UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	)	Chapter 11
	)	
ULTRA PETROLEUM CORP., *et al.*	)	Case No. 16-32202 (MI)
	)	(Jointly Administered)
	)	
Debtors.	)	
	)	

JOINT RESPONSE OF OPCO NOTEHOLDERS TO DEBTORS' CLAIMS OBJECTION, AND REPLY TO ARGUMENTS CONCERNING POST-PETITION INTEREST AND FEES

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ATTORNEYS FOR THE OPCO NOTEHOLDERS

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Forty-two holders (the "OpCo Noteholders")[1] of senior unsecured notes issued by Debtor Ultra Resources, Inc. ("OpCo") respond to the *Debtors' Objection to Asserted Make-Whole Entitlement, Default Rate Postpetition Interest, and Other Related Fees and Expenses Asserted Under the OpCo Funded Debt Claims* [Dkt. No. 1214] and the *Memorandum in Support of Debtors' Objection to Asserted Make-Whole Entitlement, Default Rate Post-Petition Interest, and Other Related Fees and Expenses Asserted Under the OpCo Funded Debt Claims* [Dkt. No. 1215] (the "Claims Objection").[2]

SUMMARY OF RESPONSE

Make-whole disputes typically raise two issues: (i) whether the creditor's claim is enforceable under governing state law, and, if so, (ii) whether it nevertheless should be disallowed on the theory that it masquerades as a claim for unmatured interest. This case presents only the first question. OpCo, the principal obligor, is solvent by several billion dollars, and has now confirmed a plan of reorganization in which every OpCo Noteholder is unimpaired. Thus each OpCo Noteholder is certainly entitled to all of the contract rights it would have enjoyed outside of bankruptcy, including the right to be paid the Make-Whole Amount.

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[1] The OpCo Noteholders are listed on **Schedules 1-3**, attached hereto. This response is filed solely on behalf of the OpCo Noteholders. The Debtors have acknowledged, however, that the Court's judgment on the Claims Objection shall apply to all OpCo Funded Debt Claims (as defined in the Plan), even if such claims are not identified in the Claims Objection, any responses filed thereto, or otherwise. Although of no relevance to this dispute, the Debtors emphasize that "[a] new group of holders purchased the OpCo Funded Debt around the Petition Date, at a material discount to par." Claims Objection at 7. Perhaps this is true of the ultimate holders of the equity value in OpCo, but it is not true of the great majority of the OpCo Noteholders, which are insurance companies that purchased the Senior Notes at par when they were originally issued.

[2] This brief also responds to the *Joinder of the Ad Hoc Committee of HoldCo Noteholders to Debtors' Objection to Asserted Make-Whole Entitlement, Default Rate Postpetition Interest, and Other Related Fees and Expenses Asserted Under the OpCo Funded Debt Claims* [Dkt. No. 1216] and the *Objection of the Ad Hoc Equity Committee to the OpCo Funded Debt Claims and Joinder to the Debtors' Objection* [Dkt. No. 1217].

Section I of the argument addresses the only challenge available to the Debtors: whether New York law would enforce the claim for the Make-Whole Amount. The answer is so settled under New York law that the Debtors make only a half-hearted effort to contest it. Two decades of case law establish that make-whole provisions, worded precisely as the one at issue here, are enforceable liquidated-damages clauses under the law of New York. This conclusion should end the make-whole dispute in this case. When a debtor is solvent, and confirms a plan treating a class of its creditors as unimpaired, courts are obliged to give effect to the contract rights of those creditors. Section 1124 of the Bankruptcy Code, its legislative history, and relevant case law all teach that courts should not disturb the solvent debtor's contracts with its creditors in order to confer a windfall on equity holders.

Section II of the argument demonstrates that even if OpCo were *in*solvent, and Class 4 had been impaired by a confirmed plan of reorganization, the claims for the Make-Whole Amount could not be disallowed under section 502(b)(2) of the Bankruptcy Code. Many courts have held that claims arising from substantially identical language represent the liquidation of real damage sustained by term lenders. Nor do these claims "double count," as the Debtors suggest. The make-whole portion of each claim compensates the OpCo Noteholders for actual damage suffered as of the Petition Date. Interest to be paid on that claim is a function of two things: OpCo's failure to pay the claim on the Petition Date, when it was due, and OpCo's status as a corporate billionaire.

The OpCo Noteholders believe that the questions of post-petition interest and legal fees are plan confirmation issues—the necessary consequence of a solvent debtor's unimpaired designation of Class 4 in a confirmed plan. In their *Objection of OpCo Noteholders to Confirmation of Chapter 11 Plan* [Dkt. No. 1269] (the "Confirmation Objection") filed on

March 6, 2017, the arguments of which were expressly preserved at the confirmation hearing, the OpCo Noteholders set out their arguments on this point in detail. Treating the dispute as one of claims allowance, the Debtors have included in their confirmation brief arguments contesting the payment of post-petition interest and legal fees. The OpCo Noteholders refer generally to and incorporate their Confirmation Objection, which addresses the subject, but add, in Section III of the argument in this brief, a reply to the points raised by the Debtors in the Claims Objection and their brief in support of confirmation. Finally, in Section IV, the OpCo Noteholders argue that they are entitled to attorneys' fees and costs under established precedent.

RELEVANT BACKGROUND

Key Provisions of the Senior Notes

1. The instruments involved in this dispute are fixed-rate, term instruments. Unlike lenders that lend on a floating rate basis, fixed-rate lenders commit their assets to fixed rates of return for a contractual term. They structure their products (for example, annuities) based on these returns. If loans are repaid early and at a time when they cannot be re-invested for the same or a greater yield, the lenders, who remain committed on their annuity and other contracts, suffer a loss. Make-whole provisions are designed to compensate this loss.

2. Prior to the Petition Date, OpCo issued eleven series of notes (the "Senior Notes") under a Master Note Purchase Agreement (as amended and supplemented, the "MNPA").[3] OpCo's obligations under the MNPA and the Senior Notes are guaranteed by Debtors Ultra Petroleum Corp. ("HoldCo") and UP Energy Corporation (together, the "OpCo Guarantors").

[3] The MNPA was dated as of March 6, 2008, and amended and supplemented by the (i) First Supplement to Master Note Purchase Agreement, dated as of March 5, 2009; (ii) Second Supplement to Master Note Purchase Agreement, dated as of January 28, 2010; (iii) Third Supplement to Master Note Purchase Agreement, dated as of October 12, 2010; and (iv) Waiver and Amendment to Master Note Purchase Agreement, Notes and Supplements, dated as of March 1, 2016 (the "Forbearance").

3. The relevant terms of the MNPA are unambiguous and their interpretation is not in dispute. All parties agree that (a) OpCo's chapter 11 petition constituted an Event of Default under the MNPA, *see* Claims Objection at 7; (b) upon that default, all outstanding amounts under the Senior Notes were automatically accelerated and became immediately due and payable, *see id.* at 4-5; and (c) the Make-Whole Amount was among the amounts that became immediately due and payable on acceleration, *see id.* The MNPA and the Senior Notes also provide for the accrual and payment of interest at the "Default Rate" on any past due amounts (including the Make-Whole Amount). *See* MNPA § 12.1; *id.*, Ex. 1.1(a).

4. Section 11(g)(ii) of the MNPA provides that an Event of Default occurs when OpCo "files . . . a petition for relief or reorganization or arrangement or any other petition in bankruptcy, for liquidation or to take advantage of any bankruptcy, insolvency, reorganization, moratorium or other similar law of any jurisdiction." *Id.* §11(g)(ii). If an Event of Default under section 11(g)(ii) occurs, "all the [Senior] Notes then outstanding shall automatically become immediately due and payable." *Id.* § 12.1(a).

5. Upon the Senior Notes becoming due and payable (whether automatically or by the affirmative act of holders of the Senior Notes):

> the entire unpaid principal amount of such [Senior] Notes, plus (w) all accrued and unpaid interest thereon (including, but not limited to, interest accrued thereon at the Default Rate), [and] (x) any applicable Make-Whole Amount determined in respect of such principal amount (to the full extent permitted by applicable law) . . . shall all be immediately due and payable, in each and every case without presentment, demand, protest or further notice.

MNPA § 12.1.

6. The "applicable" Make-Whole Amount is calculated through a formula set out in section 8.7 of the MNPA. A Make-Whole Amount is payable if, on the date of acceleration (which the agreement refers to as the "Settlement Date"), the principal amount of a Senior Note

that is prepaid or has become immediately due and payable on that date (which the MNPA refers to as the "Called Principal") is less than the "Discounted Value" of the principal and interest payments that were scheduled to come due after that acceleration date (which the MNPA refers to as the "Remaining Scheduled Payments"). *Id.* § 8.7.

