UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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

THE SENIOR CREDITOR COMMITTEE'S RESPONSE IN OPPOSITION TO (I) THE DEBTORS' OBJECTION TO OPCO FUNDED DEBT CLAIMS, (II) THE HOLDCO NOTEHOLDER COMMITTEE JOINDER, AND (III) THE EQUITY COMMITTEE OBJECTION AND JOINDER

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The *ad hoc* committee (the "Senior Creditor Committee") of unsecured creditors of OpCo[1] respectfully submits this response in opposition to (i) 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* [ECF No. 1214] and supporting memorandum [ECF No. 1215] ("Debtors' Memo"), (ii) 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* ("Note Comm. Obj.") [ECF No. 1216], and (iii) the *Objection of the Ad Hoc Equity Committee of the OpCo Funded Debt Claims and Joinder to the Debtors' Objection* ("Eq. Comm. Obj.") [ECF No. 1217] (collectively, the "Objections"). The Objections interposed by the Debtors, HoldCo Noteholder Committee, and Equity Committee (collectively, the "Objecting Parties") should be overruled.[2]

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1 Unless otherwise indicated, capitalized terms that are not defined herein have the meanings ascribed to them in the Debtors' Second Amended Joint Chapter 11 Plan of Reorganization [ECF No. 1324-1] (the "Plan"). References to the OpCo Notes, the OpCo Notes MNPA and the OpCo RCF refer to such agreements together with any agreements entered into in connection therewith. The Senior Creditor Committee is comprised of senior unsecured creditors of OpCo that collectively hold, control, or otherwise have discretionary authority over OpCo Funded Debt Claims. *See Fourth Supplemental Verified Statement of the Ad Hoc Senior Committee Pursuant to Bankruptcy Rule 2019* [ECF No. 1280]. The Debtors have agreed that the Senior Creditor Committee shall have standing to file this response and that this response shall be treated as a response by each member of the Senior Creditor Committee. The Senior Creditor Committee believes that the Debtors have all information regarding the proofs of claim filed by each member, including, without limitation, claim numbers. The individual members reserve all rights to supplement this response with claim information or to file joinders, or separate responses, to the extent any party takes the position that it is necessary for them to do so.

2 The Debtors purport to "reserve their rights, as a protective matter, to object to claims for professional fees." *See* Debtors' Memo at 3. The Equity Committee also requests that "any requested professional fees and expenses" be reduced "to account for duplicative efforts." *See* Eq. Comm. Obj. ¶ 24. Pursuant to this Court's *Order Confirming the Debtors' Second Amended Joint Chapter 11 Plan of Reorganization* [ECF No. 1324] (the "Confirmation Order"), however, the Debtors have agreed to pay to the Senior Creditor Committee's professionals' "all documented fees and expenses incurred through the Effective Date" plus "all fees and expenses . . . incurred after the Effective Date . . . pursuant to the terms of the OpCo funded debt agreements." Confirmation Order ¶ 167. Thus, insofar as these Objecting Parties seek, or reserve the right to seek, disallowance of those portions of the OpCo Funded Debt Claims that claim professional fees and expenses, the Debtors' and the Equity Committee's Objections are now moot. Indeed, the Confirmation Order further provides that the Debtors will "withdraw their objection to the . . . fees and expenses" claimed as part of the OpCo Funded Debt Claims. *Id.* Accordingly, this response does not address the portions of the Objections that relate to professional fees and expenses, as they are no longer extant.

PRELIMINARY STATEMENT

1. Had the Debtors not filed a chapter 11 petition for OpCo, the holders of OpCo Funded Debt Claims (the "OpCo Funded Debt Holders") would have been paid all components of their claims (*e.g.*, the Make-Whole Amount and interest on all unpaid amounts through the date of payment) that the Debtors now seek to disallow. Instead, the Debtors chose to file a chapter 11 petition for OpCo, even though the ultimate restructuring took place at the HoldCo and old equity levels and not at OpCo. Indeed, the creditors of OpCo will be cashed out in full. However, the allowed amounts of the OpCo Funded Debt Holders' claims cannot be lower than the amounts they would have received outside of chapter 11 for at least two reasons: (1) under the Plan, OpCo is solvent by billions of dollars, and (2) the Debtors have chosen to unimpair OpCo creditors.

2. The operative language in the applicable agreements is clear and unambiguous. The Objecting Parties do not contend otherwise. Prior to filing chapter 11 petitions, OpCo, as borrower, and HoldCo and UP Energy, as guarantors, had agreed, as consideration for borrowing approximately $2.5 billion, that, upon any event of default, they would pay certain amounts to the OpCo Funded Debt Holders, including the Make-Whole Amount and interest through the date of payment on any overdue amounts at specified default rates. It is also undisputed that the Debtors' chapter 11 filings constituted events of default that caused the principal amounts of the OpCo Funded Debt together with, among other amounts, the Make-Whole Amount, to become immediately due and payable on the Petition Date. Yet, despite the Debtors' self-proclaimed solvency early on in these Chapter 11 Cases, they elected to defer resolution of the OpCo Funded Debt Claims and allow them to accrue additional amounts, rather than seek an expedited determination of their validity or seek to refinance the underlying debt.

3. The Debtors have received the full benefit of the loans from the OpCo Funded Debt Holders. They are now using their Chapter 11 Cases to refinance the OpCo Notes and the OpCo RCF. Yet, brazenly, the Debtors seek to accomplish what they could not accomplish outside of chapter 11, namely, the avoidance of their categorical obligation to pay the Make-Whole Amount as well as the contractual interest through the date of payment.

4. The Objections are consistent with the Debtors' broader strategy in these Chapter 11 Cases to use chapter 11 as a sword to drive value to favored constituencies. At every turn, the Debtors' actions have been designed and implemented for the benefit of their equity holders, including senior management, and structurally junior creditors. The Debtors had originally attempted to redirect value from OpCo creditors to their favored constituencies by cramming down the OpCo Funded Debt Claims with new debt on below-market terms, but abandoned that plan after the Senior Creditor Committee raised serious concerns about the lack of independence of OpCo's board and the viability of the Plan. The Debtors' new efforts to avoid their contractual obligations should fare no better.

5. The Objecting Parties do not dispute that the Make-Whole Amount is due and payable under the terms of the OpCo Notes and OpCo Notes MNPA. *See infra* paragraphs 10-16. Their argument that the Make-Whole Amount should nonetheless be disallowed under the Bankruptcy Code is fundamentally flawed for several reasons. <u>First</u>, the Debtors chose to treat the OpCo Note Claims as unimpaired under the Plan and, as a consequence, are required to satisfy all of the OpCo Noteholders' contractual, legal, and equitable rights irrespective of section 502(b)(2) of the Bankruptcy Code. Section I.A. *infra*. <u>Second</u>, even if the Debtors could rely on section 502(b)(2), that provision nonetheless would not apply to the Make-Whole Amount because the Make-Whole Amount is a "charge" and not "unmatured interest." Unlike

"interest," the Make-Whole Amount does not compensate the OpCo Noteholders for the use of the principal of the OpCo Notes after the Petition Date, but rather is an amount that sets the damages the OpCo Noteholders suffer from having committed their funds to the Debtors for a specified period of time and now having to reinvest these funds prematurely. Further, the Make-Whole Amount became due and payable—*i.e.*, matured—on the Petition Date and thus was not "unmatured" for purposes of section 502(b)(2). Moreover, even if the Make-Whole Amount could be viewed as interest, the "solvent debtor exception" to the rule against payment of postpetition interest on unsecured claims requires these solvent Debtors to pay the Make-Whole Amount. Section I.B. *infra*. Third, the Make-Whole Amount is fully enforceable under applicable New York law. Section I.C. *infra*.

6. Postpetition interest likewise must be allowed on the OpCo Funded Debt Claims at the full contract default rate specified in the applicable agreements until the full amount of the OpCo Funded Debt Claims has been paid. First, the Debtors' reliance on section 726(a)(5) of the Bankruptcy Code as justification for paying postpetition interest at only the federal judgment rate is a red herring. When, as here, the Debtors have chosen to treat the OpCo Funded Debt Claims as unimpaired, thus rendering the "best interest of creditors test" of section 1129(a)(7) of the Bankruptcy Code inapplicable, section 726(a)(5) has no bearing. Section II.A. *infra*. Second, even if section 726(a)(5) were applicable, postpetition interest on the OpCo Funded Debt still must be paid at the applicable contract default rates where, as here, the Debtors are massively solvent. Section II.B. *infra*.

7. More fundamentally, each of the Objections must be overruled for the simple reason that the Bankruptcy Code was not intended to allow a solvent debtor to evade its valid prepetition contractual obligations. The Plan is premised on a valuation that renders not

only OpCo, but HoldCo, solvent by billions of dollars. As a result, this is not a case where the allowance of the OpCo Funded Debt Claims in full would deny other creditors their Plan recoveries. Indeed, no creditor of OpCo or HoldCo would receive less than payment in full if the OpCo Funded Debt Claims are allowed in full except to the extent that they have agreed to such lesser treatment. On the other hand, disallowance of any portion of the OpCo Funded Debt Claims would provide a windfall to HoldCo's common stockholders—the parties on whose behalf the Debtors' boards of directors originally agreed to the terms of the OpCo Funded Debt obligations. Equity abhors a windfall.[3] Accordingly, the OpCo Funded Debt Claims should be allowed in full.

LIMITED FACTUAL BACKGROUND

A. The OpCo Funded Debt Claims

8. The OpCo Funded Debt Claims arise under or in connection with (i) the OpCo Notes and the OpCo Notes MNPA, and (ii) the OpCo RCF. OpCo issued the OpCo Notes in multiple series pursuant to the OpCo Notes MNPA, and each of the OpCo Notes is expressly subject to the OpCo Notes MNPA's terms.[4] OpCo also borrowed funds under the OpCo RCF.[5] OpCo's obligations under the OpCo Notes, the OpCo Notes MNPA, and the RCF Credit Agreement are guaranteed by both HoldCo and UP Energy. OpCo Notes MNPA § 1.3; *id.* Exh. 1.3; Guaranty Agreements attached as "Exhibit B" to RCF Credit Agreement.

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[3] *See Prudential Ins. Co. of Am. v. S.S. American Lancer*, 870 F.2d 867, 871 (2d Cir. 1989) ("[E]quity, we believe abhors a windfall.").

[4] *See, e.g.*, OpCo Notes MNPA Exh. 1.1(a) ("Payment of principal of, interest on and any Make-Whole Amount with respect to this Note are to be made . . . as provided in the [OpCo Notes MNPA]."); *id.* ("This Note is one of a series of Senior Notes . . . issued pursuant to the [OpCo Notes MNPA] . . . and is entitled to the benefits thereof.").

[5] Copies of the OpCo Notes MNPA and the Credit Agreement dated as of October 6, 2011 in respect of the OpCo RCF (the "RCF Credit Agreement") are attached to the Debtors' Memo as Exhibits A and B, respectively.

9. The Objections only contest certain portions of the OpCo Funded Debt Claims. Pursuant to the Confirmation Order, the Debtors must "satisfy in full in Cash the principal amount of, the amendment fees, accrued prepetition interest at the contractual default rate, and postpetition interest at the FJR as of the Petition Date in respect of the OpCo Funded Debt Claims." Confirmation Order ¶ 152.

B. The Disputed OpCo Note Claims

1. The Obligation to Pay the Make-Whole Amount

10. The Objections seek disallowance of the portion of the OpCo Note Claims based on the Make-Whole Amount. The Objecting Parties do not dispute that, as a contractual matter, the Make-Whole Amount has become due and payable under the express terms of the OpCo Notes MNPA, and as such it has been accepted by all parties as fact.

11. Section 11(g)(ii) of the OpCo Notes MNPA provides that an "Event of Default" occurs when OpCo files "a petition for relief . . . in bankruptcy." OpCo Notes MNPA § 11(g)(ii). In turn, Section 12.1(a) of the OpCo Notes MNPA states that if an Event of Default occurs under Section 11(g)(ii), "all the [OpCo] Notes then outstanding shall automatically become immediately due and payable." *Id.* § 12.1(a).

12. Upon the OpCo Notes becoming due and payable under Section 12.1 of the OpCo Notes MNPA, "the entire unpaid principal amount of such Notes, plus . . . (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 presentation, demand, protest or further notice." *Id.* § 12.1 (emphasis added).[6] Furthermore, that acceleration provision expressly states that the parties "intended" the

[6] In addition to incorporating the terms of the OpCo Notes MNPA generally, the individual OpCo Notes specifically incorporate by reference the Event of Default, acceleration, and Make-Whole Amount provisions,

Make-Whole Amount to become payable upon acceleration, along with the reason why: because "each holder of a Note has the right to maintain its investment in the Notes free from repayment by the Company," and the "payment of a Make-Whole Amount . . . in the event that the Notes are prepaid ***or are accelerated as a result of an Event of Default***, is intended to provide compensation for the deprivation of such right under such circumstances." *Id.* (emphasis added).

13. The "Make-Whole Amount," which the Debtors are obligated to satisfy pursuant to Section 12.1 of the OpCo Notes MNPA, is defined in Section 8.7. *See id.* Schedule B ("'Make-Whole Amount' is defined in Section 8.7."). Specifically, the "Make-Whole Amount" is defined as "an amount equal to the excess, if any, of the Discounted Value of the Remaining Scheduled Payments with respect to the Called Principal of such fixed rate Note over the amount of such Called Principal, provided that the Make-Whole Amount may in no event be less than zero." *Id.* § 8.7 In turn, "Called Principal" is defined as "the principal of such Note that is to be prepaid pursuant to Section 8.2 ***or has become or is declared to be immediately due and payable pursuant to Section 12.1, as the context requires***." *Id.* (emphasis added).

14. Similarly, the definition of Make-Whole Amount, which incorporates by reference to other defined terms the definition of "Settlement Date," specifically contemplates that the calculation of the Make-Whole Amount is triggered off of the date of acceleration (*i.e.*, the Petition Date). The term "'Settlement Date' means, with respect to the Called Principal of any fixed rate Note, the date on which such Called Principal is to be prepaid pursuant to Section 8.2 or has become or is declared to be immediately due and payable pursuant to Section 12.1, as the context requires." *Id.*

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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 [OpCo Notes MNPA]." *See*, *e.g.*, *id.* Exh. 1.1(a).

15. In fact, the Make-Whole Amount definition expressly refers back to the obligation to pay the Make-Whole Amount in the event of an acceleration pursuant to Section 12.1 of the OpCo Notes three separate times: (1) when defining the "Called Principal" that supplies the foundation for the Make-Whole Amount formula; (2) when defining how to calculate the "Remaining Scheduled Payments"; and (3) when defining the applicable "Settlement Date." *Id.* Each of these three terms, which are incorporated either directly or indirectly into the OpCo Notes MNPA's Make-Whole Amount formula, is defined by reference to the agreement's acceleration provision—Section 12.1.[7]

16. The mutually reinforcing cross-references between the OpCo Notes MNPA's Make-Whole Amount definition and its acceleration provision thus foreclose any doubt that the agreement requires the payment of the Make-Whole Amount in the circumstances here, *i.e.*, where OpCo Notes have been accelerated as a result of OpCo's bankruptcy filing.[8]

[7] The terms "Called Principal" and "Remaining Scheduled Payments" are directly incorporated into the Make-Whole Amount formula. The term "Settlement Date," in contrast, is incorporated indirectly through the OpCo Notes MNPA's definitions of "Remaining Scheduled Payments" and "Discounted Value," both of which are part of the Make-Whole Amount formula and rely, in turn, on the definition of "Settlement Date." Two other defined terms that are themselves indirectly incorporated into the Make-Whole Amount formula also depend on the definition of "Settlement Date," specifically, the defined terms "Reinvestment Yield," and "Remaining Average Life." *Id.*

[8] As such, consistent with the decision in *U.S. Bank N.A. v. Wilmington Savings Fund. Society (In re MPM Silicones, LLC)*, 531 B.R. 321 (S.D.N.Y. 2015), the OpCo Notes MNPA expressly provides for the satisfaction of the Make-Whole Amount upon acceleration of the obligations under the OpCo Notes MNPA and, consistent with the Third Circuit's decision in *Delaware Trust Co. v. Energy Future Intermediate Holding Co. (In re Energy Future Holdings Corp.)*, 842 F.3d 247, 253 n.1, 256 (3d Cir. 2016), clearly indicates the parties' intents that such amounts would be due upon acceleration. Indeed, make-whole provisions such as the OpCo Notes MNPA's that expressly provide for payment of a make-whole amount upon acceleration are uniformly enforced by courts applying New York law. *See, e.g.*, *United Merchs. & Mfgs., Inc. v. Equitable Life Assur. Soc'y of the U.S.*, 674 F.2d 134, 140 (2d Cir. 1982) (enforcing prepayment charge where loan agreement provided that upon default "the principal of such Note shall forthwith become due and payable, together with the interest accrued thereon, and, to the extent permitted by law, an amount equal to the pre-payment charge that would be payable if [the borrower] were pre-paying such Note pursuant to [the contract's prepayment provision]"); *In re School Specialty, Inc.*, No. 13-10125 KJC, 2013 Bankr. LEXIS 1897, at *6 (Bankr. D. Del. Apr. 22, 2013) (enforcing make-whole where "the acceleration of the Term loan . . . made all outstanding principal and unpaid interest, including the Make Whole Payment, due and payable"); *In re Madison 92nd St. Assocs. LLC*, 472 B.R. 189, 195-97 (Bankr. S.D.N.Y. 2012) (enforcing prepayment premium where loan agreement provided that "if the Loan is accelerated during the Lockout Period for any reason other than casualty or condemnation, Borrower shall pay, in addition to all other amounts outstanding under the Loan documents, a prepayment premium equal

Presumably for this reason, the Objecting Parties do not even contest that the Make-Whole Amount is due under the terms of the OpCo Notes and OpCo Notes MNPA.

