IN THE SUPREME COURT OF THE

STATE OF NEVADA

NANYAH VEGAS, LLC, a Nevada limited liability company; Appellant, v. SIG ROGICH aka SIGMUND ROGICH as Trustee of The Rogich Family Irrevocable Trust; ELDORADO HILLS, LLC, a Nevada limited liability company; DOES I-X; and/or ROE CORPORATIONS I-X, inclusive, Respondents.	Case No.: 66823 District Court Case No.: A-13-686303-C Dept. No.: XXVII

Appeal

From the Eighth Judicial District Court

The Honorable Nancy L. Allf, District Judge

APPELLANT'S OPENING BRIEF

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CERTIFICATION PURSUANT TO NEV. R. APP. P. 26.1

The undersigned certifies that the following parties have an interest in the outcome of this appeal. These representations are made to enable judges of the Panel to evaluate possible disqualification or recusal:

[NOT APPLICABLE].

Dated this 30th day of March, 2015.

McDONALD LAW OFFICES, PLLC

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I. JURISDICTIONAL STATEMENT

Appellant, Nanyah Vegas, LLC ("Plaintiff"), appeals the district court's grant of a Motion for Partial Summary Judgment entered on October 1, 2014 and noticed on the same day, which granted summary judgment in favor of Defendants. Appendix ("APP"), Vol. II pp. 317-320. An appeal was filed on October 30, 2014 from this Order. APP, Vol. II pp. 322-328. Though the final judgment was not entered until February 23, 2015, this appeal is timely and invokes the jurisdiction of the Nevada Supreme Court pursuant to NRAP 4(a)(6). "[T]his court has treated a premature [notice of appeal] filing as effective, so long as the proceeding has not been dismissed before the actual due date arrives." *Lavi v. Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 38, 325 P.3d 1265, 1273 (2014) (explaining that under NRAP 4(a)(6) a premature appeal prior to a final judgment, should not be dismissed so long as it is filed prior to dismissal and within the time permitted from the final judgment).

This is an appeal of a final order. *See Lee v. GNLV Corp.*, 116 Nev. 424, 427-28, 996 P.2d 416 (2000). Thus this Court has jurisdiction pursuant to NRAP 3A(b)(1). Pursuant to NRAP 4(a)(1) and 26(c), this appeal is timely filed as each were taken within 30 days of the notice of the final judgments. Additionally, this Court has jurisdiction to hear matters related to the interlocutory order of June 21, 2013. *See Consolidated Generator–Nevada v. Cummins Engine*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998) (noting that interlocutory orders may be challenged in the context of an appeal from the final judgment); *Summerfield v. Coca Cola Bottling Co.*, 113 Nev. 1291, 1293-94, 948 P.2d 704, 705 (1997) (stating "since CGN is appealing from a final judgment the interlocutory orders entered prior to the final judgment may properly be heard by this court.").

II. STATEMENT OF ISSUES PRESENTED

1. **Whether the Court erred when it granted summary judgment by dismissing Nanyah's claim for unjust enrichment, based on the statute of limitations, when Eldorado Hill's members acknowledged that Nanyah was owed $1.5MM in express agreements, and Nanyah was not informed that it would not be repaid until late 2012?**

2. **Whether the Court erred in determining that the statute of limitations began to accrue at the moment that Nanyah provided funds that were conveyed to Eldorado Hills, rather than at the moment they reasonably believed they would not be repaid?**

3. **Whether the Court erred in its determination that it "did not need to review the facts of the case" to determine that the statute of limitations had already expired?**

4. **Whether the Court erred in determining that Nanyah was not an intended third-party beneficiary under the terms of the agreements that memorialized the debt that was owed and that it should have the same statute of limitations as the parties to the actual agreements?**

III. STANDARD OF APPELLATE REVIEW

On appeal this Court reviews a district court summary judgment de novo, without deference to the district court's findings. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate in this case if the pleadings and other evidence presented, viewed in the light most favorable to Plaintiff, demonstrated that Defendants were entitled to judgment as a matter of law and that no genuine issues of fact remained in dispute. *Id.*; *see also Angel v. Cruse*, 130 Nev. Adv. Op. 25, 321 P.3d 895, 898 (2014).

IV. STATEMENT OF THE CASE

On December 27, 2011, Plaintiff initially filed its Complaint. APP, Vol. I, pp. 1-6. On April 30, 2012, Plaintiff filed its Amended Complaint. *Id.* at pp. 7-10. On September 11, 2014 Judge Allf heard Defendant Eldorado Hills, LLC's Motion for Partial Summary Judgment.