7. The Discounted Value is calculated by discounting the Remaining Scheduled Payments to their net present value as of the Settlement Date, using a discount factor equal to the applicable "Reinvestment Yield." *Id.* The Reinvestment Yield is equal to 0.50% (*i.e.*, fifty basis points) over the yield reported two business days before the Settlement Date "for the most recently issued actively traded on-the-run U.S. Treasury securities having a maturity" equal to the remaining tenor of the relevant Senior Note as of the date it was accelerated. *Id.*

8. The effect of this formula is to *increase* the Make-Whole Amount as interest rates fall,[4] to *reduce* it as they rise, and to render no Make-Whole Amount payable if, as of the date of acceleration, rates for U.S. Treasury securities of comparable maturity (and certain comparable benchmarks identified in the formula), have risen to within fifty basis points of the contract rates. *Id.* § 8.7 (definition of "Reinvestment Yield").[5] The math in such cases will render the difference between the Called Principal and the present value of the scheduled payments zero or a negative number, resulting in no payment being due. Thus the make-whole formula is hardly "all future interest payments, subject to a modest amount of discounting." Claims Objection at 4.

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[4] As market interest rates *decline*, the term lender sustains an increased injury when it attempts to re-lend the Called Principal, as it will be unable to find a loan of comparable risk and return.

[5] As market rates *rise*, the term lender's injury (and with it the Make-Whole Amount generated by the formula) will diminish, as the prospects of re-lending the Called Principal into a more favorable market improve. A point may ultimately be reached where the term lender sustains no damage by prepayment. The contract parties approximated this point to be when the relevant U.S. Treasury rate plus fifty basis points equaled the contract rate. If rates are at or above this level at the time of breach, the formula generates no Make-Whole Amount.

Rather, the formula is the parties' effort, at the time of contracting, to approximate a liquidated sum for future damage to a term lender when damage occurs, and to generate no payable amount where it does not.

9. The make-whole formula used in section 8.7 of the MNPA is in common use and based on the American College of Investment Counsel Model Form. *See* American College of Investment Counsel, *NPA Model Form No. 2*, http://aciclaw.org/model-form/npa-model-form-no-2 (last accessed Mar. 22, 2017).

10. Each Senior Note incorporates by reference the Event of Default, Acceleration, and the make-whole provision of the MNPA, stating that "[i]f an Event of Default occurs and is continuing, the principal of this Note may be declared or otherwise become due and payable in the manner, at the price (including any applicable Make-Whole Amount) and with the effect provided in the [MNPA]." *See* MNPA, Ex. 1.1(a) (form of Senior Note).[6]

11. Each Senior Note also provides that "any overdue payment of interest, any overdue payment (including any overdue prepayment) of principal and any overdue payment of any Make-Whole Amount" shall accrue interest at the "Default Rate." *Id*. § 12.1.

12. The MNPA also provides that OpCo "will pay to the holder of each [Senior Note] on demand such further amount as shall be sufficient to cover all costs and expenses of such holder incurred in any enforcement or collection [following a default], including reasonable attorneys' fees, expenses and disbursements." *Id.* at § 12.4. The Debtors have agreed that (i) on

[6] Each of the Senior Notes contains a provision substantially similar to that set forth in Ex. 1.1(a) to the MNPA, which requires payment of default interest on any overdue payment of any Make-Whole Amount. The "Default Rate" of interest is "the greater of (i) 2% per annum above the rate of interest stated in clause (a) of the first paragraph of the [Senior Notes] or (ii) 2% over the rate of interest publicly announced by JPMorgan Chase Bank, N.A. as its "base" or "prime" rate. *See* MNPA, Sched. B at 4 (definition of "Default Rate"). Interest rates vary by note. *See Disclosure Statement for Debtors' Second Amended Joint Chapter 11 Plan of Reorganization* [Dkt. No. 1106] (the "Disclosure Statement") at 33 (listing various rates).

the Effective Date they will pay all documented fees and expenses incurred through the Effective Date by Morgan Lewis, as counsel to the group of OpCo Noteholders and (ii) after the Effective Date, they will pay Morgan Lewis's fees and expenses incurred as counsel to the OpCo Noteholders in accordance with the terms of the MNPA. *See Order Confirming the Debtors' Second Amended Joint Chapter 11 Plan of Reorganization* [Dkt. No. 1324] (the "Confirmation Order") ¶ 167; *Stipulation with OpCo Noteholder Group Regarding Reserve for Disputed OpCo Funded Debt Claims and Resolution of Objection to Confirmation of Debtors' Second Amended Joint Chapter 11 Plan of Reorganization* [Dkt. No. 1314] (the "OpCo Noteholder Group Stipulation") ¶ 15. The Debtors have refused to pay any other fees and expenses incurred by any of the OpCo Noteholders, although those fees are unambiguously payable by the Debtors under the MNPA.

Prepetition Events of Default Under the Senior Notes

13. Prior to April 29, 2016 (the "Petition Date"), OpCo advised the OpCo Noteholders that it anticipated defaults, including its failure to: (i) repay the principal on the Senior Notes due on March 1, 2016; (ii) make the interest payments on each of the Senior Notes due on March 1, 2016; (iii) comply with the consolidated leverage ratio covenant; and (iv) make timely payments or provide adequate assurance of performance to a major contract counterparty. *See* Forbearance, §§ 2.1(a), 2.2.

14. The OpCo Noteholders entered into the Forbearance with OpCo and the OpCo Guarantors, pursuant to which the OpCo Noteholders forbore from exercising remedies for the Events of Default that had occurred or would occur through the earlier of (i) April 30, 2016, or (ii) the date on which a "termination" event occurred. *Id.* § 2.1(b).

15. On the Petition Date, OpCo and the other Debtors commenced these chapter 11 cases. The filing of the petitions constituted Events of Default under section 11(g) of the MNPA

and a "termination" event under the Forbearance. The Senior Notes were automatically accelerated and all unpaid amounts owed in respect of the Senior Notes became immediately due and payable, including unpaid principal, accrued and unpaid interest, and the Make-Whole Amount. *See* MNPA § 12.1.

The Confirmed Plan's Treatment of the OpCo Noteholders

16. The Plan was confirmed on March 14, 2017. It provides that Class 4, in which the OpCo Noteholders are classified, is unimpaired. *See Debtors' Second Amended Joint Chapter 11 Plan of Reorganization* [Dkt. No. 1324-1] ("Plan") § 3.2(d)(4). It also provides that on the Effective Date, the OpCo Noteholders shall receive payment of all outstanding principal of the Senior Notes, *pre*-petition interest at the applicable contract rate and *post*-petition interest at the Federal Judgment Rate in effect as of the Petition Date (0.58% per annum),[7] and a forbearance fee. *Id.* ¶¶ 11, 12. The Debtors assert that the OpCo Noteholders are entitled to no more. *See Debtors' Memorandum of Law in Support of Confirmation of Debtors' Second Amended Joint Chapter 11 Plan of Reorganization* [Dkt. No. 1296] (the "Confirmation Brief") at 52-55; Claims Objection at 26.

17. To the "impaired" and structurally-subordinated HoldCo creditors[8] the Plan grants "all applicable post-petition interest, charges and fees (as determined by the Bankruptcy Court or as otherwise agreed by the relevant parties)" as part of their allowed claims. *See* Plan § 3.2(c)(2). Thus, structurally junior HoldCo creditors' claims include post-petition interest at the

[7] *See* United States District & Bankruptcy Court, Southern District of Texas, Post-Judgment Interest Rates – 2016, http://www.txs.uscourts.gov/page/post-judgment-interest-rates-2016 (last accessed Mar. 22, 2017) (displaying post-judgment interest rate for week ending Apr. 29, 2016).

[8] These HoldCo claims arise from debt issued by a holding company whose only stake in OpCo is its indirect ownership of OpCo's equity.

contract rate, while the structurally senior *un*impaired OpCo Funded Creditors do not.[9] Likewise, the Debtors are paying only some of the unimpaired OpCo Noteholders' fees—*i.e.*, those of Morgan Lewis—while apparently paying *all* fees of the impaired HoldCo creditors.

18. The OpCo Noteholders objected to confirmation of the Plan, noting that failure to pay the Make-Whole Amount and post-petition interest at the relevant default interest rates is impermissible for an unimpaired class in the case of a solvent debtor. *See* Confirmation Objection at 3. On March 13, 2017, the OpCo Noteholders and the Debtors entered into the OpCo Noteholder Group Stipulation, pursuant to which, among other things, they agreed that the quantification of post-petition interest would be addressed in conjunction with the make-whole dispute. The Confirmation Order expressly preserves the OpCo Noteholders' argument that because the OpCo Noteholders are "unimpaired" under the Plan, they are entitled to payment of the Make-Whole Amount and post-petition interest at the applicable contract rate. *See* Confirmation Order ¶ 169.

