No. 10-15891

United States Court of Appeals
for the
Ninth Circuit

IN RE: WASHINGTON GROUP INTERNATIONAL, INC.,
Debtor,

DAVID HATHAWAY; KAREN HATHAWAY,
Appellants,

v.

RAYTHEON ENGINEERS AND CONSTRUCTORS, INC.; WASHINGTON GROUP INTERNATIONAL, INC.; PLAN COMMITTEE; REORGANIZED DEBTORS,

Appellees.

Appeal from the Final Order of the United States District Court for the District of Nevada, Reno Division, in Case No. 3:09-cv-00058-ECR-RAM
(Honorable Edward C. Reed, Jr., Judge)

ANSWERING BRIEF OF RAYTHEON ENGINEERS AND CONSTRUCTORS, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Raytheon Engineers and Constructors, Inc. was acquired by Washington Group International in 2000. Washington Group International was acquired by URS Corporation in 2007. URS Corporation, a publicly traded Delaware company, owns 100% of the stock of URS Holdings, Inc., a Delaware company, which, in turn, owns 100% of the stock of URS Energy & Construction Holdings, Inc., a Delaware company which, in turn, owns 100% of the stock of URS Energy & Construction, Inc., an Ohio corporation, successor by merger to the company formerly known as Raytheon Engineers & Constructors, Inc.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellee Raytheon Engineers and Constructors, Inc. respectfully requests oral argument and represents that oral argument is warranted and will aid the Court's decisional process. Appellant submits that oral argument will assist the Court in addressing the issues presented and in reviewing the decisions of the District Court and the Bankruptcy Court.

PRELIMINARY STATEMENT

This appeal arises out of the chapter 11 bankruptcy case of appellee Raytheon Engineers & Constructors, Inc. ("Raytheon"), its parent company, Washington Group International, Inc. ("Washington Group"), and related affiliates. Appellants are David and Karen Hathaway (the "Hathaways"). Also implicated is Raytheon's insurer, National Union Fire Insurance Company of Pittsburgh, PA ("National Union").[1]

On January 15, 1999, the Hathaways commenced a personal injury action against Raytheon in the Massachusetts Superior Court (the "State Action"). Thereafter, on May 14, 2001, Raytheon and its parent company and affiliates (collectively, the "Debtors") filed for bankruptcy protection in the Bankruptcy Court below. On August 6, 2001, the Hathaways filed a proof of claim in the Bankruptcy Court, asserting their personal injury action as the basis for their claim against Raytheon. On December 21, 2001, the Bankruptcy Court entered an order confirming Raytheon's Second Amended Joint Plan of Reorganization, as modified (the "Plan"), which Plan took effect on January 25, 2002. Four years later, on May 16, 2006, the Hathaways obtained a judgment on their personal injury claim in state court, liquidating their claim in the amount of $7,950,000.

In this appeal, the Hathaways seek to recover interest on their personal in-

[1] The Hathaways incorrectly refer to National Union as AIG. This brief will refer to National Union by its actual corporate name.

jury claim accruing after Raytheon filed its bankruptcy petition (the "postpetition interest" claim). The Hathaways assert that Raytheon's insurer, National Union, is liable for this postpetition interest. The Hathaways' argument is fatally flawed, and both the Bankruptcy and District Courts properly rejected it.

First, Raytheon's Plan unambiguously bars their claim for postpetition interest by preventing it from either accruing or being paid. Specifically, section 7.2 of the Plan provides in relevant part that "postpetition interest shall not accrue or be paid on Claims, and no holder of a Claim shall be entitled to interest accruing on or after the Petition Date on any Claim." ER Tab 18-27. Under applicable Supreme Court and circuit precedent, the Hathaways are bound by this provision, and their claim for postpetition interest is therefore proscribed. *See, e.g., Espinosa v. United Student Aid Funds, Inc.*, 130 S. Ct. 1367, 1376, 1380 (2010); *Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2205-06 (2009); *Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940); *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938); *Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee)*, 193 F.3d 1083, 1086-87 (9th Cir. 1999).

Second, the Hathaways improperly assert that, even though Raytheon's Plan prevented their postpetition interest claim from accruing or being paid, National Union somehow bears an independent duty to pay them postpetition interest, as though National Union had somehow guaranteed the payment of postpetition inter-

est or acted as Raytheon's surety with respect to postpetition interest claims. National Union, however, is neither a guarantor nor a surety and never undertook any such obligation. National Union is simply an insurer. As an insurer, National Union is only liable to indemnify Raytheon for covered claims for which *Raytheon* is liable. If Raytheon is not liable for postpetition interest, then neither is National Union, and the Hathaways cannot rewrite National Union's insurance policies to convert them into some different kind of undertaking.

This is not a case in which an insured has an obligation to pay a judgment, but simply has not, or cannot, pay it. This is a case in which, prior to the Hathaways' obtaining their judgment, Raytheon confirmed a chapter 11 plan of reorganization that prohibits postpetition interest from accruing or being paid. The Hathaways were fully aware of Raytheon's bankruptcy case and participated in it – indeed, they filed a proof of claim. Because Raytheon never had any obligation to pay postpetition interest, neither does National Union.

In this light, the Hathaways' argument that the decisions below somehow violate section 524(e) of the Bankruptcy Code is both false and irrelevant. Section 524(e) provides that a debtor's discharge in bankruptcy does not operate to discharge a third party from whatever liability that third party may have. For example, if a third party has guaranteed the debtor's obligation to a creditor, the debtor's discharge does not relieve the guarantor of its independent guaranty liability. Of

course, if the third party has no independent liability of its own, section 524(e) is not implicated – it certainly does not *create* liability where none otherwise exists. Here, National Union does not have any independent obligation to the Hathaways to pay them postpetition interest. National Union only has the obligation of an insurer to indemnify Raytheon for whatever liability Raytheon has if the liability is also covered under the policies. The decisions below follow this principle and should be affirmed.

JURISDICTIONAL STATEMENT

Raytheon agrees with the Hathaways' statement of the basis of appellate jurisdiction.

STATEMENT OF THE ISSUES

1. Whether the proper standard of review of the Bankruptcy Court's interpretations of the Plan and its own Confirmation Order is abuse of discretion review as opposed to *de novo* review.

2. Whether the Supreme Court's decisions in *Espinosa v. United Student Aid Funds, Inc.*, 130 S. Ct. 1367, 1376, 1380 (2010); *Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2204-05 (2009); and *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938), compel affirmance of the decisions below because the Hathaways failed to object to or directly appeal the Plan or the Confirmation Order.

3. To the extent it is relevant (which it is not), whether the decisions be-

low are in accord with section 524(e) of the Bankruptcy Code.

STATEMENT OF THE CASE, STATEMENT OF THE FACTS, AND COURSE OF THE PROCEEDINGS BELOW

On January 15, 1999, appellants David Hathaway and Karen Hathaway commenced the "State Action" in Massachusetts state court against Raytheon. ER Tab 12-1. The Hathaways alleged that Raytheon, along with other defendants, was liable for work-related injuries that David Hathaway sustained in 1997. ER Tab 17-3. Raytheon later merged into a subsidiary of Washington Group. ER Tab 10-4-5.

On May 14, 2001, while the State Action was pending but unresolved, Washington Group, Raytheon, and related affiliates filed for bankruptcy under Title 11 of the United States Code. ER Tab 1-2. On August 6, 2001, the Hathaways filed a proof of claim regarding the State Action in the bankruptcy proceedings. ER Tab 17-2.

After proposing two initial chapter 11 reorganization plans, on July 23, 2001, Raytheon and the other Debtors filed their Second Amended Joint Plan of Reorganization, dated July 24, 2001. ER Tab 18-5; Tab 20-156. The Debtors subsequently modified their plan on August 23, 2001 (the "First Modification"), on October 12, 2001 (the "Second Modification"), and again on November 13, 2001 (the "Third Modification"). ER Tab 20-230; Tab 20-329; Tab 20-369. The Debtors also issued several disclosure statements in connection with the various itera-

tions of the Plan. ER Tab 20-156; Tab 20-230; Tab 20-333; Tab 20-365. On December 21, 2001, the Bankruptcy Court entered an order (the "Confirmation Order") confirming the Second Amended Joint Plan of Reorganization, as modified by the First, Second, and Third Modifications (collectively, the "Plan"). ER Tab 7-1-36.

Both the Plan and Confirmation Order prohibit the accrual or payment of postpetition interest on any "Claims." Section 7.2 of the Plan provides that:

> Unless otherwise specifically provided for in this Plan or the Confirmation Order, or required by applicable bankruptcy law, *post-petition interest shall not accrue or be paid on Claims*, and no *holder of a Claim* shall be entitled to interest accruing on or after the Petition Date on any Claim. Interest shall not accrue or be paid upon any Disputed Claim in respect of the period from the Petition Date to the date a final distribution is made thereon if and after such Disputed Claim becomes an Allowed Claim.

