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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

5	In re:	)	BAP No. NV-16-1077-LDoKi
		)	
6	GO GLOBAL, INC.,	)	Bk. No. 2:10-bk-14804
		)	
7	Debtor.	)	Adv. No. 2:14-ap-1173
		)	
8	GO GLOBAL, INC.,	)	
		)	
9	Appellant,	)	
		)	
10	v.	)	<b>MEMORANDUM*</b>
		)	
11	SIG ROGICH, Trustee of the	)	
	Rogich Family Irrevocable	)	
12	Trust; IMITATIONS, LLC;	)	
	ELDORADO HILLS, LLC; TELD,	)	
13	LLC,	)	
		)	
14	Appellees.	)	
		)	

Argued and Submitted on October 21, 2016  
at Las Vegas, Nevada

Filed - November 22, 2016

Appeal from the United States Bankruptcy Court  
for the District of Nevada

Honorable Gary A. Spraker, Bankruptcy Judge, Presiding

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Appearances: Samuel A. Schwartz argued for Appellant Go Global, Inc.; Samuel S. Lionel of Fennemore Craig, P.C. argued for Appellees Sig Rogich and Imitations, LLC; Andrew Mark Leavitt argued for Appellees Eldorado Hills, LLC and TELD, LLC.

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\* This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8024-1.

1 Before: LAFFERTY, DORE,\*\* and KIRSCHER, Bankruptcy Judges.

2 **I. INTRODUCTION**

3 Prepetition, Appellant Go Global, Inc. ("Go Global") and its  
4 principal, Carlos Huerta, sold their membership interest in  
5 Eldorado Hills, LLC ("Eldorado") to Appellee Sig Rogich, Trustee  
6 of the Rogich Family Irrevocable Trust ("Rogich Trust") for  
7 approximately \$2.7 million. Under the purchase agreement, the  
8 purchase price was to be paid solely from future distributions or  
9 proceeds from Eldorado; no other source of payment was specified,  
10 and payments were not due on any particular date. Postpetition,  
11 Rogich Trust transferred its membership interest in Eldorado to  
12 TELD, LLC ("TELD") in what Go Global alleged was an attempt to  
13 avoid Rogich Trust's obligations under the purchase agreement.

14 Although Go Global listed its receivable from Rogich Trust  
15 on Schedule B, none of the numerous disclosure statements filed  
16 by Go Global mentioned any claim against Rogich Trust, nor did  
17 the plan provide that it would be funded from any recovery on  
18 that claim. Shortly after Go Global's plan was confirmed,  
19 Go Global transferred its rights under the purchase agreement to  
20 Huerta, as Trustee of the Alexander Christopher Trust, which sued  
21 Rogich Trust in state court to recover the amounts owed under the  
22 purchase agreement (the "State Court Action"). The state court  
23 granted Rogich Trust's motion for partial summary judgment  
24 dismissing the claims against Rogich Trust on grounds of judicial  
25 estoppel because Go Global had not disclosed its claim against  
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27 \*\* Hon. Timothy W. Dore, United States Bankruptcy Judge for  
28 the Western District of Washington, sitting by designation.

1 Rogich Trust in its disclosure statement. Huerta and the  
2 Alexander Christopher Trust appealed, but the appeal was  
3 dismissed as untimely.<sup>1</sup>

4 The Alexander Christopher Trust then transferred its rights  
5 under the purchase agreement back to Go Global, which immediately  
6 filed an adversary proceeding in the bankruptcy court against  
7 Rogich Trust, Eldorado, TELD, and Imitations, LLC ("Imitations"),  
8 seeking to recover funds owed under the purchase agreement. The  
9 complaint sought to hold the additional parties liable under  
10 theories of conspiracy and aiding and abetting Rogich Trust in  
11 avoiding its obligations under the purchase agreement. On  
12 defendants' motions, the bankruptcy court dismissed the complaint  
13 based on the claim preclusive effect of the state court judgment  
14 and denied Go Global's motion to amend its complaint.

15 After independent review of this matter, we hold that the  
16 bankruptcy court lacked subject matter jurisdiction over the  
17 adversary proceeding. Accordingly, we would affirm dismissal on  
18 that ground alone. Alternatively, if the bankruptcy court had  
19 jurisdiction, we hold that it did not err in ruling that claim  
20 preclusion barred Go Global's claims in the adversary proceeding,  
21 and we affirm on that basis.

## 22 **II. FACTUAL BACKGROUND**

23 Carlos Huerta is the sole shareholder and president of  
24 Go Global. Prior to the commencement of Go Global's bankruptcy  
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26 <sup>1</sup> On April 20, 2016, the state court plaintiffs moved for  
27 reconsideration of the order granting partial summary judgment.  
28 That motion was denied on April 28, 2016. Plaintiffs appealed to  
the Nevada Supreme Court on June 6, 2016.

1 case, Huerta, Go Global, and Rogich Trust held ownership  
2 interests in Appellee Eldorado. Eldorado's primary asset is real  
3 property in Clark County, Nevada.

4 On October 30, 2008, Huerta, Go Global, and Rogich Trust  
5 executed a purchase agreement assigning Huerta's and Go Global's  
6 membership interest to Rogich Trust (the "Purchase Agreement")  
7 for \$2,747,729.50. The Purchase Agreement did not require any  
8 down payment; rather the entire amount of the purchase price was  
9 financed, at no interest, and was to be paid "from future  
10 distributions or proceeds (net of bank/debt owed payments and tax  
11 liabilities from such proceeds, if any) distributed to Buyer at  
12 the rate of 56.20% of such profits, as, when and if received by  
13 Buyer from [Eldorado]." An assignment of the sellers' interest  
14 signed by Huerta, individually and on behalf of Go Global, was  
15 attached to the Purchase Agreement.

16 On March 23, 2010, Go Global filed a chapter 11<sup>2</sup> bankruptcy  
17 petition. On Schedule B of its schedules of assets and  
18 liabilities, Go Global listed a receivable against Rogich Trust  
19 of \$2,747,729.50. Huerta and his wife, Christina Huerta, also  
20 filed a joint chapter 11 petition; the two cases were jointly  
21 administered.

22 A little over a year later, on April 4, 2011, Huerta and  
23 Go Global filed their initial joint disclosure statement. The  
24 disclosure statement did not identify or discuss any claims by  
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26 <sup>2</sup> Unless otherwise indicated, all chapter and section  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.  
28 "Rule" references are to the Federal Rules of Bankruptcy  
Procedure.

