**No. 21-20008**

**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

IN RE: ULTRA PETROLEUM CORPORATION; KEYSTONE GAS GATHERING, L.L.C.; ULTRA RESOURCES, INCORPORATED; ULTRA WYOMING, INCORPORATED; ULTRA WYOMING LGS, L.L.C.; UP ENERGY CORPORATION; UPL PINEDALE, L.L.C.; UPL THREE RIVERS HOLDINGS, L.L.C.,

*Debtors*

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ULTRA PETROLEUM CORPORATION; KEYSTONE GAS GATHERING, L.L.C.; ULTRA RESOURCES, INCORPORATED; ULTRA WYOMING, INCORPORATED; ULTRA WYOMING LGS, L.L.C.; UP ENERGY CORPORATION; UPL PINEDALE, L.L.C.; UPL THREE RIVERS HOLDINGS, L.L.C.,

*Appellants*

v.

AD HOC COMMITTEE OF OPCO UNSECURED CREDITORS; OPCO NOTEHOLDERS; ALLSTATE LIFE INSURANCE COMPANY; ALLSTATE LIFE INSURANCE COMPANY OF NEW YORK,

*Appellees*

On Appeal from the United States Bankruptcy Court for the Southern District of Texas, No. 16-32202

**BRIEF OF APPELLEE**
**OPCO NOTEHOLDERS**

Peter Sabin Willett
*Counsel of Record*
Andrew J. Gallo
MORGAN, LEWIS & BOCKIUS LLP
One Federal Street
Boston, MA 02110
T. 617.341.7700
F. 617.341.7701
sabin.willett@morganlewis.com
andrew.gallo@morganlewis.com

Renée M. Dailey
AKIN GUMP STRAUSS HAUER & FELD, LLP
65 Memorial Road
West Hartford, CT 06107
T. 860.263.2922
F. 860.263.2932
renee.dailey@akingump.com

*Attorneys for Appellee OpCo Noteholders*

(Additional Counsel and Caption Continued on Inside Cover)

David B. Salmons
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
T. 202.739.3000
F. 202.739.3001
david.salmons@morganlewis.com

*Attorney for Appellee OpCo Noteholders*

May 10, 2021

## CERTIFICATE OF INTERESTED PERSONS

No. 21-20008, *Ultra Petroleum Corporation, et al. v. Ad Hoc Committee of Unsecured Creditors, et al.*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. PARTIES:

The OpCo Noteholders:

Allianz Life Insurance Company of North America,

Allianz Life Insurance Company of North America is a wholly owned subsidiary of Allianz of America, Inc., which in turn is a wholly owned subsidiary of Allianz SE. Allianz SE is a publicly listed German corporation. No publicly held corporation owns 10% or more of Allianz SE's stock.

CM Life Insurance Company,

CM Life Insurance Company is a wholly owned subsidiary of Massachusetts Mutual Life Insurance Company ("Mass Mutual"), a mutual life insurance company owned by its policyholders. Mass Mutual has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

JHL Capital Group Master Fund LP,

JHL Capital Group Master Fund LP is a limited partnership. It has no parent corporation, and no publicly held corporation owns 10% or more of its equity.

John Hancock Life Insurance Company (U.S.A.),

John Hancock Life Insurance Company (U.S.A.) is a wholly owned subsidiary of The Manufacturers Investment Corporation, which is a wholly owned subsidiary of John Hancock Financial Corporation, which is a wholly owned subsidiary of Manulife Holdings (Alberta) Limited, which is a wholly owned subsidiary of The Manufacturers Life Insurance Company, which in turn is a wholly owned subsidiary of Manulife Financial Corporation ("Manulife"), a publicly traded corporation. No publicly held corporation owns 10% or more of Manulife's stock.

John Hancock Life Insurance Company of New York,

John Hancock Life Insurance Company of New York is a wholly owned subsidiary of John Hancock Life Insurance Company (U.S.A.), which is a wholly owned subsidiary of The Manufacturers Investment Corporation, which is a wholly owned subsidiary of John Hancock Financial Corporation, which is a wholly owned subsidiary of Manulife Holdings (Alberta) Limited, which is a wholly owned subsidiary of The Manufacturers Life Insurance Company, which in turn is a wholly owned subsidiary of Manulife Financial Corporation ("Manulife"), a publicly traded corporation. No publicly held corporation owns 10% or more of Manulife's stock.

John Hancock Life & Health Insurance Company,

John Hancock Life & Health Insurance Company, successor by merger to John Hancock Life Insurance Company of Vermont, is a wholly owned subsidiary of John Hancock Life Insurance Company (U.S.A.), which is a wholly owned subsidiary of The Manufacturers Investment Corporation, which is a wholly owned subsidiary of John Hancock Financial Corporation, which is a wholly owned subsidiary of Manulife Holdings (Alberta) Limited, which is a wholly owned subsidiary of The Manufacturers Life Insurance Company, which in turn is a wholly owned subsidiary of Manulife Financial Corporation ("Manulife"), a publicly traded corporation. No publicly held corporation owns 10% or more of Manulife's stock.

JPMorgan Chase Bank as Directed Trustee for the SBC Master Pension Trust,

JP Morgan Chase Bank as Directed Trustee for the SBC Master Pension Trust has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Massachusetts Mutual Life Insurance Company,

Massachusetts Mutual Life Insurance Company is a mutual life insurance company owned by its policyholders. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

MCP Holdings Master LP,

MCP Holdings Master LP is a limited partnership. It has no parent corporation, and no publicly held corporation holds 10% or more of its equity.

Monarch Alternative Solutions Master Fund Ltd,

Monarch Alternative Solutions Master Fund Ltd is a wholly owned subsidiary of Monarch Alternative Solutions Fund Ltd ("Monarch Alternative Solutions"), which has no parent corporation. No publicly held corporation holds 10% or more of the stock of Monarch Alternative Solutions.

Monarch Capital Master Partners III LP,

Monarch Capital Master Partners III LP is a limited partnership. It has no parent corporation, and no publicly held corporation holds 10% or more of its equity.

Monarch Debt Recovery Master Fund Ltd,

Monarch Debt Recovery Master Fund Ltd has no parent corporation, and no publicly held corporation holds 10% or more of its equity.

Monarch Master Funding Ltd,

Monarch Master Funding Ltd is a wholly owned subsidiary of Monarch Master Funding Ltd Star Trust ("Monarch Star Trust"). Monarch Star Trust has no parent corporation, and no publicly held corporation holds 10% or more of its equity.

PSAM Worldarb Master Fund Ltd.,

PSAM Worldarb Master Fund Ltd. has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

Rebound Portfolio Ltd.,

Rebound Portfolio Ltd. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

The Lincoln National Life Insurance Company,

The Lincoln National Life Insurance Company is a wholly owned subsidiary of Lincoln National Corporation ("Lincoln National"), a publicly traded corporation. No publicly held corporation owns 10% or more of Lincoln National's stock.

The Manufacturers Life Insurance Company (Bermuda Branch),

The Manufacturers Life Insurance Company is a wholly owned subsidiary of Manulife Financial Corporation ("Manulife"), a publicly traded corporation. No publicly held corporation owns 10% or more of Manulife's stock.

United Services Automobile Association,

United Services Automobile Association is a member-owned association that has no parent corporation and is not publicly traded.

USAA Casualty Insurance Company,

USAA Casualty Insurance Company is a wholly owned subsidiary of United Services Automobile Association ("USAA"), a member-owned association that has no parent corporation and is not publicly traded.

USAA Life Insurance Company,

USAA Life Insurance Company is a wholly owned subsidiary of United Services Automobile Association ("USAA"), a member-owned association that has no parent corporation and is not publicly traded.

YF Life Insurance International Limited,

YF Life Insurance International Limited, a Hong Kong life insurance company (formerly known as MassMutual Asia Limited), is majority owned by Yunfeng Financial Group Limited, a publicly listed company in Hong Kong ("YF Group"). No publicly held corporation owns 10% or more of YF Group's stock.

Petitioners:

Keystone Gas Gathering, LLC
Ultra Petroleum Corp.
Ultra Resources, Inc.
Ultra Wyoming, Inc.
Ultra Wyoming LGS, LLC
UP Energy Corporation
UPL Pinedale, LLC
UPL Three Rivers Holdings, LLC

2. OTHER INTERESTED PARTIES:

Ad Hoc Committee of OpCo Unsecured Creditors—consisting of holders of OpCo Notes and lenders under Petitioner Ultra Resources, Inc.'s prepetition Credit Agreement, dated October 7, 2011.

Ad Hoc Committee of HoldCo Noteholders—consisting of holders of notes issued by Petitioner Ultra Petroleum Corp.

Ad Hoc Equity Committee—consisting of equity holders of Petitioner Ultra Petroleum Corp.

Allianz of America, Inc.—parent of Respondent Allianz Life Insurance Company of North America.

Allianz SE—ultimate parent of Respondent Allianz Life Insurance Company of North America.

John Hancock Financial Corporation—parent of Respondents John Hancock Life Insurance Company (U.S.A.), John Hancock Life Insurance Company of New York, and John Hancock Life & Health Insurance Company.

JPMorgan Chase Bank, N.A., as administrative agent under Petitioner Ultra Resources, Inc.'s prepetition Credit Agreement, dated October 7, 2011.

Lincoln National Corporation—ultimate parent of Respondent The Lincoln National Life Insurance Company.

Manulife Financial Corporation—ultimate parent of Respondents John Hancock Life Insurance Company (U.S.A.), John Hancock Life Insurance

Company of New York, John Hancock Life & Health Insurance Company, and The Manufacturers Life Insurance Company (Bermuda Branch).

Manulife Holdings (Alberta) Limited—parent of Respondents John Hancock Life Insurance Company (U.S.A.), John Hancock Life Insurance Company of New York, and John Hancock Life & Health Insurance Company.

Monarch Alternative Solutions Fund Ltd.—parent of Respondent Monarch Alternative Solutions Master Fund Ltd.

Monarch Master Funding Ltd Star Trust—parent of Respondent Monarch Master Funding Ltd.

The Manufacturers Investment Corporation—parent of Respondents John Hancock Life Insurance Company (U.S.A.), John Hancock Life Insurance Company of New York, and John Hancock Life & Health Insurance Company.

The Manufacturers Life Insurance Company—parent of Respondents John Hancock Life Insurance Company (U.S.A.), John Hancock Life Insurance Company of New York, and John Hancock Life & Health Insurance Company.