ER Tab 18-27 (emphases supplied).[2] The Confirmation Order likewise provides that "the rights afforded under the Plan and the treatment of Claims . . . under the Plan shall be in exchange for and in complete satisfaction, discharge and release of all Claims . . . arising on or before the Effective Date *including any interest accrued on Claims from the Petition Date*." ER Tab 7-30 (emphasis supplied).

[2] The Plan defines the phrase "Petition Date" as "the date on which the Debtors filed their petitions for relief commencing the Chapter 11 Case." ER Tab 18-18. The Plan defines the term "Claim" as "a claim against the Debtors, or any of them, whether or not asserted, as defined in Section 101(5) of the Bankruptcy Code." ER Tab 18-14. In turn, Section 101(5) defines the term "claim" to mean any right to payment. 11 U.S.C. § 101(5). The Hathaways do not contend that their claim is not a "Claim."

Both the Plan and the Confirmation Order also direct the procedure for the treatment of tort claims, including the Hathaways' personal injury claim. Specifically, the Plan provides in the Third Modification as follows:

> All Tort Claims are Disputed Claims. Any Tort Claim as to which a timely Proof of Claim was filed . . . shall be tried and liquidated in the administrative or judicial forum or tribunal in which it is pending on the Effective Date. . . . Any Tort Claim determined or liquidated pursuant to a judgment . . . that has become a Final Order[3] shall, after the recovery and payment of all available insurance, be deemed an Allowed Class 7 Claim . . . .

ER Tab 18-3. The Confirmation Order likewise provides that:

> [A]ny Claim the holder of which asserts is covered by or payable by Debtors from proceeds of any contract of insurance ("Insurance Claim") issued to or for the benefit of any of the Debtors ("Insurance Policy") shall be paid solely from the proceeds of any applicable Insurance Policy and not from any property of the Debtors' Estates, except to the extent that such Insurance Claim is entitled to Class 7 treatment under the Plan . . . [the] balance of any Insurance Claim not paid from proceeds of an Insurance Policy shall be deemed to be and treated as a General Unsecured Claim under Class 7 of the Plan.

ER Tab 7-21-22. In other words, tort claims are to be paid first from available insurance, and then, if insurance is inadequate to pay them in full, to be paid from funds available to satisfy general unsecured claims against Raytheon – meaning

[3] The Plan defines a "Final Order" as "an order or judgment of the Bankruptcy Court, or other court of competent jurisdiction, as entered on the docket in the Chapter 11 Case, the operation or effect of which has not been stayed, reversed, or amended and as to which order or judgment (or any revision, modification, or amendment thereof) the time to appeal or seek review or rehearing has expired and as to which no appeal or petition for review or rehearing was filed or, if filed, remains pending." ER Tab 18-16.

that the portion not covered by insurance would be entitled to receive a fractional recovery. As the Hathaways noted in their opening brief, "[i]t is undisputed that the Hathaways' 'Claim' constitutes a 'Tort Claim,' which the Plan (as modified) defines as including 'any Claim relating to personal injury…'" Hathaways' Opening Brief ("HOB") at 6 (quoting ER Tab 18-2); *see also* ER Tab 10-47.

The Confirmation Order ultimately confirmed the "Plan and each of its provisions . . . in each and every respect pursuant to section 1129 of the Bankruptcy Code . . . ." ER Tab 7-2. The Confirmation Order further provided that "*notwithstanding any otherwise applicable law*, immediately upon the entry of th[e] Confirmation Order, the terms of the Plan and th[e] Confirmation Order are deemed binding upon the Debtors, the Reorganized Debtors, *any and all holders of Claims* . . . (irrespective of whether such Claims . . . are Impaired under the Plan or whether the holders of such Claims . . . accepted, rejected or are deemed to have accepted or rejected the Plan)." ER Tab 7-3 (emphases supplied). The Hathaways did not appeal the Confirmation Order. ER Tab 10-24.

In addition to the Confirmation Order, the Bankruptcy Court specifically held, in an order dated March 18, 2003, that tort claims would be administered in the manner established in the Plan. *See* ER Tab 16-9-11 ("A Tort Claim as to which a timely Proof of Claim was filed in these Chapter 11 cases shall be tried and liquidated in the administrative or judicial forum or tribunal in which it is

pending on the Effective Date."). The Bankruptcy Court further ordered that "[o]nce a Tort Claim is liquidated . . . in a Non-Bankruptcy Forum, such Liquidated Claim shall be satisfied in accordance with the Plan and Confirmation Order." ER Tab 16-10-11. The Hathaways did not appeal that order either.

On May 16, 2006 – four years after Raytheon confirmed its chapter 11 Plan – the Massachusetts trial court entered a judgment (the "Judgment") against Raytheon in the State Action on the Hathaways' personal injury claim in the amount of $7,950,000, plus interest at 12% per year commencing January 15, 1999. ER Tab 4-1-2. In post-trial motions, Raytheon objected to the imposition of postpetition interest in the State Action. ER Tab 4-2. The state trial court considered state court precedent on the issue and found that, in this case, the matter was "simpler" than the issue presented in a prior case, *Hamel v. Malden Mills Indus. Inc.*, No. 996117, 2003 WL 23507094 (Mass. Super. July 22, 2003), because "[h]ere, the Bankruptcy Court entered an order confirming the Plan, which contained language stating that Interest shall not accrue or be paid on any disputed claim with respect to the period from the petition date to the date a final distribution is made." ER Tab 4-9. Accordingly, the state trial court explained that:

> This case, unlike *Hamel*, is not a contest between the letter and spirit of the bankruptcy law because *the controlling language in the Plan is reasonably clear in prohibiting the accrual of interest from the petition date to the date a final distribution is made*. Likewise, it is reasonably clear that the source of payment of the judgment, Raytheon's insurance, does not take the judgment outside of the bankruptcy estate

and prevent the accrual of Interest.

ER Tab 4-9 (emphasis supplied); *see also* ER Tab 1-4. Notwithstanding its determination that the language in the Plan was reasonably clear in prohibiting postpetition interest, the Massachusetts trial court decided to defer to the bankruptcy court to resolve the issue. ER Tab 4-9. To that end, the Massachusetts trial court directed the state court clerk to enter judgment in the full amount to "avoid impairing the Hathaways' ability to collect on the judgment," but also precluded payment of the Judgment "until approved by the Bankruptcy Court." ER Tab 4-9.[4] On June 23, 2008, Raytheon appealed the Judgment to the Massachusetts Appeals Court (docketed as number 2008-P-1060), arguing that the verdict and judgment on the merits were erroneous as a matter of law, and that appeal remains pending. ER Tab 10-15-18.[5]

[4] The initial amount of the Judgment was $7,950,000. ER Tab 4-2. Pursuant to Massachusetts practice, prejudgment interest is calculated on the verdict from the date of the filing of the action through the date of entry of judgment at a statutory rate of 12% simple interest per annum. MASS. GEN. LAWS ch. 231, § 6B. Postjudgment interest is calculated at the same rate on the judgment amount. *Id.* Prejudgment interest for the period from the filing of the complaint in the State Action on January 15, 1999 through the Petition Date of May 14, 2001, or roughly 28 months, equals approximately $2,305,500. Added to the initial amount of the Judgment, the total pre-petition amount of the Judgment is approximately $10,225,500. Roughly $550,000 would then need to be deducted from this amount to account for the contributions of the other settling co-defendants. The amount of post-petition interest that would have accrued to date in the absence of the Debtors' bankruptcy is approximately $12,000,000.

[5] The liability of Raytheon to the Hathaways for the Judgment is still in dispute in Massachusetts, and accordingly, no statements made in this brief for purposes of

On October 7, 2008 – more than two years after entry of the Judgment, and nearly seven years after the Confirmation Order – the Hathaways filed with the Bankruptcy Court their Motion for Order Authorizing Payment of State Court Judgment Solely From Available Insurance Proceeds. ER Tab 11-1-13. Following an extensive review of the record, relevant pleadings and case law, ER Tab 10-5-9, the Bankruptcy Court made key findings and conclusions at a hearing, ER Tab 3-4-11, which were later incorporated into a written order to which the parties stipulated (the "Bankruptcy Court Order"). ER Tab 2-1-5. Among other things, the Bankruptcy Court specifically found that "postpetition interest on Claims is expressly disallowed under the Plan." ER Tab 2-2; Tab 3-9. The Bankruptcy Court further found that "[t]he Plan disallows postpetition interest on Claims, and nothing in Section 8.5 of the Plan excludes any liquidated claims from this disallowance of postpetition interest." ER Tab 2-4. Accordingly, the Bankruptcy Court determined that the Hathaways were not entitled to recover postpetition interest on the Judgment from National Union. ER Tab 2-4. The Hathaways appealed the Bankruptcy Court Order, ER Tab 9-1, and the United States District Court for the District of Nevada (the "District Court") affirmed. ER Tab 1-4.

