IN THE SUPREME COURT OF THE STATE OF NEVADA

NANYAH VEGAS, LLC, a Nevada Limited Liability Company, Appellants, 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 Survivor Trust of 10/30/08; and IMITATIONS, LLC, a Nevada Limited Liability Company, Respondents. AND RELATED MATTERS.	Supreme Court Case No. 79917 Eighth Judicial District Court Case No.: A-13-686303-C Eighth Judicial District Court Case No.: A-16-746239-C **RESPONDENT/CROSS APELLANT ROGICH PARTIES' ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL**

RESPONDENT/CROSS APELLANT ROGICH PARTIES' ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

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NRCP 26.1 DISCLOSURE

Counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

Respondents/Cross-Appellants Sig Rogich, a/k/a Sigmund Rogich ("Rogich"), Individually and as Trustee of The Rogich Family Irrevocable Trust ("Rogich Trust") and Imitations, LLC, ("Imitations" and collectively with Rogich and the Rogich Trust referred to herein as the "Rogich Parties") are represented by Hutchison & Steffen, including attorneys Brenoch Wirthlin, Esq. and Traci L. Cassity, Esq.

The Rogich Trust is a Nevada trust.

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Imitations is a Nevada limited liability company. No publicly held company owns any portion of this entity.

DATED this 9th day of December, 2021.

HUTCHISON & STEFFEN

By: */s/ Brenoch Wirthlin*

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I. JURISDICTIONAL STATEMENT

The Court's Jurisdiction in this matter is based upon Appellant's Appellant Nanyah Vegas, LLC ("Appellant" or "Nanyah") appeal of a Nevada district court order noticed on October 4, 2019, Appellant's Notice of Appeal filed on October 24, 2019, and from this Court's order dated October 14, 2020, clarifying finality of the underlying action for appellate purposes. The Court's jurisdiction in this matter is also based upon Cross Appellants' appeal of a two district court orders dated October 8, 2018 and March 26, 2019, and Cross Appellants' notice of cross-appeal filed on November 7, 2019. Both this answering brief and opening brief on cross-appeal concern appellate review of final orders.

II. NRAP 17 ROUTING STATEMENT

Pursuant to NRAP 17, this matter has no presumptive division between the Supreme Court and the Court of Appeals. The issues raised by this appeal and cross appeal fall outside any of the presumptive categories provided by the Nevada Rule of Appellate Procedure Rule 17, including the categories provided NRAP 17(b) for cases assigned to the Court of Appeals. Furthermore, no issues are raised in this appeal and cross appeal that fall into any of the categories for those cases to be retained by the Supreme Court. In particular, there are no issues raised herein that concern matters of first impression or statewide public importance.

III. STATEMENT OF THE ISSUES

1. Did the District Court properly apply NRS 163.120 in dismissing all claims against the Rogich Trust due to the failure of Appellant to comply with that statute?
2. Did the District Court err in dismissing the remaining claims against Rogich individually and Imitations?
3. Did the District Court err in not granting the Rogich Defendants' motion for Rule 60(b) relief despite the overwhelming disputed issues of fact?
4. Did the District Court err in denying Appellant's Motions in Limine ("MIL") Nos. 5 and 6?
5. Did the District Court err in deciding to settle jury instructions after the evidence was introduced and admitted at trial?
6. Regarding the Rogich Parties' cross-appeal – did the District Court err in denying the Rogich Parties' request for Rule 60(b) relief?

IV. STATEMENT OF THE CASE

Despite Appellant's attempts to confuse the issues, this case is very simple as it pertains to the Rogich Defendants: Did the Plaintiff comply with NRS 163.120's notice requirements? The clear answer is "no," and therefore judgment could not be entered in favor of the Appellant and dismissal of the Rogich

Defendants was required.

Regarding the remaining claims against Rogich and Imitations, the District Court correctly found that Rogich, individually, could not be held liable on the breach of contract claim against him individually, or the breach of the implied covenant of good faith and fair dealing, as he had not sighed the agreements at issue in his individual capacity. Further, the District Court found there was no evidence of a conspiracy to accomplish an unlawful objective. Accordingly, summary judgment on the remaining claims against Rogich and Imitations was warranted and necessary.

V. FACTUAL BACKGROUND[1]

A. Non-exhaustive list of false statements by Appellant.

While not all inaccurate statements made by Appellant in its Brief can be identified, a few key false statements are addressed herein.

1. Appellant's False Statement No. 1

Appellant falsely states that it "provided public records from the Gaming Control Board Showing Rogich was the sole beneficiary of the Rogich Trust. 28 JA 6723:1-3; 6743-6745. Nanyah also presented additional testimony affirming

[1] The Rogich Parties generally agree with timeline of events set forth in the Appellant's Brief regarding the relevant dates related to the procedural background of this case as they concern the Rogich Parties.

that Rogich was the sole beneficiary of the Rogich Trust." *See* Appellant's brief at 49:21-24.

These statements by Appellant are false. The truth is that these citations are merely the Appellant's own briefings submitted to the Trial Court inaccurately and deliberately misinterpreting the documentation. The truth is that the documentation provided to the Gaming Control Board merely shows that Rogich is a beneficiary, not that he is the sole beneficiary. *See* 28 JA 006744. Moreover, Appellant's assertion that Rogich is the only beneficiary of the Rogich Trust is demonstrably false, and Appellant is aware of that fact. In their Memorandum of Points and Authorities Regarding Limits of Judicial Discretion Regarding Notice Requirements Provided to Trust Beneficiaries Under NRS Chapter 163 ("Chapter 163 Brief"), the Rogich Parties included a declaration from Rogich which made clear that there were two (2) trustees of the Rogich Trust and ten (10) beneficiaries of the Rogich Trust, and that each of the ten beneficiaries had a "present interest in trust assets." 30 JA 007136. Moreover, Appellant cites 28 JA 6723:1-4 for its assertion that it "presented additional testimony affirming Rogich was the sole beneficiary of the Rogich Trust." *See* Appellant's brief at p. 50, l 1. But that citation is to the deposition of Melissa Olivas, page 113, lines 9-24 (*see* 28 JA

6723:1-4[2]) which states as follows:

> Q. Do you know if Rogich as any other trusts?
> A. Yes.
> Q. And what are they?
> A. The Rogich Family Trust.
> Q. Okay. Any others?
> A. The Sigmund Rogich 2004 Family Irrevocable Trust.
> Q. Is that different than the one that –
> A. Yes. Our estate attorney didn't do us any favors.
> Q. Okay. Do you know when those were set up?
> A. 2004. The Rogich Family Trust was 1982.
> Q. Do you know if Rogich is the beneficiary for any other trusts?
> A. I don't believe so.

See 28 JA 006750. It is made clear from actually reading the Appellant's cited evidence that it has nothing whatsoever to do with whether there are additional beneficiaries of the Rogich Trust. Further, Appellant knows the only testimony on the subject is Rogich's undisputed testimony that there are ten beneficiaries of the Rogich Trust, which Appellant knows because it read the declaration of Sig Rogich in the Rogich Parties' Chapter 163 Brief. However, consistent with the Appellant's pattern the Appellant continues to make false statements in an attempt to mislead this Court as it attempted to do with the Trial Court.

[2] This citation in turn cites to Exhibit 4 to the Appellant's Emergency Motion to Address Defendant The Rogich Family Irrevocable Trust's NRS 163.120 Notice And/Or Motion to Continue Trial for Purposes of NRS 163.120.

2. Appellant's False Statement No. 2

Appellant's false statement:

> The district court claimed its "hands were tied" and that "or within such other time as the court may fix" was meaningless and did not provide any discretionary authority to the district court. 30 JA 7191-92.

See Appellant's Brief at p. 521, ll. 18-21. Appellant's statement is false. In fact, at the hearing on the Appellant's Emergency Motion to Address Defendant the Rogich Trust's NRS 163.120 Notice and/or Motion to Continue Trial for Purposes of NRS 163.120 ("Emergency Motion") which took place on April 18, 2019, what the District Court correctly held is not that its hands were tied, but rather that Appellant's hands were tied by its own failure to comply with the statute. The District Court correctly stated as follows:

> THE COURT: All right. And -- all right. So let me get back to my questions to Mr. Simons. Mr. Simons, 163.120(2) really -- really ties your hands as far as timing. It says that you have -- what it seems to me is that it gives you the chance either before the 16.1 or after to determine who the beneficiaries are so that they can be given notice so that they have the ability to intervene.
>
> And I realize that there's a provision there that within such time as the Court may fix, but the way I read it is that so that if you don't have it by the time that the initial disclosures are made you can ask for additional time. I don't see where it can be made on the eve of trial.

JA_007191 – 7192 (emphasis added). This is an important distinction between the Appellant's false statement and what the District Court actually held. The District Court was well aware of what the statute required, and what the Appellant had failed to do. The District Court correctly found that there was no provision for the Appellant to serve a request for the names of beneficiaries on the eve of trial.

3. Appellant's false statement no. 3.

Appellant's false statement:

> The district court's order dismissed the Eliades Defendants (14 JA 3403-3412) yet found Nanyah was a third-party beneficiary of the Purchase Agreement, the Teld MIPA, and Eldorado's Amended Operating Agreement. *Id*., 3405, ¶ 4.

See Appellant's Brief at p 74, ll. 3-6. This is false. The District Court never expressly found that Appellant was a third-party beneficiary of any of the agreements at issue. In fact, in its Order Denying Nanyah Vegas, LLC's Motion in Limine #5: Parol Evidence ("Order on MIL #5"), entered on April 10, 2019, only a few days before trial, as follows:

> With respect to the Rogich Parties, it has not yet been determined whether Nanyah is a third party beneficiary of any of the written contracts at issue in this case. *See Canfora v. Coast Hotels and Casinos, Inc.*, 121 Nev. 771, 779, 121 P.3d 599, 605 (2005).

See 27 JA 006477:1-4. Thus, Appellant's assertion that the District Court "found

Nanyah was a third party beneficiary" of any agreements is a demonstrably false statement.

4. Appellant's false statement no. 4.

Appellant's false statement:

> Rogich testified that all the defendants, and each of them as members, owed fiduciary duties to Nanyah relating to its investment into Eldorado…" 11 JA 2595-2596.

See Appellant's Brief at p. 23, ll. 3-5. This is misleading. In fact, Rogich only testified that he was "familiar" with what a fiduciary duty was, not that he or anyone else owed such a duty to Appellant, and said nothing about Appellant's purported investment.

B. Factual background.

1. The Alleged Investment was in CanaMex, not Eldorado Hills, LLC ("Eldorado").

a. The set-up of Appellant Nanyah Vegas, LLC and CanaMex Nevada, LLC

In June of 2007, Yoav Harlap ("Harlap"), sole manager and owner of Appellant Nanyah, and Carlos Huerta ("Huerta"), officer of Go Global, Inc. ("Go Global") were communicating with one another regarding Harlap's potential investment of $1.5 Million (the "$1.5 Million") into CanaMex Nevada, LLC ("CanaMex"). Huerta directed Harlap to CanaMex's website of

CanaMexNevada.com and Harlap confirmed he was interested in investing $1.5 Million into CanaMex. Harlap requested Huerta to set-up the Nevada company (which would become Nanyah). Huerta suggested he be the Registered Agent for Nanyah. 22 JA 005274 - 5275

CanaMex registered as a Nevada limited liability company on December 3, 2007, just 4 days prior to Nanyah being registered. Harlap is the sole manager of Nanyah. Go Global. was sole the Manager/Managing Member of CanaMex. 22 JA 005277. Huerta was the sole officer of Go Global. 22 JA 005282.

b. Nanyah's $1.5 Million Wire

Huerta testified (as Nanyah's PMK) that he instructed Harlap to wire the $1.5 Million to the account of Eldorado Hills, LLC ("Eldorado Hills"). 22 JA 005338, at deposition p. 31, ll. 4-11. Contrary to this deposition testimony, on December 4, 2007, Huerta e-mailed Harlap instructing him to wire the $1.5 Million into **CanaMex's** bank account. 22 JA 005350. Nowhere in the e-mailed instructions from Huerta to Harlap is there any indication of, or reference to, Eldorado Hills. *Id*

Huerta further testified (as Nanyah's PMK) that Nanyah wired the funds into Eldorado Hills' bank account and that the money **never** went into the CanaMex's account. 22 JA 005338 at deposition p. 29, l. 21 to p. 30, l. 14 and p.