1 Go Global against Rogich Trust. Huerta and Go Global filed two  
2 subsequent amended disclosure statements, neither of which  
3 identified or discussed any claims against Rogich Trust. The  
4 Third Amended Joint Disclosure Statement filed April 8, 2013,  
5 provided that all future causes of action would vest in Go Global  
6 free and clear of all liens, claims, charges, or other  
7 encumbrances.<sup>3</sup> Section F(2)(b) of the Third Amended Joint  
8 Disclosure Statement further provided:

9 [N]o preclusion doctrine, including, without  
10 limitation, the doctrines of res judicata, collateral  
11 estoppel, issue preclusion, claim preclusion, waiver,  
12 estoppel (judicial, equitable or otherwise) or laches  
13 shall apply to such claims or Causes of Action upon or  
14 after the Confirmation or Consummation of the Plan  
15 based on the Disclosure Statement, the Plan or the  
16 Confirmation Order, except where such claims or Causes  
17 of Action have been expressly released in the Plan or  
18 any other Final Order (including, without limitation,  
19 the Confirmation Order).

20 At some point in 2012, Huerta learned that Rogich Trust had  
21 conveyed its interest in Eldorado to TELD. On November 7, 2012,  
22 Brandon B. McDonald, counsel for Huerta and Go Global, mailed a  
23 letter to Sig Rogich regarding the amounts due his clients under  
24 the Purchase Agreement and outlining a theory that Rogich Trust  
25 had either breached or evaded the terms of the Purchase Agreement  
26 and frustrated the just expectations of the sellers:

27 Rather than distribute profits or otherwise repay the  
28 Seller (Huerta and Go Global), we have reason to  
believe that your interests have been inappropriately  
transferred. This effectively negated any possible

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3 The Third Amended Joint Disclosure Statement was not  
included in Appellant's Excerpts of Record. In its brief,  
Appellant cites to the bankruptcy court docket, and we have  
exercised our discretion to review that docket and pleadings, as  
appropriate. See Woods & Erickson, LLP v. Leonard (In re AVI,  
Inc.), 389 B.R. 721, 725 n.2 (9th Cir. BAP 2008).

1 recovery of the monies provided by the Seller through  
2 profits or sale of the business/real property owned by  
Eldorado Hills, LLC.

3 On July 22, 2013, the bankruptcy court entered an order  
4 confirming Go Global's Third Amended Joint Plan of  
5 Reorganization. The confirmed plan provided for payment of  
6 100 percent of the principal amount of allowed general unsecured  
7 claims from recoveries from the consolidated debtors'  
8 \$5.5 million judgment against Paulson Group. The confirmed plan  
9 also contained provisions consistent with and mirroring those  
10 within the Third Amended Joint Disclosure Statement for the  
11 maintenance and preservation of causes of action, including:

12 [A]fter the effective date, the Reorganized Debtors  
13 shall retain all rights to commence, pursue, litigate  
14 or settle, as appropriate, any and all Causes of  
15 Action, . . . whether existing as of the Commencement  
Date or thereafter arising, in any court or other  
tribunal including, without limitation, in an adversary  
proceeding Filed [sic] in the Chapter 11 Cases.

16 About a week after entry of the confirmation order, on  
17 July 30, 2013, Go Global transferred all of its rights, title,  
18 and interests under the Purchase Agreement to the Alexander  
19 Christopher Trust pursuant to a one-page assignment of contract.  
20 The assignment expressly included all causes of action as allowed  
21 under law arising from the Purchase Agreement.

22 The next day, Huerta, individually and as Trustee of the  
23 Alexander Christopher Trust (as assignee of Go Global), along  
24 with a third plaintiff, Nanyah Vegas, LLC,<sup>4</sup> filed suit against  
25 Rogich Trust and Eldorado in the District Court for Clark County,

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27 <sup>4</sup> According to the state court complaint, Nanyah Vegas LLC  
28 invested \$1.5 million in Eldorado but never received an interest  
in Eldorado.

1 Nevada, to recover monies owed under the Purchase Agreement. The  
2 state court complaint asserted three causes of action on behalf  
3 of Huerta and the Alexander Christopher Trust against Rogich  
4 Trust: (1) breach of express contract; (2) breach of the covenant  
5 of good faith and fair dealing; and (3) negligent  
6 misrepresentation. The state court complaint also asserted a  
7 fourth cause of action on behalf of Nanyah Vegas, LLC, against  
8 Eldorado for unjust enrichment.

9 The first cause of action for breach of express contract  
10 alleged:

11 That Defendant Rogich materially breached the terms of  
12 the Agreement when he agreed to remit payment from any  
13 profits paid from Eldorado, yet transferred his  
14 interest in Eldorado for no consideration to TEDL, LLC  
15 [sic]. This had the net effect of allowing Rogich to  
16 keep Huerta's \$2,747,729.50 in capital, and not repay  
17 that same amount which had converted to a non-interest  
18 bearing debt.

19 The second cause of action for breach of the covenant of  
20 good faith and fair dealing alleged:

21 That Defendant, Rogich has failed to maintain the  
22 obligations which he agreed upon as memorialized herein  
23 and in the Agreement as described herein and thereby  
24 failed to act in good faith and has also failed to deal  
25 fairly in regards to upholding his defined duties under  
26 the Agreement.

27 The third cause of action for negligent misrepresentation  
28 alleged:

Rogich represented at the time of the agreement that he  
would remit payment to Huerta and Go Global as  
required, yet knew or reasonably intended to transfer  
the acquired interest to TELD, LLC; and furthermore  
knew that the representations made by him in the  
Agreement were in fact false with regard to tendering  
repayment or reasonably preserving the acquired  
interest so he could repay the debt in the future.

1           Thereafter, Rogich Trust moved for partial summary judgment;  
2 Huerta and the Alexander Christopher Trust cross-moved for  
3 partial summary judgment. The state court, the Honorable Nancy  
4 Allf, granted Rogich Trust's motion and dismissed the three  
5 claims asserted by Huerta and the Alexander Christopher Trust.  
6 In doing so, Judge Allf made the following findings orally on the  
7 record:

8           A bankruptcy was filed on or about March 23 of  
9 2010 by Go Global and on June 4 of 2010 it admits that  
10 it has a receivable. I do find that the listing of the  
11 receivable from Sig Rogich is sufficient to establish  
12 they have told their creditors that they have this  
13 receivable but it's after that that the problem begins  
14 to me. In the first disclosure statement filed on  
15 April 4 of 2011 it talks about avoidance of transfer;  
16 it mentions Paulson but never this transaction. When  
17 it talks about payments to creditors it's only from  
18 sale of assets. This receivable is never identified;  
19 litigation is never identified. There's no recovery of  
20 what might still at that point be a fraudulent  
21 transfer. And in page 18 of the first disclosure  
22 statement the liquidation analysis identifying assets  
23 only lists real estate and no receivables.