The Debtors' Solvency

19. OpCo is indeed, as the Debtors have often boasted, "massively solvent." Tr. of Hearing on February 13, 2017 [Dkt No. 1137] at 40:24-25 (testimony by chief financial officer); *see* Confirmation Brief ¶¶ 119-21 (acknowledging Debtors' solvency); *Debtors' Omnibus Reply in Support of, and in Response to Objections to, Approval of the Adequacy of Disclosure Statement for the Debtors' Joint Chapter 11 Plan of Organization* [Dkt. No. 966] at 25 (same); *see also* Motion to Dismiss [Dkt. No. 46] at 5, *Ad Hoc Comm. of Unsecured Creditors of Ultra Res., Inc. v. Ultra Res., Inc. et al.*, No. 16-03287 (Bankr. S.D. Tex. Jan. 30, 2017) (the Debtors

[9] The 2018 and 2024 HoldCo notes carry interest rates of 5.75% and 6.125%, respectively. *See* Disclosure Statement [Dkt. No. 1106-1] at 33.

are solvent "to the tune of billions of dollars").[10]

20. As of the Petition Date, approximately $1.46 billion in principal amount of Senior Notes was outstanding, *see* Disclosure Statement at 33, of which the OpCo Noteholders hold more than $770 million.

ARGUMENT

I. New York Law Does Not Permit OpCo to Avoid Its Unambiguous Obligations By Claiming that the MNPA Is Unreasonable.

A. The Debtors Face a High Burden.

21. Each OpCo Noteholder's proof of claim is *prima facie* evidence of the validity of that claim. *See* 11 U.S.C. § 502(a). These claims are supported by the unambiguous language of the MNPA and the Senior Notes. As the objecting parties, the Debtors bear the burden of rebutting the OpCo Noteholders' claims. *In re Today's Destiny, Inc.*, No. 05-90080, 2008 WL 5479109, at *4 (Bankr. S.D. Tex. 2008) ("[An] objecting party must produce sufficient evidence to overcome [a] proof of claim's *prima facie* validity.").

22. By contrast to the recent "President's Day" dispute, here the Court is asked to enforce unambiguous contract terms—as to whose meaning the parties agree. The Debtors acknowledge that the commencement of their chapter 11 cases constituted an Event of Default under the MNPA. *See* Claims Objection at 4. They also acknowledge that upon the occurrence of this Event of Default, the Senior Notes automatically accelerated and certain amounts, including outstanding principal, interest and the Make-Whole Amount, became immediately due and payable. *See id.* at 4-5. They concede that the MNPA contains an agreed-upon formula for calculating the Make-Whole Amount. *See id.* at 11. In other words, the plain terms of the

[10] While the Court's determination was one of contract construction, it is instructive that it held that the "Settlement Plan Value" is $6 billion. *See Order Determining Settlement Value* [Dkt. No. 1328].

MNPA leave no dispute that the OpCo Noteholders are contractually entitled to the Make-Whole Amount and to Default Interest on that amount for the period during which it has been unpaid.

23. The parties chose New York law to govern their agreement.[11] A bedrock principle of New York law is that courts must enforce the unambiguous terms of a contract as written. *Quadrant Structured Prods. Co., Ltd. v. Vertin*, 16 N.E.3d 1165, 1172 (N.Y. 2014) ("In construing a contract we look to its language, for a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.") (internal quotation marks omitted); *AXA Inv. Managers UK Ltd. v. Endeavor Capital Mgmt. LLC*, 890 F. Supp. 2d 373, 387 (S.D.N.Y. 2012) ("Perhaps the most fundamental principle of contract construction is that when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms[.]") (citation omitted); *Gen. Elec. Capital Corp. v. Eva Armadora, S.A.*, No. 88-cv-6013, 1993 WL 255032, at *2 (S.D.N.Y. June 30, 1993) ("[W]here the terms of a contract are unambiguous, they should be strictly enforced.").

24. This is particularly true where, as here, the contract was negotiated at arms-length by sophisticated parties. *AXA Inv. Managers*, 890 F. Supp. 2d at 388 ("New York courts also give due consideration to whether the parties were sophisticated and represented by counsel, the contract was negotiated at arms-length between parties of equal bargaining power, and . . . that [the provision] was freely contracted to.") (alteration in original) (internal quotation marks omitted); *see In re School Specialty, Inc.*, No. 13-10125 KJC, 2013 WL 1838513, at *3 (Bankr.

[11] *See* MNPA § 22.7. "[C]reditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation, subject to any qualifying or contrary provisions of the Bankruptcy Code." *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 450 (2007) (citation omitted); *United Merchs. & Mfrs. v. Equitable Life Assurance Soc'y of the U.S. (In re United Merchs. & Mfrs.)*, 674 F.2d 134, 141 (2d Cir. 1982) ("Whether a contract clause which nominally prescribes liquidated damages is in fact an unenforceable penalty provision is a question of state law.").

D. Del. Apr. 22, 2013) ("New York courts have cautioned against interfering with parties' agreements.").

25. The Senior Notes were issued in large increments in private placement transactions. *See, e.g.*, MNPA § 5.13. Most of the original purchasers were insurance companies or their financial funds. *See* MNPA, Sched. A. The issuing debtor and its affiliates were financially sophisticated. All parties were represented by counsel. *See id.* § 4.4. Their rights were set out in a 42-page agreement and supplements, 13 pages of negotiated definitions, and a private placement memorandum. *See id.* § 5.3. There is no dispute that the make-whole provision resulted from full and fair negotiation by duly informed, represented, and sophisticated parties. *See Fin. Ctr. Assocs. of E. Meadow, L.P. v. TNE Funding Corp. (In re Fin. Ctr. Assocs. of E. Meadow, L.P.)*, 140 B.R. 829, 837 (Bankr. E.D.N.Y. 1992) (where the "magnitude of the loan transaction and quality and quantity of the loan documents" is great, it "leave[s] little doubt that . . . we have an arms-length transaction between adequately represented sophisticated businessmen").

26. A narrow exception to New York's stringent rules of contract enforcement applies where a court is asked to enforce a liquidated damages provision. *See JMD Holding Corp. v. Cong. Fin. Corp.*, 828 N.E.2d 604, 609 (N.Y. 2005). If the party opposing enforcement proves that the provision is really a penalty, then the provision is unenforceable. *See id.*; Tr. of Hearing at 14:1-4, *In re GMX Res., Inc.*, No. 13-11456-SAH, Dkt. No. 687 (Bankr. W.D. Okla. Aug. 29, 2013) ("*GMX* Tr.") ("Under New York law, however, a make-whole provision or a prepayment obligation is analyzed as a liquidated damages clause, which is generally enforceable unless it is found to constitute an unenforceable penalty.").

27. The Debtors do not dispute that, under New York law, contractual make-whole

and similar yield maintenance provisions are considered liquidated damages provisions. *United Merchs. & Mfrs.*, 674 F.2d at 141-43 (analyzing a provision for a "pre-payment charge" as a liquidated damages provision); *School Specialty*, 2013 WL 1838513, at *8 (Bankr. D. Del. Apr. 22, 2013) ("Under New York law, prepayment provisions . . . are analyzed under the standards applicable to liquidated damages."); *JMD Holding Corp.*, 828 N.E.2d at 609 (analyzing "early termination" fee under liquidated damages standards); *GMX* Tr. at 14:1-3 ("Under New York law . . . a make-whole provision or a prepayment obligation is analyzed as a liquidated damages clause[.]"). Make-whole premiums as liquidated damages arise under the New York common law rule of "perfect tender," the rationale of which is that the lender has the absolute right to receive the bargained-for income stream over the life of the loan. *See, e.g., Wilmington Sav. Soc'y FSB v. Cash Am. Int'l, Inc.*, No. 15-cv-5027, 2016 WL 5092594, at *5 (S.D.N.Y. Sep. 19, 2016) (citing cases). Here, the parties agreed that the OpCo Noteholder "has the right to maintain its investment in the Notes free from repayment by [OpCo] . . . [and the] Make-Whole Amount . . . is intended to provide compensation for the deprivation of such right under such circumstances." MNPA § 12.1. The parties understood that each OpCo Noteholder might be injured by the requirement, at the time of loss, that its capital be put back to work through the balance of the term at potentially lower rates of return.

28. As the parties who challenge enforcement of the liquidated damages clause, the Debtors bear the burden to prove that it is a penalty. *JMD Holding Corp.*, 828 N.E.2d at 609 ("The burden is on the party seeking to avoid liquidated damages . . . to show that the stated liquidated damages are, in fact, a penalty."); *Wechsler v. Hunt Health Sys., Ltd.*, 330 F. Supp. 2d 383, 413 (S.D.N.Y. 2004) (same).

