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Order Granting Plaintiff's Motion or Partial Summary Judgment

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___Judgment – NRS 17.150(4)

___Military Discharge – NRS 419.020(2)

Signature

Mark H. Gunderson, Esq.

Printed Name

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CODE:

IN THE FAMILY DIVISION

OF THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

BANK OF THE WEST. A California banking corporation,

Plaintiff,

vs.

F. HARVEY WHITTEMORE and ANNETTE WHITTEMORE, husband and wife; THE LAKESHORE HOUSE LIMITED PARTNERSHIP, a Nevada limited partnership; EMERSON HEDGES, LLC, a Nevada limited liability company; and DOES 1-20,

Defendants.

_____/

Case No. CV16-00898

Dept. No. 13

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Presently before the Court is *Bank of the West's Motion for Partial Summary Judgment* ("the Motion"), filed by Plaintiff Bank of the West ("the Bank") on August 18, 2017. Defendants Emerson Hedges, LLC ("Emerson"), and the Lakeshore House Limited Partnership ("Lakeshore"), filed the *Opposition to Motion for Partial Summary Judgment* ("the Opposition") on September 1, 2017. The Bank filed *Bank of the West's Reply in Support of Motion for Partial Summary Judgment* ("the Reply") on September 14, 2017. The Motion was submitted for the Court's consideration on September 14, 2017.

Factual and Procedural Background

Defendants Harvey and Annette Whittemore ("the Whittemores") opened two lines of Credit with the Bank on March 4, 2004, each for $2,500,000.00. The Answer to Second Amended Complaint and First Amended Counterclaim ("the Answer"), 21:21-22. One line of credit was secured, the other unsecured. Id., 21:21-23. Each line of credit was attached to a promissory note ("the Notes"). The Answer, 22:1-2. On May 26, 2004, the Whittemores purchased property on 192 Glenbrook Inn Road, in Douglas County, Nevada. ("the Glenbrook Property"). *Id.*, 17:7-8.

The Bank did not strictly enforce repayment of the Notes. *Id.* 22:3-10. Instead, the Bank "repeatedly excus[ed] timely payments on" the Notes. *Id.*, 22:9-10. The Bank allowed eight extensions on the Notes between 2004 and 2009, when the Notes expired. *Id.*, 22:3-4, 20-21. In 2009, the Whittemores paid the secured note in full, and made a $250,000.00 payment on the unsecured note. *Id.*, 23:5-8. The unsecured note was replaced by an amended unsecured note ("the September Note") in the amount of $2,225,000.00, on September 1, 2009. *Id.*, 23:9-10. Between September 1, 2009, and August 5, 2010, the Whittemores paid down the September Note to the amount of $1,879.828.48. *Id.*, 23:9-12. The September Note was replaced by another unsecured note ("the November Note"), in the amount of $1,729.828.48, on November 19, 2010, which extended the due date to October 5, 2011. *Id.*, 23:26-28. The November note was executed in accordance with the Bank's plans to "term-out" the loan. *Id.*, 23:13-14. Execution of the November Note required a $250,000.00 payment due by February 5, 2011. *Id.*, 24:9-10. The Whittemores did not make the required February payment. *Id.*, 25:16. The Bank notified the Whittemores payment would be required by March 25, 2011, or the interest rate would be increased on the November Note. Id. 26:3-5. The Whittemores accepted the increased interest rate and failed to make payment on March 25th. *Id.*, 26:13-14.

The Bank initiated case number CV11-01840, on June 22, 2011, for non-payment of the November Note. *Id.*, 31:20-21. The Bank sent the Whittemores a Notice of Default concerning the November Note on August 23, 2011. *Id.*, 35:5-19. In response, the

Whittemores made a $250,000.00 payment to the Bank on September 2, 2011, in an attempt to cure the default. *Id.*, 35:21-23. However, the Bank did not accept the payment, asserting the payment was not "unconditional." *Id.*, 36:18-20. Instead, the Bank declared the entire balance of the November Note was due and owing. *Id.*, 36:20-21. After several years of litigation, the Whittemores accepted the Bank's Offer of Judgment on November 16, 2015.

