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APN# 1418-10-702-004

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Order Grating Motion for Prejudgment Writ of Attachment

Title of Document (required)

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 Affidavit of Death – NRS 440.380(1)(A) & NRS 40.525(5)

 Judgment – NRS 17.150(4)

 Military Discharge – NRS 419.020(2)

Signature

Mark H. Gunderson, Esq.

Printed Name

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1 **CODE 3060**

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5 **IN THE SECOND JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA**
6 **IN AND FOR THE COUNTY OF WASHOE**

7 BANK OF THE WEST, a California banking
8 corporation,

CASE NO. CV16-00898

DEPT. NO. B13

9 Plaintiff,

10 v.

11
12 F. HARVEY WHITTEMORE and ANNETTE
13 WHITTEMORE, husband and wife; THE
14 LAKESHORE HOUSE LIMITED
15 PARTNERSHIP, a Nevada Limited Partnership;
16 EMERSON HEDGES, LLC, a Nevada Limited
17 Liability Company; and DOES 1-20,

Defendants.
/

18 **PROPOSED ORDER GRANTING MOTION FOR**
19 **PREJUDGMENT WRIT OF ATTACHMENT**

20 On February 8, 2017, Plaintiff BANK OF THE WEST, a California banking association
21 ("Bank"), by and through its counsel of record, Mark H. Gunderson, Esq., and Austin K. Sweet, Esq,
22 filed *Plaintiff's Motion for Prejudgment Writ of Attachment or, Alternatively, Preliminary Injunction;*
23 *Request for Hearing* ("Motion") seeking an order attaching the real property located at 192 Glenbrook
24 Inn Road, Glenbrook, Nevada ("Glenbrook Property").

25 On February 27, 2017, Defendants EMERSON HEDGES, LLC, a Nevada limited liability
26 company ("Emerson Hedges") and THE LAKESHORE HOUSE LIMITED PARTNERSHIP
27 ("Lakeshore House") filed their *Opposition to Motion for Prejudgment Writ of Attachment*. Also on
28 February 27, 2017, Defendants F. HARVEY WHITTEMORE and ANNETTE WHITTEMORE,

1 husband and wife (the “Whittemores”), filed a *Joinder in Opposition to Plaintiff’s Motion for*
2 *Prejudgment Writ of Attachment or, Alternatively, Preliminary Injunction; Request for Hearing.*

3 On March 9, 2017, the Bank filed *Plaintiff’s Reply to Emerson Hedges and Lakeshore House’s*
4 *Opposition to Motion for Prejudgment Writ of Attachment.* Also on March 9, 2017, the Bank filed
5 *Plaintiff’s Reply to Joinder in Opposition to Plaintiff’s Motion for Prejudgment Writ of Attachment*
6 *or, Alternatively, Preliminary Injunction.* The Motion was submitted on March 9, 2017.

7 On April 20, 2017, the Court issued its *Order Regarding Plaintiff’s Motion for Prejudgment*
8 *Writ of Attachment or, Alternatively, Preliminary Injunction; Request for Hearing; Order to Set*
9 *Hearing,* granting the Bank’s request for hearing and ordering all parties to contact the Judicial
10 Assistant for Department 13 to set oral arguments on the Motion. The hearing was set for September
11 18, 2017.

12 On September 15, 2017, the Bank filed a *Supplemental Brief in Support of Plaintiff’s Motion*
13 *for Prejudgment Writ of Attachment or, Alternatively, Preliminary Injunction.*

14 On September 17, 2017, Emerson Hedges and Lakeshore House filed a *Response to Plaintiff’s*
15 *Supplemental Brief.*

16 On September 18, 2017, the Court heard oral arguments on the Motion.

17 Based upon the pleadings and briefing on file, the arguments of the parties, and the reasons
18 stated at the hearing, THIS COURT ENTERS THE FOLLOWING FINDINGS OF FACT AND
19 CONCLUSIONS OF LAW:

20 1. The Motion was made upon two separate areas of the Bank’s complaint: claims
21 involving fraudulent conveyance and claims involving the breach of a settlement agreement.

22 2. To obtain a prejudgment writ of attachment, the Bank must allege a “meritorious claim
23 for relief” and establish that its claim has “probable validity.” To establish the probable validity of its
24 claims, the Bank must prove to the Court that it has more than a fifty percent (50%) likelihood of
25 prevailing on its claims *and* on the defendants’ defenses and counterclaims.

26 3. With regard to the claims involving fraudulent transfer, the Court finds that Exhibit 22
27 to the Motion is one of the critical pieces of evidence cited by the Bank. While that document may be
28 true and correct coming from the defendants, the Court finds that the Bank has failed to establish the

1 foundation for that document at this time. The Court therefore will not consider Exhibit 22 to the
2 Motion as part of the evidence.

3 4. Without considering Exhibit 22 to the Motion, the Court finds that the Bank has failed
4 to meet its burden of proving a likelihood of success on the merits by a preponderance of the evidence.
5 The Court therefore declines to issue a writ of attachment based upon the fraudulent conveyance
6 claims.

7 5. With regard to the breach of contract claims relating to the settlement agreement
8 (“Settlement Agreement”), the Court finds that the Bank has met its burden of showing a meritorious
9 claim by a preponderance of the evidence a likelihood of success on the merits of both its claims *and*
10 the defendants’ defenses and counterclaims.

