FILED

AUG 7 2026

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

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

In re: KFIR GAVRIELI, Debtor.	BAP Nos. CC-26-1000-NGC CC-26-1001-NGC CC-26-1002-NGC (related appeals)
DIKLA GAVRIELI UNATIN; DEAN UNATIN, Appellants, v. J. MICHAEL ISSA, in his capacity as Post-Effective Date Trustee; KFIR GAVRIELI, Appellees.	Bk. No. 2:21-bk-10826-BB **MEMORANDUM**[*]

Appeal from the United States Bankruptcy Court
for the Central District of California
Sheri Bluebond, Bankruptcy Judge, Presiding

Before: NIEMANN, GAN, and CORBIT, Bankruptcy Judges.

INTRODUCTION

These related appeals arise in the context of the post-confirmation administration of an unusual individual chapter 11 bankruptcy estate.[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 8024-1.

[1] Unless specified otherwise, all chapter and section references are to the

Under the terms of the confirmed plan of reorganization, a post-effective date trust (the "Trust") was formed and a trustee (the "PEDT") appointed. The PEDT administers the plan with the assistance of the debtor. The plan was projected to result in a 100% payout to creditors. However, circumstances changed significantly when the friendly funding source that provided a $36.5 million backstop for payments due under the plan fell through.

Appellants argue the failure of the backstop, and the resulting default in plan payments, fundamentally changed the dynamics under the plan. Appellants Dikla and Dean Unatin are the sister and brother-in-law of the debtor Kfir Gavrieli ("Debtor"). The Unatins also hold a prepetition judgment that served as the impetus for Debtor's bankruptcy filing.

On November 26, 2025, the Unatins filed three motions—each styled a motion to enforce the terms of the plan—seeking to compel certain actions by the PEDT (collectively, the "Motions"). The Motions are the subject of these related appeals. The first motion, which is the subject of BAP No. 26-1002, asked the bankruptcy court to stop what the Unatins described as unauthorized borrowing by the PEDT (the "Borrowing Motion"). The second motion, which is the subject of BAP No. 26-1000, sought to remove the involvement of both Debtor and the law firm representing the Trust from all ongoing litigation with the Unatins (the

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Bankruptcy Code, 11 U.S.C. §§ 101–1532, and all "Rule" references are to the Federal Rules of Bankruptcy Procedure.

"Litigation Motion"). The third motion, which is the subject of BAP No. 26-1001, asked the bankruptcy court to direct the PEDT to "promptly" liquidate the Trust's assets to pay creditors and questioned the PEDT's business judgment as to that process (the "Liquidation Motion").

The bankruptcy court granted the Liquidation Motion in part, but not because of the failure of the backstop, as argued by the Unatins. Rather, the bankruptcy court found partial relief was warranted because the terms of the plan required certain accounts to be returned within 18 months of the effective date of the plan, and that deadline had passed. All other relief requested by the Motions was denied on the basis that the PEDT's actions were within the parameters of the confirmed plan and related trust agreement, and within the PEDT's discretion and business judgment. The Unatins timely appealed each of the three orders.

Finding no error in the bankruptcy court's orders, we AFFIRM.

FACTS

A. Unatin Judgment

In 2009, Debtor founded an internet-based shoe company (the "Company") with his sister, Dikla Unatin. The Company was successful for many years, but disputes arose between the siblings as to its management. Unable to resolve their issues related to the Company, the Unatins filed a lawsuit against Debtor alleging fraud, conversion, and breach of fiduciary duty (the "State Court Litigation").

After a lengthy trial, the Unatins obtained a judgment for approximately $16.9 million and a determination that Dikla owns 50% of the Company (the "Judgment"). The state court also imposed a constructive trust over 50% of roughly $13.2 million transferred to certain accounts in Hong Kong (the "Hong Kong Accounts"). Both sides appealed the Judgment, and that appeal is still pending.

B. Bankruptcy Filing, Derivative Action, and Continued Employment of Hueston Hennigan

Debtor filed his chapter 11 bankruptcy petition in February 2021, a few days after entry of the Judgment. Debtor continues to serve as the CEO of the Company, and the disputes between the parties continued into the bankruptcy case. Debtor brought an application to employ Hueston Hennigan LLP, the same law firm that represented Debtor prepetition in the State Court Litigation, as special litigation counsel to represent Debtor postpetition in his litigation with the Unatins.[2] Shortly after the bankruptcy case was filed, the Unatins filed an adversary proceeding against Debtor asserting nondischargeability claims and derivative claims on behalf of the Company (the "Derivative Action").

