues raised by the claim and points and authorities supporting any legal issues raised.

(e) The claim of exemption, together with any supporting affidavit and points and authorities, shall be filed and served on the plaintiff not less than five court days before the date set for the hearing.



1 (f) If the plaintiff desires to oppose the claim of  
2 exemption, the plaintiff shall file and serve on  
3 the defendant, not less than two days before the  
4 date set for the hearing, a notice of opposition to  
5 the claim of exemption, accompanied by an affidavit  
6 supporting any factual issues raised and points and  
7 authorities supporting any legal issues  
8 raised. . . .

9  
10 (g) If the plaintiff files and serves a notice of  
11 opposition to the claim as provided in this  
12 section, the defendant has the burden of proving  
13 that the property is exempt from attachment.

14  
15 Cal. Code Civ. Proc. § 484.070; see also Bank of Am., 207 Cal. App.  
16 3d at 270 ("It could hardly be clearer that, just as the defendant  
17 is required to make exemption claims before a noticed hearing on  
18 an attachment application, so the plaintiff is required to oppose  
19 any such claims. A defendant is deemed to have waived any untimely  
20 claim of exemption for personal property. Similarly, a plaintiff's  
21 lack of opposition concedes the propriety of timely exemption  
22 claims.").

23  
24 Here, Defendant's attempt to assert a right to exemptions  
25 under Sections 703.010-704.955 fails because Defendant does not  
26 identify the specific property he claims to be exempt, or the  
27 specific statute supporting the claim, as required by Section  
28 484.070(c). Nor does Defendant's Supplemental Declaration explain

1 why any of the property at issue is exempt under these statutes.  
2 Because Defendant has failed to show an entitlement to exemptions  
3 under Sections 703.010-704.955, such claims are waived for purposes  
4 of the instant Application. This defense fails.

5  
6 d. Defendant Has Not Shown That The Funds To Be  
7 Attached Are Necessary To Support Him Or His Family  
8

9 Defendant maintains that funds necessary to support him and  
10 his family, including funds needed for legal fees incurred in his  
11 defense in the instant action, are exempt from attachment. (Supp.  
12 Opp. at 2, 7) (citing, inter alia, Cal. Code Civ. Proc.  
13 § 487.020(b); Randone v. Appellate Dep't, 5 Cal. 3d 536, 562  
14 (1971)). Plaintiff contends that in order to assert this  
15 exemption, Defendant must disclose all of his assets and sources  
16 of income. (Reply at 7).  
17

18 Defendant is correct as a general proposition that funds  
19 necessary to support a defendant or his family are exempt from  
20 prejudgment attachment. Section 487.020(b) explicitly provides  
21 that property is exempt "which is necessary for the support of a  
22 defendant who is a natural person or the family of such defendant  
23 supported in whole or in part by the defendant." Cal. Code Civ.  
24 Proc. § 487.020(b); see also Doyka v. Superior Court, 233 Cal. App.  
25 3d 1134, 1137 (1991) ("[P]roperty necessary for the support of the  
26 defendant or the defendant's family is exempt from attachment.").

27 \\  
28 \\  
29

1           However, “[a] claim that property is exempt because it is  
2 necessary for the support of the defendant or his or her family  
3 must include a financial statement detailing the earnings of all  
4 family members and listing their assets and obligations.” Cal.  
5 Judges Benchbook, Civ. Proc. Before Trial § 14.80. Defendant did  
6 not disclose in his declaration any evidence showing his, or his  
7 family’s, income, assets and debts. Defendant therefore failed to  
8 show that the assets Plaintiff is seeking to attach are necessary  
9 for the support of him and his family.<sup>7</sup> This defense fails.

10  
11           e.     Defendant Has Not Shown That Payment And Performance  
12                    Bonds Will Adequately Protect Plaintiff  
13

14           Defendant argues that “it is likely that [Plaintiff] is  
15 adequately protected by the performance bonds” on certain projects,  
16 whereas if a writ of attachment were to issue, it would “ground  
17 all activity on all projects for Defendant and bring Defendant’s  
18 business to a complete stop.” (Supp. Opp. at 2, 8). Plaintiff  
19 argues that “[p]ayment bonds on projects only cover the  
20 contributions owed to the employees for their work on the bonded  
21 project, and do not cover [Plaintiff’s] claim for liquidated  
22 damages and audit fees.” (Reply at 4). Furthermore, Plaintiff  
23 notes that the performance bond attached to the Dominguez  
24 declaration “only guarantees [Defendant’s] performance of its  
25

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26 <sup>7</sup> Despite the lack of evidence from Defendant, Plaintiff voluntarily  
27 reduced the amount of the requested attachment to \$75,000 -- some  
28 \$27,000 less than the amount Plaintiff claims it is owed, at a  
minimum, under the contracts -- specifically in order to  
accommodate Defendant’s potential financial needs.

1 contract with the Whittier School District and [Plaintiff is] not  
2 a beneficiary of the bond and cannot recover under the bond.” (Id.  
3 at 4 n.4) (citing Dominguez Supp. Decl., Exh. B at 16).

