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

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. NV-12-1572-DKiCo
)	
WASHINGTON GROUP INTERNATIONAL, INC., ET AL.,)	Bk. No. 01-31627-GWZ
)	
Debtor.)	Adv. Proc. No. 05-05022-GWZ
)	
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WASHINGTON GROUP INTERNATIONAL, INC.,)	
)	
Appellant,)	
)	
v.)	M E M O R A N D U M ¹
)	
THE UNITED STATES OF AMERICA,)	
)	
Appellee.)	
)	
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Argued and Submitted on July 19, 2013
at Las Vegas, Nevada

Filed - August 2, 2013

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

Honorable Gregg W. Zive, Bankruptcy Judge, Presiding

Appearances: Beth Heifetz of Jones Day argued for appellant
Washington Group International, Inc.; Glenn Douglas
Gillett of the U.S. Department of Justice argued for
appellee The United States of America.

¹ 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 8013-1.

1 Before: DUNN, KIRSCHER and COLLINS², Bankruptcy Judges.

2
3 This appeal involves the impact of confirmation of a
4 chapter 11³ bankruptcy plan on claims that were not asserted in the
5 bankruptcy case but are alleged by the debtor to have been within
6 the "fair contemplation" of the claimant such that the claimant is
7 enjoined from asserting the claims in subsequent litigation filed in
8 federal district court. The bankruptcy court applied Ninth Circuit
9 precedent, particularly as set forth in Cal. Dep't of Health Svcs.
10 v. Jensen (In re Jensen), 995 F.2d 925 (9th Cir. 1993), and denied
11 the debtor's motion to enjoin the subsequent litigation. We AFFIRM.

12 I. FACTS

13 A. Context of the Current Dispute

14 On May 14, 2001 ("Petition Date"), Washington Group
15 International, Inc. ("WGI") and most of its subsidiaries filed
16 voluntary chapter 11 petitions. On December 21, 2001, the
17 bankruptcy court confirmed WGI's Second Amended Plan, which provided
18 that "[n]otwithstanding anything in the Plan or the Order of
19 Confirmation to the contrary, the Plan does not discharge any cause
20 of action that is not within the fair contemplation of the entity
21 asserting the cause of action, in accordance with In re Jensen,

23 ² Hon. Daniel P. Collins, Bankruptcy Judge for the District
24 of Arizona, sitting by designation.

25 ³ Unless specified otherwise, all chapter, code and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 995 F.2d 925 (9th Cir. 1993)." The effective date of the confirmed
2 plan was January 25, 2002 ("Effective Date").

3 On November 5, 2004, the United States of America, on behalf of
4 the United States Agency for International Development ("USAID"),
5 filed a complaint ("Complaint") in the United States District Court
6 for the District of Idaho ("USAID Litigation"), asserting claims
7 against WGI f/k/a Morrison Knudsen Corporation ("MK"), Contract
8 International Inc. ("CII"), and Misr Sons Development S.A.E., a/k/a
9 Hassom Allam Sons ("HAS") under the False Claims Act ("FCA")⁴, the
10 Foreign Assistance Act of 1961 ("FAA")⁵, and several common law
11 theories, including payment by mistake, unjust enrichment, and
12 fraud. The Complaint alleged generally that the claims being
13 asserted arose out of the

14 fraud and misrepresentation of the defendants to secure
15 five separate [USAID] funded host country construction
16 contracts ["Egypt Contracts"] with the Arab Republic of
17 Egypt ("Egypt") and the defendants' subsequent submission
of false claims to USAID through false payment demands and
other false records and statements intended to induce
payment from USAID.

18 Complaint at 2:1-15.

19 On March 23, 2005, WGI commenced an adversary proceeding in the
20 bankruptcy court seeking to enjoin continued prosecution of the
21 USAID Litigation. The bankruptcy court determined through its order
22 entered November 9, 2005, that USAID's common law claims were barred
23 as a consequence of confirmation of the plan in WGI's bankruptcy
24

25 ⁴ 31 U.S.C. §§ 3729-33, as amended.

26 ⁵ 22 U.S.C. § 2399b, as amended.

