# APPENDIX

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*Appendix A*

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

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No. 21-20008

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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*,

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.,

*Appellants*,

v.

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

*Appellees*.

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Filed: Oct. 14, 2022

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Before: Jolly, Elrod, and Oldham, *Circuit Judges*.

OPINION

Jennifer Walker Elrod, *Circuit Judge*:

Bankruptcy is ordinarily for the insolvent. The Bankruptcy Code enables economically viable businesses in financial distress to restructure and shed some of the debt burden that crippled them. Sometimes, however, initially insolvent debtors regain solvency during extended bankruptcy proceedings. This is one such case. Ultra Petroleum Corp. (HoldCo) and its affiliates, including its subsidiary Ultra Resources, Inc. (OpCo), entered Chapter 11 bankruptcy deep in the hole. But during the bankruptcy process, these debtors (collectively, Ultra) hit it big—as natural gas prices soared, they became supremely solvent. What, then, of their debt and interest must they (re)pay their creditors now that they can?

Ultra proposed a $2.5 billion bankruptcy plan. It provided that OpCo's creditors would be paid—in full and in cash—their outstanding principal and all interest that had accrued *before* bankruptcy, plus interest on both at the Federal Judgment Rate for the duration of the bankruptcy proceeding. Two groups of creditors complain that the plan falls some $387 million short: They contend that they are entitled to a "Make-Whole Amount," a lump sum calculated to give them the present value of the interest payments they would have received but for Ultra's bankruptcy. These creditors further claim that they are owed post-

petition interest at a contractually specified rate that is materially higher than the Federal Judgment Rate.

This case asks us to decide: first, whether the Bankruptcy Code precludes the creditors' claims for the Make-Whole Amount; second, even if it does, whether the traditional solvent-debtor exception applies; and third, whether post-judgment interest is to be calculated at the contractual or Federal Judgment rate. We hold that the Bankruptcy Code disallows the Make-Whole Amount as the economic equivalent of unmatured interest. But because Congress has not clearly abrogated the solvent-debtor exception, we hold that it applies to this case. And the solvent-debtor exception demands that Ultra pay what it promised now that it is financially capable. We likewise hold that, given Ultra's solvency, post-petition interest is to be calculated according to the agreed-upon contractual rate. Thus, we AFFIRM.

**I.**

Ultra is a family of natural gas exploration and production companies. In 2014 and 2015, a sharp decline in natural gas prices drove Ultra to insolvency and thence to the protection of Chapter 11 bankruptcy in early 2016. During the bankruptcy proceedings, the same volatile commodity prices that hurled Ultra into insolvency propelled the debtors back into solvency. Indeed, Ultra became "massively solvent."

Ultra proposed a plan that would pay—in full and in cash—all unsecured claims, including those of its noteholders and revolving credit facility creditors

(collectively, Creditors).[1] Ultra would thus pay Creditors' entire outstanding principal along with all accrued *pre*-petition interest at the contractual rate, plus *post*-petition interest at the Federal Judgment Rate, as specified at 28 U.S.C. § 1961(a).[2] In Ultra's view, the plan paid Creditors fully for every claim that the Bankruptcy Code allowed. For this reason, Ultra classified these Creditors as "unimpaired" under 11 U.S.C. §§ 1123(a)(2), 1124. And given their status as "unimpaired," Creditors were thus "conclusively presumed to have accepted the plan" per § 1126(f). In other words, they had no right to vote on it.

Creditors objected. They contended that the plan *did* impair them because it did not allow for claims stemming from two contractual provisions in their debt instruments—a shortfall of some $387 million. Not so, countered Ultra—those two provisions simply did not give rise to allowable claims under the Bankruptcy Code.

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[1] Unless otherwise indicated, "Creditors" will generally refer to both groups of creditor-appellees: (1) OpCo Noteholders (a group of over forty insurance companies, hedge funds, and other institutional investors); and (2) the Ad Hoc Committee of OpCo Unsecured Creditors, which represents both note and revolver creditors (a similar group of twenty investors).

[2] The Federal Judgement Rate as of April 29, 2016, the date of Ultra's bankruptcy petition (the applicable rate for the confirmed plan) was 54 basis points (0.54%), which is materially lower than the contractual rate, defined as the greater of 2% over either of two benchmark rates. 28 U.S.C. § 1961; Post-Judgment Interest Rates - 2016, (Week Ending April 22, 2016), United States District & Bankruptcy Court, Southern District of Texas, https://www.txs.uscourts.gov/page/post-judgment-interest-rates-2016.

The parties stipulated that this dispute could be resolved after plan confirmation. Ultra created a $400 million reserve to cover the alleged shortfall, and the bankruptcy court confirmed the plan. The bankruptcy court then addressed Creditors' "impaired" status vis-à-vis the disputed amounts, concluding that Creditors remained impaired unless they were paid the full amount permitted under applicable non-bankruptcy law. *In re Ultra Petroleum Corp.*, 575 B.R. 361, 366-75 (Bankr. S.D. Tex. 2017). Ultra appealed directly to this court.

We reversed. *In re Ultra Petroleum Corp.*, 943 F.3d 758 (5th Cir. 2019). We held that "[w]here a plan refuses to pay funds disallowed by the Code, the Code—not the plan—is doing the impairing." *Id.* at 765. The issue of impairment thus set aside, the only question remaining was whether Creditors were, in fact, entitled to the disputed claims under the Bankruptcy Code's disallowance provisions. On this score, we remanded to the bankruptcy court to render a decision in the first instance. *Id.* at 765-66.

On remand, the bankruptcy court faced the dispositive question of whether Creditors' disputed claims were indeed disallowed under the Bankruptcy Code. Creditors' disputed claims stemmed from two OpCo debt instruments:

1. OpCo Notes issued under a Master Note Purchase Agreement (MNPA) (totaling $1.46 billion in principal); and

2. a Revolving Credit Facility (RCF) ($999 million in principal).

Creditors claimed a "Make-Whole Amount" under the MNPA, and under both the MNPA and the RCF, they

claimed interest calculated according to a contractually specified "default rate" on all amounts due and payable at the time that Ultra filed for bankruptcy.

Under both the MNPA and the RCF, the occurrence of any contractually enumerated "Event of Default" renders any outstanding principal immediately due and payable. Under the MNPA, such an Event also triggers the requirement that OpCo pay Creditors an additional Make-Whole Amount. The Make-Whole Amount, stripped of the contract's financial jargon, is simply the value of all future unmatured interest payments on the Notes, expressed in today's dollars.[3]

Among the Events of Default that trigger principal acceleration and the Make-Whole provision is the filing of a petition for bankruptcy. Thus, the moment that Ultra filed, the remaining principal on both debt instruments became due, and Ultra contractually owed the Noteholders the Make-Whole Amount—a sum clocking in around $201 million.

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[3] Here is the nitty-gritty: The MNPA defines the Make-Whole Amount as "the excess, if any, of the Discounted Value of the Remaining Scheduled Payments with respect to the Called Principal of such fixed rate Note over the amount of such Called Principal." The "Remaining Scheduled Payments" are the payments of interest and principal that would have occurred absent OpCo's default. These payments are summed and discounted to their present value using a discount factor 50 basis points over the yield to maturity of Treasury securities comparable in risk profile to the OpCo Notes. From this figure is subtracted the "Called Principal"—the unpaid balance of the Notes' principal that was accelerated on default. The Make-Whole Amount is any resultant positive number.

On top of this, both the MNPA and the RCF specified a hefty contractual "default rate" of interest to accrue on the accelerated principal and the Make-Whole Amount for so long as these amounts remained unpaid.[4] Since bankruptcy's automatic stay prevents payment, this default-rate interest effectively accrued until plan confirmation. Creditors accordingly sought to recover $106 million in interest on the accelerated principal and $14 million in interest on the Make-Whole Amount.

Ultra objected to both the Make-Whole Amount and the default-rate interest, which together totaled some $387 million. In its view, the Make-Whole Amount was either an unenforceable penalty under governing New York law or else impermissible "unmatured interest," both of which are disallowed by the Bankruptcy Code. Ultra further urged that the interest accrued at the contractual default rate far exceeded the appropriate amount of interest, which, it contended, should be calculated at the Code's "legal rate" of post-petition interest: namely, the Federal Judgment Rate.[5]

On remand from this court to decide in the first instance whether these disputed amounts were allowable under the Bankruptcy Code (and, therefore, necessary for Creditors to be deemed unimpaired), the

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[4] Both instruments defined the rate as the greater of two percent over the Notes' usual rate or two percent over the JPMorgan Chase prime rate.

[5] As noted above, the applicable Federal Judgment Rate as of Ultra's petition date would have been 54 basis points (0.54%), which is materially less than the contractual default rate of over 2%. *See supra* n.2.

bankruptcy court ruled in Creditors' favor. *In re Ultra Petroleum Corp.*, 624 B.R. 178, 191-95, 202-04 (Bankr. S.D. Tex. 2020). The Make-Whole Amount, it held, was enforceable under New York law, and it constituted neither "unmatured interest" nor its "economic equivalent" for the purpose of § 502(b)(2). *Id.* at 191-95. As to post-petition interest, the bankruptcy court held that the historically rooted "solvent-debtor exception" to the Bankruptcy Code's prohibition of unmatured interest entitled Creditors to such interest at the contractual default rate rather than the lower Federal Judgment Rate. *Id.* at 195-204. All told, the bankruptcy court's ruling would require Ultra to pay Creditors the entire $387 million that they sought. Ultra again appealed timely and directly to this court.[6]

## II.

This appeal presents pure questions of bankruptcy law, which we review *de novo*. *Ultra*, 943 F.3d at 762.

We begin with the Make-Whole Amount. Because we need only address the solvent-debtor exception to the extent that the Bankruptcy Code would disallow the Make-Whole Amount, we first consider whether the Make-Whole Amount constitutes disallowed unmatured interest under 11 U.S.C. § 502(b)(2). Concluding that it does, we then consider whether the solvent-debtor exception survived the enactment of the Bankruptcy Code in 1978 and thus whether it still

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[6] The bankruptcy court granted Ultra's motion for certification of direct appeal, and this court granted Ultra's petition for direct appeal. We therefore have jurisdiction over this appeal under 28 U.S.C. § 158(d)(2).

applies to suspend the Code's disallowance of the Make-Whole Amount as unmatured interest. Because the exception does indeed survive intact, we then consider whether the Make-Whole Amount is an unenforceable penalty under New York law, in which case the exception could not save it. But because it is enforceable under state law, we conclude that Ultra must pay the Make-Whole Amount as a solvent debtor.

Finally, we turn to the rate of post-petition interest. Because, as the parties agree, Ultra must receive *some* post-petition interest to remain unimpaired, we must decide only which rate to apply: the contractual default rate or the Federal Judgment Rate. We conclude that in this solvent-debtor case, the contractual default rate is appropriate. We therefore affirm.

**A.**

Section 502(b)(2) of the Bankruptcy Code disallows "claim[s] . . . for unmatured interest." We have interpreted that provision to disallow the "economic equivalent of 'unmatured interest'" as well. *In re Pengo Indus., Inc.*, 962 F.2d 543, 546 (5th Cir. 1992) (citation omitted); *accord In re Chateaugay Corp.*, 961 F.2d 378, 380-81 (2d Cir. 1992).[7] Otherwise,

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[7] *See also In re Doctors Hosp. of Hyde Park, Inc.*, 508 B.R. 697, 705 (Bankr. N.D. Ill. 2014) (noting that "courts look to the *economic substance* of the transaction to determine what counts as interest" and holding that a "Yield Maintenance Premium" is subject to § 502(b)(2) disallowance because it "serves the purpose of interest *in economic reality*" (emphases added)); *In re Ridgewood Apartments of DeKalb Cnty., Ltd.*, 174 B.R. 712, 720-21 (Bankr. S.D. Ohio 1994) (holding the "clear purpose [of] a prepayment penalty" to be to "compensate the lender for

the Code's disallowance of unmatured interest would be susceptible to easy end-runs by canny creditors. *See Pengo*, 962 F.2d at 543 (refusing to allow an end-run around the Code's disallowance of unmatured interest by recharacterizing as "principal" what is essentially interest).

Contractual make-whole amounts, like the one at issue here, are expressly designed to liquidate fixed-rate lenders' damages flowing from debtor default while market interest rates are lower than their contractual rates. Lenders' damages equal the present value of all their future interest payments. In other words, a make-whole amount is nothing more than a lender's unmatured interest, rendered in today's dollars. *See In re Energy Future Holdings Corp.*, 842 F.3d 247, 251 (3d Cir. 2016) (referring to a make-whole as a "contractual substitute for interest lost on [n]otes redeemed before their expected due date"); *In re MPM Silicones, L.L.C.*, 874 F.3d 787, 801 n.13 (2d Cir. 2017) (same). It is—rather precisely—the "economic equivalent of 'unmatured interest.'" *Pengo*, 962 F.2d at 546 (citation omitted).

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anticipated interest," and therefore disallowing a claim for such); *In re Pub. Serv. Co. of N.H.*, 114 B.R. 800, 803 (Bankr. D.N.H. 1990) (holding that, "in economic fact," an original issue discount "is interest" subject to § 502(b)(2)); *cf. Thrifty Oil Co. v. Bank of Am. Nat'l Tr. & Sav. Ass'n*, 322 F.3d 1039, 1048-49 (9th Cir. 2003) (holding that damages stemming from default on interest-rate swap cannot constitute "interest" under § 502(b)(2) because "[a] fundamental characteristic of an interest rate swap is that the counterparties never actually loan or advance the notional amount"); *In re Hertz Corp.*, 637 B.R. 781, 791 (Bankr. D. Del. 2021) (adopting the "economic equivalent of unmatured interest" interpretation of § 502(b)(2)).

Because the Make-Whole Amount here is the "economic equivalent" of a lender's "unmatured interest," the Code—per our circuit's precedent—disallows it. *See* 11 U.S.C. § 501(b)(2); *Pengo*, 962 F.2d at 546. Against this straightforward syllogism, Creditors lodge an array of objections. None succeeds.

**1.**

Creditors first contend that the Make-Whole Amount is simply not unmatured interest: it is neither "interest" nor "unmatured" (if it were interest), they argue. Neither of these arguments has merit.

Creditors rely heavily on dictionary and case law definitions of the term "interest." Interest, they say, is "consideration for the *use or forbearance* of another's money accruing over time." Brief for Appellee Ad Hoc Committee of OpCo Unsecured Creditors at 37 (quoting *Ultra*, 624 B.R. at 184). And because the Make-Whole Amount does not compensate Creditors for any actual "use or forbearance," it therefore cannot be "interest."

This argument fails. Even on the terms of Creditors' own argument, the Make-Whole Amount *does* constitute compensation for "use or forbearance" of Creditors' principal—it compensates Creditors for the *future* use of their money, albeit use that will never actually occur because of Ultra's default. This is simply another way of saying that the interest is *unmatured*. And unmatured interest is still interest.[8]

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[8] If we accepted Creditors' contention that the Make-Whole Amount could not be "interest" because it does not compensate for the (prior) use of another's money, then the term "unmatured interest" in 11 U.S.C. § 502(b)(2) would be vacuous: Until it

Assuming *arguendo* that the Make-Whole Amount is interest, Creditors next argue that it had matured—albeit at the very moment of Ultra's filing for bankruptcy. If that were so, the Make-Whole Amount would narrowly escape § 502(b)(2)'s gaping maw: it would be an allowable claim for (barely) matured interest. This argument also fails.

The bankruptcy court correctly rejected the argument, reasoning that the MNPA's acceleration provision was an *ipso facto* clause that is not to be considered in assessing whether the payment it triggered had matured. *Ultra*, 624 B.R. at 188 (citing *In re ICH Corp.*, 230 B.R. 88, 94 (N.D. Tex. 1999)). But, more to the point, a make-whole amount contractually triggered by a bankruptcy petition cannot antedate that same bankruptcy petition. First the petition is filed; then the make-whole amount becomes due—first the cause; then the effect. Thus, if it is indeed "interest," the make-whole amount is also "unmatured" as of the time of filing—and therefore subject to § 502(b)(2) disallowance.

Let us suppose, though, that Creditors' characterization of the Make-Whole Amount as

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matures, *no* "interest" compensates for the use of another's money—it is "interest" only in an anticipatory sense (*i.e.*, it *will* compensate for the use of another's money when it becomes due). Interest is only "interest" when it matures. On Creditors' argument, therefore, "unmatured interest" would be a paradox.

Creditors also recharacterize the Make-Whole Amount as "compensat[ion] . . . for Ultra's decision *not* to use their money." Brief for Ad Hoc Committee of OpCo Unsecured Creditors at 38 (quoting *Ultra*, 624 B.R. at 188). But this, again, is just another way of saying that the Make-Whole Amount *is* interest—albeit *future* interest that will never mature because of Ultra's default.

something other than unmatured interest were correct. Their arguments would founder nonetheless. In our circuit, we evaluate whether a claim is disallowed under § 502(b)(2) based on whether the claim is for the "economic equivalent of unmatured interest"—not simply whether the claim is *itself* for "unmatured interest." *Pengo*, 962 F.2d at 546. What matters in this context is the underlying "economic reality" of the thing—not dictionary definitions or formalistic labels. *Id.* So, to the extent that Creditors argue, even successfully, that the Make-Whole Amount is not "unmatured interest," they are barking up the wrong tree.

**2.**

This brings us to Creditors' second chief contention: *Pengo* did not mean what it said when it interpreted § 502(b)(2) to disallow claims for the "economic equivalent of unmatured interest." Creditors attempt to cabin this controlling case to its facts. In *Pengo*, we held that a debt instrument with an "Original Issue Discount" (OID) constituted unmatured interest as a matter of "economic fact." *Id.* In essence, an OID security disguises interest as principal.[9] Recognizing this, we held that we must look through the labels assigned to claims to evaluate

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[9] Here is a simple example of how an OID works: Lender L issues Debtor D a loan in return for a Security S with a face value of $100. But, instead of handing over $100, L gives D only $90. Still, S's principal is $100 and must be repaid over the term of the loan. The $10 difference between face-value principal and actual credit extended, while denominated "principal," serves exactly the same purpose as interest: it compensates L for extending the loan.

their underlying "economic realit[ies]." *Id.*; *accord Chateaugay*, 961 F.2d at 380 ("As a matter of economic definition, OID constitutes interest."). And when the reality of things—the economic fact of the matter—is that a particular claim is really just the functional equivalent of unmatured interest, § 502(b)(2) disallows it.

Creditors attempt to distinguish the Make-Whole Amount at issue here from *Pengo*'s OIDs on the basis that an OID is an "assured payment," whereas Creditors' Make-Whole Amount is "contingent." The relevance of this distinction, though, is hazy at best. At most, it shows that OIDs are not narrowly tailored liquidated damages that account for market conditions at the time of debtor breach. The Make-Whole Amount, meanwhile, *does* constitute well-tailored liquidated damages: it pays out only when and to the extent that the Creditors are actually harmed by Ultra's breach. Yet this distinction does nothing to mitigate the force of *Pengo*'s holding: If the claim in question is the "economic equivalent of unmatured interest," it is disallowed by § 502(b)(2). Whether the claim also happens to be denominated "liquidated damages" is beside the point. Like interest masquerading as "principal," interest labeled "liquidated damages" is still interest.[10]

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[10] Creditors also unpersuasively urge that *Pengo* was really just about OIDs, pointing to our icing-on-the-cake argument from legislative history: the Code's drafters mentioned OIDs as examples of claims disallowed under § 502(b)(2). But in *Pengo*, we prefaced our mention of this fact with: "*Moreover*, the legislative history *verifies* our [conclusion] . . . ." 962 F.2d at 546 (emphases added). We certainly did *not* suggest that legislative history was dispositive in *Pengo*, let alone that legislative history could narrow the scope of a statutory

**3.**

We thus arrive at Creditors' final set of arguments. Creditors broadly argue that the Make-Whole Amount is not the "economic equivalent of unmatured interest," but rather "liquidated damages," as a number of bankruptcy courts have held. *See, e.g.*, *In re Trico Marine Servs., Inc.*, 450 B.R. 474, 480 (Bankr. D. Del. 2011). They suggest that even though unmatured interest factors heavily into the Make-Whole Amount's calculation, the figure that the formula spits out is itself something different in kind. This argument is untenable.

Creditors acknowledge, as they must, that a key ingredient in the formula used to calculate the Make-Whole Amount is the sum of Ultra's unmatured interest (and principal) future payments. Creditors posit that the formula somehow transmogrifies its inputs, including the key input—unmatured interest—into something fundamentally different on the other side of the equals sign. To suggest otherwise, they say, "makes no more sense than saying that the area of a circle constitutes π because its formula is $\pi r^2$." Brief for Appellee Ad Hoc Committee of OpCo Unsecured Creditors at 40. This argument proves far too much. Consider this formula for a hypothetical 'Fake-Whole' Amount:

$$\text{Fake-Whole Amount} = (\Sigma\ [\text{all unmatured interest payments}] + \$1.00) \times 1$$

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provision. And regardless, as we have recently said, also in interpreting the Bankruptcy Code, "We are reluctant to rely on legislative history for the simple reason that it's not law." *In re DeBerry*, 945 F.3d 943, 949 (5th Cir. 2019).

Of course, this Fake-Whole Amount is nothing more than unmatured interest plus one dollar (for good measure). Nothing transformative happened here. To determine whether a formula's output bears some identity with any of its inputs requires looking at the formula itself. And the Make-Whole formula, like the Fake-Whole formula, does nothing to its unmatured interest component to render the result different in kind.

In fact, the Make-Whole Amount's formula yields *precisely* the "economic equivalent" of Creditors' unmatured interest. The formula simply accounts for the time-value of money: A dollar today is worth more than a dollar tomorrow. The sum of unmatured interest payments today is worth more than that same set of payments paid out incrementally in the future. To create the "economic equivalent" of that unmatured interest *today*, the sum of those payments must be discounted by a factor representing the appropriate reinvestment rate—what the Creditors could earn on comparable securities in the present market. That is exactly what the Make-Whole formula does. The Make-Whole Amount is exactly the "economic equivalent of unmatured interest."

Creditors protest that the Make-Whole Amount functions more like ordinary damages to compensate them for the transaction costs involved in securing a comparable loan. Conceding that the dichotomy between "liquidated damages" and "unmatured interest" (or its "economic equivalent") is not so airtight as their briefs generally suggest, Creditors acknowledge that whether a given make-whole amount is allowable or disallowable liquidated

damages turns "on the dynamics of the individual case." Brief for Appellee Ad Hoc Committee of OpCo Unsecured Creditors at 44, 46-47; Brief for Appellee OpCo Noteholders at 38-39; *see also Ultra*, 943 F.3d at 765. And Creditors insist that *this* Make-Whole Amount is *allowable* liquidated damages—not disallowed unmatured interest in the form of liquidated damages.