3. ATTORNEYS:

*For Respondents*:

Morgan, Lewis & Bockius LLP
Peter Sabin Willett
Andrew J. Gallo
David B. Salmons

Akin Gump Strauss Hauer & Feld LLP
Renée M. Dailey

*For Petitioners*:

Kirkland & Ellis LLP
Paul D. Clement
George W. Hicks, Jr.
C. Harker Rhodes IV
Mariel A. Brookins
James H. M. Sprayregen
David R. Seligman
Michael B. Slade
Christopher T. Greco

For other interested parties:

*Counsel for the Ad Hoc Committee of OpCo Unsecured Creditors*:

Robbins Russell Englert Orseck Untereiner & Sauber LLP
Lawrence S. Robbins
Roy T. Englert, Jr.
John B. Goerlich
Jeffrey C. Thalhofer

Milbank LLP
Andrew M. Leblanc
Dennis F. Dunne
Evan R. Fleck

Norton Rose Fulbright US LLP
William Greendyke

*Counsel for Allstate Life Insurance Company and Allstate Life Insurance Company of New York*:

Eversheds Sutherland (US) LLP
Mark David Sherrill
Garrett A. Gibson
Edward P. Christian

4. PARTIES WITH A POTENTIAL FINANCIAL INTEREST[1]

1199 SEIU Healthcare Employees Pension Fund, Northern Trust
A G Global Sicav
Adriana Teresita Iglesias Figueira
Aedes LLC
Akin Gump Strauss Hauer & Feld LLP
Alaska Permanent Fund Corporation
Ana Margaret Giannini Cerrutti
Andrew J Beauvais Trust UA
Anna Falkovich
Antonio Benito Ponce
Antonio Carlos Nostre Junior/ Cleiry Domingos da Silva Nostre
Antonio Dos Santos Mota Diamil Dos Santos Fernandez
Aozara Credit Strategy Unit Trust, Mitsubishi UFJ
Automotive Industries Pension Trust Fund, Amalgamated Bank
Avenue Energy Opportunities AIV, LP
Avenue Energy Opportunities Fund II AIV, L.P.
Avenue Special Opportunities Fund II, L.P.
Avenue Strategic Opportunities Fund, L.P.
Bain Capital Credit Managed Account (Blanco), L.P.
Bain Capital Credit Managed Account (FSS), L.P.
Bain Capital Credit Managed Account (PSERS), L.P.
Bain Capital Credit Rio Grande FMC, L.P.
Bain Capital High Income Partnership, L.P.
Barclays Bank PLC
Barclays Multi-Manager Fund PLC
BassBrook & CO FBO Variable Insurance Products Fund V Strat Income Portfolio
BCC UPL Investments, L.P.
BCC UPL Investments II, L.P.
BCC UPL Investments III, L.P.
Board of Fire and Police Pension Commissioners of the City of Los Angeles, Northern Trust
BofA Securities Inc.

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[1] Appellees, having no independent way to verify it, here rely on Appellants' disclosure.

Brown Brothers Harriman & Co. FBO Fidelity High Yield Open Mother
Brown Brothers Harriman & Co. FBO Fidelity IT Strat Income Fund Mother
Brown Brothers Harriman & Co. FBO FIJ US High Yield Bond Fund Mother
Candriam Global Fixed U.S. High Yield Fund, RBC INV/BNYMELLON
Cara Jo Haman
Carl Jay Bowcutt
Citadel Equity Fund Ltd
Citibank, N.A (CEDE & CO) fbo Fidelity Advisors Series II:
Fidelity Advisor Strategic Income Fund
Citigroup Global Markets Inc
City National Rochdale Fixed Income Opportunities Fund
Cowen and Company LLC
Credit Suisse Securities (USA) LLC
Crown Cork & Seal Company, Inc. Master Retirement Trust
Cynthia A Carmack IRA, Wells Fargo Clearing Services as Custodian
DKO-RENTEN Hybrid Fund
Dow Retirement Group Trust, Northern Trust
Emerson Electric Co. Retirement Master Trust
Employees' Retirement Fund of the City of Dallas
Exelon Corporation Pension Master Retirement Trust
Federated Hermes High Income Bond Fund II
Federated Hermes High Income Bond Fund Inc.
Federated Hermes High Yield Bond Collective Investment Fund
Federated Hermes Institutional High Yield Bond Fund
Federated Hermes Opportunistic High Yield Bond Fund
Federated NVIT High Income Bond Fund
Fiducie Desjardins
Fire and Police Pension Fund, City of San Antonio, Northern Trust
George Michaels
Great-West Core Bond Fund
Griffin Institutional Access Credit Fund
Hanamalu Limited
High Yield Bond Portfolio
Hong Kong Hospital Authority Provident Fund Scheme, Northern Trust
Horace Mann Life Insurance Company, Northern Trust
Horace Mann Teachers Insurance Company, Northern Trust
Illinois Municipal Retirement Fund, Northern Trust

Indiana Public Retirement System
Interinsurance Exchange of the Automobile Club
Inversiones Tepeyac S.C.S
Inversiones y Asesorias Volterra Ltda.
INVESTMENT HUB #2 LLC
J.H. Lane Partners Master Fund, LP
Jens Mueller and Bettina
Joachim and Roswitha Finnern
JP Morgan Securities LLC
JSS InvestmentFonds
Key Colony Fund, LP
Kiwi Fields LP
Lantana Holdings Ltd
Los Angeles County Employees Retirement Association
Lurrento Corporation
M.Gardiner & Co LLC FBO Fid Advisor Series I FID ADV High Income ADV Fund
M.Gardiner & Co LLC FBO Fid Cent Invt Port LLC Fid High Income Cent Fund
M.Gardiner & Co LLC FBO Fid Summer ST Trust Fid Capital & Income Fund
M.Gardiner & Co LLC FBO Fid Summer St Trust Fid Global High Income Fund
MacKay Shields High Yield Bond CIT, Brown Brothers Harriman
MacKay Shields Select Credit Opportunities Fund LP, Bank of New York Mellon
Mainstay High Yield Corporate Bond Fund, State Street
Mainstay Short Duration High Yield Fund, State Street
Mainstay VP High Yield Corporate Bond Portfolio, State Street
Marc K Dien
Mark Taub
Mauricio Mandalaoui
Merlin Master Fonds INKA
Milbank LLP
Miller Income Fund, a series of Trust For Advised Portfolios
Monarch Alternative Solutions Master Fund Ltd
Monarch Capital Master Partners III A LP
Monarch Capital Master Partners III LP
Monarch Debt Recovery Master Fund Ltd
Monarch Income Master Fund Ltd

Morgan Lewis & Bockius LLP
Multi Manager Access II
Municipal Employees' Annuity and Benefit Fund of Chicago, Northern Trust
Mustafa Kultur
National Elevator Industry Health Benefit, Bank of New York Mellon
New Generation Limited Partnership
New Generation Turnaround Fund (Bermuda) LP
New York City Board of Education Retirement System, State Street
New York City Employees' Retirement System
New York City Fire Department Pension Fund, State Street
New York City Police Pension Fund
New York District Council of Carpenters Pension Fund, Bank of New York Mellon
New York Life Insurance Co. (New York Life General 1269-High Yield), JP Morgan Chase
New York Life Insurance Co., JP Morgan Chase
Nile Valley Holdings Limited
Northwestern Mutual Series Fund, Inc. High Yield Bond Portfolio
Norton Rose Fulbright US LLP
Oaktree (Lux.) Funds - Oaktree Global High Yield Bond Fund - USHY
Oaktree (Lux.) Funds - Oaktree North American High Yield Bond Fund
Oaktree Cascade Investment Fund I L.P.
Oaktree Global High Yield Bond Fund, L.P.
Oaktree High Yield Bond Fund, L.P.
Oaktree High Yield Fund II, L.P.
Oaktree Opportunities Fund X Holdings (Delaware), L.P.
Oaktree Opportunities Fund Xb Holdings (Delaware), L.P.
Ohio National Fund, Inc. - ON Federated High Income Bond Fund Portfolio
Ohio Police & Fire Pension Fund, Northern Trust
Pacific Capital Management LLC
Paul Lauritano and Yuko Lauritano
Paul M. Lauritano IRA Acct.
Peli Investments LLC
Peter A Carmack IRA, Wells Fargo Clearing Services as custodian
PG&E Co Post Retire Med Plan Trust Non-Management Employees and Retirees
PG&E Corporation Retirement Master Trust
Plustick Partners (QP), LP
Policemen's and Firefighters' Retirement Fund of the Lexington-
Fayette Urban County Government, Northern Trust

Portland Worldwide Investments Ltd.
Ready Ace Group Limited
Retirement Annuity Plan for Employees Army and Air Force Exchange Service
Retirement System of the Tennessee Valley Authority, Bank of New York Mellon
Richard M Fels IRA Roth
RiverNorth/Oaktree High Income Fund
Riverside Group Holdings Corp
Robert Croitorescu Living Trust
Rockies Express Pipeline LLC
Roland Desrochers
Ryiad Bank, Northern Trust
S.C.I. Camfin
Saadia Lancry Benigo
Sadia Belilty Cohen
Salt Run Capital, Inc
San Diego County Employees' Retirement Association
San Francisco City and County Employees' Retirement System
Shou-Chen, Lee
Sigfrido S.C.A. Sicav Sif
Special Situations Investing Group, Inc.
Stephen A Mefera
Stichting Bedrijfstakpensioenfonds voor het Beroepsvervoer over de Weg
Stichting Philips Pensioenfonds, State Street
SunAmerica Series Trust - SA Federated Corporate Bond Portfolio
Sunrise Partners Limited Partnership
Susquehanna Securities, LLC
Taconic Master Fund 1.5 L.P.
Taconic Opportunity Master Fund L.P.
Teachers Retirement System of Oklahoma, Northern Trust
Teachers' Retirement System of the City of New York
Tennessee Valley Authority Asset Retirement Trust, Bank of New York Mellon
Tennessee Valley Authority Master Nuclear Decommissioning Trust High Yield, Bank of New York Mellon
Texas County & District Retirement System
The City of Memphis Retirement System for General Employees Including Police Officers and Firefighters, BNYM
The Lilly Retirement Plan Master Trust

The Salvation Army An Illinois Corporation
Thisbe + Co FBO Fidelity American High Yield Fund
Thisbe + Co FBO Fidelity Canadian Balanced Fund
Tomas Paul Kis Torok
Tortuga 2014, SICAV, S.A
Toshi Trading Inc
Unisys Trading Limited
Ultra Resources, Inc.
Ultra Wyoming, LLC
UP Energy, LLC
Vast Ocean Blue Corp
Versicherungskammer Bayem BayernInvest Alternative Loan - Fonds
Wells Fargo Clearing Services, LLC
Wespath Funds Trust
William J Koperek
Xanadu Overseas Trading
Yehida International Limited Zoe Partners Limited Partnership

Dated: May 10, 2021

*s/ Peter Sabin Willett*
Peter Sabin Willett
*Attorney for Appellee*
*OpCo Noteholders*

## STATEMENT REGARDING ORAL ARGUMENT

Appellee Noteholders believe that oral argument will assist the Court's review of this appeal, given the complexity of the issues presented and procedural history.

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## INTRODUCTION

A massively-solvent debtor used plan-confirmation tools to deny voting power to a class of creditors. It then stripped from that class contract rights worth in excess of $300 million, and settled that value on its equity holders. The Bankruptcy Court rightly called foul.

Those contract rights, each valid under New York law, include a lender's right, upon prepayment of a long-term, fixed rate obligation, to damages under an agreed formula that fairly liquidates loss arising from changes in the marketplace. They also include a right to interest at the default rate when a borrower fails to pay its obligations on time. Settled bankruptcy doctrine teaches that a solvent debtor must honor all of its valid contract obligations, including these. It teaches as well that neither section 502(b)(2) nor section 726 of the Bankruptcy Code stripped these contract rights from the Appellees. The Bankruptcy Court's thoughtful decision was correct. This Court should affirm.

## JURISDICTIONAL STATEMENT

Appellee Noteholders agree with Appellants' statement of jurisdiction.

## STATEMENT OF THE ISSUES

1. Whether the "Solvent Debtor Exception" requires a solvent debtor to honor in full its contractual obligations to a class of creditors that it has classified as unimpaired.

2. Whether the parties' contract affords the appropriate rate for calculation of the post-petition interest that Appellants concede is due.

3. Whether, even if the Solvent Debtor Exception does not apply, the Bankruptcy Court correctly concluded that:

a. the Make-Whole Amount is an enforceable liquidated damages provision under applicable law and does not constitute "unmatured interest" under section 502(b)(2) of the Bankruptcy Code (the "Code"); and

b. payment of the Make-Whole Amount and post-petition interest at the contract rate does not constitute a penalty under applicable New York law, rejecting Appellants' double recovery theory.

## STATEMENT OF THE CASE

### I. Key Terms of the Notes.

OpCo issued to noteholders (the "Noteholders") notes (the "Notes") under a Master Note Purchase Agreement (as amended and supplemented, the "MNPA") that provided, among other things, that: (a) OpCo's Chapter 11 petition constituted an event of default; (b) upon that default, all outstanding obligations under the Notes and MNPA were automatically accelerated and became immediately due and payable; (c) the Make-Whole Amount was among those amounts; and (d) any amounts not paid when due would accrue interest at the contractual "default" rate. ROA.2770, 2772-73, 2893, 2895; *see also* ROA.2878.