2. The Make-Whole Amount Formula

17. The Objecting Parties also do not dispute that the application of the Make-Whole Amount formula set forth in Section 8.7 of the OpCo Notes MNPA results in a Make-Whole Amount of approximately $201 million. The Objecting Parties do, however, mischaracterize that formula as "defin[ing] the Make-Whole Amount to be all future interest payments on outstanding principal through the maturity of the Notes, subject to some modest discounting to present value based on prevailing rates of treasury securities" (Debtors' Memo at 22) and as "replicat[ing] the value of all future interest payments" (*id.* at 11; *see also* ¶ 12). That is not what the Make-Whole Amount formula does, nor is it what he formula was intended to do.

18. Section 8.7 of the OpCo Notes MNPA provides that the Make-Whole Amount on the date of acceleration (which the OpCo Notes MNPA refers to as the "Settlement Date"), is equal to the amount by which the "Discounted Value" of ***both*** the principal and interest payments that originally were scheduled to come due after that acceleration date (which the OpCo Notes MNPA refers to as the "Remaining Scheduled Payments") exceeds the undiscounted principal amount that has become immediately due and payable on such date (which the OpCo Notes MNPA refers to as the "Called Principal"). OpCo Notes MNPA § 8.7. Thus, the Make-Whole Amount formula not only discounts to net present value the future interest payments that would have become due, as the Objecting Parties' suggest, but it (i) also discounts to net present value the principal amount that would have become due, (ii) sums the net present values of the interest and principal, and then (iii) compares that sum to the

to five percent (5%) of the outstanding balance of the Loan"); *Fin. Ctr. Assocs. of East Meadow, L.P. v. TNE Funding Corp. (In re Fin. Ctr. Assocs. of East Meadow, L.P.)*, 140 B.R. 829, 835 (Bankr. E.D.N.Y. 1992) (enforcing prepayment charge that was "occasioned by [the lender's] acceleration of the debt").

undiscounted principal amount of the OpCo Notes (*i.e.*, the face amount), none of which would be involved in "replicat[ing] the value of all future interest payments."

19. The "Discounted Value" of the Remaining Scheduled Payments 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.* As defined in the OpCo Notes MNPA, the "Reinvestment Yield" is equal to 0.50% (*i.e.*, 50 basis points) in excess of 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 OpCo Note as of the date it was accelerated, here the Petition Date. *Id.* Under this formula, the Make-Whole Amount would increase as market rates for U.S. Treasury securities decline, would decrease as market rates for U.S. Treasury securities rise, and would equal zero if market rates rose to within 50 basis points of the contract interest rate.

20. As further discussed in paragraph 43 *infra*, Section 12.1 of the OpCo Notes MNPA expressly confirms that the Make-Whole Amount "is intended to provide compensation for the deprivation of [OpCo Noteholders'] right" to maintain their investment free from repayment. *Id.* § 12.1. The OpCo Notes MNPA thus reflects that the Make-Whole Amount is a charge that serves to liquidate OpCo Noteholders' damages from early termination of the loan and, contrary to the allegations in the Objections (Debtors' Memo at 11; Note Comm. Obj. at 4; Eq. Comm. Obj. at 9), ***does not*** say that the Make-Whole Amount is intended to be an acceleration of, or substitute for, future interest accruals.

3. Postpetition Interest on the OpCo Notes

21. The Objections also seek disallowance of the OpCo Note Claims insofar as they include postpetition interest through the date of satisfaction of the OpCo Note Claims at a rate in excess of the FJR as of the Petition Date, which was 0.58%. Here again, however, the

Objecting Parties do not, and cannot, dispute that, as a contractual matter, the OpCo Noteholders are entitled to an interest rate in excess of the FJR. Each OpCo Note provides for interest on "any overdue payment of interest, any overdue payment (including any overdue prepayment) of principal, and any overdue payment of any Make-Whole Amount" at the contractual default rate. *See, e.g.*, OpCo Notes MNPA Exh. 1.1(a). For each series of OpCo Notes, the contract default rate is the "greater of (i) 2% per annum above the rate of interest stated in clause (a) of the first paragraph of the Notes or (ii) 2% over the rate of interest publicly announced by JPMorgan Chase Bank, N.A. as its 'base' or 'prime' rate." *See id.* Schedule B.[9] Each OpCo Note further provides that interest is payable (and if unpaid, compounds) semiannually "on March 1 and September 1." *See id.* Exh. 1.1(a).

C. The Disputed OpCo RCF Claims for Postpetition Interest

22. The Objections only seek the disallowance of the OpCo RCF Claims to the extent they claim postpetition interest at a rate in excess of the FJR. Much like with the OpCo Notes, however, the Objecting Parties do not, and cannot, dispute that a higher interest rate is due under the terms of the RCF Credit Agreement, which provides that "if any principal of or interest on any Loan or any fee or other amount payable by the Borrower [t]hereunder is not paid when due, whether at stated maturity, upon acceleration or otherwise, such overdue amount shall bear interest, after as well as before judgment," at the contract default rate. RCF Credit Agreement § 2.13(d). Specifically, if an event of default occurs and is continuing, each Eurodollar borrowing is converted to an "ABR" borrowing. *Id.* § 2.08(e). Overdue amounts on ABR borrowings accrue interest at a rate per annum equal to 2% plus the "Alternate Base Rate"

[9] Thus, for example, the 5.92% OpCo Notes due March 1, 2018 provide for interest on overdue amounts "to the extent permitted by law, at a rate per annum from time to time equal to the greater of (i) 7.92% or (ii) 2% over the rate of interest publicly announced by JPMorgan Chase Bank, N.A. from time to time in New York, New York, as its 'base' or 'prime' rate." *See, e.g., id.*, Exh. 1.1(b).

plus the "Applicable Rate." *Id.* § 2.13(d). Because both rates, by definition, are determined on a daily basis and, because interest is payable on demand, interest compounds daily. *Id.* §§ 1.01, 2.13(d).

D. The OpCo Group Stipulation and Confirmation Order

23. After the Objections were filed, this Court confirmed the Plan, which designates OpCo Funded Debt Claims as "Unimpaired." Plan § 3.2(d)(4). In support of the Plan, the Debtors argued, and offered evidence, that the Debtors are "massively" solvent. *See Expert Report of Petrie Partners* [ECF No. 1218-3] (opining that the Debtors' total enterprise value is approximately $4.8 billion to $7.0 billion); *see also* 2/13/2017 Hr'g Tr. at 40:24-25 (testimony by Debtors' Chief Financial Officer that "OpCo is a massively solvent debtor.").

24. The Senior Creditor Committee objected to confirmation of the Plan on the grounds, among others, that for the OpCo Funded Debt Claims to be unimpaired, the Debtors must pay the Make-Whole Amount and postpetition interest on the OpCo Notes and OpCo RCF at the applicable contract default rates until the OpCo Funded Debt Claims are satisfied in full. *See, e.g.*, *The Senior Creditor Committee's Objection to Confirmation of the Debtors' Second Amended Plan* [ECF No. 1274] at 4-5, 25-29. To avoid a contested confirmation hearing, the Debtors entered into a stipulation with the Senior Creditor Committee [ECF No. 1287], the terms of which are reflected in the Confirmation Order.

25. The Confirmation Order provides that the OpCo Funded Debt Claims "shall include, without limitation, any amounts necessary to render the holders of the Allowed OpCo Funded Debt Claims Unimpaired." Confirmation Order ¶ 161; *see also* Plan § 3.2(d)(2) ("Postpetition interest calculated at the FJR or such other rate as determined by a Final Order of the Bankruptcy Court to render the OpCo Funded Debt Claims Unimpaired shall be Allowed."). It also provides that "[n]othing in the Plan or th[e] Confirmation Order . . . shall be deemed to

limit, release or waive any claims, defenses, counterclaims or other arguments of the holders of the OpCo Funded Debt Claims in connection with the Debtors' Claim Objection and joinders thereto." Confirmation Order ¶ 166. Further, "the rights of the . . . [Senior Creditor Committee] . . . to contend that the Allowance of the [OpCo Funded Debt Claims] and the treatment of the Allowed [OpCo Funded Debt] Claims under the Plan must conform to that set out in" the Senior Creditor Committee's confirmation objection, "including any arguments based upon the Plan's treatment of the Claims as Unimpaired." *Id.* ¶ 169.

APPLICABLE LEGAL STANDARD

26. Section 502 of the Bankruptcy Code governs the allowance of claims in a chapter 11 case. Under section 502(b), when an objection to a claim is filed, the Court "shall allow such claim" except to the extent one or more statutorily enumerated exceptions applies. Here, the Debtors invoke two of these enumerated exceptions: (1) section 502(b)(2), which provides for disallowance of claims "for unmatured interest," and (2) section 502(b)(1), which provides for disallowance of claims that are "unenforceable against the debtor and property of the debtor, under any agreement or applicable law." As shown below, however, neither exception applies to any component of the OpCo Funded Debt Claims.

27. Although not typically implicated in the claims allowance process, section 1124 of the Bankruptcy Code, which governs "impairment" of claims under a chapter 11 plan, is also relevant. *See* paragraphs 24-25 *supra*. As shown below, the OpCo Funded Debt Claims must be allowed in their asserted amounts for such claims to be Unimpaired as the Plan and Confirmation Order require.

ARGUMENT

I. THE MAKE-WHOLE AMOUNT MUST BE ALLOWED IN ITS ENTIRETY

A. For OpCo Note Claims To Be Unimpaired, the Debtors Must Pay the Full Make-Whole Amount Due Under State Law

28. The Objections to the Make-Whole Amount rely heavily on section 502(b)(2) of the Bankruptcy Code but fail to reconcile this reliance with the Plan's treatment of OpCo Note Claims as Unimpaired. Even if section 502(b)(2) were applicable here (and, as discussed below, it is not), irrespective of whether the Make-Whole Amount would be disallowed under that section, section 1124 unequivocally requires that the Debtors pay the full Make-Whole Amount due under applicable non-bankruptcy law for the Plan to comply with the terms of the Confirmation Order. The Debtors' decision to treat OpCo Note Claims as Unimpaired, and deny the OpCo Noteholders the right to vote on the Plan, forecloses any of the Objecting Parties' arguments based on section 502(b)(2).

29. Section 1124(1) of the Bankruptcy Code provides that a class of claims is impaired ***unless*** the plan "leaves unaltered the legal, equitable, and contractual rights" to which each claim in such class entitles its holder. 11 U.S.C. § 1124(1). The plain language of section 1124(1) makes it abundantly clear that ***any*** alteration of a claimholder's prepetition rights constitutes impairment. Indeed, courts recognize that Congress intended the term impairment to have the "broadest possible meaning." *See*, *e.g.*, *In re Vill. at Camp Bowie I, L.P.*, 454 B.R. 702, 708 (Bankr. N.D. Tex. 2011) (finding impairment in delaying (unnecessarily) payment by three months and stating that requiring any particular degree of impairment would "frustrate Congress's evident intent to give 'impairment' the broadest possible meaning") (citations omitted); *In re M & S Assocs., Ltd.*, 138 B.R. 845, 853 (Bankr. W.D. Tex. 1992) ("Congress defined impairment in the broadest possible terms"); *In re Am. Solar King Corp.*, 90 B.R. 808,

819 (Bankr. W.D. Tex. 1988) ("The Bankruptcy Code defines 'impairment' broadly, thereby maximizing creditor participation in the confirmation process, *i.e.*, even the smallest impairment nonetheless entitles a creditor to participate in voting.") (citation omitted).[10]

30. Under this "broadest possible" definition of impairment, the only way that the OpCo Note Claims would not be impaired would be for the Debtors to pay the full Make-Whole Amount.[11] Disallowing the Make-Whole Amount under section 502(b)(2) clearly does not leave the OpCo Noteholders' legal, equitable, and contractual rights unaltered. This conclusion is further confirmed by the legislative history of section 1124, which specifically addressed "redemption premiums." Before the 1994 amendments to the Bankruptcy Code, former section 1124(3) provided that a class of claims was unimpaired under a plan if such plan provided that "on the effective date of the plan, the holder of such claim . . . receives, on account of such claim . . . cash equal to . . . the allowed amount of such claim." 11 U.S.C. § 1124(3), *repealed by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106. Before section 1124(3) was enacted in 1978, however, a Senate committee report had proposed an alternative version of that section, which would have stated that "a claim or interest is unimpaired if the plan provides for their payment in cash" and that "[i]n the case of a debt liability, the cash payment is for the allowed amount of the claim, ***which does not include a redemption premium***." S. Rep. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5905 (emphasis added). Ultimately, Congress rejected this version in favor of section 1124(3), which

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10 *See also L & J Anaheim Assocs. v. Kawasaki Leasing Int'l, Inc.* (*In re L & J Anaheim Assocs.*), 995 F.2d 940, 942 (9th Cir. 1993) (acknowledging that "[i]t is well established that with this language, 'Congress define[d] impairment in the broadest possible terms'"); *In re Madison Hotel Assocs.*, 749 F.2d 410, 418 (7th Cir. 1984) (same) (citing *Di Pierro v. Taddeo (In re Taddeo)*, 685 F.2d 24, 28 (2d Cir. 1982)). Moreover, courts have stated that there is a presumption of impairment, to which section 1124 creates only three "narrow exceptions" (*Am. Solar King*, 90 B.R. at 819), one of which is the complete preservation, without the slightest deviation, of the claimholder's prepetition legal, equitable and contractual rights pursuant to section 1124(1). *See Madison Hotel*, 749 F.2d at 418; *M & S Assocs.*, 138 B.R. at 853.

11 As discussed in section I.C. *infra*, the Make-Whole Amount is fully enforceable under applicable state law.

excluded the language that would have treated claims as unimpaired even if redemption premiums were not included in their allowed amount. Thus, Congress rejected the construct that a claim can be unimpaired notwithstanding the disallowance of a redemption premium. Indeed, "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (quotation omitted); *see id.* at 442 (where immigration bills in House and Senate differed because Senate bill included additional requirement for alien to obtain asylum, "[t]he enactment of the House bill rather than the Senate bill . . . demonstrates that Congress eventually refused to restrict eligibility for asylum only to aliens meeting the stricter standard"); *Gulf Oil Corp. v. Copp*, 419 U.S. 186, 200 (1974) (conference committee's deletion of language in proposed bill "militates against a judgment that Congress intended a result that it expressly declined to enact").

31. In their memorandum of law in support of confirmation of the Plan,[12] the Debtors argued that section 1124 of the Bankruptcy Code is satisfied so long as the Plan pays in cash the full amount of the OpCo Funded Debt Claims as limited by section 502(b)(2). This argument, however, ignores the 1994 amendments to section 1124, which specifically deleted former section 1124(3), while leaving the rest of section 1124 intact. Since the 1994 amendments, it has been clear that payment in cash of the claim as limited by section 502(b)(2) is not sufficient to render such claim unimpaired. *See, e.g., In re Introgen Therapeutics, Inc.*, 429 B.R. 570, 581 (Bankr. W.D. Tex. 2010) (acknowledging that, after the 1994 amendments, payment in full in cash of the principal amount of unsecured claims in a class is not sufficient to

12 *Debtors' Memorandum of Law In Support of Confirmation of Debtors' Second Amended Joint Chapter 11 Plan of Reorganization* [ECF No. 1296] ("Confirmation Memo"), ¶¶ 112-118.

deem such class unimpaired); *In re Great Bay Hotel & Casino, Inc.*, 251 B.R. 213 (Bankr. D.N.J. 2000) (same).