The District Court rejected the Hathaways' contention that they had a right under Massachusetts law to recover directly from National Union, holding both

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the present dispute about the Hathaways' right to collect the Judgment and any interest thereon constitute an admission of liability. ER Tab 10-15-17.

that Massachusetts is not a "direct action" state and that, under Massachusetts law, "[t]he insurer's liability . . . can be no greater than that of the insured, because the insurer's only obligation under the insurance contract is to satisfy the personal liability of the insured to the third-party beneficiary." ER Tab 1-10. As the District Court explained, "where the insured's personal liability to the third-party is limited or reduced for one reason or another, so too would the insurer's liability to the third-party be limited or reduced." ER Tab 1-10. The District Court further held that the Plan was consistent with the Bankruptcy Code's general prohibition on postpetition interest, and that the Plan was clear in providing that postpetition interest would not accrue or be paid on Claims. ER Tab 1-12. The District Court determined that the Hathaways' "suggestion that the Plan is ambiguous in this regard is without merit." ER Tab 1-12. As the District Court concluded, "under the Plan and the Bankruptcy Code no post-petition interest was permitted to accrue." ER Tab 1-13-14. The Hathaways appealed the District Court's order to this Court. ER Tab 8-1-2.

SUMMARY OF THE ARGUMENT

In general, this Court reviews a bankruptcy court's conclusions of law *de novo* and its factual findings for clear error. *In re Greene*, 583 F.3d 614, 618 (9th Cir. 2009). In this case, because the Bankruptcy Court's interpretations of the Plan and its own Confirmation Order involve essentially factual inquiries and discre-

tionary interpretations of highly technical documents, this Court should review the Bankruptcy Court's findings of fact for clear error and its interpretations of the Plan and Confirmation Order for abuse of discretion. *E.g.*, *In re Shenango Group, Inc.*, 501 F.3d 338, 346 (3d Cir. 2007); *Official Comm. of Unsecured Creditors v. Dow Corning Corp. (In re Dow Corning Corp.)*, 456 F.3d 668, 677 (6th Cir. 2006); *General Elec. Capital Corp. v. Dial Business Forms, Inc. (In re Dial Bus. Forms, Inc.)*, 341 F.3d 738, 744 (8th Cir. 2003); *see also Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2204 n.4 (2009). Applying this standard, it is evident that the Bankruptcy Court did not abuse its discretion or commit clear error in concluding that the Plan and Confirmation Order bar the Hathaways' claim for postpetition interest. In addition, even if the Court were to review the Bankruptcy Court's findings of fact and interpretations of the Plan and Confirmation Order *de novo*, it should still reach the same conclusion.

The provisions of the Plan and Confirmation Order barring the accrual or payment of postpetition interest are abundantly clear. In addition, it is equally clear that the Hathaways are bound by these provisions because the Hathaways never objected to the Plan or appealed the Confirmation Order. In *Espinosa v. United Student Aid Funds, Inc.*, 130 S. Ct. 1367 (2010), the debtor commenced a bankruptcy case and obtained confirmation of a plan that barred the recovery of the unpaid interest component of a claim (the plan provided only for the payment of

the outstanding principal amount of the particular debt). After the debtor paid the claim as provided in the plan and received a discharge, the creditor sought to recover the unpaid portion of its claim, asserting that the debtor had failed to comply with relevant procedures for eliminating its unpaid interest obligation. Rejecting this argument, the Supreme Court concluded that the creditor was bound by the plan notwithstanding this defect. *Id.* at 1376, 1380; *see also Bailey*, 129 S. Ct. at 2204-05; *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938). Although the Hathaways contend that the provisions of the Plan prohibiting the accrual or payment of post-petition interest violate section 524(e) of the Bankruptcy Code (which they do not), any such argument is now foreclosed under these precedents.

The Hathaways attempt to resist the reasoning of *Espinosa*, *Bailey*, and *Stoll* by characterizing the Plan as ambiguous. As every state and federal judge who has examined the relevant text has concluded, however, the language of the Plan is clear and bars their claim for postpetition interest. The Hathaways' citation of *Maxitile, Inc. v. Sun (In re Maxitile, Inc.)*, 237 Fed. Appx. 274 (9th Cir. 2007), an unpublished opinion, is likewise unavailing. Further, the Hathaways' citation of isolated text from the Disclosure Statement is also unpersuasive. In context, the excerpts they cite do not demonstrate that the Hathaways may collect postpetition interest in spite of the plain language of the Plan prohibiting it. Further, even if the excerpts did compel such a conclusion in conflict with the Plan, the language of the

Plan properly controls.

In addition, even if the Hathaways were not so clearly bound by the unambiguous terms of the Plan and Disclosure Statement prohibiting the accrual and payment of postpetition interest on their claim, their argument that section 524(e) requires that National Union be liable for postpetition interest (even though Raytheon is not) is unfounded. Section 524(e) does not create liability where none exists. It simply recognizes that a debtor's discharge does not discharge a third party for a liability that the third party already has. The Hathaways attempt to treat National Union as though National Union had undertaken to guaranty or assure recovery of their postpetition interest claim. But that is untenable. National Union is merely Raytheon's insurer, liable to indemnify Raytheon for covered claims, not a guarantor or surety of a debt that Raytheon does not owe. Because Raytheon is not liable for postpetition interest, neither is National Union. The decisions below should be affirmed.

ARGUMENT

I. The Bankruptcy Court's Factual Findings Are Properly Reviewed for Clear Error, and Its Interpretations of the Plan and Its Own Confirmation Order Are Properly Reviewed for Abuse of Discretion.

As the District Court properly held, the provisions of the Plan and Disclosure Statement are so clear that the decision of the Bankruptcy Court should be affirmed regardless of which standard of review is adopted. ER Tab 1-7. Nonethe-

less, the proper standard to be applied in this case is for this Court (1) to review the Bankruptcy Court's factual findings for clear error, and (2) to review the Bankruptcy Court's interpretations of the Plan and its own Confirmation Order for abuse of discretion.

Although this Court has routinely applied the clear error standard to factual determinations of bankruptcy courts, it has not yet taken a definitive position on the correct standard of review of a bankruptcy court's interpretation of a plan of reorganization and confirmation order. *M & I Thunderbird Bank v. Birmingham (In re Consol. Water Utils., Inc.)*, 217 B.R. 588, 590 (B.A.P. 9th Cir. 1998); *but see Brawders v. County of Ventura (In re Brawders)*, 503 F.3d 856, 859 n.1 (9th Cir. 2007) (noting applicability of clear error standard to factual determinations of bankruptcy court in case interpreting plan provisions). The Supreme Court has noted, without reaching the point, that "[n]umerous Courts of Appeals have held that a bankruptcy court's interpretation of its own confirmation order is entitled to substantial deference." *Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2204 n.4 (2009) (citing cases). The First, Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have all held that an appellate court should defer to the bankruptcy court's interpretation of a confirmed plan of reorganization and the bankruptcy court's interpretation of its own confirmation order. *E.g., In re Shenango Group Inc.*, 501 F.3d 338, 346 (3d Cir. 2007) (collecting cases and agreeing "with

the majority view that a bankruptcy court's interpretation of its own order ought to be subject to review for an abuse of discretion" and that "[i]f the Plan is ambiguous, we will defer to the Bankruptcy Court's interpretation unless it is unreasonable under the circumstances."); *Official Comm. of Unsecured Creditors v. Dow Corning Corp. (In re Dow Corning Corp.)*, 456 F.3d 668, 677 (6th Cir. 2006) (explaining that, because phrase in plan had more than one interpretation, bankruptcy court's ultimate interpretation was subject to review for an abuse of discretion); *Finova Capital Corp. v. Larson Pharmacy Inc. (In re Optical Techs., Inc.)*, 425 F.3d 1294, 1300 (11th Cir. 2005) ("Accordingly, [we] will defer to the bankruptcy court's interpretation of its order confirming the Fourth Amended Plan, unless it clearly abused its discretion."); *Enodis Corp. v. Employers Ins. of Wausau (In re Consol. Indus. Corp.)*, 360 F.3d 712, 716 (7th Cir. 2004) ("We will not reverse a [bankruptcy] court's interpretation of its own order unless it is a 'clear abuse of discretion,' because a court that issued an order is in the best position to interpret it."); *General Elec. Capital Corp. v. Dial Business Forms, Inc. (In re Dial Bus. Forms, Inc.)*, 341 F.3d 738, 744 (8th Cir. 2003) (adopting abuse of discretion review and collecting cases from the Second, Fifth, Sixth, and Seventh Circuits that have done the same); *Colonial Auto Ctr. v. Tomlin (In re Tomlin)*, 105 F.3d 933 (4th Cir. 1997) (giving substantial deference to the bankruptcy court's analysis of its own order and reinstating the bankruptcy court's order because the record dem-

onstrated that the bankruptcy court's interpretation was reasonable under the circumstances); *Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973, 983 (1st Cir. 1995) (determining that "customary appellate deference is appropriate" where the bankruptcy court is interpreting its own confirmation order); *William B. Schnach Retirement Trust v. Unified Capital Corp. (In re Bono Dev., Inc.)*, 8 F.3d 720, 721-22 (10th Cir. 1993).