The Notes are fixed-rate, long-term instruments. Unlike lenders that lend on a floating-rate basis, the Noteholders committed their capital to fixed rates of return for a contractual term. If market interest rates rise, fixed-rate lenders must maintain the loan at what have become below-market rates. If market interest rates fall and the borrower prepays (in order to refinance at a lower rate), the principal cannot be reinvested for the same or a greater yield, and the lender suffers loss. Make-Whole provisions are designed to compensate for this loss. *See* ROA.2773.

The "applicable Make-Whole Amount" is calculated through a formula set out in section 8.7 of the MNPA. ROA.2762-63. Standard in the industry, the formula appears in model forms and has been used in thousands of agreements similar to the MNPA. *See* American College of Investment Counsel, *NPA Model Form No. 2*, https://www.aciclaw.org/model-form/model-form-npa-model-form-no-2-1-13-16/ (last accessed May 10, 2021).

The formula produces a lump-sum payment that, if immediately reinvested along with the repaid principal, compensates Noteholders for the damage caused by prepayment or acceleration in a down-market interest rate environment. To reasonably estimate necessary compensation, the formula uses the published interest rate of the U.S. Treasury security most similar to the Notes at the time of prepayment or acceleration. ROA.2762. At the time of contracting, this rate forms the basis of a fair liquidated damages calculation. Its effect is to *increase* the Make-Whole Amount as interest rates fall, to *reduce* it as they rise, and to render no Make-Whole Amount payable if, as of the date of acceleration, rates for U.S. Treasury securities of comparable maturity are within fifty basis points (0.5%) of contract rates. ROA.2762 (definition of "Reinvestment Yield").[2] No Make-Whole Amount is payable in circumstances where it appears that the Noteholders will suffer no damage, because the prepaid principal can be reinvested without loss. Thus the make-whole formula is not a substitute for future interest payments. It is the parties' effort, at the time of contracting, to fairly estimate a liquidated sum for future damage to a fixed-rate term lender when damage occurs, and to generate no payable amount where it does not.

The formula assumes that principal (and, if payable, the Make-Whole Amount) will be repaid and reinvested as of the date of acceleration. If those sums are not paid when due, the Noteholders suffer additional damage from (a) loss of the yield that would have accrued during the period of nonpayment, and (b) risk that the

[2] The spread above Treasury notes means that the lender must find an investment with more risk – and thus, a higher yield than a Treasury security. As market interest rates *decline*, the lender suffers greater damage, as it becomes more difficult to find a new loan of comparable risk and return. As market rates *rise*, the lender's loss diminishes, ultimately to zero, as prospects for relending the prepaid principal for equivalent return improve.

rates will change further, making reinvestment impossible at the rates used to calculate the Make-Whole Amount. For these reasons, the Notes provide that "any overdue payment of interest, any overdue payment (including any overdue prepayment) of principal and any overdue payment of any Make-Whole Amount" accrue interest at the "Default Rate." ROA.2893, 2894. The purpose of the Default Rate – compensating for late payments of any amount due – is distinct from that of the Make-Whole Amount. The latter liquidates damage; the former compensates for late payment of sums owed (including damages).

Upon the bankruptcy filing in April 2016, $1.46 billion of principal and accrued interest on the Notes became immediately due and payable. The Make-Whole Amount, calculated per the formula as of that date (the date of acceleration), was $201 million, less than 14% of the amount then due. ROA.367, 4522. These amounts were not paid until much later. During the period of nonpayment, $120 million of interest[3] accrued at the Default Rate on the $1.66 billion (principal plus Make-Whole Amount) that was not paid when due. This interest compensated the Noteholders for not having in hand for reinvestment the $1.66 billion during the periods that elapsed before payment, and for the risk of interest rate movements during that period.

[3] Approximately $106 million of interest on principal and pre-petition interest, and $14 million of interest on the Make-Whole Amount. ROA.2704.

## II. OpCo's Bankruptcy, Solvency and Bankruptcy Plan.

In addition to the $1.46 billion owed under the Notes, OpCo entered bankruptcy owing almost $1 billion under a separate credit agreement, and other debts, including trade debt. ROA.513. HoldCo, OpCo's parent company, was not engaged in regular business, and existed exclusively to raise capital and hold the equity of OpCo and affiliates. HoldCo owed approximately $1.3 billion to lenders of its own. ROA.513. OpCo was not obligated on HoldCo's debt, making the HoldCo lenders structurally subordinate to all of OpCo's creditors. ROA.513. With no claim against OpCo, HoldCo's lenders could recover only from equity distributions made from OpCo to HoldCo, which in turn could not be made until OpCo's creditors were paid in full.

When Appellants' plan was confirmed in 2017, higher natural gas prices had rendered OpCo massively solvent: its equity value was measured in the billions. ROA.7897, ROA.3125. The plan classified the Noteholders in Class 4, which it described as "unimpaired" under section 1124(1) of the Code. ROA.1125.

Appellants sought to discharge in excess of $300 million due to the Noteholders under the express terms of the Notes, and transfer that value to structurally subordinated HoldCo creditors. They argued that the Noteholders' claims could be "unaltered" (as unimpaired treatment requires) (a) without payment of the Make-Whole Amount, and (b) by paying post-petition interest at the much lower Federal Judgment Rate.

## III. Procedural History

In September 2017, the Bankruptcy Court ruled that neither the Make-Whole Amount nor the default interest was an unenforceable penalty, and rejected the argument that default interest, when combined with the Make-Whole Amount, represented an impermissible "double recovery." ROA.6153-61. It also ruled that "unimpaired" treatment required the Noteholders be paid all amounts due under their contracts with OpCo, including the principal, pre-petition interest, the Make-Whole Amount, and contractual default interest that accrued on those sums between the filing date and the date of actual payment. ROA.6161-63. The court also held that section 726(a)(5) of the Code was inapplicable to unimpaired claims. ROA.6166.

This Court heard the matter on direct appeal, and reversed. *In re Ultra Petroleum Corp.*, 913 F.3d 533 (5th Cir. 2019) (withdrawn). On November 26, 2019 the Court withdrew its initial opinion, and issued the controlling opinion, *In re Ultra Petroleum Corp.*, 943 F.3d 758 (5th Cir. 2019) (the "Remand Opinion"). The Court reversed the Bankruptcy Court's unimpairment holding, and remanded for a determination of whether *all* sums in dispute are due under the Solvent Debtor

Exception,[4] and, if not, whether the Code "disallows the creditors' claims for the Make-Whole Amount and the creditors' request for post-petition interest at the contractual default rates." 943 F.3d at 766-67.

On remand, the Bankruptcy Court held that the Make-Whole Amount represented an enforceable liquidated damage claim, was neither unmatured interest nor its economic equivalent, and therefore was not disallowed by section 502(b)(2) of the Code. ROA.7152-65. It ruled further that Appellees, as unimpaired creditors, were entitled to post-petition interest at the contract rate pursuant to the Solvent Debtor Exception, as implemented through the equitable prong of section 1124, after ruling that neither section 726(a)(5) nor 1129(a)(7) was the source of the exception, and that each was inapplicable. ROA.7174-80.

This Court granted the Appellants' petition for review after the Bankruptcy Court certified the matter for direct appeal.

## SUMMARY OF THE ARGUMENT

The Bankruptcy Court's decision should be affirmed under the Solvent Debtor Exception, which survived enactment of the Bankruptcy Code, and requires a solvent debtor to honor its obligations to creditors in full prior to any distribution to equity. (Arg. sec. II).

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[4] While one wouldn't know it from Appellants' characterization, *see* Br. at 2, this Court expressly directed the bankruptcy court to consider "the applicability of the solvent-debtor exception on remand." 943 F.3d at 766.

Neither the Code nor the Solvent Debtor Exception would permit OpCo to reduce the rate of interest payable during the post-petition period from the contract rate to the Federal Judgment Rate. (Arg. sec. III).

Following the majority rule and the Bankruptcy Court's analysis, this Court should conclude that the Make-Whole Amount is an enforceable liquidated damages provision that does not constitute unmatured interest. (Arg. sec. IV).

Appellants did not show that any portions of the Make-Whole Amount or post-petition interest, as calculated under the MNPA, were duplicative and therefore unenforceable as penalties under applicable New York law. Appellants' arguments to the contrary misconstrue caselaw and the purpose of the Make-Whole Amount. (Arg. sec. V).

## ARGUMENT

### I. Standard of Review

The Noteholders agree that there are no material disputes of fact, and that this appeal raises legal questions subject to *de novo* review. *In re Positive Health Mgmt.*, 769 F.3d 899, 903 (5th Cir. 2014).

### II. The Solvent Debtor Exception Requires Affirmance of the Decision Below.

#### A. The Solvent Debtor Exception Requires a Solvent Debtor to Honor Valid Contracts, and Thus Addresses All Aspects of the Appeal.

"[W]hen the debtor is solvent the judicial task is to give each creditor the measure of his contractual claim, no more and no less." *In re Chicago, Milwaukee,* *St. Paul & Pac. R. Co.*, 791 F.2d 524, 530 (7th Cir. 1986). Appellants do not dispute that under the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (1898) (repealed) (as thereafter amended by the Chandler Act of 1938, the "Act"), the Solvent Debtor Exception required a debtor to honor its contracts "in full, principal and interest to the time of payment, whenever the assets of their estates are sufficient." *Johnson v. Norris*, 190 F. 459, 466 (5th Cir. 1911). The exception was well settled.[5] This appeal involves contract rights to default-rate interest and to a Make-Whole Amount. Each comes within the Solvent Debtor Exception. The Make-Whole Amount is a valid contract right, enforceable under New York law. So too is the right to contractual default-rate interest until the date that obligations are paid.

Appellants pin their argument on the proposition that the Solvent Debtor Exception was repealed in 1978, when Congress enacted the Bankruptcy Code, including section 502(b)(2), which disallows claims for "unmatured interest." *See* Appellants' Br. ("Br.") at 24-32. The proposition is plainly wrong.

[5] *See, e.g., Chicago, Milwaukee*, 791 F.2d at 530; *Debentureholders Protective Comm. of Cont'l Inv. Corp. v. Cont'l Inv. Corp.,* 679 F.2d 264, 269 (1st Cir. 1982) ("Where the debtor is solvent, the bankruptcy rule is that where there is a contractual provision, valid under state law, providing for interest on unpaid instalments of interest, the bankruptcy court will enforce the contractual provision with respect to both instalments due before and instalments due after the petition was filed."); *see United States v. Ron Pair Enters*., 489 U.S. 235, 246 (1989) ("pre-Code practice . . . allowed post-petition interest when the debtor ultimately proved to be solvent"); *see generally* 3A Collier on Bankruptcy, ¶ 63.16[1] n.10 (14th ed. 1986) (collecting pre-Code cases recognizing the Solvent Debtor Exception).

### B. The Solvent Debtor Exception Was Recognized Under the Act.

To understand section 502(b)(2), one must begin with what preceded it. Section 63(a) of the Act provided, in pertinent part, that:

> Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, whether then payable or not, *with any interest thereon which would have been recoverable at that date* or with a rebate of interest upon such as were not then payable and did not bear interest; . . . (5) provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, *less* costs incurred and *interest accrued after the filing of the petition* and up to the time of the entry of such judgments.