Having received no payment on the Judgment from the Whittemores, the Bank initiated this matter against the above-named Defendants by filing the *Complaint* ("the Complaint") on April 21, 2016. The Complaint contained five claims for relief: 1) Avoidance of Transfer pursuant to NRS 112.210(1)(a), alleged against Harvey Whittemore, Annette Whittemore, and Lakeshore; 2) Judgment Against Lakeshore pursuant to NRS 112.220(2), alleged against Lakeshore; 3) Avoidance of Obligation pursuant to NRS 112.210(1)(a), alleged against all Defendants; 4) Alter Ego, alleged against Harvey Whittemore, Annette Whittemore, and Lakeshore; and 5) Declaratory Relief, alleged against all Defendants.[1] The Bank filed three *Notices of Pendency of Action (Lis Pendens)* contemporaneously with the Complaint. The First Lis Pendens was attached to the Glenbrook Property.

The Parties executed a Settlement Agreement ("the Settlement Agreement") on June 6, 2016.[2] Pursuant to the Settlement Agreement, the Whittemores, Lakeshore, and Emerson "were to jointly and severally pay [the Bank] one million eight hundred thousand dollars ($1,800,000.00) on or before June 24, 2016. However, none of these named Defendants made the $1,800,000.00 payment as required by the Settlement Agreement.

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[1] The Plaintiff filed the *Amended Complaint* ("the Amended Complaint") on April 29, 2016. The Amended Complaint altered the Avoidance of Transfer claim by asserting it against all Defendants; altered the Judgment claim by asserting it against Emerson as well as Lakeshore; and removed the Avoidance of Obligation claim.

[2] Although "counsel for Lakeshore House and Emerson Hedges represented that the Settlement Agreement had been fully executed by all parties," and that counsel was "in possession of all signatures," the Bank states it "never received a fully executed copy of the Settlement Agreement...."

Emerson and Lakeshore filed the *Motion to Dismiss* ("the MTD") on May 6, 2016. The MTD was fully briefed by the Parties and submitted on August 17, 2016. The Plaintiff additionally filed the *Plaintiff's Motion for Leave to File Supplemental Complaint* ("the MFL") on August 8, 2016. The MFL was fully briefed by the Parties and submitted on August 30, 2016. In response to both the MTD and MFL, the Court issued the *Order Regarding Motion to Dismiss; Order Granting Plaintiff's Motion for Leave to File Supplemental Complaint* ("the November Order"), on November 9, 2016. The November Order dismissed the Plaintiff's claim for Alter Ego, but allowed the Plaintiff to amend and re-plead the claim to cure its deficiencies. Additionally, the November Order granted the Plaintiff's request to file a supplemental complaint in order to "add a claim for relief pursuant to NRCP 15(d) for breach of a settlement agreement...."

The Plaintiff filed the SAC on November 15, 2016. The SAC re-plead the Alter Ego Claim, and added a fifth claim of Breach of Contract, alleged against Lakeshore and Emerson. As indicated in the MFL, the Breach of Contract claim concerned breach of the Settlement Agreement. [3]

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[3] The Whittemores filed the *Answer to Second Amended Complaint and Counterclaim* on April 14, 2017. Emerson and Lakeshore filed the *Answer to Second Amended Complaint and Counterclaim* on April 14, 2017. In response, the Plaintiff filed *Bank of the West's Motion to Strike Paragraphs 17 through 198(Q) of the Whittemores' Counterclaim; Bank of the West's Motion to Dismiss the Whittemore's Counterclaim;* and *Bank of the West's Motion to Dismiss the Counterclaim Filed by Emerson Hedges, LLC and the Lakeshore House Limited Partnership.* The three Motions were submitted on May 8, 2017. In Response to the three Motions, the Court issued the *Order Denying Motion to Strike; Order Regarding Motions to Dismiss* ("the August Order") on August 8, 2017. The August Order denied the Plaintiff's Motion to Strike, but partially granted the Motions to Dismiss. As to the Whittemore's counterclaim, the Court dismissed the counterclaims for Abuse of Process; Deceptive Trade Practices; Breach of the Covenant of Good Faith and Fair Dealing; Prima Facie Tort; Breach of Contract; and Slander of Title, and retained the counterclaims of Intentional Infliction of Emotional Distress, and Declaratory Relief. As to Emerson and Lakeshore's counterclaims, the Court dismissed the counterclaims for Prima Facie Tort and Deceptive and Illegal Trade Practices, and retained the counterclaims for Slander of Title; Intentional Interference with Contractual Relations; Intentional Interference with Prospective Economic Advantage; Abuse of Process; and Breach of Contract.