APP, Vol. II, pp. 328-345. The motion sought to dismiss Nanyah's claim for unjust enrichment for failure to file the claim within the applicable statute of limitations. *Id.* at 331. Nanyah contended that the statute could not have run because it had no indication that it would not be repaid until late 2012 when Mr. Rogich indicated as much to Mr. Huerta. *Id.* at 339-40 Judge Allf determined that the statute began to run at the moment that Nanyah released the money in 2007, notwithstanding there being no indication at that time or for several years thereafter that Nanyah would not be repaid. *Id.* at 344. According to Judge Allf, no further facts were relevant in her analysis of whether the statute of limitations expired. *Id.* Judge Allf also rejected Nanyah's arguments asserting that Nanyah was an intended third-party beneficiary under the agreements, because she believed there was no contractual privity with Eldorado Hills, LLC. *Id.* Therefore based on Judge Allf's ruling Nanyah's claims were dismissed. *Id.*

Due to the District Court's ruling Nanyah's case was dismissed on October 1, 2014. APP, Vol. II, pp. 317-321.

V. STATEMENT OF FACTS

1. In 2006, Huerta, Go Global and Rogich owned 100% of the membership interests of Eldorado Hills, LLC ("Eldorado"). Declaration of Carlos Huerta ("Huerta Declaration") at ¶2, APP, Vol. I, p. 149.

2. Eldorado was and continues to be the owner of approximately 161 acres of real property on the mountains to the west of Boulder City where the Pro Gun Club is located. Eldorado had intended to develop the property into a commercial mixed used industrial facility. See partial offering brochure. *Id.*

3. Due to the inability of Mr. Rogich to contribute any capital towards Eldorado's ongoing mortgage debt, Rogich entered into the "Agreement to Lend Capital" on April 24,

2008. APP, Vol. I, p. 163; *Id.* at p. 149. During this time and continuing thereafter Mr. Huerta loaned $1,500,000 so the company could retain the real property but it was also understood that this debt was a priority debt entitled to repayment upon first capital monies received. As the Agreement to Lend Capital states:

> Go Global Properties has procured capital equal to $125,000, which it will provide to The Company, in order to meet this month's (April 2008's) debt to ANB Financial. The Party is agreeing that this capital will be owed to the 1st Party in a priority fashion, whereby the outstanding principal and interest (at 22 percent per annum) will be paid back prior to any other and/or profits being out from the company and as soon as any additional capital is available in order to repay this debt. The 2nd Party is acknowledging that the 1st Party has gone out to borrow additional capital in order to be able to provide much-needed capital to The Company.

APP, Vol. I, p. 163; *Id.* at p. 149.

4. In mid-2008 Mr. Rogich had begun discussions with another investor to invest into the project. This was done so with the help of Rogich Communications Group staffer Christopher M. Cole. Eventually, the investor would take the place of Go Global and Mr. Huerta, at Mr. Rogich's urging, who at that point owned 35% of the membership interests in Eldorado. Other investors such as Eric Reitz, Craig Dunlap and Antonio Nevada would likewise be repaid the principal amounts they had provided to Eldorado. *Id.*

5. On or about October 30, 2008, Huerta, Go Global and Mr. Rogich through his family trust, entered into an agreement whereby the 35% interest of Huerta and Global would be purchased by Rogich for $2,747,729.50. Purchase Agreement, referred to as the "Agreement", attached herein as Exhibit D. *Id.* at p. 150.

6. Pursuant to the Agreement, the $2,747,729.50 (the "debt") would be paid from "future distributions or proceeds received by Buyer from Eldorado. *APP, Vol. I, p. 166; Id.* at p. 150.

7. The Agreement also had attached an Exhibit A which identified several parties which had contributed to Eldorado and which monies were due and owing to the "Potential Claimants":

Potential Claimants

1.	Eddyline Investments, LLC (potential investor or debtor)	$50,000.00
2.	Ray Family Trust (potential investor or debtor)	$283,561.60
3.	Nanyah Vegas, LLC (through Canamex Nevada, LLC)	$1,500.000.00
4.	Antonio Nevada, LLC/Jacob Feingold	$3,360,000.00

APP, Vol. I at p. 174; *Id.* at p. 150.

8. During the discovery in this matter, Defendants also asked for the production of documents which affirmed that Nanyah Vegas, LLC was owed $1,500,000. Plaintiffs identified several documents, of which multiple documents were provided by Defendants themselves:

> **REQUEST NO.1:**
>
> All documents relating to the $1,500.000 alleged in paragraph 15 of The First Amended Complaint to have been invested in Eldorado Hills, LLC by Nanyah Vegas, LLC.
>
> **RESPONSE TO REQUEST FOR PRODUCTION NO. 1:**
>
> See EH000039, EH000045 – 55; PLTFS0001 – 11; PLTFS0028, and; PLTF0030 – 33[1];
>
> As discovery is ongoing Plaintiffs reserve the right to supplement this request.