60, 11. 5-14. This was false. Further, Harlap testified that he "transferred the money to Eldorado Hills as per Carlos Huerta's wiring instructions" and that this is the basis of Nanyah's claims. 22 JA 005285, at deposition p. 20, l. 20 to p. 21, l. 11. Contrary to these self-serving statements by Huerta, the bank records show that Harlap actually wired the $1.5 Million into CanaMex's Nevada State Bank account on December 6, 2007 in compliance with Huerta's emailed instructions (not Eldorado Hills' bank account). 22 JA 005352-005353.

c. The Bank Transfers

After the alleged investment funds were wired by Harlap into CanaMex's bank account, Huerta proceeded with the following series of bank transfers, where a majority of $1.5 Million ended up in the bank account of CanaMex's sole manager/managing member (Go Global, which is a business solely operated by Huerta):

- **CanaMex:** The December 2007 bank statement for CanaMex shows a $1.5 Million check (#92) written to Eldorado Hills, signed by Huerta and processed on December 10, 2007. 22 JA 005352-005353.
- **Eldorado Hills:** The December 2007 bank statement for Eldorado Hills checking account shows a $1.5 Million deposit on December 7, 2007 (which is the $1.5 Million check from CanaMex) and a $1.45 Million internet transfer to its money market account on December 10, 2007. The December 2007 bank statement for Eldorado Hills money market account shows a

$1.45 Million internet transfer deposit from the Eldorado Hills checking account on December 10, 2007 and a $1.42 Million transfer out processed on December 14, 2007. 22 JA 005355-005356.

- **Go Global:** The December 2007 bank statement for Go Global checking account shows the Eldorado Hills transfer for $1.42 Million was deposited **into Go Global Inc.'s** account on December 14, 2007. This $1.42 Million transfer was per "an e-mail request from Carlos Huerta". 22 JA 005358-005359.

d. Investment confirmation

On December 8, 2007, Harlap received an e-mail from Summer Rellamas, Finance and Administration Manager with Go Global Properties, which attached an investment confirmation letter. The letter thanked Harlap for his recent investment of $1.5 Million *into CanaMex*, confirmed receipt of his $1.5 Million wire on December 6, 2007 and advised him that his 2007 federal tax forms should be received by February 2008. 22 JA 005361-005362.

On January 3, 2008, Huerta e-mailed Harlap an update on CanaMex and provided a letter from Go Global Properties with a subject line of CanaMex. 22 JA 005364-005365. Subsequently, on January 30, 2008, Harlap received an e-mail from Summer Rellamas of Go Global Properties attaching Nanyah's annual investor portfolio which summarizes its investment with Go Global Properties. 22 JA 005367-005375.

On March 13, 2008, Harlap received an e-mail from Huerta attaching an

update letter on letterhead of Go Global Properties, signed by Huerta as Managing Manager for CanaMex, indicated that "We, at Go Global Properties, felt it time to send out an update in regards to our CanaMex Nevada project in Las Vegas" and again directed Huerta to www.CanaMexNevada.com. 22 JA 005377-005380.

e. The K-1s prove Nanyah's interest was in CanaMex, not Eldorado.

Huerta (as Nanyah's PMK) confirmed that equity and ownership interests are preserved by a K-1 and confirmed a tax return will show the ownership interest. 22 JA 005335, at deposition p. 22, ll. 3-15. Huerta further testified (inaccurately) that Nanyah was going to be a member of Eldorado Hills or CanaMex, but that CanaMex didn't happen and Eldorado Hills never formalized its investment with a K-1. 22 JA 005422 at deposition p. 164, ll. 7-18.

Contrary to this deposition testimony, but consistent with Nanyah's confirmed investment in CanaMex, on April 12, 2008, CanaMex sent Nanyah a 2007 Schedule K-1 form via an e-mail from Summer Rellamas at Go Global Properties. The Schedule K-1 from CanaMex shows: (1) shows Nanyah as 99% owner of CanaMex; (2) for the time period of December 3, 2007 through December 31, 2007; (3) Nanyah's capital contribution during the year of $1.5 Million; and (4) that after a decrease in business income of $2,515, Nanyah's ending capital account with CanaMex as of December 31, 2007 was $1,497,485.

22 JA 005426-005427.

CanaMex additionally sent Nanyah a 2010 Schedule K-1 with a letter, which indicated that its "2010 Schedule K-1 … has been filed with the partnership tax return of CanaMex Nevada, LLC" and further advised that "[s]hould [Nanyah] have any questions regarding the information reported to [it] on this Schedule K-1, please call." The 2010 K-1 shows: (1) Nanyah still as 99% owner of CanaMex; (2) Nanyah's capital account with CanaMex at $1,497,695; and (3) that after a decrease in business income of $10, Nanyah's ending capital account with CanaMex as of December 31, 2010 was $1,497,685. 22 JA 005429-005430.

2. <u>The Potential Claimants</u>

The dispute as to the relevant contracts relate to the contracts at issue. These are the following:

a) **The Purchase Agreement**: The Purchase Agreement dated October 30, 2008, between Go Global_and Huerta as sellers, and the Rogich Trust as buyer Huerta (referred to herein as the "Purchase Agreement" 30 JA 007382 – 31 JA 007392); Rogich did not individually sign the Purchase Agreement;

b) **The Flangas Agreement**: The Membership Interest Purchase Agreement dated October 30, 2008, between the Rogich Trust as seller, the Albert Flangas Revocable Living Trust u/a/d July 22, 2005 ("Flangas") as buyer, Go Global, Huerta, and Rogich and Albert Flangas ("Flangas") regarding their "individual limited agreements" (referred to herein as the "Flangas Agreement", 31 JA 007394 – 007422;

c) **The Teld Agreement**: The Membership Interest Purchase Agreement dated October 30, 2008, between the Rogich Trust as seller and Teld, LLC ("Teld") as buyer, Go Global, Huerta, and Rogich and Peter Eliades ("Eliades") regarding their "individual limited agreements" (referred to herein as the "Teld Agreement", 31 JA 007424 – 007452;

d) **The Assignment Agreement**: The Membership Interest Assignment Agreement dated January 1, 2012, between the Rogich Trust, the Eliades Survivor Trust of 10/30/08 ("Eliades Trust") (referred to as the "Assignment Agreement", 31 JA 007454 - 007459). Rogich did not individually sign the Assignment Agreement;

e) **The Operating Agreement**: The Amended and Restated Operating Agreement of Eldorado Hills, LLC (referred to as the "Operating Agreement", 31 JA 007461 - 007474) of which the Rogich Trust, the Flangas Trust, and Teld are members.[3] Rogich did not individually sign the Operating Agreement.

The Agreements provide that the Rogich Trust will look into the *potential* claimants listed in the Purchase Agreement, and not that the Rogich Trust would pay the potential claimants. In reviewing the potential claimants, Rogich knew Appellant's purported claim lacked merit for several reasons, including without limitation, that Eldorado Hills (under Huerta's direction as the Tax Matters partner) had already provided the first two (2) potential claimants (The Ray Trust and Eddyline) with 2007 K-1s, but not Appellant. 22 JA 005432-005433.

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[3] Collectively the five agreements are referred to herein as the "Agreements". Rogich signed the Agreements only in his capacity as trustee of the Rogich Trust, not individually. *See id.*

As for Antonio Nevada, Eldorado Hills had paid it in full. In fact, Antonio Nevada later sued Eldorado Hills as a result of being a potential claimant under this Purchase Agreement. Eldorado Hills was successful in defending against that lawsuit and obtaining a Judgment against Antonio Nevada. 22 JA 005435.

As for Nanyah, there was no K-1 issued by Eldorado Hills to Nanyah for 2007 and none of the financial records mentioned Nanyah. 22 JA 005437-005438. Huerta controlled the books and records of both companies at that time and his failure to issue a K-1 to Nanyah is conclusive.

3. Statute of Limitations

Huerta testified (as Nanyah's PMK) that he was aware of the Purchase Agreement being signed in October 2008. 22 JA 005337 at deposition p. 26, ll. 4-18. Harlap testified he first became aware of the Purchase Agreement in 2008. 22 JA 005284 at deposition p. 16, line 19 to p. 18, l. 23. Harlap testified that he understood that Nanyah's potential claim to $1.5 Million investment in Eldorado Hills started from day one from his transferring or sending $1.5 Million in 2007. 22 JA 005298 at deposition p. 74, l. 12 to p. 75, l. 2.

VI. SUMMARY OF THE ARGUMENT

The District Court properly dismissed all claims against the Rogich Trust based on Appellant's failure to timely comply with the notice requirements

contained in NRS 163.120 as to notice required to be provided to the Rogich Trust's beneficiaries. Appellant failed to do so in sufficient time before trial pursuant to the statute as well as NRS 12.130.

Further, as Rogich did not individually sign the Agreements, but rather did so only in his capacity as trustee of the Rogich Trust, dismissal of the breach of contract and breach of the covenant of good faith and fair dealing claims against him individually was required.

Moreover, as there was no evidence of any conspiracy, and in fact all evidence showed lack of the required intent, dismissal of the conspiracy claim against Rogich individually and Imitations was appropriate.

Finally, as it pertains to the responsive brief, the District Court did not err in denying Appellant's MILs Nos. 5 and 6, and in deciding to wait to settle jury instructions after the relevant evidence was admitted at trial.

Regarding the Rogich Parties' cross-appeal, given the numerous unresolved disputed issues of fact, the District Court should have granted relief pursuant to NRCP 60(b).

VII. STANDARD OF REVIEW

There are various standards of review applicable to the issues raised in this appeal.

Questions of statutory construction are generally reviewed de novo, however this Court has held that "[i]f the plain meaning of a statute is clear on its face, then [this court] will not go beyond the language of the statute to determine its meaning." *Waste Mgmt. of Nevada, Inc. v. W. Taylor St., LLC*, 135 Nev. 168, 170, 443 P.3d 1115, 1117 (2019) (*citing Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 579-80, 97 P.3d 1132, 1135 (2004) (internal quotation marks omitted) (alterations in original)). When a statute is clear on its face, this Court gives the statute's plain language its "ordinary meaning." *Id*. (*citing UMC Physicians' Bargaining Unit of Nev. Serv. Emps. Union v. Nev. Serv. Emps. Union / SEIU Local 1107*, 124 Nev. 84, 88, 178 P.3d 709, 712 (2008)).

For issues related to motions for summary judgment, the general rule that objections be raised at the trial court level qualify for a de novo standard of review take precedence: "While this court gives de novo review to a district court's decision to grant summary judgment, a de novo standard of review does not trump the general rule that 'a point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Schuck v. Signature Flight Support of Nevada, Inc.*, 126 Nev. 434, 436, 245 P.3d 542, 544 (2010) (citation omitted).