The Court held a hearing concerning the Lis Pendens attached to the Glenbrook Property on December 9, 2016. Thereafter, the Court issued the *Order for Cancellation and Expungement of Lis Pendens* ("the December Order") on December 28, 2017. The December Order held "the Plaintiff did not establish to the satisfaction of the Court each of the matters required by NRS 14.015," and ordered the cancellation and expungement of the Lis Pendens. [4]

Emerson and Lakeshore filed the *Motion to Strike and Motion to Dismiss* ("the MTS") on December 1, 2016. The MTS requested certain "spurious allegations" be stricken from the SAC, and claimed the Plaintiff yet again failed to properly allege its Alter Ego claim. The MTS was fully briefed by the Parties and submitted on January 23, 2017. In response, the Court issued the *Order Regarding Motion to Strike and Motion to Dismiss* ("the March Order") on March 31, 2017. The March Order retained the allegations at issue, holding none of the allegations were "redundant, immaterial, impertinent or scandalous." However, the March Order dismissed the Plaintiff's Alter Ego claim for the second time, holding "there is no applicable statute establishing a claim for relief for alter ego as it relates to limited liability companies or limited partnerships."

The Plaintiff filed *the Plaintiff's Motion for Prejudgment Writ of Attachment or, alternatively, Preliminary Injunction; Request for Hearing* ("the MPW"), on February 8, 2017. The MPW was fully briefed by the Parties and submitted on March 9, 2017. The Court held a hearing on the MPW on September 18, 2017. Thereafter, the Court issued the Order Granting Motion for Prejudgment Writ of Attachment ("the October Order") on October 19, 2017. The October Order granted the MPW and issued the writ of attachment, holding: "the Settlement Agreement is a valid and binding contract which was executed by all parties;" "the Settlement Agreement indicates that payment was to be made jointly and severally by the Whittemores, Emerson Hedges, and Lakeshore House;" and "while the

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[4] The Parties stipulated to stay the cancellation and expungement of the Lis Pendens until January 12, 2017, pending the Plaintiff's filing of a petition for writ of mandamus with the Nevada Supreme Court. The Nevada Supreme Court transferred the petition to the Nevada Court of Appeals. The Nevada Court of Appeals denied the Plaintiff's Petition for Writ of Mandamus on March 14, 2017.

escrow account was the preferred source of payment, there is nothing in the Settlement Agreement that limited payment to come solely from that source." Accordingly the October Order held: "the [Plaintiff] has made a meritorious claim for relief that the [D]efendants breached the Settlement Agreement."

Legal Standard

Under NRCP 56(b), a defendant may move at any time for summary judgment in its favor "as to all or any part" of the claim, counter-claim, or cross claim. When it reviews a motion for summary judgment, a court will consider the evidence, and any reasonable inferences drawn from the evidence, in the light most favorable to the nonmoving party. *Wood v. Safeway*, 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005). However, even though a court reviews evidence and inferences in the light most favorable to the nonmoving party, the nonmoving party must, "by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him." *Id.* The party moving for summary judgment bears the initial burden of production to show the absence of a genuine issue of material fact. *Cuzze v. Univ. and Comm. College System of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 134 (2007). Summary judgment is appropriate under NRCP 56 when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *Safeway*, 121 Nev. at 731, 121 P.3d at 1031. A factual dispute is material if it "might affect the outcome of the suit under the governing law;" disputes that are "irrelevant or unnecessary" are not material and will not preclude summary judgment. *Safeway*, 121 Nev. at 730, 121 P.3d at 1030 (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2509-10 (1986)). A court must take great care when granting a motion for summary judgment. *Johnson v. Steel Inc.*, 100 Nev. 181, 182, 678 P.2d 676, 677 (1984), *overruled on other grounds by Shoen v. SAC Holding Corp.*, 122 Nev. 621, 137 P.3d 1171 (2006). A court cannot dispense of the action

by granting a motion for summary judgment simply because it believes "the equities of the case are obvious." *Sierra Nev. Stagelines v. Rossi*, 111 Nev. 360, 364, 892 P.2d 592, 595 (1995).

In an order concerning summary judgment, a court "shall set forth the undisputed material facts and legal determinations on which the court granted summary judgment." NRCP 56(c). If a court renders a judgment on a motion for summary judgment that does not dispose of the entire case, but instead sustains issue for trial, a court's order will specify the facts that are disputed and those that are not disputed. NRCP 56(d).