In making this argument, Creditors adopt by reference the bankruptcy court's chain of reasoning below. The bankruptcy court posed a hypothetical involving a three-party transaction: Borrower B prepays his Loan from Lender L, who turns to Broker K to identify a New Borrower N who will accept a New Loan identical to B's original Loan. But to find N and secure the loan at the same rate, K charges L a fee of 2%, which B must pay L in damages for prepayment. Would that 2% fee constitute unmatured interest? No, the court said, it is just the "negotiated cost to compensate the lender for making a new loan on comparable terms in a changed market." *Ultra*, 624 B.R. at 190. "The hypothetical is no different than the Make-Whole at issue here." *Id*.

But it *is* different. The relevant consideration is whether the make-whole amount merely compensates the borrower for the search and transaction costs of "seek[ing] to find someone else to use the capital," or goes further and compensates creditors for the loss of future interest "through the guise of a make-whole premium." Douglas G. Baird, Elements of Bankruptcy 84-85 (6th ed. 2014).[11] The bankruptcy court's helpful

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[11] *See Hertz*, 637 B.R. at 791 ("If it were enough to just label a make-whole claim liquidated damages . . . , then a contract

hypothetical illustrates the fact that there is non-overlapping space in the Venn Diagram between liquidated damages and unmatured interest. Liquidated damages certainly *can* compensate for anticipated transaction costs that are *not* unmatured interest. But the Make-Whole Amount, unlike the transaction-costs liquidated damages in the hypothetical, is *both* liquidated damages *and* the "economic equivalent of unmatured interest"—indeed, that is its whole point.[12]

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providing that on default or redemption 'all unmatured interest' would be immediately due and payable could avoid the effect of section 502(b)(2) completely.").

[12] *But see generally* Douglas G. Baird, *Making Sense of Make-Wholes*, 94 Am. Bankr. L.J. 567, 580 (2020) ("When a make-whole clause represents the parties' good faith estimate of the loss of a favorable rate of interest, it is merely serving as a liquidated damages clause, and bankruptcy judges should enforce it for the same reason judges enforce such clauses outside of bankruptcy."). Professor Baird eloquently argues that a claim for the difference between a fixed and floating interest rate does not *necessarily* constitute unmatured interest. *Id.* at 579-580 ("An obligation owed on a bad bet—involving changes in the rate of interest or anything else—is not in and of itself an obligation to pay unmatured interest."); *but cf. Thrifty Oil Co.*, 322 F.3d at 1048-49 (implying, in a case involving interest-rate swaps, that such a claim is not "interest" only when "no advance of money has occurred between the . . . counterparties" with respect to that claim—*i.e.*, when there is no principal). Professor Baird makes the case that make-whole amounts in a variable interest-rate environment are different in kind than sums of unmatured fixed-rate interest in a stable interest-rate market. He concludes that it comports with longstanding bankruptcy principles and policy to allow claims for make-whole amounts.

Be that as it may, the Code as interpreted by this circuit's binding precedent disallows the "economic equivalent of unmatured interest." *Pengo*, 962 F.2d at 546. And, as discussed

**B.**

Although we have concluded that Creditors' claim for the Make-Whole Amount is indeed a claim for unmatured interest or its economic equivalent as disallowed under 11 U.S.C. § 502(b)(2), we are not done. We must evaluate whether the solvent-debtor exception survived the Bankruptcy Code's enactment and applies to this case. We conclude that it does. For this reason, Ultra must pay the Make-Whole Amount.

In the ordinary case, the Bankruptcy Code would disallow a make-whole amount that functionally equates to unmatured interest. But this is not the ordinary case. Ultra became ultra solvent. And when a debtor is able to pay its valid contractual debts, traditional doctrine says it should—bankruptcy rules notwithstanding.

We begin with history, tracing the English provenance of the solvent-debtor exception, and its incorporation into American bankruptcy law. We then examine Ultra's contention that the 1978 Bankruptcy Code abrogated the traditional exception. Although it is a close call, the Supreme Court has instructed us not to infer abrogation of traditional bankruptcy practice. Because the Code's general bar on claims for unmatured interest does not specifically address the solvent-debtor scenario, for which traditional bankruptcy practice has always provided an

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above, Creditors' Make-Whole Amount represents the economic equivalent of interest that had not matured as of the petition date, even though it *also* constitutes liquidated damages. The conclusion inexorably follows that the Make-Whole Amount must be disallowed under current law, even though policy considerations may favor allowance.

exception, we conclude that the pre-Code doctrine concerning solvent debtors' obligations remains good law, and the exception operates in this case to suspend § 502(b)(2)'s disallowance of Creditors' Make-Whole Amount.

**1.**

For some three centuries of bankruptcy law, courts have held that an equitable exception to the usual rules applies in the unusual case of a solvent debtor. When a debtor proves solvent—that is, when the debtor's assets exceed its liabilities—bankruptcy's ordinary suspension of post-petition interest is itself suspended. When a debtor can pay its creditors interest on its unpaid obligations in keeping with the valid terms of their contract, it must. *Am. Iron & Steel Mfg. Co. v. Seaboard Air Line Ry.*, 233 U.S. 261, 266 (1914) ("[I]f, as a result of good fortune or good management, the [debtor's] estate prove[s] sufficient to discharge the claims in full, interest as well as principal should be paid."); *see also 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 . . . after* the petition was filed." (emphasis added)).

As with many of our bankruptcy rules, this doctrine originated in eighteenth-century English practice. *See* 2 William Blackstone, Commentaries *488 ("[T]hough the usual rule is, that all interest on

debts carrying interest shall cease from the time of issuing the commission, yet, in case of a surplus left after payment of every debt, such interest shall again revive, and be chargeable on the bankrupt . . . ."); *see also, e.g.*, *Bromley v. Goodere* (1743) 26 Eng. Rep. 49, 52; 1 Atk. 75, 80 ("[S]uppos[ing] . . . there should be a surplus, it would be absurd to say the creditors should not have interest . . . ."); *Ex parte Rooke* (1753) 26 Eng. Rep. 156, 157; 1 Atk. 244, 245 (ordering solvent bankruptcy petitioner "to pay the principal *and interest* . . . to all his creditors" (emphasis added)).[13]

Our forebears adopted English practice in our nation's nascent nineteenth-century bankruptcy system. *See Sexton v. Dreyfus*, 219 U.S. 339, 344 (1911) (Holmes, J.) ("We take our bankruptcy system from England, and we naturally assume that the fundamental principles upon which it was administered were adopted by us when we copied the

[13] *See also, e.g.*, *Ex parte Mills* (1793) 30 Eng. Rep. 640, 644; 2 Ves. Jun. 294, 303 (ordering payment of "interest upon [the solvent bankrupt's] debts, as either upon the face of the security or by force of the contract between the parties carry interest"); Bankruptcy Act of 1825, 6 Geo. 4 c. 16, § 132 (codifying the doctrine that "all Creditors whose Debts are now by Law entitled to carry Interest, in the Event of a Surplus, shall first receive Interest on such Debts . . . ."); *cf. Ex parte Marlar* (1746) 26 Eng. Rep. 97, 98; 1 Atk. 150, 152 (stating the rule in solvent-debtor cases "that note-creditors have no right to prove interest upon them, *unless it is expressed in the body of the notes*"); *Ex parte Williams.—In the Matter of Wilcocks*, 1 Cases in Bankruptcy 399, 399 (George Rose ed. 1813) ("Where there is a Surplus of the Bankrupt's Estate, Creditors are not entitled to Interest upon Debts, *unless it has been provided for by Contract*, either express, or implied . . . ." (emphasis added)).

system . . . .");[14] *see also Debentureholders*, 679 F.2d at 269 (referring to "the settled English and American law that when an alleged bankrupt is proved solvent, the creditors are entitled to receive post-petition interest before any surplus reverts to the debtor"). And as the Supreme Court has said, the English solvent-debtor exception "ha[s] been carried over into our system." *City of New York v. Saper*, 336 U.S. 328, 330 n.7 (1949); *see also United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 246 (1989) (noting the solvent-debtor exception's "recogni[tion] under pre-Code [American] practice").

The reason for this traditional, judicially-crafted exception is straightforward: Solvent debtors are, by definition, able to pay their debts in full on their contractual terms, and absent a legitimate bankruptcy reason to the contrary, they should. Unlike the typical insolvent bankrupt, a solvent debtor's pie is large enough for every creditor to have his full slice. With an insolvent debtor, halting contractual interest from accruing serves the legitimate bankruptcy interest of equitably distributing a limited pie among competing creditors as of the time of the debtor's filing. *See Am. Iron & Steel*, 233 U.S. at 266.[15] With a solvent debtor, that

[14] *But see Sloan v. Lewis*, 89 U.S. 150, 157 (1874) ("The English cases referred to in the argument, in our opinion, have no application here. They are founded upon the English statutes and the established practice under them. Our statute is different in its provisions and requires, as we think, a different practice.")

[15] *See also* Thomas H. Jackson & Robert E. Scott, *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain*, 75 Va. L. Rev. 155, 155 (1989) ("[P]rebankruptcy entitlements should be impaired in

legitimate bankruptcy interest is not present.[16] *See In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 791 F.2d 524, 527-28 (7th Cir. 1986) (Posner, J.) ("The only good reason for refusing to give a creditor in 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 . . . . [But] if the bankrupt is solvent the task for the bankruptcy court is simply to enforce creditors' rights according to the tenor of the contracts that created those rights . . . ."). Therefore, solvent debtors should be exempted from the general rule disallowing unmatured interest from accruing post-petition, and this "solvent-debtor exception" simply follows from the first principles of bankruptcy law.

**2.**

In the face of the solvent-debtor exception's historical provenance and comportment with bankruptcy's fundamental principles, Ultra argues

bankruptcy only when necessary to maximize net asset distributions to the creditors as a group . . . ."); Ginsburg & Martin on Bankruptcy § 1.01 (6th ed. 2022) (noting that the primary goal of United States bankruptcy law is to "promote equality of distribution among similarly situated creditors" from a limited estate).

[16] There exists a gray area, however, where a debtor is solvent enough to pay in full all allowed claims, but the surplus is not enough to cover all creditors' otherwise disallowed interest. In such a case, legitimate bankruptcy interests may well warrant a more nuanced application of the solvent-debtor exception. *See* Scott C. Shelley & Solomon J. Noh, *Show Me the Money: Another Look at Postpetition Interest in Solvent Debtor Chapter 11 Cases*, 24 Emory Bankr. Dev. J. 361, 370-71 (2008). But that situation is not present here, so we need not address it.

that Congress nonetheless abrogated it in enacting the 1978 Bankruptcy Code. The Code's straightforward disallowance of claims for unmatured interest in § 502(b)(2) does not distinguish solvent and insolvent debtors. Ultra cites a string of bankruptcy court opinions and two circuit cases for the proposition that § 502(b)(2) applies regardless of debtor solvency. Brief for Appellants at 26 (citing, *inter alia*, *In re Gencarelli*, 501 F.3d 1 (1st Cir. 2007) and *In re Dow Corning Corp.*, 456 F.3d 668 (6th Cir. 2006)).[17] Ultra further urges the court to draw negative implications from the Code's provision for impaired creditors to receive interest at "the legal rate" when a debtor proves sufficiently solvent. *See* 11 U.S.C. §§ 726(a)(5), 1129(a)(7)(A)(ii). If Congress provided for interest in this circumstance but said nothing else about solvent debtors generally, no broader exception should be inferred—*expressio unius est exclusio alterius*.

Creditors respond with equal and opposite force. Under American bankruptcy statutes in place from the late nineteenth century through much of the twentieth century, claims for unmatured interest were

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[17] *See also In re Ancona*, No. 14-10532, 2016 WL 828099, at *6 (Bankr. S.D.N.Y. Mar. 2, 2016) (rejecting "the proposition that a court must first find a debtor to be insolvent or determine all other claims against a debtor before analyzing a [§ 502(b)(6)] claim"); *In re Flanigan*, 374 B.R. 568, 575 (Bankr. W.D. Pa. 2007) (same); *In re Farley, Inc.*, 146 B.R. 739, 747-48 (Bankr. N.D. Ill. 1992) (same); *In re Federated Dep't Stores, Inc.*, 131 B.R. 808, 817 (S.D. Ohio 1991) (same); *In re PPI Enters. (U.S.), Inc.*, 228 B.R. 339, 345-46 (Bankr. D. Del. 1998); *HSBC Bank USA, Nat'l Ass'n v. Calpine Corp.*, No. 07-CIV-3088, 2010 WL 3835200, at *5, *10 (S.D.N.Y. Sept. 15, 2010) (applying § 502(b)(2) in a "very solvent" debtor case).

expressly disallowed; nevertheless, courts regularly applied the solvent-debtor exception. *See* Bankruptcy Act of 1898, Pub. L. No. 55-541, § 63, 30 Stat. 544, 563 (1898) (limiting interest on provable claims to interest "which would have been recoverable" when the petition was filed, and subtracting "interests accrued *after* the filing of the petition" (emphasis added)); Bankruptcy Act of 1938 (Chandler Act), Pub. L. No. 75-696, § 63, 52 Stat. 840, 873 (1938) (same); *see, e.g.*, *Johnson v. Norris*, 190 F. 459, 461-65 (5th Cir. 1911) (concluding that § 63 of the Bankruptcy Act "was not intended to be applied to a solvent estate"); *Ruskin v. Griffiths*, 269 F.2d 827, 829-32 (2d Cir. 1959) (awarding post-default interest on overdue interest and accelerated principal at a heightened contractual rate because the debtor was solvent, despite the then-applicable bankruptcy acts' preclusion of unmatured interest); *cf. Saper*, 336 U.S. at 330-32, 330 n.7 (acknowledging American adoption and retention of the solvent-debtor exception in our nation's bankruptcy practice, even after the Bankruptcy Act of 1898 and the 1938 Chandler Amendments codified the "long-standing rule against post-bankruptcy interest").[18]

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[18] *See also, e.g.*, *Brown v. Leo*, 34 F.2d 127, 127 (2d Cir. 1929) (recognizing that § 63 of the 1898 Bankruptcy Act fixes "the time when interest stops . . . as the date of the filing of the petition," but noting that the estate at issue there was solvent, so "neither the rule nor the reason for stopping interest at the date of the filing of the petition applies"); *Sword Line, Inc. v. Indus. Comm'r of N.Y.*, 212 F.2d 865, 870 (2d Cir. 1954) ("[I]nterest ceases upon bankruptcy in the general and usual instances noted . . . unless the bankruptcy bar proves eventually nonexistent by reason of the actual solvency of the debtor."); *Littleton v. Kincaid*, 179 F.2d

This historical bankruptcy practice, Creditors argue, demonstrates that Congressional recodification of the Bankruptcy Act's § 63 disallowance of unmatured interest in § 502(b)(2) of the 1978 Bankruptcy Code did not expressly abrogate the solvent-debtor exception. If Congress legislated cognizant of courts' practice of excepting solvent debtors from the generally applicable statutory disallowance of § 63, one would expect it to have *expressly* abrogated the judicial exception if it intended to do so.

**3.**

The parties' competing arguments center on how we expect Congress to draft statutes and, specifically, what we are to make of congressional silence. Ultra assumes, not unreasonably, that Congress means what it says and that, when Congress says one thing but not another, it means to exclude what it did not say. Creditors, meanwhile, assume that Congress legislates against a historical backdrop, and that when courts historically have fashioned an exception to a clear statutory provision, Congress is presumed to accept that practice unless it expressly says otherwise.

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848, 852 (4th Cir. 1950) ("[W]hen this unusual event [*i.e.*, debtor solvency in bankruptcy] occurs interest is payable out of this surplus to the date of payment."); *In re Magnus Harmonica Corp.*, 159 F. Supp. 778, 780 (D.N.J. 1958) (enumerating as an explicit, judicially devised exception to § 63 of the Bankruptcy Act that "[w]here the estate of the debtor is sufficient to pay all of his debts, including interest, interest may be allowed to the date of payment"), *aff'd*, 262 F.2d 515 (3d Cir. 1959); *In re Int'l Hydro-Elec. Sys.*, 101 F. Supp. 222, 224 (D. Mass. 1951) (holding a debtor's solvency dispositive in awarding creditors contractual default-rate interest).

These equally sensible presumptions are at loggerheads.

The Supreme Court breaks the tie. We must defer to prior bankruptcy practice unless expressly abrogated. The Court has endorsed a substantive canon of interpretation regarding the Bankruptcy Code vis-à-vis preexisting bankruptcy doctrine. Namely, abrogation of a prior bankruptcy practice generally requires an "unmistakably clear" statement on the part of Congress; any ambiguity will be construed in favor of prior practice. *Cohen v. de la Cruz*, 523 U.S. 213, 221-22 (1998) (stating that courts should "not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure" (quoting *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 563 (1990))); *Midlantic Nat'l Bank v. N.J. Dep't of Envt'l Prot.*, 474 U.S. 494, 501 (1986) (indicating that the "normal rule of statutory construction" that courts "follow[] with particular care" in interpreting the Code is that "if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific"); *Kelly v. Robinson*, 479 U.S. 36, 46, 53 (1986) (noting that "Congress enacted the Code in 1978 against the background of an established judicial exception . . . created in the face of a statute drafted with considerable care and specificity" and finding no "significant evidence that Congress intended to change the law"); *see also Dewsnup v. Timm*, 502 U.S. 410, 419- 20 (1992) (concluding that it is "not plausible" "to attribute to Congress the intention" to act "contrary to basic

bankruptcy principles" "without . . . mention[ing] [it] somewhere in the Code itself").[19]

The provisions of the 1978 Bankruptcy Code do not clear this high hurdle. As the bankruptcy court explained, "Absent *clear* Congressional intent, provisions of the Bankruptcy Code did not abrogate universally recognized legal principles under the Bankruptcy Act. Nothing . . . suggests that Congress intended to defang the solvent-debtor exception." *Ultra*, 624 B.R. at 198 (citation omitted) (emphasis added). We agree.

The Code's most relevant section, § 502(b)(2), tersely recodified § 63 of the preceding Chandler Act (and the 1898 Bankruptcy Act before it): It simply states that bankruptcy courts "shall allow [a] claim . . . except to the extent that," among other things, "such claim is for unmatured interest." But this affords no greater clarity than the 1898 and 1938 Acts, which similarly limited claims for interest to what "would have been recoverable at" the date the bankruptcy petition was filed—*i.e.*, matured interest. § 63, 30 Stat. at 562-63; § 63, 52 Stat. at 873;[20] *see also Ultra*, 624 B.R. at 197 ("The Bankruptcy Act's treatment of unmatured interest was nearly identical to § 502(b)(2).").

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[19] We have followed the Supreme Court's lead and held similarly. *See In re Bodenheimer, Jones, Szwak, & Winchell L.L.P.*, 592 F.3d 664, 673-74 (5th Cir. 2009) (stating the rule that pre-Code bankruptcy doctrines "remain controlling unless *explicitly* superseded" (emphasis added)); *In re Laymon*, 958 F.2d 72, 74-75 (5th Cir. 1992) (similar). These precedents also bind us.

[20] The Chandler Act reenacted this provision verbatim.

Importantly, the text of these pre-Code bankruptcy acts did not stop courts from applying the traditional solvent-debtor exception.[21] In 1911, our court was called upon to determine whether the solvent-debtor exception survived enactment of the original Bankruptcy Act of 1898. *Johnson*, 190 F. at 461. The debtors in that case, like the debtors here, were solvent. Pointing to the Bankruptcy Act's bar against claims for interest other than what "could have been recoverable" on the date the bankruptcy petition was filed, the debtors argued that they were shielded from claims for unmatured interest despite their solvency. *Id*. at 461. In rejecting the debtors' argument, we cited longstanding bankruptcy law principles to conclude that the Bankruptcy Act's bar on unmatured interest simply "was not intended to be applied to the case of a solvent estate."[22] *Id*. at 462. *See*

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[21] For this reason, this is not a case in which "the language of the Code leaves no room for clarification by pre-Code practice." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 11 (2000). This is not a case in which pre-Code practice *comported* with prior acts' text or clarified an open-ended ambiguity therein; this is a case involving a plain judicial *exception* to the prior acts. *Cf. id.* at 9-11. Because Congress was not writing upon a clean slate, we are to assume that the legislature was aware of courts' equitable exception to the prior acts' text. Had Congress intended to do away with this practice, it would have said so directly.

[22] Discussing *Johnson*, the bankruptcy court persuasively observed that unchanged "[e]quitable considerations support the solvent-debtor exception." *Ultra*, 624 B.R. at 198. "There is no reason why Congress would allow solvent debtors to wield bankruptcy as a sword to slash valid debts"—an "observation [that] applies as persuasively to Congress['s] deliberation of the Bankruptcy Code as it did to deliberations of the Bankruptcy Act." *Id.* at 199.

*also Ultra*, 624 B.R. at 196-98 (noting that this court "squarely held [in *Johnson*] that creditors of a solvent debtor may recover post-petition interest, *notwithstanding the plain text of § 63 of the Bankruptcy Act*," and that our sister circuits did likewise (emphasis added)); *supra* n.18.

The problem for the debtors in *Johnson* was not, as the dissenting opinion suggests, that the Bankruptcy Act was insufficiently explicit in its exclusion of claims for unmatured interest. The problem was that the Bankruptcy Act was insufficiently explicit about applying this general exclusion in solvent-debtor cases. *Cf. United States v. Texas*, 507 U.S. 529, 534 (1993) ("In order to abrogate a common law principle, the statute must 'speak directly' to the question addressed by the common law."(citation omitted)). That is why *Johnson* held that the traditional rule would continue to apply absent an "express provision . . . allowing interest that accrues after the filing of the petition to be paid out of a surplus . . . to the bankrupt." 190 F. at 463. The Bankruptcy Code, like its predecessors, did not give us that.

Ultra complains that this manner of statutory interpretation, which allows judicial practice to override otherwise clear statutory text, is taken from a "time capsule." But as the Creditor Committee Appellees have pointed out, this mode of statutory interpretation is alive and well. Indeed, the Supreme Court very recently applied an analogous interpretive approach in the patent law context. *See Minerva Surgical, Inc. v. Hologic, Inc.*, 141 S. Ct. 2298, 2307-08 (2021) (noting that the Patent Act of 1952 has "similar

language" to its precursor statute against which the judicial exception of assignor estoppel developed, thus suggesting that that language did not evince sufficiently plain Congressional intent to abrogate the doctrine). We are at no greater liberty to disregard the Supreme Court's instructions in the bankruptcy context than we are in the patent domain. We remain bound by the substantive canon of Bankruptcy Code interpretation embraced in *Cohen*, *Midlantic*, and *Kelly*.

