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U.S. DISTRICT COURT
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FILED BY: [REDACTED]
Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

RECUPEROS, LLC, an Idaho limited liability
company,

Plaintiff,

vs.

AMERICAN FOOD STORES, LLC, a
California limited liability company,

Defendant.

Civil No. 04-229-S-BLW

**MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION AND EXPUNGEMENT
OF LIS PENDENS**

COMES NOW the plaintiff, by and through the undersigned counsel of record, and submits this memorandum in support of its Motion for Preliminary Injunction and Expungement of Lis Pendens.

I. INTRODUCTION

The defendant in this matter, American Food Stores, LLC ("AFS" or "defendant") has engaged in an egregious abuse of the legal process by recording up to

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eleven lis pendens against \$10,000,000 of improved real property owned by the plaintiff, Recuperos, LLC ("Recuperos" or "plaintiff"). The lis pendens do not comply with the applicable Idaho or Colorado statutes, and are perjurious on their face. Moreover, the lis pendens are causing immediate, substantial and irreparable harm to the plaintiff by threatening to prevent the plaintiff's sale of the subject properties, which sale was scheduled to close this week. Accordingly, this Court should grant the plaintiff's motion and order the defendant to desist from the recording of additional lis pendens and to remove those that have already been recorded.

II. STATEMENT OF FACTS

On or about November 12, 2003, plaintiff and defendant entered into an Asset Purchase Agreement (the "Purchase Agreement"), pursuant to the terms of which defendant agreed to purchase a number of Colorado convenience store properties from plaintiff (the "Subject Properties"). The Purchase Agreement required that defendant provide plaintiff with an earnest money deposit in the aggregate amount of \$1,000,000.00. Defendant provided \$306,155.15 of such amount (the "Deposit"), of which \$10,000.00 was remitted directly to plaintiff and \$296,155.15 was held in escrow, pursuant to the terms of the Purchase Agreement. Defendant breached the terms of the Purchase Agreement and plaintiff terminated the Purchase Agreement on or about January 16, 2004. Pursuant to the terms of the Purchase Agreement, upon defendant's breach thereof, plaintiff was entitled to retain the Deposit as liquidated damages. In accordance with the terms of the Purchase Agreement, and with defendant's express consent, \$296,155.15 of the Deposit was released from escrow to plaintiff on or about

January 19, 2004. Plaintiff also retained the \$10,000.00 portion of the Deposit held by plaintiff. *See* Verified Complaint, dated May 12, 2004 (the "Complaint"), ¶¶ 8-12.

Thereafter, defendant claimed that the Deposit had been improperly retained and released and demanded return of the Deposit, which demand plaintiff rightfully refused. On or about January 28, 2004, plaintiff and defendant entered into a Mutual Settlement and Release Agreement (the "Settlement Agreement") which provided, *inter alia*, that plaintiff was entitled to retain the Deposit and that defendant thereby relinquished all claim thereto. *See* Affidavit of Jason G. Murray ("Murray Affidavit"), Exhibit A. By its terms, the Settlement Agreement is governed by Idaho law and therein the parties each consented to jurisdiction of the Idaho courts. The Settlement Agreement further provided that defendant released all claims against plaintiff which related in any manner to the Purchase Agreement or the Deposit. Complaint, ¶¶ 13-16.

Notwithstanding the express terms of the Settlement Agreement, on or about May 5, 2004, defendant made written demand upon plaintiff for return of the Deposit. *See* Murray Affidavit, Exhibit B. Such demand sets forth no cognizable factual or legal basis for the defendant's claim to the Deposit. *Id.*, ¶ 17.

On or about May 12, 2004, plaintiff filed the pending action for declaratory relief asking the Court to enforce the Settlement Agreement.

Subsequent to defendant's failure to close its purchase of the Subject Properties, and after execution of the Settlement Agreement, the plaintiff again marketed the Subject Properties in an attempt to secure a buyer. On or about March 24, 2004, the plaintiff entered into a new agreement with a new buyer to sell the Subject Properties.

