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Teld, LLC; and Respondent/Cross-Appellant
Eldorado Hills, LLC

IN THE SUPREME COURT OF THE STATE OF NEVADA

NANYAH VEGAS, LLC, A
NEVADA LIMITED LIABILITY
COMPANY,

Appellant,

vs.

SIG ROGICH, A/K/A SIGMUND
ROGICH, INDIVIDUALLY, AND
AS TRUSTEE OF THE ROGICH
FAMILY IRREVOCABLE TRUST;
ELDORADO HILLS, LLC, A
NEVADA LIMITED LIABILITY
COMPANY; TELD, LLC, A
NEVADA LIMITED LIABILITY
COMPANY; PETER ELIADES,
INDIVIDUALLY AND AS
TRUSTEE OF THE ELIADES

Electronically Filed
Feb 05 2020 04:35 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court No. 79917

District Court No. A686303

**RESPONDENT/CROSS-
APPELLANT ELDORADO
HILLS, LLC'S RESPONSE TO
ORDER TO SHOW CAUSE**

1 SURVIVOR TRUST OF 10/30/08;
2 AND IMITATIONS, LLC, A
3 NEVADA LIMITED LIABILITY
4 COMPANY,

5 Respondents.

6 ELDORADO HILLS, LLC, A
7 NEVADA LIMITED LIABILITY
8 COMPANY,

9 Cross-Appellant,

10 vs.

11 NANYAH VEGAS, LLC, A
12 NEVADA LIMITED LIABILITY
13 COMPANY,

14 Cross-Respondent.

15 SIG ROGICH, A/K/A SIGMUND
16 ROGICH, INDIVIDUALLY AND
17 AS TRUSTEE OF THE ROGICH
18 FAMILY IRREVOCABLE TRUST,

Cross-Appellant,

vs.

NANYAH VEGAS, LLC, A
NEVADA LIMITED LIABILITY
COMPANY,

Cross-Respondent,

and

ELDORADO HILLS, LLC, A
NEVADA LIMITED LIABILITY
COMPANY; TELD, LLC, A
NEVADA LIMITED LIABILITY

COMPANY; PETER ELIADES,
INDIVIDUALLY AND AS
TRUSTEE OF THE ELIADES
SURVIVOR TRUST OF 10/30/08;
AND IMITATIONS, LLC, A
NEVADA LIMITED LIABILITY
COMPANY,

Respondents.

**RESPONDENT/CROSS-APPELLANT ELDORADO HILLS, LLC'S
RESPONSE TO ORDER TO SHOW CAUSE**

Respondent/Cross-Appellant Eldorado Hills, LLC ("Eldorado Hills"),
by and through its counsel, respond to this Court's January 6, 2020 Order to
Show Cause (the "Show Cause Order"). For the following reasons, Eldorado
Hills' cross-appeal was necessary and appropriate.¹

The May 22, 2018 Order Partially Granting Summary Judgment

Eldorado Hills may challenge and cross-appeal the District Court's May
22, 2018 Order Partially Granting Summary Judgment because that particular
Order was entered in Case No. A-16-746239-C (to which Eldorado Hills is not
a party) as well as Case No. A-13-686303-C (to which Eldorado Hills is a

¹ The Show Cause Order referenced four alleged jurisdictional defects. Only the second and third alleged defects directly involve Eldorado Hills, and thus are the only matters addressed herein. With respect to the first and fourth alleged defects, it is Eldorado Hills' understanding that they have been resolved by further Order of the District Court.

1 party).² By way of background, on March 31, 2017, the District Court
2 consolidated Case No. A-16-746239-C with Case No. A-13-686303-C “for all
3 further proceedings.”³

4 On February 23, 2018, Sigmund Rogich, individually and as Trustee of
5 the Rogich Family Irrevocable Trust, and Imitations, LLC (collectively, the
6 “Rogich Defendants”) filed a Motion for Summary Judgment, primarily upon
7 the grounds that most or all of Nanyah Vegas, LLC’s claims were barred by
8 the statute of limitations.⁴ As per the Consolidation Order, the Motion for
9 Summary Judgment contained both case numbers on its caption.⁵ On March
10 5, 2018, Eldorado Hills (amongst other parties) filed a Joinder to the Motion
11 for Summary Judgment, as permitted under EDCR 2.20(d).⁶ Similar to the
12 Rogich Defendants’ Motion for Summary Judgment, Eldorado Hills’ Joinder
13 was primarily based on the grounds that Nanyah’s unjust enrichment claim

14 ² May 22, 2018 Order Partially Granting Summary Judgment, attached as
15 Exhibit 1 (listing both case numbers on the caption of the Order).

16 ³ March 31, 2017 Stipulation for Consolidation, 2:16, attached as Exhibit
17 2.

18 ⁴ Feb. 23, 2018 Motion for Summary Judgment (excluding exhibits),
attached as Exhibit 3.

⁵ *Id.*

⁶ Defs. Peter Eliades, Individually and as Trustee of the Eliades Survivor
Trust of 10/30/08, Eldorado Hills, LLC, and Teld, LLC’s Joinder to Mot. for
Summary Judgment, attached as Exhibit 4.

1 was barred by the statute of limitations.⁷ As per the Consolidation Order, the
2 Joinder contained both case numbers on its caption.⁸

3 Although the District Court did grant certain aspects of the Motion for
4 Summary Judgment and the related Joinder, it denied Eldorado Hills' Joinder
5 with respect to Nanyah's unjust enrichment claim.⁹ The District Court's Order
6 explicitly recognized that Eldorado Hills had filed a Joinder to the Motion for
7 Summary Judgment.¹⁰ Thus, Eldorado Hills' Joinder was properly filed and
8 argued under EDCR 2.20(d).¹¹ Although this Court recently held that
9 consolidated matters retain their separate identities for appellate purposes, *see*
10 *Matter of Estate of Sarge*, 134 Nev. 766, 432 P.3d 718, 722 (2018), the fact
11 remains that the District Court entered its May 22, 2018 Order under the
12 jurisdiction and scope of both cases pursuant to the Consolidation Order.
13 Thus, Eldorado Hills has standing to cross-appeal the portion of the Order

14 ⁷ *Id.*

15 ⁸ *Id.*

16 ⁹ Ex. 1, 3:2-4; *see also* April 18, 2018 Transcript of Hearing (Ruling Only), attached as Exhibit 5.

17 ¹⁰ *Id.*, 2:1-4.

18 ¹¹ It should be noted that under EDCR 2.20(d), a joinder may be considered as a "stand-alone motion." Thus, it should not matter that Eldorado Hills efficiently and judiciously pursued this summary judgment relief as a joinder as opposed to a separately filed motion for summary judgment.

1 denying its request for summary judgment on statute of limitations grounds.

2 The October 4, 2019 Order

3 Eldorado Hills filed a Cross-Appeal with respect to this Court’s October
4 4, 2019 Order in an abundance of caution to ensure that it would not be
5 precluded from arguing that the District Court erred by denying Eldorado Hills
6 May 22, 2019 Motion for Summary Judgment. While this Court has held that
7 “a party who prevails in the district court and who does not wish to alter any
8 rights of the parties arising from the judgment is not aggrieved by the
9 judgment,” this Court has also recognized that “a respondent who seeks to
10 alter the rights of the parties under a judgment must file a notice of cross-
11 appeal.” *Ford v. Showboat Operating Co.*, 110 Nev. 752, 755-56, 877 P.2d
12 546, 548-49 (1994). Thus, the issue is whether Eldorado Hills’ Cross-Appeal
13 of the District Court’s denial of Eldorado Hills’ Motion for Summary
14 Judgment is attempting to “alter the rights of the parties....”

15 By way of background, Eldorado Hills filed two dispositive Motions in
16 2019. On May 22, 2019, it filed a Motion for Summary Judgment, seeking
17 summary judgment on Nanyah’s unjust enrichment claim on two separate
18 substantive grounds, because: (1) Nanyah agreed that the Rogich Trust was

1 “solely responsible” for any claim Nanyah may assert related to its
2 \$1,500,000 payment; and (2) Nanyah had an adequate remedy at law against
3 the Rogich Trust.¹² On July 22, 2019, Eldorado Hills also filed a Motion for
4 Dismissal under N.R.C.P. 41(e).¹³

5 Although they were two separate motions filed at separate times, the
6 District Court ultimately ruled on Eldorado Hills’ Motion for Summary
7 Judgment and Motion for Dismissal at the same time. Specifically, it denied
8 the Motion for Summary Judgment as “premature,” and granted the Motion
9 for Dismissal with prejudice, thereby resolving the unjust enrichment claim
10 that Nanyah had asserted against Eldorado Hills.¹⁴

11 Eldorado Hills filed its Notice of Cross-Appeal because it believes that
12 entry of summary judgment on Nanyah’s unjust enrichment claim could alter
13 the rights of the parties as compared to the District Court’s dismissal under
14 Rule 41(e). A substantive ruling on the merits under N.R.C.P. 56 is preferable
15 to a procedural ruling under N.R.C.P. 41(e). An N.R.C.P. 41(e) dismissal,

16 ¹² Defendant Eldorado Hills, LLC’s Motion for Summary Judgment
17 (excluding exhibits), attached as Exhibit 6.

18 ¹³ Defendant Eldorado Hills, LLC’s Motion for Dismissal With Prejudice
Under Rule 41(e) (excluding exhibits), attached as Exhibit 7.

¹⁴ Decision, attached as Exhibit 8.

1 while it may bar another action, may not be an adjudication on the merits.¹⁵
2 *Compare with* N.R.C.P. 41(b) (referencing that most decisions under 41(b)
3 “operates as an adjudication on the merits.”). Thus, entry of summary
4 judgment could certainly be considered to be an enlargement of rights when
5 compared to a procedural dismissal under Rule 41(e). *See Greenwell v. Aztar*
6 *Ind. Gaming Corp.*, 268 F.3d 486. 494 (7th Cir. 2001) (“The remaining
7 significance of the cross-appeal is that without it Aztar could not ask us to
8 modify the judgment in its favor against Greenwell to make it a judgment on
9 the merits dismissing her malpractice claim with prejudice rather than a
10 procedural order dismissing it without prejudice.”).¹⁶

11 While the District Court’s procedural dismissal under Rule 41(e) was
12 with prejudice thereby barring another action, this Court could certainly
13 consider a substantive summary judgment ruling to be an enlargement of
14 rights over a procedural dismissal and therefore bar Eldorado Hills from

15 ¹⁵ Eldorado Hills’ counsel was recently in front of a District Court Judge
16 who ruled that dismissal under Rule 41(e) was not an adjudication on the
17 merits and therefore could not result in an award of attorney’s fees and/or
18 costs to the defendant as the prevailing party. Although undersigned counsel
disagreed with that decision, the potential for that holding remains, where it
would not remain with the entry of summary judgment.

¹⁶ This Court has recognized that “Nevada law is in accordance with the
federal approach to cross-appeals.” *Ford*, 110 Nev. at 756, 877 P.2d at 549.

1 challenging it without the filing of a cross-appeal. Thus, to be on the safe side
2 and ensure its ability to challenge the District Court’s denial of the Motion for
3 Summary Judgment, Eldorado Hills filed its Notice of Cross-Appeal.
4 However, to the extent this Court believes that Eldorado Hills can still
5 challenge the Motion for Summary Judgment without the necessity of a cross-
6 appeal, Eldorado Hills is perfectly willing to address it in that manner.

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Consolidation

As this Court recognized, consolidated matters retain their separate identities for appellate purposes. *Matter of Estate of Sarge*, 134 Nev. 766, 432 P.3d at 722. This Court has raised two other potential jurisdictional defects with respect to Nanyah's claims against the Rogich Defendants. Based on the legal authority above, those potential jurisdictional defects should not affect this Court's jurisdiction over Case No. A-13-686303-C and Nanyah's appeal against Eldorado Hills (including Eldorado Hill's Cross-Appeal).

DATED this 5th day of February, 2020.

BAILEY ♦ KENNEDY

By: /s/ Dennis L. Kennedy
DENNIS L. KENNEDY
JOSEPH A. LIEBMAN

*Attorneys for Respondents
Peter Eliades, Individually and as Trustee
of the Eliades Survivor Trust of 10/30/08;
Teld, LLC; and Respondent/Cross-Appellant
Eldorado Hills, LLC*

CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 5th day of February, 2020, service of the foregoing **RESPONDENT/CROSS-APPELLANT ELDORADO HILLS, LLC'S RESPONSE TO ORDER TO SHOW CAUSE** was made by electronic service through the Nevada Supreme Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known addresses:

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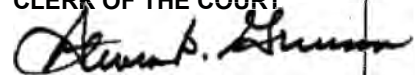
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**SIG ROGICH aka SIGMUND
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Trustee of THE ROGICH
FAMILY IRREVOCABLE
TRUST, and IMITATIONS, LLC**

/s/ Sharon L. Murnane
Employee of BAILEY❖KENNEDY

EXHIBIT 1

EXHIBIT 1



ORDR

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DISTRICT COURT
CLARK COUNTY, NEVADA

CARLOS A. HUERTA, an individual;
CARLOS A. HUERTA as Trustee of THE
ALEXANDER CHRISTOPHER TRUST, a
Trust established in Nevada as assignee of
interests of GO GLOBAL, INC., a Nevada
corporation; NANYAH VEGAS, LLC, A
Nevada limited liability company,

Plaintiffs,

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,

Defendants.

NANYAH VEGAS, LLC, a Nevada limited
liability company,

Plaintiff,

v.

TELD, LLC, a Nevada limited liability
company; PETER ELIADES, individually and
as Trustee of the Eliades Survivor Trust of
10/30/08; SIGMUND ROGICH, individually
and as Trustee of The Rogich Family
Irrevocable Trust; IMITATIONS, LLC, a
Nevada limited liability company; DOES I-X;
and/or ROE CORPORATIONS I-X, inclusive,

Defendants.

CASE NO.: A-13-686303-C

DEPT. NO.: XXVII

**ORDER PARTIALLY GRANTING
SUMMARY JUDGMENT**

CONSOLIDATED WITH:

CASE NO.: A-16-746239-C

1 The Motion for Summary Judgment by Defendant Sigmund Rogich, individually and as
2 Trustee of the Rogich Family Irrevocable Trust, and Imitations, LLC ("Rogich Defendants"),
3 joined by Peter Eliades, individually and as Trustee of the Eliades Survivor Trust of 10/30/08,
4 Eldorado Hills, LLC, and Teld, LLC ("Eliades Defendants") having come on regularly to be
5 heard on April 18, 2018, Samuel S. Lionel of Fennemore Craig, P.C. representing The Rogich
6 Defendants and Joseph A. Liebman of Bailey Kennedy representing the Eliades Defendants and
7 the Court having hearing argument and good cause appearing, does hereby set forth the
8 undisputed material facts and the Court's legal determinations.

9 **RELEVANT FACTS**

10 1. Plaintiff's Complaint against the Rogich Defendants and the Eliades Defendants
11 was filed on November 4, 2016.

12 2. The alleged transfer of the Eldorado Membership interest from the Rogich Trust to
13 the Eliades Trust occurred no later than September 2012.

14 3. Plaintiff's Fifth and Seventh Claims for Fraudulent Transfer and Constructive
15 Trust against the Rogich Defendants and the Eliades Defendants accrued no later than September
16 2012.

17 4. Plaintiff's Fifth and Seventh Claims for Fraudulent Transfer and Constructive
18 Trust were filed more than four years after they accrued.

19 **LEGAL DETERMINATION**

20 1. Plaintiff's Fifth and Seventh Claims for Fraudulent Transfer and Constructive
21 Trust were filed more than 4 years after the alleged membership interest transfer.

22 2. NRS 112.230(1) provides that a claim for fraudulent transfer is extinguished if not
23 brought within four years after the date of the transfer.

24 ~~3. The membership interest transfer is not a transfer that is permitted to be perfected~~
25 ~~and therefore, NRS 112.200(1)(b)'s and NRS 112.200(2)'s provisions do not apply.~~ *AK FOR NLA*

26 3. The Rogich Defendants and the Eliades Defendants are awarded Partial Summary
27 Judgment dismissing the Fifth and Seventh Claims, with prejudice.

28 4. Plaintiff's Fourth Claim for Intentional Interference with Contract has been

1 withdrawn by Plaintiff and should be dismissed.

2 5. The Motion of the Rogich Defendants' for Summary Judgment and the Joinder of
3 the Eliades Defendants in said Motion for Summary Judgment with respect to Plaintiffs' First,
4 Second, Third, Sixth, Eighth and Ninth Claims is denied.

5 Dated this 17 day of May, 2018.

6
7 Nancy L. Alf
8 DISTRICT COURT JUDGE
9 AE

9 Respectfully submitted by:

10 SIMONS LAW, PC

11 BY: 

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Attorney for Plaintiff Nanyah Vegas, LLC

15 Approved:

16 This _____ day of _____, 2018

17 FENNEMORE CRAIG, P.C.

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26 *The Rogich Family Irrevocable Trust and Imitations, LLC*

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BAILEY KENNEDY

By:

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Trustee of The Eliades Survivor Trust of 10/30/08
Teld, LLC and Eldorado Hills, LLC*

EXHIBIT 2

EXHIBIT 2

1 **SAO**
2 Mark G. Simons, Esq. (SBN 5132)
3 **ROBISON, BELAUSTEGUI, SHARP & LOW**
4 A Professional Corporation
5 71 Washington Street
6 Reno, Nevada 89503
7 Telephone: (775) 329-3151
8 Facsimile: (775) 329-7941
9 Email: msimons@rbsllaw.com


CLERK OF THE COURT

6 *Attorneys for Nanyah Vegas, LLC*

8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

11 CARLOS A. HUERTA, an individual;
12 CARLOS A. HUERTA as Trustee of THE
13 ALEXANDER CHRISTOPHER TRUST, a
14 Trust established in Nevada as assignee
15 of interests of GO GLOBAL, INC., a
16 Nevada corporation; NANYAH VEGAS,
17 LLC, A Nevada limited liability company,

CASE NO.: A-13-686303-C

DEPT. NO.: XXVII

15 Plaintiffs,

16 v.

