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12 *The Rogich Family Irrevocable Trust*

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Elizabeth A. Brown
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13 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

14 NANYAH VEGAS, LLC, a Nevada Limited
15 Liability Company,

16 Appellants,

17 vs.

18 SIG ROGICH, a/k/a SIGMUND ROGICH,
19 Individually and as Trustee of The Rogich
20 Family Irrevocable Trust; ELDORADO
21 HILLS, LLC, a Nevada Limited Liability
22 Company; TELD, LLC, a Nevada Limited
23 Liability Company; PETER ELIADES,
24 Individually and as Trustee of The Eliades
25 Survivor Trust of 10/30/08; and
26 IMITATIONS, LLC, a Nevada Limited
27 Liability Company,

28 Respondents.

EL DORADO HILLS, LLC, a Nevada
Limited Liability Company,

Cross-Appellant,

vs.

NANYAH VEGAS, LLC, a Nevada Limited
Liability Company,

Cross-Respondent.

Supreme Court Case No. 79917

District Court No. A686303

RESPONDENT/CROSS
APPELLANT ROGICH
PARTIES' REPLY TO
NANYAH VEGAS, LLC'S
RESPONSE TO APRIL 7, 2021
ORDER TO SHOW CAUSE

SIG ROGICH, a/k/a SIGMUND ROGICH,
Individually, and as Trustee of The Rogich
Family Irrevocable Trust; and IMITATIONS,
LLC, a Nevada Limited Liability Company,

Cross-Appellants,

vs.

NANYAH VEGAS, LLC, a Nevada Limited
Liability Company,

Cross-Respondent,

and

ELDORADO HILLS, LLC, a Nevada Limited
Liability Company; TELD, LLC, a Nevada
Limited Liability Company; and PETER
ELIADES, Individually and as Trustee of The
Eliades Survivor Trust of 10/30/08,

Respondents.

**RESPONDENT/CROSS APPELLANT ROGICH PARTIES' REPLY TO
NANYAH VEGAS, LLC'S RESPONSE TO APRIL 7, 2021 ORDER TO
SHOW CAUSE**

Sig Rogich, individually and as Trustee of The Rogich Family Irrevocable Trust ("Rogich"), and Imitations, LLC (collectively the "Rogich Parties") by and through counsel Hutchison & Steffen, hereby submit this reply ("Reply") to appellant Nanyah Vegas, LLC's ("Nanyah" or "Debtor") response ("Response") to this Court's April 7, 2021, Order to Show Cause ("OSC") as follows:

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

1. On November 1, 2019, the Debtor commenced appeal no. 79917 ("Appeal No. 79917") granting judgment against the Debtor in favor of the Rogich Parties and others in trial court case no. A-13-686303-C, consolidated with case no.

1 A-16-746239-C (collectively the “Trial Court Case”).

2 2. On November 6, 2019, Eldorado Hills, LLC filed a notice of cross-
3 appeal in Appeal No. 79917.
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5 3. On November 7, 2019, the Rogich Parties filed a notice of cross appeal
6 in Appeal No. 79917 (“Rogich Parties’ Cross-appeal”). The Rogich Parties’ Cross-
7 appeal concerned, among other things, an order by the trial court denying
8 substantive 60(b) relief sought by the Rogich Parties regarding findings against
9 them in favor of the Debtor.
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11 4. On April 14, 2020, the Debtor commenced appeal no. 81038 (“Appeal
12 No. 81038”) regarding an order granting attorney fees in favor of Peter Eliades and
13 Teld, LLC (“Eliades Judgment”) against the Debtor in the underlying Trial Court
14 Case.
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16 5. On May 21, 2020, the Debtor commenced appeal no. 81238 (“Appeal
17 No. 81238”) regarding an order granting, among other things, attorney fees for the
18 Rogich Parties (“Rogich Parties’ Judgment”) against the Debtor in the underlying
19 Trial Court Case. The Rogich Parties’ Judgment granted a judgment in the
20 principal amount of \$580,770.05 in favor of the Rogich Parties.
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22 6. On October 14, 2020, this Court entered an order consolidating Appeal
23 No. 79917, Appeal No. 81038 and Appeal No. 81238 (collectively the
24 “Consolidated Appeals”).
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II. LAW AND ARGUMENT