See Affidavit of Brian Naeve ("Naeve Affidavit"), ¶ 5. The new buyer is Super America, LLC ("SAL") and the purchase price under such agreement is approximately \$10,000,000, subject to certain adjustments. *Id.*

The plaintiff and SAL moved toward closing under the terms of their agreement, until the defendant moved to thwart the transaction. On the morning of June 16, 2004, the plaintiff received, via facsimile, copies of eleven lis pendens relating to each of the Subject Properties, which lis pendens were executed by the defendant. See Naeve Affidavit, ¶ 6 and Exhibit A. The next day, June 17, the plaintiff received confirmation that at least four of the lis pendens had been recorded in the county in which some of the Subject Properties were located. Naeve Affidavit, ¶ 7 and Exhibit B. As of the date hereof, the plaintiff has been unable to determine whether the remaining seven lis pendens have been recorded. *Id.*

Upon receipt of the four recorded lis pendens by facsimile, counsel for the plaintiff contacted each of the two attorneys that had purported to represent the defendant in this matter. Murray Affidavit, ¶ 6. Plaintiff's counsel set forth the reasons that the lis pendens were abusive and contrary to law, but each such defense counsel disavowed any participation in the execution of the documents. *Id.*, ¶ 6. Mr. Curtis, however, did suggest that plaintiff's counsel contact an attorney in Denver regarding the lis pendens, which plaintiff's counsel did. *Id.*, ¶ 7. Such Colorado counsel admitted knowledge of the lis pendens, but denied any participation in their production or recordation. *Id.*, ¶ 7. Plaintiff's counsel then sent a letter, dated June 17, 2004, to each of defendant's counsel,

demanding that the lis pendens be removed. Murray Affidavit, Exhibit C. The defendant, however, has refused to heed such demand.

The lis pendens have caused, are causing and will continue to cause the plaintiff immediate, substantial and irreparable harm. Naeve Affidavit, ¶ 9. Specifically, the lis pendens have caused the title company involved in the SAL transaction, as well as SAL itself, to reassess their existing obligations to the plaintiff. *Id.* The new buyer, SAL, has expressed grave concerns regarding the quality of title to the Subject Properties, and is extracting and attempting to extract financial and contractual concessions from the plaintiff. *Id.* The entire SAL transaction is threatened by the lis pendens. *Id.* If such transaction fails, the plaintiff will suffer immediate and substantial damages from the loss of a \$10,000,000 sale. *Id.* Even if the plaintiff is able to salvage the SAL transaction, by making additional concessions, it has still suffered and will continue to suffer great harm. *Id.*

III. ARGUMENT

A. **The Lis Pendens Do Not Comply with Either the Colorado or Idaho Lis Pendens Statutes, and Are Perjurious on Their Face.**

Although borrowing the caption of this case, and suggesting the imprimatur of this Court, the lis pendens do not cite a statute or include any attorney information. *See* Naeve Affidavit, Exhibits A and B. Being creatures of statute, the lis pendens must rely on one or both of the following.

Idaho Code Section 5-505 provides, in relevant part, as follows:

In an action affecting the title or the right of possession of real property, the plaintiff at the time of filing the complaint, and the defendant at the time of filing

his answer, when affirmative relief is claimed in such answer, or at any time afterward, may file for record with the recorder of the county in which the property or some part thereof is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action or defense, and a description of the property in that county affected thereby.

Idaho Code § 5-505 (emphasis added).

Colorado Code Section 38-35-110 provides, in relevant part, as follows:

After filing any pleading in an action in any court of record of this state or in any district court of the United States within this state wherein relief is claimed affecting the title to real property, any party to such action may record in the office of the county clerk and recorder in the county or counties in which the real property or any portion thereof is situated a notice of lis pendens containing the name of the court where such action is pending, the names of the parties to such action at the time of such recording, and a legal description of the real property.

Colorado Code § 38-35-110 (emphasis added).

The lis pendens clearly do not comply with the Colorado statute, because the defendant has not met the prerequisite of "filing any pleading in an action in any court of record *of this state*" The action is pending in Idaho, not Colorado, and, therefore, the Colorado statute does not support the lis pendens. Secondly, and more importantly, each statute requires that the action "*affect[] title to real property.*" The action from which the lis pendens purportedly arise does *not* affect title to real property. As will be discussed more thoroughly below, this action is one for declaratory relief as to the enforceability of the Settlement Agreement, pursuant to which the defendant waived all claims to a \$306,000 deposit. In fact, the defendant's own demand letter, which precipitated this lawsuit, only claims a right to the disputed Deposit, not specific

performance or any other claim to property which would support the filing of a lis pendens. See Murray Affidavit, Exhibit B.