Analysis

The Motion requests the Court grant summary judgment on the Bank's claim of Breach of Contract, alleged against Lakeshore and Emerson. The Motion argues summary judgment should be entered "in favor of the Bank...in the amount of $1,800,000.00, plus attorneys' fees, costs, and pre- and post- judgment interest." The Motion, 2:14-16. The Motion contends "[a]ll parties executed the Settlement Agreement....[It] is clear and unambiguous on its face and was negotiated with the assistance and advice of numerous experienced attorneys." The Motion, 4:8-10. Accordingly, the Motion avers the Settlement Agreement "is a valid and enforceable contract," which required Emerson and Lakeshore, "jointly and severally with each other and with the Whittemores," to pay the Bank in accordance with the Settlement Agreement.

In their Opposition, Emerson and Lakeshore argue the Settlement Agreement was "clearly contingent upon the sale of" the Glenbrook Property. The Opposition, 1:8-9. Accordingly, the Opposition contends the Bank prevented sale of the Glenbrook Property by "improper[ly] filing...the *lis pendens*," thereby preventing Emerson and Lakeshore from making payment in accordance with the Settlement Agreement. The Opposition, 4:10-12. The Opposition further argues "the plain language of the Settlement Agreement provides that if the Bank did not receive payment...by June 24, 2016, the agreement would be 'terminated in its entirety'...." The Opposition, 1:13-15. The Opposition again contends the Bank's "improper *lis pendens* and bad-faith refusal to cooperate," prevented

Emerson and Lakeshore from making payment by June 24, 2016. The Opposition, 1:16-17. Finally, the Opposition avers "[t]he evidence demonstrates that [Emerson and Lakeshore] diligently attempted to provide payment;" accordingly, the Opposition argues summary judgment is unattainable "because of Nevada's prevention doctrine." The Opposition, 1:19-21.

The Reply argues:

> [a]lthough the Settlement Agreement provided detailed escrow instructions allowing the settlement payment to be made through the sale of the Glenbrook Property, the Settlement Agreement was not contingent upon the sale of the Glenbrook Property.

The Reply, 1:12-15. The Reply contends, "if [Emerson and Lakeshore] intended delivery of the settlement payment to be contingent upon the sale of the Glenbrook Property, such a contingency should have been expressly stated..." in the Settlement Agreement. The Reply, 3:6-8. Additionally, the Reply argues the prevention doctrine does not apply because "the Bank is not alleged to have, and has not, taken any action since the execution of the Settlement Agreement which allegedly prevented performance." The Reply, 4:6-8.

I. Breach of Contract

In Nevada, a breach of contract claim requires: "(1) the existence of a valid contract, (2) a breach by the defendant, and (3) damage as a result of the breach." *Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 899 (9th Cir. 2013).[5] Generally a contract is valid if there is "an offer and acceptance, meeting of the minds, and consideration.'" *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). A breach "is the material failure to perform 'a duty arising under or imposed by agreement.'" *Dept. of Transportation*, 402 P.3d at 682, *quoting Bernard v. Rockhill Dev. Co.*, 103 Nev. 132, 135, 734 P.2d 1238, 1240 (1987).

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[5] The Court notes the Settlement Agreement is a contract. *See State of Nevada Dept. of Transp. v. Eighth Judicial Dist. Court*, 402 P.3d 677, 682 (September 27, 2017), stating "[a] settlement agreement is a contract governed by general principles of contract law."

a. Existence of a Valid Contract

In the October Order, the Court found a valid contract existed, holding "the Settlement Agreement is a valid and binding contract which was executed by all parties." *Supra*, 5:21-22. Accordingly, the Court shall not re-address the validity of the Settlement Agreement in this Order.

b. Breach by the Defendant(s)

The Motion argues Emerson and Lakeshore committed a breach when they, in concert with the Whittemores, failed to make the settlement payment owed to the Bank on or before June 24, 2016. *Supra*, 7:9-18. The Opposition contends Emerson and Lakeshore were precluded from making the settlement payment when the Bank improperly filed a lis pendens on the Glenbrook Property. *Supra*, 7:19-23. However, in the October Order, the Court determined the settlement payment was not contingent upon sale of the Glenbrook Property, holding "while the escrow account was the preferred source of payment, there is nothing in the Settlement Agreement that limited payment to come solely from that source." *Supra*, 5:23-25. As previously expressed, the Settlement Agreement does not contain such a contingency. Given the experience of counsel, it is unreasonable that a provision as important as a contingency to performance would not be expressly set forth. The Court shall not re-address the Settlement Agreement's contingency upon sale of the Glenbrook Property.