[2] The Unatins did not oppose this employment, and it was approved by the bankruptcy court. The Unatins did, however, file a statement of conditional non-opposition in which they expressed their general concern that Debtor sought to employ three special counsel law firms and retained their rights to challenge any duplication of efforts when fee applications were submitted.

In March 2021, a creditors' committee was appointed (the "Committee") and the bankruptcy court issued sua sponte an order to show cause as to why a chapter 11 trustee should not be appointed. Robert Kors (the "Chapter 11 Trustee") was approved as the chapter 11 trustee in July 2021, at the request of creditors other than the Unatins.

Upon his appointment, the Chapter 11 Trustee brought an application to amend the bankruptcy court's prior orders approving the employment of certain professionals, including Hueston Hennigan, to provide such professionals were now employed solely by the Chapter 11 Trustee, and no longer represented Debtor. The application noted that:

> Debtor has agreed to waive in favor of the estate and [the Chapter 11] Trustee all applicable privileges that relate to the estate, assets of the estate, and administration of the estate to ensure that [the Chapter 11] Trustee has full access to, control over, and use of the Estate Professionals.

The Unatins opposed the application as to Hueston Hennigan, arguing that the proposed employment conflicted with the spirit of the bankruptcy court's appointment of an independent Chapter 11 Trustee and that the law firm had conflicts of interest arising from its prepetition representation. The bankruptcy court overruled the objection and approved the continued employment of Hueston Hennigan to represent the estate in both the State Court Litigation and the Derivative Action.

C. Confirmed Plan and Failure of Plan Backstop

Six months after his appointment, the Chapter 11 Trustee filed a proposed plan of reorganization. The plan was amended and then confirmed (amended and confirmed, the "Plan"). All impaired classes voted to accept the Plan except the Unatins. The Unatins also objected to the Plan on various grounds, all of which were overruled by the bankruptcy court. The Unatins did not appeal the order confirming the Plan. The effective date of the Plan was June 17, 2022.

The Plan created the Trust to administer the Plan. J. Michael Issa was selected to serve as the PEDT. Debtor, the Chapter 11 Trustee, and Mr. Issa executed a Post-Effective Date Trust Agreement (the "Trust Agreement"), which was attached as an exhibit to and incorporated by the Plan. The term of the Plan was anticipated to be five years. Priority tax claims, which totaled in excess of $15 million, would be paid in full during the first two years of the Plan pursuant to a compromise under the IRS's Offshore Voluntary Disclosure Program ("OVDP"). All other claims would receive semi-annual payments with interest, with payments on unsecured claims beginning in the second year.

Under the Plan, the assets of the estate were transferred to the Trust. The Plan was to be funded primarily from the estate's cash accounts (including the Hong Kong Accounts) and a 50% share of the ongoing operating revenue from the Company during the course of the Plan. Debtor was allowed a monthly stipend. Non-cash assets such as passive investment real estate interests, investments in other companies (including, as relevant here, an interest valued at $12 million as of the Plan effective date in Aspiration, a company co-founded by Debtor's friend Joseph Sanberg), and cryptocurrency were also transferred to the Trust.

An important component of the Plan was a "Plan Backstop"—an unconditional revolving credit account from RJB Partner, LLC, another company affiliated with Mr. Sanberg. The concept of the Plan Backstop was originally proposed by Debtor in his own proposed plan, filed prior to the appointment of the Chapter 11 Trustee. The parties agree that the Plan Backstop had two purposes: (i) to enable the Trust to pay all allowed claims, including a cushion to pay a potential final judgment if the Unatins prevailed in the Derivative Action; and (ii) to ensure that the Trust would not be forced to prematurely liquidate or sell assets to fund Plan distributions. The Trust could borrow up to $36.5 million from the Plan Backstop, as needed, to make the semi-annual payments. The loan was unsecured, subordinated to the payment of all claims, and not due to be repaid until three years after the last Plan payment at a modest interest rate. Repayment of the Plan Backstop would thus fall to Debtor after completion of the Plan when the remaining Trust assets would be returned to Debtor. Between 2022 and 2024, the Trust drew $4.29 million under the Plan Backstop to fund Plan payments.