Furthermore, the standard of review for following issues raised in this

appeal is also abuse of discretion:

- The SOL Reconsideration Motion – Abuse of discretion. *AA Primo Builders, LLC v. Washingto*n, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010).
- The Parol Evidence MIL/Motion for Reconsideration and Statute of Limitations MIL – Abuse of discretion. *Renown Health v. Holland & Hart, LLP*, 437 P.3d 1059, 2019 WL 1530161, at *3 (Case No. 72039, filed Apr. 5, 2019) (unpublished disposition).
- The Jury Instruction Motion – abuse of discretion should apply.

Finally, the standard of review for a Court's decision to grant or deny relief under NRCP 60(b) is abuse of discretion. *Lentz v. Boles*, 84 Nev. 197, 438 P.2d 254 (1968).

VIII. ARGUMENT

A. The District Court properly applied NRS 163.120 in dismissing all claims against the Rogich Trust.

The lead case in this matter (A-13-686303-C) was filed on July 31, 2013. Named as a defendant in the lawsuit was The Rogich Family Irrevocable Trust. More than five years later, one week before trial, on April 15, 2019, Defendants filed a request for judicial notice of NRS 163.120. The underlying effect of NRS

163.120 is to place a duty on the Plaintiff to provide notice to the beneficiaries of a defendant trust to allow them time to join the action to protect their rights.

Counsel for Appellant then immediately submitted a request to Defendants to provide the names of the beneficiaries of the Sig Rogich Family Irrevocable Trust. The next day, on April 16, 2020, Appellant filed a motion to address the requirements of NRS 163.120, or in the alternative, to continue the trial so the Appellant could comply with the statute. Appellant's motion was heard on April 18, 2020, at which time the motion to continue the trial was denied. The trial court, however, did request that the parties submit briefs regarding the trial court's discretion regarding compliance with the requirements of NRS 163.120 with only days before trial.

The trial court ultimately determined on the morning of trial that Plaintiff had failed to provide notice to the trust beneficiaries of the Sig Rogich Family Irrevocable Trust pursuant to NRS 163.120, and as a consequence dismissed the trust from the action.

When considering the proper role of judicial power, Chief Justice John Marshall pointed out nearly two hundred years ago that:

> Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course

> prescribed by law; and, when that is discerned, it is the duty of the court to follow it. **Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.** *Osborn v. Bank of the United States,* 22 U. S. 738 (1824). (Emphasis added)

This principle still holds true today. Appellate courts in Nevada have consistently overturned lower courts that fail to apply the full, applicable legal analysis. *Gunderson v. D.R. Horton, Inc.*, 130 Nev. Adv. Op. 9, 319 P.3d 606, 615 (2014). Furthermore, when determining if a lower court abused its discretion, appellate courts look to whether the decision was supported by substantial evidence and guided by applicable legal principles. *Kwist v. Chang*, 127 Nev. 1152, 373 P.3d 933 (2011); *Franklin v. Bartsas Realty, Inc.*, 95 Nev. 559, 562-63, 598 P.2d 1147, 1149 (1979). Despite the constancy of this longstanding principle, there are situations which may require the use of judicial discretion to promote fairness and a more equitable legal process. Underlying this idea is the simple fact that legislatures cannot write laws to address all situations which find their way into court or that develop as a case makes its way through the legal system.

B. <u>Judicial discretion is appropriate when the law is silent.</u>

When no full, applicable legal analysis is available, use of judicial discretion may be appropriate to promote an equitable legal process by allowing the judge to consider individual circumstances in cases when the law is

insufficient or silent. *Pro se* litigants, for example, have no statutory right to be treated differently than those represented by counsel, but nevertheless often receive a larger degree of leniency from the courts. In the instant case, the law is not silent or insufficient with regard to what is required of Appellant to comply with NRS 163.120. On the contrary, NRS 163.120 provides a clear and precise explanation of the notice requirements that Appellant must provide to the beneficiaries in a pending lawsuit. That statute provides in relevant part:

> 2. A judgment may not be entered in favor of the plaintiff in the action unless the plaintiff proves that within 30 days after filing the action, or within 30 days after the filing of a report of an early case conference if one is required, whichever is longer, or within such other time as the court may fix, and more than 30 days before obtaining the judgment, the plaintiff notified each of the beneficiaries known to the trustee who then had a present interest, or in the case of a charitable trust, the Attorney General and any corporation which is a beneficiary or agency in the performance of the charitable trust, of the existence and nature of the action. The notice must be given by mailing copies to the beneficiaries at their last known addresses. The trustee shall furnish the plaintiff a list of the beneficiaries to be notified, and their addresses, within 10 days after written demand therefor, and notification of the persons on the list constitutes compliance with the duty placed on the plaintiff by this section. Any beneficiary, or in the case of charitable trusts the Attorney General and any corporation which is a beneficiary or agency in the performance of the charitable trust, may intervene in the action and contest the right of the plaintiff to recover.

Nev. Rev. Stat. Ann. § 163.120 (West). Appellant failed to comply with NRS 163.120.

C. The Trial Court was required to enforce NRS 163.120 as written and did so.

Judicial discretion may be required when the Court is faced with a statute, or a term or phrase within the statute, that is ambiguous. However, when interpreting a statute with language that is "facially clear," the Court must give that language its plain meaning. *MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.*, 134 Nev. Adv. Op. 31, 416 P.3d 249, 253 (2018); *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 125 Nev. 449, 456, 215 P.3d 697, 702 (2009).

NRS 163.120(2) states the rights and responsibilities of the respective parties in a manner in words and phrases not subject to vagueness or speculative interpretation. The language is plain and simple, and as a result, is "facially clear." The Court, therefore, must give the language of NRS 163.120(2) its plain meaning. From the plain language of the statute, four interpretive observations about the statute can be readily drawn:

D. NRS 163.120 requires notice at the beginning of an action.

NRS 163.120 clearly contemplates that trust beneficiaries are to be given notice at the very beginning in the lawsuit. The statute requires that beneficiaries be notified 30 days after filing the action, or 30 days after filing the early case

conference report, whichever is later. This provides beneficiaries the time needed to meaningfully be present and involved in the action, including participating in pre-trial discovery and being present at trial to confront adverse witnesses, present evidence, and argue on their own behalf. The principle of fairness underlies due process, and the fundamental requisite of due process of law is the opportunity to be heard, participate and protect one's rights. *Grannis v. Ordean*, 234 U. S. 385, 234 U. S. 394 (1914). The fact that the 30 days rule is the only specific time frame provided in the statute (outside a court order allowing additional time), provides a clear indication that the drafters preferred notice be given to beneficiaries at the beginning of an action.

E. <u>The duty to provide notice to the beneficiaries is placed solely on the Appellant.</u>

In response to its failure to comply with applicable law, Appellant claims that it was obligated to produce the names of the beneficiaries of the Rogich Trust (Appellant's Brief at p. 48). This is false. The beneficiaries are not part of the litigation unless and until their names are requested by the Appellant in accordance with NRS 163. Appellant failed to do this.

Appellant further argues that the Rogich Trust would have been required to "raise[d] the affirmative defense of some unnamed, unknown trust beneficiary as an indispensable party" and thus the Rogich Trust has "waived the ability to seek

dismissal" of Appellant's claims. But this is also false.;

In Nevada, a plaintiff that files a complaint is solely responsible for providing service of process of a summons and complaint on the defendants named in the lawsuit. Also in Nevada, a plaintiff that files a complaint naming a trust as a defendant must provide notice to the beneficiaries. Despite representations made by opposing counsel, the statute places no affirmative duty on the defendant to do anything other than provide a list of beneficiaries within 10 days to plaintiff upon written request.

NRS 163.120 also provides that the Court may adopt a different timeframe than those described above should circumstances require. Such situations may include difficulties or delays by the trustee in providing the list of beneficiaries to the plaintiff, or the existence of noncooperative trustee who refuses to provide the list of beneficiaries to the plaintiff after request was made. *See Branch Banking & Trust Co. v. Smoke Ranch Dev., LLC,* Case No. 2:12-cv-00453-APG-NJK (D. Nev. Aug. 27, 2015). However, the discretion of the Court must be exercised in light of the statute's clear preference that notice be provided to beneficiaries at the start of an action. In addition, the unexcused failure of a plaintiff to provide timely notice to trust beneficiaries is not good cause to extend the time for notice beyond the 30 day rule. To extend the time allowed for notice would render the 30 day rule

contained within the statute meaningless. Finally, and most importantly, notice must be provided to beneficiaries no less than 30 days prior to judgment.

F. Judgment for Appellant was precluded without proper notice to the Rogich Trust's beneficiaries.

Finally, the statute clearly bars recovery by the Appellant should proper notice not be given to the beneficiaries. The severity of this provision in the statute serves to underscore the importance the statute drafters placed upon trust beneficiaries receiving proper notice of the action so they may meaningfully participate in the litigation and "contest the right of the plaintiff to recover." *See* NRS 163.120(2).

Because the language of NRS 163.120 is clear on its face, the Trial Court had, and this Court likewise has, limited judicial discretion outside of the four corners of the statute. Moreover, it should be noted that the plain language contained in NRS 163.120 provides no corrective course under the plain language of the statute which would allow Appellant to comply with NRS 163.120.

As noted above, the Appellant's assertion that Rogich is the only beneficiary of the Rogich Trust is a blatantly false statement. Appellant's assertion that its false position was "undisputed" below is also blatantly and demonstrably false. Thus, Appellant cannot excuse its failure to comply with the statute by claiming Rogich was the only beneficiary of the Rogich Trust; if

anything the fact that Appellant repeats this falsehood knowing it to be such proves the lack of merit in its position.

G. <u>Appellant failed to meet the requirements of NRS 163.120.</u>

Appellant does not claim to have provided the beneficiaries received their 30-days due process notice in this matter. Appellant further does not claim that the Court granted Appellant an extension of time in which to provide notice to the trust beneficiaries and that they were provided notice at some later time. If fact, Appellant could not have done so because the first request for a list of beneficiaries from Appellant was not even made until April 15, 2019.

Appellant apparently believes it possible to effectuate notice to the beneficiaries at some point after trial in this matter is commenced or completed. The purpose of NRS 163.120 is to enable beneficiaries to intervene in an action to contest the right of the plaintiff to recover. In addition to the fact that the beneficiaries of the Rogich Trust had been precluded from protecting their rights in this matter **for 5 ½ years** due to Appellant's failure to comply with the statute, notice provided after the start of trial it too late to allow the beneficiaries to intervene since the right for any party to intervene in an action ends once trial begins. NRS 12.130 states that an intervention can only take place **"before the trial",** and NRCP 24 requires that any motion to intervene be made on “timely

motion." The Nevada Supreme Court has recognized this requirement. *Am. Home Assur. Co. v. Eighth Judicial Dist. Court ex rel. Cty. of Clark,* 122 Nev. 1229, 1244, 147 P.3d 1120, 1130 (2006) ("NRS 12.130(1) provides that an applicant may intervene "[b]efore the trial." As we have previously recognized, however, even when made before trial, an application must be "timely" in the sense afforded the term under NRCP 24."). For this reason, the Court could not allow any extension or other revision of the statute at issue, particularly with mere days left before trial.