29. The burden is significant. The Debtors rely on outdated language in *Pyramid*

Centres & Co. v. Kinney Shoe Corp., stating that "where there is doubt as to whether a provision constitutes an unenforceable penalty or a proper liquidated damage clause, it should be resolved in favor of a construction which holds the provision to be a penalty." 244 A.D.2d 625, 627 (N.Y. App. Div. 1997) (citation omitted); *see* Claims Objection at 21. This concept has since been abrogated. New York's highest court has recognized "***an emerging presumption against interpreting liquidated damages clauses as penalty clauses***." *JMD Holding Corp.*, 828 N.E.2d at 610 (emphasis added) (quoting *XCO Int'l Inc. v. Pac. Sci. Co.*, 369 F.3d 998, 1002–03 (7th Cir. 2004)). As another court noted:

> Earlier cases tended to . . . find[] a presumption, in close cases, [in favor of] a penalty rather than liquidated damages. The balance has now shifted towards freedom of contract, as it has become increasingly difficult to justify the peculiar historical distinction between liquidated damages and penalties. Today, the trend favors freedom of contract through the enforcement of stipulated damage provisions so long as they do not clearly disregard the principle of compensation.

GFI Brokers, LLC v. Santana, No. 06 CIV. 3988 (GEL), 2009 WL 2482130, at *2 (S.D.N.Y. Aug. 13, 2009) (internal quotation marks omitted) (citation omitted). "Accordingly, a liquidated damages provision is not to be interfered with 'absent some ***persuasive justification***.'" *Id.* (citation omitted) (emphasis added); *see JMD Holding Corp.*, 828 N.E.2d at 609 ("Absent some element of fraud, exploitive over-reaching or unconscionable conduct . . . to exploit a technical breach, there is no warrant, either in law or equity, for a court to refuse enforcement of the agreement of the parties.") (citation omitted).

30. To meet their burden of proving that a liquidated damages provision—which like any other contract provision would ordinarily be enforced according to its terms—is in fact an unenforceable penalty, the Debtors "must demonstrate either that damages flowing from a prospective early termination were readily ascertainable at the time [the parties] entered into their [agreement], or that the early termination fee is conspicuously disproportionate to these

foreseeable losses."[12] *JMD Holding Corp.*, 828 N.E.2d at 609; *see GMX* Tr. at 14:12-17 (same). The Debtors cannot meet this burden.

B. The Make-Whole Provision Cannot Be Avoided as a Penalty.

31. Despite—or perhaps because of—this significant burden, the Debtors make no direct attempt to challenge the make-whole formula as a penalty. This is no doubt because it is well settled under New York law that make-whole provisions of this type, when used in long-term fixed-rate loan agreements and based upon U.S. Treasury rates, are enforceable.

32. Damages under a long-term debt instrument like the MNPA are difficult to quantify and, therefore, not readily ascertainable at the time of contracting. *United Merchs. & Mfrs.*, 674 F.2d at 143 (finding where case "involves a loan agreement between sophisticated parties for a large sum of money . . . it is apparent that the potential damages from breach of the loan agreements . . . were difficult to determine"); *Walter E. Heller & Co.*, 459 F.2d at 900 (citing "[s]uch facts as rate of return, duration of the loan, risk, extent and realizability of collateral" as examples of "obvious uncertainties inherent in this particular contract [that] combined to make it difficult to foresee, at the time the contract was executed, the extent of damages"); *In re Vanderveer Estates Holdings, Inc.*, 283 B.R. 122, 130 (Bankr. E.D.N.Y. 2002) ("Potential losses from prepayment of a large fixed-rate, long-term mortgage are 'not subject to

[12] A make-whole provision need not merely estimate the impact of market interest fluctuations to be allowable. Courts consider other elements of the term lender's damage, including such potential or consequential damages as the cost and expense of securing a substitute borrower. *See United Merchs. & Mfrs.*, 674 F.2d at 142 (acknowledging cost and expense of procuring substitute borrower as one of many factors in determining reasonableness of liquidated damages); *Walter E. Heller & Co. v. Am. Flyers Airline Corp.*, 459 F.2d 896, 899 (2d Cir. 1972) (holding that liquidated damages amount was reasonable in part because lender "was faced with the cost and expense of procuring substitute borrower or borrowers and the attendant delay in lending the sums to be lent to [original borrowers]") (internal quotation marks omitted); *Fin. Ctr. Assocs. of E. Meadow*, 140 B.R. at 836 ("[T]he court [in *United Merchs. & Mfrs.*] acknowledged the existence of many unknown factors which result in great difficulty to determine possible actual damages [including] the cost and expenses of procuring a substitute borrower and the attendant risk and delay[.]") (citation omitted).

easy calculation.' . . . [F]actors that render the determination of potential damages difficult include . . . the rate of return on any substitute loan or loans[.]") (citation omitted); *Fin. Ctr. Assocs. of E. Meadow*, 140 B.R. at 836 ("Actual damages in complicated and sophisticated transactions do not lose their character as difficult to ascertain just because formulas may serve as a useful tool to estimate them. The mere need for a formula . . . show[s] that the actual loss to be incurred 'may be difficult to determine. '") (internal quotation marks omitted).

33. It is also settled under New York law that make-whole provisions linked to U.S. Treasury rates are not "conspicuously disproportionate" to the potential losses suffered by a lender due to prepayment. *See School Specialty*, 2013 WL 1838513, at *4 (prepayment premium based on U.S. Treasury securities was not plainly disproportionate to a lender's losses); *Vanderveer Estates*, 283 B.R. at 131 (upholding "yield maintenance premium" that was measured "based on prevailing Treasury Bond yield at or about the time of prepayment"); *Anchor Resolution Corp. v. State St. Bank & Tr. Co. of Am. (In re Anchor Resolution Corp.)*, 221 B.R. 330, 341 (Bankr. D. Del. 1998) (allowing make-whole claim based on Treasury rate plus 0.50%); *GMX* Tr. at 19:10-20:15 (finding formula using discount rate of the Treasury rate plus 0.50% reasonable).[13]

34. The Debtors' examples of liquidated damages clauses held to be invalid as

[13] Debtors argue that the combined amount of post-petition interest and Make-Whole Amount renders the latter disproportionately large. Claims Objection at 23. Lumping the two items together does not measure reasonableness. The amount derived from the Make-Whole formula, and the interest that accrues when that amount is delinquent, are separate remedies that address separate harms. *See infra* at 18. The quantum of the Make-Whole Amount varies with the quantum of damage, as a function of the term of the loan and movement in interest rates. In this case, the relationship between the Make-Whole Amount and the Called Principal is relatively small: only 14.3% ($201 million/$1.406 billion). Courts have often upheld make-whole provisions that yielded higher proportionate payments. *See School Specialty*, 2013 WL 1838513, at *1 (premium was 35.4% of Called Principal); *Anchor Resolution Corp.*, 221 B.R. at 335 (27.3%); *GMX* Tr. at 31:4-11 (19.7%).

penalties bear no resemblance to the carefully-crafted make-whole provision here. Examples cited—most of which do not deal with make-whole provisions in bankruptcy—involved damages that easily could have been calculated *ex ante*, such as lost rent, *see Evangelista v. Ward*, 308 A.D.2d 504, 505 (N.Y. App. Div. 2003) (arbitrary fee of $150 per day after sale that holdover tenant occupied building), or clauses that made no effort to approximate actual damages and required obviously disproportionate and punitive sums, *see Agerbrink v. Model Serv. LLC*, 196 F. Supp. 3d 412, 416-17 (S.D.N.Y. 2016) (clause allowing modeling agency to keep all sums collected on model's behalf as liquidated damages); *Trilegiant Corp. v. Sitel Corp.*, No. 09 CIV. 6492 KBF, 2013 WL 2181193, at *9 (S.D.N.Y. May 20, 2013) ("fine" provision requiring payment of $250 per incident of record non-retention); *Pyramid Ctrs.*, 244 A.D.2d at 627 (clause allowing for payment of double the fixed rent if tenant ceased to operate its own business in leased space).[14]

C. The Make-Whole Provision Cannot Be Avoided Under Vague Equitable Principles.

35. Unable to wage a frontal assault, the Debtors attack from the flank with a novel theory. An otherwise enforceable make-whole formula, they say, is rendered unenforceable because the operative documents require the Debtors to pay interest at the Default Rate on the Make-Whole Amount. *See* Claims Objection at 36-37. No case is cited in support of this theory. At least two courts have expressly rejected it, holding that payment of default interest on an enforceable make-whole obligation is permitted. *See Vanderveer Estates*, 283 B.R. at 134 ("The debtor argues that [the lender] is not entitled to both default interest and a yield maintenance premium under section 506(b), because these are duplicative charges. This is not correct."); *In*

[14] The Fifth Circuit has squarely held that a prepayment provision is not unenforceable as a penalty under Texas law. *See Parker Plaza West Partners v. UNUM Pension & Ins. Co.*, 941 F.2d 349 (5th Cir. 1991).

re Kimbrell Realty/Jeth Court, LLC, 483 B.R. 679, 689, 692 (Bankr. C.D. Ill. 2012) (denying debtor's claim that a "prepayment premium and [a] default interest imposed over the same post-default period result[ed] in redundant or duplicative damages."). These decisions are correctly decided. The Debtors' novel theory makes no sense under New York law.