Congress has not explicitly addressed claims for unmatured interest owed by solvent debtors. Nonetheless, statutory language may carry crucial context. *See generally* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 24 (new ed. 2018) (explaining why "the good textualist is not a literalist"). And here, that context is the backdrop of traditional bankruptcy practice. The Supreme Court has dictated that we presume Congress did not mean to abrogate traditional bankruptcy practice "absent a clear indication that Congress intended such a departure." *Cohen*, 523 U.S. at 221. Considered in the context of what came before, the text of § 502(b)(2) hardly constitutes an unambiguous—let alone explicit—change in bankruptcy practice.[23] *See Dewsnup*, 502

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[23] Ultra also argues that the Code's reticulated scheme already contemplates solvent-debtor scenarios but declines to embrace the full scope of the traditional solvent-debtor exception. This, we are told, gives rise to the negative implication that Congress did not intend the broad solvent-debtor exception to survive the Code's enactment. Specifically, because the Code provides that

U.S. at 419-20; *Bodenheimer*, 592 F.3d at 673-74. Accordingly, we hold that the Code did not abrogate the longstanding judicial exception for cases involving solvent debtors. We thus hold that the solvent-debtor exception is alive and well. The 1978 Code's disallowance of unmatured interest did not abrogate the exception with "unmistakable" clarity. *Cohen*, 523 U.S. at 221-22. Because Ultra was solvent—indeed, "massively" solvent—the solvent-debtor exception plainly applies in this case. For that reason, Ultra must pay Creditors the contractual Make-Whole Amount—even though, as we have already

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impaired creditors of solvent debtors are to receive interest at least "at the legal rate" under the best-interests-of-creditors test, *see* 11 U.S.C. §§ 726(a)(5), 1129(a)(7)(A)(ii), we are to infer that Congress intended to abrogate the traditional solvent-debtor exception and replace it with a narrower version that requires payment of post-petition interest only at the Federal Judgment Rate. Thus, Ultra tells us, we should not overstep Congress's specific instructions and apply the solvent-debtor exception to award default-rate contractual interest, despite Ultra's solvency.

We are not persuaded. Sections 726(a)(5) and 1129(a)(7)(A)(ii) do not *unambiguously* abrogate or constrict the traditional solvent-debtor exception. Indeed, authorizing "[post-petition] interest at the legal rate . . . *on any claim*" in solvent-debtor cases does not constitute any sort of exception to the Code's disallowance of "unmatured interest" as *part of a claim*, *see id.* § 726(a)(5) (emphasis added), § 502(b)(2), so those provisions cannot be said to supplant the traditional solvent-debtor exception. If anything, § 726(a)(5) arguably *expands* the scope of the traditional English solvent-debtor exception, which seems to have allowed for ongoing interest just *as part of* (rather than "on") creditors' claims in solvent-debtor scenarios. *See, e.g.*, *Rooke*, 26 Eng. Rep. at 157; *Marlar*, 26 Eng. Rep. at 98; *supra* n.13 and accompanying text.

determined, *see supra* section II.A., it is indeed otherwise disallowed unmatured interest.

**C.**

We are not done quite yet. We have determined that the Make-Whole Amount is unmatured interest, and therefore, that it is disallowed under the Code. We have also determined, however, that the solvent-debtor exception survived the Code's enactment and applies to this case. But the solvent-debtor exception *only* ensures that solvent debtors make good on their *valid* contractual obligations. So Ultra argues, in the alternative, that the Make-Whole Amount is an unenforceable penalty under governing state law. If that were so, the Bankruptcy Code would still disallow it—the solvent-debtor exception notwithstanding. We conclude, though, that the Make-Whole Amount constitutes enforceable liquidated damages under New York law. Therefore, the solvent-debtor exception continues to apply, and Ultra must keep its contractual promise.

Section 502(b)(1) of the Bankruptcy Code disallows "claim[s] [that are] unenforceable against the debtor . . . under any agreement or applicable law." The MNPA is governed by New York law. If New York law would prohibit enforcement of the Make-Whole Amount as an unenforceable penalty, the Code would not allow it as a claim, and the solvent-debtor exception could not resuscitate it.

We turn then to New York contract law. As the "party seeking to avoid liquidated damages," Ultra bears the burden of showing that the Make-Whole Amount is "in fact, a penalty." *JMD Holding Corp. v. Cong. Fin. Corp.*, 828 N.E.2d 604, 609 (N.Y. 2005). To

do so, Ultra must show that the "amount fixed is plainly or grossly disproportionate to the probable loss" incurred by Noteholder Creditors as a result of default. *Id.* (quoting *Truck Rent-A-Ctr., Inc. v. Puritan Farms 2nd, Inc.*, 361 N.E.2d 1015, 1018 (N.Y. 1977)). Showing that the Make-Whole Amount effectively grants double recovery would meet that test under New York law. *See, e.g.*, *172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Ass'n Inc.*, 25 N.E.3d 952, 957 (N.Y. 2014).

Ultra asserts the Make-Whole Amount to be unreasonably disproportionate and thus an unenforceable penalty because it allows for double recovery. The alleged double recovery stems from the fact that the MNPA "allows the Noteholders to charge ongoing interest on the accelerated principal at a 'default' rate." Brief for Appellants at 34. Since Creditors already get contractual interest on the accelerated principal, the argument goes, the Make-Whole Amount, which compensates Noteholder Creditors for the future interest payments that would have been made on the *same* accelerated principal, gives Creditors double recovery.

This argument withers under scrutiny. The Make-Whole Amount and the post-petition interest address two different harms. *Ultra*, 575 B.R. at 370-71.[24] The Make-Whole Amount serves as liquidated damages for Ultra's breach; the post-petition interest

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[24] The bankruptcy court's first opinion in this case also provides a nice illustration that mathematically demonstrates how charging default-rate interest on the unpaid Make-Whole Amount does not result in any double recovery. *Ultra*, 575 B.R. at 371-72.

compensates for Ultra's lag in paying the accelerated principal (and the Make-Whole itself), which were already due and payable for the duration of the bankruptcy. Separate harms warrant separate recoveries; accordingly, the Make-Whole Amount is not unenforceable on this theory.

Absent any other alternative theory to show that the Make-Whole Amount is unreasonably disproportionate, Ultra fails to meet its burden. *JMD Holding*, 828 N.E.2d at 609. The Make-Whole Amount is enforceable under New York law; therefore, § 502(b)(1) does not stand in the way of the solvent-debtor exception.

**D.**

We turn, finally, to post-petition interest. Ultra concedes that Creditors are entitled to *some* post-petition interest on their claims to compensate for the duration of the bankruptcy proceedings. But Ultra insists that the appropriate rate is the Federal Judgment Rate specified at 28 U.S.C. § 1961(a)—not the parties' much higher contractual default rate.[25] And Ultra reiterates that the solvent-debtor exception does not apply to suspend that rule's application here. We conclude that the contractual default rate is appropriate here.

Ultra recognizes, as it must, that unsecured creditors of solvent debtors are entitled to post-petition interest on their claims if they are to be

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[25] Recall that the difference is rather material: the applicable Federal Judgment Rate would be only 54 basis points; the contractual default rate, meanwhile, would be *the greater* of 2% *over* either of two benchmark rates. *See supra* note 2.

deemed unimpaired. *See In re New Valley Corp.*, 168 B.R. 73, 81 (Bankr. D.N.J. 1994) (holding that "a solvent debtor is not required to pay postpetition interest on claims of unsecured creditors who are unimpaired"); Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 213(d), 108 Stat. 4106, 4125-26 (overruling *New Valley* by repealing 11 U.S.C. § 1124(3) (1988), and, in effect, requiring payment of post-petition interest in order for unsecured creditors to be unimpaired); *see also In re PPI Enterprises (U.S.), Inc.*, 324 F.3d 197, 205-07 (3d Cir. 2003) (recognizing and explaining *New Valley*'s statutory abrogation). Ultra asserts, though, that post-petition interest is to be calculated at the Federal Judgment Rate, "no more and no less." Brief for Appellants at 43.

Ultra's argument depends on a series of statutory inferences. For a plan to be confirmed, creditors must either be unimpaired (and therefore "conclusively presumed to have accepted the plan," 11 U.S.C. § 1126(f)), or impaired but either (1) voting in favor of the plan, *see id.* § 1129(a)(7)(A)(i), or (2) no worse off than they would be in a chapter 7 liquidation, *see id.* § 1129(a)(7)(A)(ii). Creditors are presumed "impaired under a plan unless . . . the plan leaves unaltered the[ir] legal, equitable, and contractual rights." *Id.* § 1124(1). If, therefore, creditors are deemed "unimpaired," § 1124 necessarily requires that their "legal, equitable, and contractual rights" remain "unaltered." And per Congress's statutory overruling of *New Valley* noted above, that entails provision for post-petition interest.

The question remains: how much? As to *unimpaired* creditors, the Code does not itself say. So

Ultra turns to what it says about *impaired* creditors. It is reasonable, after all, to infer that creditors who are *unimpaired* (as Creditors here are stipulated to be) cannot be treated any worse than *impaired* creditors, who at least get to vote on the plan.

The Code provides that a bankruptcy court can "cram down" a plan on impaired creditors, over their objection, if they "will receive or retain under the plan . . . not less than the amount that [they] would so receive or retain if the debtor were liquidated under chapter 7." *Id.* § 1129(a)(7)(A)(ii). In turn, what the creditors would get if the debtor were liquidated is specified in § 726(a). Section 726(a) provides a waterfall for the distribution of a debtor's assets in a Chapter 7 liquidation. Before a solvent debtor's equity holders get any of the estate's leftovers, § 726(a)(5) says that creditors are to be paid interest on their claims "at the legal rate" from the petition date.

Ultra hangs its hat on these words. The "legal rate," it insists, must be the Federal Judgment Rate. Ultra cites and deploys many of the same arguments propounded in a Ninth Circuit case, *In re Cardelucci*, 285 F.3d 1231 (9th Cir. 2002). For instance, the definite article "the" that precedes "legal rate" in § 726(a)(5) indicates that the rate is singular and not variable—and the only reasonable single rate under federal law is the Federal Judgment Rate. *Id.* at 1234. And, as our sister circuit suggests, "the commonly understood meaning of 'at the legal rate' at the time the Bankruptcy Code was enacted was a rate fixed by statute"—and the Federal Judgment Rate is the most likely candidate. *Id.* at 1234-35. This conclusion, Ultra and the *Cardelucci* court continue, advances the

bankruptcy system's interests in "ensur[ing] equitable treatment of creditors" by compensating them all at the same rate for the same duration of bankruptcy proceedings, and, happily, it is eminently administrable. *Id.* at 1235-36.[26]

We do not quarrel with the *Cardelucci* court's sensible reasoning, but neither must we decide the matter. The precise referent of "the legal rate" is not dispositive here. Why? Because Ultra overlooks the logically prior textual fact that "the legal rate" only sets a *floor*—not a ceiling—for what an impaired (and by implication, unimpaired) creditor is to receive in a cramdown scenario. Specifically, the Code provides that objecting, impaired creditors must receive "*not less* than" what they would receive in a Chapter 7 liquidation—including "interest at the legal rate" per § 726(a)(5)—in order for the plan to be "crammed down" on them. *See id.* § 1129(a)(7)(A)(ii) (emphasis added).

So, even if "the legal rate" is the Federal Judgment Rate, the Code does not preclude unimpaired creditors from receiving default-rate postpetition interest in excess of the Federal

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[26] Still, one might well wonder why Congress did not simply cross-reference the statutory provision designating the Federal Judgment Rate, 28 U.S.C. § 1961, if indeed it meant for that to be that single rate applied. Indeed, in antitrust legislation passed just a few years after the Bankruptcy Code's enactment, Congress did just that. *See* Pub. L. No. 98-462, § 4(a), 98 Stat. 1815 (1984) (providing for "interest calculated at the rate specified in section 1961 of title 28, United States Code"); *see also, e.g.*, 28 U.S.C. § 2412(f) ("[I]nterest shall be computed at the rate determined under section 1961(a) of this title . . . ."); 15 U.S.C. § 4303(a)-(c) (similar).

Judgment Rate in solvent-debtor Chapter 11 cases. *See* Shelley & Noh, *supra* note 16, at 368-69 (arguing that "§ 1129(a)(7) should not be interpreted to *require* the application of the federal judgment rate" and that "the fair and equitable test [of § 1129(b)] will, in many instances, permit the payment of interest at a higher rate, particularly when the higher rate is set forth in a contract"). Recall that under § 1124(1), *unimpaired* creditors' "legal, equitable, and contractual rights" must remain "unaltered." And as a matter of equity, creditors are entitled to contractually specified rates of interest "on" their claims when a solvent debtor is fully capable of paying up.[27] As the bankruptcy court rightly noted below, "[t]his equitable right is the root of the solvent-debtor exception." *Ultra*, 624 B.R. at 203.[28] And as we have explained, the solvent-debtor exception survived the Bankruptcy Code's enactment. *See supra* Section II.B.

The requirements of § 1129(b) for plan confirmation buttress our conclusion. That section states that the bankruptcy court shall only confirm a

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[27] This is consistent with our prior holding that the Code's disallowance provisions do not operate to "impair" creditors. *Ultra*, 943 F.3d at 765. Section 502(b)(2) operates to disallow "unmatured interest" that is *part of* a claim—not interest *on* a claim, which is what the contractual default rates here specify. A broader reading of § 502(b)(2) to disallow *all* post-petition interest, whether as *part of* a claim or *on* a claim, would plainly conflict with § 1129(a)(7)(A)(ii) and § 726(a)(5), which expressly operate to *allow* post-petition interest *on* claims.

[28] *See also Ultra*, 624 B.R. at 203 ("The solvent-debtor exception has existed throughout the history of bankruptcy law and § 1124 provides a means to implement the exception within the plan confirmation framework of the Bankruptcy Code.").

plan if it is "fair and equitable"—a test long understood to mean the "absolute priority rule." *See* 11 U.S.C. § 1129(b)(2)(B)(ii); *In re Linn Energy, L.L.C.*, 936 F.3d 334, 341 n.1 (5th Cir. 2019) ("The absolute priority rule requires that certain classes of claimants be paid in full before any member of a subordinate class is paid." (quoting *In re Seaquest Diving, LP*, 579 F.3d 411, 420 n.5 (5th Cir. 2009))). As the bankruptcy court explained well, unsecured creditors vying against each other for shares of a "limited pot of assets" have no equitable rights vis-à-vis each other to contractual rates of interest on their claims: they must be treated equally; but "[w]hen the struggle is between creditors *and equity holders*, as opposed to creditors and creditors, [creditors'] equitable right [to contractual post-petition interest rates] is critical." *Ultra*, 624 B.R. at 203 (emphasis added). And per the absolute priority rule, creditors' rights prevail.

**III.**

To sum up, Ultra is right about one thing: Creditors' Make-Whole Amount is disallowed "unmatured interest" under the Bankruptcy Code. But the traditional solvent-debtor exception compels payment of the Make-Whole Amount because it is a valid contractual debt under applicable state law. For similar reasons, Ultra cannot avoid payment of contractual default-rate interest in favor of the much-lower Federal Judgment Rate: Creditors are entitled to what they bargained for with this solvent debtor, and the Code does not preclude the contractual interest rate. The judgment of the bankruptcy court is AFFIRMED.

Andrew S. Oldham, *Circuit Judge*, dissenting:

The majority correctly concludes that the Make-Whole Amount is unmatured interest in disguise. And it acknowledges that the Bankruptcy Code bars all unmatured interest. *See* 11 U.S.C. § 502(b)(2). In my view, it necessarily follows that the Code bars the Make-Whole Amount.

The majority nevertheless holds that an unwritten solvent-debtor exception "operates in this case to suspend § 502(b)(2)'s disallowance of [the] Make-Whole Amount." *Ante*, at 17. I recognize that the majority is attempting to faithfully apply confusing Supreme Court precedent in a difficult case. But the clear statutory text governing this issue compels me to respectfully dissent.

**I.**

In my view, the solvent-debtor exception didn't survive the adoption of the Bankruptcy Code. Premise one: If it's "unmistakably clear" that a Code provision is incompatible with a prior bankruptcy practice, then the Code overrides that prior practice.[29] *Cohen v. de la Cruz*, 523 U.S. 213, 221- 22 (1998); *see also ante*, at 23 (collecting cases). Premise two: It's unmistakably clear that 11 U.S.C. § 502(b)(2), which allows a given claim "except to the extent that . . . (2) such claim is for unmatured interest," is incompatible with the

[29] The other side of the coin: If the Code is *not* unmistakably clear, then the prior practice survives. *See ante*, at 23 (discussing and collecting cases). That proposition is orthogonal to my argument because, of course, I think the Code *is* unmistakably clear.

preexisting solvent-debtor exception. Conclusion: The Code overrides the solvent-debtor exception.

I take the first premise to be uncontroversial, *see ante*, at 23, but I should elaborate on the second. The Code provides that all claims for unmatured interest are disallowed. The solvent-debtor exception provides that not all claims for unmatured interest are disallowed. That's a stark contradiction. And the statutory text offers no alternative interpretation to avoid it, as the majority appears to recognize. *See ante*, at 17 ("[W]e conclude that the pre-Code doctrine concerning solvent debtors' obligations remains good law, *and the exception operates in this case to suspend § 502(b)(2)'s disallowance* of Creditors' Make-Whole Amount." (emphasis added)); *see generally id.* at 16-27 (majority's analysis, contending the statutory text isn't clear enough but not explaining what else the text could mean).

**II.**

The majority nonetheless disputes the second premise, maintaining it's not unmistakably clear that 11 U.S.C. § 502(b)(2) is incompatible with the solvent-debtor exception. Its analysis begins with the Bankruptcy Acts of 1898 and 1938. See ante, at 21 (citing Bankruptcy Act of 1898, 30 Stat. 544; Bankruptcy Act of 1938, 52 Stat. 840). For reference, here's the relevant text:

> Debts of the bankrupt may be proved and allowed against his estate which are (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 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; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon 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 interests accrued after the filing of the petition and up to the time of the entry of such judgments.
>
> . . .
>
> A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this Act.

Act of 1898, §§ 63(a), 65(e), 30 Stat. at 562-63, 564 (emphasis added). The 1938 Act has almost identical wording—none of the slight differences are relevant here. *See* Act of 1938, § 63(a), 65(e), 52 Stat. at 873, 875.

The majority points to the italicized text, contending it amounts to a rather obvious bar on

unmatured interest. *See ante*, at 24. At the least, the majority says, this antique unmatured-interest bar is just as clear as 11 U.S.C. § 502(b)(2)'s current bar. *See ibid.* (quoting the latter provision and saying, "this affords no greater clarity than the 1898 and 1938 Acts, which similarly limited claims for interest to what 'would have been recoverable at' the date the bankruptcy petition was filed—*i.e.*, matured interest" (citation omitted)).

The majority then cites a handful of old cases that read the 1898 and 1938 Acts not to foreclose the solvent-debtor exception. *Ante*, at 21 (collecting cases). One of the cases cited is even binding precedent in this circuit. *See Johnson v. Norris*, 190 F. 459 (5th Cir. 1911). If the old statutory bar on unmatured interest was just as clear as the Code's current bar, aren't we obligated to follow these precedents? Put differently, 11 U.S.C. § 502(b)(2) can't possibly be an "unmistakably clear" indication that Congress wanted to deviate from courts' longstanding interpretation of the 1898 and 1938 Acts. *See Cohen*, 523 U.S. at 221-22. So goes the argument.

The problem, in my view, is that the old statutes *weren't* just as clear as 11 U.S.C. § 502(b)(2) is. It's simply not true that the 1898 and 1938 Acts precluded unmatured interest, full stop. Rather, the language quoted by the majority—"with any interest thereon which would have been recoverable at that date"—comes from a clause (which is offset by a comma) in one item in a five-item list (whose entries are separated by semicolons). *See Ante*, at 24 (quoting Act of 1898 § 63(a)(1), 30 Stat. at 562-63; Act of 1938, § 63(a)(1), 52 Stat. at 873). The quoted text therefore

modifies *only* that first item, as the block quote above makes clear. That first item, in turn, concerns a specific subset of claims: "a fixed liability, as evidenced by a judgment *or an instrument in writing*, absolutely *owing at the time of the filing of the petition*." Act of 1898, § 63(a)(1), 30 Stat. at 562-63 (emphasis added); Act of 1938, § 63(a)(1), 52 Stat. at 873 (emphasis added). Contrast that with the category of claims discussed in the last listed item: "provable debts *reduced to judgments after the filing of the petition* and before the consideration of the bankrupt's application for a discharge." Act of 1898, § 63(a)(5), 30 Stat. at 563 (emphasis added); Act of 1938, § 63(a)(5), 52 Stat. at 873 (emphasis added). (The Make-Whole Amount at issue in this case, which seems never to have been reduced to judgment, is itself a good example of a debt that doesn't fit into the latter category but does fit into the former.) The upshot: Though § 63(a)(1) of the Acts expressly prohibits *some* unmatured interest, it *does not* contain a blanket bar on all unmatured interest—unlike 11 U.S.C. § 502(b)(2).

It also bears emphasis that the old § 63(a)(1) operates differently and less directly to bar unmatured interest than does § 502(b)(2). To see the old bar, we need to read § 63(a) together with § 65(e). The former gives a five-item list of allowed claims—claims upon which a creditor could recover in bankruptcy. Act of 1898, § 63(a), 30 Stat. at 562-63 (beginning with, "[d]ebts of the bankrupt may be proved and allowed against his estate which are . . ." and going on to provide five categories of recoverable debts); Act of 1938, § 63(a), 52 Stat. at 873 (nearly identical). As we've seen, that list contains some qualifications, but it mainly serves the *positive*

function of listing *what is permissible*. And the first permissible claims is "a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition 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." Act of 1898, § 63(a)(1), 30 Stat. at 562-63 (emphasis added); Act of 1938, § 63(a), 52 Stat. at 873 (emphasis added). Thus, claims for *matured* interest are allowed.[30]

Section 65(e) is a sort of zipper clause. It provides that "[a] claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this Act." Act of 1898, § 65(e), 30 Stat. at 564; Act of 1938, § 65(e), 52 Stat. at 875. That provision serves the *negative* function of stipulating that every claim not listed as permissible *is not permissible*. But because § 63(a)(1) allows matured interest without allowing unmatured interest, and because no *other* provision allows unmatured interest, it follows that unmatured interest is barred by the combination and implication of §§ 63(a)(1) and 65(e).