In addition to being contrary to the relevant statutory authority, the face of the lis pendens themselves set forth a demonstrably false statement. Each such notice states that "a civil action has been commenced and is pending in the court named above wherein the parties named above *have each asserted a claim affecting the title to real property . . .*" (emphasis added). To reiterate, the plaintiff has commenced this action in order to obtain a declaration from the Court that the defendant is not entitled to the \$306,000 Deposit; nothing in the plaintiff's pleadings "affects" title to real estate. For its part, the defendant has not filed an answer, much less a counterclaim or any other pleading which could be construed as "affecting title" to real estate. Furthermore, as discussed above, the defendant has waived any right to the Subject Properties, as expressly set forth in the Settlement Agreement.

B. This Court Should Grant Plaintiff Injunctive Relief by Ordering the Defendant to Desist From Recording Additional Lis Pendens, and to Remove the Lis Pendens Which Have Been Previously Recorded.

Federal Rule of Civil Procedure 65(b) states:

A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required.

FED. R. CIV. PROC. 65(b). However, when the Court receives a response from defendant, "the Court will deny the motion for temporary restraining order and address the motion for a preliminary injunction." *Butler v. Weathers*, No. 99-266 (D. Idaho) (Order of July 8, 1999) (Lodge, D.J.). Although "injunctive relief is not obtained as a matter of right" and is "considered to be an extraordinary remedy," when the movant is able to make a clear showing of the likelihood of prevailing on the merits, the movant carries its burden of persuasion. *See Id.*

Furthermore, in determining whether a preliminary injunction should issue, the trial court should identify the harm which the injunctive relief might cause the defendant and weigh it against the threatened injury to the plaintiff. *See Armstrong v. Mazurek*, 94 F.3d 566, 568 (9th Cir. 1996). Where the plaintiff has a very high probability of prevailing on the merits, the plaintiff need not establish great irreparable harm. *See Ayres v. City of Chicago*, 125 F.3d 1010, 1013 (7th Cir. 1997). Similarly, where the harm likely to be suffered by the defendant does not substantially outweigh the injury to plaintiff threatened by defendant's conduct, the plaintiff need only show probable success on the merits to be entitled to the requested injunctive relief. *See MacDonald v. Chicago Park Dist.*, 132 F.3d 355, 357 (7th Cir. 1997).

1. **Plaintiff is likely to prevail on its claims asserted in its Verified Complaint and the defendant will suffer no harm from removal of the lis pendens.**

As stated above, the plaintiff's Verified Complaint simply asks the Court to validate the enforceability of the Settlement Agreement. Such agreement is a well-written, fully-integrated document which addresses squarely the issue of plaintiff's

entitlement to the Deposit. Moreover, the Settlement Agreement provides that each of the plaintiff and the defendant were represented by counsel and that each participated in the drafting of the agreement. In no correspondence or communication with the plaintiff has the defendant claimed, or even suggested, that there is any basis on which to attack the Settlement Agreement. Finally, Mr. Manjit Sahota, a principal in the defendant and the signor on the lis pendens, can hardly claim ignorance of the Settlement Agreement, since he was a party *individually*. See Murray Affidavit, Exhibit A. In light of the foregoing, there is a high probability that the plaintiff will prevail on its claims, as set forth in the Complaint.

The federal rule and relevant case law invite the trial court to balance the parties' competing interests in deciding a motion for injunctive relief. In this case, the defendant has no claim to the Subject Properties, because it defaulted under the terms of the Purchase Agreement. Moreover, whatever claim it may have had subsequent to its default and the termination of the Purchase Agreement, was expressly waived in the Settlement Agreement. Assuming, *arguendo*, that the defendant has *any* claim, it is to the Deposit and not to the Subject Properties. This fact is borne out by the defendant's own demand letter, which speaks only to the return of the Deposit and not the sale of the Subject Properties. Accordingly, the defendant will suffer no harm from the plaintiff's sale of the Subject Properties to SAL; it has no claim or interest in the properties, and its claim, if any, to the liquidated amount of the Deposit will remain intact after any such sale.

The parties have selected Idaho law in the Settlement Agreement. Murray Affidavit, Exhibit A. The Idaho Supreme Court has long recognized the propriety of preliminary injunctive relief even without a showing of irreparable injury. *Cox v. Cox*, 84 Idaho 513, 518, 373 P.2d 929, 931 (1962) (citing *Goble v. New World Life Ins. Co.*, 57 Idaho 516, 67 P.2d 280 (1937) (quoting *Staples v. Rossi*, 7 Idaho 618, 65 P. 67 (1901))). See also *Nielson v. Peterson*, 37 Idaho 171, 215 P. 836 (1923) ("Injunctions will issue to restrain temporarily an act which will result in great damage to the plaintiff, although the injury is not irreparable, and plaintiff might have sued for damages"); *Meyer v. First Nat'l Bank*, 10 Idaho 175, 77 P. 334 (1904) ("Injunctions will issue to restrain temporarily an act which will result in great damage to the plaintiff, although the injury is not irreparable, and notwithstanding that other remedies lie in behalf of plaintiff."). Instead, the movant need only show it is likely to succeed on the merits of its claim. See *Armstrong v. Mazurek*, *supra*.