Bankruptcy Act of 1938, ch. 575, § 63(a)(1), (5), 52 Stat. 840, 873 (repealed) (emphasis added). This text cut off interest claims at the petition date. "No one doubts that interest on unsecured debts stops at the filing of the petition." *Sexton v. Dreyfus*, 219 U.S. 339, 344 (1911) (*citing to* section 63(a)(1)). The statute "stop[ped], or at least suspend[ed], interest as of the date of filing the petition." *In re Norcor Mfg. Co.,* 36 F. Supp. 978, 979 (E.D. Wisc. 1941); *see also In re Rhine*, 213 F. Supp. 527, 540 (D. Colo. 1963) ("Section 63 . . . provides for a cut off of interest after the filing of the petition and allows interest on other claims as accrued until th[at] date.").

The Act contained no *statutory* exception for solvent debtors. As this Court observed twelve years after the Act came into force, there is "no express provision . . . allowing [postpetition] interest . . . to be paid out of a surplus" in the bankruptcy estate after paying "all claims proved and allowed, and the interest thereon up to the date of the filing of the petition in bankruptcy." *Johnson*, 190 F. at 461, 463. To the contrary, as the Court acknowledged, section 65(e) of the Act *forbade* collecting from the bankruptcy estate "any greater amount than shall accrue pursuant to the provisions of this act." *Id*. at 461. On its face, this text barred "subsequently accruing interest," just as section 502(b)(2) now disallows claims for unmatured interest.

Despite the absence of a textual exception for solvent debtors, *Johnson* recognized that the Solvent Debtor Exception displaced the statute when the debtor was solvent. The surplus must first go towards payment of the creditors' contract rights "in full":

> The statute contains no express provision that answers the question involved in this case. There is in court a fund amounting to $88,432.81. The court must give directions as to its disposition. Whether we are governed by the apparent intention of Congress as shown by the general purpose of the bankruptcy law, or by the general principles of equity, the result would be the same. *The bankrupts should pay their debts in full, principal and interest to the time of payment, whenever the assets of their estates are sufficien*t. The balance then remaining should be returned to the bankrupts.

*Id*. at 466.

The Supreme Court later agreed in *New York City v. Saper*, 336 U.S. 328, 330 n.7 (1949). The Court noted the general rule "stopping interest at bankruptcy," acknowledged English-law bankruptcy exceptions to the rule for solvent debtors, and then observed that these exceptions "have been carried over into our system." *Id*. As Appellants concede,[6] the exception became firmly rooted in the law.

### C. The Code Did Not Repeal the Solvent Debtor Exception.

Appellants argue that the 1978 Code silently repealed this rule. But its text does not do so, and its extensive legislative history betrays no intent to do so. According to both the House and Senate reports, section 502(b)(2) codified certain "principles of present law." *See* S. Rep. No. 95-989, at 63 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5849 (disallowance of claims for unmatured interest is consistent with certain "principles of present law"); H.R. Rep. No. 95-595, at 352-53 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6308-09 (same). Neither in their discussion of subsection (b)(2), nor anywhere else in the extensive legislative history, did the House or Senate express any intent to repeal *other* "principles of present law," including the Solvent Debtor Exception.

As the Bankruptcy Court pointed out, "if Congress intended to abandon the universal principle that a capable individual must fully repay his debts, Congressional silence on the issue would be curious." ROA.7170. It is particularly

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[6] *See* Br. at 28 (referring to "the existence of a pre-Code exception for solvent debtors").

odd that Congress maintained that silence in the face of a broadly settled proposition, firmly entrenched by the Supreme Court in *Saper* and by numerous circuit courts.[7]

This silence is particularly noteworthy because of the rich jurisprudence that developed as Bankruptcy law evolved through the Bankruptcy Acts of 1867 and 1898, the substantial revisions to the Act in the 1938 Chandler Act, and the 1978 Bankruptcy Code. Corporate reorganization had its birth under the Act, with rules revised in 1978. *See* Bankruptcy Act of 1938, ch. 575, §§ 101-686, 52 Stat. 840, 883-938 (repealed); S. Rep. No. 95-989, at 63 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5795-98 (noting the differences between the new Chapter 11 and the Act provisions (Chapters 10 through 13) it replaced). As this jurisprudence developed, courts recognized that statutory amendments should not be viewed to discard settled law, absent either (i) a statute that did so expressly, or (ii) legislative history showing with equal clarity that Congress intended to discard the previous rule. The Supreme Court "will not read the Bankruptcy Code to erode past

[7] *Brown v. Leo*, 34 F.2d 127, 128 (2d Cir. 1929) ("neither the rule nor the reason for stopping interest at the date of filing of the petition applies to an estate which turns out to be solvent . . . [The debtor must pay] interest in full on claims of creditor."); *Ruskin v. Griffiths*, 269 F.2d 827, 832 (2d Cir. 1959) ("where there is no showing that the creditor entitled to [interest at the contract rate] caused any unjust delay in the proceedings, it [is] the opposite of equity to allow the [solvent] debtor to escape the expressly-bargained for result of its act."); *Chicago, Milwaukee*, 791 F.2d at 530 (applying pre-Code law in case where petition was filed prior to enactment of the Code – a solvent debtor must "give each creditor the measure of his contractual claim, no more and no less.").

bankruptcy practice absent a clear indication that Congress intended such a departure." *Cohen v. de la Cruz*, 523 U.S. 213, 221 (1998). That intent must be made "unmistakably clear." *Id*. at 222; *see Midatlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.,* 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."); *see generally*, *Dewsnup v. Timm*, 502 U.S. 410 (1992).

In short, the text of the Act cut off interest as of the petition date, but an exception outside the text provided that when the debtor was solvent, creditors were entitled to their contract rights. Section 502(b)(2) adopted the statutory cut-off, but neither that section, the broader Code, nor its legislative history expressed any intention to repeal the settled exception. The Solvent Debtor Exception survived.[8] *See Gencarelli v. UPS Cap. Bus. Credit*, 501 F.3d 1, 7 (1st Cir. 2007) ("When the debtor is solvent, the bankruptcy rule is that where there is a contractual provision, valid under state law, the bankruptcy court will enforce the contractual provision.") (citation omitted); *In re Dow Corning Corp.*, 456 F.3d 668, 679 (6th Cir. 2006) ("in solvent debtor cases, . . . [courts] generally confine themselves to . . . enforcing whatever pre-petition rights a given creditor has against the debtor.").

[8] Appellants concede that under the Code the solvent debtor must pay *some* post-petition interest, Br. at 38-39, but do not plausibly explain how this could be the case for unimpaired creditors absent survival of the Solvent Debtor Exception.

### D. The Fifth Circuit Rule Is that Act Doctrine Survived the Enactment of the Code Unless Clearly Abrogated.

This Court has affirmed that Act doctrine retains its vitality absent a clear expression of legislative intent to abrogate it. In *In re Laymon*, 958 F.2d 72 (5th Cir. 1992), the Court considered whether a contract should supply the interest rate due to over-secured creditors under section 506(b). Finding silence in the Code, the Court looked to Act precedents. "The Supreme Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history." *Id.* at 74 (citation omitted).

The Court embraced the vitality of Act doctrine again seven years later, in *In re Bodenheimer, Jones, Szwak, & Winchell L.L.P.*, 592 F.3d 664, 673 (5th Cir. 2009). Like this case, *Szwak* presented the question whether a settled Act doctrine had survived enactment of a provision in the Code. The relevant part of the decision is its treatment of pre-petition claims of a custodian whose custodianship is supplanted by a later-filed federal bankruptcy case. A partnership debtor's chapter 7 case began while that partnership's property was subject to a state custodianship.[9]

[9] When this happens, the Code requires turnover of the estate to the chapter 7 trustee, but allows the custodian an administrative expense for "services." *See generally*, 11 U.S.C. § 543.

The custodian, Earwood, filed an administrative expense claim, which included charges for his pre-petition services. Under the Act, a custodian displaced by a bankruptcy filing could not obtain administrative priority for a pre-petition claim unless his services actually benefited the estate. *See id*. But the case arose in the Code era, after Congress enacted section 503(b)(3)(E), which provides:

> (b) [T]here shall be allowed, administrative expenses … including…
>
> …
>
> (3) the actual, necessary expenses … incurred by—
>
> …
>
> (E) a custodian superseded under section 543 of this title, and compensation for the services of such custodian.

Earwood argued that the Act's "benefit to the estate" requirement had been eliminated by subsection (E)'s specific articulation of the rights of the superseded custodian, which omitted any such requirement. This Court disagreed. The "benefit to the estate" requirement, like the Solvent Debtor Exception, was a judicially-recognized doctrine. Even an enactment specifically enumerating the criteria for allowance could not eliminate the requirement, because neither the statute nor the legislative history showed an express intent to revoke it. *Id*. The Court reasoned,

> Since the Supreme Court's decision in *Randolph* [an Act decision recognizing the "benefit to the estate" requirement], Congress enacted the Bankruptcy Code. Admittedly, Congress made no mention of the "benefit to the estate" rule in the provisions of the Code governing the services of superseded custodians. However, "[w]hen Congress amends the bankruptcy laws, it does not write 'on a clean slate.'" [citation to *Dewsnup* omitted]. Indeed, we must "not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure. [citation to *Cohen* omitted]."

*Id*. *Szwak* topples the premise of Appellants' argument. Where the Code or legislative history does not specifically reject an Act doctrine, that doctrine survives. In other words, even where a Code enumeration of elements omits an element that had grown up under the Act, unless Congress specifically states an intent to eliminate that element, the element survives as a prerequisite. 592 F.3d at 673 ("There is *no indication* that Congress intended to overturn the "benefit to the estate" doctrine when passing the statutes governing payment to superseded custodians" even though other sections of the Code explicitly incorporated a "benefit to the estate" requirement.) (emphasis added).

In *Szwak*, this Court also referred to legislative history, noting that it "points to the contrary" of the appellant's argument that the benefit test had been abandoned. *See* 592 F.3d at 673 n.38 (footnoting remarks by Rep. Edwards that section 503(b)(3)(E) "codifies present law" in cases such as *Randolph* – an articulation similar to the "principles of present law" references found in the legislative history for section 502(b)(2)). The legislative history's silence as to any intent to change the Solvent Debtor Exception also points to its survival. In sum, if the enactment of section 503(b)(3)(E) was not specific enough to eliminate an Act requirement that expenses "benefit the estate," then *a fortiori*, Appellants have not overcome the presumption of continued vitality of the settled Solvent Debtor Exception by the enactment of section 502(b)(2), a near identical provision to Bankruptcy Act section

63. *Laymon*, 958 F.2d at 74-75; *Szwak*, 592 F.3d at 673. This may explain why this Court, in the Remand Opinion, saw no reason why the Solvent Debtor Exception would not apply. 943 F.3d at 765.

Appellants also cite decisions addressing the section 502(b)(6) lease damages cap to argue that there is no Solvent Debtor Exception to section 502(b)(2). Four of them (*In re Ancona*, No. 14-10532 (CGM), 2016 WL 828099 (Bankr. S.D.N.Y. Mar. 6, 2016); *In re Flanigan*, 374 B.R. 568, 575 (Bankr. W.D. Pa. 2007); *In re Farley*, 146 B.R. 739 (Bankr. N.D. Ill. 1992); and *In re Federated Dept. Stores, Inc.*, 131 B.R. 808 (S.D. Ohio 1991)), sensibly reject a landlord argument that in every rejection damages dispute the debtor – and the bankruptcy court itself – must conduct a mini-trial to prove that the debtor was *in*solvent. The Solvent Debtor Exception is, after all, an *exception*, and the narrow holding of the cases is that it is not the Debtor's burden to prove that it does not apply. This appeal presents no burden-of-proof issue. While some of the section 502(b)(6) cases contain language that – unnecessarily – goes beyond the burden issue, these cases are out-of-circuit, contain no treatment of the circuit level decisions invoking the Solvent Debtor Exception, fail to acknowledge Congress's plain intent in repealing section 1124(3) in 1994, and are all limited to section 502(b)(6). None addresses section 502(b) more broadly. Appellants also cite *In re PPI Enterprises*, 324 F.3d 197, 207 (3d Cir. 2003), which drew a distinction between subsections 502(b)(2) and (b)(6), holding that while the latter continues to apply in a solvent debtor case, the former does not. To be unimpaired in a solvent debtor case, a creditor must receive post-petition interest. *Id*. at 206-07. As *In re Energy Future Holdings Corp.*, 540 B.R. 109, 123 (Bankr. D. Del. 2015) recognizes, there is "an irreconcilable conflict" between extending the logic of the *PPI* decision to section 502(b)(2) and Congress's clear intent in repealing section 1124(3).