17 SIG ROGICH aka SIGMUND ROGICH as
18 Trustee of The Rogich Family Irrevocable
19 Trust; ELDORADO HILLS, LLC, a Nevada
20 limited liability company; DOES I-X; and/or
21 ROE CORPORATIONS I-X, inclusive,

20 Defendants.

22 **STIPULATION FOR CONSOLIDATION**

23 The parties by and through their respective counsel and stipulate as follows:

24 **A. DEPARTMENT XXVII, CASE NO. A-13-686303-C.**

25 Carlos Huerta, et al. v. Sig Rogich, et al., was filed in the Eighth Judicial District
26 Court and assigned Case No. A-13-686303-C (the "Huerta Action"). Nanyah Vegas,
27 LLC ("Nanyah") asserted a claim for unjust enrichment against Eldorado Hills, LLC
28

1 ("Eldorado Hills") in the Huerta Action. This Court previously granted summary
2 judgment against Nanyah on the basis that the statute of limitations had run on
3 Nanyah's unjust enrichment claim. The Nevada Supreme Court reversed this Court's
4 decision and remanded the case finding that the application of the statute of limitations
5 was a question of fact. Nanyah's claim therefore remains pending against Eldorado
6 Hills. The trial date in the Huerta Action has not been rescheduled.

7 **B. DEPT. NO.: III, CASE NO.: A-16-746239-C**

8 Nanyah initiated a new action against a number of defendants other than
9 Eldorado Hills in the case Nanyah Vegas, LLC v. TELD, LLC, et al., which was also filed
10 in the Eighth Judicial District Court and assigned Case No. A-16-746239-C (the
11 "Nanyah Action"). Nanyah has asserted new claims against new defendants other than
12 Eldorado Hills in the Nanyah Action, however the new claims in the Nanyah Action have
13 some similar factual issues as contained in the Huerta Action.

14 **C. CONSOLIDATION.**

15 The parties agree that the Huerta Action and the Nanyah Action should be
16 consolidated for all further proceedings. The parties believe that consolidation will
17 minimize the consumption of judicial resources, the resources of the parties and will
18 yield the most expeditious resolution of the claims in the Huerta and Nanyah Actions.
19 The Court is therefore, requested to consolidate the two cases as stated herein. Upon
20 the Court entering its Order consolidating the actions, the defendants in the Nanyah
21 Action shall have twenty (20) days thereafter to file their Answers.

22 **D. NEW CAPTION.**

23 Upon consolidation, the new caption will be as follows:

24 ///

25 ///

26 ///

27 ///

28 ///

CARLOS A. HUERTA, an individual;
CARLOS A. HUERTA as Trustee of THE
ALEXANDER CHRISTOPHER TRUST, a
Trust established in Nevada as assignee
of interests of GO GLOBAL, INC., a
Nevada corporation; NANYAH VEGAS,
LLC, A Nevada limited liability company,

Plaintiffs,

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,

Defendants.

NANYAH VEGAS, LLC, a Nevada limited
liability company,

Plaintiff,

v.

TELD, LLC, a Nevada limited liability
company; PETER ELIADAS, individually
and as Trustee of the The Eliades Survivor
Trust of 10/30/08; SIGMUND ROGICH,
individually and as Trustee of The Rogich
Family Irrevocable Trust; IMITATIONS,
LLC, a Nevada limited liability company;
DOES I-X; and/or ROE CORPORATIONS
I-X, inclusive.

Defendants.

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CASE NO.: A-13-686303-C

DEPT. NO.: XXVII

CONSOLIDATED WITH:

CASE NO.: A-16-746239-C

1 **AFFIRMATION:** The undersigned does hereby affirm that this document does
2 not contain the Social Security Number of any person.

3 DATED this 17th day of March, 2017.

4 ROBISON, BELAUSTEGUI, SHARP & LOW
5 A Professional Corporation
6 71 Washington Street
7 Reno, Nevada 89503

8 By: 

9 MARK G. SIMONS, ESQ.
10 THERESE M. SHANKS, ESQ.
11 Attorneys for Nanyah Vegas, LLC

12 DATED this 15 day of March, 2017.

13 FENNEMORE CRAIG, P.C.
14 300 South Fourth Street, Ste. 1400
15 Las Vegas, NV 89101

16 By: 

17 SAMUEL S. LIONEL, ESQ.
18 Attorneys for Eldorado Hills, LLC, TELD, LLC,
19 PETER ELIADAS, individually and as Trustee
20 of the The Eliades Survivor Trust of 10/30/08;
21 SIGMUND ROGICH, individually and as
22 Trustee of The Rogich Family Irrevocable
23 Trust; IMITATIONS, LLC

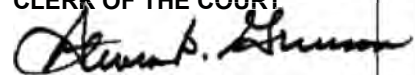
24 ORDER

25 IT IS SO ORDERED this 27 day of March, 2017

26 for 
27 DISTRICT COURT JUDGE
28

EXHIBIT 3

EXHIBIT 3



1 **MSJ**

2 Samuel S. Lionel, Esq. (Bar No. 1766)
3 Brenoch Wirthlin, Esq. (Bar No. 10282)

4 **FENNEMORE CRAIG, P.C.**

5 300 S. Fourth Street, Suite 1400

6 Las Vegas, Nevada 89101

7 Tel.: (702) 692-8000

8 Fax: (702) 692-8099

9 Email: slionel@fclaw.com

10 *Attorneys for Sigmund Rogich*
11 *and Imitations, LLC*

DISTRICT COURT

CLARK COUNTY, NEVADA

12 CARLOS A. HUERTA, an individual;
13 CARLOS A. HUERTA as Trustee of THE
14 ALEXANDER CHRISTOPHER TRUST, a
15 Trust established in Nevada as assignee of
16 interests of GO GLOBAL, INC., a Nevada
17 corporation; NANYAH VEGAS, LLC, A
18 Nevada limited liability company,

19 Plaintiffs,

20 v.

21 SIG ROGICH aka SIGMUND ROGICH as
22 Trustee of The Rogich Family Irrevocable
23 Trust; ELDORADO HILLS, LLC, a Nevada
24 limited liability company; DOES I-X; and/or
25 ROE CORPORATIONS I-X, inclusive,

26 Defendants.

27 NANYAH VEGAS, LLC, a Nevada limited
28 liability company,

Plaintiff,

v.

TELD, LLC, a Nevada limited liability
company; PETER ELIADES, individually and
as Trustee of the The Eliades Survivor Trust of
10/30/08; SIGMUND ROGICH, individually
and as Trustee of The Rogich Family
Irrevocable Trust; IMITATIONS, LLC, a
Nevada limited liability company; DOES I-X;
and/or ROE CORPORATIONS I-X, inclusive,

Defendants.

CASE NO.: A-13-686303-C

DEPT. NO.: XXVII

MOTION FOR SUMMARY JUDGMENT

DATE OF HEARING: _____

TIME OF HEARING: _____

CONSOLIDATED WITH:

CASE NO.: A-16-746239-C

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The Motion is made and based on the Declaration of Samuel S. Lionel (*Exhibit 1*) Rogich Defendants' Points and Authorities and the exhibits set forth in support of Rogich Defendants' Points and Authorities.

FENNEMORE CRAIG, P.C.

By: 
 Samuel S. Lionel, Esq. (NV Bar No. 1766)
 Brenoch Wirthlin, Esq. (Bar No. 10282)
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 E-mail: slionel@fclaw.com
*Attorneys for Sigmund Rogich
 and Imitations, LLC*

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1 **NOTICE OF MOTION**

2 **TO: ALL INTERESTED PARTIES; AND**

3 **TO: THEIR ATTORNEYS**

4 Please take notice that the undersigned will bring the above **MOTION FOR SUMMARY**
5 **JUDGMENT** on for hearing before this Court at 28 on March, 2018 at 10:00
6 a.m. or as soon as counsel can be heard.

7
8 DATED this 23 day of February, 2018.

9
10 **FENNEMORE CRAIG, P.C.**

11
12 By: 
13 Samuel S. Lionel, Esq. (NV Bar No. 1766)
14 Brenoch Wirthlin, Esq. (Bar No. 10282)
15 300 South Fourth Street, Suite 1400
16 Las Vegas, Nevada 89101
17 Telephone: (702) 692-8000
18 Facsimile: (702) 692-8099
19 E-mail: slionel@fclaw.com
20 *Attorneys for Sigmund Rogich*
21 *and Imitations, LLC*

22 **I. PRELIMINARY STATEMENT**

23 This action is a consolidated proceeding of two actions. The first action (Case No. A-13-
24 686303-C), which commenced on July 31, 2013, contains 4 causes of action ("claims"), including
25 one claim for unjust enrichment brought on behalf of Nanyah.¹ This action, which commenced
26 on November 4, 2016, alleges nine Nanyah claims against six other Defendants.

27 This Motion for Summary Judgment is based primarily on relevant Statutes of Limitations
28 which provide for actions to be brought within periods of three, four and six years. It is Rogich
Defendants' position that Nanyah's claims were not brought until eight years after they had
accrued. Therefore summary judgment should be granted, dismissing each of the nine claims.
Rogich Defendants' Motion will also consider Nanyah's claims on substantive grounds.

Yoav Harlap, an Israeli, is the Manager of Nanyah. See Yoav Harlap's Deposition from

¹ There is misjoinder of causes of action in the first action.

1 October 11, 2017 attached as *Exhibit 3*, at 50:16-20. Nanyah has never had any employees, office
2 or bank accounts. *Exhibit 3*, at 51:10-16. He is the sole investor in Nanyah. *Exhibit 3*, at 56:19-
3 24. He is a sophisticated investor. *Exhibit 3*, at 56:15-18. He has investments all over the world.
4 *Exhibit 3*, at 53:18-20. He has “so many investments I do not look at all these papers.” *Exhibit 3*,
5 at 52:19-20. He is pitched deals several times a week, all year long. When he was given a
6 investment pitch in Israel in 2007 by Carlos Huerta (“Huerta”) to invest, it was just another pitch.
7 *Exhibit 3*, at 61:4-6.

8 **II. MATERIAL FACTS PURSUANT TO NRCP 56(c)**

- 9 1. Plaintiff’s First Claim for Breach of Contract was filed more than six years after it
10 accrued.
- 11 2. Plaintiff’s Second Claim for Breach of the Implied Covenant of Good Faith and Fair
12 Dealing, Contractual was filed more than four years after it accrued.
- 13 3. Plaintiff’s Third Claim for Breach of the Implied Covenant of Good Faith and Fair
14 Dealing, Tortious was filed more than four years after it accrued and Nanyah does not
15 have the requisite fiduciary relationship.
- 16 4. Plaintiff’s Fourth Claim for Intentional Interference with Contract was filed more than
17 three years after it accrued.
- 18 5. Plaintiff’s Fifth Claim for Constructive Trust was filed more than four years after it
19 accrued and Nanyah does not have the confidential relationship required.
- 20 6. Plaintiff’s Sixth Claim for Conspiracy was filed more than four years after it accrued
21 and there is no evidence that the Defendants agreed by concerted action to accomplish
22 an unlawful object for the purpose of harming Nanyah.
- 23 7. Plaintiff’s Seventh Claim for Fraudulent Transfer was filed more than four years after
24 it accrued and there is no evidence proving that the transfer was made with the actual
25 intent to hinder, delay or defraud Nanyah.
- 26 8. Plaintiff’s Eighth Claim for Declaratory Relief, based on a contract, is subject to a six
27 year limitation period. Nanyah’s Eighth Claim was filed more than six years after it
28 accrued and does not set forth a current judicial controversy.
9. Plaintiff’s Ninth Claim for Specific Performance was filed more than six years after it

1 accrued and there is no provision in any agreement which provides for Nanyah to have
2 a membership interest in Eldorado.

3 **III. THE PURCHASE AGREEMENT**

4 In 2008, the Rogich Family Irrevocable Trust ("Rogich Trust"), Huerta and his wholly
5 owned Go Global, Inc. ("Go Global") were equal owners of Eldorado Hills, LLC ("Eldorado"), a
6 company which owned approximately 160 acres of real property in Clark County, Nevada.² In a
7 Purchase Agreement, effective October 30, 2008 ("Purchase Agreement" or "Exhibit 2"), Huerta
8 and Go Global agreed to sell their interest to the Rogich Trust. See Purchase Agreement attached
9 as *Exhibit 2*.

10 Exhibit 2 provides that the membership interest of the Seller, "as well as the ownership
11 interest of the Buyer, may be subject to certain potential claims of those entities set forth and
12 attached hereto in Exhibit 'A' and incorporated herein by this reference" ("Potential Claimants").

13 Exhibit A to the Purchase Agreement provides as follows:

14 **POTENTIAL CLAIMANTS**

- | | | |
|----|---|----------------|
| 15 | 1. Eddyline Investments, LLC (potential investor or debtor) | \$ 50,000.00 |
| 16 | 2. Ray Family Trust (potential investor or debtor) | \$ 285,561.60 |
| | 3. Nanyah Vegas, LLC (through CanaMex Nevada, LLC) | \$1,500,000.00 |
| | 4. Antonio Nevada, LLC/Jacob Feingold | \$3,360,000.00 |

17 Also effective October 30, 2008, are the Membership Interest Purchase Agreement ("Teld
18 Agreement") attached as *Exhibit 4*, the Membership Interest Purchase Agreement ("Flangas
19 Agreement") attached as *Exhibit 5*, and the Amended and Restated Operating Agreement of
20 Eldorado Hills, LLC ("Eldorado Operating Agreement") attached as *Exhibit 6*. The Membership
21 Interest Assignment Agreement dated January 1, 2012, is attached as *Exhibit 7*.

22 **IV. STATUTES OF LIMITATIONS**

23 In Peterson v. Bruen, 106 Nev. 271, 273, 792 P.2d 18, 19 (1990), the Court held:

24 "In resolving the issue before us, it is necessary to consider the purposes
25 served by statutes of limitation. Justice Holmes succinctly stated that the
26 primary purpose of such statutes is to "[prevent] surprises through the
27 revival of claims that have been allowed to slumber until evidence has
been lost, memories have faded, and witnesses have disappeared."
Telegraphers v. Ry. Express Agency, 321 U.S. 342, 348-349, 64 S.Ct.
582, 586, 88 L.Ed. 768 (1944)."

28 ² There was a small minority ownership in Eldorado.

1 In Nevada State Bank v. Jamison Family Partnership, 106 Nev. 792, 798, 801 P.2d 1377,
2 1381 (1990), the Court held:

3 "...statutes of limitation embody important public policy considerations
4 in that they stimulate activity, punish negligence, and promote repose by
5 giving security and stability to human affairs. Thus, statutes of limitation
6 rest upon reasons of sound public policy in that they tend to promote the
7 peace and welfare of society, safeguard against fraud and oppression, and
8 compel the settlement of claims within a reasonable period after their
9 origin and while the evidence remains fresh in the memory of the
10 witnesses."

11 Both quotations are applicable to Nanyah's stale claims. Yoav Harlap testified:

12 "A. I don't remember what happened in 2006 or '7...or '8."
13 *Exhibit 3*, at 111:10-12.

14 "Q. Why did you wait so long to sue?

15 MR. SIMONS: Which time?

16 A. What do you mean by 'so long'? I think I am suing within the time frame that I'm
17 permitted to. Why is it too long?

18 Q. Is that your reason?

19 A. My reasons are to be kept between me and my attorney. This is privileged
20 information.

21 Q. Is that the only answer you can give me?

22 A. I think so."

23 *Exhibit 3*, at 92:25-93:10.

24 ARGUMENT

25 **A. THE PURCHASE AGREEMENT (EXHIBIT 2) AND NANYAH**

26 Mr. Harlap was a difficult deposition witness. He frequently answered that his lawyer
27 spoke for him or that the question involved a legal issue and he was not competent to respond.
28 Some examples from Mr. Harlap's deposition testimony are as follows:

29 "Q. So you assumed that at the time?

30 A. Perhaps I assumed at the time. Perhaps not. I don't know. I don't remember what
31 happened in 2006 or '7.

32 Q. You don't remember?

33 A. Or '8. Are we between questions?"

34 *Exhibit 3*, at 111:8-13.

35 ///

1 "A. You're relating, again, to an agreement, and I'm not going to answer you in
2 regarding to the agreement whether it's establishing my rights. But my rights are
3 established, to the best of my understanding, based on the position of my
attorney."

Exhibit 3, at 27:22-28:1.

4 "A. The answer is that, according to my lawyer, they have failed in this respect, and so
5 I do."

Exhibit 3, at 140:22-24.

6 "A. I rely on that and on the explanation of my legal counsel..."

Exhibit 3, at 132:16-17.

7 "A. ...I have no way of saying what I understand from the Hebrew translation of what
8 is written here to the legal meaning of it."

Exhibit 3, at 130:19-21.

9 "Q. What's the basis for your claim against Mr. Rogich?

10 MR. SIMONS: Asked and answered.

11 BY MR. LIONEL:

12 Q. Answer the question.

13 A. Asked and answered."

14 *Exhibit 3, at 85:3-8.*

15 "Q. And you have no recollection back in 2008 of seeing Exhibit 2?

16 A. I might have, I might have not. I don't recall. This is almost ten years back."

Exhibit 3, at 189:15-18.

17 While Mr. Harlap was generally not forthcoming in his deposition, when the question
18 concerned his alleged rights under the Purchase Agreement or his being a Potential Claimant, his
19 answers were clearly more assured. See the following examples:

20 "Q. Are you familiar with the purchase agreement?

21 A. Which purchase agreement?

22 Q. In this case. The purchase agreement whereby Mr. Huerta got out of Eldorado.

23 A. If I'm not mistaken, this is the purchase agreement that says that -- that
acknowledges the potential claims of Nanyah Vegas through \$1.5 million. If this
is the document you refer to, then yes."