32. Congress's deletion of former section 1124(3) in the 1994 amendments was in direct response to in *In re New Valley Corp.*, 168 B.R. 73 (Bankr. D.N.J. 1994), where a bankruptcy court held that a claim was unimpaired where the plan provided full payment of the allowed amount of the claim after application of section 502(b)(2). Congress deleted former 1124(3) for the express purpose of overruling that decision (by name):

> In a recent Bankruptcy Court decision in *In re New Valley Corp.*, 168 B.R. 73 (Bankr. D.N.J. 1994), unsecured creditors were denied the right to receive postpetition interest on their allowed claims even though the debtor was liquidation and reorganization solvent. The New Valley decision applied section 1124(3) of the Bankruptcy Code literally by asserting, in a decision granting a declaratory judgment, that a class that is paid the allowed amount of its claims in cash on the effective date of a plan is unimpaired under section 1124(3), therefore is not entitled to vote, and is not entitled to receive postpetition interest. . . . ***In order to preclude this unfair result in the future, the Committee finds it appropriate to delete section 1124(3) from the Bankruptcy Code*.**

140 Cong. Rec. H10,752-01 (daily ed. Oct. 4, 1994) (statement of Rep. Brooks) (emphasis added). In so doing, Congress further explained its intent that "[a]s a result of this change, if a plan proposed to pay a class of claims in cash [only] in the full allowed amount of the claims, the class would be impaired entitling creditors to vote for or against the plan of reorganization." *Id.*

33. In *New Valley*, the application of section 502(b)(2) to the creditor's claim altered the creditor's prepetition rights. Congress's rejection of that decision confirms that any application of section 502(b)(2) to a creditor's claim impairs that claim and entitles the creditor to vote on the plan. This is precisely the conclusion recently reached by Delaware Bankruptcy Judge Sontchi, who recognized that any determination that a claim is not impaired when its allowed amount is limited by section 502(b)(2) "would result in exactly the same result that led

Congress to delete section 1124(3) from the Bankruptcy Code." *In re Energy Future Holdings Corp.*, 540 B.R. 109, 123 (Bankr. D. Del. 2015) (addressing claims for postpetition interest).

34. In their Confirmation Memo, the Debtors pointed to a "distinction between 'plan impairment'—that is, when a plan alters the rights owed to a creditor—and 'statutory impairment'—that is, when such alteration occurs by operation of the Bankruptcy Code." Confirmation Memo ¶ 114. The Debtors suggest that the OpCo Note Claims are not impaired by the Plan but, rather by the statute, *i.e.*, by operation of section 502(b)(2) of the Bankruptcy Code. The case on which the Debtors primarily relied is *Solow v. PPI Enterprises (U.S.), Inc. (In re PPI Enterprises (U.S.), Inc.)*, 324 F.3d 197 (3d Cir. 2003). In that case, the Third Circuit was dealing with the statutory cap on a landlord's claim created by section 502(b)(6). Finding that the application of the statutory cap did not render the landlord's claim impaired because "a creditor's rights must be ascertained with regard to applicable statutes, including the §502(b)(6) cap," (*id.* at 204) the Third Circuit rejected the landlord's argument that the "exception to the presumption of impairment" (*id.* at 205) created by the elimination of former section 1124(3), went beyond payment of postpetition interest. However (and more importantly for present purposes), the Third Circuit agreed with the bankruptcy court that Congress expressed a clear intent that the holder of an unsecured claim against a solvent debtor can only be deemed unimpaired if it received postpetition interest on its claim. *Id*. at 207. As Judge Sontchi pointed out in *Energy Future Holdings Corp.*, there is "an irreconcilable conflict" between extending the logic of the *PPI* court to section 502(b)(2) and the clear Congressional intent expressed in the amendment of section 1124. 540 B.R. at 123.

35. Here, the Debtors chose to treat the OpCo Notes as Unimpaired and must live with the consequences of that choice. One of the consequences is that the Debtors must

satisfy their full contractual obligations to the OpCo Noteholders, including the payment of the Make-Whole Amount.

B. Bankruptcy Code Section 502(b)(2) Is Inapplicable Because the Make-Whole Amount Is Not "Unmatured Interest"

36. Even if the Debtors had not treated the OpCo Note Claims as Unimpaired, section 502(b)(2) of the Bankruptcy Code still would not apply to the Make-Whole Amount.

37. The Objecting Parties' argument that the Make-Whole Amount should be disallowed pursuant to section 502(b)(2) of the Bankruptcy Code as "unmatured interest" is wrong and, as they themselves recognize, contrary to the weight of precedent. The fact is that the overwhelming majority of courts that have been called upon to determine the nature of make-whole premiums have held that they do not constitute "unmatured interest" for purposes of section 502(b)(2). *See, e.g., In re Trico Marine Servs., Inc.*, 450 B.R. 474, 480 (Bankr. D. Del. 2011) (stating that the "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") (internal citations omitted); *In re School Specialty, Inc.*, No. 13-10125, 2013 Bankr. LEXIS 1897, at *18 (Bankr. D. Del. Apr. 22, 2013) (agreeing with majority that make-whole premiums are not unmatured interest); *In re Chemtura Corp.*, 439 B.R. 561, 604 (Bankr. S.D.N.Y. 2010) (acknowledging that the "majority view" is that prepayment premium claims should not be disallowed as unmatured interest); *Noonan v. Fremont Fin. (In re Lappin Elec. Co.)*, 245 B.R. 326, 330 (Bankr. E.D. Wis. 2000) (stating that the "court is in agreement with a majority of courts that view a prepayment charge as liquidated damages, not as unmatured interest" that would be disallowed under section 502(b)(2)).

38. The Debtors seek to distinguish the cases reflecting the majority view on two principal grounds, alleging that: (i) in some of these cases, the make-whole premium was a

fixed number rather than a formula similar to that used to calculate the Make-Whole Amount here, and (ii) in some other of these cases, courts found that the prepayment premium was "mature" because it was triggered before the petition date. Debtors' Memo at 16-17. Neither of these distinctions, however, supports the Debtors' contention that the Court should depart from the majority view that the Make-Whole Amount is not unmatured interest.

39. The Make-Whole Amount is not "interest" but rather a one-time "fee" or "charge" that was a fundamental part of the negotiated bargain at the time of the issuance of the debt that sets the OpCo Noteholders' damages and to which section 502(b)(2) does not apply. And even if the Make-Whole Amount were viewed as interest, it was fully matured as of the Petition Date and, therefore, yet again not subject to section 502(b)(2). Lastly, even if the Debtors' argument were correct, it still would not carry the day. For if the Court were to determine that the Make-Whole Amount constitutes unmatured interest, the Make-Whole Amount still must be paid in full because, under the unique facts of the case at bar, not only are the Debtors solvent by billions of dollars and able to satisfy the OpCo Funded Debt Claims in full, but to permit otherwise would create a windfall for HoldCo's equityholders and allow the Debtors to achieve in bankruptcy something that would not be achievable outside of bankruptcy—prepayment of the OpCo Notes in direct contravention of the express terms of the OpCo Notes MNPA and the parties' express intentions.

1. The Make-Whole Amount Is Not "Interest"

a. *Unlike Interest, the Make-Whole Amount Does Not Compensate For the Use of Money But Rather Liquidates OpCo Noteholders' Damages From Premature Termination*

40. The Bankruptcy Code does not supply a definition for the term "interest", so the ordinary, common sense meaning of the term controls: Interest is compensation to a

creditor for a debtor's use of that creditor's money over a period of time.[13] *Cf. Clark v. Rameker*, 134 S. Ct. 2242, 2246 (2014) ("The Bankruptcy Code does not define 'retirement funds,' so we give the term its ordinary meaning."); *Hall v. United States*, 566 U.S. 506, 511-12 (2012) (adopting ordinary meaning of term in Bankruptcy Code and citing Black's Law Dictionary).

41. A make-whole premium does not fit this definition of interest. Unlike interest, a make-whole premium does not provide compensation for the debtor's use of a lender's money. Quite the opposite: A make-whole premium, which becomes due upon repayment or, as here, upon acceleration, provides compensation for losses a lender will suffer when a debtor prematurely ***stops using*** the lender's money. *See Great Plains Real Estate Dev., L.L.C. v. Union Centr. Life Ins. Co.*, 2007 U.S. Dist. LEXIS 97640, at *19 (S.D. Iowa June 4, 2007), *aff'd*, 536 F.3d 939 (8th Cir. 2008) (prepayment provision "provides the lender with compensation for the early termination of the loan").

42. The Objecting Parties' arguments that the Make-Whole Amount is economically the same as "interest" misapprehend the economic function that make-whole premiums serve. Lenders have finite funds and when a lender makes a loan to a particular borrower, it commits those funds for the term of the loan. If the loan terminates before its expected maturity, the lender might not be able to reinvest its funds in a similar loan. In that scenario, the lender loses out on the yield it could have realized if it had instead loaned those same funds to another borrower that did not thereafter default. The purpose of a make-whole premium is to compensate for this loss. *See, e.g.*, *Cappellini v. Mellon Mortg. Co.*, 991 F. Supp.

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[13] *See* Black's Law Dictionary (10th ed. 2014) (defining "interest" as "[t]he compensation fixed by agreement or allowed by law for the use or detention of money, or for the loss of money by one who is entitled to its use; esp. the amount owed to a lender in return for the use of borrowed money."); *Deputy v. du Pont*, 308 U.S. 488, 498 (1940) ("In the business world 'interest on indebtedness' means compensation for the use or forbearance of money."); *Becker v. Huss Co.*, 43 N.Y.2d 527, 543 (N.Y. 1978) (reasoning that "interest is intended to compensate for the use or nonpayment of money").

31, 36 (Bankr. D. Mass. 1997) (explaining that "prepayment penalties or charges were developed in order to compensate the lenders for costs associated with the unanticipated reinvestment of principal, presumptively at less favorable rates"); *In re Hidden Lake Ltd. P'ship*, 247 B.R. 722, 729 (Bankr. S.D. Ohio 2000) 729 (enforcing prepayment premium and recognizing that the lender's damages were dependent on "future interest rates" and "the availability of a suitable substitute investment opportunity for the lender"); *cf. Walter E. Heller & Co. v. Am. Flyers Airline Corp.*, 459 F.2d 896, 899–900 (2d Cir. 1972) (enforcing loan commitment fee as the lender "contractually limit[ed] its lending activities so that the funds to be advanced to [the debtor] might be available when needed" and "the lender was faced with the cost and expense of procuring substitute borrower or borrowers and the attendant delay in lending the [same] sums") (quotation omitted); *JMD Holding Corp. v. Congress Fin. Corp.*, 4 N.Y.3d 373, 383 (N.Y. 2005) (enforcing early termination fee as the lender "was required to limit its lending activities to insure that adequate funds were available to fulfill its [loan] obligation to [the borrower], and would incur costs to procure substitute borrowers").[14]

43. Here, the parties to the OpCo Notes MNPA expressly stated their intent that the purpose of the Make-Whole Amount is to compensate the OpCo Noteholders for the loss they would suffer from early termination. Section 12.1 states that "each holder of a Note has the right to ***maintain its investment in the Notes free from repayment***" and that the Make-Whole Amount "is intended to provide ***compensation for the deprivation of [that] right***." The Objecting Parties flagrantly mischaracterize this section as stating that "the purpose of the Make-Whole Amount is to provide noteholders with the economic equivalent of all of their

14 *See also Arthur v. Burkich*, 520 N.Y.S.2d 638, 639 (1987) ("Prepayment can impose daunting economic sacrifices upon a [creditor], not the least of which include the loss of the bargained-for rate of return, an increased tax burden, unanticipated costs occasioned by the need to reinvest the principal, and for those creditors anxious to ensure regular payments . . . it undoes the [creditor's] purpose in making the loan.") (citing Alexander, Mortgage Prepayment: The Trial of Common Sense, 72 Corn. L. Rev. 288, 310-317 (1987)).

future interest payments," thus essentially seeking to rewrite the OpCo Notes MNPA to say that: the "Make-Whole Amount is intended to provide compensation for all ***lost future interest***." Debtors' Memo at 11-12; Note Comm. Obj. ¶¶ 5-6 (quoting Section 12.1 of the OpCo Notes MNPA and falsely asserting, without elaboration, that the Make-Whole Amount "represents damages for the lost interest"); Eq. Comm. Obj. ¶ 32 (falsely describing Section 12.1 of the OpCo Notes MNPA as "expressly stat[ing] that the purpose of the Make-Whole Amount is to provide OpCo Noteholders with the economic equivalent of all of their future interest payments"). The parties to the OpCo Notes MNPA, however, did not draft Section 12.1 that way because that was ***not*** their intent, and the contractual language they did choose reflects that they intended the Make-Whole Amount to serve a different function altogether: compensating the OpCo Noteholders for the losses they will suffer from premature termination of the loans to which they had committed their funds and the resultant need to reinvest those funds.

44. Courts that have been called upon to examine make-whole premiums have recognized that they serve a different function than interest, and thus make-whole premiums are not analyzed under usury state laws. *See Feldman v. Kings Highway Savs. Bank*, 102 N.Y.S.2d 306, 306 (N.Y. App. Div. 2d Dep't 1951), *aff'd*, 102 N.E.2d 835 (N.Y. 1951) ("prepayment privilege charge" was "***not in consideration of the making of a loan or of forbearance of money***" but rather "[i]t was the converse, that is, for the making of a new and separate agreement, the termination of indebtedness" and ***"[a]ccordingly, it was not a payment of interest*** and therefore could not be the basis of a claim for usury") (emphasis added); *Lyons v. Nat'l Sav. Bank*, 113 N.Y.S.2d 695, 696 (N.Y. App. Div. 3d Dep't 1952) (following *Feldman* and holding that prepayment premium could not "be considered as interest upon a loan");[15] *see*

[15] The OpCo Notes MNPA and OpCo Notes are governed by New York law. OpCo Notes MNPA § 22.7 ("This Agreement shall be construed and enforced in accordance with, and the rights of the parties shall be governed

also Parker Plaza W. Partners v. UNUM Pension & Ins. Co., 941 F.2d 349, 352 (5th Cir. 1991) (Fifth Circuit recognizing that "Texas courts hold that ***a prepayment premium is a charge for the option or privilege of prepayment, not 'compensation . . . for the use or forbearance or detention of money' and, as such, the charge is not 'interes***t'") (emphasis added).

45. The majority of bankruptcy courts have held that make-whole premiums are properly viewed as liquidated damages rather than interest—the relevant damages being the losses the lender suffers from early loan termination—often after consulting New York state law. *See, e.g., United Merchs.*, 674 F.2d at 140 (analyzing a provision for a "pre-payment charge" as a liquidated damages provision under New York law); *Katzenstein v. VIII SV5556 Lender, LLC (In re St. Vincent's Catholic Med. Ctrs. of N.Y.)*, 440 B.R. 587, 594 (Bankr. S.D.N.Y. 2010) (analyzing an "acceleration indemnification" fee under New York law as a liquidated damages provision); Aug. 27, 2013 Hr'g Transcript ("*GMX* Hearing Transcript") at 14, *In re GMX Res., Inc.*, No. 13-11456-SAH (Bankr. W.D. Okla.), ECF No. 687 ("Under New York law . . . a make-whole provision or a prepayment obligation is analyzed as a liquidated damages clause . . ."); *School Specialty*, 2013 Bankr. LEXIS 1897, at *8 ("Under New York law, prepayment provisions . . . are analyzed under the standards applicable to liquidated damages."). The Debtors criticize these decisions as embracing a "false dichotomy" between liquidated damages and unmatured interest (Debtors' Memo at 19); however, the dichotomy is not at all false when the disparate economic functions of interest and make-whole premiums are properly understood. Because a make-whole premium does not compensate for the use of money over time, it, by definition, is not interest.

by, the law of the state of New York excluding choice of law principles of such state that would require the application of the laws of a jurisdiction other than such state."); *see, e.g., id.* Exh. 1.1(a) ("This Note shall be construed and enforced in accordance with, and the rights of the parties shall be governed by, the law of the state of New York excluding choice-of-law principles of the law of such state . . . .").