24           Now after that while the disclosure statement is  
25 pending the Plaintiff makes a demand for payment on  
26 November 7 of 2012. So at that point this Plaintiff is  
27 charged with the knowledge that it knows it has a  
28 receivable but yet when it comes back on January 17 of  
2013 with the first amended disclosure statement, it's  
the same thing again: payment to creditor by sale of  
assets, no identification of a receivable, no  
identification of litigation. And the same--Exhibit C,  
liquidation analysis lists only real estate and no  
receivables. The second disclosure statement, March 8  
of 2013, same thing; no liquidation analysis  
identifying this so that creditors are never being told  
that this may be an asset that may be collected. We  
have the third amended disclosure statement on April 8  
of 2013, again the disclosure statement, the  
liquidation analysis, income expenses, real estate  
only. It never lists the receivable or cause of  
action.

          And the reason that it matters is that in the  
Chapter 11 process you have the listing of the assets  
then you have a disclosure statement that tells  
creditors how they will get paid and then the plan



1 really just says how much they'll get paid and when.  
2 It's that disclosure statement that's operative and  
3 what the creditors use to vote whether or not to accept  
4 the plan. They were never told that there was a  
5 receivable to be collected. And the thing that really  
6 concerns me the most is that when the plan is confirmed  
7 on July 22 of 2013 with the affidavit of Mr. Huerta  
8 saying that everything in the plan and disclosure  
9 statement is true and accurate, eight days later  
10 Go Global assigns the receivable and sues somewhere  
11 else under a different name; it evidences no intention  
12 that the creditors of Go Global would ever, ever have  
13 benefitted from this transaction. This is a case  
14 that's very ripe for judicial estoppel and under the  
15 applicable case law the motion is granted.

16 Judge Allf entered an Order Granting Partial Summary  
17 Judgment (the "State Court Order") on November 5, 2014, which  
18 included the following three "legal determinations":

- 19 1. On November 7, 2012, Huerta and Go Global were  
20 aware that they had a claim against the Rogich  
21 Trust.
- 22 2. The said claim was not disclosed in Huerta's and  
23 Go Global's First Amended, Second Amended or Third  
24 Amended Disclosure Statements.
- 25 3. The said claim was not disclosed in Huerta's and  
26 Go Global's Plan or their first, second or third  
27 Amendments to the Plan.

28 Based on the foregoing, Judge Allf determined that Huerta and the  
Alexander Christopher Trust were judicially estopped from  
asserting their claims against Rogich Trust and dismissed those  
claims. On February 23, 2015, Judge Allf entered a "Final  
Judgment" awarding judgment to Rogich Trust and dismissing the  
State Court Action with prejudice. Huerta and the Alexander  
Christopher Trust appealed the State Court Order, but that appeal  
was dismissed as untimely by the Nevada Supreme Court on June 26,  
2015, and is not subject to further appellate review.<sup>5</sup>

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<sup>5</sup> Although it is not otherwise evident from documents  
(continued...)

1 On November 17, 2014, Huerta assigned all of the Alexander  
2 Christopher Trust's rights in the Purchase Agreement back to  
3 Go Global. On November 26, 2014, three weeks after entry of the  
4 State Court Order and approximately one week after Huerta  
5 executed the November 17 assignment, Go Global filed an adversary  
6 proceeding against Rogich Trust, TELD, Imitations, and Eldorado  
7 seeking to recover the funds owed under the Purchase Agreement.  
8 The complaint asserts causes of action for civil conspiracy,  
9 breach of fiduciary duty, breach of contract, breach of the  
10 covenant of good faith and fair dealing, and fraud and/or  
11 negligent misrepresentation against Rogich Trust; and conspiracy  
12 and aiding and abetting in breach of fiduciary duty against TELD,  
13 Imitations, and Eldorado.

14 Imitations and Rogich Trust each filed answers to the  
15 complaint. Thereafter, Rogich Trust moved for summary judgment  
16 on grounds that Go Global was not the real party in interest and  
17 its claims were barred by claim preclusion; TELD and Eldorado  
18 moved to dismiss on the same grounds (collectively, the  
19 "Motions"). TELD and Eldorado also sought a determination that  
20 Go Global was judicially estopped from asserting claims against  
21 them. TELD and Eldorado also challenged the sufficiency of the

22 \_\_\_\_\_  
23 <sup>5</sup>(...continued)  
24 comprising the record on appeal, the bankruptcy court noted in  
25 its oral ruling on November 16, 2015, that the dismissal of  
26 Nanyah Vegas LLC's claim was appealed, as was the award of  
27 attorney's fees to Rogich Trust. Additionally, as noted above,  
28 after this appeal was filed, Huerta and Go Global, as assignee of  
the Alexander Christopher Trust, moved the state court for  
reconsideration of the State Court Order. The state court denied  
that motion on April 28, 2016, and plaintiffs appealed to the  
Nevada Supreme Court on June 6, 2016.

1 allegations for civil conspiracy, and TELD argued that it was a  
2 bona fide purchaser of Rogich Trust's interest in Eldorado and  
3 was thus protected from Go Global's claims asserted in the  
4 adversary proceeding. Go Global opposed the Motions and also  
5 moved to amend its complaint to add causes of action for  
6 (1) actual fraudulent transfer against Rogich Trust; and  
7 (2) offset of attorney's fees awarded Rogich Trust in the State  
8 Court Action ("Motion to Amend").

9 The bankruptcy court heard argument on the Motions and the  
10 Motion to Amend on June 25, 2015 and issued an oral ruling on  
11 November 16, 2015, reserving one issue for further briefing and  
12 decision, as described below. Because the bankruptcy court  
13 considered matters outside the pleadings in ruling on the  
14 Motions, it deemed the motion to dismiss as a motion for summary  
15 judgment and combined its ruling on the Motions.

16 The bankruptcy court found that, with one exception, the  
17 elements of claim preclusion under Nevada law were met.<sup>6</sup> As  
18 discussed below, those elements are: (1) a valid final judgment;  
19 (2) the subsequent action is based on the same claims or any part  
20 of them that were or could have been brought in the first case;  
21 and (3) the parties or their privies are the same in the instant  
22 lawsuit as they were in the previous lawsuit, or the defendant  
23 can demonstrate that he or she should have been included as a  
24 defendant in the earlier suit and the plaintiff fails to provide

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26 <sup>6</sup> The bankruptcy court addressed standing as a threshold  
27 issue and found that there was a genuine issue of material fact  
28 regarding Go Global's standing to maintain its claims in the  
adversary proceeding but that claim preclusion barred those  
claims, regardless of the identity of the real party in interest.

1 a good reason for not having done so. Weddell v. Sharp, 350 P.3d  
2 80, 85 (Nev. 2015), rehr'g denied (July 23, 2015).