The PEDT made substantial progress on the payments due under the Plan. Priority tax claims in excess of $15 million were repaid in full and over $400,000 was distributed to secured creditors. Unfortunately, however, the Plan went into default in August 2025—three years into the Plan term. Per the PEDT, the Plan default was "due to a default in the Plan Backstop and loss in value of the estate's other investments, notably its holdings in Aspiration." Shortly before the default, a criminal indictment was filed against Mr. Sanberg alleging he engaged in a scheme to defraud Aspiration's investors. Aspiration filed its own bankruptcy, which was converted to a chapter 7 liquidation.

The Plan does not address the possibility of the failure of the Plan Backstop, and such failure appears to have come as a surprise to all parties to these appeals.

D. Continued Litigation with the Unatins under the Plan

The big contingency at the time the Plan was confirmed was the resolution of Debtor's various litigation matters with the Unatins. Under the terms of the Plan, the Trust is a party to three separate matters with the Unatins: (i) the appeal in the State Court Litigation; (ii) the Derivative Action; and (iii) an action to subordinate the Unatins' claims (the "Subordination Action"). All three actions remain pending at this time, although subsequent orders have substantially narrowed the remaining issues in both the Derivative Action and the Subordination Action. The results of these three actions will have a substantial impact on the distributions under the Plan.

Under section 6.14 of the Plan, Debtor, on behalf of the PEDT, "shall manage and control on behalf of the [Trust]" the State Court Litigation and the Derivative Action. The law firm representing the Trust in both matters is Hueston Hennigan. Debtor does not manage or control the Subordination Action, "which shall be managed and controlled by the [PEDT]." *Id.* The law firm primarily representing the PEDT in the Subordination Action, and all other matters including these appeals, is Hogan Lovells US LLP. Hueston Hennigan also assists the PEDT in the Subordination Action.

The Subordination Action was filed by both the Chapter 11 Trustee and the Committee prior to confirmation of the Plan. The PEDT took over as the plaintiff on the effective date of the Plan. The basis for the Subordination Action is the Unatins' active participation in a fraudulent tax scheme involving the Company. Specifically, Dean Unatin wired funds from the Company to the Hong Kong Accounts for the benefit of the Unatins and Debtor. This tax scheme resulted in the substantial priority tax debts addressed by the Plan. In May 2023, the bankruptcy court entered an order partially granting a motion by the PEDT for summary judgment (the "Subordination Order"). The Subordination Order equitably subordinated the Unatins' claims to the claims of unsecured creditors in the amount of $4,558,732.48 comprised of: (i) $2,847,898.69 in penalties and interest with respect to taxes years 2013 through 2015; and (ii) $1,710,833.79 in professional fees related to the OVDP program through which the claims were compromised.

E. Motions by the Unatins

The Motions were filed by the Unatins roughly three months after the Plan default.

The Borrowing Motion asserted the Plan and Trust Agreement do not allow the PEDT to borrow from any source other than the Plan Backstop unless such loans are similarly subordinated to creditors. Four "loans" taken by the PEDT (collectively, the "Loans") were challenged: (i) a loan for roughly $3 million secured by the cryptocurrency assets taken to fund the first distribution to unsecured creditors in January 2025; (ii) the agreement by unsecured creditors other than the Unatins to extend loans in the amounts of their first distributions (roughly $1.2 million total) at the favorable interest rate of 5%; (iii) the voluntary deferral by Debtor of his $30,000 monthly stipend for a lengthy period (ultimately totaling approximately $828,000 but partially paid shortly before the Plan default); and (iv) the payment by Debtor's mother of roughly $1.5 million in legal expenses owing by the Trust (roughly $125,000 partially repaid shortly before the Plan default). The Borrowing Motion requested an order (i) confirming the Loans violated the Plan and Trust Agreement, (ii) establishing procedures to pursue the third parties providing the Loans, and (iii) requiring the disgorgement of all payments received by professionals through the Loans. The PEDT responded that the Loans were taken in the exercise of the PEDT's sound business discretion, for the benefit of the Trust, and to facilitate liquidity while a potential settlement was pursued with the Unatins.

