EXHIBIT 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

CARLOS A. HUERTA, AN INDIVIDUAL; AND GO GLOBAL, INC., A NEVADA CORPORATION, Appellants, Petitioner, vs. SIG ROGICH, A/K/A SIGMUND ROGICH, AS TRUSTEE OF THE ROGICH FAMILY IRREVOCABLE TRUS; AND ELDORADO HILLS, LLC, A NEVADA LIMITED LIABILITY COMPANY, Respondents.	Case No.: 70492

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to NRAP 40, Carlos Huerta and Go Global, Inc. (collectively, the "**Appellants**") hereby file their Petition for Rehearing ("**Petition**") of this Court's order Denying the Appellants' Motion to Extend Time (the "**Extension Denial Order**") dated September 20, 2017. The Appellants also request rehearing and this Court's review of the Court of Appeals' Order of Affirmance (the "**Order of Affirmance**") of the district court's order, as the Appellants were not given an opportunity to petition the Court of Appeals for rehearing.

Preliminary Statement

On September 18, 2017, the Eleventh Circuit Court of Appeals, sitting *en banc*, reversed a district court's application of judicial estoppel in a bankruptcy case, and held that a district court had to consider all facts and circumstances of a case to determine whether judicial estoppel should be applied when a debtor omitted a civil claim in her bankruptcy filing. Slater v. United States Steel, 2017 WL 4110047 (11th Cir. Sept. 18, 2017) (emphasis added). Indeed the 11th Circuit stated:

> When a district court applies a judicial estoppel bar based on nondisclosure in a bankruptcy proceeding without determining that the plaintiff deliberately intended to mislead, the civil defendant avoids liability on an otherwise potentially meritorious civil claim while providing no corresponding benefit to the court system. As an equitable doctrine, judicial estoppel should apply only when a plaintiff's conduct is egregious enough that the situation "demand[s] equitable intervention."

Id. at *10, quoting Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 248 (1944).

In its Order of Affirmance, the Court of Appeals concluded that the district court, by virtue of its plenary power, had subject matter jurisdiction to consider whether the Appellants' disclosure statement in bankruptcy proceedings judicially estopped the Appellants' from bringing civil claims against the above-captioned respondents (the "**Respondents**").

The Appellants do not challenge the district court's jurisdiction to apply the judicial estoppel doctrine in state court proceedings. The Appellants, however, challenge this Court's determination that the district court only referenced the bankruptcy court's order approving the disclosure statement (the "**Disclosure Statement Order**") for judicial estoppel purposes in state court proceedings. As set forth herein, and as recently held by the 11th Circuit Court of Appeals, the district court: (a) refused to consider all facts and circumstances in the Appellants' bankruptcy case; (b) refused to consider the fact that all of Appellants' creditors were paid in full; (c) failed to properly account for the Appellants' schedule of assets which listed the claims at issue here; and (d) refused to give full faith and credit to the adequacy of the order approving the Appellants' disclosure statement.

Rather, the district court collaterally attacked the adequacy of the Appellants' disclosure statement and revisited the adequacy of disclosures to creditors, something the district court did not have jurisdiction to do. Simply put, the application of judicial estoppel is an equitable doctrine, and this Court should not allow: (i) Appellants to be punished for paying their creditors in full; and (ii) Respondents to avoid liability for a $2.7 million claim.

Turning to this Court's Extension Denial Order, the Appellants respectfully petition for rehearing on the same, as Appellants were not afforded due process in accordance with the notification rules of the Nevada Electronic Filing and Conversion Rules (NEFCR). Indeed, the Order of Affirmance was never lodged or docketed in this appeal, and as a result, neither Appellants nor their counsel received notice of the same. Indeed, despite being registered for this Court's "eFlex" system, and having filed and received notifications of all other pleadings and notices in this appeal, the Order of Affirmance was never docketed or noticed on the "eFlex" system, and as such, the remittitur should be recalled and Appellants should be afforded their appellate rights under the Nevada Rules of Appellate Procedure.

Procedural Background

On June 29, 2017, the Nevada Court of Appeals issued its Order of Affirmance, affirming the district court's denial of Appellants' motion for relief

under NRCP 60(b). The Order of Affirmance, however, was not lodged or docketed in this appeal, and neither the Appellants nor their counsel received any notice thereof. Despite having being registered with the Nevada Supreme Court's electronic filing system (eFlex), the Order of Affirmance was never lodged or docketed on the "eFlex" system.

Appellants did not become aware of the Order of Affirmance until Friday, August 4, 2017, when the Court of Appeals issued a remittitur to this Court. That is when the notice of issuance of the remittitur was lodged on the docket, and that is when undersigned counsel received notice.