24 *Exhibit 3, at 16:17-17:1.*

25 "Q. Let the record show the witness is looking at Exhibit 2."

26

27 "Q. That is a 2008 document. Did you see it in 2008?

28 A. I do not know.

Q. You don't know. You don't know or you don't remember?

A. I don't remember.

1 Q. But you don't know?

2 A. I might have.

3 Q. You might have. Okay.

4 A. I might have, because I do remember vividly that Carlos have explained to me, if I'm not mistaken, over the phone, that my rights in the Eldorado Hills are secured and that the buyer of Eldorado Hills from him has taken the commitment to pay me or register my rights to pay me back my investment in Eldorado Hills.

5 Q. When did Carlos tell you that?

6 A. This was at the time when he explained to me that he has his own issues. He had to sell and that my rights remained there. But this is many years ago, so it's the best of my recollection from, you know, the telephone conversation that was going on."

8 *Exhibit 3, at 17:6-7, 18:1-23.*

9 "Q. Does Exhibit 2 have anything to do with your claim in this case?

10 A. Absolutely.

11 Q. What does it have to do?

12 A. To the best of my understanding, according to Exhibit 2, it is clearly showing that when Sig Rogich sold his rights in Eldorado Hills, he – sorry. Hold on. Sorry.

13 Q. I don't want you to read from there. I want your recollection, please.

14 A. That when Carlos left Eldorado Hills and sold his part, whatever it is, his part, to Sig Rogich Foundation, or whatever it's called, the foundation took upon itself the commitment and acknowledged the fact that Nanyah Vegas had a claim for 1.5 million in equity of Eldorado Hills..."

15 *Exhibit 3, at 24:8-24:11, 25:8-25:19.*

16 "Q. Do you know any particular paperwork?

17 A. I remember number 2, Exhibit 2.

18 Q. That's the purchase agreement?

19 A. That's a purchase agreement. I remember this one for sure, which acknowledges, to the best of my understanding and to my attorney's understanding, my rights to be a claimant in regards to Eldorado Hills."

20 *Exhibit 3, at 70:23-71:5.*

21 "Q. Now, you say the Rogich Trust interest was subject to Nanyah's ownership interest in Eldorado. Would you explain that, if you can?

22 A. I can explain it as per Exhibit 2. Exhibit 2 says that I am a potential claimant, and as far as I understand, even that agreement alone states my interest – Nanyah's ownership interest."

23 *Exhibit 3, at 163:9-15.*

24
25 The foregoing demonstrates that Mr. Harlap was not a forthcoming witness except when
26 he felt it served his interest in connection with Exhibit 2 or his being a Potential Claimant was
27 considered.

28

**B. EXCEPT FOR NANYAH'S SEVENTH CLAIM,
NANYAH'S CLAIMS ACCRUED ON OCTOBER 30, 2008**

A statute of limitations prohibits a suit "after a period of time that follows the accrual of the cause of action." FDIC v. Rhodes, 130 Nev. Adv. Op. 88, 336 P.3d 961, 965 (2014). Such limitation period is meant to provide a concrete time frame within which a plaintiff must file a law suit and after which a defendant is afforded a level of security. City of Fernley v. State, Dep't of Tax, 132 Nev. Adv. Op. 4, 336 P.3d 699, 706 (2016); Winn v. Sunrise Hosp. & Medical Center, 128 Nev. 246, 256, 277 P.3d 458, 465 (2012).

In determining whether a statute of limitations has run against an action, the time must be computed from the day the claim accrued. NRS 11.010; Dredge Corporation v. Wells Cargo, Inc., 80 Nev. 99, 102, 389 P.2d 394, 396 (1964). A claim accrues when a suit may be maintained thereon. State ex rel. Dept. of Transp. v. Public Employees' Retirement System of Nevada, 120 Nev. 19, 22, 83 P.3d 815, 817 (2004); Clark v. Robison, 113 Nev. 949, 951, 944 P.2d 788, 789 (1977). Nanyah's present action can be maintained. It could have been maintained in 2008 after the date of the Purchase Agreement – October 30, 2008, and any of Nanyah's present claims could have been maintained thereafter if the applicable statute of limitations had not run.

Harlap's deposition shows his familiarity with Exhibit 2 since its execution and that his rights flow from Exhibit 2. Nanyah's lawyer volunteered during Harlap's deposition the importance of Exhibit 2 to Nanyah: "MR. SIMONS: When we went over the agreements. He said Exhibit 2. He told you that earlier. You went through this earlier today. He says, look, my interest is right there." *Exhibit 3*, at 192:15-18.

All of Nanyah's claims allegedly arise from the Purchase Agreement (Exhibit 2), and the Teld Agreement and Flangas Agreement, which cross reference each other and are effective October 30, 2008. See *Exhibit 2* at Para. 4; *Exhibits 4* and *5* at Para. G.³ Even the Eldorado Operating Agreement was effective October 30, 2008. See *Exhibit 6*. Without *Exhibits 2, 4*, and *5* there would be no claims. Each claim alleges or incorporates *Exhibits 2, 4, 5* and *6*.

³ At his deposition, Harlap was asked about the Teld Agreement and the Flangas Agreement. He responded: "Personally, I had no dealings with it beyond the fact that they, to my understanding, purchased some rights in Eldorado Hills to which I am a potential claimant to." *Exhibit 3*, at 32:8-11.

1 Exhibit A to Exhibit 2 shows Nanyah as a Potential Claimant and Harlap, at his
2 deposition, contended that it showed his interest in Eldorado:

3 “A. My interest in Eldorado Hills, as also mentioned in Exhibit 2...sees me as a
4 potential claimant the way it is referred to in that paper, specific paper.”
5 *Exhibit 3, at 87:6-9.*

6 “A. I think that Exhibit 2...is saying explicitly that I...have membership rights or that
7 there should be potential claims or membership rights...”
8 *Exhibit 3, at 157:13-19.*

9 “A. I can explain it as per Exhibit 2. Exhibit 2 says that I am a potential claimant, and
10 as far as I understand, even that agreement alone states my interest—Nanyah’s
11 ownership interest.”
12 *Exhibit 3, at 163:12-15.*

13 “Q. But do you remember the purchase agreement of 2008 and what it said about your
14 rights?”

15 A. As I told you, I remember that there was, and I do not remember from when I
16 remember.

17 Q. But Carlos told you about that agreement, didn’t he?

18 A. He may have. He may have not. I assume he has.”

19 *Exhibit 3, at 120:9-16.*

20 Except for Nanyah’s seventh claim for alleged fraudulent transfer, all of Nanyah’s claims
21 are based on Exhibit 2 and the other October 30, 2008 agreements. Even the alleged tort claims
22 of Intentional Interference with Contract and Concert of Action are based on those agreements.

23 Nanyah alleges that in entering into the Purchase Agreement, the Rogich Trust agreed in
24 Exhibit A – Potential Claimants to be fully responsible for repaying Nanyah’s investment in
25 Eldorado, and confirming Nanyah’s membership interest in Eldorado. Complaint at Para. 25, 26.
26 Nanyah also alleged that “as of approximately the end of 2008” the Rogich Trust was subject to
27 Nanyah’s interest claim and/or investment.” Complaint at Para. 68. Those allegations show that
28 Nanyah sued the Rogich Trust on the basis that it was indebted to it based on Exhibit 2.

Nanyah alleged the Rogich Trust breached Exhibit 2 by failing to convert its interest into a
non interest bearing debt. Complaint at Para. 92(b).

“Q. The failure to convert was done at that time?”

A. No. The failure to convert was done probably way before that. Whether it was
2008 or just after what Exhibit 2 said they should have done.

Q. It could have been 2008?

A. Could have been.”

Exhibit 3, at 132:24-133:5.

1 Nanyah must have been aware that the Purchase Agreement provided that “time is of the
2 essence of this Agreement and all of its provisions.” That provision is the last sentence of
3 *Exhibits 2, 4 and 5*. Paragraph 37 of the Complaint alleges that “the Purchase Agreement also
4 provided that ‘time is of the essence’ regarding compliance with the agreement’s provisions.”

5 In Soper v. Means, 111 Nev. 1290, 1295, 903 P.2d 222, 224 (1995), in 1975, plaintiff had
6 a loosely prepared agreement to form a corporation and build a mobile home park on Soper’s
7 land. No time for performance was specified and there were numerous disagreements. Soper did
8 not supply electricity as he promised, nor did he transfer the land. Their last conversation was in
9 1977. Means sued Soper nine years later, on January 28, 1986, to recover what he had spent in
10 doing the work on the project. The jury found for Means, but the court reversed on the ground
11 that the six year contract statute of limitations had run because Mean’s cause of action accrued
12 when he unilaterally closed out a corporate bank account on January 2, 1980.

13 In State Department of Transportation v. Eighth Judicial Dist. Court, 133 Nev. Adv. Op.
14 70 (2017), the Court held that “in a discovery based cause of action, a plaintiff must use due
15 diligence in determining the existence of a cause of action.” In Bemis v. Estate of Bemis, 114
16 Nev. 1021, 1025, 967 P.2d 437, 440 (1998), the Court held that “We have previously applied the
17 discovery rule to contract actions, holding that an action for breach of contract accrues as soon as
18 the plaintiff *knows or should know* of facts constituting a breach.” Soper v. Means, 111 Nev.
19 1290, 1294, 903 P.2d 222, 224 (1995)

20 Nanyah knew that pursuant to Exhibit 2, the Rogich Trust had agreed to repay Nanyah its
21 investment and to confirm Nanyah’s membership in Eldorado. Just as Means did not sue Soper
22 for approximately nine years after their last conversation, Nanyah did not sue for more than eight
23 years after Exhibit 2 was executed. Except for Nanyah’s fraudulent transfer claims based on
24 2012 events, there is nothing alleged in Nanyah’s Complaint based on conduct or events after
25 October 30, 2008. During that period, Nanyah knew that Rogich Trust did not repay the
26 investment or confirm its membership in Eldorado. As in Soper, the statute of limitations was
27 running.

28 Nanyah is suing Rogich Defendants based on accrued claims. If the claims were not
 accrued there is no basis for Nanyah’s claims and except for the seventh claim of alleged

1 fraudulent transfer, Nanyah's claims should be dismissed for that reason.

2 Nanyah was shown as a Potential Claimant in Exhibit 2 dated October 30, 2008. See
3 *Exhibit 2*. Being a 'Potential Claimant' on that date fully supports October 30, 2008 as the
4 accrual date for Nanyah's claims. Furthermore, because of Nanyah's knowledge of Exhibit 2 and
5 his being a Potential Claimant, he had facts, as of October 30, 2008, that "would lead an ordinary
6 prudent person to investigate the matter further." It had "inquiry notice" which was also the
7 accrual date. Such facts do not need to pertain to precise legal theories Nanyah would ultimately
8 pursue. Winn v. Sunrise Hosp. & Medical Center, 128 Nev. 246, 252, 277 P.3d 458, 462 (2012);
9 Massey v. Litton, 99 Nev. 723, 728, 669 P.2d 248, 251 (1983). In Beazer Homes Nevada, Inc. v.
10 Eighth Judicial Dist. Court ex rel. County of Clark, 120 Nev. 575, 585, 97 P.3d 1132, 1138
11 (2004), the Court recognized that a cause of action accrued and the statute of limitations began to
12 run when a litigant discovers, or reasonably should have discovered, facts giving rise to an action.
13 Peterson v. Bruen, 106 Nev. 271, 274, 792 P.2d 18, 20 (1990); Bemis v. Estate of Bemis, 114
14 Nev. 1021, 1025, 967 P.2d 437, 440 (1998). Clearly Harlap recognized he had accrued claims.
15 He testified he had potential claims against "Sig Rogich, his family foundation, to the best of my
16 understanding, Teld, which is Eliades and any other person or entity...that is mentioned in my
claim." *Exhibit 3*, at 83:19-25.

17 Mr. Harlap knew in 2008 that Exhibit 2 had been breached. Clearly the accrual date for
18 Nanyah's claims was October 30, 2008. Furthermore, Nanyah was a Potential Claimant under the
19 Purchase Agreement and had inquiry notice at that time that required it to investigate what claims
20 it had.

21 **C. NANYAH'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS**

22 The following is information concerning the application of Nevada Statutes of
23 Limitations, and other facts with respect to Nanyah's claims.

24 **FIRST CLAIM**

25 Nanyah's First Claim is a claim for breach of contract. The applicable statute of
26 limitations is NRS 11.190(1)(b) which requires an action to be brought within 6 years from its
27 accrual. As the accrual date is October 30, 2008 and the action was commenced on November 4,
28 2016, the claim is barred by NRS 11.190 (1)(b) and should be dismissed.

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1 **FOURTH CLAIM**

2 Nanyah's Fourth Claim is for Intentional Interference with Contract. Nanyah alleges that
3 Sigmund Rogich, Teld, Peter Eliades and the Eliades Trust "performed intentional acts intended
4 or designed to disrupt Nanyah's contractual rights arising out of these contracts." Complaint at
5 Para. 112.

6 In 2009, the Nevada Supreme Court ruled that claims for intentional interference with
7 contract are claims for injury to personal property and subject to a three year statute of
8 limitations. Stalk v. Mushkin, 125 Nev. 21, 26, 27, 199 P.3d 838, 841 (2009)

9 "Because we have determined that business interests are personal
10 property, we conclude that intentional interference with these business
11 interests are actions for taking personal property and not actions for
12 injuries to a person. *See Clark*, 181 N.W. 2d at 216 (concluding that a
13 claim for interference in business relationships was 'fundamentally
proprietary in character although incidental injuries may have been of a
different nature.'). Thus, we conclude that intentional interference with
business interests are subject to the three-year statute of limitations set
forth in NRS 11.190 (3)(c)."

14 Accordingly, because the Fourth Claim was filed 8 years after it accrued, it is barred by
15 the 3 year statute of limitations NRS 11.190(3)(c). Nanyah's Fourth Claim should be dismissed.

16 **FIFTH CLAIM**

17 Nanyah's Fifth Claim is for Constructive Trust. It alleges that the Eliades Trust assisted
18 the Rogich Trust in transferring its Eldorado membership to the Eliades Trust for the purpose of
19 not honoring obligations owed to Nanyah and that the Court should impose a constructive trust
20 for all profits improperly acquired. There is no statute of limitations with respect to a
21 constructive trust. Thus the 4 year provision of NRS 11.220 is applicable. As Nanyah's
22 constructive trust claim was filed in November 2016, more than 4 years after its accrual on
October 30, 2008, it is barred by NRS 11.220 and should be dismissed.

23 Furthermore, "imposition of a constructive trust requires: '[that] a confidential
24 relationship exists between the parties...' Waldman v. Maini, 124 Nev. 1121, 1131, 195 P.3d
25 850, 857 (2008); Locken v. Locken, 98 Nev. 369, 372, 650 P.2d 803, 805 (1982). Mr. Harlap
26 testified there was no relationship between Nanyah or any of the defendants. *Exhibit 3* at 141:16-
27 148:6. Thus, because there was no confidential relationship between Nanyah and the Eliades
28 Trust or Peter Eliades, Nanyah's Fifth Claim should be dismissed.

SIXTH CLAIM

Nanyah's Sixth Claim against all Defendants is labelled "conspiracy." It alleges that "Defendants, by acting in consort, intended to accomplish an unlawful objective in deceiving and depriving Nanyah from its expectations and financial benefits in being a member of Eldorado" Emphasis added, Complaint at Para. 121. Actually, acting in concert resembles the tort of civil conspiracy. Dow Chemical Co. v. Mahlum, 114 Nev. 1468, 1488, 970 P.2d 98, 112 (1998). There is no statute of limitations for acting in concert or civil conspiracy and the four year statute for actions not provided for, NRS 11.220 is applicable. As the claim was not filed within four years after its accrual, it is barred by the statute of limitations and should be dismissed.

Both the tort of concert of action and civil conspiracy require a plaintiff to prove an agreement between the tort feorsors showing their intent to accomplish an unlawful objective for the purpose of harming Nanyah. *Id* at 1489, Eikelberger v. Tolotti, 96 Nev. 525, 528, 611 P.2d 1086, 1088 (1980). Acting in concert requires that the conduct of each tort feor be in itself, tortious. Dow Chemical Co. v. Mahlum, 114 Nev. 1468, 1489, 970 P.2d 98, 112 (1998). "Parties are acting in concert when they act in accordance with an agreement to act in a particular line of conduct or to accomplish a particular result. The agreement need not be expressed in words and may be implied and understood to exist from the conduct itself. Whenever two or more persons commit tortious acts in concert, each becomes subject to liability for the acts of each other, as well as for his own acts." Restatement (Second) of Torts §876 (1979).

Interrogatory No. 26 of Defendants' Interrogatories to Nanyah was directed to Nanyah's acting in concert allegation. Interrogatory No. 26 reads: "Paragraph 121 of the Complaint alleges that defendants 'acting in concert, intended to accomplish an unlawful objective in deceiving and depriving Nanyah from its expectations and financial benefits in being a member of Eldorado.' Which defendants acted in concert? What did each do and when did they do it?"

Nanyah's response is 16 pages long and consists of conclusions and hearsay. Nothing in the response shows that any Defendant committed a tortious act. See Nanyah's Response to Interrogatory No. 26 attached as *Exhibit 8*. There is no evidence that the Defendants agreed by concerted action that they intended to accomplish an unlawful object for the purpose of harming Nanyah. Accordingly, there is no tort of concerted action and the Sixth Claim should be

1 dismissed.

