

EXHIBIT 1

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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, Case No.: 70492
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.

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.”

1 Id. at *10, quoting Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S.
2 238, 248 (1944).

3
4 In its Order of Affirmance, the Court of Appeals concluded that the
5 district court, by virtue of its plenary power, had subject matter jurisdiction to
6 consider whether the Appellants' disclosure statement in bankruptcy
7 proceedings judicially estopped the Appellants' from bringing civil claims
8 against the above-captioned respondents (the "**Respondents**").

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

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

6 Appellants did not become aware of the Order of Affirmance until
7 Friday, August 4, 2017, when the Court of Appeals issued a remittitur to this
8 Court. That is when the notice of issuance of the remittitur was lodged on the
9 docket, and that is when undersigned counsel received notice.
10

11 Importantly, the instant appeal was initially filed with this Court, and this
12 appeal did not get transferred to the Court of Appeals until after all briefing had
13 been completed on April 27, 2017. After receiving notification that the instant
14 appeal would transfer to the Court of Appeals, counsel for the Appellants
15 received no other notices, and was simply waiting to be notified of oral
16 argument.
17

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

21 On August 10, 2017, the Appellants filed their: (i) Motion to Extend
22 Time to file a petition for rehearing; and (ii) a petition for rehearing.
23

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

6 Pursuant to NRAP 40, Appellants now timely¹ file the instant Petition for
7 Rehearing with this Court.
8

9 Legal Standard

10 When contemplating rehearing, the Court considers whether it has
11 overlooked or misapprehended a material fact in the record or a material
12 question of law in a case, or whether it has overlooked, misapplied or failed to
13 consider a statute, procedural rule, regulation or decision directly controlling a
14 dispositive issue in the case. NRAP 40(c)(2)(A)-(B). The Court does not
15 permit the petitioning party to reargue matters presented in the briefs and oral
16 arguments or points to be raised for the first time on rehearing. NRAP 40(c)(1).
17

18 ///

19 ¹ NRAP 40 indicates a petition for review of a decision of an appellate
20 court must be filed within 18 days after the appellate court issues its order. As
21 this Court issued its Extension Denial Order on September 20, 2017, and
22 returned unfiled the Appellants' petition for rehearing, the deadline to file the
23 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.

1 See Extension Denial Order, pp. 1-2.

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

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

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

9 In this instance, the rules of the appellate court were not followed when
10 the Court of Appeals issued the Order of Affirmance. In fact, this Court
11 recently addressed the Nevada Electronic Filing and Conversion Rules
12 (NEFCR) in a recent case, Fulbrook v. Allstate Ins. Co., 350 P.3d 88 (Nev.
13 2015). In that case, the Court stated:

14 The Nevada Electronic Filing and Conversion Rules
15 (NEFCR) provide electronic service of documents. NEFCR 9.
16 **The rule requires that “[w]hen a document is electronically**
17 **filed, the court . . . must provide notice to all registered users**
18 **on the case that a document has been filed and is available on**
19 **the electronic service system document repository.” NEFCR**
20 **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.

21 The required notice to which the rule refers is the
22 notification within the electronic filing system. When a registered
23 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-

1 mail is sent to all the e-mail addresses of the attorneys on the case
2 who are registered users and to any additional e-mail addresses
3 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.

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

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

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

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

21 ///

22 ///

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

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

6
7 In its Order of Affirmance, the Court of Appeals stated:

8 The district court appropriately gave the bankruptcy court's orders full
9 faith and credit by recognizing the disclosure statement's validity for
10 bankruptcy proceedings, and simply concluded that the contents of the
11 disclosure statement warranted invocation of the doctrine of judicial
12 estoppel for the purposes of this state court proceeding – a conclusion
13 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.

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

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

17
18 **A. The Court of Appeals Misapprehended Application of Law.**

19 A question of law concerns the application or interpretation of the law on
20 a particular point. See Black's Law Dictionary 1366 (9th ed. 2009). The
21 Appellants submit this Court misapprehended the district court's collateral
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1 attack on the disclosure statement for purposes of judicial estoppel.