The Opposition next contends the Settlement Agreement automatically terminated when Emerson, Lakeshore, and the Whittemores failed to make the settlement payment. The Opposition, 5:20-25. Paragraph 2(e) of the Settlement Agreement states:

> A material term of this Agreement is that Bank of the West shall receive the Settlement Payment on or before June 24, 2016. If Bank of the West does not receive the Settlement Payment on or before June 24, 2016, this Agreement shall be deemed terminated in its entirety and the Escrow Officer shall return the cancellations of lis pendens to Bank of the West unrecorded without further instruction.

The Motion, exhibit 3, p.3-4. However, paragraph 5 of the Settlement Agreement states:

> Should the Settlement Payment not be timely delivered, or should the Settlement Payment be rescinded, avoided, withdrawn, or in any other manner removed from Bank of the West's possession as a result of any act or omission by the Whittemores, the Whittemore children, Lakeshore House, Emerson Hedges, or the Related Affiliates, or a court order, then Bank of the West may elect, in its sole and absolute discretion to either enforce this Agreement or to rescind this Agreement. Should Bank of the West elect to rescind this Agreement pursuant to this section, then this Agreement shall be rescinded, void, revoked, and terminated in its entirety.

The Motion, exhibit 3, p.5. The Opposition avers paragraph 5 does not apply because it was not an "act or omission" by the Whittemores, Emerson, or Lakeshore that precluded tender of the Settlement Payment. Rather, the Opposition argues it was "the Bank's own actions," i.e. the Bank's filing of the lis pendens, which precluded such tender. The Opposition, 7:6-10. The Court disagrees. Paragraph 2€ of the Settlement Agreement pertains to instructions given to the Escrow Agent specifically. As indicated *supra*, the Settlement Payment was not conditioned upon sale of the Glenbrook Property.

Nevada law instructs that a Court "should not interpret [a] contract so as to render its provisions meaningless." *Caldwell v. Consolidated Realty and Mgmt. Co.*, 99 Nev. 635, 639, 668 P.2d 284, 287 (1983) (citation omitted). The construction argued by the Deendants would do just that. The Court can reasonably construe paragraph 2(e) and paragraph 5 as harmonious: paragraph 2(e) allows the Bank to withdraw the escrow instructions permitting the cancellation of the lis pendens provided it does not receive payment through escrow in a timely manner (hence the power vested in the escrow officer), while paragraph 5 allows the Bank to elect its remedy provided it does not receive payment through any alternative means. Failing to give effect paragraph 5 in favor of honoring only paragraph 2(e) would render paragraph 5 superfluous, and therefore, meaningless. The Court declines to adopt an interpretation of the Settlement Agreement that would render paragraph 5 meaningless.

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The Court finds paragraph 5 applies concerning the Defendants' non-payment, and the Agreement was not automatically terminated via paragraph 2(e). As such, the Bank holds "sole and absolute discretion" to enforce or rescind the Agreement, and as evidenced by its Breach of Contract claim and the Motion, the Bank has elected to enforce the Agreement.

The Opposition finally contends Nevada's prevention doctrine precludes summary judgment. The prevention doctrine dictates "any affirmative tender or performance is excused when performance has in effect been prevented by the other party to the contract." *Cladianos v. Friedhof*, 69 Nev. 41, 45, 240 P.2d 208, 210 (1952). In other words, "where a party's breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused." Restatement (Second) of Contracts, § 245. The Opposition argues Emerson and Lakeshore's duty to make the Settlement Payment should be excused because the Bank filed the lis pendens, thereby preventing the sale of the Glenbrook property and tender of the Settlement Payment. In its Reply, the Bank contends the prevention doctrine does not apply because the Bank filed the lis pendens on April 22, 2016, "six weeks before the Settlement Agreement was even reached." The Reply, 4:20-22.

As discussed repeatedly above, the Settlement Payment was not contingent upon sale of the Glenbrook Property. Accordingly, the Court cannot find the lis pendens *prevented* Emerson and Lakeshore from tendering the Settlement Payment when the Payment could have been made via alternative means. Even assuming, *arguendo*, the Settlement Payment was contingent upon sale of the Glenbrook Property, the lis pendens was filed well in advance of the Settlement Agreement. Emerson and Lakeshore cannot reasonably claim filing of the lis pendens prevented payment pursuant to the Settlement Agreement when they were well aware of the lis pendens at the time the Settlement Agreement was signed.