1 case. On October 6, 2011, the bankruptcy court held a trial on the
2 remaining issues of whether USAID's claims under the FCA and the FAA
3 similarly were barred. The bankruptcy court's Memorandum Decision
4 ("Memorandum") on those issues was entered April 24, 2012, and is
5 the subject of this appeal.

6 B. Underlying Facts

7 1. The Contracts Generally

8 The Egypt Contacts were a result of the 1978 Camp David
9 Accords, through which USAID committed more than \$2 billion toward
10 the development and rehabilitation of Egypt's infrastructure. To
11 implement various infrastructure projects, the United States and
12 various Egypt government agencies sought bids from qualified United
13 States contractors. Although each contract was between a
14 U.S. contractor and the Egyptian governmental agency responsible for
15 the project, because some of the funding was from USAID, both the
16 FAA and the FCA applied. The purpose of USAID's involvement was to
17 ensure that USAID and "host country" (in this case Egypt) rules,
18 requirements and procedures were followed and to ensure performance
19 under the contract.

20 To bid on the prime contract for an individual project, a
21 prospective bidder was required first to pre-qualify through USAID.
22 USAID rules and regulations required that for any joint venture
23 bidder, each joint venture member had to be pre-qualified. The
24 primary purpose of pre-qualification was to ensure bidders could
25 satisfy USAID's "nationality and source" rules.

26 USAID and the government of Egypt financed the infrastructure

1 projects and paid the prime contractors. USAID was charged with
2 approving a contractor's request for payment ("Payment Request").
3 Each Payment Request was submitted to USAID's Contract Management
4 Coordinator ("CMC"), and contained invoices which certified that the
5 amounts requested were due and payable. The invoices also certified
6 that "to the best of [the contractor's] information and belief any
7 commodity or service supplied under said contract meets the source,
8 origin, componentry and nationality requirements specified in the
9 contract and/or letter of commitment" ("the Compliance
10 Certification").

11 At issue in the USAID Litigation are five separate
12 USAID-financed Egypt Contracts: the Ismailia Contract, the Port
13 Said Contract, the Aswan Contract, the Luxor Contract, and the
14 Telecom Contract. MK applied as the entity pre-qualifying for the
15 Ismailia Contract, the Port Said Contract, and the Telecom Contract.
16 A joint venture of MK and CII applied as the entity pre-qualifying
17 for the Aswan Contract and the Luxor Contract.

18 2. The Canal Cities Contracts

19 MK submitted its pre-approval application for the design and
20 construction of certain wastewater treatment facilities known as the
21 Canal Cities Projects on March 17, 1989, and supplemented its
22 application in June 1991 and again in September 1991. The Canal
23 Cities Projects included the Ismailia Contract and the Port Said
24 Contract. In September 1991, USAID's CMC for the Canal Cities
25 Projects recommended MK as an approved bidder to the National
26 Organization for Potable Water and Sanitary Drainage ("NOPWASD"),

1 the Egyptian government agency associated with the Canal Cities
2 Projects.

3 On August 27, 1992, MK submitted a fixed price bid on the
4 Ismailia Contract; the CMC recommended MK to NOPWASD, and NOPWASD
5 awarded the Ismailia Contract to MK on October 26, 1992. Sometime
6 thereafter, MK sought and received approval from USAID and NOPWASD
7 for CII and HAS to perform work as subcontractors on the Ismailia
8 Contract. Between 1993 and April 1995, MK submitted approximately
9 80 invoices for payment for work performed under the Ismailia
10 Contract, each of which included the Compliance Certification. The
11 Ismailia Contract was not executory at the time WGI filed its
12 bankruptcy petition.

13 On September 30, 1993, MK submitted a fixed price bid on the
14 Port Said Contract; the CMC recommended MK to NOPWASD, and NOPWASD
15 awarded the Port Said Contract to MK on December 1, 1993. Sometime
16 thereafter, MK sought and received approval from USAID and NOPWASD
17 for CII and HAS to perform work as subcontractors on the Port Said
18 Contract. Between 1993 and August 2000, MK submitted approximately
19 69 invoices for payment for work performed under the Port Said
20 Contract, each of which included the Compliance Certification. The
21 Port Said Contract was not executory at the time WGI filed its
22 bankruptcy petition.