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[30] The clause "or with a rebate of interest upon such as were not then payable and did not bear interest" is not a standalone bar on unmatured interest. That's because its "rebate" applies only to "interest upon such [claims] *as were not then payable* and did not bear interest." (Emphasis added.) That means the rebate doesn't apply to unmatured interest on claims that *were* payable at the time of filing. That is, it could be that the *claim itself* was payable at the time of filing and yet the interest didn't mature until after filing. The rebate clause doesn't say anything about that kind of unmatured interest.

The very first of the majority's old cases, *Johnson v. Norris*, interpreted the Act of 1898 in just this way. First, our court noted that § 63(a)(1) allows claims for matured interest. *Johnson*, 190 F. at 561. Second, we pointed out that § 65(e) disallows any claims not allowed. *Ibid.* Third, we *inferred* that "[o]rdinarily, no question as to subsequently accruing interest can arise," *i.e.*, that unmatured interest is generally barred. *Ibid.* We then went on to hold that this bar didn't apply in solvent-debtor cases. *Id.* at 561- 65. The important point for present purposes, however, is that the *Johnson* court *did not* (a) hold that the Acts expressly barred the unmatured interest and (b) then hold the express bar inapplicable in solvent-debtor cases. Rather, the court (a) held (correctly) that the Acts *implicitly* barred unmatured interest and (b) then held the implicit bar inapplicable in solvent-debtor cases.

So the *Johnson* court saw more ambiguity in the Acts than today's majority does. And that's doubly important because *Johnson* proved to be the seminal case on the topic. Three years after the decision, the Supreme Court reached the same conclusion, citing only two sources in support: Blackstone and *Johnson*. *See Am. Iron & Steel Mfg. Co. v. Seaboard Air Line Ry.*, 233 U.S. 261, 266 (1914) (explaining that the general rule against unmatured interest "did not prevent the running of interest during the Receivership; and if as a result of good fortune or good management, the estate proved sufficient to discharge the claims in full, interest as well as principal should be paid"). Three of the majority's cited cases relied on *Johnson* in similar fashion. *See Brown v. Leo*, 34 F.2d 127, 128 (2d Cir. 1929); *Littleton v. Kincaid*, 179 F.2d

848, 852 (4th Cir. 1950); *In re Magnus Harmonica Corp.*, 159 F. Supp. 778, 780 (D.N.J. 1958). This widespread reliance suggests that courts allowed the solvent-debtor exception to persist, not because they thought the exception could override an *explicit* congressional prohibition on unmatured interest, but because they thought any such prohibition was *implicit* at best under the old Code. As the Supreme Court put it in 1949, "[t]he long-standing rule against post-bankruptcy interest thus appears *implicit* in our current Bankruptcy Act." *City of New York v. Saper*, 336 U.S. 328, 332.

If all of that sounds convoluted, that's precisely the point. The majority's argument rests on the premise that the 1898 and 1938 Acts barred unmatured interest just as clearly as does 11 U.S.C. § 502(b)(2). *See ante*, at 24. But that premise is, with deepest respect, false. The old statutes *did* bar unmatured interest—but the reader has to stitch together two separate provisions and make an inference from them to see it. The current Code, in sharp contrast, goes for the jugular by flatly disallowing "claim[s] for unmatured interest." 11 U.S.C. § 502(b)(2). The majority protests that "Congress has not explicitly addressed claims for unmatured interest owed by solvent debtors," *ante*, at 26, but I am not sure what Congress should have done to make the point more lucid short of saying, "and the solvent-debtor exception doesn't apply." Congress need not speak superfluously to speak "unmistakably." *See Cohen*, 523 U.S. at 221-22; *BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 546 (1994) ("The Bankruptcy Code can of course override by implication when the implication is unambiguous.").

* * *

We all agree that the Make-Whole Amount is unmatured interest. And we all agree that 11 U.S.C. § 502(b)(2) bars unmatured interest. I would leave it at that. The Make-Whole Amount should be barred, and the creditors should recover post-petition interest only at the federal judgment rate. Neither the solvent-debtor exception's historical pedigree nor its policy underpinnings—no matter how compelling—can overcome Congress's clear, and clearer-than-ever, command on this point.

I respectfully dissent.

*Appendix B*

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

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No. 21-20008

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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*,

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.,

*Appellants*,

v.

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

*Appellees*.

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Filed: Nov. 15, 2022

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Before: Jolly, Elrod, and Oldham, *Circuit Judges*.*

ORDER

Per Curiam:

Treating the petition for rehearing en banc as a petition for panel rehearing (5th Cir. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

* Judges Jerry E. Smith, James L. Dennis, Catharina Haynes, Don R. Willett, and Kurt D. Engelhardt, did not participate in the consideration of the rehearing en banc.

*Appendix C*

**UNITED STATES COURT BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS**

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Nos. 16-32202, 16-03272, 16-32204, 16-32205, 16-32206, 16-32207, 16-32208, 16-32209

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IN RE: ULTRA PETROLEUM CORP., et al.
ULTRA RESOURCES, INC.
ULTRA WYOMING, INC.
ULTRA WYOMING LGS, LLC
UP ENERGY CORPORATION
UPL PINEDALE, LLC
UPL THREE RIVERS HOLDINGS, LLC
*Debtors*.

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Filed: Oct. 27, 2020

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AMENDED MEMORANDUM OPINION

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The Court answers two questions:

- Does the Bankruptcy Code disallow a contractual claim for "make-whole" liquidated damages when an interest-bearing obligation is prepaid?
- Does the Bankruptcy Code permit a solvent debtor to forego contractual obligations to an

> unimpaired class of unsecured creditors, but still pay a distribution to its shareholders?

Ultra Petroleum argues that the Bankruptcy Code allows a solvent debtor to avoid paying unimpaired unsecured creditors a contractual liquidated damages claim and to avoid paying post-petition interest at contractual default rates. The Bankruptcy Code permits neither.

Bankruptcy relief is intended for the honest, but unfortunate debtor. Although no one questions Ultra's honesty, a post-petition uptick in natural gas prices made Ultra and its shareholders quite fortunate. As a result, Ultra became massively solvent. The question becomes whether an honest but fortunate solvent debtor may use bankruptcy to discharge validly owed debt, while its shareholders retain value. Sensibly, the answer is "no." Ultra must pay its creditors before it pays its shareholders.

## BACKGROUND

The particulars of the Ultra Make-Whole litigation are well chronicled in the Federal and Bankruptcy Reporters. *Ultra Petroleum Corp. v. Ad Hoc Comm. Of Unsecured Creditors (In re Ultra Petroleum Corp.)*, 913 F.3d 533 (5th Cir. 2019) *withdrawn and superseded*, 943 F.3d 758 (5th Cir. 2019); *In re Ultra Petroleum Corp.*, 575 B.R. 361 (Bankr. S.D. Tex. 2017). The Court provides a brief history for clarity.

This dispute stems from Ultra's 2016 chapter 11 bankruptcy case and focuses on the amount owed to unimpaired Noteholders under Ultra's confirmed plan. Ultra Resources ("OpCo"), Ultra Petroleum Corp. ("HoldCo"), and UP Energy Corp. ("MidCo")

(collectively, "Ultra") engaged in natural gas exploration and production. *Ultra*, 943 F.3d at 760. Due to a precipitous decline in natural gas prices, Ultra found itself unable to pay its debts as they came due. (*See* ECF No. 30 at 18). Accordingly, the Ultra entities filed voluntary chapter 11 petitions on April 29, 2016. (ECF No. 1). After the petition date, commodity prices rose sharply, allowing Ultra to propose and confirm a chapter 11 plan paying its creditors in full.[1] *Ultra*, 943 F.3d at 761.

Among the creditors deemed unimpaired by Ultra's plan were the Class 4 Creditors. (ECF No. 1308-01 at 25-26). Class 4 of the plan set out the treatment of the "OpCo Funded Debt Claims." (ECF No. 1308-01 at 25-26). The plan defined "OpCo Funded Debt Claims" as "the OpCo Note Claims and the OpCo RCF Claims." (ECF No. 1308-01 at 16). The OpCo Note Claimants held $1.46 billion in unsecured notes, issued between 2008 and 2010. *Ultra*, 943 F.3d at 760. The OpCo RCF Claimants were owed $999 million, which OpCo borrowed under a Revolving Credit Facility ("RCF") in 2011. *Id.* HoldCo and MidCo each guaranteed the OpCo Funded Debt. *Ultra*, 575 B.R. at 363.

Ultra issued the OpCo Notes pursuant to a Master Note Purchase Agreement ("MNPA"). (ECF No. 1834 at 2). The MNPA contains a number of provisions

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[1] Although the rebound in commodity prices made Ultra "as rare as the proverbial rich man who manages to enter the Kingdom of Heaven," Ultra's stay beyond the Pearly Gates was short-lived. *See Ultra*, 943 F.3d at 760. Ultra filed a second voluntary chapter 11 petition on May 14, 2020. (Case No. 20-32631, ECF No. 1).

relevant to this dispute. Under the MNPA, Ultra could repay the Notes ahead of the Notes' maturity date, so long as Ultra also paid a Make-Whole Amount. (ECF No. 1215-1 at 27). The Make-Whole Amount could be calculated using a formula designed to compensate a Noteholder for deprivation of the "right to maintain its investment in the Notes free from repayment." (ECF No. 1834 at 11).

The MNPA defines the Make-Whole Amount as "an amount equal to the excess, if any, of the Discounted Value of the Remaining Scheduled Payments with respect to the Called Principal of such fixed rate Note over the amount of such Called Principal . . . ." (ECF No. 1215-1 at 27). "Called Principal" is "the principal of such Note that . . . has become or is declared to be immediately due and payable pursuant to Section 12.1." (ECF No. 1215-1 at 27). "Remaining Scheduled Payments" includes "all payments of such Called Principal and interest thereon that would be due after the Settlement Date," which is "the date on which such Called Principal . . . has become or is declared to be immediately due and payable pursuant to Section 12.1." (ECF No. 1215-1 at 28). The "Discounted Value" of such Remaining Scheduled Payments is comprised of "the amount obtained by discounting all Remaining Scheduled Payments with respect to such Called Principal from their respected scheduled due dates to the Settlement Date . . . . in accordance with accepted financial practice and at a discount factor . . . equal to the Reinvestment Yield" of 0.5% over the yield to maturity of specified United States Treasury obligations. (ECF No. 1215-1 at 27).

The MNPA also contained various events of defaults, the occurrence of which accelerated the Notes and caused them to become immediately due and payable. (ECF No. 1215-1 at 38). After an event of default, the entire unpaid principal, accrued but unpaid interest, and the Make-Whole Amount came due for each Note. *Ultra*, 575 B.R. at 364. One event of default was the filing of a bankruptcy petition. *Id.* Thus, Ultra's bankruptcy filing accelerated the Notes and triggered the Make-Whole Amount. *Id.*

"Failure to pay immediately trigger[ed] interest at a default rate of either 2% above the normal rate set for the note at issue or 2% above J.P. Morgan's publicly announced prime rate, whichever [was] greater." *Ultra*, 943 F.3d at 761. While the RCF did not include a Make-Whole provision, it contained a similar acceleration clause, with a default interest rate of 2% above the contractual RCF rate. *Id.*

The proposed plan distribution to Class 4 Creditors did not include the Note Claimants' Make-Whole Amount. (*See* ECF No. 1308-01 at 25-26). Nor did the plan pay Class 4 Creditors post-petition interest at the MNPA and RCF default interest rates. (*See* ECF No. 1308-01 at 25- 26). Instead, the plan only proposed to pay the Class 4 Creditors the outstanding principal under the Notes and RCF, pre-petition interest at the rate of 0.1%, and post-petition interest at the federal judgment rate. (ECF No. 1308-01 at 25-26). Despite restricting the contractual amounts due, the plan deemed Class 4 unimpaired, prohibiting Class 4 Creditors from voting on the plan. 11 U.S.C. § 1126(f).

The Class 4 Creditors objected to confirmation, citing an entitlement to the Make-Whole Amount and post-petition default interest. *Ultra*, 943 F.3d at 761. Ultra objected to the Class 4 Creditors' claims. *Id.* The Court confirmed Ultra's plan after the parties stipulated that a decision determining the amounts necessary to leave the Class 4 Creditors unimpaired could be reached after confirmation. *Id.*

On September 21, 2017, this Court issued an opinion allowing the Make-Whole Amount and post-petition interest at the default rates. *Ultra*, 575 B.R. at 361. Following a direct appeal, the Fifth Circuit reversed, holding that a creditor is not impaired when a plan incorporates the Bankruptcy Code's disallowance provisions. *Ultra*, 943 F.3d at 758. The Fifth Circuit remanded and directed this Court to consider whether the Make-Whole Amount is disallowed by the Bankruptcy Code, "the appropriate post-petition interest rate, and the applicability of the solvent-debtor exception." *Id.* at 766. The Court now determines those issues.

It is also important to place the dispute in context. The plan in this case was confirmed on March 14, 2017. (ECF No. 1324). The confirmation order reserved to the Court whether the treatment of these claims left the holders "unimpaired." The Court's sole role is to determine the amount that must be paid to leave the Class 4 Claimants unimpaired.

## JURISDICTION

The district court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334. The allowance or disallowance of a proof of claim against the estate, as well as the "estimation of claims or

interests for the purposes of confirming a plan under chapter 11," are core matters as defined in 28 U.S.C. § 157(b)(2)(B). This case was referred to the Bankruptcy Court pursuant to 28 U.S.C. § 157(a).

**DISCUSSION**

This Memorandum Opinion addresses two primary questions:

- Does the Bankruptcy Code disallow a contractual claim for "make-whole" liquidated damages when an interest-bearing obligation is prepaid?
- Does the Bankruptcy Code permit a solvent debtor to forego contractual obligations to an unimpaired class of unsecured creditors, but still pay a distribution to its shareholders?

The first question focuses on whether the amounts due under the contractual Make-Whole constitute unmatured interest. If the amounts due under the Make-Whole are unmatured interest, they would be disallowed under § 502(b)(2). Because the Fifth Circuit held that failure to pay amounts disallowed by the Bankruptcy Code does not result in impairment, the classification of the Make-Whole as unmatured interest would permit non-payment while leaving the holders of the claims "unimpaired." If the Make-Whole Amount is not unmatured interest, it is allowed under the Bankruptcy Code.

The answer to the first question is "no." Section 502(b)(2) disallows claims for the economic equivalent of unmatured interest. The Make-Whole Amount represents liquidated damages and should not be characterized as unmatured interest, or its economic

equivalent. The Make-Whole Amount is not compensation for the use or forbearance of money, and it does not accrue over time. It is not interest. The Bankruptcy Code allows the Make-Whole Amount.

The second question focuses on whether the Bankruptcy Code requires that an unimpaired unsecured creditor of a solvent debtor be paid post-petition interest at contractual rates. While the Bankruptcy Code disallows unmatured interest as part of a claim, it is ambiguous as to an unimpaired unsecured creditor's right to post-petition interest on a claim. The parties agree that the Class 4 Claimants are entitled to some post-petition interest, but dispute whether the proper amount is the federal judgment rate or the contractual default rates.

The answer to the second question is also "no." The solvent-debtor exception has been widely recognized, both before and after adoption of the Bankruptcy Code. The exception is rooted in the principle that the solvent debtor must pay its creditors in full before the debtor may recover a surplus. Congress did not silently abandon that fundamental equitable principle when it passed the Bankruptcy Code. The solvent-debtor exception entitles the Class 4 Claimants to post-petition interest. The proper rates of interest are the contractual default rates. Awarding the contractual default rates is consistent with the underlying principle of the solvent-debtor exception, that creditors must be paid what they are owed under the contract before the debtor may receive a windfall. Further, limiting the Class 4 Claimants to the federal judgment rate would treat an unimpaired class worse than an impaired class of unsecured creditors.

### *a. Make-Whole Amount is Allowed Under the Bankruptcy Code*

Ultra's confirmed plan left the Note Claimants unimpaired. The Fifth Circuit made clear that an unimpaired creditor is entitled to the full amount of his claim allowed under the Bankruptcy Code. *See Ultra*, 943 F.3d at 765. Ultra is obligated to distribute to the Note Claimants all amounts validly owed under state law, minus any amounts disallowed by the Bankruptcy Code. *See id.* at 765.

Section 502 of the Bankruptcy Code sets out categories of debts which Congress disallowed in bankruptcy. Among other categories, § 502 disallows a claim if "such claim is for unmatured interest." 11 U.S.C. § 502(b)(2). Section 502(b)(2) also encompasses a claim to the extent that it seeks "the economic equivalent of unmatured interest." *Tex. Commerce Bank, N.A. v. Licht (In re Pengo Indus., Inc.)*, 962 F.2d 543, 546 (5th Cir. 1992).

Although the Code does not define the term unmatured interest, interest is widely understood as consideration for the use or forbearance of another's money accruing over time. *See Love v. State of New York*, 78 N.Y.2d 540, 544 (N.Y. 1991); *Interest*, Black's Law Dictionary, (11th ed. 2019). The Make-Whole Amount is an enforceable liquidated damages provision which compensates the Note Claimants for any actual loss suffered due to prepayment of the notes. The Make-Whole Amount is not interest because it does not compensate the Note Claimants for OpCo's use or forbearance of the Note Claimants' money, it compensates the Note Claimants for OpCo's breach of a promise to use money. Because the Make-

Whole Amount is not interest, it is also not unmatured interest. Because the Make-Whole Amount is not unmatured interest, it forms part of the Note Claimants' allowed claims.

Section 502(a) of the Bankruptcy Code states that "a claim or interest, proof of which is filed under § 501 of this title, is deemed allowed, unless a party in interest . . . objects." Section 502(b) mandates that a claim is allowed, unless the claim (or a portion thereof) falls into one of nine disallowed categories. *See* 11 U.S.C. § 502(b); *In re Today's Destiny, Inc.*, No. 05-90080, 2008 WL 5479109, at *2 (Bankr. S.D. Tex. Nov. 26, 2008).

Section 502(b)(2) "flows from the legal principle that 'interest *stops accruing* at the date of the filing of the petition.'" *In re Pengo*, 962 F.2d at 546 (emphasis added) (quoting S. Rep. No. 989, 95th Cong., 2d Sess. 63, reprinted in 1978 U.S.S.C.A.N. 5787, 5849). When determining if an amount falls within § 502(b)(2), "much depends on the dynamics of the individual case." *Ultra*, 943 F.3d at 765. Absent controlling federal law, a determination of a creditor's allowed claim necessarily references state law. *E.g.*, *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 161 (1946) ("[W]hat 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."). Calculating a creditor's allowed claim based on state law "prevent[s] a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.'" *Butner v. United States*, 440 U.S. 48, 55 (1979) (quoting *Lewis*

*v. Mfrs. Nat'l Bank*, 364 U.S. 603, 609 (1961)). No one disputes that the MNPA is governed by New York law. To form part of an allowed claim, the Make-Whole Amount must be both enforceable under New York law, and not unmatured interest under § 502(b)(2).

#### *1. The Make-Whole Amount is Enforceable Under New York Law*

This Court previously held that the Make-Whole Amount is a valid liquidated damages clause, and not a disproportionate penalty, under New York law. *Ultra*, 575 B.R. at 369 ("Debtors fail to rebut the Noteholders' claim for the Make-Whole Amount because they fail to prove that the damages resulting from prepayment were readily ascertainable at the time the parties entered into the Note Agreement or that they were conspicuously disproportionate to foreseeable damage amounts."). The Fifth Circuit did not disturb that holding. *See Ultra*, 943 F.3d at 764.

New York courts hold that make-whole provisions are enforceable liquidated damages clauses. *JMD Holding Corp. v. Cong. Fin. Corp.*, 828 N.E.2d 604, 609 (N.Y. 2005). Liquidated damages are "[i]n effect . . . an estimate, made by the parties at the time they enter into their agreement, of the extent of the injury that would be sustained as a result of breach of the agreement." *Truck Rent-A-Ctr. v. Puritan Farms 2nd*, 41 N.Y.2d 420, 424 (N.Y. 1977). The Make-Whole Amount is enforceable under New York law.

Ultra argues that the Make-Whole Amount can be both liquidated damages under New York law and unmatured interest under the Bankruptcy Code. The Note Claimants believe that liquidated damages and unmatured interest are mutually exclusive terms in

New York. Ultra correctly notes that it is the Bankruptcy Code, not New York law, which determines the scope of amounts disallowed as unmatured interest. However, because the Bankruptcy Code leaves unmatured interest undefined, the Note Claimants' reference to state law is appropriate.

The Court need not decide whether liquidated damages and unmatured interest are mutually exclusive *per se* because this Make-Whole Amount is not the economic equivalent of unmatured interest. Black's Law Dictionary defines a "liquidated-damages clause" as "[a] contractual provision that determines in advance the measure of damages if a party breaches the agreement." *Liquidated-damages clause*, Black's Law Dictionary, (11th ed. 2019). The Court need not speculate whether some hypothetical liquidated damages clause conceivably compensates a creditor for unmatured interest under section 502(b)(2). This Make-Whole does not. This Make-Whole Amount is enforceable under New York law. For the reasons that follow, it represents neither interest, unmatured interest, nor the economic equivalent of unmatured interest.

***2. Defining Interest***

Having determined that the Make-Whole Amount is recoverable under applicable nonbankruptcy law, the Court must determine whether the Make-Whole Amount constitutes the "economic equivalent of unmatured interest." *See Pengo*, 962 F.2d at 546. The Bankruptcy Code defines neither interest nor unmatured interest. *See* 11 U.S.C. § 101. Without Congressional instruction to the contrary, undefined

words found in the Bankruptcy Code should be given their ordinary meaning. *Lamar, Archer & Cofrin LLP v. Appling*, 138 S. Ct. 1752, 1759 (2018) ("Because the Bankruptcy Code does not define the words 'statement,' 'financial condition,' or respecting,' we look to their ordinary meanings."). Further, bankruptcy courts generally interpret undefined terms in accordance with state law. *See Butner*, 440 U.S. at 54.

To decide whether the Make-Whole Amount is allowed, the Court must define the "economic equivalent of unmatured interest." *Pengo*, 962 F.2d at 546. The definition is formed in three steps. First, the Court defines interest. Second, the Court defines unmatured interest. Third, the Court identifies the characteristics which make a debt the 'economic equivalent' of unmatured interest.