Importantly, the instant appeal was initially filed with this Court, and this appeal did not get transferred to the Court of Appeals until after all briefing had been completed on April 27, 2017. After receiving notification that the instant appeal would transfer to the Court of Appeals, counsel for the Appellants received no other notices, and was simply waiting to be notified of oral argument.

On August 4, 2017, counsel for the Appellants received an electronic notification of the issuance of the remittitur to the Nevada Supreme Court, and thereafter, retrieved a copy of the Order from the Court of Appeals' website.

On August 10, 2017, the Appellants filed their: (i) Motion to Extend Time to file a petition for rehearing; and (ii) a petition for rehearing.

On September 20, 2017, the Court of Appeals issued the Extension Denial Order. Importantly, the Extension Denial Order was lodged on the docket in this case, and counsel received electronic notice of the same. The Extension Denial Order, among other things, denied Appellants' Motion to Extend Time, and returned Appellants' Petition for Rehearing unfiled.

Pursuant to NRAP 40, Appellants now timely[1] file the instant Petition for Rehearing with this Court.

Legal Standard

When contemplating rehearing, the Court considers whether it has overlooked or misapprehended a material fact in the record or a material question of law in a case, or whether it has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case. NRAP 40(c)(2)(A)-(B). The Court does not permit the petitioning party to reargue matters presented in the briefs and oral arguments or points to be raised for the first time on rehearing. NRAP 40(c)(1).

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[1] NRAP 40 indicates a petition for review of a decision of an appellate court must be filed within 18 days after the appellate court issues its order. As this Court issued its Extension Denial Order on September 20, 2017, and returned unfiled the Appellants' petition for rehearing, the deadline to file the instant petition is October 8, 2017. As October 8, 2017, falls on a Sunday, pursuant to NRAP 26(a)(3), the deadline extends to Monday, October 9, 2017, however, out of an abundance of caution, the Appellants file this petition on October 6, 2017.

Argument

I. Rehearing on the Extension Denial Order Should Be Granted.

The Appellants file the instant petition for rehearing before this Court because the Extension Denial Order involves fundamental issues of statewide public importance. Given the recent establishment of the Nevada Court of Appeals, it may also be one of first impression.

Specifically, a party's appellate rights pursuant to the Nevada Rules of Appellate Procedure are at issue in this matter, which involves a case that was fully briefed before this Court, subsequently transferred to the Court of Appeals after briefing, then transferred back to this Court after the Court of Appeals issued its Order of Affirmance.

In denying the Appellants' Motion to Extend Time to file a petition for rehearing under NRAP 40, this Court indicated the Appellants did not demonstrate a basis on which the remitter should be recalled. Relying on Wood v. State, 60 Nev. 139, 104 P.2d 187 (1940), this Court stated:

> "[A] remittitur will be recalled when, but only when, inadvertence, mistake of fact, or an incomplete knowledge of the circumstances of the case on the part of the court or its officers, whether induced by fraud or otherwise, has resulted in an unjust decision." Wood v. State, 60 Nev. 139, 141, 104 P.2d 187, 188 (1940). In this case, the remittitur was regularly issued, and appellants have not demonstrated a basis on which the remittitur should be recalled. The motion is therefore denied.

See Extension Denial Order, pp. 1-2.

Despite this Court's order, however, Wood v. State also provides as follows:

> When a remittitur has been regularly issued and filed, and there has been no violation of law **or the rules of the appellate court**, and no mistake of facts and no fraud or imposition practiced by the prevailing party upon the court or upon the losing party, the jurisdiction of the appellate court over the case is at an end.

Wood v. State, 60 Nev. at 141, 104 P.2d at 188 (emphasis added).

In this instance, the rules of the appellate court were not followed when the Court of Appeals issued the Order of Affirmance. In fact, this Court recently addressed the Nevada Electronic Filing and Conversion Rules (NEFCR) in a recent case, Fulbrook v. Allstate Ins. Co., 350 P.3d 88 (Nev. 2015). In that case, the Court stated:

> The Nevada Electronic Filing and Conversion Rules (NEFCR) provide electronic service of documents. NEFCR 9. **The rule requires that "[w]hen a document is electronically filed, the court . . . must provide notice to all registered users on the case that a document has been filed and is available on the electronic service system document repository." NEFCR 9(b).** "This notice shall be considered as valid and effective service of the document on the registered users and shall have the same legal effect as service of a paper document." Id. Further, "[t]he notice must be sent by e-mail to the addresses furnished by the registered users under Rule 13(c)." Id.
>
> The required notice to which the rule refers is the notification within the electronic filing system. When a registered user logs into his account, he can see all the notifications in his cases. In addition to the official notice within the system, an e-

> mail is sent to all the e-mail addresses of the attorneys on the case who are registered users and to any additional e-mail addresses those attorneys may list in their profiles. The e-mail notifications are a courtesy, and the official notification of a document filed in this court is the notification within the electronic filing system.