23 3. The Secondary Cities Contracts

24 MK formed a joint venture with CII ("MK/CII Joint Venture") on
25 February 16, 1997. The MK/CII Joint Venture submitted its pre-
26 approval application for what is referred to as the Secondary Cities

1 Projects, which called for the rehabilitation, augmentation, and
2 extension of wastewater facilities in several Egyptian cities. The
3 Secondary Cities Projects included the Aswan Contract and the Luxor
4 Contract. USAID's CMC for the Secondary Cities Projects recommended
5 MK and CII as approved joint venture bidders to the NOPWASD.

6 On May 6, 1998, the MK/CII Joint Venture ("Aswan Joint
7 Venture") submitted a fixed price bid on the Aswan Contract; the CMC
8 recommended the Aswan Joint Venture to NOPWASD, and NOPWASD awarded
9 the Aswan Contract to the Aswan Joint Venture on October 1, 1998.
10 Sometime thereafter, the Aswan Joint Venture sought and received
11 approval for HAS to perform work as a subcontractor on the Aswan
12 Contract.

13 Between 1998 and October 2003, the Aswan Joint Venture
14 submitted approximately 55 invoices for payment for work performed
15 under the Aswan Contract, each of which included the Compliance
16 Certification. Nineteen of the invoices were submitted after
17 confirmation of the WGI plan; eighteen of those were submitted after
18 the Effective Date of the WGI plan.

19 On June 25, 2000, the MK/CII Joint Venture ("Luxor Joint
20 Venture") submitted a fixed price bid on the Luxor Contract. The
21 bid included a copy of a Luxor Joint Venture agreement dated
22 June 13, 2000, which identified MK and CII as the parties to the
23 Luxor Joint Venture. The CMC recommended the Luxor Joint Venture to
24 NOPWASD, and NOPWASD awarded the Luxor Contract to the Luxor Joint
25 Venture on April 24, 2001. In June 2001, the Luxor Joint Venture
26 sought approval to use as a subcontractor on the Luxor Contract a

1 joint venture between CII and HAS. After USAID rejected the
2 request, the Luxor Joint Venture sought approval to use as a
3 subcontractor on the Luxor Contract a joint venture between OCI (the
4 parent of CII) and HAS, which USAID and NOPWASD approved.

5 Between 2001 and July 2004, the Luxor Joint Venture submitted
6 approximately 38 invoices for payment for work performed under the
7 Luxor Contract, each of which included the Compliance Certification.
8 Thirty-three of the invoices were submitted after confirmation of
9 the WGI plan; thirty-one of those invoices were submitted after the
10 Effective Date of the WGI plan.

11 4. The Telecom Contract

12 MK submitted its pre-approval application for the project to
13 expand the telecommunications infrastructure in Egypt ("the Telecom
14 Contract") on March 25, 1997. USAID's CMC for the Telecom Project
15 recommended MK as an approved bidder to Telecom Egypt, the Egyptian
16 government agency responsible for projects to expand Egypt's
17 telecommunications which were partially funded by USAID.

18 On February 14, 1999, MK submitted a fixed price bid, which
19 listed HAS as a proposed subcontractor, on the Telecom Contract.
20 The CMC recommend MK to Telecom Egypt, and Telecom Egypt awarded the
21 Telecom Contract to MK on August 30, 1999.

22 Between 1999 and April 2003, MK submitted more than 300
23 invoices for payment for work performed under the Telecom Contract,
24 each of which included the Compliance Certification. One hundred
25 thirty of the invoices were submitted after confirmation of the WGI
26 plan; 121 of those were submitted after the Effective Date of the

1 WGI plan.

2 5. The Investigations

3 a. The Aswan Contract Investigation

4 Beginning in September 1999, MK notified the CMC, NOPWASD and
5 USAID of problems in the Aswan Contract which resulted in cost
6 overruns and time delays. Over the course of three years, several
7 modifications to the Aswan Contract were negotiated between and
8 among the CMC, NOPWASD, USAID and the Aswan Joint Venture, the
9 result of which was additional compensation to the contractor and
10 additional time to perform for the Aswan Joint Venture. In April
11 2001, WGI submitted Variation Order Request No. 50 ("VOR 50") for
12 the Aswan Contract. VOR 50 was the precursor to WGI's formal
13 "Request for Equitable Adjustment" claim ("REA Claim") submitted to
14 an arbitration panel.