The Court begins by defining interest. The Senior Creditors' Committee and the OpCo Noteholders provide substantially similar definitions of interest. According to the Note Claimants, interest can be defined as consideration for the use or forbearance of another's money accruing over time. (ECF No. 1859 at 6 ("'*Interest'* means consideration that accrues over time for the use or forbearance of another's money.") (emphasis in original)); (ECF No. 1862 at 9 ("'Interest' means consideration for the use or forbearance of another's money over a period of time.")).[2]

The Note Claimants' definition is consistent with the ordinary meaning of interest and with state law

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[2] In its supplemental brief, Ultra did not provide a specific definition of interest. (*See generally* ECF No. 1860 at 7-12).

interpretations of the term. Black's Law Dictionary defines "interest" as "[t]he compensation fixed by agreement or allowed by law for the use or detention of money, or for the loss of money by one who is entitled to its use; especially the amount owed to a lender in return for the use of borrowed money." *Interest*, Black's Law Dictionary, (11th ed. 2019). Webster's Dictionary notes that interest accrues as a percentage over time. *See 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."). New York courts similarly recognize that interest is a cost associated with the use or nonpayment of another's money. *Love*, 78 N.Y.2d at 544 (describing interest as "the cost of having the use of another's money for a specified period"); *Becker v. Huss Co.*, 43 N.Y.2d 527, 543 (N.Y. 1978) ("[I]nterest is intended to compensate for the use or nonpayment of money."). Applying Texas law, the Fifth Circuit has acknowledged the same general definition. *See Achee Holds., LLC v. Silver Hill Fin., LLC*, 342 F. App'x 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.").

The Court adopts the Note Claimants' definition of interest. Interest means *consideration for the use or forbearance of another's money accruing over time*. The New York Court of Appeals, the Fifth Circuit, and Black's Law Dictionary expressly recognize the principle that interest is a cost associated with the use or forbearance of another's money. Webster's Dictionary adds to that principle the fact that interest is normally expressed as a percentage accruing over

time. The Note Claimants' definition appropriately incorporates each element of interest.

### *3. Defining Unmatured Interest*

If interest is consideration for the use or forbearance of another's money accruing over time, unmatured interest is interest that has not accrued or been earned as of a reference date. *See In re Sadler*, No. 14-CV-2312, 2015 WL 9474174, at *6 (N.D. Ohio Dec. 29, 2015) (noting bankruptcy court defined unmatured interest as "interest that is not yet due and payable or is not yet earned at the time of the filing of the petition"). Stated more fully, unmatured interest is *consideration for the use or forbearance of another's money, which has not accrued or been earned as of a reference date*. In a bankruptcy case, the reference date is the order for relief. *E.g.*, *In re X-Cel, Inc.*, 75 B.R. 781, 788-89 (N.D. Ill. 1987) ("Unmatured interest is defined in this context as interest which was not yet due and payable at the time the petition was filed."). This Court slightly refines the *X-Cel* court's definition. "Unmatured" is more indicative of whether the interest has accrued and been earned; the due date for payment of the interest should not be considered.

The key distinction between matured and unmatured interest is whether such interest has been earned. Interest matures when it is earned and owing to the lender. *See In re Sadler*, 2015 WL 9474174, at *6. An amount is due when it is either immediately enforceable or owing. *Due*, Black's Law Dictionary (11th ed. 2019). Under the Bankruptcy Code, interest that has accrued as of the petition date is matured. The lender has earned that compensation because his money was used pre-petition.

Because interest accrues, or is earned, steadily over time, some interest may be owed on a given date even though it is not immediately payable. In other words, on any given date between contractual installments, a portion of the interest has come due and is owing, despite the fact that the next installment is not immediately payable. Such interest is 'earned' because the borrower, looking backwards, used the lender's money. The Bankruptcy Code allows such interest, even if it is not immediately payable as of the petition date. Unmatured interest is prospective. It is compensation for the future use of another's money.

The Note Claimants argue that the Make-Whole Amount matured due to acceleration of the Notes. (ECF No. 1831 at 26). While interest can also mature when it becomes immediately payable due to acceleration, acceleration occurred post-petition in this case. Acceleration is "the advancing of a loan agreement's maturity date so that payment of the entire debt is due immediately. *NML Capital v. Republic of Arg.*, 952 N.E.2d 482, 491 (N.Y. 2011) (citing Black's Law Dictionary (9th ed. 2009)). Obligations can become due for payment through acceleration. *Id.* ("'[A]cceleration' of a repayment obligation in a note or bond changes the date of maturity from some point in the future . . . to an earlier date based on the debtor's default under the contract."). However, whether interest is matured at the moment of filing is determined without reference to acceleration clauses triggered by a bankruptcy petition. *See In re ICH Corp.*, 230 B.R. 88, 94 (Bankr. N.D. Tex. 1999). The Make-Whole Amount came due because the Notes accelerated when Ultra filed its chapter 11 petition. Because the Notes did not

accelerate prior to the petition, the Make-Whole Amount's status under § 502(b)(2) is determined without reference to the acceleration clause.

### *4. The Make-Whole Amount is not Unmatured Interest*

The Make-Whole Amount is neither interest nor unmatured interest. The Make-Whole Amount is not consideration for the use or forbearance of the Note Claimants' money, which had not accrued or been earned as of the petition date. Although the Make-Whole Amount is "consideration," it is not consideration for the use or forbearance of the Note Claimants' money. The Make-Whole Amount compensates the Note Claimants for the cost of reinvesting in a less favorable market. If the market is substantially more favorable at the time of prepayment, the Make-Whole Amount could equal zero dollars. Instead of compensating the Note Claimants for the use or forbearance of their money, the Make-Whole Amount compensates the Note Claimants for Ultra's decision not to use their money. In an unfavorable market, that decision causes the Note Claimants to suffer damages. The Make-Whole Amount liquidates those damages.

The Make-Whole Amount became payable because on the petition date, the Called Principal of the Notes was less than the "Discounted Value" of the principal and interest payments scheduled to come due after the petition date. (ECF No. 1831 at 10). Under the MNPA, "Discounted Value" was calculated by discounting the remaining payments to their net present value on the petition date, "using a discount factor equal to the applicable 'Reinvestment Yield.'"

(ECF No. 1831 at 11). The applicable "Reinvestment Yield" was 0.5% higher than the yield for similar U.S. Treasury securities reported two days prior to the petition date. (ECF No. 1831 at 11).

The Make-Whole formula incorporates both the timing of prepayment and the applicable Treasury rates just prior to prepayment. The earlier prepayment occurs, the higher the Called Principal. At lower Treasury rates, the Discounted Value becomes higher. On the other hand, higher Treasury rates equate to lower Discounted Values. A Make-Whole is owed when the Discounted Value exceeds the Called Principal, and the Make-Whole equals the difference between those two sums. The combination of the timing of prepayment and the applicable reinvestment rates approximate the damages suffered due to prepayment.

Other courts have reached the conclusion that similar make-wholes are compensate for liquidated damages. *E.g.*, *In re Trico Marine Servs. Inc.*, 450 B.R. 474, 481 (Bankr. D. Del. 2011) ("Th[e] Court is persuaded by the soundness of the majority's interpretation of make-whole obligations, and therefore finds that the Indenture Trustee's claim on account of the Make-Whole Premium is akin to a claim for liquidated damages, not for unmatured interest."); *see, e.g.*, *C.C. Port, Ltd. v. Davis-Penn Mortg. Co.*, 61 F.3d 288, 289 (5th Cir. 1995) ("Where the contract grants the borrower the right to prepay, a prepayment premium is not compensation for the use, forbearance, or detention of money, rather it is a charge for the option or privilege of prepayment.").

The Make-Whole Amount is not unmatured interest simply because it could equal zero when reinvestment rates are high. Nor would the Make-Whole Amount be unmatured interest merely because it might equal the unmatured interest due at the time of prepayment. The issue is not the final sum of the Make-Whole Amount. Rather, the issue is what the Make-Whole Amount compensates the Note Claimants for. Like a grade school math student, answering the problem requires showing the work. The arithmetic here demonstrates that the Make-Whole Amount does not compensate the Note Claimants for the use or forbearance of their money.

The Make-Whole Amount does not accrue over time. Rather, it is a one-time charge which fixes the Note Claimants' damages when it is triggered. *See Parker Plaza W. Partners v. UNUM Pension & Ins. Co.*, 941 F.2d 349, 352 (5th Cir. 1991) (noting under Texas law "a prepayment premium is a charge for the option or privilege of prepayment . . . and, as such, the charge is not 'interest'"); *Feldman v. Kings Highway Savs. Bank*, 102 N.Y.S.2d 306, 307 (N.Y. App. Div. 2d Dep't 1951) (applying New York usury law and finding prepayment premium "was not in consideration of the making of a loan or of forbearance of money. It was the converse, that is, for the making of a new and separate agreement, the termination of the indebtedness. Accordingly, it was not a payment of interest"). Interest accrues over time. Even payment in kind interest, where no interest becomes due for payment until a maturity date, accrues over the life of a note for the purposes of § 502(b)(2). *See In re Energy Future Holdings Corp.*, 540 B.R. 109, 111 (Bankr. D. Del.

2015) (characterizing portion of interest on payment in kind notes as accrued as of the petition date).

Unlike interest, the Make-Whole Amount fixes the damages sustained by the Noteholders' at the time of prepayment. While the timing of prepayment plays a significant role in calculating the damages suffered, nothing about the formula suggests the Make-Whole accrues over time. The Note Claimants do not earn the Make-Whole Amount over the life of the Notes. Instead, time is utilized in the Make-Whole formula to determine the Called Principal and remaining payments. Significantly, the time relevant to the Make-Whole formula is the date at which Ultra *ceased* to use or forbear the Note Claimants' money. The Make-Whole Amount is not earned over time.

Ultra relies on the Court of Appeals for the Second Circuit's decision in *In re MPM Silicones, LLC*, as suggesting that a make-whole is unmatured interest. 874 F.3d 787, 801-02 (2d Cir. 2017) ("The make-whole premium was intended to ensure that the Senior-Lien Note holders received additional compensation to make up for the interest they would not receive if the Notes were redeemed prior to the maturity date."). However, the Second Circuit was not presented with the question of whether a make-whole is unmatured interest. *See id.* In fact, the makewhole in *MPM Silicones* was not disallowed by the Bankruptcy Code at all. *See id.* Instead, that make-whole never became due under the relevant terms of the notes. *Id.* at 803. The makewhole in *MPM Silicones* came due if the debtor opted to prepay the notes ahead of the maturity date. *Id.* Under the acceleration clause of the notes, the debtor's bankruptcy filing automatically

accelerated the notes. *Id.* The maturity date became the petition date. Because the make-whole only became due if the debtors paid those notes ahead of the maturity date, the debtor's postpetition decision to redeem the notes was not a prepayment and did not trigger the make-whole. *Id.* Any statement by the Second Circuit about the characterization of the make-whole was dicta.

To illustrate whether the Make-Whole Amount is akin to unmatured interest, during the May 19, 2020 oral argument, the Court posed a brokerage fee hypothetical that envisioned the make-whole as a three-party transaction. The Court then requested further briefing regarding whether any portion of the brokerage fee constitutes unmatured interest. The hypothetical began with a loan, providing for a fixed 6% interest rate, prepaid exactly one year prior to maturity. Prepayment of the loan triggers a reinvestment fee equal to the amount that the lender would be required to pay to make a loan in the same industry as the original loan, with cash flows that match the remaining payments had the original loan not been prepaid. (ECF No. 1856 at 1). Following the borrower's prepayment, the lender locates a broker who will find a new borrower and replace the loan with a 6% loan in exchange for a 2.25% fee. The market interest rate at the time of prepayment is 4%. The Court asked whether any portion of the 2.25% fee is unmatured interest.

The fee is equal to the amount the lender would have to pay to a broker in order to reinvest the prepaid funds with cash flows mirroring the remaining original loan payments. The fee cannot be interest

because it does not provide consideration for the use or forbearance of the lender's money, and it does not accrue over time. Just like the Make-Whole Amount, the fee represents a negotiated cost to compensate the lender for making a new loan on comparable terms in a changed market. The hypothetical is no different than the Make-Whole at issue here. Instead of a Make-Whole that directly compensates the lender for the difference in interest rates compared to the outstanding principal, the hypothetical reinvestment fee involves a third-party broker and compensates the lender for the actual cost of making a new loan. There is no credible argument that the reinvestment fee could be considered unmatured interest under the Bankruptcy Code. Nor is there reason to believe that the Bankruptcy Code disallows the Make-Whole Amount, despite allowing a functionally identical transaction executed through a third-party. Both the Make-Whole Amount and the reinvestment fee represent damages to the lender, not interest.

The OpCo Noteholders and the Senior Creditors Committee provided substantially similar answers to the hypothetical. Both creditor groups recognized that the reinvestment fee was not for the use or forbearance of money. (ECF No. 1859 at 11 ("It is a remedy imposed upon the borrower when it no longer borrows money, after having promised to do so for a fixed term."); ECF No. 1862 at 17 ("[The fee] compensates the lender for its actual damages by obligating the initial borrower to reimburse the lender for the cost of relending the funds that the borrower had agreed to borrow for a specified period.")). Further, the fee is unlike interest because it does not grow as a function of time. (ECF No. 1859 at 11). The

reinvestment fee becomes due upon the closing of the replacement loan. (ECF No. 1862 at 18). The fee is entirely contingent on future market events.

Ultra also acknowledged that the reinvestment fee would be allowed under § 502. (ECF No. 1860 at 15 ("That brokerage fee plainly does not qualify as unmatured interest under § 502(b)(2).")). Ultra noted that because the hypothetical lender has not borrowed money from the broker, the fee does not qualify as unmatured interest. (ECF No. 1860 at 15). Rather, Ultra characterizes the fee as the transaction cost of finding a new borrower. (*See* ECF No. 1860 at 15-16). Ultra also raised concerns that the hypothetical would be economically impractical and would potentially subject the borrower to "unlimited liability upon prepayment." (ECF No. 1860 at 14). Qualms about the practicality of the hypothetical aside, Ultra's characterization of the reinvestment fee is a mere transaction cost does not distinguish the fee from the Make-Whole Amount.

The sole economic difference between the hypothetical and the Make-Whole in this case is that the Make-Whole in this case eliminates the broker. Rather than paying the broker to find the alternative borrower, the Make-Whole recipients accept the identical amount of funds. The compensation to the borrower represents liquidated damages stemming from prepayment, whether it is structured as a Make-Whole or a reinvestment fee. The hypothetical illustrates an economic equivalent of the make whole, and it is apparent that neither the hypothetical nor the Make-Whole is unmatured interest.

### *5. The Make-Whole Amount is not the Economic Equivalent of Unmatured Interest*

Ultra argues that the Make-Whole is the economic equivalent of unmatured interest. This is incorrect. Applying the Court's definitions, the economic equivalent of interest must be the economic equivalent of consideration for the use or forbearance of another's money accruing over time. A claim is the economic equivalent of unmatured interest if, in economic reality, it is the economic substance of unmatured interest. *Pengo*, 962 F.2d at 546. If it is the economic equivalent of interest, the claim must be disallowed regardless of the parties' labels. *See id.* The Make-Whole Amount is not an economic equivalent of unmatured interest.

Economic substance, rather than party labels, determines whether an amount is unmatured interest. *In re Chateaugay Corp.*, 109 B.R. 51, 57 (Bankr. S.D.N.Y. 1990) ("[T]he essential factor guiding this Court in making its determination . . . is the underlying economic substance of the transaction."). If a debt fits within the definition of unmatured interest, it is disallowed by § 502(b)(2), regardless of its superficial label. *See id.*

The Fifth Circuit expressly adopted that understanding in *Pengo*, 962 F.2d at 543. In *Pengo*, the Fifth Circuit held that an unamortized original issue discount ("OID") is disallowed by § 502(b)(2) because it is the economic equivalent of unmatured interest. *Id.*

OID notes are issued for less than face value. For example, an issuer might receive $90 for a note with a

face value of $100. The issuer receives $90 up front, but agrees to repay $100 over the life of the note. That $10 difference would, in economic fact, be compensation "for the delay and risk involved in the ultimate repayment of monies loaned." *Id.* at 546. The difference is earned over the note's term as it amortizes, and in the event of a bankruptcy petition, unearned amounts are the economic equivalent of unmatured interest. *Id.*

In deciding that unamortized OID fell within the scope of unmatured interest, the Fifth Circuit followed an analysis similar to what this Court applies here. First, it explained the mechanics of OID loans, noting that OID "is in the nature of additional interest," and that it amortizes over time. *See id.* at 546 (internal quotations omitted). Next, while the Fifth Circuit did not define unmatured interest, it stated that OID compensates a lender for "the delay and risk involved" with lending money. *Id.* Because the economic facts showed that unamortized OID fit within the meaning of unmatured interest, it was disallowed under § 502(b)(2). *Id.* ("The 'unmatured interest' bankruptcy rule and the economic notion of 'original issue discount' intersect to form the legal nexus for our decision-making."). Put simply, the Fifth Circuit compared the mechanics of OID to a common understanding of unmatured interest. Because OID's round peg fit within unmatured interest's round hole, OID was the economic equivalent of unmatured interest. *See id.*

The *Pengo* court also noted that both the Senate and House Reports describe OID as a form of unmatured interest disallowed under § 502(b)(2). *Id.*

(citing S. Rep No. 989, 95th Cong., 2d Sess. 62, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5848 (noting § 502 disallows "any portion of prepaid interest that represents an original discounting of the claim, yet that would not have been earned on the date of bankruptcy"); H.R. Rep. No. 595, 95th Cong., 2d Sess. 352, *reprinted in* U.S.C.C.A.N. 5963, 6308).

Applying *Pengo* to the case at hand, the Make-Whole Amount is distinguishable from OID and is not an economic equivalent of unmatured interest. The Make-Whole Amount does not compensate the Note Claimants for "the delay and risk involved" with lending money. *Id.* Rather than compensating for delay or risk, the Make-Whole Amount compensates for actual pecuniary loss. Further, while the timing of prepayment affects damages suffered, the Make-Whole Amount does not amortize or accrue over time. Unlike OID, the Make-Whole Amount is a square peg, one which cannot be shoved into a round hole. The Make-Whole Amount is not the economic equivalent of unmatured interest.

*In re Doctors Hospital of Hyde Park, Inc.*, 508 B.R. 697 (Bankr. N.D. Ill. 2014), which Ultra relies on, provides an unpersuasive comparison of OID and make-wholes. There, the bankruptcy court held that a make-whole (described as a "Yield Maintenance Premium") was both a liquidated damages clause and unmatured interest. *Id.* Without further explanation, *Doctors Hospital* stated that "[n]othing about the nature of liquidated damages necessarily excludes interest, or vice versa." *Id.* The court likened the make-whole to OID. *Id.* at 705 (citing *In re Chateaugay*, 961 F.2d at 380). However, that

comparison was based on the understanding that "[b]oth OID and yield maintenance premiums are one-time charges to compensate the lender for lending . . . ." *Id.*

The Court respectfully disagrees with *Doctors Hospital* for two reasons. First, as discussed, this Make-Whole Amount is distinguishable from OID. Contrary to the *Doctors Hospital* court's assertion, OID is not a one-time charge. OID is amortized and, like interest, it is earned over the term of the loan. *See Pengo*, 962 F.2d at 546. The Make-Whole Amount is distinguishable from interest because it does not accrue over time. Second, while "[n]othing about the nature of liquidated damages *necessarily* excludes interest," *Doctors Hospital* fails to explain how this Make-Whole Amount could be considered interest. *See Doctors Hosp.*, 508 B.R. at 706. Beyond the false parallel between make-wholes and OID as one-time charges, *Doctors Hospital* provides no persuasive explanation why make-wholes "serve the purpose of interest in economic reality." *Id.* at 705. The law in this circuit is that § 502(b)(2) disallows amounts seeking the economic equivalent of unmatured interest. The Make-Whole Amount does not compensate for the use or forbearance of money, and it does not accrue over time. It is not the economic equivalent of unmatured interest.

Ultra argues that the Make-Whole Amount merely compensates the Note Claimants for a portion of the unmatured interest owed on the petition date. In Ultra's view, the Note Claimants were owed a certain amount of unmatured interest under the Notes as of the petition date, and the Make-Whole Amount

is equivalent to a slice of that unmatured pie. Therefore, according to Ultra, the Make-Whole Amount must be disallowed. Section 502(b)(2) disallows a claim "to the extent that" it is for unmatured interest. Ultra is correct that any claim for unmatured interest must be disallowed, whether that claim represents the full amount of unmatured interest owed under nonbankruptcy law or only a portion thereof. However, the Fifth Circuit noted that when analyzing whether a make-whole is unmatured interest, "much depends on the dynamics of the individual case. *Ultra*, 943 F.3d at 765. Resolution of those dynamics requires consideration of "multifarious, fleeting, special, narrow facts that utterly resist generalization." *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. At Lakeridge, LLC*, 138 S. Ct. 960, 968 n.6 (2018); *see Ultra*, 943 F.3d at 765. Ultra's view oversimplifies the Make-Whole Amount and fails to engage with the economic reality that the Make-Whole Amount does not compensate the Note Claimants for the use or forbearance of money.

As discussed, the Make-Whole Amount compensates the Note Claimants for damages based on the prepayment or acceleration of the Notes. Absent the Make-Whole, if Ultra prepaid the Notes, the Note Claimants would be deprived of the interest expected to accrue between the date of prepayment and the original maturity date of the Notes. That amount would undoubtedly be unmatured interest. It also equals the maximum amount of compensable damages under the Make-Whole. Ultra believes that fact leads to the conclusion that the Make-Whole

Amount is the economic equivalent of unmatured interest. That conclusion is incorrect.

The Make-Whole Amount does not become the economic equivalent of unmatured interest merely because the Make-Whole formula references interest rates. The differential between the contractual interest rate and the reinvestment interest rate is the logical measure of a noteholder's damages. Courts recognize that reference to an interest rate differential does not transform a make-whole into unmatured interest. *See In re Sch. Specialty, Inc.*, No. 13-10125 (KJC), 2013 WL 1838513, at *4 (Bankr. D. Del. Apr. 22, 2013) (allowing claim for make whole "calculated by discounting future interest payments using an interest rate tied to Treasury Note performance").

It is neither surprising nor dispositive that the high-water mark of damages a lender may suffer when a loan is paid off ahead of schedule is equal to the expected interest lost. From a lender's perspective, interest is the benefit of the bargain. However, contrary to Ultra's argument, the Make-Whole formula does not provide the Note Claimants with a portion of the full amount owed for the use or forbearance of the Note Claimants' money. Rather, the Make-Whole builds the upper limit of unmatured interest into a formula designed to compensate the Note Claimants for actual damages. The Make-Whole does not give the Note Claimants a slice of the unmatured interest pie. Unmatured interest is merely an ingredient in the liquidated damage pie.

The Make-Whole formula is also not an example of clever attorneys drafting around the provisions of § 502. The Make-Whole measures the Note Claimants

potential economic loss based on the remaining principal at the time of acceleration and a comparison between the interest rates under the Notes and available reinvestment rates. The resulting Make-Whole Amount is not a cost for the use or forbearance of the Noteholders' money, which had not yet accrued on the petition date. Nor is it the economic equivalent of that amount. It is a principled economic estimation of the damages suffered by the Note Claimants after Ultra defaulted on the Notes.