H. Appellant's post-trial *Transamerican* plan is not possible in Nevada.

Appellant has suggested that this matter could be tried to verdict, and then entry of judgment could then be suspended to allow Appellant to satisfy the requirements of NRS 163.120. *See* Appellant's Brief at pp. 52-56. Appellant cites the Texas case *Transamerican Leasing Co. v. Three Bears, Inc.* in support of this proposition. There numerous reasons why this proposal is violative of Nevada law:

The right to intervene in Nevada is extinguished at the start of trial pursuant to NRS 12.130(1)(a). This is not the case in Texas. Rule 60 of the Texas Rules of Civil Procedure does not impose a deadline for intervention. The general rule in Texas is that a party may not intervene after final judgment unless the judgment

is set aside. *Tex. Mut. Ins. Co. v. Ledbetter,* 251 S.W.3d 31, 36 (Tex. 2008); *In re Lumbermens Mut. Cas. Ins. Co.,* 184 S.W.3d at 725; *State v. Naylor,* 330 S.W.3d 434, 438. To intervene post-judgment the plea in intervention must be filed and the judgment must be set aside within thirty days of the date of judgment. *First Alief Bank v. White,* 682 S.W.2d 251, 252 (Tex. 1984).

This is exactly what happened in the *Transamerican* case. The trial court vacated the original judgment and ordered the beneficiaries to show cause why judgment should not be rendered in the case. Because Nevada law differs from Texas law, the *Transamerican* case has no applicability in this matter.

Another distinction with the *Transamerican* case is the underlying notice statute. NRS 163.120 only requires notice to beneficiaries that have a "present interest" in the trust. The Texas statute, on the other hand, requires notice to both primary beneficiaries and contingent beneficiaries. The show cause hearing held after trial in the *Transamerican* was just for the benefit of the contingent beneficiaries which had no present interest in the trust. It should come as no surprise that contingent beneficiaries without a present interest in Texas are afforded such weak due process rights. Moreover, the issue of whether contingent beneficiaries require notice under NRS 163.120 was litigated in *Branch Banking & Trust Co. v. Smoke Ranch Dev., LLC,* Id., and the Court declined to extend the

statute's notice requirement to "future heirs or beneficiaries of the Trust Remainderman." Because of this, the ruling in Transamerican is in no way applicable to Nevada.

I. The Appellant's request for the names of the Rogich Trust beneficiaries on the eve of trial was untimely and correctly denied.

As noted above, at the hearing on the Appellant's Emergency Motion, which took place on April 18, 2019, what the District Court correctly held is not that its hands were tied, but rather that Appellant's hands were tied by its own failure to comply with the statute. The District Court correctly stated as follows:

> THE COURT: All right. And -- all right. So let me get back to my questions to Mr. Simons. Mr. Simons, 163.120(2) really -- really ties your hands as far as timing. It says that you have -- what it seems to me is that it gives you the chance either before the 16.1 or after to determine who the beneficiaries are so that they can be given notice so that they have the ability to intervene.
>
> And I realize that there's a provision there that within such time as the Court may fix, but the way I read it is that so that if you don't have it by the time that the initial disclosures are made you can ask for additional time. I don't see where it can be made on the eve of trial.

30 JA 007191 – 7192 (emphasis added). This is an important distinction between the Appellant's false statement and what the District Court actually held. The District Court was well aware of what the statute required, and what the Appellant

had failed to do. The District Court correctly found that there was no provision for the Appellant to serve a request for the names of beneficiaries on the eve of trial.

J. <u>The Appellant's request to continue the trial was properly denied.</u>

It bears noting that one of the issues Appellant raises is whether the District Court abused its discretion "by refusing to grant" Appellant a short continuance of the trial. *See* Appellant's Brief at p. 6. This is misleading. First of all, the District Court had already granted numerous continuances to both parties at the time Appellant filed its Emergency Motion seeking a continuance.

Second, what the Appellant leaves out of the April 18, 2019, hearing on the Appellant's Emergency Motion was that Appellant failed to comply with EDCR 7.30(c), (d), and (e) in making its Emergency Motion. That rule provides in relevant part

> **(c)** Except in criminal matters, if a motion for continuance is filed within 30 days before the date of the trial, the motion must contain a certificate of counsel for the movant that counsel has provided counsel's client with a copy of the motion and supporting documents. The court will not consider any motion filed in violation of this paragraph and any false certification will result in appropriate sanctions imposed pursuant to Rule 7.60.
>
> **(d)** No continuance may be granted unless the contents of the affidavit conform to this rule, except where the continuance is applied for in a mining case upon the special ground provided by NRS

16.020.

> **(e)** No amendments or additions to affidavits for continuance will be allowed at the hearing on the motion and the court may grant or deny the motion without further argument.

Nev. Rev. Stat. Ann. § 8 DIST CT Rule 7.30 (West). Appellant's Emergency Motion – filed on April 16, 2019, when trial was set to begin on April 22, 2019 – failed to contain a certification of counsel as required by EDCR 7.30(c) and (d), and Appellant's counsel's attempts to amend its Emergency Motion at the hearing were barred by subsection (e). See 30 JA 7188:22-7189:1. Accordingly, the District Court properly denied the Appellant's motion to continue the trial. *Id*. at 30 JA 7194:24-7195:4; *see also* Order Regarding Appellant's Emergency Motion to Address Defendant the Rogich Family Irrevocable Trust's NRS 163.120 Motion and/or Motion to Continue Trial for Purposes of NRS 163.120. See 32 JA 7822:18-20. Thus, the denial of Appellant's request for a trial continuance was due to Appellant's lack of compliance with EDCR 7.30, not some arbitrary exercise of discretion.

K. <u>The offers of judgment are not relevant.</u>

Appellant offers no support for its contention that the Rogich Trust's offers of judgment somehow obviated the need for Appellant's compliance with NRS 163.120. This issue was not raised below and should be precluded. *See Schuck v.*

Signature Flight Support of Nevada, Inc., 126 Nev. 434, 436 (245 P.3d 542, 544 (2010). Further, no case law supports Appellant's manufactured assertion that an offer of judgment somehow constitutes a "judicial admission" that can be used against a party later, not to mention the fact that an offer of judgment does not itself constitute a "pleading", rendering any case law concerning judicial admissions wholly inapplicable. Further, Appellant's baseless argument is contrary to the purposes of offers of judgment which are "to save time and money for the court system, the parties and the taxpayers" and to "reward a party who makes a reasonable offer and punish the party who refuses to accept such an offer." *Dillard Dep't Stores, Inc. v. Beckwith*, 115 Nev. 372, 382, 989 P.2d 882, 888 (1999). Using such a successful offer against a party is unsupported by any case law or other authority and would dissuade parties from exercising this option.

L. <u>Judicial estoppel is inapplicable.</u>

In an attempt to repackage its inaccurate assertions, Appellant falsely claims that the Rogich Trust somehow made "affirmations of fact and law" by not doing Appellant's job for it, or by serving offers of judgment. *See* Appellant's Brief at p. 59. Appellant then asserts judicial estoppel somehow excuses Appellant's failure to comply with NRS 163.120. *Id*. Appellant correctly notes that judicial estoppel exists in Nevada, but fails to include the full quotation from this Court on

the subject, to further mislead the Court. The complete holding on the issue is as follows:

> The general rule is stated in 31 C.J.S. Estoppel § 121, at 649, 650, as follows:
>
> 'Under the doctrine of judicial estoppel a party may be estopped merely by the fact of having alleged or admitted in his pleadings in a former proceeding the contrary of the assertion sought to be made. The courts recognize that this doctrine applies with particular force to admissions or statements made in the pleadings under the sanction of an oath, and it has been held that the statement in the prior proceeding must have been made under oath * * *. **In accordance with this requirement, it is stated that under the doctrine of judicial estoppel a party who has stated on oath in former litigation, as in a pleading, a given fact a true, will not be permitted to deny that fact in subsequent litigation**.

Sterling Builders, Inc. v. Fuhrman, 80 Nev. 543, 550, 396 P.2d 850, 854 (1964) (emphasis added). Thus even if Appellant could rightfully blame the Rogich Trust for Appellant's failure to comply with NRS 163.120 – which it cannot – and even if an offer of judgment could somehow constitute a judicial admission – which it does not – under Nevada law the doctrine of judicial estoppel requires that the asserted fact be made "on oath." Even Appellant's willingness to stretch the truth does not permit it to allege any such "admission" was made "on oath" such that judicial estoppel could in any way apply against the Rogich Trust.

M. The District Court correctly dismissed the Appellant's claims against The Rogich Parties, and the District Court's decision is supported by Nevada law, Nevada policy, and rules of statutory construction.

Appellant correctly notes that this court has held that good public policy dictates that cases be adjudicated on their merits. *See* Appellant's Brief at p. 59; *see also Hotel Last Frontier v. Frontier Prop*., 79 Nev. 150, 155–56, 380 P.2d 293, 295 (1963). However, this policy has its limits;

> We wish not to be understood, however, that this judicial tendency to grant relief from a default judgment implies that the trial court should always grant relief from a default judgment. Litigants and their counsel may not properly be allowed to disregard process or procedural rules with impunity. Lack of good faith or diligence, or lack of merit in the proposed defense, may very well warrant a denial of the motion for relief from the judgment.

Lentz v. Boles, 84 Nev. 197, 200, 438 P.2d at 256 (1968).

Further, while Appellant is correct that statutes should be interpreted so as to avoid absurd results (*see* Appellant's Brief at p. 60), Appellant again repeats the falsehood that the District Court held that its hands were tied; this is incorrect as the District Court held that NRS 163.120 tied Appellant's hands, not the District Court's. The reality is that the quotation from the Appellant's Brief on this issue also makes clear that "statutes should be interpreted so as to effect the intent of the legislature in enacting them." *Washoe Med. Ctr., Inc. v. Reliance*

Ins. Co., 112 Nev. 494, 496, 915 P.2d 288, 289 (1996). This is exactly what the District Court did and the result should be upheld.

N. The District Court's dismissal of the remaining claims against Rogich and Imitations was not error.

1. Appellant abandoned its conspiracy claim.

Appellant's sixth claim for relief alleged a claim for "conspiracy" against "all defendants". However, Appellant could not prevail on this claim. The conspiracy claim is based on Appellant's unsupported assertion that the Rogich Parties conspired to breach agreements of which Appellant claims to be a third-party beneficiary. Appellant's sixth claim states that it is only based on the Rogich Parties' intent to accomplish an unlawful objective in – according to the complaint – "deceiving and depriving Nanyah from its expectations and financial benefits in being a member of Eldorado." 30 JA 007347, at ¶ 121. Nowhere in its sixth claim did Appellant assert it had been damaged by the purported conspiracy by failing to receive payment of the allegedly owed $1,500,000 – only that it has been deprived of its purported interest in Eldorado. However, Appellant waived and abandoned this aspect of its claim, *i.e.*, it's purported claim to an equity interest in Eldorado. In Appellant's Motion to Extend the Dispositive Motion Deadline and Motion for Summary Judgment, it expressly and unequivocally abandons any

claim for purported damages as a result of not receiving an equity interest in Eldorado. Appellant expressly states:

> Nanyah was entitled to repayment of its $1.5 million investment and/or the issuance of a membership interest in Eldorado equal to that investment. Nanyah has elected to recover the repayment of its $1.5 million investment.

See 31 JA 007553, Appellant's Motion to Extend the Dispositive Motion Deadline and Motion for Summary Judgment ("Appellant's MSJ"), at page 3, note 1 thereto. Accordingly, because Appellant abandoned the only alleged ground for relief upon which it based its conspiracy claim against the Rogich Parties, and they are therefore entitled to judgment in their favor on Appellant's sixth claim for relief.