11 6. The Court finds that the Settlement Agreement is a valid and binding contract which
12 was executed by all parties.

13 7. The Court finds that the Settlement Agreement indicates that payment was to be made
14 jointly and severally by the Whittemores, Emerson Hedges, and Lakeshore House. The defendants
15 argue that the payment was to come from a specified source and therefore the only party liable to make
16 the settlement payment was that specified source. The Court finds that adopting this argument would
17 render the joint and several liability completely nugatory. The Court declines to enter such a ruling.

18 8. In Nevada, contracts are to be construed to avoid ridiculous or nonsensical results.
19 *Reno Club, Inc. v. Young Inv. Co.*, 64 Nev. 312, 325, 182 P.2d 1011, 1017 (1947).

20 9. The defendants argue that, the way the Settlement Agreement was written, the only
21 way the settlement payment could possibly be made was through the escrow from a specified escrow
22 agent. The Court finds that that simply is not the case. The Court finds that, while the escrow was the
23 preferred source of payment, there is nothing in the Settlement Agreement that limited payment to
24 come solely from that source. For the Court to construe the Settlement Agreement along those lines
25 would be to condone a ridiculous result, which the Court will not do.

26 10. When faced with construing a document, if one construction can stand and another
27 construction results in an ambiguity, the Court looks to the construction which can stand. *Id.* The
28 Court finds that a construction which can stand is that Section 2 of the Settlement Agreement contains

1 the escrow instructions, as the name of the provision so states, and Section 5 of the Settlement
2 Agreement is the remedies section should the Settlement Agreement not be fully effectuated. To read
3 Section 2 as the defendants suggest would render Section 5 a nullity, which the Court declines to do.

4 11. The Court finds that the first sentence of Section 5 of the Settlement Agreement is
5 stated in the disjunctive, "or." If the settlement payment is not timely delivered, "or" if the defendants
6 cause the payment to not be made, the Bank is able to elect its remedy. In this case, the settlement
7 payment was not timely made, so the Bank is fully able to elect its remedy.

8 12. The Court finds that the Settlement Agreement contains an integration clause, so the
9 defendants' arguments with regard to previous emails and what happened in those previous emails is
10 barred by the parol evidence rule.

11 13. With respect to the further assurances clause, the Court finds itself at a loss as to what
12 else the Bank could have done. The *lis pendens* was placed in escrow and was going to be expunged
13 at the time that the settlement payment was made. The *lis pendens* was not the problem raised by the
14 title company, as indicated in the defendants' exhibit. The issue raised by the title company was the
15 claim that was made in the complaint with regard to fraudulent conveyance, and that claim had already
16 been made. The title insurers knew of the claim and that bell been rung. The fact that the Bank said
17 you cannot unring that bell does not mean that they were in violation of any further assurances clause.

18 14. The Court applies the same analysis to the implied covenant of good faith and fair
19 dealing in the Settlement Agreement.

20 15. The Court finds that the Bank has met its burden of proving by a preponderance of the
21 evidence a likelihood of success on the merits of the defendants' defenses and counterclaims that the
22 Bank did not violate the further assurances clause or the implied covenant of good faith and fair dealing
23 in the Settlement Agreement.

24 16. The doctrine of prevention stops one, after a contract has been entered into, from
25 repudiating that contract.

26 17. The Court finds that the Bank did not repudiate the Settlement Agreement. The issue
27 that caused the problem at escrow and with title insurance had occurred prior to the Settlement
28 Agreement being negotiated, so the doctrine of prevention does not apply.

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2 18. The Court applies the same analysis to find that the doctrines of impossibility or
3 frustration of purpose also do not apply.

4 19. The Court finds that the Bank has made a meritorious claim for relief that the
5 defendants breached the Settlement Agreement.

6 20. A prejudgment writ of attachment shall issue in the amount of ONE MILLION NINE
7 HUNDRED TWENTY-THREE THOUSAND THREE HUNDRED SEVENTY-FIVE DOLLARS
8 AND SIXTY-THREE CENTS (\$1,923,375.63), being the amount of the settlement payment plus
9 interest at the legal rate from the date due through the date of the hearing.

10 21. The Bank shall post a bond in the amount of ONE MILLION NINE HUNDRED
11 TWENTY-THREE THOUSAND THREE HUNDRED SEVENTY-FIVE DOLLARS AND SIXTY-
12 THREE CENTS (\$1,923,375.63).

13 22. The property to be attached is the Glenbrook Property, commonly described as 192
14 Glenbrook Inn Road, Glenbrook, Nevada.

15 23. The Motion is GRANTED.

16 **IT IS SO ORDERED.**

17 DATED this 19 day of Oct., 2017.

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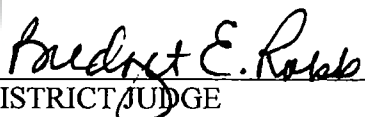
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DISTRICT JUDGE

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CERTIFICATE OF SERVICE

I hereby certify that on 10.19.17 I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

- JOHN ECHEVERRIA, ESQ.
- AUSTIN SWEET, ESQ.
- RICHARD WILLIAMSON, ESQ.
- PATRICIA LUNDVALL, ESQ.
- MARK GUNDERSON, ESQ.



Judicial Assistant

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The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.

OCT 19 2017

DATE: _____
JACQUELINE SWAYNT, Clerk of the Second Judicial District Court in and for the County of Washoe, State of Nevada.

By _____ Deputy