A. 11 USC § 362 applies to the Consolidated Appeals. Dismissal without prejudice is appropriate.

The Debtor is correct that as a general principle an appeal may not automatically be stayed if the debtor was a plaintiff at the trial court level. But the analysis should not end there. In fact, in the case law relied upon by the debtor, *In re Merrick*, the court there noted that the “essential issue” there was “essential issue is whether a defendant violates the automatic stay of § 362 by defending claims brought by a plaintiff debtor.” *In re Merrick*, 175 B.R. 333, 336 (B.A.P. 9th Cir. 1994). Similarly, while the Debtor correctly cites the generally applicable holding in *McDonough Assocs., Inc. v. Grunloh*¹ that “[t]he automatic stay under 11 U.S.C. § 362(a)(1) for judicial proceedings against the debtor does not apply to suits brought by the debtor,” the issue of whether the automatic stay applies on appeal requires a bit more analysis. For example, as the court in *In re Klarchek*² held – in response to the *McDonough* holding – the overarching question is not the debtor’s nomenclature below, but whether the appeal involves an action against an interest of the debtor:

In *Kaiser*, the Delaware district court considered whether a creditor’s action against an insurance company, seeking a declaratory judgment regarding the creditor’s interest in insurance proceeds in which the

¹ 722 F.3d 1043, 1048 (7th Cir. 2013)

² 508 B.R. 386, 394 (Bankr. N.D. Ill. 2014)

1 debtor claimed a right, violated section 362(a)(1). Even though the
2 debtor was not a named party, the court affirmed the bankruptcy
3 court's determination that the debtor was, in fact, the real party in
4 interest in the matter as it was the estate's interest that was really at
stake in the proceeding, stating that:

5 The protection of the automatic stay extends to any action
6 or proceeding against an interest of the debtor. The scope
7 of this protection is not determined solely by whom a
8 party chose to name in the proceeding, but rather, by who
is the party with a real interest in the litigation.

9 *Kaiser Aluminum*, 315 B.R. at 658. As the debtor in that matter argued
10 and the district court's ruling confirms, holding to strictly to who the
named parties are is elevating form over substance. *Id.* at 657.

11 *In re Klarchek*, 508 B.R. 386, 394 (Bankr. N.D. Ill. 2014).

12 Similarly, here the issue is more nuanced than whether the Debtor was
13 plaintiff or defendant below, as the Rogich Parties have a Judgment against the
14 Debtor for attorney fees, and are cross-appellants in the Consolidated Appeals.
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16 Regarding the Rogich Parties' Judgment against the Debtor, courts within the
17 Ninth Circuit have noted that pursuing activities which could impact the property of
18 a debtor's estate – including attorney fees – violate the automatic stay:
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21 At bottom, an action that seeks to recover attorneys' fees from the
22 debtor is unquestionably one that attempts to obtain possession of the
23 property of the debtor, and is thus subject to stay under § 362(a)(3). *In*
24 *re City of Stockton, Cal.*, 499 B.R. 802, 807 (Bankr.E.D.Cal.2013)
25 (“[A] monetary award in the form of fees, costs, or otherwise leaves a
potential for offending § 362(a)(3)”).

26 *In re City of San Bernardino*, 558 B.R. 321, 331 (C.D. Cal. 2016). Other courts
27 addressing this issue have reached the same conclusion:
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1 The stay encompasses virtually every effort a creditor may take to
2 collect a claim against a debtor in bankruptcy; such as getting a
3 judgment for attorney fees. All judicial proceedings commenced pre-
4 petition against the debtor must cease. All attempts to collect on pre-
5 petition claims and any act to obtain possession of or exercise control
6 over property of the estate must stop. The automatic stay is effective
against the world regardless of whether a party had notice of the
bankruptcy filing or of the automatic stay.

7 *In re Reynolds*, 546 B.R. 232, 238 (Bankr. M.D. Fla. 2016). Further, in *Keleher &*
8 *McLeod PA v. Derringer*, 2006 WL 8444549, (D.N.M. Jan. 13, 2006), the
9 defendants prevailed against the debtor on appeal, with the appellate court awarding
10 attorney fees and remanding to the trial court for their determination. The
11 defendants sought and obtained an award of fees, and were held to have violated the
12 automatic stay; the debtor was also awarded punitive damages against the creditors
13 for their violation of the stay. *Id* at * 3. On appellate review, the federal district
14 court upheld the decision, finding that the creditors' attempts to recover attorney
15 fees awarded on appeal were not exempt from the automatic stay. *Id.* at * 6.