Plaintiffs' Amended Response to Defendants' First Set of Request for Production of Documents; the documents identified as EH000017 - 39, EH000045 – 55; PLTFS0001 – 11;

[1] Up until the point where Nanyah invested its $1.5 million, Mr. Huerta, through his corporation Go Global had invested more than $4.2 million into Eldorado. PLTFS0032-33 is a statement and copy of one of Eldorado's bank statements showing that $1.5 million was deposited, into the company's bank account. APP, Vol. I, p. 224-26.

PLTFS0028, and; PLTFS00030 – 33 are collectively attached herein at APP, Vol. I, pp. 177-226; *Id.* at p. 150.

9. EH000039 is Exhibit "D" to a Membership Interest Purchase Agreement dated October 24, 2008 and states that The Rogich Irrevocable Trust or the "Seller" made certain representations in specific regard to the monies owed to Nanyah Vegas, LLC and others:

> QUALIFICATION OF REPRESENTATIONS OF SELLER
>
> Seller confirms that certain amounts have been advanced to or on behalf of the Company by certain third parties, as referenced in Section 8 of the Agreement, Seller shall endeavor to convert the amounts advanced into non-interest bearing promissory notes for which Seller shall be responsible. Regardless of whether the amounts are so converted, Seller shall defend, indemnify and hold harmless the Company and its members for any claims by the parties listed below, and any other party claiming interest in the Company as a result of transactions prior to the date of this Agreement against the Company or its Members.
>
> 1. Eddyline Investments, LLC (potential investor or debtor) $50,000.00
>
> 2. Ray Family Trust (potential investor or debtor) $283,561.60
>
> 3. Nanyah Vegas, LLC (through Canamex Nevada, LLC) $1,500.000.00
>
> 4. Antonio Nevada, LLC/Jacob Feingold $3,360,000.00

APP, Vol. I at pp. 177-199; *Id.* at p. 150.

10. The Agreement dated October 30, 2008 and Membership Interest Purchase Agreement of October 24, 2008 each affirm that Mr. Rogich owed $1,500,000 to Nanyah Vegas, LLC and that he and The Rogich Family Trust would indemnify Go Global and Carlos Huerta for any claims of the parties identified as "Potential Claimants", which included Nanyah Vegas, LLC. *cf.* APP, Vol. I at pp. 174 and 199. This also conformed with the Purchase Agreement, Exhibit D, which stated "Seller [Carlos Huerta and Go Global, Inc.], however will not be responsible to pay the Exhibit A Claimants their percentage of debt. This will be Buyer's obligation, moving forward and Buyer will also make sure that any ongoing company bills

(utilities, security) and expenses attributed to maintaining the property) will not be Seller's obligation(s) from the date of closing, with Pete and Al, onward." Id. at p. 168.; *Id.* at 151-52.

11. During this same time in October 2008, Mr. Huerta, Mr. Rogich and Eldorado were working on repaying persons and entities that provided funds to Eldorado either through Canamex or to Eldorado directly. *Id.* at 152.

12. Eldorado repaid Eric Reitz, PE and Craig Dunlap, Esq. respectively $20,000 and $50,000 in late 2008 because they had "advanced the sum [$20,000 and $50,000] directly or indirectly (including indirectly through Canamex Nevada, LLC) to Eldorado Hills, LLC (the "Company"). *Id.*; see e.g. Purchase Agreement dated October 31, 2008 signed by Craig Dunlap. Attached herein at APP, Vol. I at pp. 228-31.

13. Eric Reitz, PE and Craig Dunlap, Esq. were also not provided K-1s for their investment or "Advancement" as referred to in their own respective Purchase Agreements. *Id.* at 152.

14. Following the sale of Go Global's interest to The Rogich Family Trust in October 2008, through 2012, Mr. Rogich represented that he would pay the parties identified as "Potential Claimants"; the same parties that were identified in the Membership Interest Purchase Agreement. *Id.* at 153.