### E. Appellants' Arguments that the Code Subsumed the Solvent Debtor Exception Are Unpersuasive.

Appellants advance contrived arguments to suggest that Congress explicitly repealed the Solvent Debtor Exception. First, they argue that the rule that a solvent debtor must honor its contracts was supplanted by section 1112(b)(1), *see* Br. at 30 n.7, the point evidently being that cases filed by solvent debtors to evade contractual obligations will be dismissed. The argument fails at the doorstep, for bad-faith dismissal is not a Code innovation. It existed under the Act, ch. 575, §§ 141-144, 52 Stat. 840, 887 (1938) (setting procedure for dismissal of bad-faith petitions).[10] Section 1112(b) simply codified a motion-to-dismiss procedure for bad-faith filings that already existed under the Act.

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[10] Under the Act, a creditor could file an "answer" to "controvert any of the material allegations of the petition," after which the court could dismiss the petition, if it were not "satisfied that [the petition] complies with the requirements of [Chapter X] and has been filed in good faith." *Id.* at § 144.

But the argument runs aground on still larger problems. Insolvency was no more a requirement for commencing a reorganization case under the Act than it is today. *See generally, In re Marshall*, 300 B.R. 507, 515-17 (Bankr. C.D. Cal. 2003) (noting that the statutory history of bankruptcy law is void of any insolvency requirement for voluntary debtors). Without more, it is not bad faith for a solvent debtor to file. And dismissal of the entire proceeding would hardly be an equitable remedy where the debtor misuses its power as to a single creditor. In *Johnson*, the Court refers to a 'surplus;' assets had been sold and proceeds distributed to creditors. 190 F. at 461. It was far too late to dismiss the case. The notion that *dismissal* was the appropriate remedy in *Ultra* is even more absurd. When Appellants commenced their chapter 11 cases, the oil and gas industry was in a very different stage and they were arguably insolvent. It was only after about a year and a significant uptick in the natural gas market that OpCo was "massively solvent" and able to confirm a plan that left its creditors unimpaired. If the only remedy for a now-solvent debtor's mistreatment of *one* creditor class were to strip the debtors of the automatic stay, and set *all* creditors and equity holders back to the free-for-all of a hundred courthouse races, then one would have to assume that Congress – again silently – intended to replace organized restructurings with chaos. Appellants cite not a single case, scholarly authority or reference in the legislative history to support this theory.

In short, the Solvent Debtor Exception did not shrink into section 1112(b). Appellants' argument is the opposite of the "unmistakably clear" expression of legislative intent required under *Cohen* to diverge from pre-Code practice. As this case demonstrates, dismissal is not an adequate substitute for the Solvent Debtor Exception in a case where the debtor becomes solvent after filing.

Appellants' second theory is that the Solvent Debtor Exception collapsed into section 726(a)(5). No one in Congress mentioned this remarkable theory in any legislative history. Section 726(a)(5) applies squarely *only* in chapter 7 cases; thus the argument is that Congress reserved the exception for liquidations, where it would rarely have application.[11] No authority supports this absurd argument.

Finally, Appellants cite the familiar rule that a bankruptcy court does not receive unlicensed power to "do equity." *See Law v. Siegel*, 571 U.S. 415, 421 (2014), and Br. at 31. But contrary to Appellants' argument, a court's application of the Solvent Debtor Exception is the opposite of free-floating equity. The Court

[11] Section 1129(a)(7) requires a court to provide a non-consenting member of an impaired class with at least its section 726 entitlement. It does not apply to unimpaired creditors, and says nothing about what should occur in a solvent chapter 11 case. Moreover, section 1129(a)(7) is also a codification of a prior Act provision, section 366(2), that governed the confirmation of reorganization plans, then called "arrangements". Bankruptcy Act of 1938, ch. 575, § 366(2), 52 Stat. 840, 911 (repealed) ("The court shall confirm an arrangement if satisfied that — (2) it is for the best interests of the creditors.").

is left with no discretion other than to enforce the creditor's contractual entitlement – no more, and no less.

### F. The Solvent Debtor Exception Applies with Special Force When the Creditor Is Unimpaired.

The Remand Opinion observes that "it is possible a bankruptcy court's equitable power to enforce the Solvent Debtor Exception is moored in 11 U.S.C. § 1124's command that a 'plan leave[] unaltered . . . equitable . . . rights." 943 F.3d at 766 n.2 (citing *Energy Future Holdings*, 540 B.R. at 123-24). The Bankruptcy Court grounded its conclusion in that reference. ROA.7177-79. At minimum, it is clear from section 1124's reference to "equitable rights" that Congress did not intend to revoke the Solvent Debtor Exception for a class deprived of power to vote on a plan through classification as unimpaired. 11 U.S.C. §1124(1). If the Court does not reach the question whether the Solvent Debtor Exception mandates strict compliance with contractual obligations for every creditor of a solvent debtor, it should at the very least rule that where a class is unimpaired, the requirement that equitable rights be unaltered requires that creditors of a solvent debtor have the full measure of their contract rights before the equity enjoy a distribution. *See Chicago, Milwaukee*, 791 F.2d at 527 (Posner, J.) ("The only good reason for refusing to give a creditor in a reorganization all that he bargained for when he extended credit is to help other creditors, the debtor's assets being insufficient to pay all creditors in full. All of [the debtor's] creditors will be paid in full, even if the debenture holders are paid out at the highest valuation of their claim. The only competing equities are those of CMC's shareholders, and are weak . . . ."). The Noteholders here incorporate the arguments set out at 29-34 of the *Brief for Appellee Ad Hoc Committee of OpCo Unsecured Creditors*.

## III. The Post-Petition Interest Rate for Unimpaired Creditors Must Be the Contract Rate.

Appellants acknowledge that the Noteholders are entitled to post-petition interest on account of their claims through the date of payment. Br. at 38-39. They dispute the applicable rate. Appellees have shown that the Solvent Debtor Exception requires that contracts be honored in full, and it is self-evident that a debt is not paid "in full" unless interest is paid according to the terms of the debt instrument. The Second Circuit ruled that stockholders of a solvent debtor "cannot complain that they are treated inequitably when their interest is cut down by the payment *of a sum to which the debenture holders are clearly entitled by the express provisions of the trust indenture*." *Ruskin*, 269 F.2d at 832 (emphasis added). This rule remains firmly established under the Code. *Dow Corning*, 456 F.3d at 679; *In re MPM Silicones*, No. 14-22506 (RDD), 2014 WL 4436335, at *17 (Bankr. S.D.N.Y. Sept. 9, 2014); *In re Schoeneberg*, 156 B.R. 963, 970 (Bankr. W.D. Tex. 1993).

The Noteholders' unimpaired status also requires payment of interest at the contract rate. Prior to its 1994 amendment, section 1124(3) referred to the "allowed amount of such claim." This permitted a bankruptcy court to conclude, in a solvent debtor case, that no post-petition interest was due to unimpaired unsecured creditors. *In re New Valley Corp.*, 168 B.R. 73 (Bankr. D.N.J. 1994). Because this decision represented a windfall for shareholders, Congress quickly repealed section 1124(3). Following repeal, treatment of an unimpaired debt would be determined without reference to the "allowed claim," and with it, section 502(b)(2)'s exclusion of unmatured interest from the allowed claim. H.R. Rep. No. 103-835, at 48 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3356. Following the repeal, as Congress intended, the reference point for which "legal, equitable and contractual rights" must be "unaltered" under section 1124 has simply been the "claim" itself, as established by applicable (i.e. *non*bankruptcy) law. An unimpaired creditor's interest under a contract claim must accrue at the default rate if that is what the contract specifies. As the Bankruptcy Court observed, the Noteholders "here find themselves in an identical situation as the creditors in *New Valley*. Depriving the Class 4 Claimants of their bargained for interest would allow Ultra's equity holders to realize an unjust windfall. Congress did not intend such a result." ROA.7173.

Appellants argue that section 726 of the Code supplies the rate of interest here. The Bankruptcy Court properly rejected this argument, *see* ROA.7179-80, which faces two insuperable problems. The first is that section 726 has no application to *un*impaired claims in a Chapter 11 reorganization. It applies to liquidation cases under Chapter 7, and is imported into Chapter 11 only by reference to the minimum treatment of a dissenting *impaired* creditor under section 1129(a)(7). Because section 1129(a)(7)(A) refers only to “each holder of a claim [in an *impaired*] class”, it does not apply to the unimpaired Noteholders. Nothing else in Chapter 11 imports section 726 for purposes of treating interest claims of *un*impaired creditors. As the Bankruptcy Court noted, a court “cannot adopt a reading of the [] Code which places impaired creditors in a more advantageous position than unimpaired creditors” by applying the same interest rate to both, after recognizing the right of only impaired creditors to vote. *See* ROA.7180.

Appellants’ second problem is that even if section 726(a)(5) applied in this case, it would not import the Federal Judgment Rate set out in 28 U.S.C. § 1961. Section 726(a) governs a Chapter 7 trustee’s distribution of estate property. It contains a waterfall of priorities. If property remains after distribution of the first category, the trustee proceeds to the second, and so on. The first four categories are for different types of allowed claim, that is, claims without unmatured interest. For example, subsection (a)(1) includes priority claims “of the kind specified in, and in the order specified in, section 507 of this title.” These would include domestic support obligations, *see* 11 U.S.C. § 507(a)(1), and claims for unpaid federal income taxes, *see id.* § 507(a)(8). Subsection (a)(2) is for timely general unsecured claims. Subsection (a)(3) applies to certain late-filed general unsecured claims. Subsection (a)(4) applies to claims for fines, penalties, forfeitures and similar obligations.

Under applicable law, a different "legal rate" of interest might apply to *each* of these claim categories. Most states prescribe interest rates for overdue support obligations. *See, e.g.*, Tex. Fin. Code Ann. § 304.002. A special interest rate applies to unpaid federal income taxes. 26 U.S.C. § 6621. In many states, including Texas, the law prescribes different interest rates for general unsecured claims arising under tort and contract theories. *Compare* Tex. Fin. Code Ann. § 304.002 (18% interest rate payable on contract claims), *with* Tex. Fin. Code Ann. § 304.103 *and* Tex. Fin. Code Ann. § 304.003(c)(2)-(3) (varying rates (between 5%-15%) depending on prime rates as published by Board of Governors).

Section 726(a)(5) calls, in the fifth priority, for the distribution of estate property "in payment of interest at the legal rate . . . on any claim paid under paragraph (1), (2), (3), or (4)." It is hard to conceive of words that would more plainly direct a court to whatever rate applicable law confers on the particular "claim paid." The cross reference is not to "all of the foregoing," nor even to "claims," but to each singular "claim paid." The "legal rate" thus applies separately to each paid "claim," and will depend on what that claim is. Here, where New York law governs, the operative interest rate is the rate supplied by contract. *NYCTL 1998–2 Tr. v. Wagner*, 876 N.Y.S.2d 522, 523 (N.Y. App. Div. 2009) ("[W]hen a contract provides for interest to be paid at a specified rate until the principal is paid, the contract rate of interest, rather than the legal rate . . . governs until payment of the principal or until the contract is merged in a judgment.") (citation and internal quotation marks omitted); *see, e.g., NML Capital v. Republic of Argentina*, 952 N.E.2d 482, 491 (2011) ("The parties to a loan agreement . . . may, for example, agree that if principal is not repaid on the maturity date, a default rate of interest will apply thereafter.").