46. The Debtors dismissively allege that all of the decisions comprising the majority view that have allowed make-whole premiums as liquidated damages were reached "without any analysis" (*see* Debtors' Memo at 18 (referring to the decisions as the "majority" view in scare quotes)). In other words, the Debtors ask this Court to depart from the majority view by assuming that all courts that disagreed with them ***must have*** simply failed to consider whether make-whole premiums also constitute unmatured interest. The Debtors overlook, however, that when a court finds that a make-whole premium is enforceable as liquidated damages under New York law, it necessarily also finds that the make-whole premium is not the equivalent of unmatured interest. This is because New York law would not permit enforcement of a liquidated damages provision where the relevant damages are unmatured interest. *See Chaifetz v. Schreiber*, No. 02-cv-2841, 2003 U.S. Dist. LEXIS 12891, at *4 (E.D.N.Y. June 10, 2003) (default provision that required payment of unearned interest was not an enforceable liquidated damages provision, but rather a penalty); *see also Edward Andrews Grp., Inc. v. Addressing Servs. Co.*, No. 04 Civ. 6731, 2005 U.S. Dist. LEXIS 30125, at *22 (S.D.N.Y. 2005) (citing *Chaifetz* and explaining that "where a court awards liquidated damages, it will limit the prevailing party's recovery to accrued interest because unearned, by nature, has never accumulated on the debt"). Under New York law, "unearned interest" is not recoverable as damages. *See Atlas Fin. Corp. v. Ezrine*, 42 A.D.2d 256, 258 (N.Y. App. Div. 1st Dep't 1973) (creditor that sued on guarantee of accelerated mortgage note was entitled to "the unpaid balance of the principal and the matured interest up to the time of payment, ***excluding the unearned interest at that time***") (emphasis added); *see also Aardwoolf Corp. v. Nelson Capital Corp.*, 861 F.2d 46, 47 (2d Cir. 1988) ("In our view, New York legislation and judicial pronouncements demonstrate a consistent intent to deny a creditor the right to charge or retain interest that is

unearned."). Thus, a finding that an amount is enforceable as liquidated damages under New York law necessarily means the amount is not unmatured interest. The two concepts are mutually exclusive: an amount cannot be enforceable as liquidated damages and also be unmatured interest.[16]

47. Contradicting their own "false dichotomy" argument, the Debtors concede that make-whole premiums do not constitute unmatured interest for purposes of section 502(b)(2) when they are calculated as a fixed percentage of a loan's principal amount. Debtors' Memo at 16. This concession undermines the Objecting Parties' entire argument. Here, the $201 million Make-Whole Amount is less than 14% of the approximately $1.46 billion principal amount of the OpCo Notes outstanding on the Petition Date. *See Amended Declaration of Garland R. Shaw in Support of Chapter 11 Petitions and First Day Motions* [ECF No. 44] ¶ 37. If, as the Debtors acknowledge, a make-whole premium would not constitute interest under section 502(b)(2) if it were calculated as a fixed 10% of the outstanding principal amount (*see* Debtors' Memo at 16 (citing *In re 360 Inns, Ltd.*, 76 B.R. 573, 575 (Bankr. N.D. Tex. 1987), where the prepayment premium was a fixed 10%)),[17] there is no reason the Make-Whole Amount should be treated differently simply because it is derived from a formula. The fallacy at the core of the Debtors' argument is that make-whole premiums that would not qualify as interest if they were denominated as a fixed percentage of the principal are somehow transformed into interest if they are instead calculated using a "yield maintenance formula"

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[16] As discussed in section I.C. *infra*, New York law does permit creditors to recover prejudgment interest in addition to its damages because the two concepts compensate for different harms. *See Grobman v. Chernoff*, 15 N.Y.3d 525, 559 (N.Y. 2010) ("[D]amages and prejudgment interest are not the same thing. Damages compensate plaintiffs in money for their losses, while prejudgment interest is simply the cost of having the use of another person's money for a specified period.") (quotation omitted).

[17] Courts have approved make-whole premiums that amounted to a much larger percentage of the loan's principal amount. *See, e.g., School Specialty*, 2013 Bankr. LEXIS, at *17 (finding that make-whole amount equal to 37% of a term loan was not unreasonable); *Fin. Ctr. Assocs.*, 140 B.R. at 839 (prepayment charge equal to 25% of principal amount was not unreasonable).

similar to the formula in the OpCo Notes MNPA. Debtors' Memo at 13. Regardless of how a make-whole premium is calculated, however, its economic function perforce remains the same—to compensate the lender for the losses it will suffer if its investment terminates prematurely.

48. In their futile attempt to distinguish the Make-Whole Amount from a fixed percentage premium, the Objecting Parties mischaracterize the Make-Whole Amount formula set forth in Section 8.7. *See* paragraphs 17-19 *supra*. Contrary to the Objecting Parties' misleading descriptions, the Make-Whole Amount formula does not function to simply calculate the net present value of all future interest payments that would have come due under the OpCo Notes through their scheduled maturities. *See* Debtors' Memo at 11, 22; Eq. Comm. Obj. ¶¶ 12, 30. Indeed, the simple fact that the Make-Whole Amount could be zero under the Section 8.7 formula (in a scenario where the market for U.S. Treasury securities rates rose to within 50 basis points of the contract interest rate for the relevant OpCo Notes) conclusively demonstrates that the Make-Whole Amount formula serves a different function. A formula that calculates the net present value of future interest payments could never yield a result of zero.

49. Critically, the Objecting Parties' descriptions of the Make-Whole Amount formula ignore that the formula is based on ***both*** the principal and the interest payments that would have come due under the OpCo Notes. The formula discounts ***both*** amounts using a "Reinvestment Yield" based on the implied yield on U.S. Treasury securities with tenors comparable to the OpCo Notes plus 50 basis points. This is because doing so provides a rough approximation of the amount that OpCo Noteholders would need to reinvest at the prevailing market rate to be economically no worse off than if the OpCo Notes had not been accelerated. Given that the parties could not predict at the time the OpCo Notes were issued what reinvestment opportunities and market rates might be available when the OpCo Notes

accelerated, the parties assumed that the OpCo Noteholders could reinvest in an instrument that yielded higher returns than U.S. Treasury securities. *See Anchor Resolution Corp. v. State St. Bank & Trust Co. of Am. (In re Anchor Resolution Corp.)*, 221 B.R. 330, 341 (Bankr. D. Del. 1998) (make-whole "assumes that the Noteholders will be able to reinvest proceeds at a reinvestment rate equal to the relevant Treasury rate plus 0.50% . . . ."). The Make-Whole Amount formula then compares the amount the OpCo Noteholders need to reinvest to avoid suffering a loss to the amount that the OpCo Noteholders would receive by virtue of acceleration (assuming the Make-Whole Amount were not paid)—the undiscounted principal amount—to liquidate the OpCo Noteholders' anticipated damages. *See In re Vanderveer Estates Holdings*, 283 B.R. 122, 132 (Bankr. E.D.N.Y. 2002) (yield maintenance formula functions as "an attempt to compensate the lender for the actual yield loss incurred upon prepayment").

50. Tellingly, the Objecting Parties do not argue that a fixed percentage formula would provide a more reasonable approximation of OpCo Noteholders' expected reinvestment losses than the formula used in Section 8.7 of the OpCo Notes MNPA. In fact, case law is to the contrary—numerous courts have recognized that, of the two options, yield maintenance formulas, under which the resultant premium gets smaller (or "steps down") as interest payments are made over the term of the loan and takes into account market conditions, produce a more reasonable approximation of a lenders' loss than a fixed percentage formula.[18] Thus, the irony of the Debtors' argument is that they are essentially contending that lenders are

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[18] *See In re Schwegmann Giant Supermarkets P'ship*, 264 B.R. 823, 829, 831 (Bankr. E.D. La. 2001) (prepayment premium that provided calculated as a minimum of 10% of the loan principal was unreasonable because it "presumes a loss" and there is a premium "even if the reinvestment rate is higher than the contract rate and there is no economic damage"); *In re Duralite Truck Body & Container Corp.*, No. 90-5-0199, 1993 Bankr. LEXIS 2264, at *20 (Bankr. D. Md. Mar. 31, 1993) (prepayment premium calculated as fixed percentage of loan's principal was unreasonable because it "produces the same result, regardless of whether market interest rates have gone up or down since inception of the loan"); *In re A.J. Lane & Co.*, 113 B.R. 821, 829 (Bankr. D. Mass. 1990) (prepayment charge calculated as fixed percentage of loan's principal was unreasonable because it presumed a loss without accounting for market conditions).

required by section 502(b)(2) to structure make-whole premiums in a ***less*** reasonable way. By the Debtors' logic, a make-whole premium should be "unconnected to any expected damages amount." Debtors' Memo at 16 (quoting Scott K. Charles, Emil A. Kleinhaus, Prepayment Clauses in Bankruptcy, 15 AM. BANKR. INST. L. REV. 537, 581 (2007) ("Charles & Kleinhaus Article"). That logic, however, directly conflicts with the legal standard under state law for a liquidated damages provision to be enforceable. *See JMD Holding Corp.*, 4 N.Y.3d at 379 ("A contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss . . . .").

51. The Debtors contrive this proposed rule of law—that the make-whole provisions in credit documents where premiums are expressed as fixed percentages can be enforced in bankruptcy, but provisions that serve the exact same function but are based on yield maintenance formulas are prohibited—in a vain attempt to distinguish court decisions that have allowed claims for fixed percentage make-whole premiums despite section 502(b)(2). *See* Debtors' Memo at 16 (distinguishing *Lappin Elec.*, 245 B.R. at 330, and *360 Inns*, 76 B.R. at 576). Ultimately, the distinction the Debtors draw cannot support the weight the Debtors put on it. The Make-Whole Amount in these cases is not "interest."

b. *Unlike Interest, the Make-Whole Amount Is Not Earned Over Time But Rather Is a One-Time Fee or Charge*

52. That the Make-Whole Amount is not interest is further confirmed by the manner in which it is earned. As explained in the preceding section, interest compensates a lender for a debtor's use of the lender's money over a given time period. As such, interest is earned incrementally as time progresses. The purpose of a make-whole premium, in contrast, is to compensate a lender for the losses it suffers from the premature termination of its loan. Thus, unlike interest, a make-whole premium does not accrue incrementally; instead, it becomes fully

due and payable at the particular moment in time when the debtor either chooses to (in the case of a make-whole premium due upon voluntary prepayment) or is contractually required (in the case of a make-whole premium due upon acceleration) to ***stop using*** the lender's money. In this regard, a make-whole premium is akin to a commitment, breakup, exit, or termination fee—*i.e.*, a one-time fee or charge that compensates lenders for losses suffered from committing limited resources to a particular endeavor and, in so doing, foregoing other opportunities. *See* Note Comm. Obj. at 5 (referring to "make-whole ***and similar*** premiums" while citing to New York Court of Appeals decision regarding early termination fee") (emphasis added).

53. The distinction that the Bankruptcy Code makes between "interest" and a one-time "fee" or "charge" is clear from reference to section 506(b) of the Bankruptcy Code, which governs the extent to which a claim is secured. In defining what amounts can be included in the secured portion of a claim, section 506(b) expressly distinguishes "interest" from "fees, costs, or charges." *See, e.g.*, 11 U.S.C. § 506(b) (allowing "to the holder of [an oversecured] claim, ***interest*** on such claim, ***and*** any reasonable ***fees, costs, or charges*** provided for under the agreement . . .") (emphases added). As the Supreme Court has recognized, Congress clearly intended "interest" and "fees, costs, or charges" to be considered two distinct claim categories. *See United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989) ("By the plain language of the statute, the two types of recovery are distinct.").

54. Case law applying section 506(b) illustrates that amounts should be treated as fees, costs, and charges, and not interest, when they serve a different economic function than interest. In *In re AE Hotel Venture*, 321 B.R. 209 (Bankr. N.D. Ill. 2005), for example, a secured creditor sought to include in its secured claim default interest at a rate of an additional 5% per annum, but the court held that "[t]he claim for default interest is not a claim for interest at all."

Id. at 215. The court explained that "[g]enerally speaking, interest compensates for the delay in receiving money owed: 'the loss of the time value of money'" whereas "[d]efault interest is instead designed to reimburse creditors for 'extra costs incurred after default.'" *Id.* The court noted that "[t]he time value of [the creditor's] money, after all, did not magically increase by 5% once [the debtor] defaulted." *Id.* The court thus concluded that that "[d]efault interest, then, is not true interest at all" but rather "a form of late charge and thus is a 'charge' for purposes of section 506(b)." *Id.; accord In re Consolidated Props. Ltd. P'ship*, 152 B.R. 452, 455 (Bankr. D. Md. 1993) ("A default rate of interest that reflects a reasonable attempt to compensate a creditor for extra costs incurred after default is more in the nature of "additional 'fees, costs, or charges' . . . than mere 'interest on such claim'. . . .").

55. Relevant here, numerous courts have examined make-whole premiums in the context of section 506(b) and concluded that such premiums constitute "fees" or "charges" rather than unmatured interest. Indeed, as the Charles & Kleinhaus Article that the Debtors rely on acknowledges, "[t]he cases are surprisingly uniform on this issue." Charles & Kleinhaus Article at 572; *see*, *e.g.*, *Imperial Coronado Partners, Ltd. v. Home Fed. Savs. & Loan Ass'n (In re Imperial Coronado Partners, Ltd.)*, 96 B.R. 997, 1000 (B.A.P. 9th Cir. 1989) (finding that a "prepayment premium is clearly a 'charge provided for under the agreement'" within the meaning of section 506(b)); *AE Hotel Venture*, 321 B.R. 209; *In re Outdoor Sports Headquarters, Inc.*, 161 B.R. 414, 424 (Bankr. S.D. Ohio 1993) ("Prepayment charges are encompassed in the term 'charges,' as used in [section] 506(b)."); *A.J. Lane*, 113 B.R. at 823 ("[T]he statutory language compels the conclusion that this requested payment is one of the 'charges' which [section] 506(b) governs."); *cf. Lappin Elec.*, 245 B.R. at 331 (allowing claim for early termination fee).

56. Even though section 506(b) is not applicable here, cases holding that make-whole amount are a "charge" provide strong support for rejecting the Debtors' argument that the Make-Whole Amount is interest for purposes of section 502(b)(2). Just as it does in section 506(b), therefore, the term "interest" in section 502(b)(2) must exclude claims that are properly categorized as "fees, costs, or charges." It is a settled cannon of statutory construction that when Congress uses the same term in two different sections of the same statute, that term is presumed to have the same meaning in both sections. *See Barnhill v. Johnson*, 503 U.S. 393, 406 (1992) ("Normally, we assume that the same terms have the same meaning in different sections of the same statute."). Indeed, it would be illogical to treat make-whole premiums as a "fee" or "charge" for the purposes of section 506(b) of the Bankruptcy Code, but to treat them as "interest" for any other purposes under the Bankruptcy Code.

57. As the claim for the Make-Whole Amount is properly categorized as a fee or charge rather than interest, section 502(b)(2) is simply inapplicable: it only prohibits the allowance of unmatured "interest"; it contains no similar prohibition on the allowance of fees or charges of any kind. *Cf. Ogle v. Fid. & Dep. Co.*, 586 F.3d 143, 147-49 (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) and is deemed to have arisen pre-petition."); *UPS Capital Bus. Credit v. Gencarelli (In re Gencarelli)*, 501 F.3d 1, 5 (1st Cir. 2007); *SNTL Corp. v. Centre Ins. Co. (In re SNTL Corp.)*, 571 F.3d 826, 842-43 (9th Cir. 2009); *Official Comm. of Unsecured Creditors v. Dow Corning Corp. (In re Dow Corning Corp.)*, 456 F.3d 668, 680-83 (6th Cir. 2006); *In re 804 Congress, L.L.C.*, 529 B.R. 213, 230 (Bankr. W.D. Tex. 2015) ("There is no . . .

provision disallowing attorney's fees or other costs in section 502, and so *Timbers'* rationale for disallowing postpetition interest . . . simply has no application to attorney's fees").[19]

c. *Treating Make-Whole Premiums as Interest Is Inconsistent with Bankruptcy Policy*

58. The Objecting Parties argue that whether an amount is "interest" under section 502(b)(2) should be determined based on the "economic substance" of the claim, and suggest that such an analysis is dictated by the Fifth Circuit's decision in *Texas Commerce Bank, N.A. v. Licht (In re Pengo Industries, Inc.)*, 962 F.2d 543, 546 (5th Cir. 1992). Debtors' Memo at 11; Eq. Comm. Obj. ¶ 27. First and foremost, the argument is unavailing because, as discussed above, the "economic substance" of a make-whole premium, which is compensation for losses a lender suffers from having to reinvest prematurely, is fundamentally different than "interest," which is compensation for a debtor's use of the lender's money. Second, in directing the Court to focus exclusively on the economic substance of the Make-Whole Amount, the Objecting Parties have mischaracterized the law, including as set forth in *Pengo*.[20]

59. Contrary to the Objecting Parties' arguments, *Pengo* illustrates that courts determining if an amount is "interest" for purposes of section 502(b)(2) must look not just to the "economic substance" of the claim but also to whether treating the claim as "interest" would comport with bankruptcy policy. In *Pengo*, a debtor attempted an ultimately futile out-of-court

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[19] *See also In re Agway*, Inc., No. 02-65872, 2008 Bankr. LEXIS 3597, at *20 (Bankr. N.D.N.Y. July 18, 2008) ("[T]he Court concludes that the analysis in *Timbers* and its discussion of Code § 506(b) with respect to an allowance of postpetition interest is not persuasive on the issue of attorneys' fees and costs . . . ."); *In re New Power Co.*, 313 B.R. 496, 510 (Bankr. N.D. Ga. 2006) ("Neither § 506(b) nor the Timbers decision bar unsecured creditors' from asserting a contractual or statutory claim for attorneys' fees as an unsecured claim.") It makes no difference that the foregoing cases deal with attorneys' fees rather than charges, as the rationale for not applying section 502(b)(2) would be exactly the same.