19 With respect to the Rogich Parties' Cross-appeal, briefing in the
20 Consolidated Appeals will necessarily require the Rogich Parties to advance their
21 position on the cross-appeals which could impact the status of case against the
22 Debtor and potentially impact property of the estate. This would create the
23 untenable situation referenced by the Ninth Circuit in *Ingersoll-Rand Fin. Corp. v.*
24 *Miller Min. Co.*:
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1 Difficulties with the “appellant-appellee” approach to section 362
2 would arise even if only one party appealed. We can hypothesize an
3 appeal by a debtor from an adverse judgment rendered in an action
4 brought against it by one of its creditors. If the appeal is permitted
5 because it is an appeal “by” the debtor, and the debtor prevails on the
6 appeal, we question the effect of such an interpretation if the creditor
7 decides to bring the case to a higher court. Is this second level of
8 appeal then stayed because the appeal is not one “against” the debtor?
9 The unfairness of such an approach is obvious.

10 *Ingersoll-Rand Fin. Corp. v. Miller Min. Co.*, 817 F.2d 1424, 1426–27 (9th Cir.
11 1987). If the Consolidated Appeals were to move forward, and the Rogich Parties
12 prevailed on their Cross-appeal, would that violate the automatic stay? It would
13 certainly impact the interests of the Debtor and the property of the estate, and under
14 the standard set forth in the above-cited authorities, allowing the Consolidated
15 Appeals to go forward would violate the automatic stay.

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17 While the Debtor correctly notes that this Court in *Sweitzer* recognized that
18 an appeal is automatically stayed if the debtor was the defendant at the trial court
19 level, because the appellant/debtor in *Sweitzer* was a counter-defendant at the trial
20 court level, the Court recognized the appeal was stayed. *Sweitzer v. Teacher's*
21 *Health Tr.*, 460 P.3d 451 (Nev. 2020). The exact issue before this Court here,
22 however, was not before the Court in *Sweitzer*: whether the automatic stay can
23 apply to require dismissal of a pending bankruptcy where the debtor was not a
24 plaintiff in the underlying case. In fact, in the *Sweitzer* case this Court recognized
25 that the interests of justice, protection of the debtor and effectuating the purposes of
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1 the stay required dismissal of the appeal at issue:

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3 Given the applicability of the automatic stay, this appeal may linger
4 indefinitely on this court's docket pending final resolution of the
5 bankruptcy proceedings. Accordingly, judicial efficiency will be best
6 served if this appeal is dismissed without prejudice. Because a
7 dismissal without prejudice will not require this court to reach the
8 merits of this appeal and is not inconsistent with the primary purposes
of the bankruptcy stay—to provide protection for debtors and
creditors—such dismissal will not violate the bankruptcy stay.

9 *Sweitzer v. Teacher's Health Tr.*, 460 P.3d 451 (Nev. 2020). The reasoning in the
10 *Sweitzer* case is applicable here. Dismissal of the Consolidated Appeals, without
11 prejudice, would conserve judicial resources and permit the debtor to take whatever
12 action it deems appropriate upon the lifting of the stay or resolution of the
13 bankruptcy proceedings. *See also* *World Buddhism Ass'n Headquarters v. Las*
14 *Vegas Monorail Co.*, 473 P.3d 459 (Nev. 2020) (“This dismissal is without
15 prejudice to appellant's right to move for reinstatement of this appeal within 90
16 days of either the lifting of the bankruptcy stay or final resolution of the bankruptcy
17 proceedings, if appellant deems such a motion appropriate at that time.”).

21 **III. CONCLUSION**

22 For all these reasons, the Rogich Parties submit that the automatic stay
23 provisions of 11 USC § 362 are applicable to the Consolidated Appeals and that
24 dismissal without prejudice of the Consolidated Appeals is appropriate.

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26 DATED this 10th day of May, 2021.
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