Fullbrook v. Allstate Ins. Co., 350 P.3d 88, 89 (Nev. 2015) (emphasis added).

In Fullbrook, this Court denied the appellant's motion because the Court's electronic record reflected that an official notice of the order of affirmance was sent to counsel's electronic filing account, despite counsel's denial of having received an e-mail regarding the same. Id. at 89.

In this matter, however, the Order of Affirmance was never entered on the docket, which is confirmed by counsel's "eFlex" account with this Court, and counsel never received any paper notice or notice by any other means. Accordingly, unlike the appellant in Fullbrook, the Appellants' substantive appellate rights here were compromised.

Accordingly, counsel submits rehearing is necessary on the Appellants' Motion to Extend Time, as the remittitur should be recalled because (a) the Appellants never received the Order of Affirmance, (b) the Order was never lodged on the docket or with the Court's "eFlex" system, and (c) as such, the remittitur was not regularly issued in accordance with the NEFCR.

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II. Rehearing on the Order of Affirmance Should Be Granted.

In addition to the above, the Appellants also request a rehearing (or this Court's review) on the Court of Appeals' Order of Affirmance, which affirmed the district court's order denying the Appellants' motion for reconsideration under NRCP 60(b).

In its Order of Affirmance, the Court of Appeals stated:

> The district court appropriately gave the bankruptcy court's orders full faith and credit by recognizing the disclosure statement's validity for bankruptcy proceedings, and simply concluded that the contents of the disclosure statement warranted invocation of the doctrine of judicial estoppel for the purposes of this state court proceeding – a conclusion under state law that is not inconsistent with the federal bankruptcy orders...we cannot conclude that the district court lacked subject matter jurisdiction to engage in the analysis it did, and for the foregoing reasons, we order the judgment of the district court affirmed.

See Order of Affirmance, at pp. 4, 6, June 29, 2017.

In its determination, the Court of Appeals misapprehended questions of law and overlooked material facts.

A. The Court of Appeals Misapprehended Application of Law.

A question of law concerns the application or interpretation of the law on a particular point. See Black's Law Dictionary 1366 (9th ed. 2009). The Appellants submit this Court misapprehended the district court's collateral

attack on the disclosure statement for purposes of judicial estoppel. Importantly, the district court stated:

> It's that disclosure statement that's operative and what the creditors use to vote whether or not to accept the plan. They were never told that there was a receivable to be collected.

See App. Vol. II, at 1583:17-1584:18 (emphasis added).

Indeed, the district court did not just use the contents of the disclosure statement for judicial estoppel purposes, but rather, the district court determined (long after the United States Bankruptcy Court for the District of Nevada determined the disclosure statement contained adequate information for creditors) the disclosure statement was not proper in the bankruptcy proceeding, and therefore, resulted in judicial estoppel.

As indicated above, on September 18, 2017, the 11th Circuit Court of Appeals, sitting *en banc*, held that a district court had to consider all facts and circumstances of a case to determine whether judicial estoppel should be applied when a debtor omitted a civil claim in her bankruptcy filing. Slater v. United States Steel, 2017 WL 4110047 (11th Cir. Sept. 18, 2017) (emphasis added). In Slater, the Eleventh Circuit Court of Appeals rejected the notion that judicial estoppel should apply anytime a plaintiff omits a civil claim from bankruptcy schedules and later tries to pursue that claim in federal or state court. Id. at 12. Rather, courts should consider all the facts and circumstances

of the case to determine whether the debtor had the requisite intent to make a mockery of the judicial system. Id.

In Slater, the plaintiff/debtor formerly worked at U.S. Steel and sued it for discrimination. Id. at *2. Slater later filed a Chapter 7 bankruptcy petition, using different counsel, and omitted her pending lawsuit against U.S. Steel. Id. U.S. Steel subsequently moved for summary judgment based on the omission from the lawsuit from Slater's bankruptcy schedules. Id. Although Slater amended her Chapter 7 petition to include the lawsuit against U.S. Steel, the district court still applied judicial estoppel because of the initial omission. Id.

In reversing the district court, the 11th Circuit declared a district court, prior to applying judicial estoppel, must look at all circumstances of the case for three principal reasons:

> First, such an inquiry ensures that judicial estoppel is applied only when a party acted with a sufficiently culpable mental state. Second, it allows a district court to consider any proceedings that occurred in the bankruptcy court after the omission was discovered, arguably a better way to ensure that the integrity of the bankruptcy court is protected. Third, limiting judicial estoppel to those cases in which the facts and circumstances warrant it is more consistent with the equitable principals that undergird the doctrine. **By rejecting a one-size fits all approach, we reduce the risk that the application of judicial estoppel will give the civil defendant a windfall at the expense of innocent creditors.**

Id. at *9 (emphasis added).