2 Importantly, the district court stated:

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

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

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

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

3 In Slater, the plaintiff/debtor formerly worked at U.S. Steel and sued it
4 for discrimination. Id. at *2. Slater later filed a Chapter 7 bankruptcy petition,
5 using different counsel, and omitted her pending lawsuit against U.S. Steel. Id.
6 U.S. Steel subsequently moved for summary judgment based on the omission
7 from the lawsuit from Slater's bankruptcy schedules. Id. Although Slater
8 amended her Chapter 7 petition to include the lawsuit against U.S. Steel, the
9 district court still applied judicial estoppel because of the initial omission. Id.
10

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

14 First, such an inquiry ensures that judicial estoppel is applied
15 only when a party acted with a sufficiently culpable mental
16 state. Second, it allows a district court to consider any
17 proceedings that occurred in the bankruptcy court after the
18 omission was discovered, arguably a better way to ensure that
19 the integrity of the bankruptcy court is protected. Third,
20 limiting judicial estoppel to those cases in which the facts and
21 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.**

22 Id. at *9 (emphasis added).
23

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

8
9 Second, in denying the Appellants' motion for NRC 60(b) relief, the
10 district court refused to consider all of the facts and circumstances in the case,
11 especially facts and circumstances occurring after the Appellants' plan was
12 confirmed. Indeed, the district court wholly disregarded the bankruptcy court's
13 order that indicated all of Appellants' creditors were paid in full.

14
15 Third, the facts and circumstances do not warrant the application of
16 judicial estoppel to Appellants, who paid their creditors in full in a Chapter 11
17 case. Respondents, in turn, receive a \$2.7 million windfall because of the
18 Appellants' wholly unrelated bankruptcy case.

19 Like the 11th Circuit, the analysis above, and the United States Supreme
20 Court in New Hampshire v. Maine, 532 U.S. 742 (2001), the 9th Circuit Court of
21 Appeals holds that judicial estoppel is a discretionary doctrine, applied on a
22 case by case basis, where a court is not "bound" to apply the doctrine when a
23

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

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

11 Id. at 275-76.

12 Moreover, the Court of Appeals' application of the Hamilton and Hay
13 cases to the instant appeal is misplaced. Hamilton involved a Chapter 7 debtor,
14 who failed to list an insurance claim on his schedule of assets, and then sought
15 to pursue the claim later. Hamilton v. State Farm Fire & Cas., 270 F.3d 778,
16 785 (9th Cir. 2001). In the Chapter 11 case here, the claim against respondents
17 was listed on the debtors' schedules, but was omitted from the disclosure
18 statement. Nevertheless, the disclosure statement indicated that creditors would
19 be paid 100% of their claims. Indeed, the bankruptcy court found the
20 disclosures of payment in full from a \$5 million judgment was sufficient for
21 creditors, and the Appellants' creditors, were in fact paid in full.
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1 Similarly, in Hay, the Chapter 11 debtor did not list claims on its
2 schedules or disclosure statement against creditors, and later attempted to sue
3 those same creditors. Hay v. First Interstate Bank of Kalispell, N.A., 978 F.2d
4 555, 557 (9th Cir. 1992). Here, the Respondents are not creditors of the
5 Appellants, were not entitled to vote on the Chapter 11 plan, and the
6 Appellants' chapter 11 plan indicated all creditors would be paid in full.
7 Respondents had no standing to object to the contents of the Disclosure
8 Statement or use it as a shield.
9

10 Indeed, while the Hamilton and Hay cases stand for the general
11 proposition of the application of judicial estoppel in bankruptcy cases, **they are**
12 **not on point with the facts of this appeal.** The case that is directly on point
13 here is Glazier, which was overlooked and disregarded by the Court of Appeals.
14 Indeed, the Court did not indicate why it would be disinclined to apply the
15 Glazier holdings² to this case, which would afford 60(b) relief to the district
16 court's judgment.
17

18 Specifically, the Court of Appeals disregarded the Glazier court's explicit
19 finding:
20

21 ² Finding the New York state court is required to give full faith and credit
22 to the disclosure statement order of the bankruptcy court when determining all
23 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).

1 In any event, the Bankruptcy Court approved GGI's disclosure
2 statement by entering the Disclosure Statement Order, and such
3 order is res judicata as to whether GGI's disclosure statement
4 contained "adequate information" within the meaning of section
5 1125 of the Bankruptcy Code. Because Premium participated
6 in GGI's Chapter 11 case, and failed to challenge the
7 Disclosure Statement Order, Premium is precluded from
8 collaterally attacking the Disclosure Statement Order in this
9 Court.