Although the Second Circuit appears to have adopted a *de novo* standard of review, *Goldman, Sachs & Co. v. Esso Virgin Islands, Inc. (In re Duplan Corp.)*, 212 F.3d 144, 151 (2d Cir. 2000) (stating that the bankruptcy court's interpretation of text of the plan, confirmation order and final decree was a conclusion of law subject to plenary review), it has been criticized by the Third Circuit for failing to consider its own prior precedent counseling deference, *Shenango*, 501 F.3d at 346 n.2 (criticizing *Duplan* for failing to acknowledge precedent in *Comm'n of Dep't of Pub. Utils. v. New York, N.H. & H.R. Co.*, 178 F.2d 559, 563-64 (2d Cir. 1949)). The Fifth Circuit has adopted an approach whereby it will afford discretion to the bankruptcy court's interpretation only if the plan of reorganization is ambiguous. *New Nat'l Gypsum Co. v. Nat'l Gypsum Co. Settlement Trust (In re Nat'l Gypsum Co.)*, 219 F.3d 478, 484 (5th Cir. 2000).

Chapter 11 plans are specialized documents, with which bankruptcy judges have expertise and familiarity. Among other things, in order to confirm a particu-

lar chapter 11 plan, a bankruptcy judge must become acquainted with its provisions, hold a hearing on its contents, and make a series of affirmative findings to ensure that it complies with applicable law. *See* 11 U.S.C. § 1129. Bankruptcy judges likewise have close familiarity with their own confirmation orders as expressive of their rulings.[6] For these reasons, this Court should follow the great weight of authority favoring deference to a bankruptcy court's interpretations of a plan and its order confirming a plan. Under this approach, the decision of the Bankruptcy Court in this case should readily be affirmed.

II. The Hathaways Are Bound by the Provisions of the Plan and Confirmation Order Barring the Accrual or Payment of Postpetition Interest, and the Decisions Below Should Be Affirmed.

Under applicable Supreme Court precedent, the Hathaways' failure to directly appeal or object to the Plan or the Confirmation Order is fatal to their efforts to obtain postpetition interest. Section 1141(a) of the Bankruptcy Code provides that "the provisions of a confirmed plan bind . . . any creditor . . . whether or not the claim or interest of such creditor . . . is impaired under the plan and whether or not such creditor . . . has accepted the plan." 11 U.S.C. § 1141(a). The Supreme Court has consistently upheld the enforceability of a bankruptcy court's orders once final, including orders confirming bankruptcy plans, and has turned away

[6] In this case, the bankruptcy judge was interpreting his own Confirmation Order. ER Tab 2-1; Tab 3-11; Tab 7-36. Additionally, the Bankruptcy Court conducted an extensive review of the record. *See* ER Tab 10-5-9.

subsequent attempts to challenge the enforceability of those orders for procedural or substantive deficiencies that could have been raised prior to confirmation. *See, e.g., Espinosa v. United Student Aid Funds, Inc.*, 130 S. Ct. 1367, 1376, 1380 (2010); *Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2205-06 (2009); *Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940); *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938). This Circuit has likewise followed suit. *See, e.g., Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee)*, 193 F.3d 1083, 1086-87 (9th Cir. 1999) (holding that, absent a timely objection to a plan or appeal of a confirmation order, a creditor "cannot later complain about a certain provision contained in a confirmed plan, even if such a provision is inconsistent with the Code."); *Trulis v. Barton*, 107 F.3d 685, 691 (9th Cir. 1995) ("Once a bankruptcy plan is confirmed, it is binding on all parties and all questions that could have been raised pertaining to the plan are entitled to *res judicata* effect.").

In *Espinosa*, a debtor filed a plan with the bankruptcy court proposing to eliminate the unpaid interest portion of his student loan debt; however, he failed to initiate the adversary proceeding required by the Federal Rules of Bankruptcy Procedure to accomplish this. 130 S. Ct. at 1373. The creditor received notice of the plan, but failed to object to it. *Id.* The bankruptcy court confirmed the plan, and the creditor failed to appeal. *Id.* Instead, years later, the creditor filed a motion

under Fed. R. Civ. P. 60(b)(4), requesting that the bankruptcy court determine that its confirmation order was void because it was issued in violation of the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. *Id.*

The Supreme Court held that "[a] proposed bankruptcy plan becomes effective upon confirmation," *id.*, and that "[t]he Bankruptcy Court's order confirming Espinosa's proposed plan was a final judgment . . . from which [the creditor] did not appeal." *Id.* at 1376. True enough, the creditor in *Espinosa* filed a Rule 60(b) motion, which stated an "exception to finality," but the Court noted that "[o]rdinarily, 'the finality of [a] Bankruptcy Court's orders following the conclusion of direct review' would 'stan[d] in the way of challenging [their] enforceability.'" *Id.* (quoting *Bailey*, 129 S. Ct. at 2198). Moreover, even in the Rule 60(b) context, the Supreme Court held that the bankruptcy court's legal error (*i.e.*, its failure in *Espinosa* to comply with the Federal Rules of Bankruptcy Procedure and make a finding of undue hardship before confirming the debtor's plan) would not prevent the confirmation order from being enforceable and binding on the creditor because the creditor had notice of the error and failed to object or timely appeal. *Id.* at 1379. The Court held that "[a] judgment is not void . . . simply because it is or may have been erroneous." *Id.* at 1377 (citation omitted). Because the creditor failed to object to the plan or appeal the confirmation order, the Supreme Court held that the creditor had "forfeited its arguments." *Id.* at 1380.

This makes sense. If a creditor with notice has grounds for objecting to a plan, it must assert those grounds prior to confirmation or forfeit its right to do so. Both debtors and those interacting with them rely on the finality of plans once confirmed by the bankruptcy court's order. In this case, the Plan and Confirmation Order unambiguously provide that postpetition interest "shall not accrue or be paid." ER Tab 18-27. If the Hathaways had any objection to this provision, they were required to present their objection prior to confirmation of the Plan. They did not do so. Neither did they appeal the Confirmation Order. Accordingly, they are bound by the Plan's terms, including the provision that postpetition interest "shall not accrue or be paid." ER Tab 18-27.

In *Travelers Indem. Co. v. Bailey*, the Supreme Court considered the finality of a bankruptcy court's orders barring claims against a debtor's third party insurer entered in conjunction with confirmation of the debtor's chapter 11 plan. 129 S. Ct. at 2198. The Travelers Indemnity Company and its affiliates ("Travelers") had been the primary liability insurer for the Johns-Manville Corporation ("Manville"), the country's largest raw asbestos supplier in the United States from the 1920s to the 1970s. *Id.* Manville filed for bankruptcy protection as a result of the thousands of lawsuits filed against it based on studies linking asbestos exposure to respiratory disease. *Id.* at 2199. Manville devised a reorganization plan which created a trust to pay all asbestos claims against it, which would be channeled to the trust. *Id.* In

a settlement that was the "cornerstone" of the Manville reorganization, the insurers agreed to provide most of the "initial corpus of the Trust," including $80 million from Travelers. *Id.* No such payment would have occurred absent an injunction memorialized in the insurance settlement agreements providing that upon the insurers' payment of the settlement funds to the trust, "all Persons" were "permanently restrained and enjoined" from suing the insurers (the "Insurance Settlement Order"). *Id.* The bankruptcy court's confirmation order incorporated the Insurance Settlement Order by reference. *Id.* at 2199-2200. The Confirmation Order and the Insurance Settlement Order (the "1986 Orders") were both affirmed by the district court and the Second Circuit. *Id.* at 2200.