2 **SEVENTH CLAIM**

3 Nanyah's Seventh Claim alleges the Rogich Trust transferred its membership interest in
4 Eldorado to the Eliades Trust with actual intent to hinder, delay or defraud Nanyah of its interest
5 in Eldorado. Complaint at Para. 124-126. The Complaint alleges, upon information and belief,
6 that "on or about August or September of 2012, Teld and Rogich Trust entered into a new
7 agreement whereby Rogich Trust agreed to forfeit its 40% membership interest in Eldorado
8 allegedly in exchange for the sum of \$682,080, to the Eliades Trust. Nanyah is informed and
9 believes those documents were backdated to January 1, 2012, for some reason that is yet
10 unknown to Nanyah." Complaint at Para. 70.⁴

11 The Membership Interest Assignment Agreement dated January 1, 2012, is not an exhibit
12 to the Complaint. It is *Exhibit 7* to this Motion. It provides in Paragraph 1 that: "Rogich hereby
13 transfers and conveys the Membership Interest including all of his rights, title and interest of
14 whatever kind or nature in the Membership Interest to Eliades, and Eliades hereby acquires the
15 Membership Interest from Rogich, upon receipt of the Consideration (as defined here below) at
16 closing." *Exhibit 7* provides in paragraph 4 that the Closing "shall be consummated upon the
17 execution of this Agreement, the payment of consideration as herein stated and the delivery of a
18 Satisfaction of Promissory Note and release of security to Teld." The consideration of \$682,080
19 from Peter Eliades to Rogich (a check dated August 16, 2012) and the Satisfaction of Promissory
20 Note and Release of Security are attached as *Exhibits 9* and *10*.

21 Mr. Harlap testified he did not know when the interest was transferred nor when he found
22 out about it. *Exhibit 3*, at 179:11-181:2.

23 NRS 112.230(1)(a) provides as follows:

- 24 "1. A claim for relief with respect to a fraudulent transfer or
25 obligation under this chapter is extinguished unless action is
26 brought:
(a) Under paragraph (a) of subsection 1 of NRS 112.180, within 4
years after the transfer was made or the obligation was incurred
or, if later, within 1 year after the transfer or obligation was or
could reasonably have been discovered by the claimant."

27 ⁴ *Exhibits 2, 4, 5* and *6* contain the effective date of October 30, 2008. It is not unusual when a
28 party sells or transfers an interest to make the agreement effective as of an earlier date, like
January 1, for tax and other purposes.

1 NRS 112.230(1)(a) provides for claim extinguishment unless the action is brought within
2 4 years after the transfer was made or the obligation was incurred. According to the Complaint
3 and the Membership Interest Assignment Agreement between the Rogich Trust and the Eliades
4 Survivor Trust (*Exhibit 7*) the transfer occurred no later than September 2012. As this action was
5 not commenced until November 4, 2016, it was more than 4 years after the transfer.

6 The second clause of 112.230(1)(a) provides an additional period of 1 year, if, within that
7 1 year, the transfer or obligation was or could reasonably have been discovered by the claimant.
8 Nanyah admits it learned of the transfer in 2012. Complaint at Para. 83. Thus, Nanyah's Seventh
9 Claim for fraudulent transfer was extinguished because the action was not brought within 4 years
10 after the transfer was made or the obligation was incurred, and the additional one year period is
11 inapplicable. Therefore the claim should be dismissed.

12 Nanyah's Seventh Claim alleges the Rogich Trust's transfer to the Eliades Trust was made
13 with the actual intent to hinder, delay or defraud Nanyah. NRS 112.180 sets forth 11 factors that
14 could be considered in determining actual intent to hinder, delay or defraud. See *In Re Gillissie*,
15 215 B.R. 370, 374, 375 U.S. Bank. Court, N.D. Ill, Eastern Division (1997). Attached as *Exhibit*
16 *11* is the Declaration of Defendant Sigmund Rogich ("Rogich Declaration") in which he,
17 individually, and as Trustee of the Rogich Trust, responds to the 11 factors. Each factor is
18 responded to positively and demonstrates that Mr. Rogich had no improper intent with respect to
19 the transfer. See *Exhibit 11*.

20 Nanyah has the burden of proving that the Rogich Trust had a specific intent to hinder,
21 delay or defraud in transferring his Eldorado interest to the Eliades Survivor Trust. *Id* at 375;
22 *Lindholm v. Holtz*, 581 N.E.2d 860, 863 (1998). The Rogich Declaration states that the transfer
23 of the 40% membership interest from the Rogich Trust to the Eliades Survivor Trust was made in
24 good faith and that he had no intent to hinder, delay or defraud Nanyah or anyone else.

25 There does not appear to be any evidence whatsoever to prove Nanyah's allegation that
26 the transfer was made with the actual intent to hinder, delay or defraud Nanyah. Accordingly,
27 Nanyah's Seventh Claim should be dismissed.
28

1 **EIGHTH CLAIM**

2 Nanyah's Eighth Claim is a claim for Declaratory Relief under NRS 30.030 and 30.040
3 regarding Nanyah's rights and obligations with respect to its alleged investment into Eldorado.
4 There is no statute of limitations, but because it concerns a contract it is therefore governed by
5 NRS 11.190(1)(b), the six year statute of limitations applicable to contracts. Because the claim
6 was not filed within six years after the accrual, it is barred by NRS 11.190(1)(b) and should be
7 dismissed.

8 Nanyah's claim alleges in Paragraph 132, an existing current controversy between Nanyah
9 and the Defendants. It does not allege what the current controversy is. The claim doesn't state
10 which of the six defendants is concerned with such unspecified controversy. In Paragraph 133 it
11 alleges that it is "entitled to seek" declaratory relief determining the amount of its membership
12 interest and/or the amounts owed to it "in the event a membership is not sought and/or obtained."
13 That is an unintelligent non request for declaratory relief.

14 Paragraph 135 is the only allegation that seeks declaratory relief and such relief is
15 obviously not obtainable. That paragraph seeks only a declaration of Nanyah's rights "as
16 contained in the various agreements referenced herein." The right to declaratory relief does not
17 and is not intended to include the right to submit agreements to the Court with the request that the
18 court tell the plaintiff what its rights are under the agreements. That is not the required current
19 judicial controversy.

20 Nanyah's Eighth Claim makes no sense. It should be dismissed.

21 **NINTH CLAIM**

22 Nanyah's Ninth Claim is for Specific Performance of Agreements allegedly "vesting
23 Nanyah with a membership interest in Eldorado." As alleged contracts are involved, the six year
24 statute of limitations NRS 11.190(b) is the applicable statute. Because the action was not filed
25 within six years of its accrual, the claim is barred and should be dismissed.

26 Nanyah alleges "the terms of the various contracts are clear, definite and certain."
27 Complaint at Para. 137. Nevada requires a specific performance claim to be supported by
28 contract terms that are definite and certain. Serpa v. Darling, 107 Nev. 299, 305, 810 P.2d 778,
782 (1991), Mayfield v. Koroghli, 124 Nev. 343, 351, 189 P. 3d 362, 367 (2008).

1 Not only does Nanyah not set forth any definite and certain provisions in the agreements
2 to support specific performance; there is no provision in any agreement providing for Nanyah to
3 have a membership interest in Eldorado. Moreover, Paragraph 47 of the Complaint alleges that
4 the membership agreements state that the "Rogich Trust is currently acquiring the ownership"
5 interest of Nanyah. That is totally inconsistent with any alleged claim that the contract definitely
6 provided clear, definite and certain terms for vesting Nanyah with an Eldorado interest.

7 Accordingly Nanyah's Ninth Claim should be dismissed.

8 **V. CONCLUSION**

9 Based upon the foregoing, the Rogich Defendants respectfully request that this Court enter
10 Summary Judgment dismissing Nanyah's nine claims.

11 DATED this 23 day of February, 2018.

12
13 **FENNEMORE CRAIG, P.C.**

14
15 By: 

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24 *and Imitations, LLC*
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that a copy of the **MOTION FOR SUMMARY JUDGMENT** was served upon the following person(s) either by electronic transmission through the Wiznet system pursuant to NEFCR 9, NRCP 5(b) and EDCR 7.26 or by mailing a copy to their last known address, first class mail, postage prepaid for non-registered users, on this 23rd day of February, 2018 as follows:

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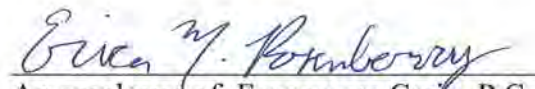
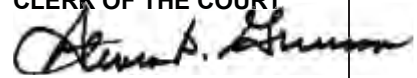

An employee of Fennemore Craig, P.C.

EXHIBIT 4

EXHIBIT 4



JMSJ (CIV)

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Attorneys for Defendants PETE ELIADES, THE
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TELD, LLC and ELDORADO HILLS, LLC

DISTRICT COURT
CLARK COUNTY, NEVADA

CARLOS A. HUERTA, an individual;
CARLOS A. HUERTA as Trustee of THE
ALEXANDER CHRISTOPHER TRUST, a
Trust established in Nevada as assignee of
interests of GO GLOBAL, INC., a Nevada
Corporation; NANYAH VEGAS, LLC, A
Nevada limited liability company,

Plaintiffs,

vs.

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,

Defendants.

NANYAH VEGAS, LLC, a Nevada limited
liability company,

Plaintiff,

vs.

TELD, LLC, a Nevada limited liability
company; PETER ELIADES, individually and
as Trustee of The Eliades Survivor Trust of
10/30/08; SIGMUND ROGICH, individually
and as Trustee of The Rogich Family
Irrevocable Trust; IMITATIONS, LLC, a
Nevada limited liability company; DOES I-X;
and/or ROE CORPORATIONS I-X, inclusive,

Defendants.

Case No. A-13-686303-C
Dept. No. XXVII

**DEFENDANTS PETER ELIADES,
INDIVIDUALLY AND AS TRUSTEE OF
THE ELIADES SURVIVOR TRUST OF
10/30/08, ELDORADO HILLS, LLC,
AND TELD, LLC'S JOINDER TO
MOTION FOR SUMMARY JUDGMENT**

Hearing Date: 3-28-18
Hearing Time: 10:00 A.M.

CONSOLIDATED WITH:

Case No. A-16-746239-C

**DEFENDANTS PETER ELIADES, INDIVIDUALLY AND AS TRUSTEE OF THE
ELIADES SURVIVOR TRUST OF 10/30/08, ELDORADO HILLS, LLC, AND TELD, LLC’S
JOINDER TO MOTION FOR SUMMARY JUDGMENT**

Pursuant to N.R.C.P. 56 and EDCR 2.20(d), Defendants Peter Eliades, individually and as Trustee of The Eliades Survivor Trust of 10/30/08, Eldorado Hills, LLC (“Eldorado”), and Teld, LLC (collectively, the “Eliades Defendants”) hereby join in Sigmund Rogich, individually and as Trustee of The Rogich Family Irrevocable Trust, and Imitations, LLC’s (collectively, the “Rogich Defendants”) Motion for Summary Judgment (the “Motion for Summary Judgment”). This Joinder is based on the following Memorandum of Points and Authorities and any oral argument heard by the Court.

DATED this 5th day of March, 2018.

BAILEY ♦ KENNEDY

By: /s/ Joseph A. Liebman
DENNIS L. KENNEDY
JOSEPH A. LIEBMAN

Attorneys for Defendants
PETE ELIADES, THE ELIADES
SURVIVOR TRUST OF 10/30/08, TELD,
LLC and ELDORADO HILLS, LLC

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The claims for relief in Nanyah Vegas, LLC’s (“Nanyah”) November 4, 2016 Complaint (the “Second Lawsuit”) are levied against the Rogich Defendants and the Eliades Defendants, with little or no explanation distinguishing between the two. Thus, the arguments in the Motion for Summary Judgment demand dismissal of not just the Rogich Defendants, but the Eliades Defendants as well. Accordingly, the Eliades Defendants hereby join in any and all arguments asserted by the Rogich Defendants in their Motion for Summary Judgment.

However, there is one remaining claim that was asserted solely against one of the Eliades Defendants. Specifically, Nanyah asserted a claim for unjust enrichment against Eldorado in its July 31, 2013 lawsuit (the “First Lawsuit”).¹ Nanyah’s unjust enrichment claim was previously dismissed by this Court via summary judgment. The Nevada Supreme Court reversed and remanded, determining that there were questions of fact relating to accrual of the unjust enrichment claim. Since that time, Nanyah’s allegations in the Second Lawsuit and additional discovery (*i.e.*, the deposition of Nanyah’s principal) have indisputably confirmed that Nanyah’s unjust enrichment claim accrued in December of 2007, or at the latest, October of 2008. Because Nanyah’s First Lawsuit was not filed until July 31, 2013, the four year statute of limitations in NRS 11.190(2)(c) bars the claim.

II. STATEMENT OF FACTS/PROCEDURAL HISTORY

On July 31, 2013, Nanyah sued Eldorado in the First Lawsuit for unjust enrichment.² Nanyah alleged that “in the years 2006 and 2007, Plaintiffs, Ray and Nanyah respectively invested \$1,783,561.60, in Eldorado, and were entitled to their respective membership interests.”³ Nanyah also alleged that it was entitled to reimbursement of those funds.⁴ On October 21, 2013, Nanyah filed a First Amended Complaint, omitting Ray as a Plaintiff. For all intents and purposes, Nanyah’s

¹ Carlos Huerta, individually and as Trustee of The Alexander Christopher Trust, Go Global, Inc., and The Ray Family Trust were also Plaintiffs in the First Lawsuit. Their claims have since been dismissed for varying reasons.

² The remaining Eliades Defendants (Eliades, the Eliades Trust, and Teld) were not parties to the First Lawsuit.

³ Compl., ¶ 12, filed July 31, 2013.

⁴ *Id.*, ¶ 15.

1 allegations against Eldorado remained the same, although it clarified that Nanyah's contribution to
2 Eldorado was \$1,500,000.00.⁵

3 On July 25, 2014, Eldorado moved for summary judgment, arguing, *inter alia*, that the unjust
4 enrichment claim was time-barred.⁶ This Court agreed and entered summary judgment in favor of
5 Eldorado on Nanyah's unjust enrichment claim.⁷ The Nevada Supreme Court later reversed the SJ
6 Order.⁸ In sum, the basis for the Court's Reversal Order was as follows:

7 Appellant's claim for unjust enrichment did not accrue until Eldorado
8 Hills retained \$1.5 million under circumstances where it was inequitable
9 for Eldorado Hills to do so. As Eldorado Hills failed to demonstrate that
10 no genuine issues of material fact remain regarding whether the
11 limitations period on appellant's unjust enrichment claim commenced
12 when Eldorado Hills received the \$1.5 million *or at a later date when
Eldorado Hills allegedly failed to issue a membership interest to
appellant or repay the money as a loan*, the district court erred in
granting summary judgment based on the expiration of the statute of
limitation.⁹

13 Following remand, on November 4, 2016, Nanyah filed the Second Lawsuit.¹⁰ Nanyah made
14 numerous factual allegations in its Complaint, all of which focus on the theory that Eldorado and its
15 principals at the time (*i.e.*, Carlos Huerta and Sig Rogich) did not issue a membership interest *in
16 December of 2007* in exchange for Nanyah's \$1,500,000.00 investment. Specifically, Nanyah
17 alleged as follows:

- 18 ➤ "Although Eldorado received the foregoing investment[] from Nanyah..., *Eldorado failed to
19 properly issue membership interests reflective of such investment[] to Nanyah....*"¹¹
20 ➤ The defendants, and each of them, breached the terms of the foregoing agreements by,
21 among other things: *failing to provide Nanyah a membership interest in Eldorado.*"¹²

22 ⁵ First. Am. Compl., ¶ 15, filed Oct. 21, 2013.

23 ⁶ See generally Mot. for Part. Summ. J., filed July 25, 2014.

24 ⁷ Order Granting Partial S. Judg. (the "SJ Order"), filed Oct. 1, 2014.

25 ⁸ February 12, 2016 Order of Reversal and Remand (the "Reversal Order"), attached as Exhibit 1.

26 ⁹ Ex. 1, p. 2 (citations omitted) (emphasis added).

27 ¹⁰ The Second Lawsuit was ultimately consolidated with the First Lawsuit. (Notice of Consolidation, filed April
5, 2017.)

28 ¹¹ First. Am. Compl., ¶ 20, filed Oct. 21, 2013 (emphasis added).

¹² *Id.* ¶ 92(a) (emphasis added).

- 1 ➤ “The defendants’ acts intended to and did accomplish the wrongful objective in deceiving
2 and depriving Nanyah of its expectations and financial benefits in *investing in Eldorado’s*
3 *ownership....*”¹³
4 ➤ “Nanyah is entitled to specific performance...*vesting Nanyah with a membership interest in*
5 *Eldorado as detailed herein.*”¹⁴

6 Although it was unclear to the Nevada Supreme Court in early 2016 whether Nanyah’s claim was
7 based on Eldorado’s alleged failure to *concurrently* issue a membership interest in exchange for a
8 \$1,500,000.00 investment or Eldorado’s alleged failure to pay back a \$1,500,000.00 loan *at a later*
9 *time*, it became clear upon the filing of the Second Lawsuit that Eldorado’s alleged wrongful act was
10 based on the former—not the latter.

11 To the extent there remained any doubt, the deposition of Yoav Harlap, Nanyah’s sole
12 principal, confirmed that his unjust enrichment claim is solely based on Eldorado’s supposed failure
13 to *concurrently* issue a membership interest in exchange for its \$1,500,000.00 investment.
14 Specifically, Harlap provided the following testimony:

- 15 ➤ “In very simple terms, *I invested in Eldorado Hills. I am supposed to be part owner of*
16 *Eldorado Hills.*”¹⁵
17 ➤ “I was assuming that Carlos Huerta will register my rights properly with his partners, Sig
18 Rogich and whoever else....”¹⁶
19 ➤ “I sent the money at the time. As far as I recall, *it was supposed to be registered properly.*”¹⁷
20 ➤ “*Nanyah’s rights were 1.5 million of investment back to whenever it was invested that was*
21 *supposed to be converted into equity....*”¹⁸

24 ¹³ *Id.*, ¶ 106 (emphasis added).

25 ¹⁴ *Id.*, ¶ 140 (emphasis added).