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

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

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

20 Another misapprehension of law is the Court of Appeals' reliance on the
21 district court's plenary powers. The Court of Appeals declared: (i) state courts
22 have plenary jurisdiction and may exercise concurrent jurisdiction with federal
23 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

1 1276, 1283 (2009); Howlett v. Rose, 496 U.S. 356, 367 (1990); Charles Dowd
2 Box Co. v. Courtney, 368 U.S. 502, 507 (1962).

3 Nevertheless, although, state courts do have plenary jurisdiction, it is
4 well established that Nevada district courts are not courts of appellate review
5 and they do not have authority to revisit other court's orders or take jurisdiction
6 from another court. See Nevada Constitution Art. 6, §§ 4, 6; State v. Sustacha,
7 108 Nev. 223, 225-26, 826 P.2d 959, 960-61 (1992); Rohlfing v. Second
8 Judicial Dist. Court In and For County of Washoe, 106 Nev. 902, 906, 803,
9 P.2d 659, 662 (1990); Markoff v. New York Life Ins. Co., 92 Nev. 268, 271,
10 549 P.2d 330, (1976). Indeed, if a judgment is rendered by a court that lacks
11 subject matter jurisdiction, it is void. Landreth v. Malik, 127 Nev. Adv. Op.
12 61*4, 251 P.3d 163, 166 (2011).

13
14 Here, any subject matter jurisdiction analysis should be applied to the
15 district court's analysis of the Disclosure Statement's adequacy, not to its
16 ability to determine whether judicial estoppel applies to other civil claims in
17 state court. Indeed, as set forth above, the district court directly attacked the
18 adequacy of the Disclosure Statement Order. By revisiting and reversing the
19 bankruptcy court's determination that the Schedules, Disclosure Statement, and
20 Plan were in the best interest of the Debtors, their bankruptcy estates and their
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1 creditors, the district court acted as an appellate court with authority to review
2 final judgments in bankruptcy court and exceeded its jurisdiction.

3 Although the district court has authority to apply a bankruptcy court's
4 final order in a judicial estoppel analysis, it cannot make its own finding
5 contrary to the bankruptcy court's order and apply that to the judicial estoppel
6 analysis. Indeed, the primary purpose of judicial estoppel is to protect the
7 judiciary's integrity. NOLM, LLC v. Cty. Of Clark, 120 Nev. 736, 743, 100
8 P.3d 658, 663 (2004). For that reason, the analysis should have accepted and
9 applied the adequacy of the Disclosure Statement as already determined by the
10 bankruptcy court. By injecting its own adequacy analysis, the district court
11 exceeded its subject matter jurisdiction, along with completely avoiding the
12 reality that this debtor had already paid its creditors in full.
13

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

16 In its Order of Affirmance, the Court of Appeals indicated that
17 Appellants did not explain how the judgment against them has been satisfied,
18 released, discharged, or otherwise vacated. Notwithstanding the fact that this is
19 an issue that could have been clarified at oral argument, the district court's
20 underlying decision relying on judicial estoppel, had been satisfied because all
21 of the Appellants' creditors had been paid in full. This is a distinctly different
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1 set of circumstances than in a chapter 7 case like Hamilton, which is another
2 reason it does not apply here.

3 Moreover, the 11th Circuit's recent opinion in Slater makes clear that a
4 district court should consider all facts and circumstances in a bankruptcy case,
5 even those events occurring in the case after the omission is discovered. Slater,
6 2017 WL 4110047, at *9.

7
8 Indeed, it appears that this Court overlooked the Order by the United
9 States Bankruptcy Court of March 29, 2016, which stated, among other things,
10 "the Debtors made all payments in accordance with their Chapter 11 Plan and
11 paid their creditors in full." App. at 1-3 (emphasis added).