Nor does "legal rate" mean the Federal Judgment Rate: the way Congress applies the Federal Judgment Rate is to refer to section 1961 by name. For example, in 15 U.S.C. § 4303(a), Congress limited an antitrust plaintiff's recovery to "actual damages" and "interest calculated at the rate specified in section 1961 of Title 28 on such actual damages." Section 844a(h) of Title 21 allows the recovery of "an amount representing interest at a rate computed in accordance with section 1961 of Title 28" for controlled substance-related assessments. Section 6082(a)(1)(B) of Title 22 grants interest on damages for trafficking confiscated property claimed by United States nationals "at the rate set forth in section 1961 of Title 28." Congress used different words – "legal rate" – in section 726(a)(5) because it meant something different.

This Court has not construed "interest at the legal rate," and bankruptcy courts have adopted different constructions, with many applying the contract rate. *Dow Corning*, 456 F.3d at 679 ("[A]bsent compelling equitable considerations, when a debtor is solvent, it is the role of the bankruptcy court to enforce the creditors' contractual rights."); *In re Dvorkin Holdings, LLC*, 547 B.R. 880, 891-92 (N.D. Ill. 2016) (adopting pre-Code law to conclude that "there is a presumption that, in a surplus Chapter 11 case, creditors who have contracts with the debtor will receive post-petition interest pursuant to the terms of their contracts"); *In re Carter*, 220 B.R. 411, 414-15 & n.10 (Bankr. D.N.M. 1998) (noting the "great majority of the courts" "have concluded that postpetition interest should be computed at the rate provided in the agreement") (citation omitted); *Schoeneberg*, 156 B.R. at 972 (convinced by the "weight of prior case law" that in a solvent debtor case, the contract rate should govern).

The mainstay of Appellants' argument is *In re Cardelucci*, 285 F.3d 1231 (9th Cir. 2002). The decision does not control here, and its logic is flawed. The Ninth Circuit begins by noting that Congress "chose the language, 'interest at the legal rate,' replacing the originally proposed language, 'interest on claims allowed.'" *Id.* at 1234. But that change cuts precisely the other way. "Interest on claims allowed," which fails to specify any rate and refers collectively to "*claims* allowed", might lead to ambiguity and the debates that long plagued interpretation of section 506(b), while the reference to "interest at the legal rate . . . on any claim paid" bound the interest rate to the particular claim paid, and the applicable law that would supply interest for that sort of claim. The *Cardelucci* court next discerns meaning in the definite article. *Id.* at 1234-35. But the phrase, "interest at *a* legal rate," would be nonsensical, and imply that there might be more than one rate, while "*the* legal rate . . . on any claim paid" (emphasis added) plainly means, in context, the singular rate that applicable law would apply to that claim.[12]

Next, the court thought applying the same rate would "ensure[] equitable treatment of creditors." *See id.* at 1235. It ensures just the opposite: inequity among creditors and equity holders, granting a windfall to the latter, and ensuring that the former do not receive what the law would otherwise give them. The court stated, "no single creditor will be eligible for a disproportionate share of any remaining assets to the detriment of other unsecured creditors," *id*. at 1236, but because every creditor receives all of its contract rights from a solvent debtor, none receives a disproportionate share.

Application of the federal judgment rate here would be highly inequitable, treating the Noteholders worse than if they had been "impaired." As "impaired" creditors in a solvent case, the Noteholders could have voted to reject the plan, which would have forced cramdown under section 1129(b). Under the "fair and equitable test" that applies in cramdown, the Noteholders would have had to receive better

[12] The court cites Black's Law Dictionary 1477 (6th ed. 1990) ("In construing statute, definite article 'the' particularizes the subject which it precedes and is word of limitation as opposed to indefinite or generalizing force 'a' or 'an.'"). 285 F.3d at 1234. Precisely. "The" in this context particularizes the rate to the particular "claim paid."

treatment than any subordinate creditor or interest holder.[13] Yet the plan left OpCo's structurally subordinate equity holder with better treatment – allowing claims for "all applicable post-petition interest, charges and fees (as determined by the Bankruptcy Court or as otherwise agreed by the relevant parties)." ROA.1125. Neither the "good faith" test of section 1129(a)(3) nor the "fair and equitable" test of section 1129(b) could have been met.

*Dvorkin Holdings* involved a solvent debtor that proposed to pay general unsecured creditors in full, plus post-petition interest at the Federal Judgment Rate. *See* 547 B.R. at 883-84. The Bankruptcy Court confirmed the plan, but the district court reversed, concluding that there is a rebuttable presumption in favor of the contract rate:

> in the case of a Chapter 11 surplus bankruptcy estate that is large enough to pay in full all unsecured creditors' claims plus post-petition interest, section 726(a)(5) does not limit a creditor with a valid contract to the Federal Judgment Rate. If the unsecured creditor's contract provides for the payment of interest, there is a presumption that the creditor is entitled to the contractual amount. This presumption may be rebutted by equitable considerations.

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[13] The "fair and equitable" test of section 1129(b) of the Code requires (i) that unsecured creditors "receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount" of the creditors' claims or (ii) "the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property[.]" 11 U.S.C. § 1129(b)(2)(B).

*Id.* at 898. The court was unconvinced by cases holding that "interest at the legal rate" means the Federal Judgment Rate in all cases when there was a "surplus" chapter 11 estate. *Id.* at 893. It relied on the Act jurisprudence, and noted that nothing in the language of 726(a)(5) clearly supplanted the "pre-Code rule that in cases involving a surplus bankruptcy estate, the bankruptcy court should enforce creditors' rights according to the tenor of the contracts that created those rights." *Id.* at 893-94 (internal quotations and citation omitted); *Schoeneberg*, 156 B.R. at 969 ("Section 726(a)(5) itself provides no clear answer" as to what "legal rate" means).

*Dvorkin Holdings* also looked to the legislative history that accompanied the 1994 repeal of former section 1124(3) of the Code (discussed *supra* at 24-25), noting that Congress did not mention the Federal Judgment Rate; emphasizing the requirement that a plan comply with the "fair and equitable" test, it cited to pre-Code case law "for the 'well established' meaning of 'fair and equitable' in the context of a solvent bankruptcy estate." *Id.* at 894-95.[14] This is consistent with this Court's approach in *Laymon*, 958 F.2d at 74 (Neither legislative history nor the language of section 506(b) referred to a specific rate of interest, "[t]herefore, we must conclude

[14] The court looked as well to the treatment of secured creditors under section 506(b) of the Code: "[a]lthough section 506(b) uses somewhat different language than [section 726(a)(5)]—'interest on such claim' rather than 'interest at the legal rate'—both phrases are ambiguous on their face . . . the Court finds relevant its general principle that contract rights should be enforced in the absence of compelling equitable considerations." *Id.* at 897.

that Congress did not intend for § 506(b) of the Code to effect a major change in pre-Code practice concerning the rate of interest applied under the section."); *see Schoeneberg*, 156 B.R. at 970-71 (discussing the Fifth Circuit's decision to resolve the 506(b) question by "examining and applying pre-Code case law.").

## IV. The Make-Whole Amount Is Not "Unmatured Interest" Under Section 502(b)(2) of the Code but Rather an Enforceable Liquidated Damages Provision and Part of the Noteholders' Allowed Claim.

### A. The Make-Whole Amount Is Not Interest.

The Code does not define "interest" or "unmatured interest." Applying the plain meaning of these terms and settled practice and case law, the Bankruptcy Court defined interest as "consideration for the use or forbearance of another's money over time." ROA.7150. This definition tracks the dictionary definition of the term. *Interest*, Black's Law Dictionary, (11th ed. 2019) ("The 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; especially the amount owed to a lender in return for the use of borrowed money."); *Interest*, Webster's New World Dictionary, (2d coll. ed. 1970) ("[M]oney paid for the use of money [and/or] the rate of such payment, expressed as a percentage per unit of time.").

This definition also tracks the definition other courts have given the term. *See e.g., Deputy v. Du Pont*, 308 U.S. 488, 498 (1940) (noting that interest means "the amount which one has contracted to pay for the use of borrowed money") (internal quotations and citations omitted). Claims of creditors are determined by reference to state law, *see Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 161 (1946) ("what claims of creditors are valid and subsisting obligations against the bankrupt at the time a petition in bankruptcy is filed, is a question which, in the absence of overruling federal law, is to be determined by reference to state law."), and allowable in bankruptcy unless the Code expressly disallows them. *See also Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 452 (2007). New York law, which governs the MNPA, defines "interest" as the Bankruptcy Court did. *See Love v. State of New York*, 78 N.Y.2d 540, 544 (1991) ("[I]nterest . . . is simply the cost of having the use of another person's money for a specified period"); *Becker v. Huss Co.*, 43 N.Y. 2d 527, 543 (1978) ("interest is intended to compensate for the use or nonpayment of money"). And New York precedent holds that enforceable make-whole provisions liquidate a damage entitlement that is not interest or its equivalent. *See Feldman v. Kings Highway Sav. Bank*, 102 N.Y.S.2d 306, *aff'd*, 303 N.Y. 675 (1951) (holding a sum of money characterized as a "prepayment privilege charge" was not interest and, therefore, not usurious).

The Bankruptcy Court's definition of interest is also the same definition that this Court has used to determine whether a prepayment fee is interest under Texas law. *See Achee Holds., LLC v. Silver Hill Financial, LLC,* 342 Fed. Appx. 943, 944 (5th Cir. 2009) ("Specifically a fee will not be considered interest if it is not for the use, forbearance or detention of money."); *C.C. Port v. Davis-Penn Mortgage Co.,* 61 F.3d 288, 289 (5th Cir. 1995) (same); *Parker Plaza West Partners v. UNUM Pension & Ins. Co.,* 941 F.2d 349, 352 (5th Cir. 1991) (same).

"Consideration for the use or forbearance of another's money over time" is typically calculated as the product of (i) a stated or formulaic percentage of principal accruing per unit of time and (ii) a principal amount outstanding during the actual time elapsed. *See Sys. Fuels, Inc. v. United States*, 78 Fed. Cl. 769, 807 (2007), *on reconsideration*, 92 Fed. Cl. 101 (2010), *aff'd in part, rev'd in part*, 666 F.3d 1306 (Fed. Cir. 2012) (defining interest as an "amount charged by a lender to a borrower for the use of funds," that is often equal to "principal x interest rate x period of time"). Nothing in the Code provides that "interest" should be defined differently from the commonly accepted definition grounded in state law.

Taking into account this widely accepted definition, and mindful of this Court's direction in the Remand Opinion that "much depends on the dynamics of the individual case," 943 F.3d at 765, the Bankruptcy Court evaluated in detail the dynamics of the Make-Whole Amount and held that the Make-Whole Amount was not interest, not unmatured interest, and not the economic equivalent of interest. ROA.7148. It correctly concluded that the "Make-Whole Amount is not consideration for the use or forbearance of the Note Claimants' money" but, the opposite: compensation for the damage a fixed-rate lender may suffer when the borrower *ceases* to use money. ROA.7152. The Make-Whole Amount "compensates the Note Claimants for the cost of reinvesting in a less favorable market." ROA.7152. The Bankruptcy Court noted that "in an unfavorable market [the decision to no longer use the borrowed money] causes the Note Claimants to suffer damages" and that the "Make-Whole Amount liquidates those damages." ROA.7152. Here the agreed compensation for the Appellants' decision not to use the Noteholders' money is the Make-Whole Amount.