3 The bankruptcy court found that the State Court Order was a  
4 valid final judgment, and that the claims in the adversary  
5 proceeding were or could have been brought in the State Court  
6 Action. The bankruptcy court also found that plaintiffs  
7 Go Global and the Alexander Christopher Trust were in privity,  
8 and that defendants Rogich Trust and Eldorado were defendants in  
9 the State Court Action, thus satisfying the privity requirement.  
10 With respect to the additional defendants, TELD and Imitations,  
11 the bankruptcy court observed that the parties had not addressed  
12 whether those defendants were in privity with the state court  
13 defendants. The bankruptcy court noted that in Weddell, the  
14 Nevada Supreme Court broadened the concept of "privity" for claim  
15 preclusion purposes, subject to an exclusion. See id. at 85  
16 ("[T]he parties or their privies are the same in the instant  
17 lawsuit as they were in the previous lawsuit, or the defendant  
18 can demonstrate that he or she should have been included as a  
19 defendant in the earlier suit and the plaintiff fails to provide  
20 a 'good reason' for not having done so."). Because the Nevada  
21 Supreme Court's decision in Weddell had been issued shortly  
22 before oral argument in the bankruptcy court on the Motions, and  
23 rehearing was denied on July 23, 2015, after oral argument had  
24 taken place, the bankruptcy court permitted Go Global to brief  
25 whether it had a good reason for not including TELD and  
26 Imitations as defendants in the State Court Action.

27 The bankruptcy court denied the Motion to Amend as futile  
28 because the fraudulent transfer claim would also be barred by

1 claim preclusion, and the claim for offset could not be asserted  
2 by Go Global because the mutuality requirement for offset could  
3 not be met--the fees had been awarded against the Alexander  
4 Christopher Trust and not Go Global.

5         Thereafter, the parties submitted supplemental briefing  
6 regarding privity under Weddell as permitted by the bankruptcy  
7 court. On March 10, 2016, the bankruptcy court issued its Order  
8 on Pending Motions After Supplemental Briefing ("Order on Pending  
9 Motions") finding that Go Global had offered "nothing new by way  
10 of explanation as to why it did not include the claims now  
11 asserted as part of the State Court Action." Accordingly, the  
12 bankruptcy court adopted its oral ruling of November 16, 2015  
13 granting the Motions and denying the Motion to Amend.

14         Go Global timely appealed.

### 15                                 **III. JURISDICTION**

16         The bankruptcy court determined, without any substantive  
17 discussion, that it had jurisdiction over the adversary  
18 proceeding under 28 U.S.C. § 1334 as a "related to" proceeding.<sup>7</sup>  
19 Although no party has argued that the bankruptcy court lacked  
20 jurisdiction over the adversary proceeding, we have an  
21 independent duty to consider jurisdictional issues sua sponte.  
22 Alcove Inv., Inc. v. Conceicao (In re Conceicao), 331 B.R. 885,  
23 890 (9th Cir. BAP 2005) (citing WMX Tech., Inc. v. Miller,  
24 104 F.3d 1133, 1135 (9th Cir. 1997)).

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26         <sup>7</sup> The jurisdictional paragraph of Go Global's adversary  
27 complaint references §§ 547 and 548 and states that it is a core  
28 proceeding under 28 U.S.C. § 157(b)(2)(I), which pertains to  
dischargeability. However, all of the causes of action asserted  
in the complaint are state law claims.

1 A bankruptcy court has jurisdiction over all civil  
2 proceedings arising under title 11, or arising in or related to  
3 cases under title 11. 28 U.S.C. § 1334(b). A matter "arises  
4 under" the Bankruptcy Code "if its existence depends on a  
5 substantive provision of bankruptcy law, that is, if it involves  
6 a cause of action created or determined by a statutory provision  
7 of the Bankruptcy Code." Battle Ground Plaza, LLC v. Ray  
8 (In re Ray), 624 F.3d 1124, 1131 (9th Cir. 2010) (citations  
9 omitted). A proceeding "arises in" a case under title 11 if it  
10 is "an administrative matter unique to the bankruptcy process  
11 that has no independent existence outside of bankruptcy and could  
12 not be brought in another forum, but whose cause of action is not  
13 expressly rooted in the Bankruptcy Code." Id. (citation  
14 omitted).

15 The bankruptcy court also has jurisdiction over proceedings  
16 that are "related to" a bankruptcy case. The Ninth Circuit has  
17 adopted the "Pacor<sup>8</sup> test" for determining the scope of "related  
18 to" jurisdiction: whether the outcome of the proceeding could  
19 conceivably have any effect on the estate being administered in  
20 bankruptcy. Montana v. Goldin (In re Pegasus Gold Corp.),  
21 394 F.3d 1189, 1193 (9th Cir. 2005). Put another way, an action  
22 is "related to" bankruptcy if the outcome "could alter the  
23 debtor's rights, liabilities, options, or freedom of action  
24 (either positively or negatively) and which in any way impacts  
25 upon the handling and administration of the bankrupt estate."  
26 Id. (citations omitted).

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27  
28 <sup>8</sup> Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984).

1           Notwithstanding the broad standard of Pacor concerning  
2 "related to" jurisdiction in general, subsequent case law  
3 indicates that **postconfirmation** jurisdiction is much narrower,  
4 and the Ninth Circuit has expressly adopted this approach. In  
5 In re Pegasus Gold, the Ninth Circuit Court of Appeals adopted  
6 the "close nexus" test for postconfirmation jurisdiction as set  
7 forth in Binder v. Price Waterhouse & Co., LLP (In re Resorts  
8 Int'l, Inc.), 372 F.3d 154 (3d Cir. 2004). Under that test,  
9 postconfirmation bankruptcy court jurisdiction is limited to  
10 matters that affect the interpretation, implementation,  
11 consummation, execution, or administration of the confirmed plan.  
12 Id. at 168-69. The close nexus test requires "particularized  
13 consideration of the facts and posture of each case, as the test  
14 contemplates a broad set of sufficient conditions and retains a  
15 certain flexibility." Wilshire Courtyard v. Cal. Franchise Tax  
16 Bd. (In re Wilshire Courtyard), 729 F.3d 1279, 1289 (9th Cir.  
17 2013).

18           Here, the adversary proceeding is not a matter that "arises  
19 under" the Bankruptcy Code because it does not assert a cause of  
20 action created or determined by a statutory provision of the  
21 Bankruptcy Code, nor is it one that "arises in" a bankruptcy  
22 case, because the causes of action asserted are not unique to the  
23 bankruptcy process and could have been brought in another forum--  
24 the claims in the original adversary complaint are all state law  
25 causes of action. Thus, the only basis for jurisdiction would be  
26 "related to" jurisdiction. However, there is no basis to  
27 conclude that the standards for "related to" jurisdiction have  
28 been met here.