Over ten years later, plaintiffs began bringing actions against Travelers alleging, *inter alia*, that Travelers had conspired with other insurers and manufacturers to hide the dangers of asbestos and had violated common law duties by failing to warn the public. *Id.* Travelers filed a motion with the bankruptcy court to enjoin 26 of such actions pending in various state courts based upon the terms of the 1986 Orders. *Id.* The bankruptcy court issued a temporary restraining order and referred the parties to mediation, which resulted in a settlement between Travelers and three sets of plaintiffs. *Id.* In 2004, the bankruptcy court entered an order (the "2004 Order"), providing that the 1986 Orders barred the state law actions against Travelers. *Id.* at 2201.

The Supreme Court held that the bankruptcy court "correctly understood that the [state law actions] f[e]ll within the scope of the 1986 Orders." *Id.* at 2203. The Court held further that "the 1986 Orders became final on direct review over two decades ago," *id.*, and upheld the final effect of the 1986 Orders, stating: "where the plain terms of a court order unambiguously apply, as they do here, they are entitled to their effect." *Id.* at 2204. The Court reasoned, "[i]f it is black-letter law that the terms of an unambiguous private contract must be enforced irrespective of the parties' subjective intent, it is all the clearer that a court should enforce a court order, a public governmental act, according to its unambiguous terms." *Id.* (citation omitted). As the Court explained, "once the 1986 Orders became final on direct review (whether or not proper exercises of bankruptcy court jurisdiction and power)," those Orders had res judicata effect. *Id.* at 2205. The Court held that "the need for finality forbids a court called upon to enforce a final order to 'tunnel back' for the purpose of reassessing" prior issues that could have been dealt with on direct appeal. *Id.; see also Chicot*, 308 U.S. at 376-77; *Stoll*, 305 U.S. at 171. The Court concluded that "[a]lmost a quarter-century after the 1986 Orders were entered, the time to prune them is over." *Bailey*, 129 S. Ct. at 2206; *see also Salazar v. Buono*, 130 S. Ct. 1803, 1815 (2010) (citing *Bailey* and holding that district court's judgment granting an injunction (and its reasons for granting the injunction) could not be reconsidered once judgment became final upon completion of

direct review).

The Supreme Court's reasoning and holding in *Bailey* applies here. The Hathaways apparently believe that they should be able to accrue postpetition interest on their claim at the rate of 12% per annum. The Plan and Confirmation Order, however, provide unambiguously that postpetition interest "shall not accrue or be paid" on their claim. ER Tab 18-27. Regardless of the merits of the Hathaways' view, their argument is simply foreclosed. The Bankruptcy Court confirmed the Plan on December 21, 2001 – four years *before* the Hathaways liquidated their personal injury claim – and the provisions of the Plan and Confirmation Order barring the accrual or payment of postpetition interest are properly entitled to *res judicata* effect. ER Tab 4-1-2; Tab 7-1-36.

The Supreme Court's decision in *Stoll v. Gottlieb*, 305 U.S. 165 (1938), is also relevant because it was decided under section 16 of the 1898 Bankruptcy Act, which the Hathaways identify as the precursor to section 524(e) of the Bankruptcy Code, a provision they cite in support of their argument that they should be entitled to collect postpetition interest. HOB 18 ("Section 524(e) of the Bankruptcy Code is a reenactment of Section 16 of the 1898 Bankruptcy Act, which provided that 'the liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt.'") (quoting Act of July 1, 1898, ch. 541, § 16(a), 30 Stat. 550, 11 U.S.C. § 35 (re-

pealed 1979)). In *Stoll*, the bankruptcy court entered an order confirming the reorganization plan of the Ten Fifteen North Clark Building Corporation ("Ten Fifteen"). 305 U.S. at 169. The plan and confirmation order enjoined William Gottlieb, a creditor, from pursuing a claim directly against J. O. Stoll ("Stoll") based on Stoll's guaranty of Ten Fifteen's debt to Gottlieb. *Id.* at 168-69. In spite of the bankruptcy court's order extinguishing the liability, Gottlieb pursued his guaranty claim against Stoll in a collateral proceeding. *Id.* at 169. On review, the Supreme Court held that, regardless of whether the bankruptcy court had jurisdiction to enter its order in the first place, its original jurisdiction was not now subject to challenge, and the confirmation order was binding on Gottlieb, barring his claim. *Id.* at 172.

Just as the creditor in *Stoll* could not ignore the bankruptcy court's order in that case, the Hathaways cannot ignore the Bankruptcy Court's order confirming the Plan in this case. In Ten Fifteen's bankruptcy proceeding, section 16(a) would have operated to prevent Ten Fifteen's discharge from altering Gottlieb's guaranty claim. Act of July 1, 1898, ch. 541, § 16(a), 30 Stat. 550, 11 U.S.C. § 35 (repealed 1979). However, Ten Fifteen provided in its plan that Stoll's guaranty liability would be extinguished. *Stoll*, 305 U.S. at 169. Gottlieb failed to object to this provision prior to confirmation. *Id.* When the bankruptcy court confirmed the plan, it

became binding on all parties and thus extinguished the guaranty obligation.[7] Accordingly, Gottlieb was bound by the plan, and his claim was discharged *notwithstanding the clear terms of section 16(a), which would have otherwise prevented Ten Fifteen's discharge from altering Stoll's guaranty liability to Gottlieb*.[8] Because Gottlieb failed to object prior to confirmation of the plan, he was bound by the plan, and his claim was released.

Put simply, the Supreme Court has made it patently clear time and again that the finality of a bankruptcy court's order is entitled to paramount consideration. If not objected to or challenged successfully on direct appeal, the order becomes binding and final – even when, as in *Espinosa* or *Stoll*, the order is in direct contravention of the Federal Rules of Bankruptcy Procedure or the Bankruptcy Code, and even when, as in *Bailey*, the order deals with matters as fundamental as a bank-

[7] Ten Fifteen confirmed its plan under section 77B of the former Bankruptcy Act of 1898. *Stoll*, 305 U.S. at 168; Act of June 7, 1934, ch. 424, § 77B, 48 Stat. 912, 11 U.S.C. § 207 (repealed 1938). Like section 1327(a), section 77B(g) provided that the provisions of a confirmed plan "shall be binding upon . . . the debtor . . . and . . . all creditors . . . ." Act of June 7, 1934, ch. 424 § 77B(g), 48 Stat. 920, 11 U.S.C. § 207(g) (repealed 1938). Section 77B(h) provided that the final decree in the case operated to "discharge the debtor from its debts and liabilities . . . except as provided in the plan . . . ." Act of June 7, 1934, ch. 424, § 77B(h), 48 Stat. 920, 11 U.S.C. § 207(h) (repealed 1938).

[8] Notably, given the confirmed plan of reorganization, the Supreme Court did not even need to address the issue of whether the extinguishing of Stoll's guaranty liability was properly within the jurisdiction of the bankruptcy court and simply assumed without deciding that the bankruptcy court did not have jurisdiction. *Stoll*, 305 U.S. at 171 & n.8.

ruptcy court's jurisdiction to issue its orders in the first place. In this case, the Bankruptcy Court, the District Court, and the state trial court all found that the terms of the Plan prohibiting the accrual or payment of postpetition interest are clear. Moreover, far from being contrary to the Bankruptcy Code, the non-accrual of postpetition interest is actually directed by the Code itself, as discussed more fully below. In any event, the provisions of the Plan and Confirmation Order are fully binding on the Hathaways.

As this Court has remarked, "[o]nce a bankruptcy plan is confirmed, it is binding on all parties and all questions that could have been raised pertaining to the plan are entitled to *res judicata* effect. *See* 11 U.S.C. § 1141(a)." *Trulis v. Barton*, 107 F.3d 685, 691 (9th Cir. 1997). This makes sense, because it is by virtue of the binding nature of its determinations that "[a] bankruptcy court is able to provide the debtor a fresh start . . . despite the lack of participation of all of his creditors, because the court's jurisdiction is premised on the debtor and his estate, and not on the creditors." *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004). The *in rem* jurisdiction of a bankruptcy court allows it to "determin[e] all claims that anyone, whether named in the action or not, has to the property or thing in question. The proceeding is 'one against the world.'" *Id.* at 448 (quoting 16 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE § 108.70[1], at 108-106 (3d ed. 2004)). Accordingly, once a bankruptcy plan is confirmed, it is binding on every-

one, and once the opportunity for direct appeal has passed, the confirmation order is a final judgment, immune from challenge on collateral review. The Hathaways' position contravenes these essential principles and places in jeopardy a variety of bankruptcy objectives by eroding the finality of the bankruptcy court's orders. The decisions below should be affirmed

A. The Plan Is Clear.

The Hathaways attempt to avoid *Espinosa*, *Bailey* and *Stoll* by arguing that the Plan is ambiguous. To begin with, as Raytheon explained in the District Court, the Hathaways waived any contention that the Plan is "ambiguous" by failing to present this argument to the Bankruptcy Court. Raytheon U.S.D.C. Br. 20-21 & n.14. Further, the Hathaways' argument is also without merit. *See* ER Tab 1-12.