15. It was only in late 2012 that Mr. Rogich represented that he conveyed his membership interest in Eldorado to TELD, LLC, a Nevada limited liability company.[2] Rogich

[2] Mr. Rogich admits that he did not tell Mr. Huerta of his transfer of interest for no consideration until "early fall 2012." Sig Rogich as Trustee of Rogich Family Irrevocable Trust Answers to Plaintiff's First Set of Interrogatories, APP, Vol. I at p. 2:13-17, 22-26. Therefore even using Mr. Rogich's own admission that Nanyah would not receive repayment because he

failed to inform Huerta and Go Global of his intentions to transfer all the acquired membership interest in Eldorado to TELD, LLC and was only informed after the transfer had in fact occurred. Prior to this time in 2012, Plaintiffs had no reason to suspect that they would not be repaid for the monies provided. Additionally, Mr. Rogich has provided no evidence that at any time subsequent to October 2008 that he was not going to honor the obligations mentioned in the Purchase Agreement or Membership Interest Purchase Agreement. *Id.* at p. 153.

It was against these willful admissions that the Defendants were obligated to repay Nanyah, that the District Court granted partial summary judgment in their favor. APP, Vol. I at pp. 317-21. Incredibly the District found that: 1) Nanyah purportedly claimed a capital interest in Eldorado' 2) There was no evidence that it invested in Eldorado Hills, LLC, and 3) There was no privity between Nanyah and Eldorado Hills. *Id.* at p. 320. Further, the Court independently determined (as the argument was not made by Defendants) that the statute of limitations began to accrue the moment Nanyah invested the funds and therefore the time to file began as early as 2007. *Id.*; *see also* Transcript at pp. 332 and 344. The District Court did not even consider Nanyah's argument that it was an intended third-party beneficiary. *See Transcript generally*, at pp. 329-344. Yet the District generally reasoned that Nanyah Vegas's claim for unjust enrichment must be dismissed for lack of contractual privity, when unjust enrichment does not require such element as it sought in cases which good conscious and equity should afford an implied contract. *Id.* at p. 344. Based on these reasons, and as further

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decided not to honor his commitments, that information was not available until Fall 2012. Neither of the Plaintiffs herein would have reason to believe that they would suffer damages until that time, and the statute of limitations would run from Fall 2012. Thus when Plaintiffs filed their claims approximately one year following on July 31, 2013, the Plaintiffs timely filed for relief.

discussed below, the District Court committed clear and egregious error when it determined that Defendants were entitled to summary judgment.

VI. SUMMARY OF THE ARGUMENT

The District Court made several clear and manifest errors in dismissing the Complaint of Nanyah Vegas. A statute of limitations only begins to accrue when a party reasonably believes or may discover that the facts are present for giving rise to an action. In conjunction, the "injury discovery rule" also prevents parties when concealing their true intentions and allows the applicable statute of limitations to toll when the "injury" is reasonably discovered or should have been reasonably discovered. In this matter Plaintiff only had reason to believe that a cause of action was present when Mr. Rogich informed Mr. Huerta in fall 2012 that he would not repay the debt owed to Plaintiff. The District Court erred when it determined based on its own independent judgment that the statute of limitations began to accrue even before the October 2008 agreement. Contrary to the District Court's conclusion that it "I don't need to determine any questions of fact to determine the statute of limitations" (APP., Vol. II, p. 343:25 – 344:1), both summary judgment and several Courts in Nevada have held that the facts **must** be examined to make a determination that the statute of limitations has expired.

Nanyah was an intended third-party beneficiary of the Purchase Agreement and Membership Interest Purchase Agreement and, thus, may avail itself to the same statute of limitations as the parties to the agreements. The only elements to prove that Nanyah was an intended third party beneficiary was the fact that an agreement provided for its benefit. The agreements discussed herein and above made it expressly known that Plaintiff was to benefit from these promises, and reliance was also shown. Yet, notwithstanding the clear case law, the

District Court erroneously claimed that there was a necessity for contractual privity. Because the District Court clearly erred, this matter must be remanded.

VII. LEGAL ARGUMENT

A. THE COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT BY DISMISSING NANYAH'S CLAIM FOR UNJUST ENRICHMENT, BASED ON THE STATUTE OF LIMITATIONS, WHEN ELDORADO HILL'S MEMBERS ACKNOWLEDGED THAT NANYAH WAS OWED $1.5MM IN EXPRESS AGREEMENTS, AND NANYAH WAS NOT INFORMED THAT IT WOULD NOT BE REPAID UNTIL LATE 2012?