1 First, the action is not "related to" the bankruptcy case  
2 under the traditional test: the resolution of the claims would  
3 not increase or diminish the size of the bankruptcy estate (which  
4 ceased to exist upon confirmation in any event) since the plan  
5 did not purport to utilize the proceeds from the claim to pay  
6 creditors, nor would it obligate Go Global to distribute any  
7 recovery to creditors because the confirmed plan did not so  
8 provide.

9 Second, and more importantly in this instance, the close  
10 nexus test is not satisfied. The claims asserted in the  
11 adversary proceeding did not require the bankruptcy court to  
12 interpret, implement, consummate, execute, or administer the  
13 plan. As noted, the claims were not disclosed in any version of  
14 the plan or disclosure statement and were not relied upon as a  
15 source of funding for the plan. To the extent the bankruptcy  
16 court considered the plan at all, it only needed to inspect the  
17 plan to determine what provisions it contained, or, more to the  
18 point here, did not contain. Although the state court arguably  
19 "interpreted" the plan to determine whether judicial estoppel  
20 barred the state court claims, in fact that review was also  
21 limited to observing the absence of any mention of the claim  
22 against Rogich Trust. And the bankruptcy court did not need to  
23 interpret the plan on these issues; indeed, it was prohibited  
24 from doing so, as it was required to give the state court  
25 judgment on this issue, from which no party appealed, full faith  
26 and credit. Moreover, to the extent the plan could be construed  
27 as reserving jurisdiction to the bankruptcy court to adjudicate  
28 that claim, such a reservation would be, by itself, ineffective.



1 See In re Resorts Int'l, 372 F.3d at 161 (holding that subject  
2 matter jurisdiction cannot be conferred by consent of the  
3 parties).

4 Go Global moved to amend its complaint to add a claim for  
5 fraudulent transfer, which is a core matter under 28 U.S.C.  
6 § 157(b)(2)(H) that "arises in" a bankruptcy case. However,  
7 adding such a claim would not automatically confer  
8 postconfirmation jurisdiction here because the plan did not  
9 provide for any distribution to creditors from such a claim  
10 (despite specifically providing for another avoidance claim).<sup>9</sup>

11 For these reasons, we conclude that the bankruptcy court  
12 lacked subject matter jurisdiction over the adversary proceeding.  
13 Because we may affirm on any basis supported by the record,  
14 Caviata Attached Homes, LLC v. U.S. Bank (In re Caviata Attached  
15 Homes, LLC), 481 B.R. 34, 44 (9th Cir. BAP 2012), we would affirm  
16 on that basis. However, if a reviewing court finds that the  
17 bankruptcy court had jurisdiction, we would have jurisdiction  
18 under 28 U.S.C. § 158 to decide these issues on appeal, and, as  
19 discussed below, we find no error in the bankruptcy court's  
20 dismissal of the adversary proceeding or denial of Go Global's  
21 Motion to Amend.

#### 22 **IV. ISSUES**

23 1. Did the bankruptcy court err in granting Appellees'  
24 Motions on grounds that claim preclusion applied to bar

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26 <sup>9</sup> Almost immediately after this appeal was filed, on  
27 March 30, 2016, the bankruptcy court entered an order closing the  
28 main bankruptcy case, finding that "Debtors made all payments in  
accordance with their Chapter 11 Plan and paid their creditors in  
full[.]"

1 Go Global's claims in the adversary proceeding?

2 2. Did the bankruptcy court abuse its discretion in  
3 denying Go Global's Motion to Amend?

#### 4 V. STANDARD OF REVIEW

5 We review the bankruptcy court's grant of summary judgment  
6 de novo. Boyajian v. New Falls Corp. (In re Boyajian), 564 F.3d  
7 1088, 1090 (9th Cir. 2009); Lopez v. Emergency Serv. Restoration,  
8 Inc. (In re Lopez), 367 B.R. 99, 103 (9th Cir. BAP 2007).

9 We review rulings regarding the availability of claim  
10 preclusion de novo as a mixed question of law and fact in which  
11 legal questions predominate. Robi v. Five Platters, Inc.,  
12 838 F.2d 318, 321 (9th Cir. 1988); Alary Corp. v. Sims  
13 (In re Associated Vintage Grp., Inc.), 283 B.R. 549, 554 (9th  
14 Cir. BAP 2002).

15 We review the bankruptcy court's denial of a motion to amend  
16 a complaint for an abuse of discretion. See Gerber v. Hickman,  
17 291 F.3d 617, 623 (9th Cir. 2002) (en banc).

18 Under the abuse of discretion standard, we cannot reverse  
19 unless we have a definite and firm conviction that the trial  
20 court committed a clear error of judgment in the conclusion it  
21 reached upon a weighing of the relevant factors. Solomon v. N.  
22 Am. Life & Cas. Ins. Co., 151 F.3d 1132, 1138-39 (9th Cir. 1998).

#### 23 VI. DISCUSSION

24 **A. The bankruptcy court did not err in finding that claim**  
25 **preclusion was available as a defense to the claims asserted**  
26 **by Go Global in the adversary proceeding.**

##### 27 1. Standard for Application of Claim Preclusion

28 Under the full faith and credit statute, the preclusive  
effect of a state court judgment in a subsequent federal lawsuit

1 is determined by reference to the preclusion law of the state in  
2 which judgment was rendered. Marrese v. Am. Acad. of Orthopaedic  
3 Surgeons, 470 U.S. 373, 380 (1985); Far Out Productions, Inc. v.  
4 Oskar, 247 F.3d 986, 993 (9th Cir. 2001). Because the judgment  
5 at issue was rendered by a Nevada state court, Nevada preclusion  
6 doctrines are applicable.

7 The Nevada Supreme Court has observed that "the purpose of  
8 claim preclusion is to obtain finality by preventing a party from  
9 filing another suit that is based on the same set of facts that  
10 were present in the initial suit." Weddell, 350 P.3d at 82.

11 Claim preclusion has a broader reach than issue preclusion:

12 [W]hile claim preclusion can apply to all claims that  
13 were or could have been raised in the initial case,  
14 issue preclusion only applies to issues that were  
15 actually and necessarily litigated and on which there  
16 was a final decision on the merits. . . . [C]laim  
17 preclusion applies to preclude an entire second suit  
18 that is based on the same set of facts and  
19 circumstances as the first suit, while issue preclusion  
20 . . . applies to prevent relitigation of only a  
21 specific issue that was decided in a previous suit  
22 between the parties, even if the second suit is based  
23 on different causes of action and different  
24 circumstances.

19 Five Star Capital Corp. v. Ruby, 194 P.3d 709, 713-14 (Nev. 2008)  
20 (en banc), as modified by Weddell, 350 P.3d at 81-86.