[20] The Debtors also cite to *In re Oakwood Homes Corp.*, 449 F.3d 588 (3d Cir. 1999), as an example of a court "examining the 'economic reality of the transaction' when addressing section 502(b)(2)." Debtors' Memo at 11. The question presented in *Oakwood*, however, was not whether an amount constituted unmatured interest, but whether the principal amount of contract claim should be further discounted to present value after the unmatured interest was disallowed under section 502(b)(2). *Oakwood* is therefore wholly inapposite here.

workout before it was forced into chapter 11 by an involuntary petition filed against it. The workout involved a face value debt-for-debt exchange in which the exchange debentures had a lower interest rate but were senior in priority of payment to the old debentures and had an earlier maturity date and more favorable conversion rights. When bondholders filed proofs of claim for the full face amount of their new debentures, certain unsecured creditors objected, asserting that the bondholders' claims should be reduced to reflect the fact that the fair market value of the old debentures was lower than the face amount of the new debentures at the time of the exchange, which created original issue discount ("OID") equal to the amount of the difference.

60. The Fifth Circuit does begin its opinion in *Pengo*, as the Objecting Parties observe, by recognizing that, generally, unamortized OID would be "a disallowable claim in bankruptcy under section 502(b)(2),"[21] but the Objecting Parties ignore that the court went on to hold that the prepetition debt-for-debt exchange at issue "did not create original issue discount ***for purposes of section 502(b)(2)***." *Pengo*, 962 F.2d at 549. Critically, the Fifth Circuit did not base its decision on any finding that there was not, in fact, a differential between the market value of the old debentures and the face amount of the new debentures, but rather on its "disfavor [for] a judicial interpretation of the Bankruptcy Code that contravenes the substantial Congressional policy favoring out-of-court consensual workouts." *Id.* The Fifth Circuit noted

[21] The Debtors suggest that a make-whole amount is analogous to OID, citing to *Paloain v. LaSalle Bank Nat'l Ass'n (In re Doctors Hospital of Hyde Park, Inc.)*, 508 B.R. 697 (Bankr. N.D. Ill. 2014). Debtors' Memo at 11, 12. Both the Debtors and *Doctors Hospital* are wrong. OID constitutes interest because it compensates for the ongoing use of a lender's money and is earned over time. In fact, under New York law, if a loan terminates early, the unearned portion of any OID must be credited back to the debtor. *See Berman v. Schwartz*, 59 Misc. 2d 184, 186 (N.Y. Sup. Ct. N.Y. Cnty. 1968), *aff'd*, 305 N.Y.S.2d 1019 (N.Y. App. Div. 1st Dep't 1969) ("The mere fact that the total interest is computed in advance and added in equal proportions to and included in the face amount of the notes, as a form of prepaid interest or discount, does not change the equitable principle that the unearned part of the interest must be deducted upon acceleration and payment of an indebtedness prior to maturity."); *see also Aardwoolf Corp.*, 861 F.2d at 49 (applying New York law and requiring that original issue discount be refunded). As discussed in section I.B.1.a. *supra*, a make-whole amount is not compensation for the use of money and is not earned over time. A make-whole amount is thus dissimilar from OID and, unlike OID, is not interest.

that a prior bankruptcy court ruling to the contrary had "created an enormous disincentive for investors to participate in consensual out-of-court restructurings and, thus, spurred movement of financially troubled companies into the bankruptcy courts." *Id.* at 547. The Fifth Circuit thus adopted a rule that "aims to align the resolution of the OID issue with th[e] bankruptcy policy" of promoting consensual workouts. *Id.* at 549. Other courts have similarly relied on bankruptcy policy in deciding whether amounts should be considered "interest" for purposes of section 502(b)(2). *See Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 322 F.3d 1039, 1047 (9th Cir. 2002) ("Where the specific characteristics of a transaction create uncertainty as to whether a claim includes unmatured interest, federal courts do not base their decisions on economic theories of interest. Instead, they evaluate the transaction in light of the principles that underlie Section 502(b)(2) and the policies that flow throughout the Bankruptcy Code."); *id.* at 1053 (citing "strong Congressional policy of protecting interest rate swaps, termination damages and the swap market from the effects of bankruptcy" in holding that payments on interest rate swaps that were part of integrated loan transaction did not constitute unmatured interest for purposes of section 502(b)(2)); *LTV Corp. v. Valley Fidelity Bank & Trust Co. (In re Chateaugay Corp.)*, 961 F.2d 378, 382 (2d Cir. 1992) (like *Pengo*, citing "strong bankruptcy policy" in holding that a face value debt-for-debt exchange does not result in unmatured interest in the form of OID for purposes of section 502(b)(2)); *Blair v. Bank One, N.A.*, 307 B.R. 906, 911 (N.D. Ill. 2004) (agreeing with *Thrifty Oil* that swap breakage fees were not unmatured interest for purposes of section 502(b)(2) given "the congressional purpose of encouraging such swaps").

61. Much like in the above cases, the Objecting Parties' proposed rule that make-whole premiums should be treated as interest conflicts with one of the fundamental

bankruptcy policies: "[u]niform treatment of property interests by both state and federal courts." *Butner v. United States*, 440 U.S. 48 (1979). As the Supreme Court has explained, this policy "serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving a windfall merely by reason of the happenstance of bankruptcy" (precisely as the HoldCo's equity holders seek to obtain here). *Id.* at 55. The Supreme Court has thus held that "[t]here is no reason why [property] interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding . . . [u]nless some federal interest requires a different result." *Id.* As discussed in section I.B.1.a. *supra*, New York law does not treat make-whole premiums as unmatured interest. This Court should not create dis-uniformity between federal and state courts where, as here, there is no federal interest that requires interfering with a bargain struck by sophisticated lenders and borrowers that protects the lenders' interests through make-whole premiums. *See United Merchs.*, 674 F.2d at 144 (pre-Code decision enforcing prepayment premium because "[n]othing in bankruptcy law or policy counsels against recognition of [the lender's] claims for liquidated damages"); *In re Skyler Ridge,* 80 B.R. 500, 508 (Bankr. C.D. Cal. 1987) ("No bankruptcy policy compels the invalidation of a properly drawn prepayment clause in all cases.").[22]

2. The Make-Whole Amount Was Fully Matured as of the Petition Date

62. Section 502(b)(2) does not apply to the Make-Whole Amount for yet another, independent reason: The Debtors' obligation to pay such amount was not "unmatured" as of the Petition Date.

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[22] *See also Travelers Cas. & Sur. Co. of Am. v. Pac. Gas. & Elec. Co.*, 549 U.S. 443, 450 (2007) ("[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 . . . . That principle requires bankruptcy courts to consult state law in determining the validity of most claims.") (quotation and citations omitted); *Raleigh v. Illinois Dep't of Revenue*, 530 U.S. 15, 20 (2000) (explaining that the basic "federal rule" in bankruptcy is that state law governs the substance of claims).

63. An amount is "unmatured" when it is not yet "due and payable." *See, e.g.*, *In re Moore*, 307 B.R. 394, 397 (Bankr. S.D.N.Y. 2004) ("The Bankruptcy Code does not provide a definition for what constitutes 'unmatured interest' but case law has defined it as interest that is not yet due and payable at the time the debtor filed its bankruptcy petition or that has not been 'earned' as of the filing of the bankruptcy petition.") (internal citations omitted); *In re X-Cel, Inc.*, 75 B.R. 781, 788-89 (Bankr. N.D. Ill. 1987) ("Unmatured interest is defined in this context as interest which was not yet due and payable at the time the petition was filed."). "Due and payable" is precisely how the OpCo Notes MNPA describes the status of the Make-Whole Amount on the Petition Date. Section 12.1 thus provides that "[i]f a[bankruptcy] Event of Default with respect to [OpCo] . . . has occurred . . . the entire unpaid principal amount of the [OpCo] Notes, plus . . . (x) any applicable Make-Whole Amount determined in respect of such principle 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." OpCo Notes MNPA § 12.1 (emphasis added). As a matter of New York law, the acceleration of the OpCo Notes advanced the maturity date to the Petition Date itself. *See NML Capital v. Republic of Arg.*, 952 N.E.2d 482, 491 (N.Y. 2011) ("[A]cceleration of a repayment obligation in a note or bond changes the date of maturity . . . to an earlier date based on the debtor's default under the contract.").

64. To get around the fact that the Make-Whole Amount became due and payable ***as of*** the Petition Date by the express language of the OpCo Notes MNPA, the Debtors appeal to the legislative history of section 502(b)(2) that states that whether or not interest is matured or unmatured as of the petition date "is to be determined without reference to any *ipso facto* or bankruptcy clause in the agreement creating the claim." Debtors' Memo at 14 (citing

H.R. Rep. No. 95-595 (1977) and S. Rep. No. 95-989 (1977)). The Debtors then declare, without any proof or argument, that Section 12.1 of the OpCo Notes MNPA constitutes such an *ipso facto* clause. This assertion is both factually untrue and misses the mark on the law.[23]

65. Black's Law Dictionary, on which the Debtors rely in support of this assertion, defines an "*ipso facto* clause" as a "contract clause that ***specifies the consequences of a party's bankruptcy***." Debtors' Memo at 14. In contrast, Section 12.1 of the OpCo MNPA, rather than specifying the "consequences of OpCo's bankruptcy," expressly specifies ***the consequences of the acceleration*** of the OpCo Notes, regardless of the trigger for acceleration. A bankruptcy filing is but one of 14 distinct Events of Default that lead to the same result—acceleration of the OpCo Notes and the obligation to pay the Make-Whole Amount along with other components of the accelerated claim. *See* OpCo Notes MNPA § 11.

66. In addition, when Congress used the term "*ipso facto* clauses" in the House and Senate reports on section 502(b)(2), it could only have been referring to section 365(e)(1) of the Bankruptcy Code (as the other two instances where the Bankruptcy Code addresses *ipso facto* clauses (sections 363(l) and 541(c)(1)(B)) are inapplicable to the relevant circumstances). *See Anchor Resolution Corp.*, 221 B.R. at 338 (agreeing that section 541(c)(1)(B) had no application to a make-whole amount triggered by a bankruptcy filing).

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[23] Despite the Debtors' contention that "many courts have ruled that whether interest is considered unmatured 'as of the petition date' under section 502 is determined without reference to an ipso facto clause" (Debtors' Memo at 14), the Debtors cite only one such case. Neither *In re Watson*, 32 B.R. 491 (Bankr. W.D. Wis. 1983), nor *In re Bonner*, No. 80-01342, 1984 Bankr. LEXIS 6533 (Bankr. M.D. Ga. Jan. 3, 1984), even involved a contractual acceleration. Rather, both cases concerned what formula should be used in calculating the portion of unearned interest or financing charges that a creditor must rebate to the debtor. *In re Oahu Cabinets, Ltd.*, 12 B.R. 160 (Bankr. D. Hawaii 1981), in turn, does nothing more than quote from the same Congressional reports that the Debtors rely on. There is no issue presented in the case as to whether any amount had matured.

However, by its own terms, section 365(e)(1) applies only to executory contracts. *See* 11 U.S.C. § 365(e)(1). The OpCo Notes MNPA is ***not*** an executory contract.[24]

67. Thus, not surprisingly, in the only Circuit level case that has ruled on this issue, *U.S. Bank Trust N.A. v. AMR Corp. (In re AMR Corp.)*, 730 F.3d 88 (2d Cir. 2013), the Second Circuit rejected the argument that an automatic acceleration provision similar to that contained in the OpCo Notes MNPA is an unenforceable *ipso facto* clause, calling such argument "without merit." *Id*. at 106. The court in *GMX* reached the same result and held that a make-whole premium that became due and payable as a result of an automatic acceleration on the petition date was not "unmatured" for purpose of section 502(b)(2). *See GMX* Hearing Transcript at 27 ("[N]ot every bankruptcy default provision is unenforceable in bankruptcy, but, under the specific language of the Bankruptcy Code, only in the narrow circumstances where the contract at issue is an executory contract or unexpired lease, neither of which is present here. . . . [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)."); *see also Anchor Resolution Corp.*, 221 B.R. at 343 (allowing claim for make-whole premium triggered by debtor's bankruptcy filing despite debtor's argument that make-whole clause was an unenforceable *ipso facto* provision). This Court should do the same. Indeed, as one court recognized, "[i]f automatic acceleration of a debt defeats the purpose of a prepayment premium clause, such a clause could never be enforced in a bankruptcy case. A debtor, under such a rule, could always avoid the effect of a prepayment

[24] To determine whether a contract is executory, the Fifth Circuit utilizes the Countryman test: a contract is executory if, at the time of the bankruptcy filing, the failure of either party to complete performance would constitute a material breach, excusing the performance of the other party. *See, e.g., Phoenix Expl., Inc. v. Yaquinto (In re Murexco Petroleum, Inc.)*, 15 F.3d 60, 62-63 (5th Cir. 1994). The OpCo Notes MNPA contains no ongoing obligations for the OpCo Noteholders—once the OpCo Notes have been paid for, no unexecuted obligations by the noteholders remained thereunder, and there is no possibility that their conduct can ever result in a breach that would excuse OpCo's performance under the OpCo Notes MNPA.

premium clause by filing a bankruptcy case. Neither the Bankruptcy Code nor case law compels so drastic a result." *Skyler Ridge*, 80 B.R. at 507 (cited by Debtors).

3. The Debtors' Solvency Compels Payment of the Make-Whole Amount

68. Even if the Court were to determine that the Make-Whole Amount constitutes unmatured interest (and it should not), section 502(b)(2) still should not prevent the OpCo Noteholders from collecting it because of the universal recognition that notwithstanding section 502(b)(2), solvent debtors must pay postpetition interest.

69. The rule embodied in section 502(b)(2) that interest ceases accruing after the petition date is based on two policy concerns. The first is the "administrative inconvenience of continuous recomputation of interest causing recomputation of claims." *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 164 (1946). The second is the "equitable principle that creditors should not be disadvantaged *vis-à-vis* one another by legal delays attributable solely to the time consuming procedures inherent in the administration of bankruptcy laws," which principle "rests at bottom on an awareness of the inequity that would result if, through the continuing accumulation of interest in the course of subsequent bankruptcy proceedings, obligations bearing relatively high rates of interest were permitted to absorb the assets of a bankrupt estate whose funds were already inadequate to pay the principal of the debts owed by the estate." *Nicholas v. United States*, 384 U.S. 678, 683-84 (1966).

70. The first policy concern—"continuous recomputation" of claims—has no application to make-whole premiums. Irrespective of whether a make-whole premium is calculated using a fixed percentage of a loan's principal amount or a yield-maintenance formula, the amount of the premium becomes fixed at that the time the premium is triggered and, therefore, no "continuous recomputation" of creditors' claims is required.

71. The second policy concern likewise has no application where an estate is solvent. In that scenario, concerns inherent in the allocation of a debtor's "limited pie" among its creditors do not exist. *See Chemtura Corp.*, 439 B.R. at 605 ("With a solvent debtor, issues as to fairness amongst creditors, in sharing a limited pie, no longer apply . . . ."). Instead, the "equitable balancing" required in such a scenario involves allocation of value between creditors ***and equity***. And "[c]ourts have long recognized where a debtor is solvent, it is inequitable and improper for shareholders to recover before the debtors' unsecured creditors receive postpetition interest." *In re Loral Space & Commc'ns Ltd.*, No. 03-41710, ECF No. 2621 (Bankr. S.D.N.Y. July 25, 2005) (noting that to "permit such a recovery by shareholders would give them a windfall at the expense of the unsecured creditors."); *see e.g., In re David Green Prop. Mgmt.*, 164 B.R. 92 (Bankr. W.D. Mo. 1994) ("It would be inequitable under these circumstances to allow Debtor to avoid the payment of post-petition interest to unsecured creditors. It would be an unwarranted and undeserved windfall to Debtor"); *In re Gaines*, 178 B.R. 101, 103 (Bankr. W.D. Va. 1995) (noting that "the debtor is not to receive a windfall at the expense of creditors in the event that there is a surplus after payment of all allowed claims.") (cited by the Debtors).