The 11th Circuit's analysis as applied to this matter indicates judicial estoppel should have never been applied, and the district court abused its discretion in denying the Appellants' motion for NRCP 60(b) relief. First, the Appellants never acted with a culpable mental state to deceive. The claim against Respondents was listed in the Debtors' schedules, and while inadvertently omitted from the disclosure statement, the disclosure statement indicated creditors would be paid in full.

Second, in denying the Appellants' motion for NRCP 60(b) relief, the district court refused to consider all of the facts and circumstances in the case, especially facts and circumstances occurring after the Appellants' plan was confirmed. Indeed, the district court wholly diregarded the bankruptcy court's order that indicated all of Appellants' creditors were paid in full.

Third, the facts and circumstances do not warrant the application of judicial estoppel to Appellants, who paid their creditors in full in a Chapter 11 case. Respondents, in turn, receive a $2.7 million windfall because of the Appellants' wholly unrelated bankruptcy case.

Like the 11th Circuit, the analysis above, and the United States Supreme Court in New Hampshire v. Main, 532 U.S. 742 (2001), the 9th Circuit Court of Appeals holds that judicial estoppel is a discretionary doctrine, applied on a case by case basis, where a court is not "bound" to apply the doctrine when a

party's prior position was based on inadvertence or mistake. Ah-Quin v. County of Kauai Dept. of Transp., 733 F.3d 267, 272 (9th Cir. 2013), citing New Hampshire, 532 U.S. at 751. Applying a more flexible approach to the doctrine, the 9th Circuit also stated a similar policy rationale to the 11th Circuit, as follows:

> If Defendant here did, in fact, discriminate against Plaintiff, it will not have to pay the consequences of its actions, for the entirely unrelated reason that Plaintiff happened to file for bankruptcy and, possibly due to inadvertence, happened to omit the claim from her schedules. Further, because the application of judicial estoppel does not look at the nature of the underlying claim, the alleged bad actor could be someone who clearly does not warrant a windfall.

Id. at 275-76.

Moreover, the Court of Appeals' application of the Hamilton and Hay cases to the instant appeal is misplaced. Hamilton involved a Chapter 7 debtor, who failed to list an insurance claim on his schedule of assets, and then sought to pursue the claim later. Hamilton v. State Farm Fire & Cas., 270 F.3d 778, 785 (9th Cir. 2001). In the Chapter 11 case here, the claim against respondents was listed on the debtors' schedules, but was omitted from the disclosure statement. Nevertheless, the disclosure statement indicated that creditors would be paid 100% of their claims. Indeed, the bankruptcy court found the disclosures of payment in full from a $5 million judgment was sufficient for creditors, and the Appellants' creditors, were in fact paid in full.

Similarly, in Hay, the Chapter 11 debtor did not list claims on its schedules or disclosure statement against creditors, and later attempted to sue those same creditors. Hay v. First Interstate Bank of Kalispell, N.A., 978 F.2d 555, 557 (9th Cir. 1992). Here, the Respondents are not creditors of the Appellants, were not entitled to vote on the Chapter 11 plan, and the Appellants' chapter 11 plan indicated all creditors would be paid in full. Respondents had no standing to object to the contents of the Disclosure Statement or use it as a shield.

Indeed, while the Hamilton and Hay cases stand for the general proposition of the application of judicial estoppel in bankruptcy cases, **they are not on point with the facts of this appeal**. The case that is directly on point here is Glazier, which was overlooked and disregarded by the Court of Appeals. Indeed, the Court did not indicate why it would be disinclined to apply the Glazier holdings[2] to this case, which would afford 60(b) relief to the district court's judgment.

Specifically, the Court of Appeals disregarded the Glazier court's explicit finding:

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[2] Finding the New York state court is required to give full faith and credit to the disclosure statement order of the bankruptcy court when determining all issues relating to the adequacy of information contained in the disclosure statement. Glazier Group v. Premium Supply Co., Inc., 2013 WL 1727155, *4-5 (N.Y. Supp. 2013).

> In any event, the Bankruptcy Court approved GGI's disclosure statement by entering the Disclosure Statement Order, and such order is res judicata as to whether GGI's disclosure statement contained "adequate information" within the meaning of section 1125 of the Bankruptcy Code. Because Premium participated in GGI's Chapter 11 case, and failed to challenge the Disclosure Statement Order, Premium is precluded from collaterally attacking the Disclosure Statement Order in this Court.

See The Glazier Group v. Premium Supply Co., Inc., 2013 WL 1727155, *4 (N.Y. Sup. 2013); See also Appellant's Opening Brief, at pp. 19:12-25:17, Jan. 5, 2017 (distinguishing Hamilton, and analogous to the facts here).