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Accordingly, because Emerson and Lakeshore failed to tender the Settlement Payment to the Bank as contemplated by the Settlement Agreement, and such failure is not excused by any argument set forth above by the Defendants, the Court finds Emerson and Lakeshore committed a breach of the Settlement Agreement.

c. Damages

As a result of Emerson and Lakeshore's failure to tender the Settlement Payment, the Bank has not been paid $1,800,000.00. Additionally, the Bank has incurred significant attorneys' fees and costs in pursuit of the failed payment. Accordingly, the Court finds the Bank has suffered damages as a result of Emerson and Lakeshore's breach of the Settlement Agreement.

Because a valid and enforceable contract exists between the Parties; there has been a breach of the Settlement Agreement by Emerson and Lakeshore; and the Bank has suffered damages as a result of the breach, the Court GRANTS summary judgment on the Bank's fifth claim for relief: Breach of Contract.

II. Prejudgment Interest

The Motion argues the Bank should be awarded prejudgment interest, with accrual beginning on June 15, 2016. The Motion, 4:16, 21. Although the Opposition notes the "whopping" amount of the requested interest, the Opposition fails to offer any argument against its award. The Opposition, 11:7-8.

NRS 99.040 provides:

> [w]hen there is no express contract in writing fixing a different rate of interest, interest must be allowed at a rate equal to the prime rate...as ascertained by the Commissioner of Financial Institutions, on January 1 or July 1, as the case may be, immediately preceding the transaction, plus 2 percent, upon all money from the time it becomes due....The rate must be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied.

"The decision to grant prejudgment interest rests with the discretion of the trial court." *Vance v. American Hawaii Cruises, Inc.*, 789 F.2d 790, 794 (9th Cir. 1986). An award of prejudgment interest "is viewed as compensation for use by [the] defendant of money to

which [the] plaintiff is entitled from the time the cause of action accrues until the time of judgment; it is not designed as a penalty." *Ramada Inns, Inc. v. Sharp*, 101 Nev. 824, 826, 711 P.2d 1, 2 (1985) (citation omitted).

As explained above, the Settlement Agreement was a valid and binding contract. The Bank was "entitled" to payment in accordance with its terms. Non-payment has thereby allowed the Defendants use of the unpaid amount. Prejudgment interest is granted, and shall be calculated from June 15, 2016, until the date of this Order.

III. Attorneys' Fees and Costs

The Motion contends "the Bank should be awarded reasonable attorneys' fees and costs" pursuant to the Settlement Agreement. The Motion, 5:6-7. Paragraph 6 of the Settlement Agreement states:

> [i]f any action or proceeding is commenced to enforce the terms of this Agreement, any prevailing party shall be entitled to recover its reasonable attorneys' fees and costs incurred therein, in an amount to be determined by the court.

The Motion, exhibit 3, p.6. The Court has found the Settlement Agreement to be a valid and binding contract. *Supra*, 5:21-22. Accordingly, paragraph 6 of the Settlement Agreement applies. The Court shall award reasonable attorneys' fees and costs in accordance with the clear language of the Settlement Agreement. The Bank shall submit a Wilfong affidavit setting forth attorneys' fees and costs for the Court's consideration within ten (10) days of the filing of this Order. Thereafter, the Defendants shall then have ten (10) days to file any objection to the reasonableness of the fees alleged.

IT IS SO ORDERED.

Dated: ~~September~~ DEC 7, 2017.

Barbara E. Reed
District Judge

Case No. CV16-00898

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify on the 7 day of December, 2017, I electronically filed the foregoing with the Clerk of Court by using the ECF system which will send a notice of electronic filing of the document to:

JOHN ECHEVERRIA, ESQ.

MARK GUNDERSON, ESQ.

RICHARD WILLIAMSON, ESQ.

PATRICIA LUNDVALL, ESQ.

AUSTIN SWEET, ESQ.

Judicial Assistant

CERTIFIED COPY

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.

DATE: DEC 07 2017

JACQUELINE BRYANT, Clerk of the Second Judicial District Court, in and for the County of Washoe, State of Nevada.

By _____ Deputy