12 Simply put, it was no longer equitable to enforce for the district court's
13 finding of judicial estoppel, because all of the Appellants' creditors were paid in
14 full. "Equity cannot condone a defendant's avoidance of liability through a
15 doctrine premised upon intentional misconduct without establishing such
16 misconduct." Slater, 2017 WL 4110047, at *10. The claims at issue here have
17 no bearing on the recovery of creditors in the Appellants' underlying
18 bankruptcy case.
19

20 **D. Oral Argument was Appropriate**

21 In addition to the errors noted above, the Order of Affirmance was issued
22 without oral argument, which denied the Court of Appeals the ability to
23

1 challenge Appellants on their application of law and factual assertions and it
2 denied the Appellants the ability to clarify points of doctrine for the Court of
3 Appeals. Indeed, the Court of Appeals indicated there were points in the
4 Appellants' briefing that were unclear and/or not addressed, and consequently,
5 counsel could have clarified those points at oral argument. As a result, the
6 Court of Appeals broadly dismissed the Appellants application of the res
7 judicata doctrine, and NRCP 60(b)(5) arguments. This prevented full
8 examination of the issues and arguments.
9

10 Conclusion

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

13 Dated this 6th day of October, 2017.

14 Respectfully submitted:

15 SCHWARTZ FLANSBURG PLLC
16

17 By: /s/ Samuel A. Schwartz
18 Samuel A. Schwartz, Esq.
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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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Attorneys for the Petitioners/Appellants

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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1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 CARLOS A. HUERTA, AN
3 INDIVIDUAL; AND GO GLOBAL,
4 INC., A NEVADA CORPORATION,
Appellants,

Petitioner,

5 vs.

6 SIG ROGICH, A/K/A SIGMUND
7 ROGICH, AS TRUSTEE OF THE
8 ROGICH FAMILY IRREVOCABLE
9 TRUST; AND ELDORADO HILLS,
LLC, A NEVADA LIMITED
LIABILITY COMPANY,

10 Respondents.

Case No.: 70492

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Elizabeth A. Brown
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11 **MOTION TO RECALL REMITTITUR AND REQUEST**
12 **FOR PERMISSION TO FILE PETITION FOR REHEARING**¹

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

1 **MOTION TO RECALL REMITTITUR AND**
2 **REQUEST FOR PERMISSION TO FILE PETITION FOR REHEARING**

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

12 **Preliminary Statement**

13 On September 18, 2017, the Eleventh Circuit Court of Appeals, sitting *en*
14 *banc*, reversed a district court’s application of judicial estoppel in a bankruptcy
15 case, and held that a district court had to consider all facts and circumstances of
16 a case to determine whether judicial estoppel should be applied when a debtor
17 omitted a civil claim in her bankruptcy filing. Slater v. United States Steel,
18 2017 WL 4110047 (11th Cir. Sept. 18, 2017) (emphasis added). Indeed, the
19 11th Circuit stated:
20 11th Circuit stated:

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

1 defendant avoids liability on an otherwise potentially meritorious
2 civil claim while providing no corresponding benefit to the court
3 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."

4 Id. at *10, quoting Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S.
5 238, 248 (1944).

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

12 The Appellants do not challenge the district court's jurisdiction to apply
13 the judicial estoppel doctrine in state court proceedings. The Appellants,
14 however, challenge the determination that the district court only referenced the
15 bankruptcy court's order approving the disclosure statement (the "**Disclosure**
16 **Statement Order**") for judicial estoppel purposes in state court proceedings.
17 As set forth herein, and as recently held by the 11th Circuit Court of Appeals,
18 the district court: (a) refused to consider all facts and circumstances in the
19 Appellants' bankruptcy case; (b) refused to consider the fact that all of
20 Appellants' creditors were paid in full; (c) failed to properly account for the
21 Appellants' schedule of assets which listed the claims at issue here; and (d)
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23

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

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

9
10 Turning to this Court's Extension Denial Order, the Appellants
11 respectfully request the remittitur be recalled, and petition for rehearing on the
12 Extension Denial Order be permitted, as Appellants were not afforded due
13 process in accordance with notification rules of the Nevada Electronic Filing
14 and Conversion Rules ("**NEFCR**"). Indeed, the Order of Affirmance was never
15 lodged or docketed in this appeal, and as a result, neither Appellants nor their
16 counsel received notice of the same. Despite being registered for this Court's
17 electronic filing system ("**eFlex**"), and having filed and received notifications of
18 all other pleadings and notices in this appeal, the Order of Affirmance was
19 never docketed or noticed on the eFlex system, and as such, the remittitur
20 should be recalled and Appellants should be afforded their appellate rights
21 under NRAP.
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Procedural Background

On June 29, 2017, the Nevada Court of Appeals issued its Order of Affirmance, affirming denial of Appellants' motion for relief under NRC 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 been 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.