Applying Glazier, the bankruptcy court entered a Disclosure Statement Order, and the district court should not have been allowed to collaterally attack the adequacy of information and disclosures to creditors in the disclosure statement. Because Glazier is so factually similar to this matter, Glazier should be applied here, and Hamilton, which is so easily distinguishable, should not.

B. The District Court Lacks Jurisdiction to Review Bankruptcy Court Orders and Final Judgments from Federal Courts.

Another misapprehension of law is the Court of Appeals' reliance on the district court's plenary powers. The Court of Appeals declared: (i) state courts have plenary jurisdiction and may exercise concurrent jurisdiction with federal court over federal claims; (ii) state courts have authority to decide federal claims; and (iii) nothing prevents state courts from enforcing rights created by federal law. John v. Douglas Cty. Sch. Dist., 125 Nev. 746, 756, 219 P.3d

1276, 1283 (2009); Howlett v. Rose, 496 U.S. 356, 367 (1990); Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507 (1962).

Nevertheless, although, state courts do have plenary jurisdiction, it is well established that Nevada district courts are not courts of appellate review and they do not have authority to revisit other court's orders or take jurisdiction from another court. See Nevada Constitution Art. 6, §§ 4, 6; State v. Sustacha, 108 Nev. 223, 225-26, 826 P.2d 959, 960-61 (1992); Rohlfing v. Second Judicial Dist. Court In and For County of Washoe, 106 Nev. 902, 906, 803, P.2d 659, 662 (1990); Markoff v. New York Life Ins. Co., 92 Nev. 268, 271, 549 P.2d 330, (1976). Indeed, if a judgment is rendered by a court that lacks subject matter jurisdiction, it is void. Landreth v. Malik, 127 Nev. Adv. Op. 61*4, 251 P.3d 163, 166 (2011).

Here, any subject matter jurisdiction analysis should be applied to the district court's analysis of the Disclosure Statement's adequacy, not to its ability to determine whether judicial estoppel applies to other civil claims in state court. Indeed, as set forth above, the district court directly attacked the adequacy of the Disclosure Statement Order. By revisiting and reversing the bankruptcy court's determination that the Schedules, Disclosure Statement, and Plan were in the best interest of the Debtors, their bankruptcy estates and their

creditors, the district court acted as an appellate court with authority to review final judgments in bankruptcy court and exceeded its jurisdiction.

Although the district court has authority to apply a bankruptcy court's final order in a judicial estoppel analysis, it cannot make its own finding contrary to the bankruptcy court's order and apply that to the judicial estoppel analysis. Indeed, the primary purpose of judicial estoppel is to protect the judiciary's integrity. NOLM, LLC v. Cty. Of Clark, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004). For that reason, the analysis should have accepted and applied the adequacy of the Disclosure Statement as already determined by the bankruptcy court. By injecting its own adequacy analysis, the district court exceeded its subject matter jurisdiction, along with completely avoiding the reality that this debtor had already paid its creditors in full.

C. The Court of Appeals Ignored the Bankruptcy Court's Order that Appellants' Creditors Were Paid in Full.

In its Order of Affirmance, the Court of Appeals indicated that Appellants did not explain how the judgment against them has been satisfied, released, discharged, or otherwise vacated. Notwithstanding the fact that this is an issue that could have been clarified at oral argument, the district court's underlying decision relying on judicial estoppel, had been satisfied because all of the Appellants' creditors had been paid in full. This is a distinctly different

set of circumstances than in a chapter 7 case like Hamilton, which is another reason it does not apply here.

Moreover, the 11th Circuit's recent opinion in Slater makes clear that a district court should consider all facts and circumstances in a bankruptcy case, even those events occurring in the case after the omission is discovered. Slater, 2017 WL 4110047, at *9.

Indeed, it appears that this Court overlooked the Order by the United States Bankruptcy Court of March 29, 2016, which stated, among other things, "the Debtors made all payments in accordance with their Chapter 11 Plan and paid their creditors in full." App. at 1-3 (emphasis added).

Simply put, it was no longer equitable to enforce for the district court's finding of judicial estoppel, because all of the Appellants' creditors were paid in full. "Equity cannot condone a defendant's avoidance of liability through a doctrine premised upon intentional misconduct without establishing such misconduct." Slater, 2017 WL 4110047, at *10. The claims at issue here have no bearing on the recovery of creditors in the Appellants' underlying bankruptcy case.

D. Oral Argument was Appropriate

In addition to the errors noted above, the Order of Affirmance was issued without oral argument, which denied the Court of Appeals the ability to

challenge Appellants on their application of law and factual assertions and it denied the Appellants the ability to clarify points of doctrine for the Court of Appeals. Indeed, the Court of Appeals indicated there were points in the Appellants' briefing that were unclear and/or not addressed, and consequently, counsel could have clarified those points at oral argument. As a result, the Court of Appeals broadly dismissed the Appellants application of the res judicata doctrine, and NRCP 60(b)(5) arguments. This prevented full examination of the issues and arguments.