21 In Nevada, a defendant asserting claim preclusion must  
22 demonstrate that (1) the final judgment is valid; (2) the  
23 subsequent action is based on the same claims or any part of them  
24 that were or could have been brought in the first case; and  
25 (3) the parties or their privies are the same in the instant  
26 lawsuit as they were in the previous lawsuit, or the defendant  
27 can demonstrate that he or she should have been included as a  
28 defendant in the earlier suit, and the plaintiff fails to provide

1 a good reason for not having done so. Weddell, 350 P.3d at 85.

2 Go Global argues that the bankruptcy court erred in finding  
3 that claim preclusion applied to bar its claims in the adversary  
4 proceeding. Go Global argues that the state court claims were  
5 not litigated on the merits; that the state court complaint was  
6 not dismissed with prejudice; and that the parties and claims are  
7 not identical. Go Global also contends that nonmutual claim  
8 preclusion does not apply because Go Global was not aware of  
9 facts giving rise to claims against TELD and Eldorado until over  
10 a year after the commencement of the State Court Action.

11 **2. Application of the Standard to the Facts Presented**

12 **a. The State Court Order is final and valid.**

13 Go Global contends that the State Court Order does not meet  
14 the "final and valid" requirement because (1) the State Court  
15 Order was not a final judgment for purposes of claim preclusion  
16 because it was entered without prejudice; and (2) the claims in  
17 the State Court Action were not actually litigated on the merits.

18 As noted, Judge Allf entered a Final Judgment in the State  
19 Court Action on February 23, 2015 awarding judgment to Rogich  
20 Trust and dismissing the State Court Action with prejudice. To  
21 the extent the State Court Order could be construed as having  
22 been entered without prejudice, the entry of the Final Judgment  
23 "with prejudice" corrected any purported ambiguity.

24 As to the "final and valid" requirement, Go Global seems to  
25 conflate the elements of issue preclusion and claim preclusion,  
26 which are two different doctrines with different elements. See  
27 Five Star Capital, 194 P.3d at 713 (setting out the elements for  
28 the application of each doctrine). The requirement that an issue

1 be "actually litigated" applies only to issue preclusion, not  
2 claim preclusion. See id. At oral argument, Go Global's counsel  
3 clarified that its contention is that the claims were dismissed  
4 on procedural rather than substantive grounds, which Go Global  
5 contends disqualifies the State Court Order and Final Judgment  
6 from having claim preclusive effect. The controlling case law  
7 does not support Go Global's position.

8 In Five Star Capital, the first lawsuit had been dismissed  
9 under a local court rule for the plaintiff's failure to attend a  
10 pretrial calendar call. The Nevada Supreme Court rejected the  
11 appellant's argument that the dismissal was not on the merits,  
12 holding that under Nevada Rule of Civil Procedure 41(b), a  
13 dismissal operates as an adjudication on the merits unless the  
14 dismissal is for lack of jurisdiction, improper venue, or failure  
15 to join a party.<sup>10</sup> 194 P.3d at 715. Because the order in the  
16 first suit had not been based on any of those grounds, the Nevada  
17 Supreme Court rejected the appellant's argument that the order at  
18 issue was not a valid final judgment. Id. The court noted that  
19 "[w]hile the requirement of a valid final judgment does not  
20 necessarily require a determination on the merits, it does not  
21 include a case that was dismissed without prejudice or for some  
22 reason (jurisdiction, venue, failure to join a party) that is not

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24 <sup>10</sup> The rule provides, in relevant part:

25 Unless the court in its order for dismissal otherwise  
26 specifies, a dismissal under this subdivision and any  
27 dismissal not provided for in this rule, other than a  
28 dismissal for lack of jurisdiction, for improper venue,  
or for failure to join a party under Rule 19, operates  
as an adjudication upon the merits.

1 meant to have preclusive effect.” Id. at 713 n.27.

2 Despite the clear direction of this authority, Go Global  
3 insists that a dismissal based on judicial estoppel does not  
4 operate as an adjudication on the merits for purposes of claim  
5 preclusion. The cases cited in support of this argument do not  
6 support that conclusion. They loosely support the conclusion  
7 that nondisclosure of causes of action in a bankruptcy is not  
8 always grounds for a dismissal of those claims with prejudice,  
9 but they do not address whether a dismissal based on judicial  
10 estoppel may have claim preclusive effect in a subsequent  
11 proceeding. See Ryan Operations G.P. v. Santiam-Midwest Lumber  
12 Co., 81 F.3d 355 (3d Cir. 1996); The Glazier Grp., Inc. v.  
13 Premium Supply Co., Inc., 2013 WL 1727155 (N.Y. Apr. 16, 2013);  
14 and Bertrand v. Belhomme, 892 So. 2d 1150 (Fla. App. 3 Dist.  
15 2005).<sup>11</sup>

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17 <sup>11</sup> In Ryan Operations, the Third Circuit Court of Appeals  
18 held that the debtor’s failure to disclose claims against  
19 non-creditors in a chapter 11 case did not bar a subsequent  
20 lawsuit outside of bankruptcy; the Court of Appeals declined to  
21 decide whether failure to disclose, standing alone, could support  
22 a finding that a plaintiff had asserted inconsistent positions  
23 because there was no evidence of bad faith by debtor’s principal.  
24 In The Glazier Group, the New York Supreme Court held that a  
25 debtor’s failure to disclose a claim against a non-creditor in  
26 its chapter 11 disclosure statement did not bar a subsequent suit  
27 outside of bankruptcy where the causes of action were unknown to  
28 the debtor when it filed for bankruptcy relief. Finally, in  
Bertrand, the Florida Court of Appeals reversed a trial court’s  
dismissal with prejudice of a lawsuit for fraud on the court,  
which was based on many factors, including the plaintiff’s  
nondisclosure of a lottery prize in her prior bankruptcy case.  
The appellate court held that the state court had no authority to  
sanction plaintiff for her conduct in the bankruptcy proceeding,  
and that the plaintiff’s initial omission of the lottery prize

(continued...)

1           These cases are not controlling. In the Ninth Circuit,  
2 failure to disclose a cause of action in a plan or disclosure  
3 statement may constitute grounds for the application of judicial  
4 estoppel. See Hamilton v. State Farm Fire & Cas. Co., 270 F.3d  
5 778, 783 (9th Cir. 2001) (citing Hay v. First Interstate Bank of  
6 Kalispell, N.A., 978 F.2d 555, 557 (9th Cir. 1992)). In any  
7 event, to the extent Go Global is arguing that judicial estoppel  
8 should not have been applied, that is a collateral attack on the  
9 State Court Order. Even if the bankruptcy court agreed with that  
10 conclusion, it was required to give full faith and credit to the  
11 State Court Order and Final Judgment, which found that the  
12 Alexander Christopher Trust, as assignee of Go Global, was  
13 judicially estopped from asserting its claims against Rogich  
14 Trust.