Ultra advances a theory where the economic equivalent of unmatured interest equates to anything Ultra believes is similar to unmatured interest. The parameters of Ultra's broad view of an economic equivalent are uncertain. What is certain is that Congress disallowed claims for "unmatured interest" in bankruptcy. 11 U.S.C. § 502(b)(2). Just as a federal court cannot narrow the scope of § 502(b)(2) by allowing some forms of unmatured interest, a court cannot widen the scope by disallowing claims that are not for unmatured interest. *Pengo* teaches that unmatured interest is determined based on economic reality, not by contractual labels. 962 F.2d at 546 ("For 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.'"). Despite this, Ultra reads *Pengo* as expanding § 502(b)(2) to disallow unmatured interest *and* other amounts that (in its view) seem similar to unmatured interest. (*See* ECF No. 1860 at 10 (arguing unmatured interest includes "its economic substitutes")). Yet, Congress was clear that § 502(b)(2) disallows only unmatured interest.

Ultra resists defining unmatured interest because "much depends on the dynamics on the individual case." (ECF No. 1860 at 7 (quoting *Ultra*, 943 F.3d at 765)). Ultra argues that because "[t]he Make-Whole Amount was expressly intended to serve as an *economic substitute* for the Creditors' expected future interest payments," the Make-Whole Amount is the economic equivalent of unmatured interest. (ECF No. 1860 at 11 (emphasis added)). However, without a workable definition of unmatured interest, it is impossible to determine whether a make-whole is the economic equivalent of unmatured interest.

Notably, Ultra frequently stressed that *Pengo* disallows claims for the *economic equivalent* of unmatured interest. Yet, at various points in its briefing, Ultra's reading of *Pengo* shifts. At times, Ultra suggests that *Pengo* disallows claims for the *economic substitute* of unmatured interest. (*E.g.*, ECF No. 1860 at 10 ("In short, the critical lesson of *Pengo* is that 'unmatured interest' under § 502(b)(2) must be defined to include not only amounts traditionally labeled as 'interest,' but also amounts that represent an economic substitute for traditional interest."); ECF No. 1834 at 16 ("[T]he Make-Whole Amount in the MNPA was expressly designed to serve as an economic substitute for unmatured interest . . . .")). An *equivalent* and a *substitute* are not, for lack of a better word, equivalent.

The reason for this subtle shift in terminology is clear: the Make-Whole Amount cannot be categorized as the equivalent of interest. The Make-Whole Amount does not compensate the Note Claimants for the use or forbearance of their money. It is not interest

and it is not the economic equivalent of interest. Ultra attempts to avoid this issue by framing *Pengo* as disallowing substitutes for unmatured interest. Whether or not the Make-Whole Amount is a "substitute" for unmatured interest, *Pengo* says nothing about substitutes. *Pengo* disallows equivalents because an equivalent to unmatured interest is economically identical to unmatured interest. That is what Congress chose to disallow. A substitute is not an equivalent. When a restaurant diner substitutes a $10.00 slice of salmon for $10.00 of chopped grilled chicken on a Caesar salad, it is not because salmon and grilled chicken (even at the equivalent price) are the same. She does so because they are different. Section 502(b)(2) disallows claims for unmatured interest, not amounts that parties contract to pay instead of interest. The Make-Whole Amount is allowed under § 502 of the Bankruptcy Code.

***b. The Solvent-Debtor Exception***

The second question before the Court is whether the "solvent-debtor exception" survived the enactment of the Bankruptcy Code, and if so, whether the exception entitles the Class 4 Creditors to post-petition interest at the MNPA and RCF default rates.[3]

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[3] Because the Make-Whole Amount is allowed under § 502 of the Bankruptcy Code, the Court does not decide whether the solvent-debtor exception also permits recovery of the Make-Whole Amount. While the solvent-debtor exception is rooted in a court's duty to enforce creditors' contractual rights, the exception has traditionally been utilized only to award post-petition interest. Because the Make-Whole Amount is not interest, it is unclear whether the solvent-debtor exception provides an

The answer to both questions is yes. The parties agree that Ultra was "massively solvent" at confirmation, and that the Class 4 Claimants are entitled to receive some amount of post-petition interest. Ultra argues that post-petition interest should be limited to the federal judgment rate. However, "absent compelling equitable considerations, when a debtor is solvent, it is the role of the bankruptcy court to enforce the creditors' contractual rights." *In re Dow Corning Corp.*, 456 F.3d 668, 679 (6th Cir. 2006). For the reasons that follow, this Court upholds the Class 4 Claimants' contractual rights.

***1. The Historical Basis of the Solvent-Debtor Exception***

Under § 502(b)(2), interest as part of a claim ceases to accrue upon the filing of a bankruptcy petition. However, in some circumstances, creditors may demand post-petition interest on their claims. *See* 11 U.S.C. § 506. Historically, one such circumstance allowed unsecured creditors of a solvent debtor to receive post-petition interest on their claims.

Courts have heard disputes between solvent debtors and their creditors over the right to post-petition interest for nearly three hundred years. Over the centuries, courts developed a solvent-debtor exception to the general bankruptcy rule that interest stops accruing on the petition date. The rationale for the exception is as obvious as it is uncontroversial: an individual with the means to pay his debts in full should be required to do so. *See Johnson v. Norris*, 190

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alternative basis for the Note Claimants to recover the Make-Whole Amount.

F. 459, 466 (5th Cir. 1911) ("The bankrupts should pay their debts in full, principal and *interest to the time of payment*, whenever the assets of their estates are sufficient." (emphasis added)).

The solvent-debtor exception, rooted in English bankruptcy law, long predates the Bankruptcy Code. Lorde Chancellor Hardwicke first recognized the exception in *Bromley v. Goodere*, (1743) 1 Atkyns 75. There, certain creditors held notes with an entitlement to interest. Following a thirty-year bankruptcy proceeding, a surplus remained after the creditors were paid the full principal of the notes, as well as contractual interest up to the date of the bankruptcy. *Id.* at 79. Lord Chancellor Hardwicke held that, due to the surplus assets, the creditors were entitled to recover post-bankruptcy interest before any distribution could be made to the debtor's heirs. *Id.* Subsequent English cases adopted this solvent-debtor exception. *E.g.*, *Ex parte Mills*, 2 Vesey, Jr., 295; *Ex parte Clarke*, 4 Vesey, Jr., 676.

Congress exercised its Constitutional power to adopt uniform bankruptcy law in 1898, when it passed the Bankruptcy Act.[4] U.S. Const. art. I. § 8, cl. 4; Bankruptcy Act of 1898, ch. 541, 30 Stat. 544. Interpreting the Bankruptcy Act, the Supreme Court "naturally assume[d] that the fundamental principles upon which [England's bankruptcy system] was administered were adopted by [the United States]

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[4] Prior to passage of the Bankruptcy Act of 1898, Congress passed three short-lived bankruptcy statutes: The Bankruptcy Act of 1800, the Bankruptcy Act of 1841, and the Bankruptcy Act of 1867. Those Acts were repealed after three, two, and eleven years, respectively.

when we copied th[at] system." *Sexton v. Dreyfus*, 219 U.S. 339, 344 (1911). One fundamental principle of English bankruptcy adopted in the Bankruptcy Act was the suspension of interest accrual as of the petition date. *City of New York v. Saper*, 336 U.S. 328, 330-31 (1949); *see also Dreyfus*, 219 U.S. at 344 (stating "[n]o one doubts interest on unsecured debt stops" accruing on the petition date).

The Bankruptcy Act expressly disallowed unmatured interest as part of a claim. Section 63 of the Bankruptcy Act dealt with claims allowance, and provided:

> Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability . . . 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* . . . (5) provable debts reduced to judgments after the filing of the petition . . . *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, 52 Stat. 840 (repealed) (emphasis added). Section 63 disallowed post-petition on both secured and unsecured claims. *See id.*; *In re Al Copeland Enters., Inc.*, 133 B.R. 837, 840 (Bankr. W.D. Tex. 1991).

Despite that fundamental principle, the solvent-debtor exception entitled creditors of a solvent debtor to recover post-petition interest. Courts consistently applied the solvent-debtor exception under the Bankruptcy Act. *Am. Iron & Steel Mfg. Co. v.*

*Seaboard Air Line Ry.*, 233 U.S. 261, 266-67 (1914) ("Even in bankruptcy . . . it has been held, in the rare instances where the assets ultimately proved sufficient for the purpose, that creditors were entitled to interest accruing after adjudication."); *see also Sword Line, Inc. v. Indus. Comm'r of N.Y.*, 212 F.2d 865, 870 (2d Cir. 1954) ("[I]nterest ceases upon bankruptcy in the general and usual instances noted and unless the bankruptcy bar proves eventually nonexistent by reason of the actual solvency of the debtor.").

The Bankruptcy Act's treatment of unmatured interest was nearly identical to § 502(b)(2). Prior to Congresses' adoption of the Bankruptcy Code, courts understood that "in the case of a solvent bankrupt the bankruptcy court should be guided by the contract between the bankrupt and its creditors rather than by the distinct principles of equity jurisprudence." *In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 791 F.2d 524, 531 (7th Cir. 1986).

In *Johnson v. Norris*, the Fifth Circuit squarely held that creditors of a solvent debtor may recover post-petition interest, notwithstanding the plain text of § 63 of the Bankruptcy Act. 190 F. at 460 ("The rule in bankruptcy for the computation of interest on claims to the date of filing the petition *has no application* to a solvent estate." (emphasis added)). The trustee in *Norris* had $88,432 on hand after paying all creditors in full, including pre-petition interest. *Id.* at 461. The debtors contended that the creditors were "entitled to collect only the principal of their claims and interest to the date of the filing of the

voluntary petition, and that therefore the entire surplus should be returned to the bankrupts." *Id.*

The Fifth Circuit noted that in a typical case there is no dispute that § 63 disallows post-petition interest. *Id.* ("Ordinarily no question as to subsequently accruing interest can arise, for it is a very rare occurrence that a surplus is left after paying the principal and interest to the date of the filing of the petition."). However, that general rule promoted equitable distribution of limited assets, a consideration that was inapplicable to a solvent estate. *Id.* at 462 ("It was not intended to be applied to a solvent estate. It was not in the contemplation of Congress that a solvent estate would be settled in the bankruptcy courts."). Thus, the Fifth Circuit applied the solvent-debtor exception and held that "[w]hether 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 the estate are sufficient." *Id.* at 466.

Multiple circuit courts followed *Norris*' lead. *E.g.*, *Littleton v. Kincaid*, 179 F.2d 848, 852 (4th Cir. 1950) ("Ordinarily interest on claims against a bankrupt estate runs to the filing of the petition in bankruptcy . . . [pursuant to] Section 63 . . . . [But] when [solvency] . . . occurs interest is payable out of this surplus to the date of payment." (citations omitted)); *Brown v. Leo*, 34 F.2d 127, 127 (2d Cir. 1929) ("[T]he time when interest stops . . . has already been fixed as a matter of law as the date of the filing

of the petition . . . . But this estate will be solvent, and neither the rule nor the reason for stopping interest at the date of the filing of the petition applies to an estate which turns out to be solvent." (citations omitted)). Some courts went further and held that there is an *obligation* to enforce the solvent-debtor exception in cases where a claim included a contractual right to post-petition interest. *See Ruskins v. Griffiths*, 269 F.2d 827, 832 (2d Cir. 1959) ("[W]here there is no showing that the creditor entitled to the increased interest caused any unjust delay in the proceedings, it seems to us the opposite of equity to allow the debtor to escape the expressly-bargained-for" contractual interest provision); *In re Int'l Hydro- Elec. Sys.*, 101 F. Supp. 222, 225 (D. Mass. 1951) ("Fairness requires that the debenture holders who were compelled to wait for their interest payments should receive the compensation which the indenture provided they should be paid in such an eventuality.").

### *2. Adoption of the Bankruptcy Code did not Abrogate the Solvent-Debtor Exception*

There is no doubt that courts recognized a solvent-debtor exception to § 63 of the Bankruptcy Act. When Congress enacted the Bankruptcy Code, Congress confirmed that section 502(b)(2) incorporated the principle that "interest stops accruing at the date of the filing of the petition." S. Rep. No. 95-989, at 63 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, at 6309. In fact, § 502(b)(2) is "closely analogous" to § 63 of the Bankruptcy Act. *In re Dow Corning Corp.*, 244 B.R. 678, 684 (Bankr. E.D. Mich. 1999). The primary change from pre-Code practice was the adoption of § 506(b), which allows over-secured creditors to

recover postpetition interest up to the value of the collateral in all cases. *Rake v. Wade*, 508 U.S. 464, 471 (1993). Absent clear Congressional intent, provisions of the Bankruptcy Code did not abrogate universally recognized legal principles under the Bankruptcy Act. *E.g.*, *Gladstone v. U.S. Bancorp*, 811 F.3d 1133, 1139-40 (9th Cir. 2016). Nothing in the legislative history of the Bankruptcy Code or § 502(b)(2) suggests that Congress intended to defang the solvent-debtor exception.

Parsing legislative history is always a murky business. However, 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. The Supreme Court has made clear that it "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." *Cohen v. de la Cruz*, 523 U.S. 213, 221 (1998); *see also 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."). Congress gave no indication that it intended to erode the solvent debtor exception.

Equitable considerations support the solvent-debtor exception. Limiting claims to prepetition interest is of overwhelming consequence when creditors must share a limited pool of assets, but that limitation is without cause when the debtor can afford to pay all of its debts. *UPS Cap. Bus. Credit v. Gencarelli (In re Gencarelli)*, 501 F.3d 1, 7 (1st Cir.

2007); *In re Chemtura Corp.*, 439 B.R. 561, 605 (Bankr. S.D.N.Y. 2010) ("With a solvent debtor, issues as to fairness amongst creditors, in sharing a limited pie, no longer apply."). Instead, when the debtor is solvent, the equitable tug exists between unsecured creditors and the debtor's equity holders. The solvent-debtor exception ensures that the debtor does not receive a windfall at the expense of its creditors. *See In re Carter*, 220 B.R. 411, 416-17 (Bankr. D.N.M. 1998) ("[I]f the Court were to modify the originally contracted for [default] interest rate . . . , it would result in a windfall to the Debtor . . . at the [creditors'] expense.").

*Norris* recognized that rationale over one hundred years ago, and it remains persuasive to this day. Nothing in the legislative history surrounding the adoption of the Bankruptcy Code suggests that Congress intended to eliminate the solvent-debtor exception. This may be unsurprising given the *Norris* court's recognition that bankruptcy law "was not intended to be applied to a solvent estate. It was not in the contemplation of Congress that a solvent estate would be settled in the bankruptcy courts." 190 F. at 462. That observation applies as persuasively to Congresses' deliberation of the Bankruptcy Code as it did to deliberations of the Bankruptcy Act. There is no reason why Congress would allow solvent debtors to wield bankruptcy as a sword to slash valid debts. The solvent-debtor exception was "sufficiently widespread and well recognized" under the Bankruptcy Act to survive adoption of the Bankruptcy Code, absent a clear legislative intent to the contrary. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 10 (2000). No such intent was present

when Congress passed the Bankruptcy Code. Elimination of the solvent-debtor exception would allow solvent debtors to realize windfalls by virtue of bankruptcy, while reneging on valid contractual debt. *Id.* Neither legal, equitable, or contractual principles favor such an outcome.

Numerous courts recognize that the solvent-debtor exception survived enactment of the Bankruptcy Code. *See, e.g.*, *In re Gencarelli*, 501 F.3d at 7 ("[T]he equities strongly favor holding the [solvent] debtor to his contractual obligations as long as those obligations are legally enforceable under applicable nonbankruptcy law."); *In re Dow Corning Corp.*, 456 F.3d 668, 679 (6th Cir. 2006) (holding solvent debtor must pay post-petition interest and remanding to determine whether contractual default rate or contractual non-default rate applied); *In re Schoeneberg*, 156 B.R. 963, 972 (Bankr. W.D. Tex. 1993) (in a solvent debtor case the "weight of prior case law . . . convinces this Court that, when there was a prepetition contract between the parties that provided for interest, it is that contract rate which should be applied"); *In re Beck*, 128 B.R. 571, 573 (Bankr. E.D. Okla. 1991) ("The scale balancing the equities . . . is overwhelmingly tilted toward restoring the creditor to as near a position as the creditor would have occupied absent bankruptcy before benefitting the Debtors with surplus funds.").

Legislative history after the adoption of the Bankruptcy Code also shows that the solvent-debtor exception enjoys continued vitality. The history of § 1124 of the Bankruptcy Code indicates that Congress intended that a solvent debtor's creditors

should receive post-petition interest. Section 1124 sets out the conditions that must be satisfied for a class of claims to be unimpaired in a chapter 11 plan. Before 1994, § 1124(3) stated that a claim was unimpaired where "the holder of such claim . . . receive[d] . . . cash equal to . . . the allowed amount of such claim." 11 U.S.C. § 1124(3) (1988). Congress removed that provision in direct response to a bankruptcy court's decision in *In re New Valley Corp.*, 168 B.R. 73 (Bankr. D.N.J. 1994).

In *New Valley*, the court confirmed a solvent debtor's chapter 11 plan. The plan left a class of unsecured creditors unimpaired, despite limiting the class' claims to prepetition interest while providing a recovery to a junior class. The debtor's argued that because § 1124(3) only required that unimpaired creditors receive the *allowed* amount of their claims, paying postpetition interest was not necessary. The bankruptcy court agreed and confirmed the plan.

Congress quickly rejected that result by removing § 1124(3) from the Bankruptcy Code. The House Reporter states that:

> The principal change in this section . . . relates to the award of postpetition interest. In a recent Bankruptcy Court decision in *New Valley*, unsecured creditors were denied the right to receive post-petition interest on their allowed claims even though the debtor was liquidation and reorganization solvent. The *New Valley* decision applied section 1124(3) of the Bankruptcy Code literally by asserting . . . that a class that is paid the

> allowed amount of its claims in cash on the effective date of a plan is unimpaired under section 1124(3), therefore is not entitled to vote, and is not entitled to receive postpetition interest . . . . In order *to preclude this unfair result in the future*, the Committee finds it appropriate to delete section 1124(3) from the Bankruptcy Code.

H.R. Rep No. 103-835, at 47-48 (1994), reprinted in 1994 U.S.C.C.A.N. 3340. The repeal of § 1124(3) illustrates that, by adopting the Bankruptcy Code, Congress did not intend to eliminate the solvent-debtor exception. The principle that unsecured creditors of a solvent debtor are entitled to post-petition interest continues to exist under the Bankruptcy Code. Congress expressly recognized that the amendment after *New Valley* was meant to "preclude" the "unfair result" of depriving such creditors of post-petition interest "in the future." *Id.*

The Class 4 Claimants 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. Moreover, depriving the Class 4 Claimants of post-petition interest would run counter to a "monolithic mountain of authority," developed over nearly three hundred years in both English and American courts, holding that a solvent debtor must make its creditors whole. *See Ultra*, 943 F.3d at 760. Congresses' amendment to the Bankruptcy Code after the *New Valley* decision supports the conclusion that the solvent-debtor exception remains.

### *3. The Solvent-Debtor Exception is not Rooted in § 105(a)*

This review of competing statutes, legislative history, amendments to the Code, and case law may appear both sprawling and technical. These are the tools available to interpret the Bankruptcy Code. The task is delicate. The mechanics of the solvent-debtor exception and the precise manner of its incorporation into the Bankruptcy Code is similarly nuanced. However, it is crucial to remember that the exception's reason for existence is plain: a "fortunate" debtor must repay its creditors.

While the solvent-debtor exception survives, it must be applied within the parameters of the Bankruptcy Code. *See Gencarelli*, 501 F.3d at 7. A bankruptcy court is undoubtedly forbidden from exercising equitable powers "in contravention of the Code." *Law v. Siegel*, 571 U.S. 415, 423 (2014); *see* 11 U.S.C. § 105(a). Any explanation of the exception as a gloss to § 502(b)(2), allowing unmatured interest as part of a claim, is foreclosed by *Law v. Siegel*. Such an understanding plainly contravenes the Bankruptcy Code. Thus, the Court must look to other provisions of the Bankruptcy Code to understand the solvent-debtor exception's operation.

This Court is mindful of the Supreme Court's admonishment of bankruptcy courts using roving equity to disregard provisions of the Bankruptcy Code. *Id.* However, the Fifth Circuit has "caution[ed] against an overly literal interpretation of the Bankruptcy Code," instead encouraging interpretations based on "careful review of the statutory language, legislative history, and public policy considerations . . . ."

*CompuAdd Corp. v. Tex. Instruments Inc. (In re CompuAdd Corp.)*, 137 F.3d 880, 882 (5th Cir. 1998). *Law v. Siegel* dealt with a bankruptcy court's use of its equitable powers to rewrite the Code based on what that court thought was fair. 517 U.S. at 423. The solvent-debtor exception, while equitable in nature, does not lend itself to whimsical application by courts. It is triggered when one concrete fact exists: the estate's assets exceed its liabilities. Its application is similarly straightforward: creditors are paid the postpetition interest to which they are legally or contractually entitled.

***4. The Best Interest of Creditors Test is not the Source of the Exception***

Ultra suggests that Congress codified some aspects of the solvent-debtor exception in § 1129(a)(7) of the Bankruptcy Code, but that suggestion lacks merit. Ultra's vision of the solvent-debtor exception under the Bankruptcy Code is that unimpaired creditors are simply entitled to the same post-petition interest as impaired creditors. There is neither a textual nor historical basis for that assertion.

Section 1129(a)(7), commonly known as the best interest of creditors test, prohibits confirmation of a chapter 11 plan if a dissenting impaired class would receive less than it would in a chapter 7 liquidation. Because an unsecured creditor in chapter 7 is entitled to receive postpetition "interest at the legal rate" before funds may be distributed to the debtor, Ultra argues that Congress incorporated the solvent-debtor exception into the best interest of creditors test. *See* 11 U.S.C. § 726(a)(5).

One problem with Ultra's argument is that the best interest of creditors test already existed in the Bankruptcy Act. Section 366(2) of the Bankruptcy Act provided that "[t]he court shall confirm an arrangement if satisfied that . . . it is for the best interests of the creditors." Bankruptcy Act of 1938, ch. 575, § 366, 52 Stat. 840, 911. Section 366(2) was "broadly interpreted to require a comparison between what creditors would receive under the composition offer and what they would receive in liquidation of the estate. Where the composition offer would pay creditors considerably less than they might reasonably expect to realize in liquidation, the composition . . . was not for the best interest of creditors." *In re Gilchrist Co.*, 410 F. Supp. 1070, 1074 n.2 (E.D. Pa. 1976) (citation omitted).