The Hathaways contend that nothing in the Plan suggests that confirmation would discharge or limit the liability of any entity other than the debtors. HOB 27. The relevant point, however, is not one of the "discharge" of a preexisting debt, but rather that, as a matter of federal law, the Plan and Confirmation Order operate directly to prevent the *accrual* or payment of postpetition interest on the Hathaways' subsequently liquidated tort claim. Section 7.2 of the Plan plainly states that "[u]nless otherwise specifically provided for in this Plan or the Confirmation Order, or required by applicable bankruptcy law, *post-petition interest shall not accrue or be paid on Claims*, and *no holder of a Claim* shall be entitled to interest ac-

cruing on or after the Petition Date on any Claim." ER Tab 18-27 (emphasis supplied); ER Tab 18-27 ("Interest shall not accrue or be paid upon any Disputed Claim in respect of the period from the Petition Date to the date a final distribution is made thereon if and after such Disputed Claim becomes an Allowed Claim."). This language applies to any holder of any "Claim," and the Hathaways are, indeed, the holders of a "Claim."

Moreover, there is nothing ambiguous about the provisions of section 7.2. Both the Bankruptcy Court and the District Court found its terms to be plain, and there is no basis for disturbing their conclusions. ER Tab 2-2 (Bankruptcy Court quoting relevant language and finding that "postpetition interest on Claims is *expressly* disallowed under the Plan.") (emphasis supplied); ER Tab 1-12 (District Court quoting section 7.2 and finding that "[a]ppellants' suggestion that the Plan is ambiguous in this regard is without merit."); *see also* ER Tab 2-4 (Bankruptcy Court finding that "[t]he Plan disallows postpetition interest on Claims. . . ."). Not surprisingly, the state court judge was also of the same opinion. ER Tab 4-9 (Massachusetts Superior Court opinion explaining that "[t]his case . . . is not a contest between the letter and spirit of the bankruptcy law because the controlling language in the Plan is reasonably clear in prohibiting the accrual of interest from the petition date to the date a final distribution is made."); *see also* ER Tab 1-4.

It is true that part of section 7.2 bars the accrual or payment of postpetition

interest "[u]nless otherwise specifically provided for in this Plan or the Confirmation Order." ER Tab 18-27. The Hathaways, however, can point to no other provision of the Plan or Confirmation Order that expressly directs that they are entitled to accrue postpetition interest on their tort claim.

It is further true that part of section 7.2 bars the accrual or payment of postpetition interest "[u]nless . . . required by applicable bankruptcy law." ER Tab 18-27. No provision of "applicable bankruptcy law," however, requires the accrual of postpetition interest in this case.

By statute, the holders of unsecured claims such as tort claims are not entitled to postpetition interest. *See* 11 U.S.C. § 502(b)(2). In this regard, section 502(b)(2) expressly provides that a claim in bankruptcy is not permitted "to the extent that . . . such claim is for unmatured interest." 11 U.S.C. § 502(b)(2). While the Code does not define the phrase "unmatured interest," the legislative history explains that the phrase includes "postpetition interest that is not yet due and payable." H.R. REP. NO. 95-595, at 352 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6308; S. REP. NO. 95-989, at 62 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5848; *see also Bruning v. United States*, 376 U.S. 358, 361-62 (1964) ("the general rule for liquidation of the bankruptcy estate has long been that a creditor will be allowed interest only to the date of the petition in bankruptcy."). According to the legislative history, under section 502(b), "interest stops accruing at the date of the

filing of the petition, because any claim for unmatured interest is disallowed under this paragraph." H.R. REP. NO. 95-595, at 353 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6309; S. REP. NO. 95-989, at 63 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5849. The Plan properly aligns with this statutory mandate. ER Tab 18-27.[9] More important, the Hathaways are properly bound by the express provisions of section 7.2 and can state no legitimate exception to it.[10]

There is a further compelling reason why the accrual of postpetition interest is barred under the Plan. In addition to the provisions of section 7.2 discussed immediately above, there is another series of provisions in section 7.2 that deny the accrual of postpetition interest specifically with regard to tort claims. Immediately

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[9] The Hathaways contend that section 502(b)(2) cannot restrict post-petition interest where the creditor is not seeking the allowance of a claim against the estate, but the cases they cite do not support that proposition. *See* HOB 47-50. The cases cited concern nondischargeable debts and, accordingly, hold that post-petition interest on those debts is also non-dischargeable. *See, e.g.*, *Bruning*, 376 U.S. at 358; *Hanna v. United States (In re Hanna)*, 872 F.2d 829, 830 (8th Cir. 1989); *In re Lamarre*, 269 B.R. 266, 267 (Bankr. D. Mass. 2001). But the Hathaways' claim, and Raytheon's corresponding debt on that claim, is fully dischargeable, and these cases are inapposite.

[10] In contrast, applicable bankruptcy law expressly requires the allowance of post-petition interest with respect to certain kinds of over-collateralized secured claims (e.g., a bank loan secured by a mortgage lien on property that is worth more than the amount of the loan). *See* 11 U.S.C. § 506(b). The Hathaways' unsecured tort claim does not qualify for treatment under section 506(b) applicable to secured claims. Moreover, the Hathaways never argued below that their claim qualifies for treatment under section 506(b), and accordingly, any argument in this regard has been waived.

following the sentence discussed above that states that "post-petition interest shall not accrue or be paid on Claims," section 7.2 next provides that "[i]nterest shall not accrue or be paid upon any Disputed Claim in respect of the period from the Petition Date to the date a final distribution is made thereon if and after such Disputed Claim becomes an Allowed Claim." ER Tab 18-27. The Plan provides further that "[a]ll Tort Claims are Disputed Claims," and that tort claims are not deemed to be "Allowed Claims" until the amount of the tort claim is finally determined in state court after the conclusion of any applicable appellate process. ER Tab 18-3; Tab 18-16 (defining "Final Order" as "an order or judgment of . . . [a] court of competent jurisdiction . . . the operation or effect of which has not been stayed, reversed, or amended and as to which order or judgment . . . no appeal or petition for review or rehearing was filed or, if filed, remains pending."). Of course, that has not yet happened in this case. This additional provision, dealing specifically with tort claims, even more unequivocally reiterates the prohibition against the accrual of postpetition interest.

In an effort to create ambiguity where none exists, the Hathaways point out, as they did for the first time in their reply to Raytheon's opening brief in the District Court, that the *Disclosure Statement* states that "[t]he Plan does not provide for a discharge of any non-Debtor party." HOB 29 (citing ER Tab 19-69) (emphasis omitted). Once again, however, the relevant point is not one of "discharge,"

but, rather, that the Plan and Confirmation Order prohibit the *accrual* or payment of postpetition interest, and this prohibition is *res judicata* with respect to their subsequently liquidated claim.

Nevertheless, the Hathaways infer in the alternative that there is a discrepancy between the Plan and the Disclosure Statement, and intimate that this discrepancy removes this matter from the ambit of *Espinosa* because it had an adverse effect on the notice they received. HOB 29. This argument, however, is wholly without merit. The Plan clearly provides that the accrual and payment of postpetition interest is not permitted, and nothing in the Disclosure Statement provides to the contrary.

In addition, even if there were some kind of discrepancy, page ii of the Disclosure Statement clearly states, in block capitals, that the "PLAN SUMMARIES AND STATEMENTS MADE IN THIS DISCLOSURE STATEMENT *ARE QUALIFIED IN THEIR ENTIRETY BY REFERENCE TO THE PLAN . . . .*" ER Tab 19-2 (emphasis supplied); *see also* ER Tab 19-20 ("ALTHOUGH THE DEBTORS BELIEVE THAT THE SUMMARIES OF THE PLAN AND RELATED DOCUMENT SUMMARIES ARE FAIR AND ACCURATE, SUCH SUMMARIES ARE QUALIFIED TO THE EXTENT THAT THEY DO NOT SET FORTH THE ENTIRE TEXT OF SUCH DOCUMENTS . . . . THE DEBTORS DO NOT WARRANT OR REPRESENT THAT THE INFORMATION

CONTAINED HEREIN . . . IS WITHOUT ANY MATERIAL INACCURACY OR OMISSION."); ER Tab 19-21 ("ALL HOLDERS OF CLAIMS AGAINST THE DEBTORS ARE ENCOURAGED TO READ THIS DISCLOSURE STATEMENT AND ITS APPENDICES [which include the Plan] CAREFULLY AND IN THEIR ENTIRETY BEFORE DECIDING TO VOTE EITHER TO ACCEPT OR TO REJECT THE PLAN.").