26 ¹⁵ Ex. 3 to Mot. for Summ. J., 71:13-15 (emphasis added).

27 ¹⁶ *Id.*, 72:10-12.

28 ¹⁷ *Id.*, 125:21-22 (emphasis added).

¹⁸ *Id.*, 170:6-8 (emphasis added).

III. ARGUMENT

A. An Unjust Enrichment Claim Accrues at the Time it Becomes Inequitable to Retain the Alleged Benefit, Regardless of Plaintiff’s Actual or Constructive Knowledge.

As recognized by the Nevada Supreme Court in its Reversal Order, NRS 11.190(2)(c) is the relevant statute of limitations for an unjust enrichment claim—“[a]n action upon a contract, obligation or liability not founded upon an instrument in writing.”¹⁹ Unlike numerous other claims for relief contained within the same chapter, the Nevada Legislature omitted any such discovery rule from that particular statute of limitations. *Compare with* NRS 11.190(2)(d) (“...but the cause of action shall be deemed to accrue when the aggrieved party discovers, or by the exercise of due diligence should have discovered, the facts constituting the deceptive trade practice”); NRS 11.190(3)(d) (“...but the cause of action in such a case shall be deemed to accrue upon the discovery by the aggrieved party of the facts constituting the fraud or mistake.”).²⁰

The Nevada Supreme Court has not explicitly determined in a published opinion how or when an unjust enrichment claim accrues for the purposes of NRS 11.190(2)(c). The only guidance this Court has received is the Reversal Order.²¹ “Appellant’s claim for unjust enrichment did not accrue until Eldorado Hills retained \$1.5 million *under circumstances where it was inequitable for Eldorado Hills to do so.*”²² *This rule does not reference actual or constructive knowledge of the claim.* While the Nevada Supreme Court determined there were questions of fact regarding accrual of Nanyah’s unjust enrichment claim, those questions of fact involved whether Nanyah’s unjust enrichment claim was based on an investment or a loan, as that particular issue would dictate when it became inequitable for Eldorado Hills to retain the \$1,500,000.00 (immediately or when the loan

¹⁹ Ex. 1, p. 2.

²⁰ *See Dreyer-Lefevre v. Morissette*, 127 Nev. 1131, 373 P.3d 910, at *2 (July 1, 2011) (“[W]e note that while the Legislature has seen fit to expressly apply the discovery rule to other of causes of action, it is notably absent from NRS 11.190(4)(e). Therefore, we conclude that the discovery rule does not apply to a cause of action that NRS 11.190(4)(e) controls.”) (internal citations omitted).

²¹ The Reversal Order did cite an opinion discussing the discovery rule (*Oak Grove Inv’rs v. Bell & Gossett Co.*, 99 Nev. 616, 668 P.2d 1075 (1983)); however, that opinion did not involve an unjust enrichment claim. Additionally, the Reversal Order does not cite *Oak Grove* for the purpose of attributing a discovery rule to an unjust enrichment claim. Instead, it cites *Oak Grove* for the proposition that it is the movant’s burden on summary judgment to show when a particular claim accrues.

²² Ex. 1, p. 2 (emphasis added).

1 should have been paid back).²³

2 Other jurisdictions have squarely addressed the issue of when an unjust enrichment claim
3 accrues. For good reason, they do not include actual or constructive knowledge in their analysis.
4 *See, e.g., East-West, LLC v. Rahman*, 873 F.Supp.2d 721, 730 (E.D. Va. 2012) (“The statute of
5 limitations for unjust enrichment begins to run at the time the unjust enrichment occurred not when a
6 party ‘knew or should have known’ of the unjust enrichment.”) (citation omitted); *Farmers*
7 *Elevator Co. of Oakville, Inc. v. Hamilton*, 926 N.E.2d 68, 78 (Ind. Ct. App. 2010) (“We likewise
8 conclude that where a plaintiff seeks recoupment of money had and received based on payments
9 made to the defendant, his cause of action accrues at the time the payments are made irrespective of
10 his knowledge or discovery of injury.”); *News World Comm, Inc. v. Thompsen*, 878 A.2d 1218, 1223
11 (D.D.C. 2005) (“A claim for unjust enrichment accrues, however, when the enrichment becomes
12 unjust....”). Thus, this Court need not include actual or constructive knowledge in its accrual
13 analysis here.

14 **B. The Second Lawsuit and Additional Discovery Have Confirmed That Nanyah’s Unjust**
15 **Enrichment Claim is Based on an Alleged Failure to Issue a Membership Interest.**

16 As explained above, the Nevada Supreme Court could not determine whether Nanyah’s
17 \$1,500,000.00 payment was an investment or a loan. Thus, it remanded the case to this Court in
18 order to make that determination. Nanyah’s Complaint in the Second Lawsuit shows that its
19 \$1,500,000.00 payment was *not* a loan. To be sure, there are no details regarding interest rate,
20 interest payments, maturity date, etc. On the contrary, Nanyah’s Complaint clearly maintains that
21 Nanyah should have received a membership interest in Eldorado *at the time* it invested
22 \$1,500,000.00. When Eldorado (*i.e.*, Huerta) allegedly failed to issue that membership interest to
23 Nanyah, it became inequitable to retain Nanyah’s \$1,500,000.00.²⁴ Thus, Nanyah’s claim accrued in
24 December of 2007.

25 ²³ *Id.* (“As Eldorado Hills failed to demonstrate that no genuine issues of material fact remain regarding whether
26 the limitations period on appellant’s unjust enrichment claim commenced when Eldorado Hills received the \$1.5 million
27 or at a later date when Eldorado Hills allegedly failed to issue a membership interest to appellant or repay the money as a
loan, the district court erred in granting summary judgment based on the expiration of the statute of limitation.”).

28 ²⁴ As explained in prior briefing, Eldorado did not retain the \$1,500,000.00. Huerta immediately paid it to himself
(*i.e.*, Go Global) as a “consulting fee.”

1 One particular jurisdiction (New York) has analyzed the accrual of an unjust enrichment
2 claim based upon very similar facts to those alleged here. Specifically, in *Elliott v. Quest Comm.*
3 *Corp.*, an investor wired \$50,000 for the purchase of preferred stock in 1995. *Id.*, 25 A.D.3d 897,
4 897 (N.Y. App. Div. 2006). The company never issued the stock certificate evidencing the
5 investment. *Id.* The investor did not inquire further until 2002, at which time he was told there was
6 no record of his investment. *Id.* He sued for unjust enrichment in 2003. *Id.*

7 Just like the Reversal Order, the court recognized that an unjust enrichment claim accrues
8 “upon the occurrence of the wrongful act giving rise to a duty of restitution.” *Id.* at 898 (citations
9 omitted). The Court reasoned that the accrual date was when the money was wired and the stock
10 certificate was not issued, *not* “**when the purported ownership interest was later repudiated.**” *Id.*
11 (emphasis added).

12 Similarly here, assuming Nanyah’s allegations are true, Eldorado’s retention of the
13 \$1,500,000.00 was wrongful when it (*i.e.*, Huerta) did not concurrently (or soon thereafter) issue a
14 membership interest to Nanyah in exchange for payment. In December of 2007 and early 2008,
15 Nanyah could have sued regarding Eldorado’s (*i.e.*, Huerta’s) alleged failure to issue its membership
16 interest. **At a minimum**, the claim accrued by the time Nanyah was listed as “potential claimant” in
17 October of 2008. If Nanyah did not have a claim at that time, why would it be listed as a “potential
18 claimant?”²⁵ Either way, the claim is barred by NRS 11.190(2)(c).²⁶

19 ///

20 ///

21 ///

22 ///

23 ///

24
25 ²⁵ Ex. 2 to Mot., Recital A; Exhibit A.

26 ²⁶ Even assuming that NRS 11.190(2)(c) requires actual or constructive knowledge, it strains credulity to believe
27 that Nanyah was not aware that it did not receive its membership interest in 2007 and 2008. It would have received K-
28 1’s each and every year if it were a member. It would have received other evidence of its ownership interest. Even if
Nanyah did not know it did not receive a membership interest, for the reasons set forth in the Motion for Summary
Judgment, it certainly **should have** known as a “sophisticated investor.” (*See* Mot. for Summ. J., 4:3, filed Feb. 23,
2018.)

IV. CONCLUSION

For the foregoing reasons, as well as the reasons contained within the Motion for Summary Judgment, summary judgment should be entered against Nanyah and in favor of the Eliades Defendants with respect to any and all claims against the Eliades Defendants.

DATED this 5th day of March, 2018.

BAILEY ♦ KENNEDY

By: /s/ Joseph A. Liebman
DENNIS L. KENNEDY
JOSEPH A. LIEBMAN

Attorneys for Defendants
PETE ELIADES, THE ELIADES
SURVIVOR TRUST OF 10/30/08, TELD,
LLC and ELDORADO HILLS, LLC

CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 5th day of March, 2018, service of the foregoing **DEFENDANTS PETER ELIADES, INDIVIDUALLY AND AS TRUSTEE OF THE ELIADES SURVIVOR TRUST OF 10/30/08, ELDORADO HILLS, LLC, AND TELD, LLC'S JOINDER TO MOTION FOR SUMMARY JUDGMENT** was made by mandatory electronic service through the Eighth Judicial District Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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TRUST, and GO GLOBAL, INC.

/s/ Sharon L. Murnane
Employee of BAILEY❖KENNEDY

EXHIBIT 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

NANYAH VEGAS, LLC, A NEVADA
LIMITED LIABILITY COMPANY,

Appellant,

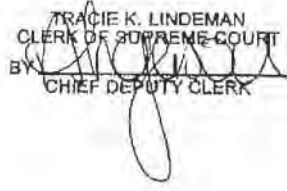
vs.

SIG ROGICH A/K/A SIGMUND
ROGICH AS TRUSTEE OF THE
ROGICH FAMILY IRREVOCABLE
TRUST; AND ELDORADO HILLS, LLC,
A NEVADA LIMITED LIABILITY
COMPANY,
Respondents.

No. 66823

FILED

FEB 12 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court final judgment in a contract action. Eighth Judicial District Court, Clark County; Nancy L. Alf, Judge.

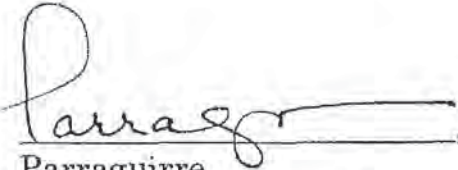
Appellant argues that the district court erred by granting summary judgment in favor of respondent Eldorado Hills, LLC, based on a finding that appellant's unjust enrichment claim was time-barred under the four-year statute of limitations. According to appellant, the statute of limitations did not begin to run until appellant became aware that it would not be repaid and that it owned no interest in Eldorado Hills. Having considered the parties' arguments and appendices, we conclude that the district court erred in granting summary judgment on statute-of-limitations grounds. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (holding that this court reviews summary judgments de novo and that summary judgment is only appropriate if the pleadings and


other evidence on file, viewed in the light most favorable to the nonmoving party, demonstrate that no genuine issue of material fact remains in dispute and that the moving party is entitled to judgment as a matter of law); *Oak Grove Inv'rs v. Bell & Gossett Co.*, 99 Nev. 616, 623, 668 P.2d 1075, 1079 (1983) (placing the burden of demonstrating the absence of a genuine issue of material fact as to when a party discovered or should have discovered the facts underlying a claim on the party seeking summary judgment on statute-of-limitations grounds), *disapproved on other grounds by Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000).

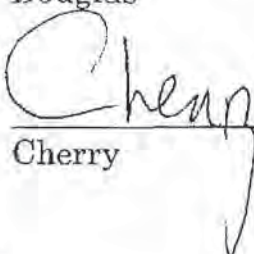
Appellant's claim for unjust enrichment did not accrue until Eldorado Hills retained \$1.5 million under circumstances where it was inequitable for Eldorado Hills to do so. *See Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev., Adv. Op. 35, 283 P.3d 250, 257 (2012) ("Unjust enrichment exists when the plaintiff confers a benefit on the defendant, the defendant appreciates such benefit, and there is acceptance and retention by the defendant of such benefit under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof"). As Eldorado Hills failed to demonstrate that no genuine issues of material fact remain regarding whether the limitations period on appellant's unjust enrichment claim commenced when Eldorado Hills received the \$1.5 million or at a later date when Eldorado Hills allegedly failed to issue a membership interest to appellant or to repay the money as a loan, the district court erred in granting summary judgment based on the expiration of the statute of limitation. *Oak Grove Inv'rs*, 99 Nev. at 623, 668 P.2d at 1079; *see* NRS 11.190(2)(c) (setting a four year

statute of limitation for "[a]n action upon a contract, obligation or liability not founded upon an instrument in writing"). Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.


Parraguirre, C.J.

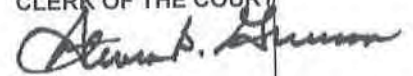

Douglas, J.


Cherry, J.

cc: Hon. Nancy L. Alf, District Judge
Ara H. Shirinian, Settlement Judge
McDonald Law Offices, PLLC
Fennemore Craig Jones Vargas/Las Vegas
Eighth District Court Clerk

EXHIBIT 5

EXHIBIT 5



1 RTRAN

2
3
4
5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7
8 CARLOS HUERTA,
9 Plaintiff,

CASE#: A-13-686303-C
DEPT. XXVII

10 vs.

11 ELDORADO HILLS LLC,
12 Defendant.

13 BEFORE THE HONORABLE NANCY L. ALLF, DISTRICT COURT JUDGE
14 WEDNESDAY, APRIL 18, 2018

15 **RECORDER'S PARTIAL TRANSCRIPT OF HEARING**
16 **ALL PENDING MOTIONS (RULING ONLY)**

17 APPEARANCES:

18 For the Plaintiff:

MARK G. SIMONS, ESQ.

19
20
21 For the Defendant:

JOSEPH A. LIEBMAN, ESQ.
SAMUEL S. LIONEL, ESQ.

22
23
24
25 RECORDED BY: BRYNN GRIFFITHS, COURT RECORDER

1 Las Vegas, Nevada, Wednesday, April 18, 2018

2
3 [Case called at 9:53 a.m. - argument not transcribed]

4 [Ruling began at 11:03 a.m.]

5 THE COURT: Thank you. This is the Defendant's motion
6 for sum -- summary judgment with a substantive joinder by the Third
7 Party Defendants. Plaintiff has done a countermotion for summary
8 judgment, an opposition, and a request for relief under 56(f).

9 Matter is submitted and the ruling is as follows. Given the
10 fact that the Supreme Court has already sent this back once on the
11 statute of limitations issue and has told me that there are issues of
12 fact that needs -- need to be determined. And given the fact that a
13 jury has been demanded, I'm going to deny almost all of the
14 Defendant's motion for summary judgment, except for two issues.

15 First, I find that the motion can be granted only with regard
16 to the fran -- fraudulent conveyance action and with regard to the
17 constructive trust. Because constructive trust relies on fraudulent
18 conveyance and if there is no cause of action that can lie, due to the
19 statute of limitations for fraudulent conveyance, the constructive
20 trust argument also fails.

21 The other issues are with regard to accrual of causes of
22 action. There are facts in dispute with regard to that. I'm going to
23 have to see the demeanor, the personal knowledge, the -- the
24 credibility of the witnesses on -- on all sides to determine that -- if
25 it's me, of a jury's entitled, the parties are entitled to a jury.

1 So the motion is granted only in those two small regards.
2 The Plaintiff's motion for summary judgment is denied, and the
3 Plaintiff's countermotion for relief under 56(f) is also denied. This
4 case goes back to 2013, and I know that there was an appeal that
5 would toll the five-year rule. But at this point, so long as you can
6 get your discovery done, I will get your trial done on that June trial
7 stack.

8 Were there -- Mr. Lionel to prepare the order because you
9 are successful on two causes of action. Were there any questions?

10 MR. SIMONS: What was your ruling on Nanyah's
11 countermotion?

12 THE COURT: On?

13 MR. SIMONS: Nanyah's countermotion for summary
14 judgment? Have you rendered that?

15 THE COURT: It is denied.

16 MR. SIMONS: Denied?

17 THE COURT: In all respects.

18 MR. SIMONS: Okay.

19 THE COURT: And the 56(f) is denied as well.

20 MR. SIMONS: Okay. With regard to the 56(f), since we're
21 doing discovery, and we'll have it completed, I'm assuming that's
22 without prejudice because there may be more facts to establish the
23 perfection.

24 THE COURT: If you have a May 15th discovery cutoff,
25 which is what you told me today, you have the right to -- to either

1 seek relief of that date, separately, I'm denying it today because you
2 told me you have a chance to get your discovery finished.

3 MR. SIMONS: Oh, I see what you're saying.

4 THE COURT: Or you could stipulate to extend that, but
5 I'm not going to extend your trial out any further. Both sides are
6 entitled to finality in this case.

7 MR. SIMONS: I -- I understand. I'm just saying it's
8 not -- your ruling is not with prejudice --

9 THE COURT: No.

10 MR. SIMONS: Because -- okay. The second component
11 is, may I request you advise us of what your trial calendar may be
12 like in October? There may be a need for us to continue the trial.

13 THE COURT: What I would suggest is that if you can
14 agree -- I saw in your early case conference you thought the -- we
15 had dispute on how long you thought the trial would take, and given
16 the consolidation, I understand that. I'm going to suggest that you
17 guys see if you can agree how long it will take, confirm with me
18 whether it's a jury trial or not, and give your availability say through,
19 I don't know, through the end of the year.

20 MR. SIMONS: Okay.

21 THE COURT: And then I'll make sure to get you set for
22 trial.

23 MR. SIMONS: I appreciate that.

24 THE COURT: And I can give you a firm setting rather than
25 keeping you on the June stack.

1 MR. SIMONS: That would be excellent because I have to
2 bring in clients from out of --

3 THE COURT: I assume everyone in this case is going to
4 have a very busy schedule.

5 MR. SIMONS: Yeah, true.

6 THE COURT: I want to accommodate the parties, the
7 witnesses and the counsel.

8 MR. SIMONS: True. Thank you very much.

9 THE COURT: Mr. Liebman, one more question?

10 MR. LIEBERMAN: Yeah, I'm a little confused about Mr.
11 Simons comment about the ruling being without prejudice. I mean,
12 obviously it's a summary judgment motion.