36. *First* and most obviously, the Make-Whole Amount and interest are different remedies that serve different purposes. The first is an agreed measure of damages. The second is a remedy for failure to pay the first when it was due. If a sum—any sum—is due and *un*paid, then the obligation to pay interest at the Default Rate applies to that sum. Therefore, Default Interest applies to the unpaid Make-Whole Amount, just as it applies to other unpaid sums, such as principal and pre-default interest. *See* MNPA, Ex. 1.1(a) (form of Senior Note) at 1. Here, the contract—composed, in each claimant's case, of its Senior Notes and the MNPA—defines "Make-Whole Amount" and "Default Rate" as separate things, MNPA § 8.7; *id.*, Sched. B at 4 (defining "Default Rate"), 7 ("Make-Whole Amount"). Each claimant's Make-Whole Amount was immediately payable upon the filing of OpCo's voluntary petition. *See* MNPA §§ 11(g), 12.1. Each Senior Note directed that the overdue payment of any Make-Whole Amount would include "interest accrued thereon at the Default Rate." *Id.* § 12.1. The parties were exquisitely careful to define distinct obligations, and because the harms are distinct, payment of both is not "double counting." *See Vanderveer Estates*, 283 B.R. at 134.

37. *Second*, the Debtors' argument leads to an absurdity. If the Debtors were correct, then the parties' express agreement—that interest at the Default Rate was always due on unpaid Make-Whole Amounts—would never be enforceable when a Make-Whole Amount was delinquent. By contrast, whenever a Make-Whole Amount was paid when due, Debtors would have no penalty argument, because the contract, in those situations, calls for no payment of

interest at all. The effect of these gymnastics would be to encourage an issuer never to perform its contract. The issuer would always benefit by breaching its promise to make a timely payment of the Make-Whole Amount (thereby generating a penalty argument), and would always suffer detriment by performing its contract (eliminating the penalty argument). Arguments so perverse are not available under New York law to a sophisticated party that bound itself to an unambiguous, integrated contract. *See, e.g.*, *AXA Inv. Managers*, 890 F. Supp. 2d at 388-89.

38. *Third*, the Debtors would invoke equity, but they do so in an inequitable way. They argue that the Make-Whole Amount, when due, is calculated by reference to a *component* of the future payment stream that the parties, at the time of contracting, thought might be unavailable in a re-lending situation. And so, they say, default interest on a damage so composed is a form of duplication. But this argument is advanced in an inequitable enterprise: an effort to shift to the equity holder of a sophisticated and solvent issuer sums that issuer agreed to pay. And as advanced, the argument would profoundly unsettle commercial finance. Make-whole provisions in a form regularly approved by courts, whenever appearing alongside standard default interest provisions (which is to say, whenever they appear at all), would suddenly become unenforceable.[15]

39. In sum, it is not surprising that the Debtors have found no decision to support the double-counting challenge. It is an evasion of the settled rules by which courts consider liquidated damages clauses. Those provisions can be avoided only where an issuer meets the heavy burden to show that when it struck this bargain, using acutely precise language, the parties were not reasonably attempting to approximate an uncertain future outcome. *See* discussion, *supra* at 15-16, and cases cited. As we have already shown, Debtors have not met this burden.

[15] In resolving this dispute, the Court need not reach the question of whether equity might supplant the bargain in a case involving an insolvent debtor.

There is no question that, at the time of contracting, it was difficult to assess the future consequences of breach in a dynamic interest market. And a wealth of cases has shown that the formula these parties agreed to employ is a reasonable one in common use. *See* discussion, *supra* at 15-16. There is simply nothing in the "penalty" jurisprudence that would allow the Court to ignore the terms of a bargain entered into by a massively solvent Debtor.

D. Because the Claims Are Unimpaired and the Debtor is Solvent, the Make-Whole Amount Must be Paid.

40. That the Make-Whole Amount is a valid contractual obligation payable under applicable law should end this claims dispute. In their Confirmation Objection, the OpCo Noteholders showed (i) that where a debtor is solvent, it is well established that it must honor its contracts, *see* Confirmation Objection at 13-15, and (ii) where claims are unimpaired, the same rule obtains, *i.e.*, that the creditor is entitled to the terms of its contract, and section 502(b)(2) of the Bankruptcy Code, which relates only to *allowance*, does not come into play, *id*. at 10-13.[16] Because each is true here, resolution of the New York law questions establishes that the Make-Whole Amount must be paid.

(i) OpCo's "massive" solvency.

41. Where a debtor is solvent, the bankruptcy court's duty is to enforce the terms of valid state law contractual provisions:

> Let us be perfectly clear. This is a solvent debtor case and, as such, the equities strongly favor holding the debtor to his contractual obligations as long as those obligations are legally enforceable under applicable non-bankruptcy law. When the debtor is solvent, ***the bankruptcy rule is that where there is a contractual provision, valid under state law . . . the bankruptcy court will enforce the contractual provision***.

UPS Capital Bus. Credit v. Gencarelli (In re Gencarelli), 501 F.3d 1, 7 (1st Cir. 2007) (emphasis added) (internal quotation marks omitted) (citation omitted). Many cases, a few of which are

[16] Key elements of the argument on these points are summarized in paragraph 62 *infra*.

cited in the footnote, stand for this rule.[17]

42. Throughout their objection, the Debtors urge the Court to look beyond "form" of the make-whole provision (by which they mean the plain terms of the bargain that OpCo struck) to what they call the "economic substance" of the transaction, to determine that the Make-Whole Amount is unmatured interest. *E.g.*, Claims Objection at 11. But none of the cited cases involve a plainly-solvent debtor. *See Tex. Commerce Bank v. Licht (In re Pengo Indus., Inc.)*, 962 F.2d 543, 546 (5th Cir. 1992); *In re Oakwood Homes Corp.*, 449 F.3d 588, 599 (3d Cir. 2006); *In re Doctors Hosp. of Hyde Park, Inc.*, 508 B.R. 697, 705 (Bankr. N.D. Ill. 2014).[18]

43. This point was directly addressed by Judge Lynn in *In re Mirant Corp.*, 327 B.R. 262, 270-71 (Bankr. N.D. Tex. 2005). There, the parents of a solvent subsidiary and their

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[17] *See Official Comm. of Unsecured Creditors v. Dow Chem. Corp. (In re Dow Corning Corp.)*, 456 F.3d 668, 679 (6th Cir. 2006) ("[I]n solvent debtor cases, rather than considering equitable principles, courts have generally confined themselves to determining and enforcing whatever pre-petition rights a given creditor has against the debtor."); *In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 791 F.2d 524, 530 (7th Cir. 1986) ("[W]hen the debtor is solvent, the judicial task is to give each creditor the measure of his contractual claim, no more and no less."); *Debentureholders Protective Comm. of Cont'l Inv. Corp. v. Cont'l Inv. Corp.*, 679 F.2d 264, 269 (1st Cir. 1982) ("Where the debtor is solvent, the bankruptcy rule is that where there is a contractual provision, valid under state law, providing for interest on unpaid instalments of interest, the bankruptcy court will enforce the contractual provision with respect to both instalments due before and instalments due after the petition was filed."); *see also Ruskin v. Griffiths*, 269 F.2d 827, 832 (2d Cir. 1959) (stockholders of a solvent debtor "cannot complain that they are treated inequitably when their interest is cut down by the payment of a sum to which the debenture holders are clearly entitled by the express provisions of the trust indenture"); *In re Chemtura Corp.*, 439 B.R. 561, 605 (Bankr. S.D.N.Y. 2010) (citing to *Dow Corning* and *Gencarelli* decisions and noting that "[w]ith a solvent debtor, issues as to fairness amongst creditors, in sharing a limited pie, no longer apply; the allowance of claims under a make-whole provision, or for damages for breach of a no-call, no longer comes at the expense of other creditors"); Scott K. Charles & Emil A. Kleinhaus, *Prepayment Clauses in Bankruptcy*, 15 Am. Bankr. Inst. L. Rev. 537, 582 (Winter 2007).