15 On March 13, 2002, a WGI employee produced in support of its
16 REA Claim a document reflecting that the Aswan Joint Venture had
17 requested and received cash calls from HAS in connection with the
18 Aswan Contract, and that a three-party joint venture existed as to
19 the Aswan Contract which included HAS. This document was turned
20 over to USAID which then opened an investigation ("Aswan
21 Investigation") into the existence of a three-party joint venture
22 agreement related to the Aswan Contract. During the Aswan
23 Investigation, WGI produced two signed joint venture agreements
24 relating to the Aswan Contract, one which included HAS and one which
25 did not.

26 Additional documents produced during the Aswan Investigation

1 revealed that undisclosed joint venture agreements existed with
2 respect to other Egypt Contracts. WGI produced a three-party joint
3 venture agreement relating to the performance of the Ismailia
4 Contract; the parties to the agreement were MK, CII, and HAS. WGI
5 produced a three-party joint venture agreement relating to the
6 performance of the Port Said Contract; the parties to the agreement
7 were MK, CII, and HAS. WGI produced an unsigned three-party joint
8 venture agreement relating to the performance of the Luxor Contract;
9 the parties to the unsigned agreement were WGI, CII, and HAS.
10 Finally, WGI produced a two-party joint venture agreement relating
11 to the performance of the Telecom Contract; the parties to the
12 agreement were MK and HAS.

13 b. The Telecom Contract Investigation

14 Approximately sixteen months after MK was awarded the Telecom
15 Contract, one of its suppliers, 3M, requested clarification from the
16 CMC whether certain components to be supplied would comply with
17 USAID regulations for the Telecom Contract. Shortly thereafter, in
18 April 2001, a CMC agent visited WGI's warehouse to verify the source
19 and origin of components awaiting use in the Telecom Contract at
20 which time he observed packing cartons marked "Made in Spain" and
21 "Made in Mexico." A USAID agent then interviewed the CMC agent
22 regarding these observations. On June 27, 2001, a WGI employee
23 called a CMC agent to inform him that WGI was ordering additional
24 components from 3M that were not from the United States, and
25 inquired whether those components would be compliant with USAID
26 source and origin requirements. On July 14, 2001, another WGI

1 employee submitted a Telecom Contract invoice which included the
2 Compliance Certification. On September 5, 2001, representatives of
3 the CMC and of USAID inspected WGI's Telecom Contract warehouse in
4 Heliopolis, Egypt, where they observed shipping boxes containing
5 modular connectors and terminal blocks bearing Spain and Mexico
6 manufacturing markings. The following week, a USAID agent visited
7 WGI's offices to advise WGI of its civil investigation into WGI's
8 use of components made in Mexico and Spain on the Telecom Contract.
9 On November 18, 2001, WGI complied with USAID's request for source
10 and origin information with respect to components supplied by 3M.

11 On October 9, 2001, Telecom Egypt recommended that the CMC
12 withhold payment to WGI for non-USA product in light of questions
13 regarding WGI's compliance with the source and origin requirements
14 of the Telecom Contract. On October 10, 2001, the CMC notified WGI
15 that it was withholding payment pending documentation of compliance
16 with the source and origin requirements. The CMC sent WGI a letter
17 report on October 31, 2001, outlining the apparent failure to comply
18 with the source and origin requirements and advising that payments
19 were being withheld for non-compliant components.

20 On November 7, 2001, a USAID agent subpoenaed WGI's records
21 relating to the Telecom Contract. WGI complied with the subpoena on
22 November 16, 2001. USAID's investigation of the source and origin
23 issues with the Telecom Contract continued through 2002.