Mr. Rogich and Eldorado continued to represent all the way up to 2012 that Nanyah Vegas would be repaid, and only after their representations in 2012 that none of the parties owed would be repaid did Nanyah suffer damages. *See* Sig Rogich as Trustee of Rogich Family Irrevocable Trust Answers to Plaintiff's First Set of Interrogatories, APP, Vol. I at p. 2:13-17, 22-26. A statute of limitations commences when a party knew or should have reasonably known of facts giving rise to cause of action. *Nevada State Bank v. Jemison Family Partnership*, 106 Nev. 792, 800, 801 P.2d 1377, 1382 (1990). The Court in *Millspaugh v. Millspaugh*, 96 Nev. 446, 448, 96 Nev. 446, 449 (2008) the issue of when a statute began to toll was addressed:

> The pertinent question here is whether appellant should have learned, through the exercise of proper diligence, of the fraud or mistake when she met with her attorney in 1972, thereby triggering the statute of limitations. **This is a question of fact to be determined by the jury or trial court after a full hearing where, as here, the facts are susceptible to opposing inferences.** *See Golden Nugget, Inc. v. Ham, 95 Nev. 45, 589 P.2d 173 (1979)*; *Dredge Corp. v. Wells Cargo, Inc.*, 80 Nev. 99, 389 P.2d 394 (1964); *Hobart v. Hobart Estate Co.*, 26 Cal.2d 412, 159 P.2d 958 (1945).

Id. (Emphasis Added).

The statute of limitations is contingent on the answer to specific questions. The Court in

Dredge Corp. stated:

> [t]he applicability of the statute of limitations **depends upon a prior determination of material questions of disputed fact which should have been reserved for decision after a full trial.** Had the record (affidavits and depositions) before the trial court shown, without dispute, that Wells had breached the agreement by failing to perform the work required by November 12, 1955, then the claim of Dredge, at least for the coercive relief of contract damages (though perhaps not for an accounting), would have been barred by the six year statute, for this suit was not started until November 30, 1962. **However, this issue was disputed.**

Id. at 102-103 (Emphasis Added)

Based on this the *Dredge Corp.* court concluded:

> Thus, the summary judgment may not stand as to any of the relief sought-declaratory or coercive. The former, because it is not subject to the bar of limitations as a matter of law; the latter, because disputed fact issues must first be decided before the applicability of limitations is placed into focus.

Id. at 103.

The "injury discovery rule" also prevents parties when concealing their true intentions and allows the applicable statute of limitations to toll when the "injury" is reasonably discovered or should have been reasonably discovered. However "injury" means "legal injury." *Massey v. Litton*, 99 Nev. 723, 727-28, 669 P.2d 248, 251-52 (1983) (holding that NRS 41.097(2) "injury" means "legal injury" and thus the time is tolled for a reasonable time to conclude that damages have resulted). The *Massey court* also explained that the statute of limitations begins to toll when the affected party "knows or should have damages had been suffered" or the "injury discovery rule":

> Having decided that "injury" means legal injury, we now determine when the patient "discovers" her legal injury. In *Ballinger,* the court held that the statute begins to run when the injured person knows or should know that he has suffered a legal injury. *Id.* Thus the discovery may be either actual or presumptive. Our statute similarly provides for actual or presumptive discovery. NRS 41A.097(1).

> This construction is in accord with the majority view in construing statutory and common law discovery rules. The discovery may be either actual or presumptive, but must be of both the fact of damage suffered and the realization that the cause was the health care provider's negligence. *See* 1 D. Louisell & H. Williams, Medical Malpractice sec. 13.07 at 13–24 n. 54, 13–25 (1983). *See also Sanders v. Blunt,* 357 So.2d 620, 621 (La.App.1978); *Brown v. Mary Hitchcock Memorial Hosp.,* 117 N.H. 739, 378 A.2d 1138, 1140 (1977); *Lopez v. Swyer,* 62 N.J. 267, 300 A.2d 563, 567 (1973); *Ohler v. Tacoma General Hosp.,* 92 Wash.2d 507, 598 P.2d 1358, 1360 (1979). This rule has been clarified to mean that the statute of limitations begins to run when the patient has before him facts which would put a reasonable person on inquiry notice of his possible cause of action, whether or not it has occurred to the particular patient to seek further medical advice. *See Graham v. Hansen,* 128 Cal.App.3d 965, 180 Cal.Rptr. 604, 609 (1982); *Sanchez v. South Hoover Hosp.,* 18 Cal.3d 93, 132 Cal.Rptr. 657, 663, 553 P.2d 1129, 1135 (1976). The focus is on the patient's knowledge of or access to facts rather than on her discovery of legal theories. *Graham v. Hansen,* 180 Cal.Rptr. at 609–610. *See also* Louisell & Williams, *supra,* at 13–25.

Massey v. Litton, 99 Nev. 723, 727-28, 669 P.2d 248, 251-52 (1983).