2. <u>Even if Appellant had not waived its sixth claim for relief, the 2012 Assignment Agreement on which Appellant based its sixth claim involves a different trust which is not a party to this action. Further, neither Rogich nor Imitations even signed the 2012 Assignment Agreement.</u>

Nanyah's Conspiracy claim against Imitations, LLC is based upon the 2012 Assignment Agreement. 30 JA 007342 – 007348, Complaint at ¶¶ 81 and 120 – 123. However, neither Imitations nor Rogich in his individual capacity, ever signed the 2012 Assignment Agreement. Moreover, the only agreement on which Imitations even appears – but not as a signatory – involves an unrelated trust

which is not the Rogich Trust, and is not a defendant in this action. 31 JA 007573 – 007578 (naming a separate trust, known as the Rogich Family Trust).

3. Appellant's conspiracy claim failed on the additional ground that it cannot prove the elements, including the necessary intent.

This Court has recognized that "civil conspiracy liability may attach where two or more persons undertake some concerted action with the intent to commit an unlawful objective, not necessarily a tort." *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. Adv. Op. 15, 345 P.3d 1049, 1052 (2015). As set forth in the declaration of Rogich (31 JA 007598) there was never any intent on behalf of the moving defendants – or the dismissed Rogich Trust – to commit any unlawful objective that would harm Appellant in any way. The remaining defendants, outside of Eldorado against whom the conspiracy claim is not being made, were dismissed. Accordingly, Appellant cannot prove the necessary intent element.

4. Even if the Appellant could have proven the required intent, which it could not, summary judgment was still appropriate as the agreements at issue provided for alternative means of performance, even under Appellant's flawed theory.

Nanyah's conspiracy claim failed as a matter of law based upon the plain language of the agreements at issue. The Agreements upon which the Appellant's conspiracy claim is based all provide for alternative means of performance. It is important to note that the Rogich Parties took the position, and have always taken

the position, that the agreements at issue do not require any affirmative obligation with respect to Appellant. But even if Appellant's claim to be a third party beneficiary of the Agreements was accurate – which it is not – it still could not maintain a claim for conspiracy, because the 2012 Assignment Agreement only impacted one method of possible compliance with what Appellant claims were the Rogich Parties' (and the Rogich Trust's) purported obligations.

The three relevant agreements executed in 2008 upon which Appellant bases its conspiracy claim each provide for alternative means of performance – payment **or** equity:

- **Purchase Agreement**: "Buyer [Rogich Trust] intends to negotiate such claims with Seller's [Go Global / Carlos Huerta] assistance so that such claimants confirm or convert the amounts … into non-interest bearing debt or an equity percentage to be determined by Buyer…" 30 JA 007382

- **Flangas / Teld Agreements**: "Seller [Rogich Trust] shall defend, indemnify and hold Buyer [Flangas Trust] harmless from any and all of the claims of … Nanyah Vegas, LLC …, each of whom invested or otherwise advanced the funds, plus certain possible claimed accrued interest. It is the current intention of [Rogich Trust] that such amounts be confirmed or converted to debt, with no obligation to participate in capital calls…" 31 JA 007405-06 (Flangas Agreement at ¶ 8(c)) and 31 JA 007435-36 (Teld Agreement at ¶ 8(c)).

Thus, these agreements – while they provide only for indemnification and not a promise to repay Appellant anything – provide that the indemnification will

take place as either payment or equity. This is sometimes referred to as an "alternative methods of performance contract" or "alternative contract."[4] The plain language of the cited provisions provide for the Trust to elect how indemnification – if necessary – will occur. This is also consistent with case law on this issue. *See San Bernardino Val. Water Dev. Co. v. San Bernardino Val. Mun. Water Dist*., 236 Cal. App. 2d 238, 247, 45 Cal. Rptr. 793, 799 (Ct. App. 1965) ("[A]lternative or disjunctive promises of a contract afford an option to the promisor to select one or more which he will perform.").

Further, Appellant's conspiracy claim is based on an alleged deprivation of its purported right to an equity interest in Eldorado. Appellant has now waived and abandoned that claim. Even if it had not, Appellant admitted in its MSJ that – at least in its mind – "Nanyah was entitled to repayment of its $1.5 million investment and/or the issuance of a membership interest in Eldorado equal to that investment. Nanyah has elected to recover the repayment of its $1.5 million

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[4] An alternative contract is defined as:

> "A contract in which the performing party may elect to perform one of two or more specified acts to satisfy the obligation; a contract that provides more than one way for a party to complete performance, usually performing that party to choose the manner of performance."

See Alternative Contract, Black's Law Dictionary (9th ed. 2009).

investment." *See* 31 JA 007553. Thus, even if the 2012 Membership Interest Assignment Agreement prevented the Rogich Trust from providing an equity interest to Appellant in Eldorado (assuming it was entitled to any, which it was not), nothing about that agreement prevented the Rogich Trust from paying $1,500,000 (if in fact it was owed, which it was not). Thus, the ability of the Rogich Trust to comply with what Appellant asserts was its obligation (*i.e.*, paying Nanyah $1.5M) negates the required element of the conspiracy claim, namely an unlawful act. The 2012 Assignment Agreement at best eliminated only one method of compliance with what Appellant claims were the Trust's obligations under the Agreements, *i.e.*, providing Nanyah an interest in Eldorado, which was the option Nanyah itself abandoned.

As noted above, "[a]n actionable civil conspiracy 'consists of a combination of two or more persons who, by some concerted action, intend to accomplish an unlawful objective for the purpose of harming another, **and damage results from the act or acts.'** " *Consol. Generator-Nevada, Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1311, 971 P.2d 1251, 1256 (1998). If the Rogich Trust could have paid Appellant the $1,500,000 it alleges it is owed, then no damage has resulted from the purported conspiracy alleged concerning the 2012 Assignment Agreement, and the Rogich Parties were entitled to judgment.

5. Appellant's conspiracy claim was also barred by the intra-corporate conspiracy doctrine.

Rogich didn't individually sign the 2012 Assignment Agreement, only the Rogich Trust. Imitations did not sign it either. This Court has previously held that:

> Agents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage.[5]

See Collins v. Union Fed. Sav. & Loan Ass'n, 99 Nev. 284, 303, 662 P.2d 610, 622 (1983).

Here, Rogich signed the 2012 Assignment Agreement in his official capacity as Trustee of The Rogich Trust. There can be no conspiracy between Rogich and the Trust as Rogich was acting on behalf of the Trust. Therefore, Appellant's conspiracy claim failed as a matter of law.

In its Brief on this issue, Appellant continues its unfortunate pattern of blatantly misconstruing Rogich's deposition testimony. Appellant claims that Rogich testified he "never had any intention of paying Nanyah 1.5 million", but fails to note that Rogich's counsel objected as to foundation as there was nothing

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[5] *Citing Wise v. Southern Pacific Co.*, 223 Cal. App.2d 50, 35 Cal. Rptr. 652, 655 (Cal. App. 1963); *also citing Bliss v. Southern Pacific Co.*, 212 Or. 634, 321 P.2d 324, 328-329 (Or. 1958)).

in the document that required Rogich to repay anyone anything. *See* 32 JA_007811:4-22.

Moreover, the District Court's holding on this issue was comprehensive and accurate. In its order, the District Court made clear that it rejected the stand-alone conspiracy claims because there was no evidence of either a conspiracy, or intent to accomplish an unlawful objective. The District Court held as follows:

> An actionable conspiracy "consists of a combination of two or more persons who, by some concerted action, **intend to accomplish an unlawful objective** for the purpose of harming another, and damages results from the act or acts." *Consol. Generator-Nevada, Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1311 (1998).
>
> Here, Nanyah's conspiracy claims are primarily premised on agreements in which the Rogich Trust agreed to indemnify Nanyah. Imitations, LLC was not a party to any of these agreements. Nevertheless, the Court does not find that there was intent to pursue an unlawful objective based on (1) Rogich's declaration; and (2) the agreements at issue. While Nanyah cites to Rogich's deposition as evidence of his unlawful intent, the testimony does not expressly state that he intended to accomplish an *unlawful* object for the purpose of harming Nanyah. Similarly, there is no evidence in the record that Defendant Imitations, LLC neither intended to accomplish an unlawful objective nor was Defendant Imitations, LLC even a party to the agreements at issue. Finally, there are not facts in dispute of an illegal agreement amongst the parties. Without the necessary intent requirement under *Consol. Generator-Nevada, Inc.*, Nanyah's conspiracy claims cannot succeed.
>
> As such, summary judgment is appropriate on the civil conspiracy cause of action.

See 33 JA_8061:14 – 8062:5 (emphasis in original). Accordingly, Appellant's attempts to falsely misconstrue Rogich's deposition testimony were heard, considered and correctly rejected by the District Court. The District Court's decision on Appellant's conspiracy claims was fully supported by the law and facts in this case, and should not be overturned.

6. NRS 163.120 precluded a finding of a contract involving Rogich, individually, as he had signed the Agreements in his capacity as trustee of the Rogich Trust. Accordingly, dismissal of the breach of contract and breach of the covenant of good faith and fair dealing claims was required.

As the District Court noted in its Decision and Order, no contractual relationship between Rogich, individually, and Appellant existed. 33 JA 008060. While Rogich was the trustee of the Rogich Trust, " a trustee is not personally liable on a contract properly entered into in the capacity of representative in the course of the administration of the trust unless the trustee fails to reveal the representative capacity or identify the trust in the contract." *See* NRS 163.120. One of the fundamental elements of a breach of contract or of the covenant of good faith and fair dealing, is for a valid contract to exist. 33 JA 008060. Thus, summary judgment on Appellant's causes of action for breach of contract and breach of the covenant of good faith and fair dealing against Rogich individually were warranted. 33 JA 008061.

Moreover, it bears noting that in its opposition – filed after the trial had been scheduled to commence – Appellant argued that it should be able to assert an alter ego claim against Rogich individually. The District Court rejected this, finding that this Court's holding in *Callie v. Bowling*, 123 Nev. 181, 185 (2007) required "an independent action" in order to assert an alter ego claim. 33 JA 008060. Further, the District Court correctly rejected the Appellant's last ditch effort to pretend there was a "special relationship" between Appellant and Rogich, individually since this is limited to "rare and exceptional cases when there is a special relationship between the victim and tortfeasor." *See K Mart Corp. v. Ponsock*, 103, Nev. 39, 49 (1987). As no such relationship existed in this case, the District Court found that summary judgment was appropriate. 33 JA 008061.

O. <u>The District Court did not err in denying Appellant's MIL #5.</u>

1. <u>The District Court never found Nanyah to be a third party beneficiary of any of the Agreements.</u>

The District Court's ruling on the MIL #5 was indisputably correct. The District Court correctly ruled that "[w]ith respect to the Rogich Parties, it has not yet been determined whether Nanyah is a third party beneficiary of any of the written contracts at issue in this case. *See* 27 JA_006477:1-4 (*citing Canfora v. Coast Hotels and Casinos, Inc.*, 121 Nev. 771, 779, 121 P.3d 599, 605 (2005). In its Brief Appellant simply misstates the District Court's ruling in its October 2018

Order ("October Order"). Appellant inaccurately asserts that the District Court found in its October Order that Appellant is a third-party beneficiary. *See* Appellant's Brief at p. 74. This is false. The October Order contains provisions that Appellant is only "an **alleged** third-party beneficiary" to the Purchase Agreement and that its purported advance is only an "**alleged** investment in Eldorado." 25 JA 006102, at pg. 8, ll. 14-15 and 25 JA 006103 at pg. 9, ll. 2-3. At no point in the underlying litigation did the District Court find that Appellant was a third-party beneficiary of any Agreements.