Interest is a charge for the <u>use</u> of money. The Make-Whole Amount is a formula for assessing damages – which may or may not arise – from Ultra's <u>failure to use</u> money. Interest on a fixed rate note like the Notes accrues steadily, at a measurable rate, for use of the borrowed money, regardless of what is occurring in the marketplace. *Compare In re Pengo Indust. Inc.,* 962 F.2d 543, 546 (5th Cir. 1992) (describing interest as money "to be paid to compensate for the delay and risk involved in the ultimate repayment of monies loaned."), *with Achee Holds.*, 342 Fed. Appx. at 944 ("Specifically, a fee will not be considered interest if it is not for the use, forbearance or detention of money"). Because interest is consideration for the use or forbearance of money, measured as the product of elapsed time and a percentage rate established by contract or law, interest always *increases* as a direct function of time. In contrast, the Make-Whole Amount is not earned over time, and the only temporal association of contingent make-whole obligations (including the

Make-Whole Amount) is that they tend to *decrease* with time. The longer the term for which a borrower uses the funds, the less any damages generated by the formula are likely to be.

If the Make-Whole Amount truly were unmatured interest, it would be payable after *every* prepayment or acceleration, because every such event results in unmatured interest. Yet whether this make-whole formula will result in an amount due depends entirely on market conditions. A formula that, under certain circumstances, yields no payment at all cannot be interest. That it results in an amount payable only when prepayment or acceleration exposes the lender to an unfavorable re-lending environment supports the majority view that a make-whole provision should be considered liquidated damages as compensation for the non-use of money, and not interest. *See In re School Specialty,* No. 13-10125 (KJC), 2013 WL 1838513, at *5 (Bankr. D. Del. Apr. 22, 2013) (agreeing with majority rule that make-whole premiums are not unmatured interest); *In re Trico Marine Servs. Inc.*, 450 B.R. 474, 480 (Bankr. D. Del. 2011) ("[T]he substantial majority of courts considering this issue have concluded that make-whole or prepayment obligations are in the nature of liquidated damages rather than unmatured interest[.]"); *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 unmatured interest"); *United Merchs. & Mfgs., Inc. v.*

*Equitable Life*, 674 F.2d 134, 144 (2d. Cir. 1982) (pre-Code decision enforcing prepayment premium because "[n]othing in bankruptcy law or policy counsels against recognition of the [the lenders'] claims for liquidated damages"); *see also* 4 Collier on Bankruptcy, ¶ 502.03 (16th ed. 2021) (noting that the majority of cases have rejected the view that make-wholes should be treated as unmatured interest). The necessary implication of the majority rule that the Make-Whole Amount constitutes liquidated damages is that it cannot *also* be interest.

Appellants argue that interest and liquidated damages are not mutually exclusive. *See* Br. at 13. And while a putative liquidated damage provision that simply totaled up future interest payments would likely be disallowed both under section 502(b)(1) (as a penalty under New York law, given its failure to approximate actual damage) and 502(b)(2) (as a clear effort to collect all unmatured interest in every case), the Bankruptcy Court rightly declined to "speculate whether some hypothetical liquidated damages clause conceivably compensates a creditor for unmatured interest under Section 502(b)(2)," holding that "[t]his Make-Whole does not". ROA.7148.

The Make-Whole Amount is not a mere sum of remaining interest payments. It is calculated by reference to discounted rate differentials and is intended to compensate the lender for its approximated loss – which could be zero. Other courts considering this specific formula – which establishes the "dynamics" of this case –

have concluded that it is not unmatured interest. *See, e.g., School Specialty*, 2013 WL 1838513, at *5; *In re Anchor Resolution Corp.*, 221 BR 330, 341 (Bankr. D. 1998) (holding that a make-whole claim calculated by discounting outstanding principal and remaining interest to present value using a discount rate equal to .50% over Treasury rates of the same weighted average life to maturity as the notes in question is a reasonable liquidated damages provision).

In *Thrifty Oil Co. v. Bank of America National Trust & Sav. Ass'n*, 322 F.3d 1039, 1048 (9th Cir. 2003), the Ninth Circuit considered an analogous damages formula. Like the Make-Whole formula, it compared the present values of notional payment streams under varying interest rates, holding that its result was not void as "unmatured interest" under section 502(b)(2). The debtor was party to open interest rate swaps that terminated upon its bankruptcy filing. It contended that its damage obligation ought to be void because the damages were effectively comprised of future interest components. The Ninth Circuit disagreed, noting that "interest" is a charge for money that is actually used, and that "[p]ayments made under an interest rate swap cannot possibly compensate for the delay and risk associated with borrowed money . . . damages due upon termination of the swap merely provide the replacement cost of the lost swap payments and likewise cannot represent interest, unmatured or otherwise." *Id.* The Make-Whole Amount functions in a similar way. Whether payment is due depends, in part, on interest rates in force at the measurement date, just as in the case of the *Thrifty Oil* swap. The swap termination fixes the cost (if any) of the close-out, just as the Make-Whole formula fixes the damage (if any) arising from early termination of a loan. Neither arrangement involves "unmatured" interest.

Appellants rely extensively on *Pengo Industries. Pengo* involved "original issue discount" bonds – bonds issued for a price below par.[15] OID is not a damages provision for a breach, but rather a structure that builds interest into the face amount of a bond. When the bond is paid at maturity, the holder receives what amounts to interest in the form of the difference between the par value of the bond and the discounted price at which it was issued. Unlike the Make-Whole Amount, OID is always owing; it is not subject to a variable formula that might produce zero. OID constitutes "a method of providing for and collecting what in economic fact is interest to be paid to compensate for the delay and risk involved in the ultimate repayment of monies loaned." *Pengo,* 962 F.2d at 546 (internal quotation marks omitted). Understandably, Congress singled out OID and disallowed payment of the gross amount of OID yet to accrue as of a bankruptcy filing. *Id.* (quoting from legislative history and noting that Congress "considered unamortized OID the economic equivalent of unmatured interest") (internal quotation marks omitted). In

[15] A lender may lend $90 that the borrower will repay for $100 at maturity. The $10 of "discount" is compensation for the borrower's use of the $90 in principal over the term of the loan.

contrast, the Make-Whole formula assesses whether damage has occurred at all. *Pengo* offers no support for the argument that Congress intended to disallow a reasonable liquidated damages provision compensating lenders for payment or acceleration before a note's scheduled maturity.

Appellants also rely on cases with very different contractual rights from those at issue here, including "no-call" cases that are not analogous to the claim for the Make-Whole Amount. *First,* Appellants point to *In re Wiston XXIV Ltd. P'ship*, 170 B.R. 453, 462 (D. Kan. 1994). *See* Br. at 21. The creditor there claimed the sum of all post-petition interest over the remaining life of the loan. *Id*. at 462. *Second*, Appellants cite "no-call" cases involving contracts that restricted prepayment. Most such cases, including those cited by Appellants, do not provide for a prepayment premium or make-whole upon acceleration following bankruptcy, which distinguishes them from this case. *See, e.g., HSBC Bank USA, Nat'l Assoc. v. Calpine Corp*., No. 07-cv-3088 (GBD), 2010 WL 3835200, at *1 (S.D.N.Y. Sept. 15, 2010) (rejecting the lenders' claim for damages for breach of a no-call provision and finding "none of the notes required the payment of a premium in the event of repayment pursuant to acceleration"); *Cont'l Sec. Corp. v. Shenandoah Nursing Home*, 188 B.R. 205, 219 (W.D. Va. 1995) (same).

### B. The Use of Interest Rates in the Formula Does Not Transform the Make-Whole Amount into Interest.

Appellants argue that the Make-Whole Amount must be the economic equivalent of interest because interest rates are one factor within the formula. This sort of simplistic argument has been tried and rejected before in this Court. *See Achee Holds.*, 342 Fed. Appx. at 944-45 ("Though the interest rate on the loan was used as part of the formula for calculating the [prepayment fee]" since the substance of the prepayment fee is "not compensation for the use, forbearance or detention of money, it is not interest.").

Principal is also an essential element of the make-whole formula, but no one contends that the Make-Whole Amount is principal. That is because the product of a formula is not the same thing as its constituent elements. As the Bankruptcy Court put it, "[u]nmatured interest is merely an ingredient in the liquidated damage pie." ROA.7162. And hardly a surprising one at that. Damage, if it occurs at all, results from the difference between a fixed contract rate and the comparable treasury rates in a changed marketplace; the formula has to compare those rates to determine whether damage has occurred.

Some prepayment charges are blunt instruments, simply requiring payment of a percentage of the principal of a loan, without regard to whether the resulting sum bears any relationship to a lender's loss. Even those arrangements, if not unconscionably high, have been upheld many times. *See, e.g., JMD Holding Corp.*, 828 N.E.2d at 607. The Make-Whole formula here is more precise because it uses actual interest rates. The use of such rates to produce a formula that more accurately measures a lender's loss does not transform the product of the calculation into interest.

Appellants further argue that the Make-Whole Amount is the economic equivalent of unmatured interest because it subtracts the principal being repaid at the end of the calculation. Br. at 17. This is another failed effort to tease the damages pie into its ingredients. The Make-Whole Amount is calculated by (1) totaling the present value of each of the remaining scheduled payments of principal and interest using a contractually discount agreed rate of comparable Treasuries plus 50 basis points, and (2) subtracting the principal amount (as it is separately being repaid). Essentially the Make-Whole formula compares the present value of a lender's contractual right to be paid principal and interest through the life of a loan with the value of receiving the principal payment early.[16] Only when the former exceeds the

[16] Consider a $100 loan accruing interest at 5% per annum (payable semi-annually). At the time of a prepayment or acceleration event that triggers the make-whole, one year remains until maturity. Further assume that the relevant Treasury Rate is 1.22%, resulting in a relevant discount rate of 1.72%. Following the formula in the MNPA, (1) the remaining scheduled payments of principal and interest total $105 (the $100 principal plus $5 remaining interest), (2) applying the 1.72% discount rate to the remaining scheduled payments of $105, yields $103.20, and (3) subtracting the principal amount of $100 results in a make-whole amount of $3.20. If the principal was not subtracted at the end of the formula, a borrower prepaying $100 would owe a make-whole payment of $103.20. If only the remaining interest,

latter is a Make-Whole due. Discounting the future contractual interest payments alone would not take into account the value of receiving the principal early and would always yield a positive number, even if the lender suffered no harm. If the principal prepaid was not deducted, the borrower would be assessed for it twice, once as the prepaid principal, and again as part of the Make-Whole Amount.

### C. The Make-Whole Amount Is Not Unmatured.

In addition to not being "interest," the Make-Whole Amount is also not "unmatured." Unmatured interest means interest that, as of a reference date, and per the terms of an enforceable contract provision, has not yet accrued. Accrual refers to the accumulation of interest owed during the time in which principal is used. In the context of section 502(b), unmatured interest is interest that would accrue for the Appellants' actual use or forbearance of money during the post-petition period, and excludes amounts that, pursuant to an enforceable provision in a pre-petition agreement, are due and owing as a result of acceleration on the Petition Date.