Moreover, the Disclosure Statement's Summary of the Plan provides, again in block capitals, that "THIS SECTION PROVIDES A SUMMARY OF THE STRUCTURE, CLASSIFICATION, TREATMENT AND IMPLEMENTATION OF THE PLAN AND IS *QUALIFIED IN ITS ENTIRETY BY REFERENCE TO THE PLAN, WHICH ACCOMPANIES THIS DISCLOSURE STATEMENT*, AND TO THE EXHIBITS ATTACHED THERETO. *THE PLAN ITSELF* AND THE DOCUMENTS REFERRED TO THEREIN *WILL CONTROL THE TREATMENT OF CREDITORS . . . UNDER THE PLAN AND WILL, UPON THE EFFECTIVE DATE, BE BINDING UPON HOLDERS OF CLAIMS* AGAINST, OR INTERESTS IN, THE DEBTORS. . . .AND OTHER PARTIES IN INTEREST" ER Tab 19-52 (emphases supplied).

The express provisions of the Plan properly control the question of postpetition interest. Because the Hathaways are bound by the Plan, the decisions of the courts below should be affirmed.

B. This Court's Decision in *Maxitile* Is Not to the Contrary.

The Hathaways argue further that the "controlling authority" in this case is not the Supreme Court's decisions in *Espinosa* or *Bailey*, but rather an unpublished Ninth Circuit opinion, *Maxitile, Inc. v. Sun (In re Maxitile)*, 237 Fed. Appx. 274 (9th Cir. 2007). Under Ninth Circuit Rule 36-3(a), however, "[u]npublished dispositions and orders of this Court *are not precedent*, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion." (emphasis supplied). Thus, although *Maxitile* may be cited under Fed. R. App. 32.1(a) and Ninth Circuit Rule 36-3(b), it may not be relied upon as precedent. Accordingly, it does not constitute "controlling authority" as the Hathaways urge. HOB 29. Rule 32.1 "addresses only the *citation*" of unpublished opinions; "[i]t says nothing about what effect a court must give to one of its unpublished opinions or the unpublished opinions of another court." Fed. R. App. P. 32.1 cmt. note (2006) (emphasis in original). Ninth Circuit Rule 36-3 clarifies the effect this Court will give an unpublished opinion like *Maxitile* – in this context, it is "not precedent."

Moreover, even if it were precedential, the Court decided *Maxitile* prior to *Espinosa* and *Bailey*, and it cannot supersede those Supreme Court holdings. Further, the facts of *Maxitile* are distinguishable. To begin with, it involved the propriety of a contempt order for violating an injunction in a plan. *Maxitile*, 237 Fed. Appx. at 275. More important, the plan in *Maxitile* was apparently ambiguous. *Id.*

In contrast, the language here is not. *Maxitile* is thus inapposite.

III. National Union Does Not Have Any Independent Obligation to Pay Postpetition Interest, and There Is No Conflict with Section 524(e) of the Bankruptcy Code.

As noted, part of section 7.2 of the Plan states that "post-petition interest shall not accrue or be paid on Claims," but creates an exception: "[u]nless . . . required by applicable bankruptcy law." ER Tab 18-27. As explained above, the phrase "[u]nless . . . required by applicable bankruptcy law" does not apply to require the payment of postpetition interest on the Hathaways' claim because applicable bankruptcy law does not authorize the accrual of postpetition interest on such claims. On the contrary, applicable bankruptcy law forbids it. *See* 11 U.S.C. § 502(b)(2). Nevertheless, in spite of section 502(b)(2), the Hathaways contend repeatedly that the accrual of postpetition interest is somehow mandated under section 524(e).

As explained above, any discussion of section 524(e) is irrelevant in light of the Plan's express prohibition on the accrual or payment of postpetition interest on the Hathaways' claim, together with the Supreme Court's pronouncements in *Espinosa*, *Bailey*, and *Stoll*. In addition, all that section 524(e) says is that the "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e). By its terms, this provision does not "*require*" the payment of postpetition interest. *Cf.*

11 U.S.C. § 506(b) (requiring the payment of postpetition interest for certain over-collateralized secured claims). It simply provides that a "discharge" of the debtor does not affect a liability that a third party may have, whatever that may be. Because National Union has no independent liability to pay postpetition interest to the Hathaways, section 524(e) is simply not affected. Further, even if section 524(e) did apply, it is overridden in this case by other provisions of the Plan.

National Union is neither a guarantor nor a surety of Raytheon's debt, but is an insurer that is only liable to indemnify Raytheon for covered claims that *Raytheon* is liable for, and only to the extent that Raytheon is liable. *See, e.g., Houston v. Edgeworth (In re Edgeworth)*, 993 F.2d 51, 53-54 (5th Cir. 1993) ("In the liability insurance context, of course, a tort plaintiff must first establish the liability of the debtor *before the insurer becomes contractually obligated to make any payment*.") (emphasis supplied). Critically, National Union never signed a guaranty or surety debt instrument independently obligating itself to the Hathaways to pay postpetition interest, and section 524(e) does not create liability where none otherwise exists.

In addition, other than pursuant to the Plan, the Hathaways have no direct claim against Raytheon. Among other reasons, Massachusetts is not a "direct action" state – i.e., one that permits a claimant to bypass the insured and sue an insurer directly. *See, e.g., Edgeworth*, 993 F.2d at 53-54 (specifically noting that the

applicable statute where the case arose was not a "direct action" state).[11] Rather, the Hathaways were obligated to sue Raytheon (which they did), and National Union is only obligated to pay Raytheon's liabilities that are covered under National Union's policies. Because Raytheon is not liable for postpetition interest, neither is National Union.

In support of their contrary argument, the Hathaways cite numerous cases that are distinguishable from this matter because they deal with the obligations of guarantors who are *independently* liable for the obligations of the debtor. *See, e.g., American Hardwoods, Inc. v. Deutsche Credit Corp. (In re American Hardwoods, Inc.)*, 885 F.2d 621 (9th Cir. 1989) (addressing bankruptcy court's ability to enjoin action against nondebtor guarantor). Again, National Union is not a guarantor or a surety; it is an insurer, and these cases are inapposite.

The Hathaways contend further that "the vast majority of courts hold that collection efforts against insurers are not affected by the insured's bankruptcy filing so long as recovery is limited to available insurance proceeds." HOB 18. In support of this contention, the Hathaways cite a case from the Ninth Circuit Bankruptcy Appellate Panel and string cite, *inter alia*, several circuit court decisions. HOB 18-20. These cases, however, do not stand for the proposition that the holder

[11] The Hathaways argued below that Massachusetts was a "direct action" state, but appear to have abandoned that argument on appeal. ER Tab 10-45; HOB 35-38. They offer no explanation for the court's distinction on this point in *Edgeworth*.

of a tort claim may recover postpetition interest from an insurer where the holder of the claim is barred from doing so under the insured's chapter 11 plan, nor that an insurer may be liable for *more* than the insured's liability. Nothing in section 524(e) permits the Hathaways to *increase* their award against National Union beyond Raytheon's liability.

Though they string cite various cases in support of their position, the Hathaways rely principally on *Owaski v. Jet Florida Systems, Inc. (In re Jet Florida Systems, Inc.)*, 883 F.2d 970 (11th Cir. 1989), and a district court decision from the Eastern District of Pennsylvania, *Metro Commercial Real Estate, Inc. v. Reale*, 968 F. Supp. 1005 (E.D. Pa. 1997). *Metro Commercial*, however, is readily distinguishable because it involved a general partner who was co-liable for the contractually agreed-upon interest, contrary to the facts of this case. *Metro Comm'l*, 968 F. Supp. at 1006. Accordingly, unlike National Union, the general partner's liability for the postpetition interest was an independent obligation of that partner.

In addition, although *Jet Florida* states generally that under section 524(e), "a plaintiff may proceed against the debtor simply in order to establish liability as a prerequisite to recover from another, an insurer, who may be liable," nothing in *Jet Florida* addresses the issue of postpetition interest presented in this case. *Jet Florida*, 883 F.2d at 976. Here, as in *Jet Florida*, the Hathaways were permitted under the Plan to liquidate their action in state court and then satisfy that claim from in-

surance proceeds in accordance with the Plan. They cannot now pretend that the Plan does not exist, nor assert successfully that section 524(e) expands an insurer's liability beyond what the insurer's policies provide.