Massey and *Libby v. Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 39, 325 P.3d 1276, 1279 (2014) are distinct though from a case involving claims based in contract or equity as the statute of limitations for medical malpractice has a one-year discovery statute of limitations and a three year limitation. *Id.* As explained in *Libby*:

> [c]ourts have similarly concluded that a plaintiff does not need to be aware of the cause of his or her injury for the three-year limitation period to begin to accrue. *Marriage & Family Ctr. v. Superior Court,* 228 Cal.App.3d 1647, 279 Cal.Rptr. 475, 478 (1991). In so concluding, California courts have reasoned that the purpose of the three-year limitation period is "to put an outside cap on the commencements of actions for medical malpractice, to be measured from the date of the injury, regardless of whether or when the plaintiff discovered its negligent cause." *Id.*

Libby v. Eighth Jud. Dist. Ct., 130 Nev. Adv. Op. 39, 325 P.3d 1276, 1280 (2014).

In *Libby*,[3] the Nevada Supreme Court recognized that the California court had

[3] This is the sole case in which Defendants have offered to support their argument that Nanyah's claim began at the time of the Purchase Agreement in October 2008, and not when

determined that the plaintiff must "have suffered some appreciable harm" for the three-year statute of limitations to run. *Id.* The Nevada Supreme Court, in adopting this analysis, stated "that the Nevada Legislature tied the running of the three-year limitation period to plaintiffs appreciable injury and not to the plaintiffs awareness of that injury's possible cause". *Id.* Due to this interpretation Ms. Libby's statute of limitation only began to run when a test showed that she had an infection following surgery, not when she knew the cause. *Id.*

In this matter, the statute of limitations began to toll when Nanyah reasonably had facts giving rise to their cause of action. *See Nevada State Bank*, 106 Nev. at 800. Mr. Huerta, who testified on behalf of Nanyah Vegas, LLC, has stated that he did not become aware that Defendants would not honor the debts, until late 2012. Huerta Declaration at ¶16, APP, Vol. 1 at p. 153. This fact was also admitted by Mr. Rogich. *See* Sig Rogich as Trustee of Rogich Family Irrevocable Trust Answers to Plaintiff's First Set of Interrogatories, APP, Vol. I at p. 2:13-17, 22-26. A determination of whether the statute of limitations tolled at a date prior to 2012 is a question of fact for a jury to consider. *See Millspaugh*, 96 Nev. at 448. Additionally, Defendants did not submit an affidavit of Mr. Rogich claiming that he put Nanyah Vegas on notice at any time prior to 2012 that he would not repay the debt. The multiple agreements which Mr. Rogich signed actually say the opposite, that he would repay Nanyah and indemnify Carlos Huerta/Go Global, Inc. for any claims that Nanyah may have in the future. *See* agreements at APP. Vol. I at pp. 164-227. The District Court could not determine, as a matter

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Nanyah actually became aware that they would suffer damages in 2012. Using Defendant's rationale, based on *Libby*, every contracts statute of limitations, whether breached or not, would begin to accrue at the time of execution and not at the time of breach. This assertion is not supported by *Libby* as expressed herein nor supported by any other case law, and conflicts with the well-grounded law in Nevada.

of fact, the statute of limitations began to accrue in 2008 or earlier, because it was a disputed material fact; a fact which should have been reserved for trial. *Dredge Corp.*, 80 Nev. at 109.

The statute of limitations did not toll until Nanyah had suffered some "appreciable injury." *See Libby*, 325 P.3d at 1280; *see also Massey*, 99 Nev. at 727-28. Similar to the case in *Libby*, the statute of limitations could not begin to accrue until Nanyah was made aware that they would not receive the $1,500,000 promised by Mr. Rogich and evidently received by Eldorado, according to its own bank statements. *See Libby*, 325 P.3d at 1280. Nanyah was only made aware of the breach several years after the agreements were executed and during this same time Mr. Huerta was still assisting Eldorado to sell the property or obtain a profit. When Mr. Rogich informed Mr. Huerta in 2012 that he would not pay the monies owed to Nanyah or any others, this was the similar triggering event as in *Libby*, when the plaintiff received the test results. Thus, the statute of limitations began to accrue at that time. Because the statute of limitations began to accrue in 2012 and not 2008, or earlier (according to the District Court), the Nanyah claim filed in 2013 is well within the statute of limitations period pursuant to NRS 11.190(2).

B. THE COURT ERRED IN DETERMINING THAT THE STATUTE OF LIMITATIONS BEGAN TO ACCRUE AT THE MOMENT THAT NANYAH PROVIDED FUNDS THAT WERE CONVEYED TO ELDORADO HILLS, RATHER THAN AT THE MOMENT THEY REASONABLY BELIEVED THEY WOULD NOT BE REPAID?