4  
5 The Court is not persuaded that Defendant’s bonds on will  
6 necessarily fully protect Plaintiff should it eventually prevail  
7 at trial. As Plaintiff contends, because Defendant has not  
8 cooperated in the audit of his records, even if Plaintiff could  
9 assert claims on the bonds, it is unclear whether Plaintiff would  
10 be able to do so within the applicable statutes of limitation.  
11 Similarly, it is not clear that the amounts of the bonds will be  
12 sufficient to cover any additional claims Plaintiff may discover,  
13 or even the liquidated damages, interest, and audit fees on  
14 currently known projects. (Reply at 4). Furthermore, Defendant  
15 has not cited to any case precluding a creditor from obtaining a  
16 writ of attachment against a debtor’s property simply because  
17 payment may be available indirectly from another source at the  
18 conclusion of the action. This defense fails.

19  
20 f. The Attachment Amount Is Not Inflated Due To  
21 Plaintiff’s Entitlement To Liquidated Damages  
22

23 Defendant summarily asserts, without citation to law or  
24 further elaboration, that Plaintiff’s liquidated damages claim is  
25 “arguably impermissible given the punitive nature of the damages.”  
26 (Supp. Opp. at 2, 8). Plaintiff emphasizes that both the written  
27 agreements and ERISA, 29 U.S.C. § 1132(g)(2), provide for  
28 liquidated damages, which the Ninth Circuit has “repeatedly held

1 . . . are mandatory elements of any court award." (Reply at 2)  
2 (citing cases; emphasis in original).

3  
4 Section 1132(g) (2) provides:

5  
6 In any action under this subchapter by a fiduciary for  
7 or on behalf of a plan to enforce section 1145 of this  
8 title in which a judgment in favor of the plan is  
9 awarded, the court shall award the plan--

- 10  
11 (A) the unpaid contributions,  
12 (B) interest on the unpaid contributions,  
13 (C) an amount equal to the greater of--  
14 (i) interest on the unpaid contributions, or  
15 (ii) liquidated damages provided for under the  
16 plan in an amount not in excess of 20  
17 percent (or such higher percentage as may  
18 be permitted under Federal or State law) of  
19 the amount determined by the court under  
20 subparagraph (A),  
21 (D) reasonable attorney's fees and costs of the  
22 action, to be paid by the defendant, and  
23 (E) such other legal or equitable relief as the court  
24 deems appropriate.

25  
26 29 U.S.C. § 1132(g) (2) (emphasis added); see also Nw. Adm'rs, Inc.  
27 v. Albertson's, Inc., 104 F.3d 253, 257 (9th Cir. 1996) ("Section  
28 1132(g) (2) is 'mandatory and not discretionary.' To be entitled

1 to a mandatory award under § 1132(g)(2), the following three  
2 requirements must be satisfied: (1) the employer must be delinquent  
3 at the time the action is filed; (2) the district court must enter  
4 a judgment against the employer; and (3) the plan must provide for  
5 such an award.”) (internal citation omitted).

6  
7 It is undisputed that the agreements here provide for  
8 liquidated damages. (See, e.g., Higa Decl. ¶ 11.2). Defendant’s  
9 cursory and unsupported argument alleging that liquidated damages  
10 are impermissible is flatly contradicted by the ERISA statute  
11 specifically requiring the court (“the court shall award the plan”)  
12 to assess such damages. This defense fails.

13  
14 **V.**

15 **CONCLUSION**

16  
17 Plaintiff has satisfied the criteria for the issuance of a  
18 writ of attachment. Defendant’s attempted defenses are  
19 unpersuasive. Accordingly, Plaintiff’s Application for a Right to  
20 Attach Order and Writ of Attachment, as amended by the reduction  
21 in the amount to be attached to \$75,000, is GRANTED.

22  
23 At the hearing, Plaintiff argued against the posting of a bond  
24 as a condition of levying the writ of attachment on the ground that  
25 Defendant was unlikely to prevail in this matter, rendering the  
26 purpose of the bond -- to protect a defendant against a wrongful  
27 attachment -- moot. However, this argument does not address the  
28 statutory requirement. See Cal. Code Civ. Proc. §§ 489.210-

1 489.220. Because the Court has not found any authority allowing  
2 it to exercise discretion regarding the posting of a bond, a bond  
3 is necessary here. See Vershbow v. Reiner, 231 Cal. App. 3d 879,  
4 883 (1991) ("Absent the prerequisite undertaking, the writ of  
5 attachment issued by the clerk of the court was void ab initio  
6 . . . ."). If Plaintiff is aware of any contrary authority,  
7 Plaintiff may file a Notice of Authority within 7 days of the date  
8 of this Order, with a brief explanation in support of its contention  
9 that no bond is required. Defendant may file a response within 7  
10 days of service of the Notice. If the Court is persuaded that a  
11 bond is not required, the Court may amend this Order. Plaintiff  
12 shall submit a proposed Right to Attach Order and Writ of Attachment  
13 reflecting the amended sum to be attached within seven days of the  
14 date of this Order.

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DATED: November 21, 2017

/s/  
\_\_\_\_\_  
SUZANNE H. SEGAL  
UNITED STATES MAGISTRATE JUDGE