72. To prevent such inequity, courts have thus recognized that when, as here, the debtor is solvent, make-whole premiums should be enforceable to the same extent that they would be under state law, irrespective of section 502(b)(2). *See Energy Future Holdings Corp.*, 842 F.3d at 253 n.1, 256 (where solvent debtor that was "able to pay all allowed claims of its creditors in full" filed for bankruptcy protection to avoid make-whole payments, court's "primary objective . . . [wa]s to give effect to the intent of the parties" and it enforced the make-whole premiums); *Gencarelli*, 501 F.3d at 8 (where debtor was solvent, the court held there was no "useful purpose" in examining whether prepayment premium was reasonable for

purposes of section 506(b) and remanded on limited issue of whether claim was enforceable under state law); *Chemtura Corp.*, 439 B.R. at 606 (approving settlement of make-whole premiums and observing that "since we here have a solvent debtor, I think the bondholders are likely to get whatever they're entitled to under state law"); *Premier Entm't Biloxi LLC v. U.S. Bank Nat'l Ass'n (In re Premier Entm't Biloxi LLC)*, 445 B.R. 582, 636-37 (Bankr. S.D. Miss. 2010) (without deciding whether creditor's damages from breach of no-call provision constituted interest, where debtor was solvent, court held creditor was entitled to claim damages). Indeed, even the Charles & Kleinhaus Article on which the Debtors put so much weight states that "[t]he effect of prepayment clauses in solvent cases . . . ***should be an issue of state law alone***." *Id.* at 584 (emphasis added).

73. For all of the foregoing reasons, section 502(b)(2) has no application to the Make-Whole Amount in the circumstances of these Chapter 11 Cases.

C. The Make-Whole Amount Is Fully Enforceable Under State Law

74. Acknowledging that the majority of courts recognize that a make-whole premium is not interest for purposes of section 502(b)(2), and that the OpCo Notes MNPA and OpCo Notes expressly provide for the uncontroverted contractual right to payment of the Make-Whole Amount, the Objecting Parties argue that the Make-Whole Amount, nevertheless, should be disallowed under section 502(b)(1) of the Bankruptcy Code because it fails to conform to New York state law requirements for an enforceable liquidated damages provision. Specifically, the Debtors argue that the Make-Whole Amount is not a proper liquidation damages provision because (i) "actual damages here are not difficult to calculate" (Debtors' Memo at 22 n.13) and (ii) the OpCo Noteholders would be able to reinvest the principal of the OpCo Notes "at higher rates than the discount rate reflected in the formula." Debtors' Memo at 22. The Objecting Parties further argue that allowing the OpCo Noteholders to collect both the

Make-Whole Amount and postpetition interest on the outstanding principal and on the Make-Whole Amount itself would "double count (and more) any actual harm the OpCo Noteholders might suffer upon acceleration of the Notes" (Debtors' Memo at 22; *see also* Note Comm. Obj. ¶¶ 10-12; Eq. Comm. Obj. ¶¶ 36-41), thus (i) impermissibly allowing the Debtors to collect "actual damages in addition to liquidated damages" (Debtors' Memo at 23; *see also* Note Comm. Obj. ¶ 13), and (ii) making these disputed components of the OpCo Note Claims "grossly disproportionate to the probable loss when the parties drafted the MNPA" (Debtors' Memo at 23). None of these arguments has merit. The Make-Whole Amount is fully enforceable under New York state law.

1. The Make-Whole Amount Is a Valid Liquidated Damages Provision

75. New York law on the enforceability of liquidated damages is clear:

> A contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise calculation. If, however, the amount fixed is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced.

JMD Holding Corp., 4 N.Y.3d at 379 (quotation omitted).

76. Whether the Make-Whole Amount represents an "enforceable liquidation of damages or an unenforceable penalty is a question of law," and the burden is on the party seeking to avoid paying the liquidated damages. *Id.* at 379-80.[25] "Absent some element of fraud, exploitive overreaching 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." *Id.* at 380 (citations omitted). Here, the Objecting Parties have not met their burden.

[25] "In the absence of a modification expressed in the Bankruptcy Code," the burden of proof on a claim in bankruptcy "remains where the substantive law puts it." *Raleigh*, 530 U.S. at 26.

77. While the Debtors suggest that actual damages under the OpCo Notes MNPA are "not difficult to calculate," "[t]he soundness of [a liquidated damages] clause is tested in light of the circumstances existing as of the time that the agreement is entered into rather than at the time that the damages are incurred or become payable." *Walter E. Heller & Co.*, 459 F.2d at 898. The OpCo Notes MNPA is a complex credit document negotiated by well-represented, sophisticated parties that contains a bargained-for, and plainly market, formula for the calculation of liquidated damages. When looked at without the benefit of hindsight, all of the factors courts typically consider in analyzing the enforceability of a liquidated damages provision under New York law are present here and support the finding that the Make-Whole Amount may be viewed as an enforceable liquidated damages provision. It was difficult, if not impossible, to determine the OpCo Noteholders' anticipated losses at the time the OpCo Notes MNPA was executed. The parties could not have known when the OpCo Notes would be accelerated, what the market conditions would be at the time of acceleration, or what other investment opportunities OpCo Noteholders would have to forsake based on their investment in the OpCo Notes. *See, e.g., United Merchs.*, 674 F.2d at 142 (listing these, among other uncertainties inherent in complex commercial transactions); *Walter E. Heller & Co.*, 459 F.2d at 899 (same); *Fin. Ctr. Assocs.*, 140 B.R. at 837 ("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.").

78. As to the entirely unsubstantiated assertion that the OpCo Noteholders would be able to reinvest the principal of the OpCo Notes "at higher rates than the discount rate reflected in the formula," such an assertion holds no merit as a legal argument. Numerous courts have upheld liquidated damages provisions under New York law based on formulas substantially

similar to that used in the OpCo Notes MNPA. *See GMX* Hearing Transcript at 20 ("[N]umerous courts, including courts from New York, have found that application of a discount rate that is calculated based on the Treasury rate does not result in an amount that is plainly disproportionate to the lender's potential losses upon prepayment."); *School Specialty*, 2013 Bankr. LEXIS 1897, at *13-14 (prepayment premium based on U.S. Treasury securities was not plainly disproportionate to a lender's losses).[26] This Court should likewise enforce the terms of the OpCo Notes MNPA. New York law analyzes liquidation damages provisions as of the time that the contract was executed, and "[i]t makes no difference whether the actual damages are ultimately higher or lower than the sum stated in the clause." *United Merchs.*, 674 F.2d at 142 (internal quotation omitted).[27]

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[26] *See also Katzenstein*, 440 B.R. at 594 (acknowledging that "[l]iquidated damages provisions [based on] U.S. Treasury bills have been upheld by New York bankruptcy courts"); *VCC Healthcare Fund, LLC v. Double G Arrowhead Orchards P'ship (In re Double G Arrowhead Orchards P'ship)*, No. CV-11-0004, 2011 U.S. Dist. LEXIS 79229, at *9-10 (D. Ariz. July 20, 2011) (holding that a make-whole premium calculated in reference to a treasury rate is reasonable based, in part, on the uncertainty of future interest rates); *In re CP Holdings, Inc.*, 332 B.R. 380, 391 (W.D. Mo. 2005), *aff'd*, 206 F. App'x 629 (8th Cir. 2006) (upholding payment of a make-whole amount calculated in reference to the yield on a U.S. Treasury issue as reasonable because substituting commercial loan interest rates would be "offensive to the basic notion of freedom of contract" and such Treasury instruments are, among other things, "default free") (internal quotation marks omitted); *Vanderveer Estates Holdings*, 283 B.R. at 132 (holding that the choice of a "Treasury Bill benchmark" was not "unreasonable"); *Fin. Ctr. Assocs.*, 140 B.R. at 837-38 (upholding prepayment provision calculated by using the yield on U.S. Treasury bonds).

[27] The Objecting Parties do not, and cannot, dispute that the OpCo Notes resulted from arm's-length transactions between represented, sophisticated parties. The OpCo Notes were issued in increments of no less than $500,000 in private placement transactions, *see, e.g.*, OpCo Notes MNPA § 5.3, and the purchasers were institutional investors, most, if not all, of which were insurance companies or funds managed thereby, *see, e.g., id.* Schedule A. OpCo was represented by Haynes and Boone, LLP, and Foley & Lardner LLP acted as special counsel for OpCo Noteholders. *See, e.g., id.* § 4.4. The parties' respective rights were comprehensively detailed in the OpCo Notes MNPA supplements, and OpCo Notes, and OpCo Noteholders also received Private Placement Memoranda that provided additional disclosures. *Id.* § 5.3. In these circumstances, there can be no concern that the Make-Whole Amount resulted from anything other than full and fair negotiation by duly informed, represented, and sophisticated parties. *See Fin. Ctr. Assocs.*, 140 B.R. at 837 (where the "magnitude of the loan transaction and quality and quantity of the loan documents" is great, it "leave[s] little doubt that here we have an arms-length transaction between adequately represented sophisticated businessmen").

2. OpCo Noteholders Are Not Attempting to Collect Both Liquidated and Actual Damages

79. The Objecting Parties also allege that the OpCo Noteholders are impermissibly attempting to collect both actual and liquidated damages. Debtors' Memo at 23; Note Comm. Obj. ¶ 13. This allegation, however, is not true, and the Debtors' analogy of the OpCo Notes MNPA to the liquidated damages provision in *Agerbrink v. Model Serv. LLC*, 196 F. Supp. 3d 412, 417 (S.D.N.Y. 2016) (*see* Debtors' Memo at 24), is entirely misplaced. The agreement at issue in *Agerbrink* provided that, if the plaintiff defaulted under her agreement with the modeling agency, the agency could both (i) hold (as either liquidated damages or "security") all of the model's earnings already received and to be received thereafter and (ii) bring an action to determine its actual damages. In holding that such a provision constituted an unfair penalty and resulted in the agency's unjust enrichment, the court reasoned that the applicable provision was "designed 'not to make a fair estimate of damages to be suffered but to serve only as an added spur to performance.'" *Id.* at 417 (internal citation omitted).

80. This provision in *Agerbrink* bears no resemblance to the terms of the OpCo Noes MNPA. The Make-Whole Amount provision in the OpCo Notes MNPA liquidates the OpCo Noteholders' damages from the early termination of their investment. The postpetition interest sought by the OpCo Noteholders is a distinct obligation that is due on account of the Debtors' separate failure to pay the principal, unpaid interest, and Make-Whole Amount when due and, as discussed *infra* in the next section, is an amount that would otherwise be owed under New York statutory law.

3. Asserting Claims for Both the Make-Whole Amount and Postpetition Interest Is Permissible Under New York Law

81. The Objecting Parties' main complaint about the OpCo Noteholders' claims on account of both the Make-Whole Amount and postpetition interest is that the

combined amounts produce a measure of damages that is "grossly disproportionate" to those that could be reasonably anticipated at the time the parties executed the OpCo Notes MNPA—*i.e.*, a penalty. The gist of the Objecting Parties' argument is that "postpetition interest is the same interest for which the Make-Whole Amount is supposed to provide Noteholders compensation." Debtors' Memo at 22. This argument is incorrect as a matter of law for at least three reasons. First, as discussed in section I.B.1. *supra*, the Make-Whole Amount is not interest, but, rather a charge intended to compensate the OpCo Noteholders for losses suffered from having to reinvest their committed funds prematurely. Second, the Make-Whole Amount and postpetition interest are clearly intended to remedy two different harms. Third, if the OpCo Noteholders were pursuing their collection efforts against the Debtors under state law, there is no doubt that they would have been entitled to collect interest on both the overdue amounts of principal and interest and on their contractual damages until such claims were satisfied in full.[28]

82. Whether asserting damages for both the Make-Whole Amount and postpetition interest is a "penalty" is evaluated solely under New York law. Under New York CPLR § 5001, a prevailing party in a breach of contract action is entitled, as a matter of right, to collect prejudgment interest on its "damages." CPLR § 5001(a), (b). *See also NML Capital*, 952 N.E.2d at 489; *Chesapeake Energy Corp. v. Bank of N.Y. Mellon Trust Co., N.A.*, No. 13 Civ. 1582, 2015 Dist. LEXIS 90118, at *56-59 (S.D.N.Y. July 10, 2015), *aff'd*, 837 F.3d 147 (2d Cir. 2016) ("*Chesapeake I*") (explaining that prejudgment interest is mandatory). Under NY CPLR

[28] The Equity Committee also asserts in its Objection that payment of both the Make-Whole Amount and post-petition interest is a violation of the principal espoused in *Ivanhoe Building & Loan Ass'n of Newark, N.J. v. Orr*, 295 U.S. 243, 245-46 (1935), that a creditor cannot receive more than 100% of its claims. Eq. Comm. Obj. ¶ 39. That argument, however, has absolutely no merit. First, the Make-Whole Amount and postpetition interest constitutes two independent contractual components of the OpCo Notes Claims; second, as demonstrated herein, the Make-Whole Amount and postpetition interest are intended to compensate the OpCo Noteholders for two different harms; and third, each of the Objecting Parties has conceded that postpetition interest is due on the ***full amount*** of the allowed OpCo Notes Claims.

5001, New York courts routinely award prejudgment interest on and in addition to contractual liquidated damages. *See, e.g., Days Inn Worldwide, Inc. v. Amar Hotels, Inc.*, No. 05 Civ. 10100, 2008 U.S. Dist. LEXIS 47221 (S.D.N.Y. June 18, 2008) (awarding damages in a breach of contract action for (i) outstanding amounts due under the contract, (ii) liquidated damages, and (iii) prejudgment interest on both of the foregoing); *Wechsler v. Hunt Health Sys.*, 330 F. Supp. 2d 383 (S.D.N.Y. 2004) (awarding damages for (i) outstanding amounts owed under contract, (ii) liquidated damages provided for therein, and (iii) prejudgment interest on both of the foregoing).

83. Prejudgment interest has specifically been imposed on make-whole premiums. In *Chesapeake I*, the District Court for the Southern District of New York was called upon to determine the proper measure of damages payable to certain noteholders as a result of the issuer's failure to pay the bargained-for make-whole amount upon the redemption of the notes. Having awarded the noteholders their claim for the full make-whole amount, the District Court went on to award them prejudgment interest on the make-whole amount at the rate provided for in the relevant indenture. *Chesapeake I*, 2015 Dist. LEXIS 90118, at *56-59. On appeal, just as the Debtors do here, the issuer argued that the award was excessive as it allowed the noteholders to receive compensation in excess of the value of the notes at the time of redemption. The Second Circuit disagreed and affirmed the District Court's decision. *See Chesapeake Energy Corp. v. Bank of N.Y. Mellon Trust Co., N.A.*, 837 F.3d 147 (2d Cir. 2016).

84. Likewise, prejudgment interest has also been imposed on overdue interest. In *NML Capital*, the New York Court of Appeals was asked by the Second Circuit to rule on certain questions of New York law in connection with a lawsuit brought against the Republic of Argentina by the purchasers of its floating rate bonds governed by New York law upon Argentina's default. Under the documents governing the bonds, the entire principal of the bonds

was payable upon their maturity, and until such maturity, Argentina was only responsible for biannual interest-only payments. The holders of the bonds were seeking to collect unpaid principal, the missed biannual interest-only payments, and prejudgment interest on both of the foregoing claims. Among other objections, Argentina argued that it should not be liable for prejudgment interest on the missed interest-only payments as this would constitute "a windfall to the bondholders." *NML Capital*, 952 N.E.2d at 490. The Court of Appeals overruled this objection, explaining that, under New York law, "the function of prejudgment interest is to compensate the creditor for the loss of use of money the creditor was owed" and that, while "the biannual interest payments were designed to reimburse the bondholders for the loss of use of the principal during the relevant six-month time interval[, t]he imposition of statutory interest on the unpaid interest payments compensates the bondholders for a different loss – the failure of the issuer to timely make the interest-only payments." *Id.* at 492. Thus, "[a]bsent this component of damages, plaintiffs would be reimbursed only for their loss of use of the principal – and not for loss of use of the periodic interest payments, a separate injury." *Id.* Similarly, while the Make-Whole Amount is designed to compensate the OpCo Noteholders for the damages they will suffer from the early termination of their investment in the OpCo Notes, postpetition interest is supposed to compensate the OpCo Noteholders for the failure of the Debtors to timely make the payment of the overdue principal, interest, and Make-Whole Amount—a separate injury.

85. Moreover, under New York CPLR § 5004, the rate of prejudgment interest is 9% per annum, unless a different rate is specified in the parties' contract. *See NML Capital*, 952 N.E.2d at 488 (explaining that the statutory rate set forth in CPLR § 5004 applies "[i]f the parties failed to include a provision in the contract addressing the interest rate that governs . . . in the event of a breach"). Significantly, the 9% statutory interest rate to which the OpCo

Noteholders would have been entitled under CPLR is at the highest end of the range of rates they are seeking to collect under the OpCo Notes MNPA, which are between 7 and 9%. It is difficult to see how, under New York law, a rate of 7-9% could result in a "penalty," when, under New York statute, the OpCo Noteholders would have been entitled to more in the absence of an applicable contractual provision in the OpCo Notes MNPA.