In *Bursch v. Beardsley & Piper*, the Eighth Circuit provided a more useful analysis than those the Hathaways cite, specifically addressing the interaction between sections 502(b)(2) and 524(e). 971 F.2d 108 (8th Cir. 1992). As the court explained in *Bursch*, "[w]here a claim is *discharged*, the debt is recognized . . . but the debtor is relieved of responsibility for it…[and] a party *derivatively liable* for the debt, such as an insurer, remains responsible." *Id.* at 114 (emphasis supplied). On the other hand, "[w]here a claim is *disallowed* . . . the debt is not recognized . . . [and] an insurer cannot be derivatively liable for the debt because the debtor was never principally liable for it." *Id.* (emphases supplied). In this case, postpetition interest is not only disallowed under section 502(b)(2), it is also barred from accruing under the Plan. Thus, National Union cannot be liable for postpetition interest as Raytheon's insurer.[12]

[12] As the Hathaways point out in their brief, their tort claim was estimated at $0 by the Bankruptcy Court and subsequently disallowed in full. HOB 7-8. The reason for this, however, is evident from the quote they reproduce in their brief: because of how the Plan is structured in this case (i.e., their tort claim will be paid from insurance), their claim "will never become an Allowed Class 7 Claim [entitled to payment by *the Debtors*] and therefore should be estimated at Zero ($0) for purposes of distribution." HOB 7-8 (quoting ER Tab 15-7). This was necessary so that the Debtors would not have to set aside money of their own for payment of the claim after the claim was liquidated in the State Action and all appeals were ex-

This makes sense because, as noted, the insurer can have no greater obligation than that for which it contracted, *i.e.*, the liability of the insured. That is why the Confirmation Order permits litigation of insurance claims against the Debtors to collect proceeds from the insurance policies, but only "subject to the terms and conditions of such Insurance Policy" and "only to the extent of existing coverage." ER Tab 7-22. The Hathaways cannot evade these settled principles.

Alternatively, in addition to prohibiting the accrual of postpetition interest in section 7.2, the Plan and Confirmation Order otherwise specifically prohibit the payment of postpetition interest on all "Claims" irrespective of applicable bankruptcy law. In particular, section 12.10 of the Plan (which the Hathaways cite in

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hausted – the Debtors were free to use their money to pay other claims. Although the Hathaways' tort claim was also "disallowed," this does not alter the analysis because the provisions of the Plan control. In particular, the Plan provides that the claim will be paid by applicable insurance, but also bars postpetition interest. ER Tab 18-27. In this case, the fact that the claim was technically "disallowed" is a red herring because just as the Hathaways cannot now complain of the Plan's treatment of postpetition interest on their claim, National Union cannot now benefit from the subsequent disallowance of the Hathaways' claim as the Plan clearly provides for the payment of their Judgment and any prepetition interest and the Plan is binding on National Union as well as the Hathaways. For example, as an alternative to its structure, the Plan could have provided that only allowed claims would be entitled to be paid from insurance in the amount allowed by the Bankruptcy Court. After the state court liquidated the amount of the Hathaways' claim, the Bankruptcy Court would then have allowed the principal amount of the Hathaways' claim, together with prepetition interest, but not postpetition interest because of the prohibition against postpetition interest in section 502(b)(2). The allowed claim (without postpetition interest) would then have been paid. Instead of doing it this way, the Plan provides for the payment of the tort claim as liquidated in state court, but expressly bars postpetition interest. The result is the same.

their brief) provides without legal qualification that the Plan operates as a "complete satisfaction, discharge and release of all Claims . . . including any interest accrued on Claims from the Petition Date." ER Tab 18-36. As a result, even if section 7.2 of the Plan did not apply in this case to limit the accrual of postpetition interest (which it does), section 12.10 unambiguously proscribes it, irrespective of applicable bankruptcy law.

Likewise, the Confirmation Order provides unequivocally that the treatment of Claims under the Plan and Confirmation Order is "in exchange for and in complete satisfaction, discharge and release of all Claims . . . including any interest accrued on Claims from the Petition Date." ER Tab 7-30. The Confirmation Order further provides that "*notwithstanding any otherwise applicable law* . . . the terms of the Plan and this Confirmation Order are deemed binding upon . . . any and all holders of Claims . . . ." ER Tab 7-3 (emphasis supplied). Finally, the Confirmation Order directs that, in the event of a conflict between the terms of the Plan and the terms of the Confirmation Order, the terms of the Confirmation Order will control. ER Tab 7-2. Accordingly, even if section 524(e) might be construed to require the payment of postpetition interest (which it does not), the Confirmation Order would still prohibit it.

The Hathaways cite to Massachusetts General Law chapter 175, section 112, for the proposition that "any 'policy insuring against liability for loss or damage on

account of bodily injury . . . become[s] absolute whenever the loss or damage for which the insured is responsible occurs.'" HOB 36. The Hathaways cite further to section 113, which provides that upon entry of a final judgment against the insured, "the judgment creditor shall be entitled to have the insurance money applied to the satisfaction of the judgment. . . ." HOB 36-37. But as the District Court correctly found, "Massachusetts is not a 'direct action' state," and Massachusetts courts have not interpreted those statutes to create a separate and independent liability for insurers. ER Tab 1-8; *Mathewson v. Colpitts*, 188 N.E. 601, 602 (Mass. 1933) (applicable statute "does not give an independent cause of action against the insurance company.").

Under Massachusetts law, the "statutes affording a remedy for an injured plaintiff against an insurer issuing a liability policy require as a prerequisite to suit the recovery of a final judgment against the insured wrongdoer." *Rogan v. Liberty Mut. Ins. Co.*, 25 N.E.2d 188, 189 (Mass. 1940) (citations and marks omitted); *see also Gallo v. Foley*, 296 Mass. 306, 309 (1936) ("The right of the person injured to avail himself of the insurance is ancillary to his original and primary right of action against the tortfeasor against whom, or whose estate, the plaintiff must first establish his claim in the methods and subject to the limitations provided by law."). Section 112 was adopted to invalidate provisions in insurance policies that limited an insurer's liability to losses actually paid by the insured. *See Sanders v. Austin*

W. Fishing Corp., 224 N.E.2d 215, 217 (Mass. 1967); *see also* MASS. GEN. LAWS ch. 175, § 112 ("the satisfaction by the insured of a final judgment for such loss or damage shall not be a condition precedent to the right or duty of the company to make payment on account of said loss or damage."). Section 113 simply provides that the proceeds of an insurance policy can be "reached and applied" in satisfaction of a judgment against the insured without the insured first actually paying the judgment. *Sanders*, 224 N.E.2d at 218. Neither of these provisions require the insurer to assume a greater liability than the insured must bear.

As the District Court explained, "the insurer's only obligation under the insurance contract is to satisfy the personal liability of the insured to the third-party beneficiary." ER Tab 1-10 (quoting *Flattery v. Gregory*, 489 N.E.2d 1257, 1261-62 (Mass. 1986)). Because that liability does not include postpetition interest, the decisions of the courts below should be affirmed.

IV. The Hathaways Seek a Windfall.

In this case, as in most chapter 11 proceedings, the Bankruptcy Court confirmed a Plan that was the product of extensive negotiation and a careful balancing of competing creditor interests. Although the Hathaways filed a large claim against Raytheon in Raytheon's bankruptcy case and had the opportunity to participate in the plan confirmation process, they chose not to do so, nor to object to any of the terms and conditions of Raytheon's Plan. As noted above, the general

rule in bankruptcy is that postpetition interest is not available. *Bruning v. United States*, 376 U.S. 358, 361-62 (1964) ("the general rule for liquidation of the bankruptcy estate has long been that a creditor will be allowed interest only to the date of the petition in bankruptcy."). If the Hathaways had a complaint about the Plan's treatment of postpetition interest, they should have objected prior to confirmation of the Plan. If their objection was unsuccessful, they should have appealed the Confirmation Order. Having failed to do so, they cannot now properly ask this Court to rewrite the past.

Accordingly, although the Hathaways assert that National Union is attempting to receive a windfall, the opposite is true: the Hathaways are seeking more than the law allows. In many instances, a bankrupt debtor's insurance will often prove insufficient to pay all of the debtor's tort claims in full. Denying the accrual of postpetition interest on tort claims serves the interests of fairness because permitting one tort claimant to recover 12% postpetition interest will likely mean in many cases that there will be inadequate insurance proceeds left over to pay others. The Hathaways are entitled to nothing more than the law permits, and the decisions of the courts below should be affirmed.

CONCLUSION

For the foregoing reasons, the Court should affirm the decisions of the District Court and Bankruptcy Court.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to 9th Cir. R. 28-2.6, Raytheon is not aware of any related case pending in this Court.

CERTIFICATION OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation provided in Rule 32(a)(7)(C)(i) of the Federal Rules of Appellate Procedure. The foregoing brief contains 12,041 words of Times New Roman (14 pt) proportional type. Microsoft Word is the word-processing software that was used to prepare the brief.

/s/ *G. Eric Brunstad, Jr.*
G. Eric Brunstad, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

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