Applicable federal and Idaho law supports the plaintiff's position in its motion.

2. The lis pendens are causing plaintiff great and irreparable harm.

This Court should order defendant to remove the lis pendens, since the lis pendens are causing plaintiff great and irreparable harm.

The Idaho Supreme Court has recognized that "[t]he effect of filing a lis pendens is that a person who purchases or acquires rights in the subject matter of the litigation during the pendency of the action (which encompasses appeal) takes subject to the final disposition of the case." *Suits v. First Sec. Bank of Idaho, N.A.*, 100 Idaho 555,

559, 602 P.2d 53, 57 (1979). See also *Eismann v. Miller*, 101 Idaho 692, n.6, 619 P.2d 1145, n.6 (1980) (“[N]otices of lis pendens have operated in the nature of recorded liens.”). The practical effect of a lis pendens “is to render . . . property unmarketable and unsuitable as security for a loan.” *TSA Int’l Ltd. v. Shimizu Corp.*, 990 P.2d 713 (Haw. 1999). Thus, “the financial pressure exerted on the property owner may be considerable, forcing him [or her] to settle not due to the merits of the suit but to rid himself [or herself] of the cloud upon his [or her] title.” *Id.* (alterations in original). “***The potential for abuse is obvious.***” *Id.* (emphasis added). See also *BGJ Assocs., LLC v. Superior Court of Los Angeles County*, 89 Cal. Rptr. 2d 693 (Cal. Ct. App. 1999) (“Once a lis pendens is filed, it clouds the title and effectively prevents the property’s transfer until the litigation is resolved or the lis pendens is expunged. Accordingly, lis pendens is a provisional remedy which should be applied narrowly.”); *Hilberg v. Superior Court*, 263 Cal. Rptr. 675 (Cal. Ct. App. 1989) (“***We cannot ignore as judges what we know as lawyers—that the recording of a lis pendens is sometimes made not to prevent conveyance of property that is the subject of the lawsuit, but to coerce an opponent to settle regardless of the merits.***”) (emphasis added).

The defendant is engaged in the egregious abuse of legal process. None of its three attorneys will even lend their names to the lis pendens. The defendant knows, as evidenced by the express language of the Settlement Agreement and its own demand letter, that it has no claim to the Subject Properties. Setting aside, for the moment, that it has no rightful claim to the Deposit either, the defendant has recklessly generated and/or

recorded a series of lis pendens for the sole purpose of pressuring the plaintiff into a favorable settlement. This is precisely the abuse warned of in the above-cited authority.

In stark contrast to the defendant's lack of harm, the plaintiff will suffer immediate, substantial and irreparable harm if the defendant is permitted to drive SAL away and kill the pending transaction. Evidence in the record thus far clearly indicates that the lis pendens have already had an impact on the plaintiff's agreement with SAL and may ultimately succeed in thwarting the sale. At a minimum, the plaintiff has suffered and will continue to suffer real and immediate harm. And, if the defendant prevails, its spurious claims to the Subject Properties will undoubtedly prevent the plaintiff from realizing a \$10,000,000 sale of assets.

C. In Addition, This Court Should Expunge the Lis Pendens Which Have Been Filed on the Subject Properties.

In addition to finding that plaintiff is entitled to relief under Rule 65, this Court should expunge the lis pendens which have already been recorded to date by the defendant. Although Idaho law apparently does not address expungement directly, neighboring jurisdictions have addressed this issue. Two such jurisdictions are California and Nevada.

In California, legislation has been adopted to curb abuses of lis pendens procedures. *Hunting World, Inc. v. Superior Court*, 26 Cal. Rptr. 2d 923 (Cal. Ct. App. 1994). The California courts have recognized that a lis pendens must be narrowly applied "in order to avoid vexing society by clouding title to real property with frivolous claims." *See Hilberg*, 263 Cal. Rptr. 675 (analyzing motion to expunge under prior law requiring claimant to show good faith and proper motive in order to maintain lis

pendens). Pursuant to California law, “[g]ood faith and a proper purpose are no longer sufficient to maintain notice of lis pendens.” *Id.* (referencing former CAL. CIV. PROC. CODE § 409.1, repealed in 1992, which required claimant to show proper motive and good faith). Now, the courts are required to expunge notices of lis pendens if “the claimant has not established by a preponderance of the evidence the probable validity of the real property claim.” *Id.* (quoting CAL. CIV. PROC. CODE § 405.32).¹