Conclusion

For the foregoing reasons, Appellants respectfully petition this Court for rehearing and request oral argument at the rehearing.

Dated this 6th day of October, 2017.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Petition for Rehearing 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

I further certify that this Answer to Petition for Rehearing complies with the page- or type-volume limitations of NRAP 40 or 40A because it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 4,528 words (less than the limit of 4,667 words).

☐ does not exceed ____ pages.

Dated this 6th day of October, 2017.

By: /s/ Samuel A. Schwartz

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PETITION FOR REHEARING** was filed electronically with the Nevada Supreme Court on the 6th day of October, 2017. I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

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IN THE SUPREME COURT OF THE STATE OF NEVADA

CARLOS A. HUERTA, AN INDIVIDUAL; AND GO GLOBAL, INC., A NEVADA CORPORATION, Appellants, Petitioner, vs. SIG ROGICH, A/K/A SIGMUND ROGICH, AS TRUSTEE OF THE ROGICH FAMILY IRREVOCABLE TRUST; AND ELDORADO HILLS, LLC, A NEVADA LIMITED LIABILITY COMPANY, Respondents.	Case No.: 70492	Electronically Filed Oct 10 2017 09:06 a.m. Elizabeth A. Brown Clerk of Supreme Court

MOTION TO RECALL REMITTITUR AND REQUEST FOR PERMISSION TO FILE PETITION FOR REHEARING[1]

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[1] Should the Court grant Appellants' Motion to Recall Remittitur, Appellants will pay the associated filing fee for the Petition for Rehearing, which is attached as **Exhibit 1**.

MOTION TO RECALL REMITTITUR AND
REQUEST FOR PERMISSION TO FILE PETITION FOR REHEARING

Pursuant to the Nevada Rules of Appellate Procedure ("**NRAP**") 27, Carlos Huerta and Go Global, Inc. (collectively, the "**Appellants**") hereby file their Motion to Recall Remittitur and Request for Permission to File Petition for Rehearing ("**Motion**") of this Court's order Denying the Appellants' Motion to Extend Time (the "**Extension Denial Order**") dated September 20, 2017. The Appellants also request permission for rehearing including this Court's review of the Court of Appeals' Order of Affirmance (the "**Order of Affirmance**") of the district court's order, as the Appellants were not given an opportunity to petition the Court of Appeals for rehearing.

Preliminary Statement

On September 18, 2017, the Eleventh Circuit Court of Appeals, sitting *en banc*, reversed a district court's application of judicial estoppel in a bankruptcy case, and held that a district court had to consider all facts and circumstances of a case to determine whether judicial estoppel should be applied when a debtor omitted a civil claim in her bankruptcy filing. Slater v. United States Steel, 2017 WL 4110047 (11th Cir. Sept. 18, 2017) (emphasis added). Indeed, the 11th Circuit stated:

> When a district court applies a judicial estoppel bar based on nondisclosure in a bankruptcy proceeding without determining that the plaintiff deliberately intended to mislead, the civil

> defendant avoids liability on an otherwise potentially meritorious civil claim while providing no corresponding benefit to the court system. As an equitable doctrine, judicial estoppel should apply only when a plaintiff's conduct is egregious enough that the situation "demand[s] equitable intervention."

Id. at *10, quoting Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 248 (1944).

In its Order of Affirmance, the Court of Appeals concluded that the district court, by virtue of its plenary power, had subject matter jurisdiction to consider whether the Appellants' disclosure statement in bankruptcy proceedings judicially estopped the Appellants' from bringing civil claims against the above-captioned respondents (the "**Respondents**").

The Appellants do not challenge the district court's jurisdiction to apply the judicial estoppel doctrine in state court proceedings. The Appellants, however, challenge the determination that the district court only referenced the bankruptcy court's order approving the disclosure statement (the "**Disclosure Statement Order**") for judicial estoppel purposes in state court proceedings. As set forth herein, and as recently held by the 11th Circuit Court of Appeals, the district court: (a) refused to consider all facts and circumstances in the Appellants' bankruptcy case; (b) refused to consider the fact that all of Appellants' creditors were paid in full; (c) failed to properly account for the Appellants' schedule of assets which listed the claims at issue here; and (d)

refused to give full faith and credit to the adequacy of the order approving the Appellants' disclosure statement.

Rather, the district court collaterally attacked the adequacy of the Appellants' disclosure statement and revisited the adequacy of disclosures to creditors, something the district court did not have jurisdiction to do. Simply put, the application of judicial estoppel is an equitable doctrine, and this Court should not allow: (i) Appellants to be punished for paying their creditors in full; and (ii) Respondents to avoid liability for a $2.7 million claim.