86. Thus, it appears that what the Objecting Parties are really arguing is that, even though the OpCo Noteholders may be entitled under state laws to the full measure of damages they are claiming under the terms of the OpCo Notes MNPA, awarding them such damages would be somehow "inequitable." As discussed above, however, the equities in these cases favor the OpCo Noteholders. First, the Debtors have asserted that they are solvent by billions of dollars. Pursuant to the terms of the Plan, every creditor of each Debtor will receive full cash payment of its claims unless it agreed to other treatment, thus, no creditor will benefit from the disallowance of the Make-Whole Amount. As the Senior Creditor Committee has argued all along since the filing of the very first iteration of the Plan, the Debtors' sole objective in proposing the Plan and objecting to the clear contractual entitlements of the OpCo Noteholders has always been to transfer value that rightfully belongs to OpCo's creditors to HoldCo's equityholders.[29] HoldCo's equityholders will not suffer any inequity if the Debtors are required to instead honor their lawful debts to their creditors. *Ruskin v. Griffiths*, 269 F.2d 827 832 (2d Cir. 1959) ("[Equityholders] cannot complain . . . when their interest is cut down by the payment of a sum to which the [note]holders are clearly entitled by the express provisions of the

[29] As the *Energy Future Holdings Corp.* court has pointed out, in determining the issue of postpetition interest payable to unsecured creditors, equity considerations may be different depending on whether, if such interest is not paid, the "saved" funds are distributed to another debtor entity (*i.e.*, will inure to the benefit of such debtor entity's creditors) or, as here, to "the ultimate equity holders of the enterprise." 540 B.R. at 118-19.

trust indenture."). But the OpCo Noteholders, in contrast, would suffer a grave inequity if the Debtors dishonored those obligations to ensure a windfall to HoldCo's equityholders.

87. Second, any delay resulting in the accrual of postpetition interest on the overdue principal, interest, and Make-Whole Amount is entirely of the Debtors' own making and they should not be allowed to avoid their contractual obligations simply by hindering the OpCo Noteholders' efforts to collect these amounts. Even before these cases commenced, the Debtors were fully aware that the OpCo Noteholders intended to collect the Make-Whole Amount and all other damages to which they are entitled under the OpCo Notes MNPA. The Debtors nevertheless actively opposed all efforts to expedite the determination of the OpCo Note Claims and, despite proclaiming their "massive solvency" early in these cases, opted not to even explore refinancing the OpCo Notes until after first pursuing, and later abandoning, their original cramdown plan. In *NML Capital*, the court acknowledged that the claim against the defendant became "extraordinarily large, primarily due to the passage of time and the application of the contract's floating interest rate," but did not let this fact prevent it from awarding plaintiffs the full measure of their contractual damages and prejudgment interest.[30] 952 N.E.2d at 489. There is no reason for the Court to issue any different ruling here.

30 The Debtors cite two cases in which secured creditors apparently reduced their make-whole claims by the amount of prepetition interest paid to such creditors during a bankruptcy case. *See* Debtors' Memo at 35 (citing *Anchor Resolution Corp.*, 221 B.R. at 340); Debtors' Memo at 13 n.11 (citing *School Specialty*, 2013 Bankr. LEXIS 1897). Neither case is on point and, moreover, cannot be given any precedential value as the creditors voluntarily reduced their claims without any apparent suggestion by or order of the court. The Debtors also attempt to distinguish two recent make-whole cases, *Energy Future Holdings Corp.*, 842 F.3d 247, and *MPM Silicones*, 531 B.R. 321, which they characterize as "avoid[ing] the duplicative recovery the MNPA provides here." Debtors' Memo at 24-25. However, neither case, in fact, supports the Debtors' argument. As the Debtors point out themselves, the reason that postpetition interest was not, in fact, at issue in either of those cases was because the parties limited their dispute solely to the allowability of the make-whole premiums. In addition, in *Energy Future Holdings Corp.*, the debtors voluntarily prepaid the prepetition amounts due, thus stopping the clock on postpetition interest. Debtors' Memo at 24-25. However, after the Third Circuit reversed the *Energy Future Holdings Corp.* bankruptcy and district courts' refusal to award make-whole claims to the noteholders and remanded the case to the bankruptcy court for calculation of the make-whole claims, the parties chose to settle their litigation. The settlement agreement executed by the parties expressly provided for the payment of each of the following components of the noteholders' claims: (i) the make-whole premiums,

88. For the foregoing reasons, the Make-Whole Amount is fully enforceable under applicable New York law and should be allowed in full.

II. POSTPETITION INTEREST SHOULD BE ALLOWED AT THE CONTRACT DEFAULT RATES

89. In support of their objections to the postpetition interest component of the OpCo Funded Debt Claims, the Objecting Parties again rely, in part, on section 502(b)(2) of the Bankruptcy Code. As discussed in section I.A. *supra*, section 502(b)(2) is inapplicable here because the Plan treats the OpCo Funded Debt Claim as Unimpaired.

90. Despite arguing that section 502(b)(2) disallows all claims for "unmatured interest," the Debtors acknowledge, in the very next sentence, that, in a solvent debtor case, unsecured creditors are nevertheless entitled to postpetition interest on their allowed claims. Debtors' Memo at 25. Indeed, the Debtors had already conceded as much—the Plan itself provides for recoveries on account of postpetition interest on the HoldCo Note Claims (apparently at the contract rate) and on the OpCo Funded Debt Claims (albeit at the FJR). *See* Plan §§ 3.2(c) and (d). The real thrust of the Objecting Parties' argument is that if the Court awards postpetition interest on the OpCo Funded Debt Claims, "that interest should be assessed, at most, at the federal judgment rate."[31] Debtors' Memo at 25; *see also* Note Comm. Obj. ¶ 43. Thus, the sole dispute with respect to postpetition interest presented by the Objections concerns the rate at which such interest should be payable on the OpCo Funded Debt Claims under the

(ii) interest on the make-whole premiums from the time of postpetition redemption (which was the contractual trigger for the payment of the make-whole premiums) through the date the make-whole premiums were paid in full, and (iii) interest on interest. *See* Settlement Agreement, *In re Energy Future Holdings Corp.*, Case No. 14-10979, ECF No. 10848-5 (Bankr. D. Del. Feb. 16, 2017).

[31] The Debtors also state that postpetition interest on the OpCo Funded Debt Claims accrues only through the Effective Date without any explanation or applicable supporting precedent. However, for the OpCo Funded Debt Claims to be Unimpaired under the Plan, postpetition interest must be paid (at the applicable contract rates) through the date the claims are satisfied in full. Here, the disputed portions of these claims will not be paid until significantly after the Effective Date. Accordingly, and in light of the "equitable balancing" discussed above, postpetition interest must be paid on the OpCo Funded Debt Claims through the time such claims are actually satisfied in full.

specific circumstances of these chapter 11 cases, the most important of these specific circumstance being the Debtors' asserted "massive solvency."[32]

91. Because "the disallowance of claims for unmatured interest . . . is one of policy and convenience rather than of substantive law,"[33] there exists a universally accepted "solvent debtor exception" to the general disallowance codified in section 502(b)(2) of the Bankruptcy Code. Although the Objecting Parties generally acknowledge the existence of this exception[34] they are laboring under two fundamental misconceptions in its application: (i) that section 726(a)(5) of the Bankruptcy Code is the sole source of the solvent debtor exception for unsecured creditors, and (ii) that the term "legal rate" in section 726(a)(5) always means FJR, regardless of the circumstances of the case. The Objecting Parties are wrong on both counts.

A. <u>Section 726(a)(5) Is Not Applicable in these Chapter 11 Cases</u>

92. The Objecting Parties' attempt to limit the postpetition interest components of the OpCo Funded Debt Claims by reference to section 726(a)(5) of the Bankruptcy Code is a sleight of hand trick—section 726(a)(5) has no application here. Section 726(a)(5) is only applicable in chapter 7 liquidations. *See* 11 U.S.C. § 103(b) ("Subchapter I and II of chapter 7 of this title apply ***only*** in a case under such chapter") (emphasis added); *see also In re Dow Corning Corp.*, 244 B.R. 678, 686 (Bankr. E.D. Mich. 1999) ("*<u>Dow II</u>*") ("[Section] 726(a)(5) . . . applies ***exclusively*** to chapter 7 proceedings") (emphasis added). As the Objecting

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32 The Debtors do not dispute that, pursuant to the terms of the relevant agreements, and in accordance with applicable New York law, the OpCo Funded Debt Holders are permitted to collect interest (and compounded interest) outside of bankruptcy. Interest on interest is permitted under New York Law where the agreement expressly provides for it. N.Y. Gen. Oblig. Law § 5-527 (McKinney 1997) ("A loan or other agreement providing for compound interest shall be enforceable. . . ."); *see, e.g., Bank of New York v. Foamex Int'l Inc. (In re Foamex Int'l Inc.)*, 382 B.R. 867 (Bankr. D. Del. 2008) (interpreting a contract, governed by New York law, which provided for post-maturity interest on overdue installments of interest and concluding that debtors were required to pay compound interest until the principal was paid in full, regardless of whether payment in full occurs subsequent to the Notes' maturity date).

33 *See In re Cont'l Airlines*, 110 B.R. 276, 280 (Bankr. S.D. Tex. 1989).

34 *See* Debtors' Memo at 26; Note Comm. Obj. ¶ 44.

Parties themselves acknowledge, the only way section 726(a)(5) can be imported into a chapter 11 case is through the "best interest of creditors" test contained in section 1129(a)(7) of the Bankruptcy Code,[35] which sets forth ***the minimum*** of what a holder of an ***impaired claim*** is entitled to receive for a chapter 11 plan to be confirmable.[36] Here, however, the Plan treats the OpCo Funded Debt Claims as ***Unimpaired*** and, thus, neither section 1129(a)(7), nor, by extension, section 726(a)(5), is applicable. *See Energy Future Holdings Corp*., 540 B.R. at 123 (stating that neither section 726(a)(5) nor section 1129(a)(7) "either singularly or in tandem serve to create a universal limitation on the payment of post-petition interest on unsecured debt" and acknowledging that "neither sections 1129(b) nor 1129(a)(7) apply to unimpaired creditors"). Thus, contrary to the Objecting Parties' arguments, section 726(a)(5) of the Bankruptcy Code simply cannot be the source of the conceded entitlement of the OpCo Funded Debt Holders to postpetition interest.

93. Instead, to the extent there is a statutory source of the solvency exception for ***unimpaired*** claims, it can be found in section 1124 of the Bankruptcy Code. The legislative history of section 1124 clearly reflects Congress' intent that, for a claim to be considered unimpaired in a solvent debtor case, the holder of such claim is entitled to postposition interest until such claim has been satisfied. As discussed in detail in section I.A. *supra*, former section 1124(3) of the Bankruptcy Code used to provide that a class of claims was unimpaired under a plan if the plan provided that "on the effective date of the plan, the holder of such claim . . . receives, on account of such claim . . . cash equal to . . . the allowed amount of such claim."

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35 Debtors' Memo at 27 (asserting that "Section 726(a) applies to chapter 11 proceedings via the 'Best Interests of Creditors test'"); *see also* Note Comm. Obj. ¶ 3 (asserting that payment of postpetition interest at the FJR is "consistent with an application of the best interest test").

36 *See* 11 U.S.C. § 1129(a)(7) ("With respect to ***each impaired class*** of claims or interests—(A) each holder of a claim or interest of such class . . . "will receive or retain under the plan . . . property of a value, as of the effective date of the plan, ***that is not less than*** the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date.") (emphases added).

When a bankruptcy court (in *In re New Valley Corp.*, 168 B.R. 73 (Bankr. D.N.J. 1994)) interpreted this to allow a solvent debtor to deny postpetition interest on a class of unsecured claims and still treat such class as unimpaired, Congress determined this was an "unfair result" and repealed former section 1124(3), noting: "In order to preclude this unfair result in the future, the Committee finds it appropriate to delete section 1124(3) from the Bankruptcy Code. As a result of this change, if a plan proposed to pay a class of claims in cash in the full allowed amount of the claims, the class would be impaired, entitling creditors to vote for or against the plan of reorganization."[37] Congress thus clearly envisioned that, in a chapter 11 case of a solvent debtor, for an unsecured claim to be considered ***unimpaired*** under section 1124, the holder must receive its full contractual entitlements, including postpetition interest.[38]

94. Although the Objecting Parties fail to address section 1124 even once in their Objections, in the Confirmation Memo, the Debtors conceded that section 1124 requires payment of postpetition interest, stating that "[t]he OpCo Noteholder Group correctly points out that some courts have found the legislative history accompanying the deletion of section 1124(3) was intended to convey that unsecured creditors of solvent debtors must receive *some* postpetition interest" and acknowledged that "the ***correct*** approach" is to view these cases as "stand[ing] for the proposition that a claim must receive *some* form of post-petition interest in a *solvent* debtor case to qualify as unimpaired." Confirmation Memo at 52-53 (emphasis added). Nor do the Objecting Parties challenge these cases in the Objections. Instead, the Debtors simply leap to the conclusion that the applicable ***rate*** of postpetition interest is supplied by

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37 H. Rep. 103-835, at 47-48 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3356-57.

38 *See In re Energy Future Holdings Corp.*, 540 at 123 (noting that to find otherwise would "create a conflict between the treatment of impaired and unimpaired creditors in solvent reorganization cases such that unimpaired creditors might receive inferior treatment than that accorded impaired creditors"); *Rockland Credit Fin. v. Ceda Mills, Inc. (In re Ceda Mills, Inc.)*, No. 04-24452JAD, 2009 Bankr. LEXIS 5563, at *17 (Bankr. W.D. Pa. Feb. 11, 2009) (noting in *dicta* that "Courts have held that a promise to make payment 'in full' equates to a promise to pay each and every part of the creditor's claim --including interest").

section 726(a)(5). But this is completely illogical: By the Debtors' reasoning, the interest rate required to treat a claim as ***unimpaired*** would be supplied by a provision that only applies to a claim that is ***impaired***. There is simply no logical bridge between these two Bankruptcy Code provisions.

95. In the absence of express statutory guidance regarding the rate of postpetition interest required for claims to be treated as unimpaired under section 1124, the Court should be mindful of a fundamental principle expressed by the Supreme Court of the United States (albeit in a pre-Code case): "the touchstone of each decision on allowance of interest in bankruptcy . . . [is] a ***balance of equities between creditor and creditor or between creditors and the debtor***." *Vanston*, 329 U.S. at 165 (emphasis added); *see also Johnson v. Norris*, 190 F. 459, 466 (5th Cir. 1911) (stating that where the Bankruptcy Act was silent on the matter of postpetition interest, "general principles of equity" should govern). Indeed, one way that the *Energy Future Holdings Corp.* court suggested to reconcile the conflict between sections 502(b)(2) and 1124 is to follow *Vanston* and allow postpetition interest to unimpaired unsecured creditors of solvent debtors "as a matter of equity." *Energy Future Holdings Corp.*, 540 B.R. at 123.

96. Numerous courts have reiterated the principle articulated in *Vanston*, both before and after the adoption of the Bankruptcy Code. Despite the Objecting Parties' assertion to the contrary, there is no authority for the proposition that Congress intended to shed equitable principles and policies in the context of awarding postpetition interest when it enacted the Bankruptcy Code.[39] Thus, the existence of equities unique to solvent debtor cases should guide

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[39] The Debtors' assertion that "equitable balancing" should be "rejected" (Debtors' Memo at 35) as reflecting the pre-Code law superseded by section 726(a)(5) of the Bankruptcy Code is wrong because, as discussed above, section 726(a)(5), being, by its terms, limited to chapter 7 cases, could not supersede anything relating to a chapter 11 case. Indeed, the only chapter 11 case the Debtors cite in support of this assertion does not compel

the Court in determining what rate of postpetition interest (payable through the date the OpCo Funded Debt Claims are satisfied in full) would assure that the holders of the OpCo Funded Debt Claims are truly Unimpaired by the Plan.