[18] The Debtors' lone Fifth Circuit case, *Pengo Indus.*, deals with an insolvent debtor and addresses the issue of original issue discount or "OID", which Congress has expressly indicated should be treated as the "economic equivalent" of unmatured interest. 962 F.2d at 546.

creditors sought to recharacterize lease obligations of the solvent subsidiary in order to increase returns to equity. Judge Lynn denied the *Mirant* debtors' request to look beyond the plain terms of the leases to their alleged economic substance, finding that recharacterization of an agreement would be inconsistent with the Code where the debtor was solvent and recharacterization would only benefit equity holders. *See id*. at 272 n.23 ("That a solvent debtor is granted relief under the Code as a member of a corporate family should not, under ordinary circumstances, diminish the rights of parties that dealt with that debtor. . . . Nor would it be appropriate to allow a debtor properly in bankruptcy by way of its membership in a financially distressed corporate family to utilize the Code to achieve results that it would not be allowed to achieve were it a stand-alone debtor with no affiliates whatsoever."); *see also Dow Corning*, 456 F.3d at 679 ("[I]n solvent debtor cases, rather than considering equitable principles, courts have generally confined themselves to determining and enforcing whatever pre-petition rights a given creditor has against the debtor."); Charles & Kleinhaus, *supra*, at 582 ("In a solvent case, a bankruptcy judge does not have free floating discretion to redistribute rights in accordance with his personal views of justice and fairness; rather, it is the role of the bankruptcy court to enforce the creditors' contractual rights.") (internal quotation marks omitted).

44. The same logic applies here. The Debtors urge the Court to ignore plain terms in favor of alleged "economic substance." The purpose of this exercise is to shift value from the creditors of OpCo to the parties now interested in its equity holder—that is, HoldCo's creditors and equity holders. The inequitable nature of this request is obvious. As the holder of 100% of the equity in OpCo, HoldCo controlled OpCo at the time it entered into the MNPA and the Senior Notes. It controlled it when the Make-Whole Amount became due and payable. It seeks to avoid its obligations solely to increase the value of its equity stake.

45. The inequitable core of this effort is illustrated by the joinders: a group of HoldCo's creditors and its Equity Committee. Leaving aside their lack of standing (they have no claims against or interest in OpCo), the motive is plain: they stand to reap the benefit if value can be shifted from OpCo's creditors to its equity holder, HoldCo.[19]

46. Even the authorities cited by the Debtors in arguing that the Make-Whole Amount is unallowable as "unmatured interest" recognize that the rule does not apply in solvent debtor cases. *In re MPM Silicones*, No. 14-22503, 2014 WL 4436335, at *17 (S.D.N.Y. Sept. 9, 2014) (noting solvent debtor exception to section 502(b)(2)); *Chemtura Corp.*, 439 B.R. at 604 (noting that whether a make-whole premium constitutes unmatured interest would "be relevant only in the case of an ***insolvent*** debtor.") (emphasis added); Charles & Kleinhaus, *supra*, at 582 (assumptions regarding the enforceability of make-whole provisions, "as well as other assumptions predicated on the Bankruptcy Court's equitable discretion over the distribution of estate property, ***are not applicable in solvent cases***") (emphasis added).

(ii) Class 4's Unimpaired Status Separately Requires the Performance of Contracts.

47. What has been said above about solvency applies with equal force to unimpairment. The Confirmation Objection shows at pages 10-13, that unimpaired status means that the creditor is entitled to its contract rights under state law, undiminished by special rules applying to claims allowance.

48. The points developed in the Confirmation Objection—that the text of section 1124 of the Bankruptcy Code shows that a *claim* in an unimpaired class is not limited by *allowance* limitations under section 502(b)—are underscored by other aspects of the Code.

[19] Ignoring the rule of pots and kettles, the HoldCo Equity Committee protests that OpCo's creditors generate "duplicative" fees—and then submits a joinder that repeats the Debtors' arguments.

Section 1126 also shows Congress's careful distinction between "claims" and "allowed claims." Section 1126(a), which provides the baseline voting rule, confines that rule to allowed claims. "The holder of a claim *allowed under section 502* may accept or reject a plan." 11 U.S.C. § 1126(a) (emphasis added). Section 1126(f) contains a special rule for claims in unimpaired classes. It presumes plan acceptance by an unimpaired class "and each holder of a claim . . . of such class," *and makes no reference to "allowed" claims.* 11 U.S.C. § 1126(f) (emphasis added). That is, an impaired holder votes its *allowed claim*, while an unimpaired holder of a *claim*—not an "allowed claim"—is presumed to accept.

49. In this case, both features—solvency and unimpaired treatment—are present. While each is sufficient, the Court may approve the payment of the Make-Whole Amount on narrow grounds—in circumstances where the Debtor is solvent (indeed prosperous), and the claim has been granted unimpaired status in a confirmed plan of reorganization.

II. The Make-Whole Amount is Allowable Under the Bankruptcy Code.

50. Even if they were insolvent, and the claims of the OpCo creditors were impaired, the Debtors could not meet their burden to show that the Make-Whole Amount should be disallowed as "unmatured interest" under section 502(b)(2) of the Bankruptcy Code.

51. The great weight of authority holds that make-whole provisions like those at issue here are not unmatured interest.[20] The Debtors acknowledge this authority, but claim that the vast majority of cases are wrongfully decided and merely perpetuate flaws in earlier cases. But the judges deciding these cases did not blindly follow earlier authority. The opinions are well

[20] *GMX* Tr. at 19:10-20:15; *United Merchants & Mfrs.*, 674 F.2d at 141-43; *In re School Specialty*, 2013 WL 1838513, at *5; *Trico Marine Servs.*, 450 B.R. at 480; *In re Hidden Lake P'ship*, 247 B.R. 722, 730 (Bankr. S.D. Ohio 2000); *Noonan v. Fremont Fin. (In re Lappin Elec. Co.)*, 245 B.R. 326, 330 (Bankr. E.D. Wis. 2000); *In re Outdoor Sports Headquarters, Inc.*, 161 B.R. 414, 424 (Bankr. S.D. Ohio 1993); *Fin. Ctr. Assocs. of E. Meadow*, 140 B.R. at 837.

reasoned and come to the same conclusion—that prepayment premiums and make-whole provisions are not unmatured interest. *See, e.g., In re Trico Marine Servs. Inc.,* 450 B.R. 474, 481 (Bankr. D. Del. 2011) ("This Court is persuaded by the soundness of the majority's interpretation of make-whole obligations, and therefore finds that the Indenture Trustee's claim on account of the Make-Whole Premium is akin to a claim for liquidated damages, not for unmatured interest.").

52. *First*, the claim for the Make-Whole Amount is not an interest claim at all. New York law treats it as liquidated damages, and does so for good reason. The calculation is a function of U.S. Treasury rates. This results in approximating damage in those cases where the loss of a committed rate through a fixed term will cause damage, and calling for no damage payment where interest rates rise sufficiently to indicate that damage is unlikely to occur. If the Make-Whole Amount were truly unmatured interest, it would be payable after *every* prepayment, because every prepayment results in unmatured interest. The fact that it is not automatically payable in all situations supports the majority view that it should be considered liquidated damages. *See School Specialty,* 2013 WL 1838513, at *5 (agreeing with majority that make-whole premiums are not unmatured interest); *Trico Marine*, 450 B.R. at 480 ("[T]he substantial majority of courts considering this issue have concluded that make-whole or prepayment obligations are in the nature of liquidated damages rather than unmatured interest[.]"); *Lappin*, 245 B.R. at 330 (stating that "[the] court is in agreement with a majority of courts that view a prepayment charge as liquidated damages, not unmatured interest [that would be disallowed under section 502(b)(2)]"); *see United Merchs. & Mfrs.,* 674 F.2d at 144 (pre-Code decision enforcing prepayment premium because "[n]othing in bankruptcy law or policy counsels against recognition of the [the lenders'] claims for liquidated damages").

53. *Second*, even if the Make-Whole Amount *were* "interest," it would not be "unmatured." Under section 12.1 of the MNPA, the Make-Whole Amount fully matured, along with all principal and accrued interest, when the Senior Notes automatically accelerated on the Petition Date. *See GMX* Tr. at 27:10-14 ("[T]he applicable premium is due and payable and thus matured upon acceleration of the debt, which was triggered by bankruptcy filing. Consequently, the applicable premium is not unmatured within the language of section 502(b)(2)."); s*ee also Doctors Hosp.*, 508 B.R. at 706 (when prepayment premium is triggered by the acceleration occurring immediately upon bankruptcy filing, such interest may not be viewed as "unmatured").[21]

54. The Debtors' citations fall into several distinguishable categories, and none deals directly with a make-whole provision, like this one, that was automatically accelerated and came due as of the bankruptcy filing.