The District Court erred when it determined based on its own independent judgment that the statute of limitations began to accrue even before the October 2008 agreement. *See Transcript generally*, at pp. 329-344. This argument that the statute of limitation began to accrue at the moment of investment was not even argued by Defendants' counsel, or in their papers to the Court. *Id.* The District Court did not explain how or why the "injury discovery

rule" did not apply or cite to any case law, rules, statutes or otherwise that supported this unfounded factual and legal conclusion. This conclusion that led the District Court to believe that the statute of limitations had expired, was a manifest error.

C. THE COURT ERRED IN ITS DETERMINATION THAT IT "DID NOT NEED TO REVIEW THE FACTS OF THE CASE" TO DETERMINE THAT THE STATUTE OF LIMITATIONS HAD ALREADY EXPIRED?

In the same statement referred to above the District Court made the conclusion that:

> A lack of contractual privity precludes any relief under the unjust enrichment cause of action but additionally the statute of limitations would preclude the cause of action by this Plaintiff as against this Defendant -- this particular cause of action and the fourth cause of action simply because it's the -- I don't need to determine any questions of fact to determine the statute of limitations. The cause of action if any would have risen at the time of the investment and there's no analysis needed to determine when the cause of action arose in this case simply because there's no contractual privity. So for those reasons the motion will be granted…

Transcript at p. 343-44.

As discussed above, a court must examine the facts of a case to determine whether the statute of limitations has expired or not. See *Dredge Corp.*, 80 Nev. at 109 (holding that determination of statute of limitations expiration depends on resolving disputed issues of fact). The District Court's conclusion also negated the application of the "injury discovery rule."

The District Court further erred by determining that contractual privity was required for an unjust enrichment claim. The terms "restitution" and "unjust enrichment" are the modern counterparts of the doctrine of quasi-contract. *Unionamerica Mortgage & Equity Trust v. McDonald*, 97 Nev. 210, 212, 626 P.2d 1272, 1273 (1981) (citing *Smith v. Smith*, 95 Idaho 477, 511 P.2d 294 (1973). "Various means and remedies have been employed to afford relief outside of the domains of technical contracts and torts. Unjust enrichment, restitution, quasi contract, implied contract, resulting and constructive trusts, accounting, etc. are some of the

means thus employed. *See* 46 Am.Jur. 99-101, Restitution and Unjust Enrichment, for numerous instances and examples." *Magill v. Lewis*, 74 Nev. 381, 385, 333 P.2d 717, 719 (1958). Under Nevada law, unjust enrichment is an implied contract which "occurs whenever a person has and retains a benefit which in equity and good conscience belongs to another." *In re Amerco Derivative Litig.*, 252 P.3d 681, 703 (Nev.2011) (quotation omitted); *Leasepartners Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975*, 113 Nev. 747, 942 P.2d 182, 187 (1997).

Plaintiff asserted a claim of unjust enrichment, because it contended that Eldorado Hills retained a benefit which under equity and good conscious it should not have been permitted to retain. First Amended Complaint, APP, Vol. I at p. 28. Plaintiff correctly plead the elements of unjust enrichment, but the District Court claimed that there was a necessity for "contractual privity." *See* Transcript, APP, Vol. I at p. 344-45. "Contractual privity" is not an element of unjust enrichment. *See In re Amerco Derivative Litig.*, 252 P.3d at 703; *Leasepartners Corp.*, 113 Nev. at 755. However, because the evidence demonstrated that Eldorado Hills received the $1.5MM from Nanyah, the District Court erred in not allowing the imposition of a quasi-contract, and instead treated the matter as if Plaintiff asserted a contractual breach based on an express contract (which express contract require contractual privity). As such determination was based in fact or law, the District Court committed clear error.

D. THE COURT ERRED IN DETERMINING THAT NANYAH WAS NOT AN INTENDED THIRD-PARTY BENEFICIARY UNDER THE TERMS OF THE AGREEMENTS THAT MEMORIALIZED THE DEBT THAT WAS OWED AND THAT IT SHOULD HAVE THE SAME STATUTE OF LIMITATIONS AS THE PARTIES TO THE ACTUAL AGREEMENTS?