97. As discussed in detail in section I.B.3. *supra*, it is axiomatic that, where an estate is solvent, concerns inherent in the allocation of a debtor's "limited pie" among its creditors do not exist and, instead, the "equitable balancing" required involves allocation of value between creditors ***and equity***. It follows that, in the case of a solvent debtor, it is "the opposite of equity to allow the debtor to escape the expressly-bargained-for result of its act," *Ruskin*, 269 F.2d at 832, and, accordingly, in a solvent debtor case equity demands that all of the debtor's contractual obligations be honored to the letter. Among such bargained-for contractual obligations that courts routinely enforce in solvent debtor cases is the obligation to pay interest as provided for in the applicable contract, including the default and compounding interest. *See In re Schoeneberg*, 156 B.R. 963, 970 (Bankr. W.D. Tex. 1993) (allowing interest at contract rate in a solvent chapter 11 debtor case and holding that "when there was a prepetition contract between the parties that provided for interest, it is that contract rate which should be applied in situations such as these"); *see also Colfin Bulls Fundings A, LLC v. Paloian (In re Dvorkin Holdings, LLC)*, 547 B.R. 880, 898 (N.D. Ill. 2016) ("The Court . . . is not convinced that the "legal rate" is limited to the Federal Judgment Rate when the bankruptcy estate turns out to be solvent . . . . Instead, the Court concludes that there is a presumption that, in a surplus Chapter 11 case, creditors who have contracts with the debtor will receive postpetition interest pursuant to the terms of their contracts."); *Dow II*, 244 B.R. at 695-96 (noting that "[w]here the debtor is

this erroneous conclusion. In *In re Manchester Gas Storage, Inc*., 309 B.R. 354 (Bankr. N.D. Okla. 2004), having already ruled that the creditor was not entitled to postpetition interest for several reasons, including the debtor's ***insolvency*** as of the petition date, the court noted, in irrelevant *dicta*, that, it its opinion, *Vanston* has been overruled by the enactment of section 726(a)(5) of the Bankruptcy Code.

solvent, the bankruptcy rule is that where there is a contractual provision, valid under state law, providing for interest on unpaid installments of interest, the bankruptcy court will enforce the contractual provision with respect to both instalments [sic] due before and . . . after the petition was filed . . . .").[40] Indeed, had it been otherwise, as one court observed, if the FJR is sufficiently low, allowing payment of postpetition interest at such rate over applicable contract rate "could create perverse incentives" for debtors with sufficient funds "to file for Chapter 11 reorganization to escape their obligations to pay interest at rates that are unfavorable in comparison to the [FJR]." *Dvorkin Holdings*, 547 B.R. at 898.

B. Even If Section 726(a)(5) Were Applicable, in the Circumstances of these Cases, Postpetition Interest Should Be Paid at the Contract Default Rates

98. Even if section 1129(a)(7) (and, thus, section 726(a)(5)) were applicable to a class of unimpaired claims, it does not follow, as the Objecting Parties assert, that postpetition interest is payable at the FJR in the circumstances of these cases.

99. As the Debtors acknowledge, the Bankruptcy Code does not define "legal rate," and the Fifth Circuit has not adopted any particular definition of this term.[41] Cases that interpret the phrase "interest at the legal rate" range from cases allowing interest at the FJR, to cases allowing interest at the rates prescribed in the applicable state statutes, to cases allowing

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[40] *See*, *e.g.*, *Debentureholders Protective Comm. of Cont'l Inv. Corp. v. Cont'l Inv. Corp.*, 679 F.2d 264, 269 (1st Cir. 1982) (contractual provision for interest on unpaid installments of interest applies postpetition where estate is solvent); *Fed. Sav. & Loan Ins. Corp. v. Moneymaker (In re A & L Props.)*, 96 B.R. 287, 289-90 (C.D. Cal. 1998) (awarding postpetition interest at the rate set forth in the contract); *In re Fast*, 318 B.R. 183, 194 (Bankr. D. Colo. 2004) (allowing postpetition interest on unsecured claim at default contract rate in solvent chapter 7 debtor case); *360 Inns*, 76 B.R. at 584 (stating that "this Court is of the opinion that [creditor] is entitled to be paid interest on the unpaid installments, which necessarily includes interest on interest").

[41] The HoldCo Noteholder Committee is misleading when it asserts that "longstanding Fifth Circuit controlling law" provides that any postpetition interest must be awarded at the federal judgment rate." Note Comm. Obj. ¶ 44. Unsurprisingly, the HoldCo Noteholder Committee fails to cite to any such allegedly "controlling" Fifth Circuit cases.

interest at the contract rate.[42] Thus, even though some courts have held that the "legal rate" for the purposes of section 726(a)(5) is the FJR, these cases are either distinguishable on their facts or their reasoning is wrong.

100. Most of the cases cited by the Objecting Parties, including *In re Melenzyer*, 143 B.R. 829 (Bankr. W.D. Tex. 1992), from within the Fifth Circuit, are chapter 7 liquidations.[43] However, as the court explained in *Robinson* (cited by the Debtors), "[t]he issues of the interest rate to be applied to a class of unsecured claims in a Chapter 11 case . . . are not present in a Chapter 7 case. Not only do they involve . . . different Code sections[, but they] are subject to potentially different policy concerns." *Robinson*, 2017 Bankr. LEXIS 497, at *17-18. Based on these distinctions, the *Dow II* court rejected "the proposition that the federal judgment rate applies in [cases under] all Code chapters . . . ." *Dow II*, 244 B.R. at 685. Acknowledging that the construction of the Bankruptcy Code offered by the plan proponents (which was the same as that championed here by the Objecting Parties) "promotes simplicity and cross-chapter parity," the *Dow II* court noted that "there is a price to be paid for 'simplicity'," namely, it may require sacrificing creditors' contract rights (*id.*), which are "of ***pivotal importance*** in the chapter

42 *See Schoeneberg*, 156 B.R. at 972 ("The weight of historical case law nationally, as well as in this circuit, is that post-petition interest is payable either at the contract rate, at the statutory rate (if a specialized statute establishes a specialized rate of interest for a particular creditor) or, if there is no applicable statute and no rate was contracted for, at the state judgment rate."); *see, e.g., In re Smith*, No. 03-10666, 2008 Bankr. LEXIS 7, at *3 (Bankr. W.D. Ky. Jan. 7, 2008) (applying contract rate as the "legal rate" under section 726(a)(5)); *Dvorkin Holdings*, 547 B.R. at 898 (holding that, for purposes of determining legal rate under section 726(a)(5), there is a presumption that creditors with contracts should receive interest at the rate provided in such contracts); *In re Carter*, 220 B.R. 411, 416-17 (Bankr. D.N.M. 1998) (holding that the "legal rate" under section 726(a)(5) was the rate provided for under contract).

43 *See e.g., Cadle Co. of Ohio, Inc. v. Kravitz (In re Kravitz),* No. BAP MW 00-070, 2001 Bankr. LEXIS 2347, at *3 (B.A.P. 1st Cir. Feb. 16, 2001); *In re Robinson*, No. 15-51556, 2017 Bankr. LEXIS 497, at *16-17 (Bankr. N.D. Ga. Feb. 22, 2017); *In re Augé*, 559 B.R. 223, 228 (Bankr. D.N.M. 2016); *Branch Banking & Trust Co. v. McDow (In re Garriock),* 373 B.R. 814, 816 (E.D. Va. 2007); *In re Best*, 365 B.R. 725, 727 (Bankr. W.D. Ky. 2007); *Bayside Marina v. Ldi Holding Corp. (In re Bayside Marina, Inc.),* 282 B.R. 285, 294 (Bankr. E.D.N.Y. 2002); *In re Country Manor of Kenton, Inc.*, 254 B.R. 179, 183 (Bankr. N.D. Ohio 2000); *In re Chiapetta*, 159 B.R. 152 (Bankr. E.D. Pa. 1993); *In re Melenyzer*, 143 B.R. 829 (Bankr. W.D. Tex. 1992); *In re Godsey,* 134 B.R. 865 (Bankr. M.D. Tenn. 1991).

11 plan-confirmation process," while being irrelevant in chapter 7. *Id.* at 678 (emphasis added). Accordingly, the *Dow II* court opined that "Congress might rationally have decided that this trade-off [*i.e.*, sacrificing creditors' contract rights for simplicity and uniformity] was justifiable only in chapter 7 liquidations, which typically proceed fairly quickly in comparison to reorganization proceedings," but that applying FJR to chapter 11 reorganization cases "cannot be reconciled with the central role of contract rights in a pending reorganization." *Id.* at 685.[44] As the court noted in *Best*, another case cited by the Debtors, "there could be circumstances where a mechanical application of the federal judgment interest rate would result in a windfall for some solvent debtor" and "[t]herefore, the holding [in the case] is limited to the specific facts" of the case. 365 B.R. at 727-28. Accordingly, none of the chapter 7 cases cited by the Objecting Parties is persuasive precedent here.

101. Each of the few non-chapter 7 cases cited by the Objecting Parties where the court expressly ruled that, despite the debtor's solvency, postpetition interest to which an unsecured creditor is entitled is FJR is also distinguishable. Generally, these cases fall into four categories: (i) cases decided in the context of a chapter 11 ***liquidation***, where principles similar to those applicable in chapter 7 cases apply;[45] (ii) cases where the court had to determine the appropriate rate of interest with respect to a claim that was either not based on a contract or where the contract was silent on the issue of interest rate;[46] (iii) cases determining cramdown

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44 The *Dow II* court also emphasized that "[r]ather than being set forth in a statute of general applicability, the provision for 'interest in the legal rate' is found in §726(a)(5), which applies exclusively to chapter 7 proceedings." *Dow II*, 244 B.R. at 688.

45 *See Gaines*, 178 B.R. 101 (a liquidating chapter 11 case where the court noted that "[s]ince this Chapter 11 is a controlled liquidation, it has striking similarities to a Chapter 7.); *David Green Prop. Mgmt.*, 164 B.R. 92 (Bankr. W.D. Mo. 1994) (a liquidating chapter 11 case where the court was not asked to consider the appropriate interest rate).

46 *See Onink v. Cardelucci (In re Cardelucci)*, 285 F.3d 1231 (9th Cir. 2002) (judgment claim); *Beguelin v. Volcano Vision (In re Beguelin),* 220 B.R. 94 (B.A.P. 9th Cir. 1998) (judgment claim); *In re Hoskins*, 405 B.R. 576 (Bankr. N.D.W. Va. 2009) (restitution damage claim); *Bayside Marina*, 282 B.R. at 294 (no interest

interest rate, not the pendency interest rate;[47] and/or (iv) cases containing no substantive analysis.[48]

102. Furthermore, even if the Court were persuaded that, ***for the purposes of section 726(a)(5)***, the "legal rate" always means the FJR, that would not be the end of inquiry with respect to these chapter 11 cases. Under 1129(a)(7), the only provision that could make section 726(a)(5) applicable here, for a plan to be confirmed, each holder of an impaired claim must receive "***not less than***" the amount such holder would have received in a hypothetical chapter 7 liquidation, *i.e.*, under the waterfall contained in section 726. *See* 11 U.S.C. § 1129(a)(7). As the *Dow II* court put it, section 1129(a)(7) "simply establishes a ***minimum*** payment requirement" and "the creditor of a solvent chapter 11 estate must receive postpetition interest at a rate which is ***at least*** equal to the federal statutory rate." *Dow II*, 244 B.R. at 685, 686.

103. Indeed, some of the chapter 11 cases cited by the Objecting Parties held that impaired creditors were entitled to an interest rate higher than FJR under the "fair and equitable" standard of section 1129(b) of the Bankruptcy Code.[49] It would be manifestly absurd

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specified in contract); *Willauer v. IRS (In re Willauer)*, 192 B.R. 796 (Bankr. Mass. 1996) (IRS payments to obtain release of federal tax liens); *Chiapetta*, 159 B.R. 152 (judgment claim); *In re Robinson* (no interest specified in contract), 2017 Bankr. LEXIS 497; *David Green Prop. Mgmt.*, 164 B.R. 92 (no contracts mentioned).

[47] *See In re Cook*, 322 B.R. 336, 340 (Bankr. N.D. Ohio 2005); *In re Suggs*, No. 10-04400-8-JRL, 22011 Bankr. LEXIS 644, at *1 (Bankr. E.D.N.C. Feb. 22, 2011).

[48] *See In re 431 W. Ponce De Leon, LLC*, 515 B.R. 660 (Bankr. N.D. Ga. 2014) (the court cited to *In re Cardelucci* but provided no substantive analysis).

[49] *See Dow II*, 244 B.R. at 685-86; *In re Adelphia Recovery Trust v. FPL Grp., Inc. (In re Adelphia Commc'ns Corp.)*, 652 F. App'x 19, 21-22 (2d Cir. 2016)*; Energy Future Holdings Corp.*, 540 B.R. at 114-16. If the Debtors are urging the Court to start applying sections of the Bankruptcy Code that are not relevant to the circumstances of these cases, there is no reason not to examine section 1129(b) of the Bankruptcy Code that, just as section 1129(a)(7), ***might have been*** applicable in different circumstances. A plan is deemed "fair and equitable" under section 1129(b) as to a dissenting class of unsecured creditors only if it does not violate the absolute priority rule. Under the absolute priority rule, absent full satisfaction of a creditor's allowed claims, no member of a class junior in priority may receive anything on account of its claim or equity interest. *See* 11 U.S.C. § 1129(b).

to argue that "unimpaired" creditors can be meted an inferior treatment and stripped of bargained-for contractual rights, while "impaired" creditors, under the "fair and equitable" standard of section 1129(b), merit a more favorable treatment and are entitled to keep all such rights intact. In fact, not a single case cited by the Objecting Parties stands for the proposition that Congress intended, by reference to chapter 7 liquidations in section 1129(a)(7), to provide a mechanism for debtors to avoid bargained-for contractual obligations by filing for chapter 11 protection.[50]

104. The Objecting Parties would have this Court place a great deal of weight on the Fifth Circuit's decision in *In re Laymon*, 958 F.2d 72 (5th Cir. 1992). However, the holding in that case pertained to the rate of interest under section 506(b) of the Bankruptcy Code, which is not at issue here,[51] and any discussion by the bankruptcy court about section 726(a)(5) was *dicta.* Nor was *Laymon* a solvent debtor case, which also limits its applicability to the matter at hand considerably. Furthermore, even in that case, Bankruptcy Judge Clark acknowledged that there may be circumstances "which would dictate the payment of some additional amount perhaps approaching the contract rate." *In re Laymon*, 117 B.R. 856, 864 (Bankr. W.D. Tex. 1990), *rev'd on other grounds*, 958 F.2d 72 (5th Cir. 1992). In a later case, Judge Clark reiterated his view that there is an "equitable appeal" to offering unsecured creditors a "second cut" measured by interest at the creditors' respective contract rates after ensuring that each unsecured creditor has received a minimum interest payment at the FJR. *Melenzyer*, 143 B.R. at 834. While the Debtors are correct that Judge Clark rejected the "second cut" approach

[50] This kind of exploitation of the bankruptcy process is exactly what bankruptcy law seeks to avoid. The *Dow II* court correctly notes that "[i]f Congress had intended to supplant the contractual right to interest with the rate specified by 28 U.S.C. § 1961(a), one would expect that intention to be plainly expressed. But no such expression exists." *Dow II*, 244 B.R. at 686.

[51] *In re Madison 92nd St. Assocs. LLC*, 472 B.R. 189, 200 (Bankr. S.D.N.Y. 2012), cited by the Debtors, was also a section 506(b) case.

in *Melenzyer*, they ignore two key distinguishing factors: *Melenzyer* was a ***chapter 7*** case involving a debtor that was ***not sufficiently solvent***.[52] Accordingly, the case in the Fifth Circuit that is most analogous to these chapter 11 cases is not *Laymon,* but *In re Schoenberg* where Judge Cox, ***after*** considering Judge Clark's decisions in both *Laymon* and *Melenzyer*, explained that the weight of the applicable case law compelled the court to find that "where there was a prepetition contract between the parties that provided for interest, it is that ***contract rate which should be applied***." 156 B.R. at 972 (emphasis added).

105. Similarly, the weight of the ***applicable*** case law should compel the Court to find that it would be inequitable to allow the Debtors to shirk their contractual obligations where they are sufficiently solvent to pay all unsecured creditors in full, at the rate provided for in the applicable agreements. Not only would depriving the OpCo Funded Debt Holders of their contractual right to default and compounding interest for the period during which their claims remain unsatisfied result in a windfall to equity, it would be particularly inequitable in light of the Plan providing the HoldCo Noteholders—creditors structurally junior to the OpCo Funded Debt Holders—with a recovery on account of all of their contractual rights, including postpetition interest at their ***contract rate***.

CONCLUSION

Based on all of the foregoing, the Senior Creditor Committee respectfully requests that the Court overrule the Objections, allow the OpCo Funded Debt Claims in their full asserted amounts, including the full Make-Whole Amount and postpetition interest at the respective contract default rates, and grant the Senior Creditor Committee such other relief as the Court deems appropriate.

[52] *See Melenzyer*, 143 B.R. at 834 ("[B]ecause the Melenzyer estate, now before the court, potentially has more assets than are needed to pay interest to all unsecured creditors fully at the federal judgment rate, but not enough to pay all creditors at their contract or state statutory rates, we have reevaluated our "second cut" proposal.").

Dated: March 24, 2017
Houston, Texas

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CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2017, a true and correct copy of the foregoing was served via email on the parties entitled to receive service through the Court's CM/ECF system.

/s/ *Bob B. Bruner*
Bob B. Bruner