55. *Timing of Acceleration Cases*. Two cases heavily relied upon by the Debtors, *Doctors Hosp.* and *Ridgewood Apartments*, deal with prepayment premiums that were not automatically triggered upon the bankruptcy filing and that did not come due until *after* the bankruptcy petition was filed. In *Doctors Hosp.*, the court disallowed a yield maintenance provision that did not come due until three months after the bankruptcy. 508 B.R. at 706. The court specifically distinguished the situation in that case from the majority cases, including *In re*

[21] A contractual provision that provides for automatic acceleration of debt upon the filing of a bankruptcy petition is not an unenforceable *ipso facto* clause. *In re AMR Corp.*, 730 F.3d 88, 106 (2d Cir. 2013) (The "argument that the Code categorically prohibits enforcement of [automatic acceleration] clauses—and that these clauses, in particular, are unforceable—is without merit."). It also remains unclear whether the Senior Notes were accelerated prior to *OpCo's* commencement of its bankruptcy case, because the Debtors have not advised whether Debtor Keystone Gas Gathering, LLC ("Keystone"), which filed its bankruptcy petition prior to OpCo, was a "Material Restricted Subsidiary" under the MNPA. If it was, then the filing of the Keystone chapter 11 petition triggered an independent event of default under the MNPA. MNPA § 11(g).

Skyler Ridge, 80 B.R. 500 (Bankr. C.D. Cal. 1987), where the prepayment premium came due either prior to, or—as here—upon the bankruptcy filing. *Id.*

56. Similarly, in *Ridgewood Apartments*, the lender was not entitled to prepayment premium where (i) the applicable contract did not specifically require payment of the premium on the petition date upon the automatic acceleration of the debt; and (ii) the plan did not contemplate prepayment. *In re Ridgewood Apartments of DeKalb County, Ltd.*, 174 B.R. 712, 720 (Bankr. S.D. Ohio) ("[N]o prepayment penalty was due or owing prior to the Debtor's bankruptcy filing and such amount is not properly part of Fannie Mae's claim.").

57. *Original Issue Discount Cases.* Two of the Debtors' cases, *Pengo Indus.*, 962 F.2d at 546 and *In re Allegheny Int'l, Inc.*, 100 B.R. 247, 250 (Bankr. W.D. Pa. 1989), address the treatment of original issue discount (OID), a convention that is *expressly* characterized as unmatured interest by Congress in the legislative history to section 502(b)(2). *See, e.g., Pengo Indus.*, 962 F.2d at 546 (quoting from legislative history and noting that Congress "considered unamortized OID the economic equivalent of unmatured interest") (internal quotation marks omitted). Given this clear congressional intent, OID cases are not instructive here.

58. *No-Call Provision Cases.* The Debtors also rely on cases that involve no-call provisions, and not any corresponding prepayment premium or make-whole provision. *See, e.g., HSBC Bank USA, Nat'l Assoc. v. Calpine Corp.*, No. 07-cv-3088, 2010 WL 3835200, at *1 (S.D.N.Y. 2010) (involving no-call provisions and finding "none of the notes required the payment of a premium in the event of repayment pursuant to acceleration . . . ."); *Cont'l Sec. Corp. v. Shenandoah Nursing Home*, 188 B.R. 205, 214 (W.D. Va. 1995) (involving an instrument with a no-call provision without a corresponding prepayment premium provision, and finding, without analysis of any kind, that awarding the creditor a prepayment premium therefore

would violate section 502(b)).[22] In each case the creditors were seeking the rest of the contract interest as their damages, without an existing right in the documents or any showing that the total interest constituted damage. In none of these cases was a court asked to enforce specific contractual terms. None of the relevant instruments contained a prepayment premium or make-whole provision. Courts were rather being asked to fashion a damages award in the absence of clear contractual language providing for liquidated damages.

59. *Other Non-Make-Whole/Yield Maintenance Cases*. The Debtors rely on several cases that provide no guidance on the question of whether a make-whole constitutes unmatured interest. *In re Winston XXIV Ltd. P'ship*, for example, involved an analysis of a liquidated damages provision in a promissory note governed by Illinois law. 170 B.R. 453 (D. Kan. 1994). After holding that the liquidated damages provision was unenforceable, the court, in *dicta* (and without analysis) said that the liquidated damages could not be added to the creditor's claim because "unmatured interest is not recoverable by an undersecured creditor as part of its claim."). *Id.* at 462. *In re Oahu Cabinets, Ltd.*, 12 B.R. 160 (Bankr. D. Haw. 1981), involved a provision of a lease agreement imposing a late charge. The court held that the late charge constituted a penalty under state law but issued no finding on the issue of whether it constituted unmatured

[22] This statement was made in the context of the court's analysis of whether the creditor was "unimpaired" under the plan without payment of a premium. *Id*. at 212. The court held that the creditor was unimpaired under section 1124(3) because the creditor would receive the full amount of its allowed claim. *Id*. at 218. As the OpCo Noteholders discuss at page 30 of this brief and in the Confirmation Objection at pages 10-12, the repeal of section 1124(3) has removed the focus on "allowed" claims from the impairment analysis. Thus, *Shenandoah Nursing* underscores the OpCo Noteholders' argument that the claims of unimpaired creditors must be determined without reference to section 502(b)(2). The court in *Shendandoah Nursing* touched on the requirements of section 1124(1), but determined that that subsection did not improve the creditor's claims since the underlying document itself did not provide for any prepayment premium. *Id.* at 217-18.

interest. *Id.* at 165.[23] And in *Oakwood Homes*, the Third Circuit analyzed whether a bankruptcy court had correctly discounted the principal of a creditor's claim to present value *after* disallowing post-petition interest. 49 B.R. at 592. The creditor did not appeal the bankruptcy court's disallowance of post-petition interest, and the court "***express[ed] no view*** on whether the Bankruptcy Court correctly disallowed post-petition interest pursuant to 11 U.S.C. § 502(b)(2)." *Id.* at 595 (emphasis added).

60. *Consumer Debtor Cases.* The Debtors rely on several consumer debtor cases concerning the calculation of interest rebates in consumer financing transactions. *In re Bonner*, No. 80-01342, 1984 WL 37542 (Bankr. M.D. Ga. Jan. 3, 1984) was a chapter 13 case involving a dispute over the terms of a motor vehicle financing plan where the court was focused on the rebate of unearned interest under Georgia's Motor Vehicle Sales Finance Act. *Id.* at *1-2. *In re Watson*, 32 B.R. 491 (Bankr. W.D. Wis. 1983) was a chapter 7 case involving individual debtors where the court was focused on a permissible method for "arriv[ing] at a credit for unearned finance charges." *Id*. at 492. These cases provide no guidance here.

61. In sum, sound reasoning supports the majority view that a make-whole is not unmatured interest, and the Debtors have offered no sound reason why this Court should depart from the majority view.

III. Post-Petition Interest Should be Allowed at the Contractual Default Rate.

62. The application of the Default Rate of interest to the Class 4 claims are set forth in

[23] The Debtors include a quote from *Oahu Cabinets* as part of their discussion on the impact of *ipso facto* clauses on the unmatured interest analysis. Claims Objection at 14-15. The language at issue was included in the court's discussion on the lessor's right to payment of *post-petition interest* on its claim, and the *Oahu Cabinets* court expressly acknowledged that "when a debtor is solvent and there is a surplus after all creditors are paid in full, the creditors should receive interest on their claims prior to any surplus being turned over to the Debtor." *Id.* at 163. To the extent that *Oahu Cabinets* is relevant to this Court's analysis, its holding does not advance the Debtors' position.

the OpCo Noteholders' Confirmation Objection, which the OpCo Noteholders incorporate by reference. In brief:

- Congress repealed section 1124(3) of the Code in 1994 to expressly permit unsecured creditors to receive post-petition interest in solvent-debtor cases. It did so by removing the reference to claims "allowance" in section 1124. To be unimpaired, a creditors' claim as established by non-bankruptcy law must be left *unaltered*. *See In re Introgen Therapeutics*, 429 B.R. 570, 581 (Bankr. W.D. Tex. 2010) ("While there appears to be no relevant Fifth Circuit cases discussing the effect of the deletion of § 1124(3), it appears clear from the legislative intent and case law from across the country that . . . through the Plan's modification of [the creditor's] contract rights and not allowing for post-petition interest, is truly an impaired class."). This means that the claim must not be disturbed by provisions of the Bankruptcy Code, like section 506, that deal with claims allowance. Confirmation Objection at 10-12.