Nanyah was an intended third-party beneficiary of the Purchase Agreement and Membership Interest Purchase Agreement and, thus, may avail itself to the same statute of limitations as the parties to the agreements. "To obtain such a status, there must clearly appear

a promissory intent to benefit the third party (***825** *Olson v. Iacometti*, 91 Nev. 241, 533 P.2d 1360 (1975)), and ultimately it must be shown that the third party's reliance thereon is foreseeable (*Lear v. Bishop*, 86 Nev. 709, 476 P.2d 18 (1970))." *Lipshie v. Tracy Inv. Co.*, 93 Nev. 370, 379, 566 P.2d 819, 824-25 (1977). As the *Olson Court* further addressed, even a party who does not know of a contract which is for his benefit, may maintain an action, if that contract contains a provision for its benefit:

> Although a plaintiff can maintain an action on a simple contract to which he is not a party, upon which he was not consulted, and to which he did not assent, when it contains a provision for his benefit (Citations Omitted) he must prove that there was an intent to benefit him. 'Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must, at least, show that it was intended for his direct benefit.' *Robins Dry Dock & Repair Co. v. Flint*,275 U.S. 303, 307, 48 S.Ct. 134, 135, 72 L.Ed. 290 (1927). (Citations Omitted)

Olson v. Iacometti, 91 Nev. 241, 245-46, 533 P.2d 1360, 1364 (1975).

The Purchase Agreement and Membership Interest Purchase Agreements clearly evidenced that Nanyah was an intended third party beneficiary and entitled to same statute of limitations as Go Global. It is not disputed that Nanyah was identified as a benefitting party and it is reasonable to believe that after being made aware of that written promise that reliance would result. *See Lipshie*, 93 Nev. at 379.

The evidence before District Court, demonstrated that there were multiple agreements that were intended to benefit Nanyah Vegas, as these agreement said that Nanyah Vegas was owed $1.5 MM. This fact was not disputed. In fact the only argument that Defendants raised against these claims was that Eldorado Hills was not a party to those agreements (but avoids admitting that all of the parties who signed those same agreements represented all of the members of Eldorado Hills, LLC):

> Plaintiffs argument that Nanyah was a third party beneficiary of the Purchase Agreement
> and the Membership Interest Purchase Agreement is based on Plaintiffs totally specious position that Eldorado was a party to those Agreements and made purported promises to Potential Claimants. Eldorado was not a patiy to the Agreements and made no promises. The argument, like others based on the same premise, is meritless.

APP, Vol. 1, p. 259:17-22.

Defendants did not argue any case law, because they did not present any to dispute the fact that Nanyah Vegas was an intended third-party beneficiary. And again the determination of being a third party beneficiary is not contingent on contractual privity, Nanyah Vegas need only prove that there was an intent to benefit. *See Olson v. Iacometti*, 91 Nev. at 245-46. Defendants did not dispute that there was an intent to benefit Nanyah Vegas, nor did the District Court. Thus as Plaintiff was an intended third party beneficiary, its claim could not have been dismissed.

Furthermore, Plaintiff was entitled to the same statute of limitations as the actual parties to the agreements enjoyed. Generally, a third-party beneficiary takes subject to any defense arising from the contract that is assertible against the promisee, including the statute of limitations. *Gibbs v. Giles*, 96 Nev. 243, 246-47, 607 P.2d 118, 120 (1980)[4]; *citing e. g., Skylawn v. Superior Court*, 88 Cal.App.3d 316, 151 Cal.Rptr. 793 (1979); *Bogart v. George K. Porter Co.*, 193 Cal. 197, 223 P. 959 (1924); 4 Corbin on Contracts s 820 (1951); 2 Williston on Contracts s 394 (3d ed. 1959). Therefore under the status of third-party beneficiary the statute of limitations for Nanyah had not passed, since a breach of October 2008 agreement only occurred in fall of 2012, when Mr. Rogich stated that he had transferred his interest and would

[4] *Gibbs* was superseded by statute on other grounds not relative to the point that that the statute of limitations for a third-party beneficiary shares the same statute of limitations with the party with whom is directly associated with the contract. *See State of Washington v. Bagley*, 114 Nev. 788, 963 P.2d 498 (1998) (holding that unpaid child support payments accruing within past six year period were subject to enforcement).

not fulfill the conditions of the agreement. Again however, the Defendants and the District Court failed to address these well-reasoned points of law and fact, which was clear error.

VII. CONCLUSION

Wherefore based on foregoing, the District Court erred in dismissing the claim of Nanyah Vegas, and the order of October 1, 2014 should be stricken and this case remanded for further discovery and a trial on the actual merits.

Dated this 30th day of March, 2015.

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CERTIFICATION PURSUANT TO NEV. R. APP. P. 28.2

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word version 14 in Times New Roman with a font size of 12; or

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2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[ ] Proportionately spaced, has a typeface of 14 points or more, and contains _____ words; or

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[X] Does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 30th day of March, 2015.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c)(1), I hereby certify that on this 30th day of March, 2015, service of the foregoing **APPELLANT'S OPENING BRIEF** was made by submission to the electronic filing service for the Nevada Supreme Court upon the following registered users to the email addresses on file:

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Brandon McDonald

/s/ C.J. Barnabi
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