13 THE COURT: Well, I denied the 56(f).

14 MR. LIEBERMAN: Yes.

15 THE COURT: But, what I said is, you can stipulate to
16 extend discovery, but I won't change a trial.

17 MR. LIEBERMAN: I just want to specify --

18 THE COURT: Or you can --

19 MR. LIEBERMAN: -- with respect to granting the motion
20 on fraudulent transfer claim and the constructive trust claim, those
21 are with prejudice?

22 THE COURT: That's correct.

23 MR. LIEBERMAN: Okay.

24 MR. SIMONS: That -- that was the point. It should be
25 without prejudice given the fact that we're going to be conducting

1 discovery and I should have the opportunity to say look, here's the
2 evidence that they did not perfect. That's all I'm trying to reserve.

3 THE COURT: And so, I -- your objection is so noted for the
4 record. My ruling is that it's with prejudice.

5 Was there any last issue?

6 MR. LIONEL: No, Your Honor.

7 THE COURT: No. Thank you all, for your appearance.

8 MR. LIEBERMAN: Thank you, Your Honor.

9 THE COURT: And may I respectfully say, if you guys ever
10 have really long motions again, if you contact us, we'll
11 accommodate you to get them set, so that it's not on a -- on a
12 stacked calendar, and you can have all the time you need.

13 MR. LIEBERMAN: Will do, Your Honor. Thank you.

14 THE COURT: Thank you, both.

15 [Hearing concluded at 11:08 a.m.]

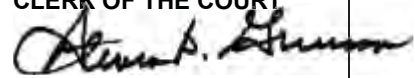
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20
21 ATTEST: I do hereby certify that I have truly and correctly transcribed the
22 audio/video proceedings in the above-entitled case to the best of my ability.

23 
24 Brynn Griffiths
25 Court Recorder/Transcriber

EXHIBIT 6

EXHIBIT 6



MSJD (CIV)

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Nevada Bar No. 1462

JOSEPH A. LIEBMAN
Nevada Bar No. 10125

BAILEY ♦ KENNEDY

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ELDORADO HILLS, LLC

DISTRICT COURT
CLARK COUNTY, NEVADA

CARLOS A. HUERTA, an individual;
CARLOS A. HUERTA as Trustee of THE
ALEXANDER CHRISTOPHER TRUST, a
Trust established in Nevada as assignee of
interests of GO GLOBAL, INC., a Nevada
Corporation; NANYAH VEGAS, LLC, A
Nevada limited liability company,

Plaintiffs,

vs.

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,

Defendants.

NANYAH VEGAS, LLC, a Nevada limited
liability company,

Plaintiff,

vs.

TELD, LLC, a Nevada limited liability
company; PETER ELIADES, individually and
as Trustee of The Eliades Survivor Trust of
10/30/08; SIGMUND ROGICH, individually
and as Trustee of The Rogich Family
Irrevocable Trust; IMITATIONS, LLC, a
Nevada limited liability company; DOES I-X;
and/or ROE CORPORATIONS I-X, inclusive,

Defendants.

Case No. A-13-686303-C
Dept. No. XXVII

(Hearing Requested)

**DEFENDANT ELDORADO HILLS,
LLC'S MOTION FOR SUMMARY
JUDGMENT**

CONSOLIDATED WITH:

Case No. A-16-746239-C

DEFENDANT ELDORADO HILLS, LLC'S MOTION FOR SUMMARY JUDGMENT

Pursuant to N.R.C.P. 56, Defendant Eldorado Hills, LLC ("Eldorado") respectfully moves the Court for summary judgment on Nanyah Vegas, LLC's ("Nanyah") unjust enrichment claim. First, Nanyah has explicitly agreed that the Rogich Trust was "solely responsible" for any claim it may assert for the repayment of its \$1,500,000.00. Second, Nanyah's equitable claim is barred because it had an adequate remedy at law against the Rogich Trust. Eldorado's Motion is based on the following Memorandum of Points and Authorities, the exhibits attached hereto, and any oral argument heard by the Court.

DATED this 22nd day of May, 2019.

BAILEY ♦ KENNEDY

By: /s/ Joseph A. Liebman
DENNIS L. KENNEDY
JOSEPH A. LIEBMAN

Attorneys for Defendant
ELDORADO HILLS, LLC

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On November 4, 2016, Nanyah sued numerous parties for breach of the October 30, 2008 Membership Interest Purchase Agreement (the "MIPA"), among other contracts.¹ Nanyah sued "as a third-party beneficiary of each agreement."² The following language is contained in the MIPA:

[The Rogich Trust] shall defend, indemnify, and hold [Teld] harmless from any and all the claims of Eddyline Investments, LLC, Ray Family Trust, *Nanyah Vegas, LLC* and Antonio Nevada, LLC, each of whom invested or otherwise advanced the funds, plus certain possible claimed accrued interest.

It is the current intention of [the Rogich Trust] that such amounts be confirmed or converted to debt, with no obligation to participate in capital calls or monthly payments, a pro-rata distribution at such time as the Company's real property is sold or otherwise disposed of. ***Regardless of whether this intention is realized, [the Rogich Trust]***

¹ Compl., Case No. A-16-746239-C, ¶¶ 85-99, filed Nov. 4, 2016.

² *Id.*, ¶¶ 45, 88.

*shall remain solely responsible for any claims by the above referenced entities set forth in this section above.*³

Under Nevada law as well as the law of many other jurisdictions, when Nanyah sued as a third-party beneficiary to the MIPA, *it agreed to and adopted the language above*. See, e.g., *Canfora v. Coast Hotels and Casinos, Inc.* 121 Nev. 771, 779, 121 P.3d 599, 604 (2005). In other words, Nanyah explicitly agreed that the Rogich Trust was “solely responsible” for Nanyah’s potential claim. Clearly, if the Rogich Trust is “solely responsible,” Eldorado cannot be responsible.

Further, under Nevada law as well as the law of many other jurisdictions, no party may pursue an equitable remedy if it has or had an adequate remedy at law. This Court has previously determined that Nanyah had an adequate contractual remedy against the Rogich Trust, which is only now precluded because of Nanyah’s noncompliance with NRS 163.120. Thus, as a matter of law, this Court must enter summary judgment in favor of Eldorado on Nanyah’s unjust enrichment claim.

II. STATEMENT OF UNDISPUTED FACTS

A. The Relevant History of Eldorado.

Eldorado was formed in 2005 for the purpose of owning and developing approximately 161 acres of land near Boulder City, Nevada. Eldorado was originally comprised of Go Global (100% owned by Huerta) and the Rogich Trust.⁴

In 2007, Carlos Huerta solicited Nanyah to invest. In December of 2007, Nanyah wired \$1,500,000.00, which eventually was deposited (temporarily) into Eldorado’s bank account.⁵ In October of 2008, approximately ten months later, Teld purchased a 1/3 interest in Eldorado for \$3,000,000.00. Concurrently, the Flangas Trust purchased a 1/3 interest in Eldorado for \$3,000,000.00, which was subsequently transferred to Teld when the Flangas Trust backed out of the deal. Because Teld ended up with a larger percentage of Eldorado than originally contemplated, it was later agreed that the Rogich Trust would re-acquire 6.67% of Eldorado from Teld. As a result of these transactions, Go Global (*i.e.*, Huerta) no longer owned an Eldorado membership interest, Teld

³ Oct. 30, 2008 Membership Interest Purchase Agreement, § 8(c)(i), attached as Ex. 1-B (emphasis added).

⁴ Summary Judgment Order, ¶ 1.

⁵ *Id.*, ¶ 2.

owned 60% of Eldorado, and the Rogich Trust owned 40% of Eldorado.⁶

B. The Relevant Agreements.

These transactions were memorialized in various written agreements. Nanyah was not included as a named signatory on the agreements—however, the agreements explicitly confirmed that the Rogich Trust agreed to be responsible for the repayment of Nanyah’s \$1,500,000.00 payment.⁷ In fact, the relevant agreements—in particular the MIPA—state that the Rogich Trust would be “*solely responsible*” for Nanyah’s claim.

➤ ***October 30, 2008 Purchase Agreement between Go Global, Huerta, and the Rogich Trust:***

- “[Go Global and Huerta], however, will not be responsible to pay the Exhibit A Claimants their percentage or debt. *This will be [the Rogich Trust’s] obligation, moving forward....*”⁸

➤ ***October 30, 2008 Membership Interest Purchase Agreement between the Rogich Trust, Teld, Go Global, and Huerta:***

- “It is the current intention of [the Rogich Trust] that such amounts be confirmed or converted to debt, with no obligation to participate in capital calls or monthly payments, a pro-rata distribution at such time as [Eldorado’s] real property is sold or otherwise disposed of. *Regardless of whether this intention is realized, [the Rogich Trust] shall remain solely responsible for any claims by the above referenced entities set forth in this section above.*”⁹
- “The ‘pro-rata distributions’ hereinabove referenced shall mean equal one-third shares pursuant to the ownership set forth in Section 3 above, provided, that any amounts owing to those entities set forth on Exhibit ‘D,’ or who shall otherwise claim an ownership interest based upon contributions or advances directly or indirectly to

⁶ *Id.*, ¶ 3.

⁷ *Id.*, ¶ 4.

⁸ October 30, 2008 Purchase Agreement, § 4, attached as Exhibit 1-A (emphasis added); *see also* Summary Judgment Order, ¶ 5(a)(ii).

⁹ October 30, 2008 Membership Interest Purchase Agreement, § 8(c)(i), attached as Exhibit 1-B (emphasis added); *see also* Summary Judgment Order, ¶ 5(b)(vii).

[Eldorado] made prior to the date of this agreement, *shall be satisfied solely by [the Rogich Trust]*.”¹⁰

➤ ***October 30, 2008 Amended and Restated Operating Agreement between the Rogich Trust, the Flangas Trust, and Teld:***

- “The Rogich Trust will retain a one-third (1/3rd) ownership interest in [Eldorado] (subject to certain possible dilution or other indemnification responsibilities *assumed by the Rogich Trust in the Purchase Documents*).”¹¹

C. **The Summary Judgment Order.**

On October 5, 2018, the Court entered summary judgment against Nanyah and in favor of the Eliades Defendants, dismissing each and every one of Nanyah’s claims against the Eliades Defendants.¹² For the purposes of this Motion, this Court’s Summary Judgment Order is particularly meaningful because the Court determined that Nanyah has an adequate contractual remedy at law for the return of its \$1,500,000.00. That remedy is against the Rogich Trust—not against Eldorado. Specifically, the Court found as follows:

- “The Rogich Trust *specifically agreed to assume* the obligation to pay Nanyah its percentage interest in Eldorado or to pay Nanyah its \$1,500,000 invested into Eldorado.”
- “Seller Go Global, however, will not be responsible to pay the Exhibit A claimants their percentage or debt. *This will be Buyer[] The Rogich Trust’s obligation.* The Exhibit A Claimants include Nanyah and its \$1,500,000.00 investment.”
- “[T]he Rogich Trust shall remain solely responsible for any claims by any of the above referenced entities set forth in this section above.”
- “[A]ny amounts owing to those entities set forth on Exhibit ‘D,’ or who shall otherwise claim an ownership interest based upon contributions or advances directly or indirectly to Eldorado made prior to the date of this agreement, *shall be satisfied solely by the Rogich Trust.*”

¹⁰ *Id.*, § 8(c)(ii) (emphasis added); *see also* Summary Judgment Order, ¶ 5(b)(viii).

¹¹ Am. and Restated Op. Agreement, Recital B, attached as Exhibit 1-C (emphasis added); *see also* Summary Judgment Order, ¶ 5(c)(i).

¹² The “Eliades Defendants” include Teld, Peter Eliades, and the Eliades Survivor Trust of 10/30/08.

- “The October 30, 2008, Purchase Agreement states that *the Rogich Trust specifically agreed to assume* the obligation to pay Nanyah its percentage or debt.”¹³

III. ARGUMENT

A. Legal Standard for Summary Judgment.

“Summary judgment is appropriate and ‘shall be rendered forthwith’ when the pleadings and other evidence on file demonstrate that no ‘genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.’” *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (quoting N.R.C.P. 56(c)). “[T]he non-moving party must, by competent evidence, produce specific facts that demonstrate the presence of a genuine issue for trial.” *Elizabeth E. v. ADT Sec. Sys. W., Inc.*, 108 Nev. 889, 892, 839 P.2d 1308, 1310 (1992). The non-moving party’s burden must be borne on each and every element of its claims for relief; “[w]here an essential element of a claim for relief is absent, the facts, disputed or otherwise, as to other elements are rendered immaterial and summary judgment is proper.” *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 446-47, 956 P.2d 1382, 1386 (1998).

B. Nanyah Has Agreed That the Rogich Trust is “Solely Responsible” for the Repayment of Its \$1,500,000.00.

Although Nanyah is not a party to the MIPA, *it is bound by its language as a matter of law because it decided to sue as a third-party beneficiary of that agreement.* As stated by the Nevada Supreme Court, “an intended third-party beneficiary is bound by the terms of a contract even if she is not a signatory.” *Canfora v. Coast Hotels and Casinos, Inc.* 121 Nev. 771, 779, 121 P.3d 599, 604 (2005).

Other jurisdictions are in complete accord.

- *Camp Ne’er Too Late, LP v. Swepi, LP*, 185 F.Supp.3d 517, 542 (M.D. Pa. 2016) (“‘Implicit adoption occurs when a party accepts benefits intended for third party beneficiary.’ ‘Courts will often find implicit adoption when a party who has received benefits of a contract then tries to avoid burdens imposed by the same contract.’”) (internal citations omitted).

¹³ See generally Summary Judgment Order, ¶¶ 4, 5(a)(ii), 5(b)(vii), 5(b)(viii), 7 (emphasis added).

- *Clearwater REI, LLC v. Boling*, 318 P.3d 944, 951 (Idaho 2014) (“‘[A] third-party beneficiary must comply with all the terms and provisions of an agreement to the same extent as they apply to the beneficiary.’”) (citation omitted);
- *NAMA Holdings, LLC v. Related World Market Center, LLC*, 922 A.2d 417, 431 (Del. Ch. Ct. 2007) (“Indeed, a court will not allow a third-party beneficiary to cherry-pick certain provisions of a contract which it finds advantageous in making its claim, while simultaneously discarding corresponding contractual obligations which it finds distasteful.”);
- *Benton v. Vanderbilt Univ.*, 137 S.W.3d 614, 618 (Tenn. 2004) (“‘Before the beneficiary may accept the benefits of the contract, he must accept all of its implied, as well as express, obligations.’ As we have explained, ‘if the beneficiary accepts, he adopts the bad as well as the good, the burden as well as the benefit.’”) (internal citations omitted);
- *Lankford v. Orkin Exterminating Co.*, 597 S.E.2d 470, 473 (Ga. Ct. App. 2004) (“Third-party beneficiaries under the contract ‘are bound by any valid and enforceable provisions of the contract in seeking to enforce their claims.’”) (citation omitted).

Nanyah decided to sue various parties as an intended third-beneficiary of the MIPA, which explicitly states that the Rogich Trust is “solely responsible” for the repayment of its \$1,500,000.00.¹⁴ Nanyah cannot attempt to reap the benefits under the MIPA by suing as a third-party beneficiary while ignoring its burdens. Once it sued under the MIPA, it explicitly agreed to and adopted the provision stating that the Rogich Trust was “solely responsible” for the repayment of its \$1,500,000.00. *See Harris Moran Seed Co., Inc. v. Phillips*, 949 So.2d 916, 931 (Ala. Ct. App. 2006) (“‘The law is clear that a third party beneficiary is bound by the terms and conditions of the contract **that it attempts to invoke.**’”) (citation omitted) (emphasis added); *LaSalle Inc. v. Int’l Broth. of Elec. Workers Local No. 665*, 336 S.Supp.2d 727, 729 (W.D. Mich. 2004) (“A third-party beneficiary **bringing a breach of contract claim** is bound by all of the terms and conditions of the contract that it invokes.”) (emphasis added). Clearly, if the Rogich Trust is “solely responsible,” Eldorado Hills is not responsible. Thus, as a matter of law, this Court must enter summary judgment

¹⁴ Ex. 1-B, § 8(c)(i).

in favor of Eldorado on Nanyah’s unjust enrichment claim.

C. **Nanyah’s Contractual Remedy Against the Rogich Trust Bars Its Equitable Claim for Unjust Enrichment Against Eldorado as a Matter of Law.**

Unjust enrichment is an equitable claim. *Wynn Las Vegas LLC v. Tofani*, No. 69936, 2017 WL 6541827, at *6 n. 7 (Nev. Ct. App. Dec. 14, 2017) (“An equitable claim like unjust enrichment requires no proof whatsoever of intent or state of mind; it’s a strict liability claim based solely on notions of equity.”); *see also generally Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc.*, 124 Nev. 272, 274, 182 P.3d 764, 766 (2008) (referring to unjust enrichment as an “equitable claim.”) “Nevada recognizes the general rule that an equitable claim, like unjust enrichment, is not available where the plaintiff has a full and adequate remedy at law.” *Small v. Univ. Med. Center of Southern Nev.*, 2016 WL 4157309, at *3 (D. Nev. Aug. 3, 2016) (citing *In re Wal-Mart Wage & Hour Emp’t Prac. Litig.*, 490 F. Supp. 2d 1091, 1125 (D. Nev. 2007) (citing *State v. Second Judicial Dist. Court in & for Washoe Cty.*, 241 P. 317, 322 (Nev. 1925))).