Further, as the District Court recognized in its ruling on the Appellant's MIL whether an individual is an intended third-party beneficiary depends on the parties' intent, "gleaned from reading the contract as a whole in light of the circumstances under which it was entered." 27 JA 006483, *citing Canfora v. Coast Hotels & Casinos, Inc*., 121 Nev. 771, 779, 121 P.3d 599, 605 (2005). As set forth above, there are numerous factual issues in dispute, including whether Appellant was actually a third-party beneficiary of any agreement at issue in this case.

In addition to the binding precedent set forth above, multiple courts have recognized that resolution of the question of whether a party to a lawsuit is a third-party beneficiary of a contract requires resolution of legal and factual issues. *See*

Smith v. Cent. Ariz. Water Conservation Dist., 418 F.3d 1028, 1034 (9th Cir. 2005) ("Whether the district court correctly applied the relevant law in concluding the landowners are not third-party beneficiaries of the relevant contracts is a mixed question of law and fact which we review de novo."); *WuMac, Inc. v. Eagle Canyon Leasing, Inc*., No. 2:12-CV-0926-LRH, 2015 WL 995095, at *8 (D. Nev. Mar. 5, 2015) (recognizing the court had found "that there remains a question of fact as to whether WuMac was a third party beneficiary to the contract between Eagle and Atlanta Jet"); *Glass v. United States*, 258 F.3d 1349, 1353 (Fed. Cir.), opinion amended on reh'g, 273 F.3d 1072 (Fed. Cir. 2001) ("The underlying question of whether the shareholders are third party beneficiaries to the alleged contract is a mixed question of law and fact"); *CPJ Enterprises, Inc. v. Gernander*, 521 N.W.2d 622, 624 (Minn. Ct. App. 1994) ("But in Admiral, the court applied the well-established third-party beneficiary theory of attorney liability and held that whether the plaintiffs were third-party beneficiaries was a fact question.").

2. <u>The parol evidence rule is inapplicable.</u>

As noted above, Nanyah conveniently fails to mention that the October 2018 Order contains provisions that "Nanyah is an **alleged** third-party beneficiary" to the Purchase Agreement and that its purported advance is only an

"**alleged** investment in Eldorado." 25 JA 006102, at pg. 8, ll. 14-15 and 25 JA 006103 at pg. 9, ll. 2-3.

Appellant's assertions in its Brief regarding the parol evidence rule are directly contradicted by binding Nevada precedent. While the parol evidence rule generally may be invoked by any party to a contract, the long standing rule set forth in Nevada by the state Supreme Court is that it cannot be invoked by a stranger to such contract. *See Bank of California v. White*, 14 Nev. 373, 376 (1879) (holding that the parol evidence rule "has no application whatsoever as against any party who is a stranger to the instrument.") (emphasis added); *see also Pittman v. Providence Washington Ins. Co*., 394 So. 2d 223 (Fla. Dist. Ct. App. 1981) (recognizing that a third party beneficiary is a stranger to a contract.).

Accordingly, Appellant's assertions that parol evidence rule somehow barred the Defendants from introducing any testimony or other evidence at trial fail as a matter of law. The District Court's ruling on MIL #5 was correct

P. The District Court did not err in denying Appellant's MIL #6.

1. Appellant's MIL #6 was correctly denied.

Nanyah readily admitted that its MIL #6 was a rehash of its Motion in Limine #3 Re: Defendants Are Bound by their Answers to Complaint ("MIL #3"). In its order on Appellant's MIL #3 it held as follows:

> Nanyah's MIL #3 is granted in part and only against the Rogich Parties, as Eldorado was not a party to the Answer in Case No. A-16-746239-C. The Rogich Parties are bound by their answers to paragraphs 82 and 83 of Nanyah's Complaint. However, to the extent the Rogich Parties obtained additional information after their Answer was filed, they are not precluded from bringing that forward at the time of trial.

22 JA 005442 at ll. 20-24. Accordingly, Nanyah's representation that the MIL Order somehow found that the Rogich Parties have no evidence rebutting Nanyah's inaccurate assertion regarding its purported "discovery" allegedly made in 2012 is wrong.

Nanyah's Motion in Limine #6 sought "to exclude any attempt by [Defendants]…from presenting any evidence seeking to contradict that Nanyah first discovered the breach of Defendants' duty to repay its $1.5 Million investment did not occur until December, 2012." Apparently, Nanyah wanted to preclude testimony with respect to defendants' answers in paragraph 83 of its First Amended Answer.

With respect to paragraph 83 of the Complaint and paragraph 83 of the Defendants' Answer, the Motion should be denied because paragraph 83 of the Answer does not admit even one word of paragraph 83 of the Complaint. In fact, paragraph 83 is denied. Further, paragraph 83 of Defendants' Answer "alleges they are without knowledge or information as to the truth of the allegations in

paragraph 83." 30 JA 7359. Nanyah contends the words" are without knowledge and information" is an admission. They are not. That answer has "the effect of a denial." NCRP 8(b). Thus, paragraph 83 is denied and there is no basis for Nanyah's Motion with respect to paragraph 83 of its Complaint.

2. <u>Substantial evidence exists that Nanyah was aware of its purported claim well before 2012</u>.

Appellant alleges that the defendants have presented no evidence establishing that Nanyah knew about the 2012 transaction prior to December, 2012. *See* Appellant's Brief at pp. 77-78, generally. The Membership Interest Assignment Agreement ("Assignment Agreement") is dated January, 2012. Appellant conflates the date it purportedly knew about the Assignment Agreement with the date it discovered the defendants' purported breach of their alleged obligation to Nanyah. *Id.* The evidence in this case makes clear these are two different dates and the Rogich Parties could not fairly be precluded from introducing evidence on the disputed issue of fact as to when Appellant's purported claim accrued.

For example, as noted above, Nanyah received a K-1 from Canamex, not Eldorado, in 2008. At that point, Nanyah was on notice that its money and investment, if any, were in Canamex, not Eldorado. As noted above, Harlap claims his money went directly into Eldorado. This is indisputably false. Harlap

also said that Huerta told him his investment was in Eldorado. This may be true; but it proves that upon receipt of its K-1 from Canamex in 2008, Nanyah was on notice as of that time that its purported claims had accrued since it had not received what it now claims it had paid for – an interest in Eldorado.

Moreover, Harlap testified that he "vividly" remembers Huerta explaining to him in 2008 that he saw the Purchase Agreement (which was Exhibit 2 in Harlap's deposition), which would have put him on notice of his potential claim:

> "Q. Let the record show the witness is looking at Exhibit 2."
> ….
> "Q. That is a 2008 document. Did you see it in 2008?
> A. I do not know.
> Q. You don't know. You don't know or you don't remember?
> A. I don't remember.
> Q. But you don't know?
> A. I might have.
> Q. You might have. Okay.
> 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.
> Q. When did Carlos tell you that?
> 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."

22 JA 005284 at 17:6-7, 18:1-23.

Accordingly, the Rogich Parties could not fairly or lawfully be precluded

from introducing evidence that Appellant's alleged claim accrued in 2008 and is therefore barred by the applicable statutes of limitation. As such, Nanyah's MIL #6 was correctly denied.

Q. <u>No rule or statute requires the District Court to settle jury instructions prior to trial.</u>

Appellant's claims regarding the District Court's decision to settle jury instructions after hearing evidence are mistaken. No rule requires the District Court to settle jury instructions on the Appellant's time table, and Appellant cites no case law to support this far-fetched assertion. Further, it is well settled that generally speaking a the proper time to settle jury instructions is after the close of evidence. *See United States v. Fast Horse*, 747 F.3d 1040, 1047 (8th Cir. 2014) ("The district court did not settle the final jury instructions until after the close of the evidence, at which time the court determined to give the instruction described above."); *Enriquez v. Cochran*, 126 N.M. 196, 211, 967 P.2d 1136, 1151 ("The issue arose after the close of evidence during the jury instruction settlement conference."); *State v. Hocter*, 362 Mont. 215, 220, 262 P.3d 1089, 1093 ("After the close of evidence, the parties held a conference to settle jury instructions."). The purpose behind this general rule is clear: where there is additional evidence that may be adduced at trial, it is impractical to request a judge settle jury

instructions. As the 8th Circuit recognized, the evidence brought forth at trial impacts the instructions:

> Before the instructions were resolved, the district court did not exclude any evidence that Fast Horse sought to introduce on the issue of knowledge. If Fast Horse had additional evidence that would raise doubt about his knowledge of the victim's incapacity, then he had no reason to withhold it during the trial while a decision on final jury instructions was pending.

Fast Horse, supra, 747 F.3d at 1047.

Additionally, contrary to Appellant's assertions, the case law it cites actually stands for the proposition that jury instructions cannot "comment[] upon a disputed fact or invad[e] the province of the jury." *City of Reno v. Silver State Flying Serv., Inc.*, 84 Nev. 170, 179, 438 P.2d 257, 263 (1968). As set forth herein, Appellant requests that this Court do exactly that by "settling" disputed issues of fact that are clearly the province of the jury as fact finder. As the Nevada Supreme Court has held, "[i]f there is conflicting evidence on a material issue, or if reasonable persons could draw different inferences from the facts, the question is one of fact for the jury and not one of law for the court." *Broussard v. Hill*, 100 Nev. 325, 327, 682 P.2d 1376, 1377 (1984) (emphasis added). In this case there were numerous disputed material issues for trial. Accordingly, because the District Court had not heard all the evidence at the time the Appellant's motion

was filed, the motion was rightly denied.

Further, the District Court has discretion to control the manner of proceedings in front of it, and it makes no logical sense to required the District Court to settle jury instructions before the trial even starts. *Principal Invs. v. Harrison*, 132 Nev. 9, 18, 366 P.3d 688, 695 (2016) (recognizing a court has "inherent power to control its docket and to prevent abuse in its proceedings"). In addition, here it would have made no sense for the District Court to settle jury instructions before a jury was even empaneled, and in fact, here the case never went to a jury so instructions were unnecessary.

R. In the event of a remand, public policy dictates this case should not be transferred to a different department.

Appellant requests that this Court reassign this case should this Court see fit to remand it to the trial level. However, Appellant offers only its unsupported and speculative claims of bias against it merely because not every decision went its way. In fact, Appellant received many favorable rulings from the District Court, in spite of Appellant's own disrespectful and condescending behavior toward the District Court. Regardless, Appellant offers no actual justification for reassignment, and it would be a gross waste of judicial resources to require another Court to get up to speed on this case when no actual evidence of bias whatsoever has been offered by the Appellant. *See Allstate Ins. Co. v. Thorpe*,

123 Nev. 565, 571, 170 P.3d 989, 994 (2007) (recognizing the value of the policy of conserving judicial resources).

IX. CROSS-APPEAL[6]

A. Introduction

On November 7, 2019, the Rogich Parties filed their Notice of Cross-Appeal, appealing from (A) the October 5, 2018 Order: (1) Granting Defendants Peter Eliades, Individually and as Trustee of the Eliades Survivor Trust of 10/30/08, and Teld, LLC's Motion for Summary Judgment; and (2) Denying Nanyah Vegas, LLC's Countermotion for Summary Judgment; and (B) March 26, 2019, Order Denying the Rogich Parties' NRCP 60(b) Motion.

B. Relevant Procedural History

1. On June 1, 2018, Peter Eliades, Individually and as Trustee of the Eliades Survivor Trust of 10/30/08, and Teld, LLC filed their Motion for Summary Judgment (the "Eliades Defendants' Motion for Summary Judgment") against plaintiff Nanyah Vegas, LLC ("Appellant" or "Nanyah"). 15 JA 003665 – 003679.