Turning to this Court's Extension Denial Order, the Appellants respectfully request the remittitur be recalled, and petition for rehearing on the Extension Denial Order be permitted, as Appellants were not afforded due process in accordance with notification rules of the Nevada Electronic Filing and Conversion Rules ("**NEFCR**"). Indeed, the Order of Affirmance was never lodged or docketed in this appeal, and as a result, neither Appellants nor their counsel received notice of the same. Despite being registered for this Court's electronic filing system ("**eFlex**"), and having filed and received notifications of all other pleadings and notices in this appeal, the Order of Affirmance was never docketed or noticed on the eFlex system, and as such, the remittitur should be recalled and Appellants should be afforded their appellate rights under NRAP.

Procedural Background

On June 29, 2017, the Nevada Court of Appeals issued its Order of Affirmance, affirming denial of Appellants' motion for relief under NRCP 60(b) in district court. The Order of Affirmance, however, was not lodged or docketed in this appeal, and neither the Appellants nor their counsel received any notice thereof. Despite having being registered with eFlex, the Order of Affirmance was never lodged or docketed on the eFlex system.

Appellants did not become aware of the Order of Affirmance until Friday, August 4, 2017, when the Court of Appeals issued a remittitur to this Court. That is when the notice of issuance of the remittitur was lodged on the docket, and that is when undersigned counsel received notice.

Importantly, the instant appeal was initially filed with this Court, and did not get transferred to the Court of Appeals until after all briefing was completed on April 27, 2017. After receiving notification that the instant appeal would transfer to the Court of Appeals, counsel for the Appellants received no other notices, and was simply waiting to be notified of oral argument.

On August 4, 2017, counsel for the Appellants received an electronic notification of the issuance of the remittitur to the Nevada Supreme Court, and thereafter, retrieved a copy of the Order from the Court of Appeals' website.

On August 10, 2017, the Appellants filed their: (i) Motion to Extend Time to file a petition for rehearing; and (ii) a petition for rehearing.

On September 20, 2017, the Court of Appeals issued the Extension Denial Order. Importantly, the Extension Denial Order was lodged on the docket in this case, and counsel received electronic notice of the same. The Extension Denial Order, among other things, denied Appellants' Motion to Extend Time, and returned Appellants' Petition for Rehearing unfiled. Pursuant to NRAP 27, Appellants timely[2] file this Motion to Recall Remittitur and Request for Permission to File Petition for Rehearing with this Court.

Argument

I. The Remittitur Should Be Recalled and Rehearing on the Extension Denial Order Should Be Granted.

The Appellants file the instant Motion before this Court because the Extension Denial Order involves fundamental issues of statewide public

[2] NRAP 40 indicates a petition for review of a decision of an appellate court must be filed within 18 days after the appellate court issues its order. As this Court issued its Extension Denial Order on September 20, 2017, and returned unfiled the Appellants' petition for rehearing, the deadline to file the instant petition is October 8, 2017. As October 8, 2017, falls on a Sunday, pursuant to NRAP 26(a)(3), the deadline extends to Monday, October 9, 2017.

Appellants timely filed their Petition for Rehearing on October 6, 2017, but subsequently learned the remittitur had to be recalled before the Court could accept the Petition for Rehearing. Thus, Appellants file the instant Motion and attach the Petition for Rehearing.

importance. Given the recent establishment of the Nevada Court of Appeals, it may also be one of first impression.

Specifically, a party's appellate rights pursuant to NRAP are at issue in this matter, which involves a case that was fully briefed before this Court, subsequently transferred to the Court of Appeals after briefing, then transferred back to this Court after the Court of Appeals issued its Order of Affirmance.

In denying the Appellants' Motion to Extend Time to file a petition for rehearing under NRAP 40, this Court indicated the Appellants did not demonstrate a basis on which the remitter should be recalled. Relying on Wood v. State, 60 Nev. 139, 104 P.2d 187 (1940), this Court stated:

> "[A] remittitur will be recalled when, but only when, inadvertence, mistake of fact, or an incomplete knowledge of the circumstances of the case on the part of the court or its officers, whether induced by fraud or otherwise, has resulted in an unjust decision." Wood v. State, 60 Nev. 139, 141, 104 P.2d 187, 188 (1940). In this case, the remittitur was regularly issued, and appellants have not demonstrated a basis on which the remittitur should be recalled. The motion is therefore denied.

See Extension Denial Order, pp. 1-2.

Despite this Court's order, however, Wood v. State also provides:

> When a remittitur has been regularly issued and filed, and there has been no violation of law **or the rules of the appellate court**, and no mistake of facts and no fraud or imposition practiced by the prevailing party upon the court or upon the losing party, the jurisdiction of the appellate court over the case is at an end.

Wood v. State, 60 Nev. at 141, 104 P.2d at 188 (emphasis added).