Section 1129(a)(7) of the Bankruptcy Code restates the test found in § 366 of the Bankruptcy Act. *See In re SM 104 Ltd.*, 160 B.R. 202, 219 (Bankr. S.D. Fla. 1993) ("Section 1129(a)(7) sets out the financial minimum that assenting creditors in an assenting class can impose on dissenting creditors within that class. This minimum was drawn from the best interests test that came to the Bankruptcy Code from the old [Bankruptcy Act].").

Again, the solvent-debtor exception was widely recognized under the Bankruptcy Act. The best interest of creditors test also existed under the Bankruptcy Act. Section 502(b)(2) and § 1129(a)(7) of the Bankruptcy Code closely mirror their predecessor provisions in the Bankruptcy Act. Nothing in the legislative history suggests Congress intended to eliminate the solvent-debtor exception or that

Congress incorporated it into § 1129(a)(7) of the Bankruptcy Code. *See In re Dow Corning*, 244 B.R. at 684 (citing H.R. Rep. No. 95-595, at 353 (1977)).

A second problem with Ultra's argument is based upon the plain text of the Bankruptcy Code. Section 1129(a)(7) expressly applies only to impaired creditors in a cramdown scenario. Nothing in the text of the Bankruptcy Code applies § 1129(a)(7) to unimpaired creditors. Nor does any provision of the Bankruptcy Code give unimpaired creditors a right to interest at the legal rate under § 726(a)(5). Instead, the Bankruptcy Code is silent regarding an unimpaired creditor's right to post-petition interest.

#### *5. The Fair and Equitable Test is not the Source of the Exception*

The Class 4 Claimants' argument that the solvent-debtor exception is rooted in the fair and equitable test under § 1129(b)(1) faces a similar issue as Ultra's argument regarding the best interest of creditors test. Section 1129(b)(1) requires a plan to be "fair and equitable" before a court may allow confirmation. 11 U.S.C. § 1129(b)(1). "'Fair and equitable' (a redundant term) should be pictured vertically, as it 'regulates priority among classes of creditors having higher and lower priorities.'" *In re Tribune Co.*, 972 F.3d 228, 232 (3d Cir. 2020) (quoting Markell, *A New Perspective on Unfair Discrimination in Chapter 11*, 72 Am. Bankr. L.J. 227, 228 (1998)). Thus, a plan must be fair and equitable as between interest holders of higher and lower priorities. *Id.*

As with the best interest of creditors test, the fair and equitable test only applies "with respect to each class of claims or interests that is impaired under, and

has not accepted, the plan." 11 U.S.C. § 1129(b)(1). Nothing in the Bankruptcy Code applies the fair and equitable test to unimpaired classes of creditors. For that reason, a bankruptcy court cannot apply the test to determine whether a plan that limits or denies post-petition interest to unimpaired creditors, but awards a recovery to equity holders, is fair and equitable.

### *6. The Solvent-Debtor Exception Entitles the Class 4 Claimants to Post-Petition Interest*

No single provision of the Bankruptcy Code explains the solvent-debtor exception on its own. However, piecing these Bankruptcy Code provisions together, the solvent-debtor exception works as follows. Section 1124 sets out what the Class 4 Claimants are entitled to receive under Ultra's plan. Section 1124 requires that the plan leaves the Claimants' "legal, equitable, and contractual rights" unaltered. 11 U.S.C. § 1124(1). This encompasses a panoply of rights, derived from a number of different sources. The starting points are the MNPA and RCF, without which the Class 4 Claimants would have no contractual rights, and thus, no legal or equitable rights in this bankruptcy case. The MNPA gives the Note Claimants a contractual right to the Make-Whole Amount and interest at the default rate. The RCF gives the RCF Claimants a right to interest at the default rate. New York law provides the Class 4 Claimants with a legal right to those contractual rights. The full amount of the Make-Whole Amount and interest at the default rates represent the Class 4 Claimants maximum limit that the plan would distribute.

Of course, § 502(b)(2) supersedes New York law and the parties' contract by restricting the legal right to receive unmatured interest in bankruptcy. The Fifth Circuit made clear that any limitation on the Class 4 Claimants' claims imposed by the Bankruptcy Code does not result in impairment. *Ultra*, 943 F.3d at 762. In other words, § 502(b)(2) subtracts unmatured interest from the ceiling of recovery provided by New York law, the MNPA, and the RCF. At the very least, the Class 4 Creditors must receive their full allowed claims in order to be unimpaired.

However, the Class 4 Creditors possess two important equitable rights as well. First, they have an equitable right, based within the Bankruptcy Code, to be treated better than similarly situated impaired creditors. *See In re Energy Future Holdings*, 540 B.R. at 119 (quoting *In re PPI Enters. (U.S.), Inc.*, 324 F.3d 197, 202-203 (3d Cir. 2003)). Impaired creditors in a solvent chapter 11 must receive at least their full allowed claim plus interest at the legal rate. *See id.* The Bankruptcy Code is silent as to whether unimpaired creditors have a right to post-petition interest. This creates ambiguity because equity dictates that unimpaired creditors be treated no less favorably than impaired creditors.

Second, the Class 4 Claimants have an equitable right to be paid the full amount they are validly owed before Ultra's equity holders receive any recovery. *See Norris*, 190 F. at 466. This equitable right is the root of the solvent-debtor exception. In a typical case, the right vanishes because other creditors must share a limited pot of assets. That is not so when the debtor is solvent. *Id.* at 462. When the struggle is between

creditors and equity holders, as opposed to creditors and creditors, the equitable right is critical.

The Bankruptcy Code's ambiguity leaves an unimpaired unsecured creditor's right to post-petition interest uncertain. Because an unimpaired creditor has equitable rights to be treated no less favorably than an impaired creditor and to be paid in full before the debtor realizes a recovery, a plan denying post-petition interest in a solvent debtor case alters the equitable rights of an unimpaired creditor under § 1124(1).

Viewed in this light, the solvent-debtor exception is not simply a judicial gloss allowing courts to bypass § 502(b)(2). Instead, the exception recognizes that the equitable prong of § 1124 applies differently when the debtor is solvent. *In re Energy Future Holdings*, 540 B.R. at 111 ("The receipt of post-petition interest, thus, does not arise as part of the allowed amount of the claim but, rather, as a requirement to confirmation."). The solvent-debtor exception has existed throughout the history of bankruptcy law and § 1124 provides a means to implement the exception within the plan confirmation framework of the Bankruptcy Code. Because impaired creditors are expressly entitled to post-petition interest, unimpaired creditors of a solvent chapter 11 debtor, who must be no worse off than impaired creditors, should also receive post-petition interest. Further, because creditors in a solvent case need not share limited assets, there is no equitable reason to deny unimpaired creditors post-petition interest.

### *7. The Class 4 Claimants Must Receive Interest at the Default Rates*

The final question is what post-petition interest rate the Class 4 Claimants are entitled to receive. The Claimants argue that they must be paid interest at the MNPA and RCF default rates. On the other hand, Ultra believes the Claimants must be limited to interest at the federal judgment rate. Courts are split as to whether the reference to interest "at the legal rate" under § 726(a)(7) means the federal judgment rate or a contractual rate. *Compare In re Cardelucci*, 285 F.3d 1231 (9th Cir. 2002), *with In re Carter*, 220 B.R. 411 (Bankr. D.N.M. 1998).

The Court need not pin down the meaning of the "legal rate" at this time because the Class 4 Claimants have a right to receive interest at the contractual default rates even if interest "at the legal" rate means the federal judgment rate. As discussed, the Class 4 Claimants' right to post-petition interest is based on two key equitable rights. First, the right to receive no less favorable treatment than impaired creditors. And second, the right to have their contractual rights fully enforced. *See In re Dow Corning*, 456 F.3d at 679 ("When a debtor is solvent, the presumption is that a bankruptcy court's role is merely to enforce the contractual rights of the parties, and the role that equitable principles play in the allocation of competing interest is significantly reduced.").

Assuming that the legal rate under § 726(a)(7) is the federal judgment rate, the Class 4 Claimants may nevertheless recover interest at the contractual default rates. If the legal rate is the federal judgment rate, then impaired creditors of a solvent chapter 11

debtor must receive interest at least at the federal judgment rate. The Court cannot adopt a reading of the Bankruptcy Code which places impaired creditors in a more advantageous position than unimpaired creditors. If the Class 4 Creditors are limited to the federal judgment rate, they are worse off than if they were impaired under Ultra's plan. This is because even though the Class 4 Creditors would receive identical interest as a hypothetical impaired class, as an unimpaired class the Claimants were deprived of the right to vote for or against the plan.

Additionally, limiting the Class 4 Claimants to interest at the federal judgment rate contravenes the purpose of the solvent-debtor exception. The underlying purpose of the exception, recognized for nearly three hundred years, is that a debtor must repay its debts in full when it has the means to do so. This means that when a debtor is solvent, "a bankruptcy court's role is merely to enforce the contractual rights of the parties." *In re Dow Corning*, 456 F.3d at 679. Limiting post-petition interest to the federal judgment rate would not enforce the contractual rights of the parties in this case. Instead, it would curtail the Class 4 Claimants' recovery, while allowing Ultra and its equity holders to escape bankruptcy with a windfall.

The solvent-debtor exception is based on the critical public policy consideration that a debtor cannot walk away from bankruptcy with a windfall while creditors walk away with depleted pockets. This Court will not upset three hundred years of established law. The Class 4 Claimants are entitled to

post-petition interest at the MNPA and RCF default rates.

## CONCLUSION

The Court will issue an order consistent with this Memorandum Opinion.

SIGNED October 27, 2020.

[handwritten: signature]
Marvin Isgur
UNITED STATES
BANKRUPTCY JUDGE

*Appendix D*

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

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No. 17-20793

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

*Debtors*,

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

*Appellants*,

v.

AD HOC COMMITTEE OF UNSECURED CREDITORS OF ULTRA RESOURCES, INCORPORATED; OPCO NOTEHOLDERS,

*Appellees*.

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Filed: Jan. 17, 2019

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Before: DAVIS, ENGELHARDT, and OLDHAM, Circuit Judges

## OPINION

ANDREW S. OLDHAM, Circuit Judge:

These bankruptcy proceedings arise from exceedingly anomalous facts. The debtors entered bankruptcy insolvent and now are solvent. That alone makes them rare. But second, the debtors accomplished their unlikely feat by virtue of a lottery-like rise in commodity prices. The combination of these anomalies makes these debtors as rare as the proverbial rich man who manages to enter the Kingdom of Heaven.

The key legal question before us is whether the rich man's creditors are "impaired" by a plan that paid them everything allowed by the Bankruptcy Code. The bankruptcy court said yes. In that court's view, a plan impairs a creditor if it refuses to pay an amount the Bankruptcy Code independently disallows. In reaching that conclusion, the bankruptcy court split from the only court of appeals to address the question, every reported bankruptcy court decision on the question, and the leading treatise discussing the question. We reverse and follow the monolithic mountain of authority holding the Code-not the reorganization plan-defines and limits the claim in these circumstances.

Because the bankruptcy court saw things differently, it ordered the debtors to pay certain creditors a contractual Make-Whole Amount and postpetition interest at a contractual default rate. We

vacate and remand those determinations for reconsideration.

I.

Ultra Petroleum Corporation ("Petroleum") is an oil and gas exploration and production company. To be more precise, it's a holding company. Petroleum's subsidiaries-UP Energy Corporation ("Energy") and Ultra Resources, Inc. ("Resources")-do the exploring and producing. Resources took on debt to finance its operations. Between 2008 and 2010, Resources issued unsecured notes worth $1.46 billion to various noteholders. And in 2011, it borrowed another $999 million under a Revolving Credit Facility. Petroleum and Energy guaranteed both debt obligations.

In 2014, crude oil cost well over $100 per barrel. But then Petroleum's fate took a sharp turn for the worse. Only a year and a half later, a barrel cost less than $30. The world was flooded with oil; Petroleum and its subsidiaries were flooded with debt. On April 29, 2016, the companies voluntarily petitioned for reorganization under Chapter 11. *See* 11 U.S.C. § 301(a). No one argues the companies filed those petitions in bad faith. *See id.* § 1112(b).

During bankruptcy proceedings, however, oil prices rose. Crude oil approached $80 per barrel, and the Petroleum companies became solvent again. So, the debtors proposed a rare creature in bankruptcy-a reorganization plan that (they said) would compensate the creditors in full. As to creditors with claims under the Note Agreement and Revolving Credit Facility (together, the "Class 4 Creditors"), the debtors would pay three sums: the outstanding principal on those obligations, pre-petition interest at a rate of 0.1%, and

post-petition interest at the federal judgment rate. *In re Ultra Petroleum Corp.,* No. 4:16-bk-32202, ECF No. 1308-1 at 25-26 (Bankr. S.D. Tex. 2017). Accordingly, the debtors elected to treat the Class 4 Creditors as "unimpaired." Therefore, they could not object to the plan. 11 U.S.C. § 1126(f).

The Class 4 Creditors objected just the same. They insisted their claims *were* impaired because the plan did not require the debtors to pay a contractual Make-Whole Amount and additional post-petition interest at contractual default rates.

Under the Note Agreement, prepayment of the notes triggers the Make-Whole Amount. That amount is designed "to provide compensation for the deprivation of" a noteholder's "right to maintain its investment in the Notes free from repayment." A formula defines the Make-Whole Amount as the amount by which "the Discounted Value of the Remaining Scheduled Payments with respect to the Called Principal" exceeds the notes' "Called Principal." Remaining scheduled payments include "all payments of [the] Called Principal and interest . . . that would be due" after prepayment (if the notes had never been prepaid). And the discounted value of those payments is keyed to a "Reinvestment Yield" of 0.5% over the total anticipated return on comparable U.S. Treasury obligations.

Under the Note Agreement, petitioning for bankruptcy automatically renders the outstanding principal, any accrued interest, and the Make-Whole Amount "immediately due and payable." Failure to pay immediately triggers interest at a default rate of either 2% above the normal rate set for the note at

issue or 2% above J.P. Morgan's publicly announced prime rate, whichever is greater.

The Revolving Credit Facility does not contain a make-whole provision. But it does contain a similar acceleration clause that made the outstanding principal and any accrued interest "automatically . . . due and payable" as soon as Resources petitioned for bankruptcy. And it likewise provides for interest at a contractual default rate—2% above "the rate otherwise applicable to [the] Loan"—if Resources delayed paying the accelerated amount.

Under these two agreements, the creditors argued the debtors owed them an additional $387 million-$201 million as the Make-Whole Amount and $186 million[1] in post-petition interest. Both sides chose to kick the can down the road. Rather than force resolution of the impairment issue at the plan-confirmation stage, the parties stipulated the bankruptcy court could resolve the dispute by deeming the creditors unimpaired and confirming the proposed plan. Meanwhile, the debtors would set aside $400 million to compensate the Class 4 Creditors if necessary "to render [the creditors] Unimpaired." The bankruptcy court agreed and confirmed the plan.

After confirmation, the parties (and the bankruptcy court) turned back to the question of impairment. The debtors acknowledged the plan did not pay the Make-Whole Amount or provide post-

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[1] This amount includes $106 million in interest on the outstanding principal under the notes, $14 million in interest on the Make-Whole Amount, and $66 million in interest on the outstanding principal under the Revolving Credit Facility, all accruing after the debtors filed their petitions.

petition interest at the contractual default rates. But they insisted the Class 4 Creditors were not "impaired" because federal (and state) law barred them from recovering the Make-Whole Amount and entitled them to receive post-petition interest only at the federal judgment rate.

The Bankruptcy Code provides that a class of claims is not impaired if "the [reorganization] plan . . . leaves unaltered the legal, equitable, and contractual rights to which such claim . . . entitles the holder." 11 U.S.C. § 1124(1). Elsewhere the Code states that a court should disallow a claim "to the extent that [it seeks] unmatured interest." *Id.* § 502(b)(2). The debtors argued the Make-Whole Amount qualified as unmatured interest. But even if it didn't, they said, it was an unenforceable liquidated damages provision under New York law. In either case, something *other than* the reorganization plan itself-the Bankruptcy Code or New York contract law-prevented the Class 4 Creditors from recovering the disputed amounts.

The debtors' argument as to post-petition interest was much the same: The Bankruptcy Code entitles creditors, at most, to post-petition interest at the "legal rate," not the rates set by contract. 11 U.S.C. § 726(a)(5). And the legal rate, they said, is the federal judgment rate under 28 U.S.C. § 1961. Once again, the Code-not the plan-limited the Class 4 Creditors' claims.

The bankruptcy court rejected the premise that it must bake in the Code's provisions before asking whether a claim is impaired. Instead it concluded unimpairment "requires that [creditors] receive all

that they are entitled to under state law." *In re Ultra Petroleum Corp.,* 575 B.R. 361, 372 (Bankr. S.D. Tex. 2017). In other words, if a plan does not provide the creditor with all it would receive under state law, the creditor is impaired even if the Code disallows something state law would otherwise provide outside of bankruptcy. So, the bankruptcy court asked only whether New York law permits the Class 4 Creditors to recover the Make-Whole Amount (concluding it does), and whether the Code limits the contractual post-petition interest rates (concluding it does not). *Id.* at 368-75. It never decided whether the Code disallows the Make-Whole Amount as "unmatured interest" under § 502(b)(2) or what § 726(a)(5)'s "legal rate" of interest means. It ordered the debtors to pay the Make-Whole Amount and post-petition interest at the contractual rates to make the Class 4 Creditors truly unimpaired.

The debtors sought a direct appeal to this Court (rather than the district court) because the case raises important and unsettled questions of law. *See* 28 U.S.C. § 158(d)(2)(A). The bankruptcy court agreed, and so did we. *In re Ultra Petroleum Corp.,* No. 16-32202, 2017 WL 4863015, at *1 (Bankr. S.D. Tex. Oct. 26, 2017). On appeal, we review those legal questions anew. *In re Positive Health Mgmt.,* 769 F.3d 899, 903 (5th Cir. 2014).

## II

We consider first whether a creditor is "impaired" by a reorganization plan simply because it incorporates the Code's disallowance provisions. We think not.

A.

Chapter 11 lays out a framework for proposing and confirming a reorganization plan. Confirmation of the plan "discharges the debtor from any debt that arose before the date of such confirmation." 11 U.S.C. § 1141(d)(l). Because discharge affects a creditor's rights, the Code generally requires a debtor to vie for the creditor's vote first. *Id.* § 1129(a)(8). And when it does, the creditor may vote to accept or reject the plan. *Id.* § 1126(a). But the creditor's right to vote disappears when the plan doesn't actually affect his rights. If the creditor is "not impaired under [the] plan," he is "conclusively presumed to have accepted" it. *Id.* § 1126(f). The question, then, is whether the Class 4 Creditors were "impaired" by the plan.

Let's start with the statutory text. Section 1124(1) says "a class of claims or interests" is not impaired if "the plan . . . leaves unaltered the [claimant's] legal, equitable, and contractual rights." The Class 4 Creditors spill ample ink arguing their rights have been altered. But that's both undisputed and insufficient. The plain text of§ 1124(1) requires that "the plan" do the altering. We therefore hold a creditor is impaired under § 1124(1) only if "*the plan*" itself alters a claimant's "legal, equitable, [or] contractual rights."

The only court of appeals to address the question took the same approach. In *In re PPI Enterprises (U.S.), Inc.,* a landlord (creditor) argued the reorganization plan of his former tenant (debtor) impaired his claim because it did not pay him the full $4. 7 million of rent he was owed over the life of the lease. 324 F.3d 197, 201-02 (3d Cir. 2003). The Third

Circuit disagreed. Because the Bankruptcy Code caps lease-termination damages under § 502(b)(6), the plan merely reflected the *Code's* disallowance. *Id.* at 204. At the end of the day, "a creditor's claim outside of bankruptcy is not the relevant barometer for impairment; we must examine whether the plan itself is a source of limitation on a creditor's legal, equitable, or contractual rights." *Ibid.* It simply did not matter the landlord "might have received considerably more if he had recovered on his leasehold claims before [the debtor] filed for bankruptcy." *Id.* at 205. The debtor's plan gave the landlord everything the law entitled him to once bankruptcy began, so he was unimpaired.

Decisions from bankruptcy courts across the country all run in the same direction. *See, e.g., In re Tree of Life Church,* 522 B.R. 849, 861-62 (Bankr. D.S.C. 2015); *In re RAMZ Real Estate Co.,* 510 B.R. 712, 717 (Bankr. S.D.N.Y. 2014); *In re K Lunde, LLC,* 513 B.R. 587, 595-96 (Bankr. D. Colo. 2014); *In re Mirant Corp.,* No. 03-46590, 2005 WL 6440372, at *3 (Bankr. N.D. Tex. May 24, 2005); *In re Coram Healthcare Corp.,* 315 B.R. 321, 351 (Bankr. D. Del. 2004); *In re Monclova Care Ctr., Inc.,* 254 B.R. 167, 177 (Bankr. N.D. Ohio 2000), *rev'd on other grounds,* 266 B.R. 792 (N.D. Ohio 2001); *In re Am. Solar King Corp.,* 90 B.R. 808, 819-22 (Bankr. W.D. Tex. 1988). All agree that "[i]mpairment results from what the *plan* does, not what the [bankruptcy] statute does." *Solar King,* 90 B.R. at 819.

The creditors cannot point to a single decision that suggests otherwise. That's presumably why Collier's treatise states the point in unequivocal terms: "Alteration of Rights by the Code Is Not

Impairment under Section 1124(1)." 7 COLLIER ON BANKRUPTCY, 1124.03[6] (16th ed. 2018). "We are always chary to create a circuit split." *United States v. Graves,* 908 F.3d 137, 142 (5th Cir. 2018) (quotation omitted). That's especially true "in the context of bankruptcy, where uniformity is sufficiently important that our Constitution authorizes Congress to establish 'uniform laws on the subject of bankruptcies throughout the United States.'" *In re Marciano,* 708 F.3d 1123, 1135 (9th Cir. 2013) (Ikuta, J., dissenting) (quoting U.S. CONST. art. I, § 8, cl. 4). We refuse to create one today.

B.

The Class 4 Creditors' counterarguments do not move the needle. First, they focus on§ 1124(1)'s use of the word "claim." They note the Code elsewhere speaks of "*allowed* claims." *See, e.g.*, 11 U.S.C. §§ 506(a)(1), 506(a)(2), 510(c)(1), 1126(c). Then they suggest the absence of"allowed" in§ 1124(1) means "claim" there refers to the claim *before* the Code's disallowance provisions come in and trim its edges.