15           Go Global also cites Classic Auto Refinishing, Inc., v.  
16 Marino (In re Marino), 181 F.3d 1142 (9th Cir. 1999), to support  
17 its argument that a dismissal on procedural grounds does not  
18 support the application of claim preclusion. In Marino, the  
19 bankruptcy court dismissed "with prejudice as to its  
20 reinstatement" an untimely nondischargeability complaint in the  
21 debtor's chapter 11 case. Thereafter, the case was converted to  
22 chapter 7, and new deadlines were set for the filing of  
23 objections to discharge. This time, the creditor filed a timely  
24 nondischargeability complaint. The debtor moved for summary  
25 judgment, arguing that the lawsuit was barred by "res judicata"

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27           <sup>11</sup> (...continued)  
28 was not central to the lawsuit.

1 because of the prior dismissal with prejudice. The bankruptcy  
2 court denied the motion, and the BAP reversed.

3 The Ninth Circuit affirmed the bankruptcy court. It  
4 observed that although a dismissal with prejudice based on a  
5 statutory time limit may constitute a dismissal on the merits to  
6 bar a subsequent suit, the bankruptcy court in the case before it  
7 had not intended for the dismissal to operate as a bar to a  
8 future timely filed nondischargeability complaint. Marino,  
9 131 F.3d at 1145. In so doing, the Ninth Circuit stated: "we do  
10 not subject res judicata law to a bouleversement. We only hold  
11 that in the unique world of the bankruptcy rules the particular  
12 facts of this case require a determination that [appellee] was  
13 able to press its new complaint." Id. at 1146. But here the  
14 Final Judgment, which disposed of the claims with prejudice, was  
15 clearly intended to be final, unlike the judgment at issue in  
16 Marino.

17 If anything, Marino supports the bankruptcy court's finding  
18 that the Final Judgment has preclusive effect. The Marino court  
19 noted that a dismissal on statutes of limitations grounds (an  
20 affirmative defense) presents a variation on the requirement that  
21 a final judgment must be on the merits to bar subsequent  
22 litigation of the same cause of action. Id. at 1144. The court  
23 noted that such dismissals

24 are not on the merits in the sense that the underlying  
25 substantive claim has been adjudicated. Rather, the  
26 passage of time precludes testing whether the claim  
27 would otherwise have been valid. Nevertheless, for res  
28 judicata purposes a dismissal on statute of limitations  
grounds can be treated as a dismissal on the merits.  
Indeed, the Restatement has abandoned the "on the  
merits" terminology because, as it explains,  
"[i]ncreasingly . . . judgments not passing directly on



1 the substance of the claim have come to operate as a  
2 bar."

3 Id. (citing Restatement (Second) of Judgments § 19 cmt. a (1982))  
4 (additional citations omitted). Like the statute of limitations  
5 defense, judicial estoppel is an affirmative defense that must be  
6 pleaded and proved.<sup>12</sup> If proven, an affirmative defense "will  
7 defeat the plaintiff's claim even if all allegations in the  
8 complaint are true." Douglas Disposal, Inc. v. Wee Haul LLC,  
9 170 P.3d 508, 513 (Nev. 2007). If a dismissal on grounds of  
10 judicial estoppel is not on the merits for preclusion purposes,  
11 no dismissal based on an affirmative defense would have  
12 preclusive effect. Indeed, such a proposition would be contrary  
13 to the cited authorities.

14 In sum, the bankruptcy court did not err in concluding that  
15 the State Court Order was final and valid. There is no  
16 requirement for the application of claim preclusion that the  
17 prior matter be actually litigated, and the dismissal was on the  
18 merits for claim preclusion purposes. The Final Judgment was  
19 with prejudice, and the bankruptcy court was required to give  
20 that judgment (and the underlying orders) full faith and credit.  
21 Marino does not support the conclusion that the State Court Order

22 \_\_\_\_\_  
23 <sup>12</sup> Other affirmative defenses include accord and  
24 satisfaction, arbitration and award, assumption of risk,  
25 contributory negligence, discharge in bankruptcy, duress,  
26 estoppel, failure of consideration, fraud, illegality, injury by  
27 fellow servant, laches, license, payment, release, res judicata,  
28 statute of frauds, statute of limitations, and waiver. Nev. R.  
Civ. P. 8. A dismissal on any of these grounds would not be "on  
the merits" in the sense that if those defenses are successful,  
the court would not be required to evaluate the merits of the  
plaintiff's claims.

1 and Final Judgment were not entitled to claim preclusive effect.

2           **b. The subsequent action is based on the same claims**  
3           **or any part of them that were or could have been**  
4           **brought in the first case.**

5           The bankruptcy court found that this element was satisfied  
6 because the claims asserted in the adversary proceeding were  
7 based on the same facts and circumstances as the first suit.  
8 Go Global argues that the addition of a claim for civil  
9 conspiracy negates this element.<sup>13</sup> However, Go Global focuses  
10 solely on the identity of the parties in support of this  
11 argument, which, as we explain below, misapprehends the relevant  
12 standard.

13           We find no error in the bankruptcy court's conclusion that  
14 the civil conspiracy claim could have been brought in the State  
15 Court Action. The claims asserted in both lawsuits are based on  
16 the same allegedly wrongful conduct by Rogich Trust. See Five  
17 Star Capital, 194 P.3d at 715 ("Since the second suit was based  
18 on the same facts and alleged wrongful conduct of Ruby as in the  
19 first suit, the breach of contract claim could have been asserted  
20 in the first suit. As a result, claim preclusion applies").

21           **c. Nonmutual claim preclusion applies because**  
22           **Go Global did not provide a good reason for not**  
23           **naming TELD or Imitations as defendants in the**  
24           **State Court Action.**

25           In Weddell, the Nevada Supreme Court adopted the doctrine of  
26 nonmutual claim preclusion, which provides that claim preclusion  
27 can apply to a defendant not in privity with the original

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28           <sup>13</sup> Go Global also states that its complaint included a  
fraudulent transfer claim, but no such claim was asserted in the  
original complaint.

1 defendants if "the defendant can demonstrate that he or she  
2 should have been included as a defendant in the earlier suit and  
3 the plaintiff fails to provide a 'good reason' for not having  
4 done so." Weddell, 350 P.3d at 81. In the State Court Action,  
5 claims were asserted only against Rogich Trust.<sup>14</sup> In the  
6 adversary proceeding, Go Global asserted claims against Rogich  
7 Trust, Eldorado, TELD, and Imitations.