24 C. The USAID Litigation and WGI's Bankruptcy Case

25 1. Facts Relating to USAID's Notice of WGI's Bankruptcy

26 Three days after the Petition Date, WGI's Executive Vice

1 President sent a letter to USAID at its Washington, D.C. offices, to
2 advise it of the bankruptcy filing, but emphasized that USAID's
3 "contracts are with a non-filing subsidiary and therefore will not
4 be affected by the filing." (Emphasis in original.) Six days after
5 the Petition Date, a WGI vice president sent a letter to a USAID
6 employee in Egypt to notify USAID of the bankruptcy filing, but
7 emphasized that the "contract for the Luxor Project is with a non-
8 filing joint venture and therefore will not be affected by the
9 filing."⁶ (Emphasis in original.)

10 On August 8, 2001, WGI filed amended schedules and an amended
11 statement of financial affairs, modified in numerous places to
12 include WGI's interests in joint ventures. The amended "Schedule G
13 - Executory Contracts and Unexpired Leases" alone consisted of
14 531 pages. Additionally, some, but not all, of the monthly
15 operating reports between the months ending June 2001 through
16 November 2001 included a "Schedule of Investment and Receivables in
17

18 ⁶ There is an inconsistency in the record with respect to
19 the date the Luxor Contract was awarded. "NOPWASD, with USAID's
20 approval, on or about April 24, 2001, awarded and entered into the
21 Luxor Contract with the Luxor MK/CII JV." Memorandum at 11:3-4.
22 However, the USAID employee in Egypt testified that at the time he
23 received word of WGI's bankruptcy, WGI and CII were the low bidder
24 on the Luxor Contract, that the letter he received prompted USAID to
25 check out the financial soundness of the joint venture, that WGI
26 provided additional information to assure USAID and NOPWASD that WGI
had the financial soundness and capacity to perform the Luxor
Contract, and that WGI "thereafter" was awarded the Luxor Contract.
Memorandum at 16:1-7; see generally Memorandum at 16:8-25
(identifying May 20, 2011, as the proposed signing date for the
Luxor Contract).

1 Joint Ventures."

2 2. USAID's Common Law Claims

3 On November 9, 2005, the bankruptcy court granted summary
4 judgment in the adversary proceeding in favor of WGI barring USAID
5 from asserting all claims in the USAID Litigation. In doing so, the
6 bankruptcy court relied upon the following facts.

7 During the course of WGI's bankruptcy case, WGI filed motions
8 to assume all of the Egypt Contracts. After hearing, the motions
9 were granted. The United States never raised an issue of default
10 with respect to the Egypt Contracts, and did not request any cure
11 prior to assumption. Orders were entered approving the assumptions
12 of the Egypt Contracts on July 6, 2001 and August 1, 2001. In
13 addition, the bankruptcy court established September 17, 2001, as
14 the deadline for the United States to file proofs of claim asserting
15 the need to cure the Egypt Contracts. The United States filed no
16 cure claims by the deadline or at any time thereafter. The
17 bankruptcy court noted that USAID waited more than three years after
18 the cure claims deadline to raise its claims in the USAID
19 Litigation, which it did without first obtaining the permission of
20 or even notifying the bankruptcy court. The bankruptcy court also
21 noted that it had approved a settlement between WGI and the United
22 States of America with respect to all "indirect rate adjustment
23 claims." WGI's motion to approve the settlement stated that the
24 agreement between the parties "resolv[ed] all claims, including
25 future claims, with the United States of America due to the formal
26 closing of certain contracts that existed between WGI and the

1 federal government" and that "[t]he debtors believe that the
2 Agreement resolves all claims between WGI and the federal government
3 with respect to the Contracts and is fair and equitable and in the
4 best interests of the estates." Based on the foregoing chronology,
5 and upon USAID's failure to object to WGI's characterization that
6 all claims were resolved by the settlement agreement, the bankruptcy
7 court determined that USAID was barred from pursuing all of its
8 alleged claims in the USAID Litigation.