Other jurisdictions are in complete accord:

- *United States v. Bame*, 721 F.3d 1025, 1031 (8th Cir. 2013) (“[I]t is the existence of an adequate legal remedy that precludes unjust enrichment recovery.”) (interpreting Minnesota law);
- *Buckner v. Kennard*, 99 P.3d 842, 857 (Utah 2004) (“[T]he general rule is that equitable jurisdiction is precluded if the plaintiff has an adequate remedy at law and will not suffer substantial irreparable injury.”);
- *Delahunt v. Cytodyne Tech.*, 241 F.Supp.2d 827, 841 (S.D. Ohio 2003) (“The equitable claim of unjust enrichment fails when a legal remedy is available.”);
- *In re Managed Care Litig.*, 185 F.Supp.2d 1310, 1337 (S.D. Fla. 2002) (“It is blackletter law that ‘the theory of unjust enrichment is equitable in nature and is, therefore, not available where there is an adequate legal remedy.’”) (citation omitted).

This Court has determined—via the Summary Judgment Order—that Nanyah had an adequate contractual remedy against the Rogich Trust. Further, the subject of Nanyah’s contractual remedy against the Rogich Trust is synonymous with Nanyah’s unjust enrichment claim against

1 Eldorado—*i.e.*, the \$1,500,000.00 payment. Once this Court determined that there is a valid contract
2 obligating the Rogich Trust to Nanyah for the \$1,500,000.00 payment, Nanyah’s ability to seek
3 equitable relief was permanently foreclosed. *See Maintenance Enterprises, LLC v. Orascom E&C*
4 *USA*, Case No. 3:16-cv-00014-SMR-CFB, 2017 WL 6997892, at *3 (S.D. Iowa Nov. 13, 2017)
5 (“MEI’s claim for unjust enrichment against Iowa Fertilizer is indeed precluded because MEI has an
6 adequate remedy at law against OEC for breach of contract.”); *Tomei v. Corix Utilities (U.S.) Inc.*,
7 Civil Action No. 07–cv–11928–DPW, 2009 WL 2982775, at *21 (D. Mass. Sep. 14, 2009)
8 (dismissing an unjust enrichment claim because the plaintiff had a triable breach of contract claim as
9 a third-party beneficiary). It does not matter that Nanyah is not currently able to pursue its breach of
10 contract claim against the Rogich Trust due to noncompliance with NRS 163.120. *Fernandes v.*
11 *Havkin*, 731 F.Supp.2d 103, 114 (D. Mass. 2010) (“The disposition of those claims is irrelevant.
12 Their mere availability is a bar to a claim of unjust enrichment.”). Nanyah had an adequate remedy
13 at law but for its noncompliance with NRS 163.120, and thus summary judgment should be entered
14 in Eldorado’s favor, dismissing Nanyah’s unjust enrichment claim with prejudice.

15 IV. CONCLUSION

16 For the foregoing reasons, summary judgment should be entered against Nanyah and in favor
17 of Eldorado with respect to Nanyah’s unjust enrichment claim. Because that is Nanyah’s only
18 pending claim, Eldorado should be dismissed from this case entirely and with prejudice.

19 DATED this 22nd day of May, 2019.

20 BAILEY❖KENNEDY

21
22 By: /s/ Joseph A. Liebman
23 DENNIS L. KENNEDY
JOSEPH A. LIEBMAN

24 *Attorneys for Defendant*
25 ELDORADO HILLS, LLC
26
27
28

CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 22nd day of May, 2019, service of the foregoing **DEFENDANT ELDORADO HILLS, LLC’S MOTION FOR SUMMARY JUDGMENT** was made by mandatory electronic service through the Eighth Judicial District Court’s electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

MARK G. SIMONS, ESQ. SIMONS LAW, PC 6490 So. McCarran Blvd., #20 Reno, NV 89509	Email: mark@mgsimonslaw.com <i>Attorneys for Plaintiff</i> NANYAH VEGAS, LLC
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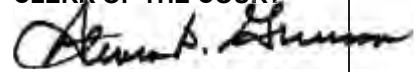
SAMUEL S. LIONEL, ESQ. FENNEMORE CRAIG, P.C. 300 S. Fourth Street, Suite 1400 Las Vegas, NV 89101	Email: slionel@fclaw.com <i>Attorneys for Defendant</i> SIG ROGICH aka SIGMUND ROGICH, Individually and as Trustee of THE ROGICH FAMILY IRREVOCABLE TRUST, and IMITATIONS, LLC
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MICHAEL V. CRISTALLI JANIECE S. MARSHALL GENTILE CRISTALLI MILLER ARMENI SAVARESE 410 South Rampart Blvd., Suite 420 Las Vegas, NV 89145	Email: mcristalli@gcmaslaw.com jmarshall@gcmaslaw.com <i>Attorneys for Defendants</i> SIG ROGICH aka SIGMUND ROGICH as Trustee of THE ROGICH FAMILY IRREVOCABLE TRUST
---	---

/s/ Sharon L. Murnane
Employee of BAILEY❖KENNEDY

EXHIBIT 7

EXHIBIT 7



MDSM (CIV)

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DISTRICT COURT
CLARK COUNTY, NEVADA

CARLOS A. HUERTA, an individual;
CARLOS A. HUERTA as Trustee of THE
ALEXANDER CHRISTOPHER TRUST, a
Trust established in Nevada as assignee of
interests of GO GLOBAL, INC., a Nevada
Corporation; NANYAH VEGAS, LLC, A
Nevada limited liability company,

Plaintiffs,

vs.

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,

Defendants.

NANYAH VEGAS, LLC, a Nevada limited
liability company,

Plaintiff,

vs.

TELD, LLC, a Nevada limited liability
company; PETER ELIADES, individually and
as Trustee of The Eliades Survivor Trust of
10/30/08; SIGMUND ROGICH, individually
and as Trustee of The Rogich Family
Irrevocable Trust; IMITATIONS, LLC, a
Nevada limited liability company; DOES I-X;
and/or ROE CORPORATIONS I-X, inclusive,

Defendants.

Case No. A-13-686303-C

Dept. No. XXVII

(Hearing Requested)

**DEFENDANT ELDORADO HILLS,
LLC'S MOTION FOR DISMISSAL
WITH PREJUDICE UNDER RULE 41(e)**

CONSOLIDATED WITH:

Case No. A-16-746239-C

**DEFENDANT ELDORADO HILLS, LLC'S MOTION FOR DISMISSAL WITH
PREJUDICE UNDER RULE 41(e)**

Pursuant to N.R.C.P. 41(e) and Nanyah Vegas, LLC's ("Nanyah") want of prosecution, Defendant Eldorado Hills, LLC ("Eldorado") respectfully moves the Court for dismissal of any and all of Nanyah's remaining claims against Eldorado. Nanyah had until April 29, 2019 to bring this matter to trial. It failed to do so, and Eldorado must be dismissed with prejudice. Eldorado's Motion is based on the following Memorandum of Points and Authorities, the exhibits attached hereto, and any oral argument heard by the Court.

DATED this 22nd day of July, 2019.

BAILEY ♦ KENNEDY

By: /s/ Joseph A. Liebman
DENNIS L. KENNEDY
JOSEPH A. LIEBMAN

Attorneys for Defendant
ELDORADO HILLS, LLC

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The trial was never actually started. Other than the ruling addressed herein, no other action occurred on April 22, 2019; no jury was empaneled, no evidentiary stipulations were placed on the record and no exhibits were marked. Further, there is no record of any jury panel even being called for the case.

*This is language directly from Nanyah's recent Writ Petition to the Nevada Supreme Court.*¹ And it is entirely accurate.² The trial never began due to Nanyah's request to pursue emergency writ relief regarding the dismissal of its claims against the Rogich Family Irrevocable Trust (the "Rogich Trust").

Nanyah's unjust enrichment claim against Eldorado was the subject of a remittitur that was filed with this Court on April 29, 2016. Under N.R.C.P. 41(e)(4)(B), Nanyah had until April 29,

¹ Pet. for Writ of Mandamus, or in the Alternative, Prohibition, 23 n. 8, attached as Exhibit 1.

² The Court also entertained and denied Nanyah's Motion to Amend on April 22, 2019.

2019 to bring its claims against Eldorado to trial. Based on binding Nevada precedent and Nanyah’s admission quoted above, it failed to do so. The Nevada Supreme Court has repeatedly held that—absent a written stipulation and order to extend the limitations period set forth in Rule 41(e)—noncompliance with Rule 41(e) requires dismissal regardless of the circumstances or equities involved. No such written stipulation and order exists here. Thus, the Motion must be granted, and Nanyah’s remaining claims against Eldorado must be dismissed with prejudice.

II. PROCEDURAL HISTORY

A. Case No. A-13-686303-C

On July 31, 2013, Carlos Huerta (“Huerta”), Go Global, Inc. (“Go Global”), and Nanyah filed a lawsuit against Sig Rogich, the Rogich Trust, and Eldorado. Huerta and Go Global’s claims have since been dismissed. With respect to Nanyah, it initially filed claims against Eldorado for unjust enrichment and breach of implied agreement.³ After Eldorado filed a Motion to Dismiss addressing both claims, Nanyah filed an Amended Complaint, repleading its unjust enrichment claim (alleging that Eldorado was responsible for returning its \$1,500,000.00 investment) and abandoning the breach of implied agreement claim.⁴

On July 25, 2014, Eldorado filed a Motion for Partial Summary Judgment, seeking dismissal of Nanyah’s unjust enrichment claim based on a statute of limitations defense.⁵ On September 25, 2014, the Court granted the Motion for Partial Summary Judgment and dismissed Nanyah’s unjust enrichment claim against Eldorado.⁶

Nanyah appealed the dismissal of its unjust enrichment claim to the Nevada Supreme Court. On February 12, 2016, the Nevada Supreme Court issued an Order of Reversal and Remand, finding there was a question of fact with respect to the accrual of Nanyah’s unjust enrichment claim.⁷ On April 1, 2016, the Nevada Supreme Court issued an Order Denying Rehearing.⁸ On April 29, 2016,

³ Compl., Case No. A-13-686303-C, 7:18-9:2, filed July 31, 2013.

⁴ See generally Am. Compl., Case No. A-13-686303-C, filed Oct. 21, 2013.

⁵ See generally Mot. for Partial Summary Judgment, filed July 25, 2014.

⁶ See generally Order Granting Partial Summary Judgment, filed Oct. 1, 2014.

⁷ See generally Remittitur/Order of Reversal and Remand/Order Denying Rehearing, filed April 29, 2016.

⁸ Id.

the remittitur was filed with this Court, thereby triggering the limitations period under N.R.C.P. 41(e)(4)(B).⁹

B. Consolidation With Case No. A-16-746239-C

On November 4, 2016, Nanyah filed a new action against Rogich, the Rogich Trust, Imitations, LLC (collectively, the “Rogich Defendants”), Teld, LLC, Peter Eliades, and the Eliades Survivor Trust of 10/30/08 (collectively, the “Eliades Defendants”).¹⁰ Nanyah did *not* include Eldorado as a Defendant in the new action.

On March 31, 2017, Case No. A-13-686303-C was consolidated with Case No. A-16-746239-C.¹¹ On September 21, 2017, all of the parties (except Eldorado) stipulated to re-open the discovery deadlines.¹² Within the stipulation, all of the parties (except Eldorado) stated the following:

The parties hereby stipulate that the three year provision of NRCP 41(e) applies to the consolidated cases given the remittitur from the Nevada Supreme Court of the lead case on July 21, 2016.¹³

The reference to the July 21, 2016 date appears to have been a mistake, as the remittitur on Nanyah’s unjust enrichment claim was filed with this Court on April 29, 2016.¹⁴ The July 21, 2016 remittitur related to the Nevada Supreme Court’s Order affirming an award of attorney’s fees to the Rogich Trust and against Huerta/Go Global.¹⁵ Nevertheless, it has now been more than three years from the filing date of both remittiturs.

C. The Trial That Never Happened

After a couple of trial continuances due to extenuating circumstances, trial was scheduled to

⁹ *Id.*

¹⁰ (See generally Compl., Case No. A-16-746239-C, filed Nov. 4, 2016.) Any and all claims against the Eliades Defendants were later dismissed by this Court via summary judgment. (See generally Order: (1) Granting Defs. Peter Eliades, Individually and as Trustee of the Eliades Survivor Trust of 10/30/08, and Teld, LLC’s Mot. for Summary Judgment; and (2) Denying Nanyah Vegas, LLC’s Countermot. for Summary Judgment.)

¹¹ See generally Notice of Consolidation, filed April 5, 2017.

¹² See generally Stipulation Re: Re-Open Deadlines, filed Sep. 21, 2017.

¹³ *Id.*, 2:7-9.

¹⁴ See generally Remittitur/Order of Reversal and Remand/Order Denying Rehearing, filed April 29, 2016.

¹⁵ See generally Remittitur/Order of Affirmance, filed July 21, 2016.

begin on April 22, 2019.¹⁶ On the morning of April 22, 2019, all the parties arrived to begin trial. Prior to *voir dire*, the Court was scheduled to entertain and rule on two separate motions. First, the Court entertained and denied Nanyah’s Motion for NRCP 15 Relief, which had sought to reassert an implied contract claim.¹⁷

Next, the Court entertained and granted the Rogich Trust’s request for dismissal for non-compliance with NRS 163.120.¹⁸ Based on the dismissal of the Rogich Trust, Nanyah stated that it wanted to suspend or continue the trial in order to file a Writ Petition with the Nevada Supreme Court.¹⁹ Ultimately the parties did agree to suspend the trial indefinitely to permit Nanyah to seek writ relief.²⁰

However, none of the parties agreed to waive the three year requirement set forth in N.R.C.P. 41(e)(4)(B). In fact, when the Court questioned whether there were any issues with N.R.C.P. 41(e), Nanyah was unconcerned and simply stated “[i]t’s actually been satisfied, since we’ve commenced the trial.”²¹ Yet, as shown above, Nanyah has taken the opposite (and correct) position in its Writ Petition, in which it stated the following:

Due to the “suspension” of the trial in this action, the beneficiaries remain fully capable of intervening if such action is warranted “prior to” trial in this action. That is because the use of the phrase “suspension” of the trial is a misnomer. ***The trial was never actually started.*** Other than the ruling addressed herein, no other action occurred on April 22, 2019; no jury was empaneled, no evidentiary stipulations were placed on the record and no exhibits were marked. Further, there is no record of any jury panel even being called for the case.²²

Because—as Nanyah admits above—the trial never started, there is no possible argument around N.R.C.P. 41(e)(4)(B). Thus, the Motion must be granted, and any and all claims remaining against

¹⁶ See generally Order Re-Setting Civil Jury Trial and Calendar Call, filed Dec. 7, 2018.

¹⁷ Order Denying Nanyah Vegas, LLC’s Mot. for NRCP 15 Relief, filed May 29, 2109; see also Recorder’s Trans. of Mot. Hearing, 4:2-9:2, attached as Exhibit 2.

¹⁸ Order, filed April 30, 2019; see also Ex. 2, 9:3-13:16.

¹⁹ Ex. 2, 13:17-25.

²⁰ *Id.*, 14:14-16:7.

²¹ *Id.*, 16:8-15.

²² Ex. 1, 23: n. 8 (emphasis added).

Eldorado must be dismissed with prejudice.

III. ARGUMENT

A. Legal Standard Under Rule 41(e)

If a party appeals a judgment and the judgment is reversed on appeal and remanded for a new trial, the court must dismiss the action for want of prosecution if a plaintiff fails to bring the action to trial within 3 years after the remittitur was filed in the trial court.

N.R.C.P. 41(e)(4)(B). The Court does not have discretion under Rule 41(e) and cannot examine the circumstances of the delay or the equities of the case. *Allyn v. McDonald*, 117 Nev. 907, 912, 34 P.3d 584, 587 (2001). “As the promoter of its case, the plaintiff has the duty to carefully track the crucial procedural dates and to actively advance the case at all stages, a duty that may require the plaintiff to take initiative and prod the district court when the case sits dormant.” *Id.* Thus, if the limitations period expires, the Court must dismiss the case. *Id.*

The only way to avoid dismissal is to bring the case to trial or obtain a written stipulation to extend the time. *See* N.R.C.P. 41(e)(5). Any such stipulation must specifically reference N.R.C.P. 41(e), and a mere stipulation to continue the trial is insufficient as a matter of law. *Prostack v. Lowden*, 96 Nev. 230, 231, 606 P.2d 1099, 1100 (1980).

B. Nanyah Admits it Never Brought This Matter to Trial

The Nevada Supreme Court has identified only two events sufficient to commence trial for the purposes of N.R.C.P. 41(e). It has “held on numerous occasions that the swearing of a witness who gives testimony is sufficient to commence trial and thus toll the limitations period specified in N.R.C.P. 41(e).” *A French Bouquet Flower Shoppe, Ltd. v. Hubert*, 106 Nev. 324, 324, 793 P.2d 835, 836 (1990). Alternatively, it has “held that a litigant who obtains a trial date within the statutory period, appears for trial in good faith, argues motions *and examines jurors*, thereby brings the case to trial.” *Lipitt v. State*, 103 Nev. 412, 413, 743 P.2d 108, 109 (1987).

Nanyah did not have the Court swear in any witnesses on April 22, 2019. Nanyah did not examine any jurors on April 22, 2019. In fact, no potential jurors were ever brought into the courtroom. Instead, following the dismissal of the Rogich Trust, Nanyah unilaterally asked the Court and the Defendants to suspend the trial in order to seek emergency writ relief with the Nevada

Supreme Court. And in that Writ Petition, *Nanyah admits that the trial never began.*

The trial was never actually started. Other than the ruling addressed herein, no other action occurred on April 22, 2019; no jury was empaneled, no evidentiary stipulations were placed on the record and no exhibits were marked. Further, there is no record of any jury panel even being called for the case.²³

Pursuant to the legal authority above and Nanyah's binding admission from its Writ Petition, this Court must find that the trial in this matter never commenced for the purposes of N.R.C.P. 41(e).