The Litigation Motion asserted the failure of the Plan Backstop created an "incurable default" under the Plan with two separate consequences. First, the Unatins asserted section 4.2 of the Trust Agreement requires Debtor to be removed from the management and control of the Derivative Action and State Court Litigation. Second, the Unatins argued the default creates an "irreconcilable conflict" between the PEDT and Debtor as to the Hong Kong Accounts, which requires the removal of Hueston Hennigan as the PEDT's counsel because Hueston Hennigan previously argued in the State Court Litigation that Debtor "does not possess or control those accounts." The Unatins asserted standing to raise the alleged conflict as beneficiaries of the Trust. The Litigation Motion requested an order requiring the PEDT to "exercise sole control over the Derivative Action and State Court Litigation" and also employ new counsel.

The Liquidation Motion was related to and cross-referenced in the Litigation Motion. The Liquidation Motion argued the PEDT is required, also under section 4.2 of the Trust Agreement, to promptly liquidate the Trust's assets and distribute the "full remaining value" of such assets to prepetition creditors. The Unatins asserted this provision prohibits any further payments to professionals or any further stipend to Debtor. The

Liquidation Motion requested an order (i) requiring the immediate liquidation of all cryptocurrency assets; (ii) compelling Debtor to turnover the Hong Kong Accounts; (iii) requiring the prompt liquidation of other remaining Trust assets; and (iv) prohibiting the use of Trust assets for any purpose other than distributions to prepetition creditors.

Taken together, the Motions thus sought to prevent the PEDT from paying any professional (including presumably the PEDT himself) or the stipend owing to Debtor from Trust assets, while also requiring both the PEDT and Debtor to recover and liquidate such assets primarily for the Unatins' benefit. At the same time, the Unatins wanted actions brought against the third parties providing the Loans (which would include other unsecured creditors, Debtor, and Debtor's mother) and the PEDT's professionals who received payments through the Loans. Finally, even if the PEDT could find an independent funding source not tied in any way to Trust assets, the Unatins wanted to prevent the PEDT from continuing to use the Hueston Hennigan firm in any capacity.

The bankruptcy court denied the bulk of the Motions, finding the PEDT's actions were within his discretion under the confirmed Plan and the failure of the Plan Backstop did not alter that discretion. The Liquidation Motion was granted in part, as to the Hong Kong Accounts, on the basis that the 18 months afforded by the Plan to bring back those accounts had passed. The PEDT was directed to take actions to promptly pursue the Hong Kong Accounts, and the Unatins were directed to cooperate in good faith with such efforts. The Unatins timely appealed each of the orders on the Motions, also contesting the partial relief granted as to the Liquidation Motion.

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2). Two issues are raised by the parties potentially impacting our jurisdiction on appeal—both arising from the Unatins' arguments, as part of the Litigation Motion, to try to prevent the Hueston Hennigan firm from continuing to represent the PEDT. We must consider these jurisdictional challenges before considering the merits.

The first issue is the Unatins' standing to raise such a challenge. The Unatins argued they had standing to raise the perceived conflict as a party in interest in the bankruptcy case, citing *In re Worldcom, Inc.*, 311 B.R. 151, 167 (Bankr. S.D.N.Y. 2004). The Unatins further argued they had standing to require the PEDT to employ "independent, unconflicted legal counsel" as a beneficiary of the Trust. The PEDT disputed both points arguing: (i) the Unatins are not an aggrieved party with standing to appeal this issue; (ii) the PEDT's employment of professionals is not subject to the same approval by the bankruptcy court that may have been required pre-confirmation; and (iii) the Estate is the only named beneficiary of the Trust. The bankruptcy court's comments on the issue were limited, with the court noting on the record that the choice of counsel was up to the PEDT and not the Unatins.

The second and related jurisdictional issue is the PEDT's argument on appeal that an order denying a motion to disqualify counsel in a bankruptcy case is interlocutory. *SS Farms, LLC v. Sharp* (*In re SK Foods, L.P.*, 676 F.3d 798, 802 (9th Cir. 2012) ("Where the underlying bankruptcy court order involves the appointment or disqualification of counsel, courts have uniformly found that such orders are interlocutory even in the more flexible bankruptcy context.") (quoting *Sec. Pac. Bank. Wash. v. Steinberg (In re Westwood Shake & Shingle, Inc.)*, 971 F.2d 387, 389 (9th Cir. 1992)). If the order was interlocutory, the Unatins would have to seek leave from the Panel to appeal the Litigation Motion under Rule 8004. *See Giesbrecht v. Fitzgerald (In re Giesbrecht)*, 429 B.R. 682, 687 (9th Cir. BAP 2010) (citing 28 U.S.C. § 158(a)(3)). Since the Unatins did not seek such leave, the PEDT argues the Panel lacks appellate jurisdiction to hear the appeal as to the Litigation Motion. *See Belli v. Temkin (In re Belli)*, 268 B.R. 851, 854 (9th Cir. BAP 2001). The Unatins do not address this argument in their reply.