In this instance, the rules of the appellate court were not followed when the Court of Appeals issued the Order of Affirmance. In fact, this Court recently addressed the Nevada Electronic Filing and Conversion Rules (NEFCR) in a recent case, Fulbrook v. Allstate Ins. Co., 350 P.3d 88 (Nev. 2015). In that case, the Court stated:

> The Nevada Electronic Filing and Conversion Rules (NEFCR) provide electronic service of documents. NEFCR 9. **The rule requires that "[w]hen a document is electronically filed, the court . . . must provide notice to all registered users on the case that a document has been filed and is available on the electronic service system document repository." NEFCR 9(b).** "This notice shall be considered as valid and effective service of the document on the registered users and shall have the same legal effect as service of a paper document." Id. Further, "[t]he notice must be sent by e-mail to the addresses furnished by the registered users under Rule 13(c)." Id.
>
> The required notice to which the rule refers is the notification within the electronic filing system. When a registered user logs into his account, he can see all the notifications in his cases. In addition to the official notice within the system, an e-mail is sent to all the e-mail addresses of the attorneys on the case who are registered users and to any additional e-mail addresses those attorneys may list in their profiles. The e-mail notifications are a courtesy, and the official notification of a document filed in this court is the notification within the electronic filing system.

Fullbrook v. Allstate Ins. Co., 350 P.3d 88, 89 (Nev. 2015) (emphasis added).

In Fullbrook, this Court denied the appellant's motion because the Court's electronic record reflected that an official notice of the order of

affirmance was sent to counsel's electronic filing account, despite counsel's denial of having received an e-mail regarding the same. Id. at 89.

In this matter, however, the Order of Affirmance was never entered on the docket, which is confirmed by counsel's eFlex account with this Court, and counsel never received any paper notice or notice by any other means. Accordingly, unlike the appellant in Fullbrook, the Appellants' substantive appellate rights here were compromised.

Accordingly, counsel submits rehearing is necessary on the Appellants' Motion to Extend Time, as the remittitur should be recalled because: (a) the Appellants never received the Order of Affirmance; (b) the Order was never lodged on the docket or with the Court's eFlex system; and (c) as such, the remittitur was not regularly issued in accordance with the NEFCR.

II. Rehearing on the Order of Affirmance Should Be Permitted.

Additionally, the Appellants request rehearing (or this Court's review) of the Court of Appeals' Order of Affirmance, which affirmed the district court's order denying reconsideration under NRCP 60(b). When considering rehearing, the Court determines whether it has overlooked or misapprehended a material fact in the record or a material question of law in a case, or whether it has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case. NRAP

40(c)(2)(A)-(B). The Court does not permit the petitioning party to reargue matters presented in the briefs and oral arguments or points to be raised for the first time on rehearing. NRAP 40(c)(1).

The district court did not just use the contents of the disclosure statement for judicial estoppel purposes, but rather, it determined (long after the United States Bankruptcy Court for the District of Nevada found the disclosure statement contained adequate information for creditors) the disclosure statement in the bankruptcy proceeding was inadequate, resulting in judicial estoppel.

Applying the Slater Court's analysis indicates judicial estoppel should have never been applied. First, the Appellants never acted with a culpable mental state to deceive. The claim against Respondents was listed in the Debtors' schedules, and while inadvertently omitted from the disclosure statement, the disclosure statement indicated creditors would be paid in full. Second, the district court refused to consider all of the facts and circumstances in the case, especially the facts and circumstances occurring after the Appellants' plan was confirmed. Indeed, the district court wholly disregarded the bankruptcy court's order indicating all of Appellants' creditors were paid in full. Third, the facts and circumstances do not warrant the application of judicial estoppel because Respondents, undeservingly, receive a $2.7 million windfall.

Moreover, the Court of Appeals' application of the Hamilton and Hay cases to the instant appeal is misplaced. Indeed, both cases are readily distinguished from this matter. Furthermore, the district court improperly engaged in appellate review by making its own determination the disclosure statement was insufficient. Indeed, Nevada district courts are not courts of appellate review and cannot revisit other court's orders. See Nevada Constitution Art. 6, §§ 4, 6; State v. Sustacha, 108 Nev. 223, 225-26, 826 P.2d 959, 960-61 (1992).

Conclusion

For the foregoing reasons, Appellants respectfully petition this Court for rehearing and request oral argument should rehearing be permitted.

Dated this 9th day of October, 2017.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Motion 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

I further certify that this Motion complies with the page- or type-volume limitations of NRAP 27 because it:

☒ does not exceed 10 pages.

Dated this 9th day of October, 2017.

By: /s/ Samuel A. Schwartz

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **MOTION TO RECALL REMITTITUR AND REQUEST FOR PERMISSION TO FILE PETITION FOR REHEARING** was filed electronically with the Nevada Supreme Court on the 9th day of October, 2017. I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

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