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

3 On September 20, 2017, the Court of Appeals issued the Extension
4 Denial Order. Importantly, the Extension Denial Order was lodged on the
5 docket in this case, and counsel received electronic notice of the same. The
6 Extension Denial Order, among other things, denied Appellants' Motion to
7 Extend Time, and returned Appellants' Petition for Rehearing unfiled. Pursuant
8 to NRAP 27, Appellants timely² file this Motion to Recall Remittitur and
9 Request for Permission to File Petition for Rehearing with this Court.
10

11 Argument

12 **I. The Remittitur Should Be Recalled and Rehearing on the** 13 **Extension Denial Order Should Be Granted.**

14 The Appellants file the instant Motion before this Court because the
15 Extension Denial Order involves fundamental issues of statewide public
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18 ² NRAP 40 indicates a petition for review of a decision of an appellate
19 court must be filed within 18 days after the appellate court issues its order. As
20 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.

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

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

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

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

12 “[A] remittitur will be recalled when, but only when,
13 inadvertence, mistake of fact, or an incomplete knowledge of
14 the circumstances of the case on the part of the court or its
15 officers, whether induced by fraud or otherwise, has resulted in
16 an unjust decision.” Wood v. State, 60 Nev. 139, 141, 104 P.2d
17 187, 188 (1940). In this case, the remittitur was regularly
18 issued, and appellants have not demonstrated a basis on which
19 the remittitur should be recalled. The motion is therefore
20 denied.

21 See Extension Denial Order, pp. 1-2.

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

23 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.

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

2 In this instance, the rules of the appellate court were not followed when
3 the Court of Appeals issued the Order of Affirmance. In fact, this Court
4 recently addressed the Nevada Electronic Filing and Conversion Rules
5 (NEFCR) in a recent case, Fulbrook v. Allstate Ins. Co., 350 P.3d 88 (Nev.
6 2015). In that case, the Court stated:

7
8 The Nevada Electronic Filing and Conversion Rules
9 (NEFCR) provide electronic service of documents. NEFCR 9.
10 **The rule requires that “[w]hen a document is electronically**
11 **filed, the court . . . must provide notice to all registered users**
12 **on the case that a document has been filed and is available on**
13 **the electronic service system document repository.” NEFCR**
14 **9(b).** “This notice shall be considered as valid and effective
15 service of the document on the registered users and shall have the
16 same legal effect as service of a paper document.” Id. Further,
17 “[t]he notice must be sent by e-mail to the addresses furnished by
18 the registered users under Rule 13(c).” Id.

19 The required notice to which the rule refers is the
20 notification within the electronic filing system. When a registered
21 user logs into his account, he can see all the notifications in his
22 cases. In addition to the official notice within the system, an e-
23 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.

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

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

3 In this matter, however, the Order of Affirmance was never entered on
4 the docket, which is confirmed by counsel's eFlex account with this Court, and
5 counsel never received any paper notice or notice by any other means.
6 Accordingly, unlike the appellant in Fullbrook, the Appellants' substantive
7 appellate rights here were compromised.
8

9 Accordingly, counsel submits rehearing is necessary on the Appellants'
10 Motion to Extend Time, as the remittitur should be recalled because: (a) the
11 Appellants never received the Order of Affirmance; (b) the Order was never
12 lodged on the docket or with the Court's eFlex system; and (c) as such, the
13 remittitur was not regularly issued in accordance with the NEFCR.
14

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

16 Additionally, the Appellants request rehearing (or this Court's review) of
17 the Court of Appeals' Order of Affirmance, which affirmed the district court's
18 order denying reconsideration under NRCP 60(b). When considering rehearing,
19 the Court determines whether it has overlooked or misapprehended a material
20 fact in the record or a material question of law in a case, or whether it has
21 overlooked, misapplied or failed to consider a statute, procedural rule,
22 regulation or decision directly controlling a dispositive issue in the case. NRAP
23

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

4 The district court did not just use the contents of the disclosure statement
5 for judicial estoppel purposes, but rather, it determined (long after the United
6 States Bankruptcy Court for the District of Nevada found the disclosure
7 statement contained adequate information for creditors) the disclosure statement
8 in the bankruptcy proceeding was inadequate, resulting in judicial estoppel.
9

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

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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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