8 The bankruptcy court concluded that Eldorado, TELD, and  
9 Imitations should have been named as defendants in the State  
10 Court Action because Eldorado and TELD figured prominently in the  
11 state court complaint, and Rogich Trust received an ownership  
12 interest in Imitations in exchange for the transfer of Eldorado  
13 to TELD. The bankruptcy court also determined that Go Global had  
14 failed to provide a good reason for not naming the additional  
15 defendants in the State Court Action. The bankruptcy court cited  
16 Paragraph 23 of the state court complaint, which provides:

17 That Defendant Rogich materially breached the  
18 terms of the Agreement when he agreed to remit payment  
19 from any profits paid from Eldorado, yet transferred  
20 his interest in Eldorado for no consideration to TEDL  
21 [sic], LLC. This had the net effect of allowing Rogich  
22 to keep Huerta's \$2,747,729.50 in capital, and not  
23 repay that same amount which had converted to a  
24 non-interest bearing debt.

25 The bankruptcy court correctly found that these allegations,  
26 along with the allegation in Paragraph 13 of the complaint that  
27 the transfer made it impossible for Huerta and Go Global to  
28 receive their "rightful return of the debt," formed the basis for

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27 <sup>14</sup> Although Eldorado was named as a defendant in the State  
28 Court Action, the claim against it was asserted by Nanyah Vegas  
LLC, not Go Global.

1 either an actual or constructive fraudulent transfer from Rogich  
2 Trust to TELD, and for the tort claims Go Global sought to  
3 assert:

4 TELD was the transferee, and Imitations was the  
5 consideration Rogich received in exchange for  
6 transferring his interest in Eldorado Hills to TELD.  
7 While the First Amended Complaint does not identify  
8 Imitations, it sufficiently calls into question the  
9 bona fides of the transaction such that all of the  
10 participants to the transaction should have been named  
11 as defendants when that transaction was originally  
12 challenged.

13 Go Global argues that although it was aware of TELD's and  
14 Eldorado's involvement in Rogich Trust's transfer of its interest  
15 in Eldorado, it was not aware of the extent of that involvement  
16 or that TELD or Eldorado were part of a conspiracy to deprive  
17 Go Global of the funds it was owed under the Purchase Agreement.  
18 However, we find no error in the bankruptcy court's conclusion.  
19 The state court complaint reveals that Go Global knew of TELD's  
20 and Eldorado's involvement in the transaction. The allegations  
21 of the state court complaint also raise questions about the  
22 propriety of the transfer, supporting the bankruptcy court's  
23 conclusion that all participants should have been named as  
24 defendants in the State Court Action.

25 All the elements of claim preclusion were met, and the  
26 bankruptcy court did not err in finding that claim preclusion was  
27 available as a defense to bar Go Global's claims.

28 **B. The bankruptcy court did not abuse its discretion in denying  
Go Global's motion to amend the complaint.**

Go Global argues that the bankruptcy court abused its  
discretion in denying as futile Go Global's motion to amend the  
complaint to add claims for fraudulent transfer and offset of

1 attorney's fees awarded to Rogich Trust in the State Court  
2 Action. Go Global contends that it did not become aware of  
3 TELD's fraudulent transfer scheme until after the commencement of  
4 the State Court Action, but this contention is belied by the  
5 allegations of Paragraph 23 of the state court complaint quoted  
6 above. As such, the bankruptcy court correctly found that the  
7 claim would be barred by the doctrine of claim preclusion.

8 The bankruptcy court denied the motion to amend to add a  
9 setoff claim because no mutuality of obligations existed. The  
10 attorney's fee award was against the state court plaintiff, the  
11 Alexander Christopher Trust, while Go Global was the party  
12 attempting to assert a setoff claim. Setoff is authorized under  
13 § 553, but a party asserting a setoff claim must establish that  
14 each claim or debt arose prepetition and that the debts are  
15 mutual. Newbury Corp. v. Fireman's Fund Insurance Co., 95 F.3d  
16 1392, 1398-99 (9th Cir. 1996). Mutuality requires that the  
17 countervailing debts must be "in the same right and between the  
18 same parties, standing in the same capacity." Id. (citations  
19 omitted). Although the Alexander Christopher Trust had assigned  
20 its rights under the Purchase Agreement to Go Global, it could  
21 not assign its liability for the attorney's fee award or alter  
22 Rogich Trust's right to collect from the Alexander Christopher  
23 Trust (nor was there any evidence that it attempted to do so).  
24 Because Go Global was not liable for the attorney's fees, the  
25 bankruptcy court correctly concluded that the debts at issue were  
26 not mutual.<sup>15</sup> Additionally, the claims did not both arise pre-

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27  
28 <sup>15</sup> The bankruptcy court also noted that the offset claim  
(continued...)

1 petition; Go Global's claims against the defendants did not arise  
2 until 2012 when Rogich Trust transferred its interest to TELD.

3 On appeal, Go Global argues that its setoff claim is valid  
4 under the equitable doctrine of recoupment.<sup>16</sup> Go Global did not  
5 raise this issue in the bankruptcy court. Thus, we do not  
6 consider it. Absent exceptional circumstances, we generally will  
7 not consider arguments raised for the first time on appeal.  
8 United Student Funds, Inc. v. Wylie (In re Wylie), 349 B.R. 204,  
9 213 (9th Cir. BAP 2006) (citing El Paso v. Am. W. Airlines, Inc.  
10 (In re Am. W. Airlines, Inc.), 217 F.3d 1161, 1165 (9th Cir.  
11 2000)) (additional citations omitted).

12 The bankruptcy court did not abuse its discretion in denying  
13 the Motion to Amend.

#### 14 **VII. CONCLUSION**

15 Because there was no "close nexus" between the adversary  
16 proceeding and Go Global's confirmed plan, the bankruptcy court  
17 lacked subject matter jurisdiction over the adversary proceeding.

18 Alternatively, if the bankruptcy court had jurisdiction, it  
19 did not err in finding that claim preclusion was available to bar  
20 Go Global's claims against Appellees. Finally, for the reasons  
21 explained above, the bankruptcy court did not abuse its

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22  
23 <sup>15</sup> (...continued)  
24 asserted by Go Global was a collateral attack on the award  
25 itself, which was entitled to be given full faith and credit and  
could not be reviewed by the bankruptcy court.

26 <sup>16</sup> Setoff allows adjustments of mutual debts arising out of  
27 separate transactions between the parties. Recoupment, on the  
28 other hand, involves a netting out of debt arising from a single  
transaction. Oregon v. Harmon (In re Harmon), 188 B.R. 421, 425  
(9th Cir. BAP 1995).

1 discretion in denying Go Global's Motion to Amend.

2 Accordingly, we AFFIRM.

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