An application of the aforementioned rationale to this case would require the defendant to show, by a preponderance of the evidence, the probable validity of its claim in order to maintain its lis pendens—a burden it clearly cannot meet. First, the defendant does not have a “claim” as that term is contemplated by the Idaho or Colorado lis pendens statutes. Even if there were a valid claim for purposes of the statutes, the defendant does not have a valid claim to the Subject Properties. *See* CAL. CIV. PROC. CODE § 405.32.

Even more protective against the danger of frivolous claims is the Nevada statute. Under Nevada law, the party seeking to uphold a lis pendens must establish the following:

¹ Section 405.32 states as follows:

In proceedings under this chapter, the court shall order that the notice be expunged if the court finds that the claimant has not established by a preponderance of the evidence the probable validity of the real property claim. The court shall not order an undertaking to be given as a condition of expunging the notice if the court finds the claimant has not established the probable validity of the real property claim.

- (a) The action . . . affects the title or possession of the real property described in the notice;
- (b) The action was not brought in bad faith or for an improper motive;
- (c) He will be able to perform any conditions precedent to the relief sought in the action insofar as it affects the title or possession of the real property; *and*
- (d) He would be injured by any transfer of an interest in the property before the action is concluded.

NEV. REV. STAT. 14.015(2) (emphasis added).

In addition, the party who recorded the notice must establish either:

- (a) That he is likely to prevail in the action; or
- (b) That he has a fair chance of success on the merits in the action and the injury described in paragraph (d) of subsection 2 would be sufficiently serious that the hardship on him in the event of a transfer would be greater than the hardship on the defendant resulting from the notice of pendency, and that if he prevails he will be entitled to relief affecting the title or possession of the real property.

NEV. REV. STAT. 14.015(3).

As with the California analysis, the defendant could not meet its burden under the standard adopted by Nevada.

As discussed above, defendant has breached its Purchase Agreement with plaintiff, in that it failed or refused to close the transaction as provided under the Purchase Agreement. The Purchase Agreement in this case is not for a small parcel of land or a petty sum of money, rather, it involves 11 separate properties with an aggregate value of approximately \$10,000,000. Plaintiff is entitled to stand on the Purchase Agreement and the Settlement Agreement as they were made, and defendant cannot

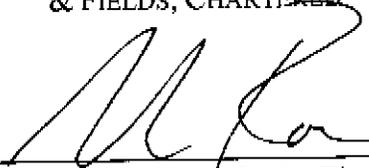
demand specific performance. *See, e.g.*, NEV. REV. STAT. 14.015(3)(a). What is more, the pending action is for declaratory relief on the Settlement Agreement and has nothing to do with title or possession of real estate. Simply put, defendant's claim to the Subject Properties is absolutely baseless. Furthermore, defendant cannot show that this action was brought in good faith or for a proper motive. *See, e.g.*, NEV. REV. STAT. 14.015(2)(b). In some instances, "the patent lack of merit of a lawsuit may strongly suggest that the plaintiff has not filed the action for a proper purpose or in good faith." *See Hilberg*, 263 Cal. Rptr. 675. In light of the fact that the defendant has already irrevocably breached the terms of the Purchase Agreement, and knowing that defendant has no right to the Subject Properties or to the Deposit following the Settlement Agreement, it is clear that the lis pendens in this case were filed in bad faith and for an improper motive.

IV. CONCLUSION

The defendant has perverted the legal process in order to serve its own, narrow objective of forcing the plaintiff to settle a baseless claim. This type of action should not be countenanced by the Court. Accordingly, the plaintiff's motion should be granted in its entirety.

DATED this 18th day of June, 2004.

MOFFATT, THOMAS, BARRETT, ROCK
& FIELDS, CHARTERED

By 
Michael O. Roe -- Of the Firm
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

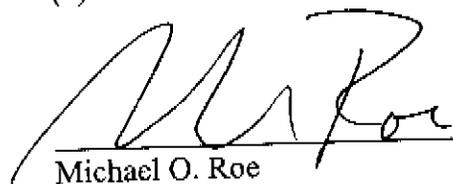
I HEREBY CERTIFY that on this 18th day of June, 2004, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND EXPUNGEMENT OF LIS PENDENS** to be served by the method indicated below, and addressed to the following:

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