9 USAID appealed to the District Court for the District of
10 Nevada, which reversed to the extent the bar applied to USAID's
11 claims under the FCA and the FAA, on the basis that the bankruptcy
12 court had erred in deeming those claims to be cure claims under the
13 Egypt Contracts rather than statutory claims. The District Court
14 did not disturb the bankruptcy court's determination that USAID's
15 alleged common law claims were barred.

16 3. USAID's Alleged Statutory Claims

17 On remand, and following further pretrial proceedings, the
18 bankruptcy court held that as the party seeking relief, WGI bore the
19 burden of proving that prosecution of the USAID Litigation was
20 barred by the confirmation order as claims that were within the fair
21 contemplation of USAID at the time of confirmation. The bankruptcy
22 court then applied the "fair contemplation" test set forth in Jensen
23 to USAID's statutory claims as to each of the Egypt Contracts.

24 With respect to the statutory claims relating to the Ismailia
25 Contract and the Port Said Contract, the bankruptcy court held that
26 because USAID did not learn of the alleged illegal joint venture

1 agreements among WGI, CII and HAS until after the Effective Date,
2 USAID could not have fairly contemplated its alleged statutory
3 claims against WGI. In addition, to the extent WGI made disclosures
4 in its bankruptcy filings which identified its joint venture
5 partners with respect to the Ismailia Contract and the Port Said
6 Contract, the bankruptcy court determined that those disclosures
7 were too vague to have alerted USAID to the illegal joint venture
8 agreements. Finally, the letter assurances WGI sent USAID to the
9 effect that the Egypt Contracts were with a non-filing subsidiary
10 and therefore not affected by the bankruptcy filing negated any fair
11 contemplation by USAID.

12 With respect to the statutory claims relating to the Aswan
13 Contract, the bankruptcy court held that the analysis was similar as
14 to that for the Canal Cities Contracts, except with respect to WGI's
15 REA Claim. However, no evidence was provided to indicate that any
16 information USAID obtained from the dispute regarding the REA Claim
17 would raise USAID's suspicions as to alleged statutory claims. To
18 the contrary, USAID and WGI had a 20-year history, including the
19 Egypt Contracts and others, which the bankruptcy court characterized
20 as "long and mutually beneficial." Further, WGI's cooperation in
21 prior investigations would not have given USAID any specific reason
22 to suspect WGI might have violated the FCA or the FAA. Thus, any
23 pre-Effective Date statutory claims could not have been fairly
24 contemplated by USAID. Additionally, the bankruptcy court reasoned
25 that under O'Loghlin v. County of Orange, 229 F.3d 871 (9th Cir.
26 2000), any post-Effective Date statutory claims USAID had based on

1 continuing violations of the FCA or the FAA were not barred, because
2 to hold otherwise would effectively provide WGI with a continuing
3 license to violate the law.

4 With respect to the statutory claims relating to the Luxor
5 Contract, the bankruptcy court held that any pre-Effective Date
6 claims were not fairly contemplated because the alleged illegal
7 joint venture agreement was not produced by WGI until after the
8 Effective Date. Any statutory claims USAID may have had based on
9 post-Effective Date violations of the FCA or the FAA were not
10 barred, because to hold otherwise would effectively provide WGI with
11 a continuing license to violate the law.

12 With respect to USAID's statutory claims relating to the
13 Telecom Contract, the bankruptcy court held that pre-Effective Date
14 claims related to use of alleged foreign-made components could have
15 been fairly contemplated by USAID, and therefore discharged through
16 WGI's plan, because USAID had begun to investigate WGI's compliance
17 with component source and origin requirements on September 5, 2001,
18 and withheld payment pending its investigation by November 2001.
19 However, under the O'Loghlin analysis, the bankruptcy court ruled
20 that any post-Effective Date claims related to use of alleged
21 foreign-made components were not fairly contemplated by USAID,
22 because to hold otherwise would effectively provide WGI with a
23 continuing license to violate the law. Finally, any statutory
24 claims based upon alleged false certifications and/or the existence
25 of an illegal joint venture agreement, were not barred. As with the
26 other Egypt Contracts, any pre-Effective Date claims were not fairly

1 contemplated because the alleged illegal joint venture agreement was
2 not produced by WGI until after the Effective Date, and statutory
3 claims USAID may have had based on post-Effective Date violations of
4 the FCA or the FAA were not barred, because to hold otherwise would
5 effectively provide WGI with a continuing license to violate the
6 law.