[6] The Rogich Parties incorporate their brief on appeal in their cross-appeal, including without limitation all factual assertions and argument, as well as their jurisdictional statement, routing statement, statement of the issues and the case, factual and procedural background, and argument.

2. On June 19, 2018, Nanyah filed its Opposition to the Eliades Defendants' Motion for Summary Judgment and Countermotion for Summary Judgment ("Nanyah's Countermotion for Summary Judgment") against the Eliades Defendants. 15 JA 003681 – 003722.

3. On July 19, 2018, the Eliades Defendants filed their Reply in Support of their Motion for Summary Judgment and Opposition to Nanyah's Countermotion for Summary Judgment. 15 JA 003724 – 003738.

4. On July 26, 2018, the Court held the hearing on the Eliades Defendants and Nanyah's competing Motions. 15 JA 003740 – 16 JA 003778.

5. On October 5, 2018, the Court entered the Order: (1) Granting Defendants Peter Eliades, Individually and as Trustee of the Eliades Survivor Trust of 10/30/08, and Teld, LLC's Motion for Summary Judgment; and (2) Denying Nanyah Vegas, LLC's Countermotion for Summary Judgment (the "October 2018 Order"). 16 JA 003780 – 003789. The October 2018 Order was never approved as to form and content by the Rogich Parties' counsel or by counsel for the Eliades Defendants. Further, competing orders were offered by the Eliades Defendants and Nanyah. 16 JA 003791 – 003832.

6. With respect to Nanyah's competing Order, Nanyah included a redlined version of the 2 competing Orders highlighting the differences between the 2 versions. 16 JA 003811 – 003821.

7. On October 8, 2018, Notice of Entry of the October 2018 Order was filed and served. 16 JA 003834 – 003848.

There is no dispute that the above-referenced motions for summary judgment, which resulted in the entry of the October 2018 Order, did not seek summary judgment against the Rogich Parties, or any of them.

C. <u>The Rogich Parties rejected the October 2018 Order.</u>

The October 2018 Order includes disputed affirmative findings and conclusions (*i.e.*, that The Rogich Trust has any obligation or debt owed to Appellant (as a potential claimant) for its alleged investment into Eldorado Hills). 16 JA 003780 – 003789. The Rogich Parties specifically disputed the following within the October 2018 Order: (1) Undisputed Material Facts, paragraphs 4, 5(a)(ii), 5(b)(i), 5(b)(iii), 5(b)(iv) and 5(d)(ii); and(2) Conclusion of Law, paragraphs 7, 9, 12, 15, 20 and 21. *Id.* The October 2018 Order could be misconstrued to have made several affirmative findings and conclusions that the Rogich Trust has an obligation or debt owed to Nanyah (as a potential claimant) for its purported investment into Eldorado Hill. *See id.* The record clearly shows

that the arguments/exhibits, presented in the moving papers and at the hearing (as cited below), indicate that any claim by Nanyah is only a "potential" claim, and that any purported investment by Nanyah into Eldorado is not only disputed, but demonstrably inaccurate. Set forth below are various references to documents and testimony in the record in this case demonstrating that a genuine issue of material fact clearly remains regarding Nanyah's purported "claim" against any of the defendants, and regarding its purported "investment" into Eldorado:

1. Eliades Defendants' Motion for Summary Judgment

- "On the contrary, the Purchase Agreements state that the Rogich Trust agreed to negotiate with Nanyah (amongst others) to attempt to resolve its "***potential*** claim." 15 JA 003670, at pg. 6, ll. 6-10.

- ***"Notably, the Rogich Trust --not Teld, Eliades, or the Eliades Trust--agreed to be responsible for Nanyah's potential claim."*** 15 JA 003675 at pg. 11, ll. 5-6 (emphasis in original).

- "On the contrary, the Purchase Agreements reiterate over and over again the only the Rogich Trust is responsible for Nanyah's ***potential*** claim." 15 JA 003676 at pg. 12, ll. 7-9.

2. Transcript of the July 26, 2018 Hearing

- Mr. Liebman: "Fourth, in 2008, when TELD LLC does become involved with the company, they put forward these explicit agreements that address Nanyah's ***potential*** claim -- that's the word it uses, a ***potentially*** [sic] claim…." 16 JA 003744 at p.5, ll. 13-16 thereto.

D. The language of the October 5, 2018 is inconsistent within itself.

The October 2018 Order includes disputed affirmative findings and conclusions (*i.e.*, that The Rogich Trust has any obligation or debt owed to Nanyah (as a potential claimant) for its alleged investment into Eldorado Hill), which are provided for at: (1) Undisputed Material Facts, paragraphs 4, 5(a)(ii), 5(b)(i), 5(b)(iii), 5(b)(iv) and 5(d)(ii); and (2) Conclusion of Law, paragraphs 7, 9, 12, 15, 20 and 21. 16 JA 03780 – 03789. Importantly, the October 2018 Order itself includes the following findings and conclusions that are inconsistent with the affirmative findings and conclusions:

- "...there is no basis for Nanyah--as an **alleged** third-party beneficiary--to sue the Eliades Defendants." *Id*. 16 JA 003787, at p. 8, ll. 14-15.
- "...the Eliades Defendants supposedly pursued their own individual advantage by seeking to interfere with the return of Nanyah's **alleged** investment in Eldorado." *Id*. 16 JA 003788 at p. 9, ll. 1-2.

These above inconsistencies acknowledge there are still disputed material facts at issue.

E. Disputed Material Facts

To further support relief from the October 2018 Order, the facts set forth in section V above constitute a non-comprehensive list of disputed material facts,

more than supports the Rogich Parties' requested relief from the October 2018 Order.

X. ARGUMENT

A. <u>This Court should relieve the Rogich Parties from the October 5, 2018 Order due to mistake and/or inadvertence.</u>

NRCP 60(b) in pertinent part, allows the Court, "[o]n motion and **upon such terms as are just**", to "**relieve a party**…**from a** final judgment, **order** or proceeding for the following reasons: (1) **mistake, inadvertence**, surprise or excusable neglect…." NRCP 60(b) (Emphasis Added). Moreover, the relief requested by the Rogich Parties is well within this Court's jurisdiction to grant. *See A-Mark Coin Co. v. Redfield's Estate*, 94 Nev. 495, 498, 582 P.2d 359, 361 (1978) (recognizing, in the probate context, that a court "has jurisdiction to vacate a prior order upon learning that it was entered through mistake" and further confirms that "[o]ur remedial rule, NRCP 60(b), contemplates such action.") (citation omitted). The Rogich Parties' Motion was timely filed within six (6) months from service of the notice of entry of the October 2018 Order. *See id*.

Despite the fact that the Agreements plainly state that Nanyah's alleged claim is only "potential" – a significant detriment to Nanyah's current position – this critical modifier failed to make its way into the October 2018 Order through inadvertence or neglect. Regardless, there can be no doubt that Nanyah should

not be able to benefit from its own error in drafting the October 2018 Order, as it now attempts to do by ignoring the fact that its purported claim is only "potential", and its purported "investment" into Eldorado is only an allegation, not a proven fact.

Thus, while the subject Motions for Summary Judgment were not seeking summary judgment against the Rogich Parties, the October 2018 Order inadvertently or mistakenly made affirmative findings and conclusions that Nanyah attempts to incorrectly construe as a basis for summary judgment against the Rogich Parties, even going so far as to assert that the Rogich Parties were even prohibited from presenting any evidence in their defense at trial.

It is worth noting that Nanyah Vegas has, in past proceedings, brought motions for summary judgment against the Rogich Parties, where it sought summary judgment very similar to the disputed affirmative findings and conclusions provided for within the October 2018 Order. Each time, the Rogich Parties were successful and the District Court denied Nanyah summary judgment on what are very clearly disputed issues of fact. Without question, Nanyah's mistakes in drafting the October 2018 Order, if left uncorrected, would gravely and unjustly impact the Rogich Parties' due process rights.

Given that there are disputed material facts still at issue regarding the referenced provisions of the October 2018 Order, the affirmative findings and conclusions related to these disputed material facts should be modified to reflect them as allegations only. This Court should grant the Rogich Parties relief from the October 2018 Order. To illustrate the small, but significant, changes that would be required to amend the October 2018 Order, and for the Court's convenience, the Rogich Parties provide a redlined/amended version of the October 2018 Order that they believe should have been entered (the "Proposed Amended Order"). 16 JA 003850 – 003859. The Rogich Parties request that the Proposed Amended Order be entered in place of the October 2018 Order.

While the Eliades Defendants were granted their MSJ, and Appellant's Counter-MSJ was denied, the Court enter its Order which included findings and conclusions that are against the Rogich Parties. Prior to the entry of the October 2018 Order, the Rogich Parties had no reason to oppose the summary judgment sought by the Eliades Defendants, or by Appellant, since those motions did not request findings against the Rogich Parties; thus, denying the Rogich Parties relief from the October 2018 Order would greatly prejudice the Rogich Parties rights, effectively denying them due process. *See Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007) (recognizing that procedural due process requires

meaningful notice and an opportunity to be heard). Accordingly, the Rogich Parties should be granted their requested relief from the October 2018 Order.

B. <u>The parol evidence rule is inapplicable as a matter of law.</u>

Appellant attempts to improperly use the parol evidence rule as a sword and shield. Appellant will likely provide a circular argument to this Court on why the October 2018 Order should not be vacated - - because the Court entered the October 2018 Order and, therefore, the parol evidence rule bars the Rogich Parties' Motion in total. Clearly, even if the parol evidence rule could apply in this instance – which, as set forth below, the Nevada Supreme Court has held it cannot – it could not possibly apply to prevent this Court from granting relief from its own order,

Moreover, Appellant conveniently fails to mention that the October 2018 Order contains provisions that "Appellant is an **alleged** third-party beneficiary" to the Purchase Agreement and that its purported advance is only an "**alleged** investment in Eldorado." 16 JA 003787 – 003788, at pg. 8, ll. 14-15 and pg. 9, ll. 2-3. Appellant further argues that the Rogich Parties are barred from contesting that Appellant's "investment", if any, was in Eldorado, as opposed to the place where Nanyah's money actually ended up, which is CanaMex. Even the October 2018 Order states that Appellant's alleged investment is just that: **<u>alleged</u>**. The

fact that Appellant mistakenly thinks it can spin this into summary judgment in its favor only underscores the need for Rule 60(b) relief from the October 2018 Order.

In addition to employing inaccurate circular reasoning, Appellant's assertions regarding the parol evidence rule are directly contradicted by binding Nevada precedent. While the parol evidence rule generally may be invoked by any party to a contract, the long standing rule set forth in Nevada by the state Supreme Court is that it cannot be invoked by a stranger to such contract. *See Bank of California v. White*, 14 Nev. 373, 376 (1879) (holding that the parol evidence rule "has no application whatsoever as against any party who is a stranger to the instrument.") (emphasis added); *see also Pittman v. Providence Washington Ins. Co*., 394 So. 2d 223 (Fla. Dist. Ct. App. 1981) (recognizing that a third party beneficiary is a stranger to a contract.). Further, under binding Nevada case law, where one party to a lawsuit is not bound by the parol evidence rule, "either party is at liberty to show, by parol, a different state of facts from that set out in the writing." *Bank of California*, *supra*, 14 Nev. at 376. Accordingly, Appellant's assertions that parol evidence rule somehow bar the Rogich Parties from introducing any testimony or other evidence at trial fail as a matter of law.