Both challenges are resolved, however, if the Litigation Motion is not viewed as a motion to disqualify Hueston Hennigan but rather as a motion to enforce the terms of the Plan. The word "disqualify" is never used in the Litigation Motion, and the relief requested is far broader than just the Hueston Hennigan firm. The alleged need to remove Hueston Hennigan was entwined with the perceived conflict in Debtor's continued involvement and the Unatins' continued objection thereto. The Litigation Motion sought to rewrite the Plan's terms regarding the management and control of the Derivative Action and State Court Litigation for the litigation advantage of the Unatins. The pretext for these demanded changes was the Plan default. There is no dispute between the parties that the Unatins have standing to bring a motion to enforce the Plan or that the appeal of an order on such a motion is not interlocutory. The bankruptcy court simply found the Plan does not provide the relief sought upon such a default. We have jurisdiction under 28 U.S.C. § 158.

ISSUES

1. Did the bankruptcy court err in its ruling partially granting the Liquidation Motion that directed the PEDT to begin pursuing the Hong Kong Accounts as expeditiously as possible and the Unatins to cooperate in good faith with such efforts?

2. Did the bankruptcy court otherwise err in denying the balance of the Motions on the basis that the disputed actions were taken by the PEDT in the exercise of his discretion and business judgment under the Plan?

STANDARD OF REVIEW

There is a dispute between the parties as to the appropriate standard of review. The Unatins assert the orders on the Motions interpret the terms of the Plan and Trust Agreement. A plan is generally treated as a contract with the interpretation of contracts being a legal question reviewed de novo unless extrinsic evidence was introduced on issues such as intent. *Dolven v. Bartelson (In re Bartleson)*, 253 B.R. 75, 78-79 (9th Cir. BAP 2000).

The law of the state in which the plan was confirmed governs its interpretation. *Id.* at 84. Under California law, a contract must be interpreted to give effect to the mutual intention of the parties as it existed at the time of contracting. Cal. Civ. Code § 1636. The intention of the parties is to be ascertained from the language of the contract; the language is to govern the contract's interpretation, if the language is clear and explicit and does not involve an absurdity. Cal. Civ. Code § 1638.

The PEDT argues the appealed orders require the interpretation of the bankruptcy court's "confirmation order and the plan it confirmed." The bankruptcy court's interpretation of its own confirmation order is entitled to substantial deference and reviewed under an abuse of discretion standard. *See Ground Improvement Techs., Inc. v. Plan Comm.* (*In re Washington Grp. Int'l, Inc.)*, 460 B.R. 280, 283 n.1 (D. Nev. 2011), *aff'd*, 530 F. App'x 650 (9th Cir. 2013); *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151 n.4 (2009) (noting that "[n]umerous Courts of Appeals have held that a bankruptcy court's interpretation of its own confirmation order is entitled to substantial deference" and collecting cases).

We find that the appropriate standard of review as to the orders on the Motions is de novo. A review of the transcript from the hearing on the Motions reflects the confirmation order was never referenced. Nor was any provision in the confirmation order raised in the parties' briefs, either before the bankruptcy court or on appeal. Instead, all citations by the parties and the bankruptcy court were to the terms of either the Plan or the

Trust Agreement. Since the controlling language being interpreted was the Plan and not the confirmation order, *Bartleson* and a de novo standard of review apply. When we review a matter de novo, we give no deference to the bankruptcy court's decision. *Francis v. Wallace (In re Francis)*, 505 B.R. 914, 917 (9th Cir. BAP 2014).