7 The bankruptcy court entered its order denying WGI's motion to
8 enjoin the USAID Litigation on May 29, 2012. The bankruptcy court
9 entered its order denying WGI's motion to alter or amend the
10 Memorandum Decision on October 30, 2012. WGI filed a timely notice
11 of appeal.

12 II. JURISDICTION

13 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
14 and 157(b)(2)(B), (I), and (O). We have jurisdiction under
15 28 U.S.C. § 158(a).

16 III. ISSUES⁷

17 Whether the bankruptcy court erred when it placed the burden of
18 proof on WGI to establish that the USAID Litigation was barred by
19 the confirmed chapter 11 plan.

20 Whether the bankruptcy court erred in its application of the
21 "fair contemplation" test to determine whether the Statutory Claims
22 were barred.

23
24 ⁷ As stated in footnote 1 of Appellee's Opening Brief, WGI
25 failed to comply with Rule 8010(a)(1)(B) &(C) by failing to include
26 in its opening brief (1) a statement of appellate jurisdiction,
(2) the standard of appellate review, (3) and the issues presented
on appeal.

1 [Lujan v. Defenders of Wildlife, 504 U.S. 55, 560-61
2 (1992)]; see Cal. Pro-Life Council, Inc. v. Getman,
3 328 F.3d 1088, 1093 (9th Cir.2003). The injury in fact
4 must constitute "an invasion of a legally protected
5 interest which is (a) concrete and particularized, and
6 (b) actual or imminent, not conjectural or hypothetical."
7 [Lujan, 504 U.S. at 560](internal citations and quotations
8 omitted).

9 Lopez v. Candaele, 630 F.3d 775, 785 (9th Cir. 2010).

10 In its adversary complaint, WGI invoked the jurisdiction of the
11 bankruptcy court to determine whether the USAID Litigation violated
12 the discharge provided by the confirmed plan. Paragraph J.1.(d) of
13 the order confirming the chapter 11 plan provides an exception to
14 discharge of certain claims:

15 Notwithstanding anything in the Plan or the Order of
16 Confirmation to the contrary, the Plan does not discharge
17 any cause of action that is not within the fair
18 contemplation of the entity asserting the cause of action,
19 in accordance with In re Jensen, 995 F.2d 925 (9th Cir.
20 1993).

21 Whether the USAID Litigation constituted "an invasion of a legally
22 protected interest," i.e., WGI's discharge of claims through the
23 confirmed plan, required a determination that the FCA and FAA claims
24 were within the fair contemplation of USAID. The bankruptcy court
25 properly placed the burden of proof on WGI.

26 B. The Bankruptcy Court Correctly Analyzed the Status of USAID's
Statutory Claims.

27 "We look to federal law to determine when a claim arises under
28 the bankruptcy code." Zilog, Inc. v. Corning (In re Zilog, Inc.),
29 450 F.3d 996, 1000 (9th Cir. 2006). The Bankruptcy Code defines the
30 term "claim" broadly:

1 The term "claim" means -
2 (a) right to payment, whether or not such right is reduced
3 to judgment, liquidated, unliquidated, fixed, contingent,
4 matured, unmatured, disputed, undisputed, legal,
5 equitable, secured, or unsecured; or
6 (B) right to an equitable remedy for breach of performance
7 if such breach gives rise to a right to payment, whether
8 or not such right to an equitable remedy is reduced to
9 judgment, fixed, contingent, matured, unmatured, disputed,
10 secured, or unsecured.

11 Section 101(5).

12 However, the broad definition of claim is not without limit.
13 In this appeal we are asked to determine whether two specific limits
14 on the definition of claim apply to the USAID Litigation. The first
15 is known as the "fair contemplation" test, as set forth in Jensen,
16 and specifically incorporated into WGI's confirmation order. The
17 second limit, identified in O'Loughlin, can render postpetition acts
18 in violation of a statute into a postpetition claim, notwithstanding
19 that the debtor had been violating the statute prepetition.