- This Court held in *In re Moody Nat'l SHS Houston H, LLC*, 426 B.R. 667 (Bankr. S.D. Tex. 2010), that unimpairment through reinstatement, pursuant to section 1124(2), requires the payment of interest at the default rate. *Id.* at 672. If subsection 1124(1)'s "unaltered" claim approach could lead to a different result than the cure-of-default analysis under subsection (2), subsection (2) would fall away entirely. The Third Circuit's decision in *Solow v. PPI Enters. (U.S.), Inc. (In re PPI Enters. (U.S.), Inc.)*, 324 F.3d 197 (3d Cir. 2003), is inconsistent with *Moody* and flawed because it conflates "claims" with "allowed claims." While acknowledging that, following the repeal of section 1124(3), an unsecured creditor's claim could not qualify for unimpairment under section 1124(1) without paying post-petition interest, *id.* at 206-07, it did not address the

1994 amendment's elimination of reference to claims "allowance" in section 1124 nor the fact that the section 502 limitation with which it was concerned—section 502(b)(6)—addressed only claims allowance. Confirmation Objection at 11-13.

- The Bankruptcy Code does not supplant the clearly established pre-code practice of awarding default interest at the contract rate in solvent debtor cases. *See id.* at 13-17.

- If interest is awarded pursuant to section 726(a)(5) of the Bankruptcy Code, this Court should follow the better reasoned cases, including *Colfin Bulls Funding A, LLC v. Paloian, Tr. (In re Dvorkin Holdings, LLC)*, 547 B.R. 880 (N.D. Ill. 2016), which hold that interest at the "legal rate" is the contract rate of interest. Confirmation Objection at 17-20.

- Equitable principles, like those followed by the court in *In re Energy Future Holding Corp.*, 540 B.R. 109 (Bankr. D. Del. 2015), merit awarding the contract rate of interest here, particularly where the claims of the structurally subordinated creditors of HoldCo include post-petition interest at the contract rate. Confirmation Objection at 20-23.

A. Cases Cited by the Debtors Do Not Rebut the OpCo Noteholders' Impairment Argument.

63. The OpCo Noteholders addressed the flaws in the *PPI* decision in their Confirmation Objection at pages 11-13, and *supra* paragraph 62.

64. The Debtors point to two additional cases—*Mirant* and *American Solar King*—as support for the asserted distinction between *plan* impairment and *statutory* impairment.[24] This distinction finds no basis in—and in fact contradicts—the text of section 1124. The reference to "plan" in section 1124 is explained by the facts that: (1) impairment applies to "class[es] of

[24] These arguments can be found in the Confirmation Brief starting at page 48.

claims or interests," and "classes" exist only under plans; and (2) impairment leads to a right to vote under section 1126, an element of the plan process. *See* 11 U.S.C. §§ 1124, 1126. Section 1124 does not provide that a class of claims is impaired unless "the plan . . . leaves unaltered"—[***except for alterations by the Bankruptcy Code***]—"the legal, equitable and contractual rights to which such claim entitles the holder[.]" 11 U.S.C. § 1124(1) (language and emphasis added). And it does not say that the class is impaired unless "the plan . . . leaves unaltered the legal, equitable and contractual rights to which [***an allowed***] claim entitles the holder[.]" *Id.* (language and emphasis added). The section reads that any alteration to a claim, which is simply a right to payment, is impairment. *See* 11 U.S.C. § 101(5). Code alterations for allowance purposes are among such alterations. And as shown above, section 1126 of the Bankruptcy Code itself distinguishes between "allowed claims," which vote, and "claims," which, when unimpaired, are presumed to accept. *See* discussion, *supra* at 23-24.

65. *Mirant* and *American Solar King* are unpersuasive here for additional reasons. *American Solar King* was decided prior to the 1994 amendment to section 1124, upon which the OpCo Noteholder's entire impairment argument is based. *See generally Am. Solar King*, 90 B.R. 808 (Bankr. W.D. Tex. 1988); Confirmation Objection at 10-11.

66. In the *Mirant* decision, Judge Lynn does cite various cases that draw the distinction between plan and statutory impairment, but his decision does not rely on those decisions. *See Mirant*, 2005 WL 6440372, at *3 (citing cases). The issue in *Mirant* was whether the post-confirmation structure of the reorganized debtors, as implemented by the plan, violated the terms of debt instruments that were being reinstated. *Id.* The opinion is a detailed factual analysis of the provisions of the applicable indenture and whether those provisions were violated by the proposed plan. *Id.* at *2. The court concluded, as a matter of fact, that they were not. *Id.*

at *4.

B. The Debtors Offer No Good Basis to Follow Cases that Interpret Section 726(a)(5) to Provide Only for Application of the Federal Judgment Rate.

67. The interpretation of the phrase "legal rate of interest" in section 726(a)(5) of the Bankruptcy Code is unsettled. At pages 17-20 of their Confirmation Objection, the OpCo Noteholders show that the cases permitting application of the contract rate of interest are better reasoned.

68. The argument that section 726(a)(5) must be interpreted to provide for interest at the federal judgment rate relies heavily upon the use of the word "the" in the statute. Use of the definite article, however, is merely an indication that with respect to any one claim there will be one applicable "legal rate" of interest. The rate need not be the same for every claim. "The" applicable rate for any given claim could be the contract rate.

69. The Debtors also claim that section 726 should be interpreted to require use of the federal judgment rate in all cases as a matter of good policy. They assert that use of a uniform rate will eliminate uncertainty, promote uniformity and lead to the consensual resolution of disputes by avoiding disparate views regarding interest rates.

70. The argument's premise is false. Imposing a uniform rate of interest is no more "uniform" than imposing on different debts an identical allowed amount. "Uniformity" is served by granting every creditor *all of its legal entitlement*. That means that every creditor should receive the interest rate that it bargained for, or, failing such a bargain, the rate supplied by operative law.

71. It is important to remember, that the issue here is what rate is payable in a ***solvent***-debtor case. In such cases, no creditor should be concerned with the rate of interest being paid to others, because everyone is getting paid in full. This is also why the Debtors'

reliance on *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004), is misplaced. *Till* involves the applicable rate of interest in a cram-down situation where, by definition, there will be many impaired creditor classes. *See id.* at 468.

IV. The OpCo Noteholders Are Entitled to Attorneys' Fees and Costs.

72. Contractual claims for attorneys' fees and expenses are enforceable in bankruptcy. *See Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 454 (2007) (holding that unsecured claims for contractual attorneys' fees incurred while litigating issues of bankruptcy law are allowable under section 502(b)); *Ogle v. Fid. & Dep. Co. of Md.*, 586 F.3d 143, 148-49 (2d Cir. 2009) ("We hold that an unsecured claim for post-petition fees, authorized by a valid pre-petition contract, is allowable under section 502(b)[.]"). This is especially true in the case of a solvent debtor. *See In re Cont'l Airlines Corp.*, 110 B.R. 276, 280 (Bankr. S.D. Tex. 1989) ("[A]s in the case of interest, creditors should be entitled to the recovery of attorney fees in instances where the Debtor is solvent and they would be entitled to attorney fees under state law for litigation over the validity and amount of their claim but for the filing of the bankruptcy case. . . . This Court finds no logical reason to prohibit the allowance of attorney's fees for professional services rendered in successfully establishing a disputed unsecured claim when the debtor is solvent."). Section 12.4 of the MNPA provides that the OpCo Noteholders are entitled to "reasonable attorneys' fees, expenses and disbursements" incurred in connection with the enforcement of their rights under the MNPA. The fees and expenses that the OpCo Noteholders have incurred to date have been the direct result of their need to seek to protect their contractual rights under the MNPA and the Senior Notes.[25]

73. Courts in this Circuit have held that the general presumption that a court will

[25] All fees and expenses due under the MNPA must be paid in order for the OpCo Noteholders to be unimpaired.

enforce a solvent debtor's contract obligations extends to attorneys' fees. *Cont'l Airlines Corp.*, 110 B.R. at 281 ("[T]he rule this Court would follow in light of the authorities is that . . . unsecured creditors are entitled to attorney's fees in the successful prosecution of a disputed claim where state law provides and the debtor is solvent); *see Sakowitz, Inc. v. Chase Bank Int'l (In re Sakowitz, Inc.)*, 110 B.R. 268, 270 (Bankr. S.D. Tex. 1989) (observing that "[t]his Court is further of the opinion that attorney fees should be allowed where the Debtor is solvent (before and after allowance) due to policy considerations akin to those with respect to the allowance of interest post-petition."). Courts in other circuits have also awarded attorneys' fees to unsecured creditors in solvent debtor cases. *See, e.g., Dow Corning*, 456 F.3d at 683 ("We therefore choose to join the body of cases holding that unsecured creditors may recover their attorneys' fees, costs and expenses from the estate of a solvent debtor where they are permitted to do so by the terms of their contract and applicable non-bankruptcy law.").

WHEREFORE, the Court should order that the Allowed Class 4 Claims includes the Make-Whole Amount, and all fees and expenses and that payment of post-petition interest at the contractual default rate is required given the classification of Class 4 as unimpaired.

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Respectfully submitted,

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