DISCUSSION

A. The bankruptcy court did not err in partially granting the Liquidation Motion as to the Hong Kong Accounts.

The Unatins argue on appeal that the bankruptcy court did not go far enough in the relief granted as to the Hong Kong Accounts. Specifically, the Unatins want remand with instructions to enter an order compelling Debtor to turnover the Hong Kong Accounts. Such an order would foist all responsibility, and thereby also costs, on Debtor. However, the relief actually entered by the bankruptcy court shows the issues related to the Hong Kong Accounts are far more complicated than the Unatins represent.[3]

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[3] The order provides, in relevant part, as follows:

> [The PEDT] is hereby directed to begin pursuing the approximately $13 million in Hong Kong funds as expeditiously as possible. The Unatins are directed to cooperate in good faith with the [PEDT's] efforts to recover the Hong Kong funds.
>
> . . .
>
> The Court is not deciding the issue of whether the [PEDT] is entitled to reimbursement from the Unatins' portion of any recovered funds for reasonable fees and costs, including seeking to have reasonable recovery costs paid from recovered proceeds prior to any allocation or distribution. The parties' respective arguments, claims and defenses regarding reimbursement are preserved.

In both its tentative ruling and on the record at the hearing on the Motions, the bankruptcy court noted that section 5.2 of the Plan provides that, "Within eighteen (18) months after the Effective Date, the Estate shall bring back the Hong Kong Funds." Hong Kong Funds is defined by the Plan as "the Estate's 50% share of the funds in the Hong Kong Accounts, provided that if [the] Estate is found to own more than 50% of the Company by a Final Order, or through agreement of the relevant parties, the Estate's share shall be such higher percentage as the Estate is found to own."[4] Hong Kong Accounts is, in turn, defined as "collectively, the bank accounts located in Hong Kong, including: (a) bank account at HSBC in the name of Wei Lin Fung Limited; (b) bank account at HSBC in the name of Xian Shing Limited; and (c) bank account at Hang Seng Bank (together with HSBC, the "Banks") in the name of Tall Crest Trading Limited."

The language of section 5.2 of the Plan directs the Trust to "bring back" the portion of the Hong Kong Accounts owned by the Trust, which the Plan defines as the Hong Kong Funds. The bankruptcy court interpreted this provision to be an express directive for the PEDT to pursue those funds. The bankruptcy court further noted on the record that section 5.2 of the Plan "does not say that the PEDT will do this so long as the Unatins pay half of the expenses or up to $250,000 in expenses."

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[4] Under the terms of the Plan, a Final Order requires a final resolution "by the highest court to which the order or judgment was appealed."

The Plan's definition of Hong Kong Funds acknowledges that the Trust's share of the Hong Kong Accounts is not yet fixed, with that issue being the subject of the appeal of the State Court Litigation. In the meantime, there is a constructive trust, for the benefit of the Unatins, for the portion not owned by the Trust. As noted in the definition of Hong Kong Accounts, the accounts at issue are in the names of three different entities, not Debtor. Further, as the bankruptcy court has found in the Subordination Action, the Unatins are not without liability as to the Hong Kong Accounts. Compelling Debtor to turnover the Hong Kong Accounts would ignore these intricacies, which are expressly addressed in the Plan.

Considering these provisions together, the bankruptcy court did not err in its interpretation of the Plan's provisions as to the Hong Kong Accounts and the partial relief granted as to such accounts in its order on the Liquidation Motion.

B. The bankruptcy court did not err in otherwise denying the Motions.

The bankruptcy court denied the balance of the relief sought in the Motions on the basis that each of the disputed actions taken by the PEDT was within the parameters of the powers delegated to the PEDT under the Plan and Trust Agreement.

1. Borrowing Motion

With respect to the Borrowing Motion, the relevant provisions of the Plan and Trust Agreement cited by the bankruptcy court were as follows:

- "[A]ll Cash required for payments to be made hereunder shall be funded by the Estate's Cash balances, future income and earnings, borrowings (most notably the Plan Backstop) . . ." Plan, § 5.2.

- The powers of the PEDT include "administering, *monetizing*, liquidating, selling or abandoning the Assets or any portion thereof." Trust Agreement, § 3.1(C) (emphasis added).

- All payments "shall be made only from the Assets or proceeds from Causes of Action and in accordance with the Plan or from proceeds of borrowing under the Plan Backstop *or any other source of funding for the Trust/Estate*." Trust Agreement, § 4.4 (emphasis added).