C. **Dismissal of Any and All Claims Against Eldorado is Mandatory Due to Expiration of the Three Year Time Period in N.R.C.P. 41(e)(4)(B)**

There is no dispute that this case has been pending for more than three years since the remittitur was filed in this Court on April 29, 2016. Even assuming this Court accepts the mistake in the September 21, 2017 Stipulation which stated that the remittitur was filed on July 21, 2016, three years have still lapsed without trial. The Nevada Supreme Court has repeatedly held that dismissal is mandatory in such an instance. It does not matter that the Rogich Trust was dismissed on April 22, 2019 and that Nanyah wanted to seek emergency writ relief. Nanyah had the sole duty to bring Case No. A-13-686303-C to trial against Eldorado within three years or obtain a written extension under N.R.C.P. 41(e), and it failed to do either.²⁴ *Allyn*, 117 Nev. at 912, 34 P.3d at 587. Any and all claims against Eldorado shall be dismissed with prejudice.

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²³ Ex. 1, 23: n. 8.

²⁴ It appears the Court tried to warn Nanyah about N.R.C.P. 41(e) on April 22, 2019, but Nanyah did not heed the Court's advice. (Ex. 2, 16:8-13.)

IV. CONCLUSION

Nanyah has admitted that trial never commenced in this matter. The Nevada Supreme Court’s binding precedent confirms the same. Three years have elapsed since the remittitur was filed with this Court. Thus, because trial has not commenced and Nanyah failed to procure a written extension under N.R.C.P. 41(e), any and all claims against Eldorado shall be dismissed with prejudice.

DATED this 22nd day of July, 2019.

BAILEY ♦ KENNEDY

By: /s/ Joseph A. Liebman
DENNIS L. KENNEDY
JOSEPH A. LIEBMAN

Attorneys for Defendant
ELDORADO HILLS, LLC

CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY ♦ KENNEDY and that on the 22nd day of July, 2019, service of the foregoing **DEFENDANT ELDORADO HILLS, LLC'S MOTION FOR DISMISSAL WITH PREJUDICE UNDER RULE 41(e)** was made by mandatory electronic service through the Eighth Judicial District Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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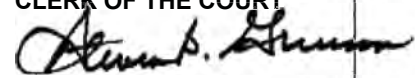
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EXHIBIT 8

EXHIBIT 8



DISTRICT COURT
CLARK COUNTY, NEVADA
* * * *

CARLOS HUERTA, et al.

Plaintiff(s)

vs.

ELDORADO HILLS LLC, et al.

Defendant(s)

CASE NO.: A-13-686303

DEPARTMENT 27

CONSOLIDATED WITH:
CASE NO.: A-16-746239

And all related matters.

DECISION

Pending before the Court are (1) Defendant Eldorado Hills, LLC's Motion for Dismissal with Prejudice Under Rule 41(e); (2) Defendant Eldorado Hills, LLC's Motion for Summary Judgment; and (3) Defendants Sigmund Rogich and Imitations, LLC's Motion for Summary Judgment, or Alternatively for Judgment as a Matter of Law Pursuant to NRCP 50(e). The matter came on for hearing on Motions Calendar on September 5, 2019 and following arguments of counsel, as well as the pleadings and papers on file herein, the Court took the matter under advisement. This decision follows.

I. Eldorado Hills LLC's Motion for Dismissal Under Rule 41(e)

On July 22, 2019, Defendant Eldorado Hills, LLC ("Eldorado") filed its Motion for Dismissal Under N.R.C.P. 41(e)(4)(B). Eldorado argues that dismissal is warranted because three years have elapsed since the remittitur was filed with the Court and that Nanyah Vegas, LLC ("Nanyah") failed to prosecute its case within the applicable limitations. This Court agrees.

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CLERK OF THE COURT

HONORABLE NANCY L. ALLF

DISTRICT COURT JUDGE

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Applicable Standard

N.R.C.P. 41(e)(4)(B), in pertinent part, provides that “[i]f a party appeals a judgment and the judgment is reversed on appeal and remanded for a new trial, the court **must dismiss** the action for want of prosecution if a plaintiff fails to bring the action to trial within 3 years after the remittitur was filed in the trial court (emphasis added).” In order to avoid dismissal, the parties may stipulate, in writing, to extend the time in which to prosecute the action. *See*, N.R.C.P. 41(e)(5).

Discussion

The Complaint in the instant action was filed on July 31, 2013. On July 25, 2014, Eldorado filed a Motion for Partial Summary Judgment seeking to dismiss the unjust enrichment claim, which this Court granted. Nanyah appealed this Court’s dismissal to the Nevada Supreme Court. The Nevada Supreme Court issued an Order of Reversal and Remand, finding that there was a question of fact with respect to Nanyah’s unjust enrichment claim. On April 29, 2016, the Nevada Supreme Court’s remittitur was filed with this Court, thus, triggering the limitations imposed under N.R.C.P. 41(e)(4)(B). Given this remittitur, Nanyah must have brought the action to trial by April 29, 2019, or otherwise stipulated to extend for purposes of N.R.C.P. 41(e).

The instant case was not brought to trial within the time limits of Rule 41(e); moreover, the parties did not agree to stipulate the proceedings for purposes of N.R.C.P 41(e).

The Nevada Supreme Court has held that the swearing of a witness who gives testimony is sufficient to commence trial and thus toll the limitations period specified in N.R.C.P. 41(e). *See Lipitt v. State*, 103 Nev. 412, 413 (1987). Alternatively, examining a juror satisfies the limitations in N.R.C.P. 41(e) and avoids dismissal. *See Smith v. Timm*, 96 Nev. 197, 200 (1980).

1 In *Prostack v. Lowden*, the Nevada Supreme Court interpreted N.R.C.P. 41(e) in the
2 context of the 5-year rule embedded therein and held that “an oral stipulation, entered into in
3 open court, approved by the judge, and spread upon the minutes, is the equivalent of a written
4 stipulation for the purposes of this rule.” 96 Nev. 230, 231 (1980). However, the *Prostack* Court
5 also held that a stipulation that is silent as to the 5-year rule is not sufficient to satisfy N.R.C.P.
6 41(e)’s written-stipulation requirement. *Id.* at 231. The *Prostack* Court further held that “words
7 and conduct, short of a written stipulation, cannot estop a defendant from asserting the
8 mandatory dismissal rule.” *Id.* (quoting *Thran v. District Court*, 79 Nev. 176, 181 (1963)).
9

10 Here, in order to avoid mandatory dismissal, Nanyah must have either (1) called a
11 witness; (2) examined a juror; or (3) stipulated to extend trial expressly for purposes of
12 N.R.C.P. 41(e). None of the three scenarios occurred because the jury trial was halted before
13 *voir dire* even began. First, not a single witness was called nor has a single juror been examined.
14 As such, this Court finds that trial has not begun for purposes of surviving a N.R.C.P. 41(e)
15 dismissal. Second, the April 22, 2019 oral stipulation that was made on the Court’s record was
16 silent as to N.R.C.P. 41(e)(4)(B)’s 3-year rule. Moreover, the Stipulation and Order Suspending
17 Jury Trial filed on May 16, 2019 with this Court was also silent as to N.R.C.P. 41(e)(4)(B)’s 3-
18 year rule. Rather, the jury trial was suspended to allow Nanyah to file an emergency writ with
19 the Supreme Court with respect to this Court’s Order dated April 30, 2019.¹ Therefore,
20 under *Prostack*, this Court finds that the stipulations that were made were not sufficient to
21 satisfy the rule’s express written-stipulation requirement.
22

23 Accordingly, mandatory dismissal is warranted under N.R.C.P. 41(e)(4)(B).
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1 In its Order, the Court dismissed the Rogich Trust defendants with prejudice.

1 **II. Eldorado Hills, LLC's Motion for Summary Judgment**

2 In addition to its Motion to Dismiss discussed *supra*, Eldorado filed a Motion for
3 Summary Judgment on May 22, 2019.² Eldorado argues that Nanyah's only remaining claim
4 against it for unjust enrichment should be dismissed because Nanyah once had an adequate
5 remedy at law against the Rogich Trust. This Court disagrees.
6

7 **Applicable Standard**

8 Summary judgment is proper if the pleadings and all other evidence on file demonstrate
9 that no genuine issue of material fact exists and that the moving party is entitled to judgment as
10 a matter of law. *See*, N.R.C.P. 56 et seq. When deciding a summary judgment motion, this
11 Court views the evidence in a light most favorable to the nonmoving party. *Id.*
12

13 **Discussion**

14 "Unjust enrichment exists when the plaintiff confers a benefit on the defendant, the
15 defendant appreciates such benefit, and there is acceptance and retention by the defendant of
16 such benefit under circumstances such that it would be inequitable for him to retain the benefit
17 without payment of the value thereof." *Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev.
18 371, 381 (2012). "An action based on a theory of unjust enrichment is not available when there
19 is an express, written contract, because no agreement can be implied when there is an express
20 agreement." *Leasepartners Corp. v. Robert L. Brooks Trust Dated November 12, 1975*, 113
21 Nev. 747, 755 (1997).
22

23 Here, it is undisputed that Nanyah wired Eldorado \$1,500,000 as memorialized in the
24 October 30, 2008 Membership Interest Purchase Agreement (the "MIPA"). In this MIPA, the
25 Rogich Trust agreed to solely assume the obligation to pay Nanyah's debt. However, this Court
26

27
28

² In light of this Court's ruling on Eldorado's Motion for Dismissal Pursuant to N.R.C.P. 41(e), Eldorado's Motion
for Summary Judgment is moot. Nevertheless, this Court will analyze the motion on the merits.

1 dismissed the Rogich Trust because Nanyah's written demand for a list of beneficiaries was
2 untimely under N.R.S. 163.120 as such notification would not permit interested beneficiaries of
3 the trust an opportunity to intervene in this action pursuant to N.R.S. 12.130(1). Given this
4 dismissal, Nanyah does not currently have an adequate remedy at law in which to pursue. Thus,
5 in light of this Court's decision, unjust enrichment is appropriate as an alternative equitable
6 basis.
7

8 The Court disagrees with Eldorado's argument that Nanyah once *had* an adequate
9 remedy at law, which bars it from pursuing a claim against it for unjust enrichment. The case
10 law in Nevada is consistent in holding that recovery based on unjust enrichment is unavailable
11 if the party *has* an adequate remedy at law. Thus, the test is not past tense—as Eldorado
12 suggests—but rather present perfect tense.
13

14 Viewing facts in light most favorable to Nanyah, questions of fact exist as to whether the
15 *Certified Fire Prot. Inc.* test is met. First, Nanyah has established, for purposes of surviving
16 summary judgment, that Eldorado received a benefit from the \$1,500,000 investment in made in
17 Eldorado. Second, Nanyah has shown that Eldorado accepted the funds and that it had a
18 reasonable expectation of payment. And, Nanyah has demonstrated that it would be inequitable
19 for Eldorado to retain Nanyah's investment without payment.
20

21 For these reasons, summary judgment on Nanyah's unjust enrichment claim is
22 premature.
23

24 ///

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1 **III. Defendants Sigmund Rogich and Imitations, LLC's Motion for Summary**
2 **Judgment, or Alternatively for Judgment as a Matter of Law Pursuant to**
3 **NRCP 50(e)**

4 On May 10, 2019, Defendants Sigmund Rogich and Imitations, LLC filed their Motion
5 for Summary Judgment, or alternatively, for judgment as a matter of law pursuant to N.R.C.P.
6 50(a) with the Court seeking dismissal of (1) the breach of contract claim against Mr. Rogich,
7 individually; (2) the breach of implied covenant of good faith and fair dealing claim against Mr.
8 Rogich, individually; and (3) the conspiracy claim against Mr. Rogich, individually, and
9 Imitations, LLC. This Court agrees with Defendants Sigmund Rogich and Imitations, LLC that
10 summary judgment is warranted.

11
12 **Applicable Standard**

13 Summary judgment is proper if the pleadings and all other evidence on file demonstrate
14 that no genuine issue of material fact exists and that the moving party is entitled to judgment as
15 a matter of law. *See*, N.R.C.P. 56.

16
17 **Discussion**

18 **A. Breach of Contract and Breach of the Implied Covenant of Good Faith and Fair**
19 **Dealing**

20 The elements necessary for breach of contract are as follows: (1) formation of a valid
21 contract; (2) performance or excuse of performance by the plaintiff; (3) material breach by the
22 defendant; and (4) damages. *Bernard v. Rockhill Dev. Co.*, 103 Nev. 132, 134 (1987). In
23 Nevada, an implied covenant of good faith and fair dealing exists in every contract. *A.C. Shaw*
24 *Const., Inc. v. Washoe County*, 105 Nev. 913, 915 (1989). When a party seeks only contractual
25 damages, that party must show that the breaching party acted in bad faith. *Nelson v. Heer*, 123
26 Nev. 217, 226 (2007) ("It is well established that all contracts impose upon the parties an
27

1 implied covenant of good faith and fair dealing, which prohibits arbitrary or unfair acts by one
2 party that work to the disadvantage of the other.”

3
4 Here, no contractual relationship between Mr. Rogich—**individually**—and Nanyah
5 exists. While Mr. Rogich was the Trustee of the Rogich Trust, “a trustee is **not personally**
6 **liable** on a contract properly entered into in the capacity of representative in the course of
7 administration of the trust unless the trustee fails to reveal the representative capacity or identify
8 the trust in the contract.” *See*, NRS 163.120. One of the fundamental elements of a breach of
9 contract claim is for a valid contract—oral or otherwise—to exist.

10
11 In its opposition, Nanyah argues that there are questions of fact related to whether Mr.
12 Rogich is personally liable under the alter ego doctrine. “A party who wishes to assert an alter
13 ego claim must do so in an **independent action** against the alleged alter ego with the requisite
14 notice, service of process, and other attributes of due process (emphasis added).” *Callie v.*
15 *Bowling*, 123 Nev. 181, 185 (2007). Nanyah has not alleged alter ego as a separate independent
16 action against Mr. Rogich. Thus, its assertion that there are questions as fact under the alter ego
17 doctrine is without merit.³

18
19 Similarly, Nanyah argues that there are questions of fact as to the existence of a “special
20 relationship” between Nanyah and Mr. Rogich, individually. This Court disagrees. First, the
21 special relationship requirement is for tortious conduct, which are only available “in rare and
22 exceptional cases when there is a special relationship between the victim and tortfeasor,” or
23 where one party holds “‘vastly superior bargaining power’ ” over another. *See K Mart Corp. v.*
24 *Ponsock*, 103 Nev. 39, 49 (1987). The relationships between the parties here are memorialized
25 in contractual agreements. Specifically, this dispute arises out of an investment by Nanyah in
26

27
28 ³ Further, this Court cannot grant Nanyah leave to amend if it so seeks it at this juncture because the applicable
statute of limitations bars alter ego claims.

1 Eldorado Hills. Eldorado Hills owned 161 acres of real property in Boulder City that was
2 intended to be developed into commercial mixed-use facilities. Nanyah invested in Eldorado
3 \$1,500,000. Agreements in October, 2008 affirm that the Rogich Trust solely owed Nanyah its
4 \$1,500,000 investment. The Court does not find that any party had "superior bargaining
5 powers" over another. Thus, the relationship is not a special relationship that gives rise to
6 recovery of tort damages; rather, it is a contractual relationship. *See Nelson v. Heer*, 123 Nev.
7 217, 226 (2007).
8

9 Accordingly, because there is no contract between Nanyah and Mr. Rogich individually,
10 the Court finds that summary judgment is appropriate on Nanyah's causes of actions for breach
11 of contract and breach of the implied covenant of good faith and fair dealing against Mr.
12 Rogich.
13

14 **B. Civil Conspiracy**

15 An actionable civil conspiracy "consists of a combination of two or more persons who,
16 by some concerted action, **intend to accomplish an unlawful objective** for the purpose of
17 harming another, and damage results from the act or acts." *Consol. Generator-Nevada, Inc. v.*
18 *Cummins Engine Co.*, 114 Nev. 1304, 1311 (1998).
19

20 Here, Nanyah's conspiracy claims are primarily premised on agreements in which the
21 Rogich Trust agreed to indemnify Nanyah. Imitations, LLC was not a party to any of these
22 agreements. Nevertheless, the Court does not find that there was intent to pursue an unlawful
23 objective based on (1) Mr. Rogich's declaration; and (2) the agreements at issue. While Nanyah
24 cites to Mr. Rogich's deposition as evidence of his unlawful intent, the testimony does not
25 expressly state that he intended to accomplish an *unlawful* object for the purpose of harming
26 Nanyah. Similarly, there is no evidence in the record that Defendant Imitations, LLC neither
27 intended to accomplish an unlawful objective nor was Defendant Imitations, LLC even a party
28

1 to the agreements at issue. Finally, there are not facts in dispute of an illegal agreement amongst
2 the parties. Without the necessary intent requirement under *Consol. Generator-Nevada, Inc.*,
3 Nanyah's conspiracy claims cannot succeed.
4

5 As such, summary judgment is appropriate on the civil conspiracy cause of action.

6 **ORDER**

7 Accordingly, **COURT ORDERS** for good cause appearing and after review that the
8 Motion Defendant Eldorado Hills, LLC's Motion for Dismissal with Prejudice Under Rule
9 41(e) is hereby **GRANTED**.

10 **COURT FURTHER ORDERS** for good cause appearing and after review that
11 Defendant Eldorado Hills, LLC's Motion for Summary Judgment on the unjust enrichment
12 claim is hereby **DENIED**.
13

14 **COURT FURTHER ORDERS** for good cause appearing and after review that
15 Defendants Sigmund Rogich and Imitations, LLC's Motion for Summary Judgment, or
16 Alternatively for Judgment as a Matter of Law Pursuant to NRCP 50(e) is hereby **GRANTED**.
17

18 DATED this 30 day of September, 2019.
19

20 Nancy L Allf
21 NANCY ALLF
22 DISTRICT COURT JUDGE
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