20 As noted by the bankruptcy court:

21 Jensen's "fair contemplation" test is a totality of the
22 circumstances test, whereby the court should consider:
23 (1) when the conduct underlying the creditor's claim
24 occurred; (2) the creditor's knowledge of that conduct;
25 (3) whether the creditor had an opportunity to learn of
26 the conduct underlying the claim and whether it undertook
an investigation to determine whether it had a claim; and
(4) whether there was any prepetition relationship between
the parties.

Memorandum Decision at 46:3-10.

The bankruptcy court determined that with respect to USAID's
alleged claims premised upon the FCA and FAA based on WGI's alleged
illegal joint ventures, those claims could not have been in USAID's
fair contemplation prior to the Effective Date because USAID first

1 learned of the illegal joint ventures during the Aswan
2 Investigation, which commenced after the Effective Date. The record
3 supports this determination. Although WGI amended its schedules and
4 statement of financial affairs prior to the Effective Date to make
5 reference to some or all of the illegal joint ventures, there is
6 nothing in the record to demonstrate that these disclosures were
7 brought to USAID's attention. Had USAID been looking for them, it
8 would have been like looking for the proverbial needle in a hay
9 stack in light of the magnitude of the changes to the schedules. In
10 any event, USAID would not have been on notice to look for them
11 where WGI had affirmatively assured USAID that their contracts were
12 not implicated in the filing. While the bankruptcy court's decision
13 in November 2005 barring the common law claims referenced the
14 assumption of the Egypt Contracts and a settlement with USAID of
15 rate adjustment claims which took place prior to the Effective Date,
16 WGI did not provide anything in the record with respect to these
17 proceedings from which we might conclude USAID had some knowledge of
18 the alleged illegal joint ventures. We therefore agree that
19 (1) USAID's claims on the Ismailia Contract and the Port Said
20 Contract, (2) USAID's pre-Effective Date claims on the Aswan
21 Contract and the Luxor Contract, and (3) USAID's pre-Effective Date
22 claims on the Telecom Contract, which are based on alleged illegal
23 joint ventures, are not subject to WGI's discharge based on the
24 application of the Jensen "fair contemplation" test.

25 Even after the Effective Date, WGI continued to submit invoices
26 which bore allegedly false certifications. As a matter of policy,

1 it was appropriate to apply O’Loghlin to exclude these claims from
2 WGI’s discharge. To do otherwise, as repeatedly stated by the
3 bankruptcy court, would be to provide WGI with a continuing license
4 to violate the law. Accordingly, the bankruptcy court did not err
5 when it determined that (1) USAID’s post-Effective Date claims on
6 the Aswan Contract and the Luxor Contract, and (2) USAID’s post-
7 Effective Date claims on the Telecom Contract, based upon alleged
8 false certifications, were not subject to WGI’s discharge.

9 Finally, the bankruptcy court determined that because USAID had
10 commenced an investigation into its source and origin claims under
11 the Telecom Contract prior to the Effective Date, those statutory
12 claims were within USAID’s “fair contemplation” such that USAID
13 should have asserted them on or before the claims bar date in WGI’s
14 bankruptcy case. Because these claims were not timely asserted,
15 they are discharged. USAID did not appeal this determination; nor,
16 of course, did WGI. WGI does assert on appeal, however, that the
17 bankruptcy court erred when it did not extend the discharge to post-
18 Effective Date claims for the same alleged violations, rather than
19 applying O’Loghlin. We cannot agree. Like the bankruptcy court, we
20 believe that doing so would be tantamount to giving WGI a license to
21 violate the FCA and FAA post-Effective Date.

22 VI. CONCLUSION

23 As the party seeking relief through the adversary proceeding
24 complaint, WGI bore the burden of proof to establish that the scope
25 of the discharge encompassed the claims in the USAID Litigation.
26 The bankruptcy court did not err when it determined that the only

1 alleged statutory claims of USAID which were discharged were the
2 pre-Effective Date claims for violations of the source and origin
3 requirements under the Telecom Contract. We AFFIRM.

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