- The PEDT "may use, acquire, and dispose of property owned by the Estate or owned by the Reorganized Debtor and may compromise or settle any Claims without supervision or approval by the Bankruptcy Court and free of any restrictions of the Bankruptcy Code or Bankruptcy Rules . . . ." Plan, § 10.1.

- "Any good faith determination by the Trustee as to what actions are in the best interests of the Trust shall be determinative." Trust Agreement, § 3.12.

The bankruptcy court interpreted these provisions as not limiting borrowing by the Trust to the Plan Backstop or subordinated borrowings. Therefore, no disgorgement of professional fees paid or actions against the parties providing the Loans was warranted.

The Unatins' argument that the Trust is limited to borrowing from either the Plan Backstop or another subordinating borrowing relies on the Unatins' interpretation of a portion of section 5.2 of the Plan that provides:

> Within eighteen (18) months after the Effective Date, the Estate shall bring back the Hong Kong Funds. Should the Estate be unsuccessful in bringing back the Hong Kong Funds within 18 months after the Effective Date, the Plan Backstop shall automatically be increased by $6.5 million to account for the Hong Kong Funds.
>
> To the extent that Claims exceed expected amounts and additional funding is required, the Estate shall have the right to increase the amount of the backstop or obtain a further backstop, provided that such backstop shall not be repaid during the term of the Plan.

However, as noted by the bankruptcy court, this provision only addresses one of the many funding options left to the business discretion of the PEDT by the other provisions noted above. Reading the final sentence of this portion of section 5.2 of the Plan in isolation, as it was selectively quoted and argued by the Unatins, would be inconsistent with and negate the other noted provisions. The bankruptcy court did not, therefore, err in denying the relief sought by the Borrowing Motion.

2. Litigation Motion

The Litigation Motion asked the bankruptcy court to enter an order "requiring the PEDT to exercise sole control over the Derivative Action and State Court Litigation and requiring the PEDT to retain legal counsel without the appearance of an irreconcilable conflict."

a. Control of Litigation

The bankruptcy court correctly noted there are no provisions in either the Plan or Trust Agreement that alter how pending litigation is to be managed or who is to manage the litigation in the event of a default under the Plan. The Litigation Motion cites section 4.2 of the Trust Agreement, which provides:

> Notwithstanding any other provision herein . . . [i]n the event of a Default under the Plan, the [PEDT] shall have the sole discretion to determine how best to maximize the value of the Assets with no direction and no consent needed from the Debtor.

The Unatins argue this provision removes Debtor from any involvement in the Derivative Action or the State Court Litigation upon a Plan default. This interpretation makes sense, per the Unatins, because "allowing . . . Debtor, who has no residual interest in the Estate at this point, to use Estate assets to advance his self-described 'nuclear war' on the Unatins serves no legitimate Trust purpose." We, like the bankruptcy court, disagree.

Section 4.2 of the Trust Agreement is not a provision discussing the management and control of the estate's litigation, but instead "Distributions After Default Under Plan." For that reason, the quoted language discusses "Assets." Even if the State Court Litigation, Derivative Litigation and Subordination Litigation are viewed as "Assets," section 4.2 of the Trust Agreement is not inconsistent with the provisions of the Plan and Trust Agreement that do address the management and control of the estate's litigation.[5] The Unatins may not like that Debtor manages and

[5] Section 3.4 of the Trust Agreement covers "Litigation" and largely mirrors the portion of section 6.14 of the Plan which gives Debtor control over certain litigation

controls the Derivative Action and the State Court Litigation on behalf of the PEDT, but that is the arrangement expressly provided under the Plan and Trust Agreement. *See* Plan, § 6.14 and Trust Agreement, §§ 3.4 and 3.15 (also cited by the bankruptcy court in support of its decision to deny the Liquidation Motion). The bankruptcy court interpreted section 4.2 of the Trust Agreement to mean, at most, that the PEDT could, if he so desired in the exercise of his sole discretion, decide to override decisions made by Debtor with respect to the litigation. The PEDT did not do so and, therefore, the issue of what may happen if he does was not properly before the bankruptcy court—despite the Unatins' efforts to force the issue.

b. Choice of Counsel

The Unatins' objection to the PEDT's continued employment of Hueston Hennigan is related to Debtor's control of the Derivative Action and State Court Litigation. The Litigation Motion noted Debtor directs the actions taken by Hueston Henningan in those matters and a disagreement might arise between the PEDT and Debtor as to such matters. This argument for the removal of Hueston Hennigan rests on a perceived conflict arising from the firm's prior representation of Debtor. Beyond a potential disagreement as to the management of the litigation, the Litigation Motion argued there is now an "irreconcilable conflict" between the PEDT and Debtor as to the Hong Kong Accounts. Specifically, the

matters.