Under section 12.1 of the MNPA, the Make-Whole Amount fully matured, along with all principal and accrued interest, when the Notes automatically accelerated on the Petition Date. *In re Outdoor Sports Headquarters, Inc.,* 161 B.R. 414, 424 (Bankr. S.D. Ohio 1993) ("Prepayment amounts, although often computed

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here $5, was discounted at the 1.72% discount rate, the result would be $4.90, significantly more than the $3.20.

as being interest that would have been received through the life of a loan, do not constitute unmatured interest because they fully mature pursuant to the provisions of the contract . . . and will not be disallowed pursuant to § 502(b)(2).") (internal citations omitted); *In re GMX Res., Inc.*, No. 13-11456-SAH, (Bank. D. Okla. Aug. 29, 2013), Tr. of Oral Decision, Dkt. No. 687 at 27:10-14 ("[T]he applicable premium is due and payable and thus matured upon acceleration of the debt, which was triggered by bankruptcy filing. Consequently, the applicable premium is not unmatured within the language of section 502(b)(2)."); *In re Doctors Hosp. of Hyde Park, Inc.*, 508 B.R. 697, 706 (Bankr. N.D. Ill. 2014) (noting that a prepayment premium triggered by the acceleration occurring immediately upon bankruptcy filing cannot be viewed as unmatured); *In re Skyler Ridge,* 80 B.R. 500, 507 (Bankr. C. D. Cal. 1987) ("If automatic acceleration of a debt defeats 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 premium clause by filing a bankruptcy case. Neither the Code nor case law compels so drastic a result."). The force of an automatic acceleration clause in a loan agreement (which is not an executory contract), on the filing of a bankruptcy case is not limited by the Code. *See In re AMR Corp.*, 730 F.3d 88, 106 (2d Cir. 2013) (The argument that the *ipso facto* clause and "the Code categorically prohibits enforcement of [automatic acceleration] clauses—and that these clauses, in particular, are unenforceable—is without merit.”).

Appellants’ reliance on *Doctors Hospital* is misplaced. There the debtor was a loan guarantor. Its filing did not trigger the automatic acceleration provision or the yield maintenance provision under the loan agreement. The loan was not accelerated until the lender commenced foreclosure proceedings against the borrower three months *after* the *Doctors Hospital* bankruptcy petition. It is no surprise that the court held the yield maintenance premium to be unmatured as of the petition date three months earlier. *See* 508 B.R. at 705. The court noted that “the timing of when a prepayment clause takes effect matters” and distinguished those cases where “[l]iquidated damages, including prepayment premiums, fully mature at the time of the breach.” *Id.* at 706 (citation omitted).

Appellants’ reliance on *In re Ridgewood Apartments of DeKalb Cty., Ltd.* also fails. There the contract provided for a yield maintenance premium only upon a *voluntary* prepayment, not upon acceleration. Since there was no voluntary prepayment as of the petition date, the court correctly found the right unmatured. 174 B.R. 712, 720 (Bankr. S.D. Ohio 1994).

## V. The Make-Whole Is an Enforceable Liquidated Damages Clause Under New York Law.

### A. The Make-Whole Amount, a Reasonable and Proportionate Measure of Damages, Does Not "Double Count."

It is important to stress what is not at issue in this appeal. Appellants do not argue that the Make-Whole Amount, standing alone, is an unenforceable penalty. Under New York Law, an argument attacking a liquidated damages provision negotiated at arms-length between sophisticated parties faces a steep climb. "Absent some element of fraud, exploitive over-reaching or unconscionable conduct . . . to exploit a technical breach, there is no warrant, either in law or equity, for a court to refuse enforcement of the agreement of the parties." *JMD Holding Corp. v. Cong. Fin. Corp.*, 828 N.E.2d 604, 609 (N.Y. 2005). There is "an emerging presumption against interpreting liquidated damages clauses as penalty clauses." *Id.* at 610 (citation omitted).[17] "Accordingly, a liquidated damages provision is not to be

[17] *See United Merchs. & Mfgs.*, 674 F.2d at 143-44 (holding pre-payment charge was an enforceable claim for liquidated damages); *Walter E. Heller & Co. v. Am. Flyers Airline Corp.*, 459 F.2d 896, 900 (2d Cir. 1972) (holding liquidated damages amount in loan contract was reasonable); *Wilmington Sav. Soc'y FSB v. Cash Am. Int'l, Inc.*, No. 07-civ-3088 (GBD), 2016 WL 5092594, at *5 (S.D.N.Y. Sep. 19, 2016) (enforcing make-whole) (citing cases); *see also, Great Plains Real Estate Dec., L.L.C. v. Union Cent. Life Ins. Co.*, 536 F.3d 939, 945 (8th Cir. 2008) (citing *In re A.J. Lane & Co.*, 113 B.R. 821, 829 (Bankr. D. Mass. 1990)). *School Specialty*, 2013 WL 1838513, at *5; *In re Hidden Lake P'ship*, 247 B.R. 722, 730 (Bankr. S.D. Ohio 2000); *Lappin*, 245 B.R. at 330; *Outdoor Sports*, 161 B.R. at 424; *In re Fin. Ctr. Assocs. of E. Meadow,* 140 B.R. 829, 837 (Bankr. E.D.N.Y. 1992); *see also* Restatement (Third) of Property (Mortgages), § 6.2 (1997) ("When a mortgage permits prepayment only with the payment of an additional fee, the clause

interfered with 'absent some persuasive justification.'" *GFI Brokers, LLC v. Santana*, No. 06 CIV. 3988 (GEL), 2009 WL 2482130, at *2 (S.D.N.Y. Aug. 13, 2009) (citation omitted).

Appellants argue that because the Make-Whole Amount is triggered before the actual prepayment, the accrual of default interest on both the principal and Make-Whole Amount represents a double recovery and thus an unenforceable penalty. Br. at 33. But as the Bankruptcy Court explained in its September 2017 decision, the Make-Whole Amount and the post-petition interest address two different harms. ROA.6153-6161.[18] The Bankruptcy Court began by showing that, in line with long-standing New York law, the Make-Whole Amount was a valid liquidated damages clause and not a disproportionate penalty under New York Law nor a double recovery.

The Make-Whole Amount is compensation for the harm caused by the early repayment or termination of use of amounts due under the MNPA. It is a "present-value" type measure of future damage, calculated as of the date of prepayment or

providing for the fee accomplishes a shift from the mortgagor to the mortgagee of the risk of loss associated with prepayment . . . . The fee clause may also be viewed as analogous to a liquidation of damages.").

[18] The Bankruptcy Court's most recent decision does not restate this analysis because, as the Bankruptcy Court noted, this Court had not disturbed that holding. ROA.7147 (citing to *In re Ultra Petroleum Corp.*, 575 B.R. 361, 369 (Bankr. S.D. Tex. 2017) (*see also* ROA.6156), and Remand Opinion, 943 F.3d at 764).

acceleration. The formula assumes the Noteholders receive the principal and Make-Whole Amount on the date of calculation to reinvest at the then-prevailing interest rates that were used in the formula. If the Make-Whole Amount is not paid as of the measurement date, then the Noteholders suffer additional harm because the Make-Whole Amount was not paid when due. Any delay in receipt produces loss from both the delay in reinvestment and the risk of rate fluctuation from the time the Make-Whole Amount was calculated until the date of payment. Default interest that accrues from the petition date (which is the date of calculation) on both the principal and Make-Whole Amount compensates for this loss and this risk. As the Bankruptcy Court explained, "the post-petition default interest . . . would compensate the Noteholders for the Debtors' failure to pay the principal, unpaid interest, and Make-Whole Amount as they came due at the time of acceleration." ROA.6158.

Appellants cite no case holding that default interest "double counts" a make-whole amount that is not paid when due. At least four courts have squarely held that it does not. One was the original Bankruptcy Court decision. A second supporting decision is *Federal National Mortgage Ass'n v. Bridgeport Portfolio*, LLC, 92 A. 3d 966 (Ct. App. 2014) (holding the combination of a prepayment premium and default interest would not be unenforceable as a penalty). A third is *In re Vanderveer Ests. Holdings, Inc.*, 283 B.R. 122, 134 (Bankr. E.D.N.Y. 2002) ("The debtor argues that [the lender] is not entitled to both default interest and a yield maintenance premium under section 506(b), because these are duplicative charges. This is not correct."). In a fourth decision, *In re Kimbrell Realty/Jeth Court*, *LLC*, 483 B.R. 679 (Bankr. C.D. Ill. 2012), the court ruled that a prepayment premium and a default interest imposed over the same post-default period did not result in "redundant or duplicative damages" and were not "double compensation for the same loss." *Id*. at 689, 692.[19]

Appellants rely on *172 Van Duzer Realty Corp. v. Global Alumni Student Assistance Assoc.*, 24 N.Y.3d 528 (2014), which held that a defendant-tenant was entitled to present evidence on whether the undiscounted accelerated rent amount was disproportionate to the landlord's losses. 24 N.Y.3d at 536-37. There was no judgment on the merits, let alone a finding of double counting.

Were Appellants correct, the promise to pay default interest to cover unpaid obligations would render every Make-Whole Amount triggered by acceleration a penalty. This would encourage nonperformance: the issuer would always benefit by breaching its promise to make a timely payment of a make-whole because it would then be able to claim that the obligation to pay both default interest and the make-whole was void as a penalty. Arguments so perverse are not available under New

[19] While not specifically addressing the calculation, in *Chesapeake Energy Corp. v. Bank of N.Y. Mellon Tr. Co., N.A.*, 837 F.3d 146, 152 (2d Cir. 2016), the Second Circuit affirmed a decision that awarded *both* damages based on a make-whole formula and interest that accrued on the make-whole amount calculated from the date it was incurred until the date of payment.

York law to a sophisticated party that bound itself to an unambiguous contract, *see, e.g., AXA Inv. Managers UK Ltd. v Endeavor Capital Mgmt. LLC*, 890 F. Supp. 2d 373, 388-89 (S.D.N.Y. 2012), and it is not the role of courts to rewrite contracts of sophisticated parties. *See, e.g., Cardoni v. Prosperity Bank*, 805 F.3d 573, 580 (5th Cir. 2015).

Appellants claim it would be a windfall if the Noteholders received their contractual right to both the Make-Whole Amount and post-petition interest. Br. at 1-2. But payment of the post-petition interest places the Noteholders in an economically-equivalent position to the one the contract contemplates; because the Make-Whole Amount and principal were not in hand on the measurement date, the interest compensates for the delay in its receipt. The real windfall would be in the value shift – from creditors owed money to junior equity holders – that Appellants seek. Such a shift would offend commercial finance and equitable distribution principles.

In sum, the Make-Whole Amount in the MNPA is not disallowed under section 502(b)(2) because it (1) is not interest, (2) is not unmatured, and (3) is an enforceable liquidated damages provision under state law. This Court should affirm the Bankruptcy Court's holding.

## CONCLUSION

The decision of the Bankruptcy Court should be affirmed.

Dated: May 10, 2021

Respectfully submitted,

s/ *Peter Sabin Willett*
Peter Sabin Willett
*Counsel of Record*
Andrew J. Gallo
MORGAN, LEWIS & BOCKIUS LLP
One Federal Street
Boston, MA 02110
T. 617.341.7700
F. 617.341.7701
sabin.willett@morganlewis.com
andrew.gallo@morganlewis.com

David B. Salmons
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
T. 202.739.3000
F. 202.739.3001
david.salmons@morganlewis.com

Renée M. Dailey
AKIN GUMP STRAUSS HAUER & FELD, LLP
65 Memorial Road
West Hartford, CT 06107
T. 860.263.2922
F. 860.263.2932
renee.dailey@akingump.com

*Attorneys for Appellee OpCo Noteholders*

## CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May, 2021, a true and correct copy of the foregoing Brief of Appellee OpCo Noteholders was served via electronic transmission, in portable document format (.pdf), on all counsel of record in this case using the CM/ECF system.

s/ *Peter Sabin Willett*
Peter Sabin Willett
*Attorney for Appellee*
*OpCo Noteholders*

## CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Fifth Circuit Rule 32.2, because it contains 12,843 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

Undersigned counsel further certifies that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced 14-point Times New Roman typeface using Microsoft Word 365.

Undersigned counsel also certifies that any required privacy redactions have been made pursuant to Fifth Circuit Rule 25.2.13, the electronic submission is an exact copy of the paper submission, and the brief has been scanned for viruses using McAfee Endpoint Security Version 10.7.0.2421 and is free of viruses.

Dated: May 10, 2021

*s/ Peter Sabin Willett*
Peter Sabin Willett
*Attorney for Appellee*
*OpCo Noteholders*