C. <u>There are many disputed issues of material fact remaining in this case, including with respect to the Agreements at issue and the interpretation of their ambiguity.</u>

As noted above, there were genuine issues of material fact surrounding the subject Agreements precluding summary judgment against the Rogich Defendants. The relevant Agreements only provide that Mr. Rogich's Trust will look into the **<u>potential</u>** claimants listed in the Purchase Agreement. The relevant Agreements do not establish that Mr. Rogich's Trust will pay Appellant or the other potential claimants. In fact, each of the potential claimants were not legitimate as they had either received K-1s from Eldorado or, in the case of Appellant, was not entitled to a K-1 from Eldorado as it was not an investor.

In fact, through discovery in this case, the Rogich Parties learned that CanaMex provided K-1s to Appellant for its $1.5 Million investment into CanaMex and that CanaMex confirmed Nanyah's investment into CanaMex on several occasions. No amount of testimony by Harlap or Huerta will change the fact that the $1.5 Million went into CanaMex and eventually ended up in its manager's/Go Global's pocket and that Nanyah's $1.5 Million was identified on the K-1s provided by CanaMex to Appellant. Any evidence and testimony to support Nanyah's alleged investment in Eldorado or that the Rogich Parties agreed

to repay Nanyah's alleged investment was in dispute. Further, the October 5, 2018 Order itself supports the fact that genuine material facts remaining.

Moreover, the agreements at issue have numerous ambiguities internally and between them. For example, the following is a non-exhaustive sample of the ambiguities existing in the above documents with respect to Appellant's allegations:

> 1. The Purchase Agreement refers to Appellant as a "**Potential Claimants**". 19 JA 004602 at Recital A. Despite Appellant's misleading assertions, nowhere has this Court found that "potential claimant" means that Appellant could have had an "investment" in Eldorado or received a return of the $1,500,000 it transferred to CanaMex. Appellant's contrary assertion is inaccurate and its attempt to speculate as to the intent of the parties to the contract – which did not include Appellant – is inadmissible.
>
> 2. Exhibit A to the Purchase Agreement refers to Appellant as a "**Potential Claimant**". 19 JA 004611. Moreover, this Exhibit A further highlights the dispute as to whether Appellant has any claim at all against any of the named defendants since it states that Appellant's purported "claim" is "**through Canamex Nevada, LLC**". *Id*. This shows that even Appellant acknowledges its money went to Canamex, and it is the Rogich Parties' position that any claim Appellant may have is against Canamex, not against the Rogich Parties or Eldorado.
>
> 3. The purported promise in the Flangas and Teld Agreements appears as part of an indemnification agreement to hold the buyers (Flangas or Teld, respectively) harmless, not an affirmative, stand alone provision to pay Appellant anything. 19 JA 004614 – 004671.

> 4. Further, Exhibit D to the Flangas and Teld agreements confusingly states that "certain amounts have been advanced **to or on behalf of the Company** by certain third parties…" 19 JA 004636 (Flangas Agreement) and 19 JA 004665 (Teld Agreement). It is not even clear from the language of Exhibit D whether Appellant "advanced" funds in the form of a loan, or on behalf of some other entity. Notably, Exhibit D to these agreements also states that any potential claim by Appellant is "through Canamex Nevada, LLC" – again confirming that Appellant's claim, if any, is against Canamex, not the Rogich Parties or Eldorado.

In addition to the above, Appellant's claims are further barred to the extent they rely on the Operating Agremeent as that agreement specifically prohibits any claims by third party beneficiaries. Paragraph 10.11 of the Operating Agreement provides as follows:

> 10.11 No Third Party Beneficiaries. Except as set forth in Article IX [unrelated provision], this Agreement is adopted solely by and for the benefit of the Members and its [six] respective successors and assigns, and no other Person shall have any rights, interest or claims hereunder or be entitled to any benefits under or on account of this Agreement as a third party beneficiary or otherwise.

19 JA 004691.

Here there is no dispute that the parties to the Operating Agreement specifically prohibited any claims by any purported third party beneficiaries. It is as a result of the ambiguity of the subject agreements that the October 2018 Order contains contradictory findings and conclusions. These alleged findings and conclusions support the vacating of the October 2018 Order.

Moreover, multiple additional factual issues are present in this matter. For example, the Court has previously denied in part the Rogich Parties' motion for summary judgment related to the statute of limitations ***based on the Court's finding that disputed questions of fact remain regarding this issue.*** For example, in the transcript of the District Court's ruling on this issue the District Court specifically noted the following:

> First, I find that the motion can be granted only with regard to the fran – fraudulent conveyance action and with regard to the constructive trust….
>
> The other issues [including with respect to the statute of limitations arguments by the Rogich Parties] are with regard to accrual of causes of action. **There are facts in dispute with regard to that.** I'm going to have to see the demeanor, the personal knowledge, the –the credibility of the witnesses on – on all sides to determine that – if it's me, or a jury's entitled, the parties are entitled to a jury.

19 JA 004696 (emphasis added).

In addition, this Court has recognized that the determination of when a cause of action accrues "ordinarily presents a question of fact" and may only be determined as a matter of law when there is irrefutable evidence supporting that determination. *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 251, 277 P.3d 458, 462 (2012); *Golden v. Forage*, No. 72163, 2017 WL 4711619, at *1 (Nev. App. Oct. 13, 2017) (same); *Errico v. Eighth Judicial Dist. Court of State, ex rel. Cty. of Clark*, No. 70147, 2016 WL 2846397, at *1 (Nev. May 11, 2016) (same).

Further, as noted above, there were specific issues that would have needed to be determined at trial (absent the dismissal which occurred) as to when Appellant's claims accrued. Just because there may not have been a "date certain" in any of the agreements at issue as to when any repayment of Appellant's purported claim would take place, that does not mean Appellant's alleged claim could not have accrued outside the applicable statute of limitations period. For example, a fact finder could have determined that Appellant's receipt of the 2007 K-1 from CanaMex put Appellant on notice that – if it did have a claim against any of the defendants for failure to repay its alleged "loan" or "investment" – such claim accrued when Appellant received unequivocal confirmation that its purported "investment" it now claims was meant for Eldorado, was, in fact, in Canamex!

Moreover, Appellant suggests that there is somehow a "conclusive presumption" from a recital in one or more of the agreements at issue and that therefore Appellant does not have to prove its case and can instead do an end run around the Rogich Parties' due process rights. Appellant tried this tactic in front of the District Court, who rejected it outright:

> The specific presumption sought by Nanyah under NRS 47.240(2) is a recital of consideration, which is excluded from the statute. Nanyah and its counsel are precluded from arguing to the jury that

> Eldorado is bound by any of the contractual recitals in the October 30, 2008 Purchase Agreement, the October 30, 2008 Membership Interest Purchase Agreement, and the October 30, 2008 Amended and Restated Operating Agreement pursuant to the provisions of NRS 47.240(2) as the Court finds that evidentiary presumption is inapplicable on the grounds stated.

20 JA 004776, order denying Appellant's MIL #3, at p. 3, ll. 13-19.

In addition, an enormous amount of evidence – discovered and timely disclosed during discovery – makes clear that Nanyah's claim did, in fact, accrue in 2008. As noted above, the 2007 K-1 indisputably put Appellant on notice that it had not received an equity interest in Eldorado, constituting accrual of Appellant's claim (to the extent it has one, which the Rogich Parties dispute). Moreover, Harlap's own deposition testimony makes clear that in 2008 he was shown documents by Huerta putting him on notice of any potential claim Appellant may have had. 20 JA 004782 – 004784, at p. 16, line 19 to p. 18, line 23. These are only a few of the numerous pieces of evidence – not to mention the testimony of the trial witnesses – that will demonstrate the statute of limitations provides a complete defense to all of Nanyah's alleged claims.

Further, during the time of Appellant's alleged investment into Eldorado, Rogich never had any control or access to the books and records. 20 JA 004788 – 004789, Declaration of Sigmund Rogich, at ¶ 4. At that time, the books and records of Eldorado were all handled by Huerta. *Id*. Further, Huerta, who was in

control of all financial filings, only sent K-1s to the shareholders of Eldorado and, consistent with the IRS code, did not send a K-1 to Appellant. *Id*. at ¶ 5. Importantly, during the depositions of both Rogich and Melissa Olivas, the deponents were handed what was asserted by Nanyah's counsel to be the general ledger of Eldorado. *Id*. at ¶ 6. However, it has since been discovered that that this general ledger was fraudulently altered by Huerta and is not a true and authenticate copy of Eldorado's general ledger handed over by Huerta to Rogich during the time of the signing of the relevant Purchase Agreement. *Id*. In addition, at no time prior to the commencement of the lawsuit, did Rogich ever even speak to or communicate with Appellant or Harlap because there was no reason to as they were not an investor in Eldorado. *Id*. at ¶ 7. These issues, along with myriad others, overwhelmingly support granting of the Rogich Parties' Motion.

XI. CONCLUSION

For all these reasons, the District Court's decisions dismissing all claims against the Rogich Trust and subsequent decision dismissing all remaining claims against Rogich and Imitations should be affirmed in their entirety, the District Court's decisions regarding Appellant's MILs and motion to settle jury instructions should be affirmed, and the District Court's denial of Rule 60(b) relief to the Rogich Parties should be reversed.

DATED this 9th day of December, 2021.

HUTCHISON & STEFFEN

By: */s/ Brenoch Wirthlin*

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NRAP 32(a)(9) CERTIFICATE OF COMPLIANCE

I hereby certify that Respondent/Cross Appellant Rogich Parties' Answering Brief on Appeal and Opening Brief on Cross-Appeal Response Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type-style requirements of NRAP 32(a)(6) because this brief has been proportionally spaced typeface using Microsoft Word in Times New Roman font size 14.

I further certify that Respondent/Cross Appellant Rogich Parties' Answering Brief on Appeal and Opening Brief on Cross-Appeal Response Brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, beginning with the Statement of the Case, and as contemplated by NRAP 32(a)(7)(C), it contains 16,089 words, which is less than the maximum number of words allowed pursuant to NRAP 28.1(e)(2)(B)(i) which allows no more than 18,500 words for combined answering and opening briefs.

I further certify that I have read Respondent/Cross Appellant Rogich Parties' Answering Brief on Appeal and Opening Brief on Cross-Appeal Response Brief, and to the best of my knowledge, information, and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. I further

certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R. App. P. 28(e), which requires every section of the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: December 9, 2021. **HUTCHISON & STEFFEN**

By: */s/ Brenoch Wirthlin, Esq.*
Brenoch Wirthlin, Esq.

VERIFICATION

I, Brenoch Wirthlin, Esq., declare as follows:

1. I am an attorney with Hutchison & Steffen, counsel of record for Respondents/Cross-Appellants Sig Rogich, a/k/a Sigmund Rogich, Individually and as Trustee of The Rogich Family Irrevocable Trust, and Imitations, LLC.

2. I verify that I have read the foregoing **RESPONDENT/CROSS APELLANT ROGICH PARTIES' ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL**; that the same is true to my own knowledge, except for matters therein stated on information and belief, and as to those matters, I believe them to be true.

I declare under the penalty of perjury the statements herein are true and correct.

Executed on December 9, 2021 in Clark County, Nevada.

HUTCHISON & STEFFEN

By: */s/ Brenoch Wirthlin, Esq.*
Brenoch Wirthlin, Esq.

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c)(1)(B), I certify that I am an employee of Hutchison & Steffen on the 9th day of December, 2021, I submitted the foregoing **RESPONDENT/CROSS APELLANT ROGICH PARTIES' ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL** to the Supreme Court of Nevada'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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