Unatins note that Hueston Hennigan previously asserted on behalf of Debtor in the State Court Litigation that Debtor "does not possess or control those accounts." The Unatins insist there is overwhelming evidence to the contrary.

However, this alleged conflict is, like the Unatins' turnover arguments discussed above, a construction that ignores the intricacies of the Hong Kong Accounts addressed by the Plan and Trust Agreement. There is nothing inconsistent in the Plan or Trust Agreement with the argument, allegedly made by Hueston Hennigan on behalf of Debtor, that Debtor does not control the Hong Kong Accounts. The Plan contemplated that additional steps would be required to "bring back" the Hong Kong Funds. Neither the PEDT nor Debtor opposed the partial relief granted by the bankruptcy court and, per the PEDT's arguments on appeal, efforts have already been made to "bring back" the Hong Kong Accounts. As to PEDT's use of the Hueston Hennigan firm, (i) Debtor waived any potential conflict for the benefit of the Estate, and (ii) the PEDT has wide discretion under the Plan in the employment of professionals, expressly including professionals "who previously were employed by the Chapter 11 Trustee, the Committee, and/or the Debtor." *See* Plan, § 3.7. The Plan does not require approval of such employment by the bankruptcy court, with decisions left to the sole discretion of the PEDT. *See* Plan, § 3.13. There is, therefore, no basis for a creditor to challenge the continued employment of a professional under the Plan.

For each of these reasons, the bankruptcy court did not err in denying the relief requested by the Litigation Motion.

3. Liquidation Motion

As to the Liquidation Motion, the bankruptcy court found no provision in either the Plan or Trust Agreement requiring the PEDT to immediately liquidate all Trust assets in the event of a Plan default. The only temporal limitation provided in the Plan regarding the administration of Trust assets is the 18 months related to the Hong Kong Accounts discussed above. Otherwise, the Plan and Trust Agreement leave the administration of Trust assets and the Plan to the PEDT's discretion and business judgment. The bankruptcy court found the PEDT adequately explained his actions, which were also supported by the post-confirmation status reports periodically filed by the PEDT.

The Liquidation Motion relies on section 4.2 of the Trust Agreement, which provides in pertinent part:

> [I]n the event of an uncured Default, the [PEDT] shall distribute to Holders of Allowed Claims on behalf of the Estate their Pro Rata share of the full remaining value of the Assets from the Trust in accordance with the priorities of their respective Classes as otherwise determined in accordance with the Plan as promptly as is reasonably practicable consistent with seeking to maximize the value of the Assets, and, subject to Section 2.3, no Assets of the Trust shall be transferred to the Estate for the purpose of the Estate transferring such Assets to the Debtor unless all Allowed Claims have been paid in full.

The Unatins argue this provision must be read to prohibit the use of Trust assets for any purpose other than distributions to prepetition creditors after a Plan default. This would mean no professionals could be paid and no further stipend provided to Debtor.

Again, we, like the bankruptcy court, disagree. Selectively emphasizing the "full remaining value of the Assets" to require immediate liquidation would again be inconsistent with and negate other provisions of the Plan and Trust Agreement. For example, section 4.2 of the Trust Agreement provides in the very next sentence, "In the event of a Default under the Plan, the [PEDT] shall have the sole discretion to determine how best to maximize the value of the Assets with no direction and no consent needed from the Debtor." Section 3.7 of the Trust Agreement permits the PEDT to employ and pay professionals. Both the Plan and Trust Agreement provide Debtor will receive a monthly living expense stipend of $30,000. Plan, § 7.4; Trust Agreement, § 7.8. Section 2.3 of the Trust Agreement, which is referenced in the portion of section 4.2 quoted above, expressly provides for the payment of fees and expenses incurred by the PEDT or professionals from Trust assets. For each of these reasons, the Unatins' selective interpretation of section 4.2 of the Trust Agreement is not supported. The bankruptcy court did not, therefore, err in denying the relief requested by the Liquidation Motion.

CONCLUSION

Based on the foregoing, we AFFIRM.