But the broader statutory context cuts the other way. Section 1124 is not just (or even primarily) about the allowance of claims. It is about rights- the "legal, equitable, and contractual rights to which [the] claim . . . entitles the holder." *Id.* § 1124(1). That means we judge impairment after considering everything that defines the scope of the right or entitlement-such as a contract's language or state law. *See In re Energy Future Holdings Corp.,* 540 B.R. 109, 121 (Bankr. D. Del. 2015); 11 U.S.C. § 502(b)(1). Even the bankruptcy court recognized this to some extent because it asked whether New York law permitted the

Noteholders to recover the Make-Whole Amount. *See Ultra Petroleum,* 575 B.R. at 368-72. "The Bankruptcy Code itself is a statute which, like other statutes, helps to define the legal rights of persons." *Solar King,* 90 B.R. at 819-20.

Finding no help in § 1124(1)'s statutory text, the Class 4 Creditors turn to the legislative history of a different provision. In 1994, Congress repealed § 1124(3), which provided that a creditor's claim was not impaired if the plan paid "the *allowed amount* of such claim." 11 U.S.C. § 1124(3) (1988) (emphasis added). This proves, they say, that disallowance should now play no role in the impairment analysis.

Even for those who think legislative history can be relevant to statutory interpretation, this particular history is not. It does not say that every disallowance causes impairment. Rather, Congress repealed § 1124(3) in response to a specific bankruptcy court decision. *See In re New Valley Corp.,* 168 B.R. 73 (Bankr. D.N.J. 1994). That decision held unsecured creditors who received their allowed claims from a solvent debtor, but who did not receive post-petition interest, were unimpaired. *Id.* at 77-80. In debating the proposed repeal of§ 1124(3), the House Judiciary Committee singled out *New Valley* by name as the justification for the repeal. *See* H.R. Rep. No. 103-835, at 4 7-48 (1994) (citing *New Valley* and explaining the intent to repeal§ 1124(3) "to preclude th[e] unfair result" of "den[ying] the right to receive post petition interest"). It is noteworthy the committee report does not cite other bankruptcy cases—such as *Solar King*—that addressed Code impairment under § 1124(1). That is why the Third Circuit rejected appellees'

legislative-history argument in *PPI* and held the repeal of § 1124(3) "does not reflect a sweeping intent by Congress to give impaired status to creditors more freely outside the postpetition interest context." 324 F.3d at 207 (noting the committee report cited *New Valley* but not *Solar King).*

Next, the Class 4 Creditors attempt to distinguish *PPI*. True, that case involved disallowance under § 502(b)(6), not § 502(b)(2). But that's a distinction without a difference. *See In re W.R. Grace* & Co., 475 B.R. 34, 161- 62 (Bankr. D. Del. 2012); *Energy Future,* 540 B.R. at 122. Section 502 states that "the court . . . *shall allow* [a] claim in [the requested] amount, *except to the extent that"* any one of nine conditions apply. If any of the enumerated conditions applies, the court shall not allow the relevant portion of the claim. *PPI* reasoned that where one of those conditions applies, the Code—not the plan—impairs the creditors' claims. *See* 324 F.3d at 204. That reasoning applies with equal force to § 502(b)(2).

The Class 4 Creditors (like the bankruptcy court) also point to the mechanics of Chapter 11 discharge to suggest the plan itself, not the Code, is doing the impairing. They note the Code's disallowance provisions are carried into effect only if the plan is confirmed, and "confirmation of the plan . . . discharges the debtor from any debt that arose before" confirmation. 11 U.S.C. § 1141(d). In one sense, plan confirmation limits creditors' claims for money by discharging underlying debts. But in another sense, the Code limits the creditors' claims for money and imposes substantive and procedural requirements for plan confirmation. The Class 4

Creditors' argument thus begs the critical question: What is doing the work here? We agree with *PPI,* every reported decision identified by either party, and Collier's treatise. Where a plan refuses to pay funds disallowed by the Code, the Code—not the plan—is doing the impairing.

III.

That leaves the question whether the Code disallows the creditors' claims for the Make-Whole Amount and post-petition interest at the contractual default rates specified in the Note Agreement and the Revolving Credit Facility. The bankruptcy court never reached either question. The parties nevertheless urge us to reach them now. The creditors say their contracts entitle them to both amounts, and that their contracts should be honored under bankruptcy law's longstanding "solvent-debtor" exception. The debtors argue no such exception exists in modern bankruptcy law. And the debtors further argue both claims are governed by the Bankruptcy Code, not the pre-Code law or the parties' contracts.

A word of clarification at the outset regarding terminology: For almost three hundred years, bankruptcy law has recognized different kinds of "postpetition interest." As relevant here, the first is part of an underlying debt obligation-like the rate specified in the Note Agreement (i.e., interest *as part of* a claim). Although such interest has a life before bankruptcy, it may continue to exist and accrue from when the debtor files a bankruptcy petition until the day he finally pays the underlying debt. The second is interest a creditor is entitled to recover as a consequence of receiving a bankruptcy award (i.e.,

interest *on* a claim). That interest never existed before bankruptcy; rather, it arises only after bankruptcy has transmogrified a debt obligation into a bankruptcy award. Both types of interest are "post-petition" in that they accrue after the petition is filed. But the parties use the phrase "post-petition interest" to refer exclusively to the latter type of interest. Unless otherwise indicated below, so do we.

With that understanding, we first consider the historical, pre-Code provenance of the solvent-debtor exception. Second, we consider the proper interpretation of the Code. Finally, we vacate and remand both questions to the bankruptcy court.

A.

In eighteenth-century England, only a creditor could kick-start bankruptcy proceedings by submitting a petition and an affidavit to the Lord Chancellor. (There was nothing like our voluntary debtor petition under Chapter 11. *See* 11 U.S.C. § 301; Bankruptcy Act of 1841, ch. 9, § 1, 5 Stat. 440, 441 (1841) (repealed 1843).) The Lord Chancellor, in turn, granted a commission to "wyse and honest discrete p[er]sons," who were tasked with administering the bankrupt's estate. An Acte Touchyng Orders for Bankruptes 1571, 13 Eliz. c. 7, § 2; *see generally The Case of Bankrupts* (1589), 76 Eng. Rep. 441; 2 Co. Rep. 25a (K.B.).[2] Although English bankruptcy law

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[2] Because the Lord Chancellor appointed commissioners promptly upon determining the debtor qualified as a bankrupt, the commission marked the beginning of bankruptcy proceedings. *See* Stephen J. Lubben, *A New Understanding of the Bankruptcy Clause,* 64 CASE WESTERN RES. L. REV. 319, 331-32 (2013); Louis Edward Levinthal, Note, *The Early History of*

mollified (somewhat) the severity of the Romans,[3] it authorized the commissioners "to breake open the [bankrupt's] House" to seize him and all of his goods. An Acte for the Discripcion of a Banckrupt and Reliefe of Credytors 1623, 21 Jae. c. 19, § 7; *see* 2 WILLIAM BLACKSTONE, COMMENTARIES *479-80.

Several debtor-friendly rules softened things. Of critical importance, English law barred creditors from recovering any interest that accrued after the Lord Chancellor issued his commission. *Sexton v. Dreyfus*, 219 U.S. 339, 344 (1911). Although the bankrupt was liable for interest up to the commission date, if bankruptcy proceedings dragged on, he was not liable for interest accruing as a result of the delay those proceedings caused before the commissioners actually paid his creditors. *See Ex Parte Bennet* (1743), 26 Eng.

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*English Bankruptcy,* 67 U. PENN. L. REV. 1, 17 (1919). For that reason, the commission date is functionally equivalent to the petition date under our present bankruptcy laws.

[3] As England's foremost jurist once said, we "like not Lawes written in bloode." Edward Coke, Speech in the House of Commons (May 24, 1621), *in* 5 COMMON DEBATES, 1621, at 176 (Wallace Notestein et al. eds., 1935). *Compare* LEGES DUODECIM TABULARUM tbl. III, law X *in* 1 S.P. SCOTT, THE CIVIL LAW 64 (2001) ("Where a party is delivered up to several persons, on account of a debt, after he has been exposed in the Forum on three market days, they shall be permitted to divide their debtor into different parts, if they desire to do so."), *with* An Acte for the Discripcion of a Banckrupt and Reliefe of Credytors 1623, 21 Jae. c. 19, § 6 (A bankrupt may be "sett upon the Pillory in some publique Place, for the space of Two Houres, and have one of his or her Eares nayled to the Pillory and cutt off."); *but see* An Act to Prevent Frauds Frequently Committed by Bankrupts 1705, 4 & 5 Ann. c. 4, § 1 (authorizing punishment of death without the benefit of clergy for certain bankrupts).

Rep. 716, 717; 2 Atk. 527, 528 (Ch.); 1 WILLIAM COOKE, THE BANKRUPT LAWS 196-97 (6th ed. 1812) (citing *Ex Parte Wardell* (1787)). And after paying his creditors in full, the bankrupt could recover any surplus left in his estate. *See* An Acte for the Better Reliefe of the Creditors Againste Suche as Shall Become Bankrupts 1603, 1 Jae. c. 15, § 10; 13 Eliz. c. 7, § 4.

But there were exceptions to these rules. For example, where a secured creditor held collateral that produced interest during bankruptcy proceedings, he could recover that interest after the commission date. *See Ex Parte Ramsbottom* (1835), *in* 2 BASIL MONTAGU & SCROPE AYRTON, REPORTS OF CASES IN BANKRUPTCY 79, 83-84 (1836); *cf. Sexton,* 219 U.S. at 346. The oversecured-creditor rule was another example. Where a secured creditor held collateral that exceeded the value of the underlying debt, he could recover postpetition interest up to the value of his security. That is, a creditor with collateral valued at $500,000 to secure an underlying debt for $400,000 would be able to recover interest up to $100,000. *See Vanston Bondholders Protective Comm. v. Green,* 329 U.S. 156, 164 (1946); *but see United States v. Ron Pair Enters., Inc.,* 489 U.S. 235, 246 (1989) (observing this oversecured-creditor exception was "of more doubtful provenance").

Most importantly for our purposes, however, English bankruptcy law carved out an exception for solvent debtors. "In case of a surplus coming to a Bankrupt, Creditors have a right to interest wherever there is a contract for it appearing, either on the face of the security or by evidence." 1 COOKE, *supra,* at 198; 2 WILLIAM BLACKSTONE, COMMENTARIES *488. So, in

1743, the Lord Chancellor awarded "subsequent interest" to Stephen Evance's creditors because his estate was "able to pay it." *Bromley v. Goodere* (17 43), 26 Eng. Rep. 49, 50-52; 1 Atk. 75, 77-80 (Ch.). Where the bankrupt's estate was solvent, the Lord Chancellor reasoned, awarding post-commission interest to some creditors would not prevent other creditors from receiving their "rateable portion." *Ibid.; see also Ex Parte Rooke* (1753), 26 Eng. Rep. 156, 157; 1 Atk. 244, 245 (Ch.).

But the fact the bankrupt's estate contained sufficient funds to pay creditors post-commission interest did not create a free-standing right to recover interest accruing throughout bankruptcy and up to payment. *Ex Parte Marlar* (1746), 26 Eng. Rep. 97, 98; 1 Atk. 150, 151 (Ch.). The solvent-debtor exception simply allowed any interest to *continue* accruing (at the contractual rate) if the creditor's contract already provided for interest on the underlying debt. *See Ex Parte Mills* (1793), 30 Eng. Rep. 640, 644; 2 Ves. jun. 295, 303 (Ch.); *accord Nicholas v. United States,* 384 U.S. 678, 682 n.9 (1966). Thus, English law conceived of post-commission interest as part and parcel of the underlying debt obligation, not something external to the obligation that the creditor received as a consequence of recovering from the bankrupt's estate. In other words, the solvent-debtor exception permitted interest that was *part of* a creditor's claim, not interest *on* a claim.

American bankruptcy law is codified against this background. The Constitution authorizes Congress "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S.

CONST. art. I, § 8, cl. 4. When Congress first exercised that power to adopt permanent federal bankruptcy legislation in 1898, it borrowed extensively from this English history. *See* Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549; *cf.* THOMAS COOPER, THE BANKRUPT LAW OF AMERICA, COMPARED WITH THE BANKRUPT LAW OF ENGLAND (1801) (noting earlier American law, on which the 1898 Act was based, closely tracked English bankruptcy law). Ever since, "we [have] naturally assume[d] that the fundamental principles upon which [England's bankruptcy system] was administered were adopted by us when we copied th[at] system." *Sexton,* 219 U.S. at 344. That includes the fundamental principle barring creditors from recovering interest accruing after the petition (or commission) date-and the exceptions to that principle. *See Am. Iron* & *Steel Mfg. Co. v. Seaboard Air Line Ry.,* 233 U.S. 261, 266-67 (1914).

B.

In 1978, Congress enacted an entirely new Bankruptcy Code. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101-1532). The Code adopted many of these early bankruptcy principles, but with some important modifications.

For starters, Congress codified the general rule barring post-petition interest that is *part of* a creditor's claim in 11 U.S.C. § 502(b)(2). That provision disallows a claim "to the extent that [it seeks] unmatured interest." Numerous courts have recognized this connection between§ 502(b)(2) and the

pre-Code rule. *See, e.g.*, *Leeper v. Pa. Higher Educ. Assistance Agency,* 49 F.3d 98, 100-01 (3d Cir. 1995); *In re Fesco Plastics Corp.,* 996 F.2d 152, 155-56 (7th Cir. 1993); *In re Monahan,* 497 B.R. 642, 647 (B.A.P. 1st Cir. 2013).

Congress also codified the exception for oversecured creditors. *See United Sau. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 373 (1988). Section 506(b) allows a creditor to recover interest if the value of his security "is greater than the amount of [his allowed secured] claim." And we have held that § 506(b) incorporates the "pre-Code case law" providing that the creditor is entitled to such interest at "the contract rate." *In re Laymon,* 958 F.2d 72, 75 (5th Cir. 1992).

At first blush, it appears Congress also codified the solvent-debtor exception-or something very much like it-in § 726(a)(5). *See In re Colortex Indus., Inc.,* 19 F.3d 1371, 1376 & n.4 (11th Cir. 1994). Section 726(a) lists a descending waterfall of priorities for distributing property in a Chapter 7 bankruptcy:

> (a) Except as provided in section 510 of this title, property of the estate shall be distributed-
>
> > (1) first, in payment of claims of the kind specified in . . . section 507 . . . ;
> >
> > (2) second, in payment of any allowed unsecured claim, other than a claim of a kind specified in paragraph (1), (3), or (4) of this subsection . . . ;

> (3) third, in payment of any allowed unsecured claim proof of which is tardily filed under section 501(a) of this title . . . ;
>
> (4) fourth, in payment of any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, arising before the earlier of the order for relief or the appointment of a trustee . . . ;
>
> (5) fifth, in *payment of interest at the legal rate from the date of the filing of the petition, on any claim* paid under paragraph (1), (2), (3), or (4) of this subsection; and
>
> (6) sixth, to the debtor.

11 U.S.C. § 726 (emphasis added). If the debtor's estate is sufficient to pay items 1 through 4, then creditors should also get post-petition interest (item 5) before the debtor can recover any surplus (item 6).

This principle applies in Chapter 11 cases too. Chapter 7 and Chapter 11 bankruptcies generally run along different tracks.[4] But § 1129(a)(7), commonly referred to as the "Best Interests of Creditors" test, incorporates § 726(a)'s waterfall provision. *See* 7 COLLIER, *supra*, ¶ 1129.02[7][c][iii]. It requires a Chapter 11 plan to provide that impaired creditors

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[4] Proceedings under Chapter 7 end in a fire sale, and the debtor is left a pile of ash. *See* 11 U.S.C. §§ 704(a)(1), 721. Proceedings under Chapter 11, however, are designed to reorganize—rather than liquidate—the debtor, which emerges capable of doing business. *See id.* §§ 1107-08, 1141.

"will receive . . . not less than the amount that [they] would . . . receive if the debtor were liquidated under chapter 7," 11 U.S.C. § 1129(a)(7)(A)(ii), including postpetition interest at "the legal rate," *id.* § 726(a)(5).

But § 726(a)'s solvent-debtor exception differs from the pre-Code version 1n several respects. First, although the pre-Code version applied to all creditors with a contractual entitlement to interest, the Code's version applies to all creditors in Chapter 7 cases, but only impaired creditors in Chapter 11 cases. Section 1129(a)(7) states it applies only "with respect to [an] impaired class of claims." Its plain text does not apply to *unimpaired* claims. *See Cont'l Sec. Corp. v. Shenandoah Nursing Home P'ship*, 193 B.R. 769, 776 (W.D. Va. 1996); *In re Seatco, Inc.,* 257 B.R. 469, 480 (Bankr. N.D. Tex. 2001); 7 COLLIER, *supra*, ¶ 1129.02[7][a] ("[I]f a class is unimpaired under section 1124, its members do not get the protections of the best interest test; instead they are left to their unaltered legal or equitable rights.").

Second, the Code changed the source of recoverable post-petition interest. The pre-Code solvent-debtor exception allowed creditors to recover interest *as part of* a claim. The Code, by contrast, requires solvent debtors to pay post-petition interest *on* a claim.

The Code itself highlights the difference. And we infer a distinction in meaning from Congress's distinction in language. *See, e.g.,* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 170 (2012). For example, § 726(a)(2) refers to payment of a "claim." So too does § 502(b)(2), which refers to a "*claim* . . . for

unmatured interest." These provisions prove Congress knew how to write about interest *as part of* a claim when it wanted to. By contrast, § 726(a)(5) provides for "payment of [postpetition] interest . . . *on* [*the*] *claim."* In doing so, Congress necessarily determined the type of post-petition interest contemplated in § 726(a)(5) is not *part of* the claim itself.[5]

Third, the Code may have changed the applicable interest rate. The pre-Code exception allowed interest at the contract rate because it permitted interest fixed by contract to continue accruing according to the contract's terms. *Ex Parte Marlar,* 27 Eng. Rep. at 98. The Code, however, requires "interest at the legal rate." 11 U.S.C. § 726(a)(5). Some courts interpret "the legal rate" to mean a rate set by statute. *See, e.g.*, *In re Cardelucci*, 285 F.3d 1231, 1234 (9th Cir. 2002) (citing 28 U.S.C. § 1961). Others interpret "the legal rate" to mean one set by contract. *See, e.g.*, *In re Schoenberg,* 156 B.R. 963,972 (Bankr. W.D. Tex.

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[5] Courts routinely talk about § 726(a)(5) as a present-day solvent-debtor "exception" to the general rule-now codified in § 502(b)(2)-barring post-petition interest. *See, e.g., Fesco Plastics,* 996 F.2d at 155-56; *accord In re Shoen,* 176 F.3d 1150, 1153 n.2 (9th Cir. 1999) (McKeown, J., dissenting). For convenience, we have used that terminology here in discussing whether, and if so how, the pre-Code exception survives in the post-Code world. But as the preceding discussion makes clear, that framing misses a key nuance. Section 726(a)(5) is not really an exception to § 502(b)(2) at all because the provisions are talking about two different kinds of interest: Section 502(b)(2) (the general rule) bars interest as part of a claim, while § 726(a)(5) (the so-called exception) allows interest on a claim. *See Energy Future,* 540 B.R. at 113.

1993). If the former are correct, the Code changed the pre-Code rate.

One final note: Pre-Code, our Court pioneered the incorporation of England's solvent-debtor exception into American bankruptcy law. But we did so, at least in part, based on concerns that a solvent debtor could file a voluntary petition in bad faith to avoid paying interest and that a creditor would be powerless to stop the *then-ex-parte* bankruptcy proceedings. *See Johnson v. Norris,* 190 F. 459, 463 (5th Cir. 1911). While the pre-Code law left creditors "powerless to resist" a bad-faith petition filed by a solvent debtor, *ibid.,* today the Code allows creditors to seek dismissal based on a debtor's bad faith, *see* 11 U.S.C. § 1112(b)(1); *In re Krueger,* 812 F.3d 365, 373 (5th Cir. 2016).

C.

The next question is what this historical and statutory backdrop means for the creditors' claims to the Make-Whole Amount and post-petition interest. As we explain below, the creditors can recover the Make-Whole Amount if (but only if) the solvent-debtor exception survives Congress's enactment of § 502(b)(2). We doubt it did. But we vacate and remand to allow the bankruptcy court to answer the question in the first instance.

The creditors' entitlement *vel non* to post-petition interest is even murkier. The parties agree the creditors are entitled to some post-petition interest, but they disagree about the rate—namely, whether it is the federal judgment rate or something higher. To the extent the creditors seek post-petition interest *as part of* their claims, they run into the same issues that

affect the Make-Whole Amount. To the extent they seek post-petition interest *on* their claims, the pre-Code solvent-debtor exception does not countenance it. And the Code itself says nothing about post-petition interest on unimpaired claims for Chapter 11 cases. It is not clear then what should fill that vacuum, and the bankruptcy court said nothing about it. We therefore vacate the award of post-petition interest and remand that question to the bankruptcy court as well.

1.

We start with whether the Make-Whole Amount is disallowed by § 502(b)(2). That Code provision requires a bankruptcy court to disallow a claim "to the extent that [it seeks] unmatured interest." 11 U.S.C. § 502(b)(2). Our precedent in turn defines§ 502(b)(2)'s "unmatured interest" by looking to economic realities, not trivial formalities. *In re Pengo Indus., Inc.,* 962 F.2d 543, 546 (5th Cir. 1992) ("economic reality," "economic fact," "economic equivalent"). Section 502(b)(2) thus disallows any claim that is the economic equivalent of unmatured interest. *Ibid.*

The debtors make a compelling argument the Make-Whole Amount is one such disallowed claim. We are persuaded by three aspects of the debtors' argument.

First, the Make-Whole Amount is the economic equivalent of "interest." The purpose of a make-whole provision "is to compensate the lender for lost interest." 4 COLLIER, *supra,* ¶ 502.03[3][a]; *see In re MPM Silicones, L.L.C.,* 874 F.3d 787, 801-02 & n.13 (2d Cir. 2017) (The "make-whole premium was intended to ensure that [noteholders] received additional compensation to make up for the interest

they would not receive if the Notes were redeemed prior to their maturity date."); *In re Energy Future Holdings Corp.,* 842 F.3d 247, 251 (3d Cir. 2016) (similar); *In re Ridgewood Apartments of DeKalb Cty., Ltd.,* 174 B.R. 712, 720 (Bankr. S.D. Ohio 1994) (similar). So too here. The Make-Whole Amount is calculated by subtracting the accelerated principal from the discounted value of the future principal and interest payments. That captures the value of the interest the Noteholders would have eventually received if the Notes had not been prepaid. *See In re Doctors Hosp. of Hyde Park, Inc.,* 508 B.R. 697, 705 (Bankr. N.D. Ill. 2014).[6]

Second, the interest for which the Make-Whole Amount compensates was "unmatured" when the debtors filed their Chapter 11 petitions. Section 502(b)'s disallowance provisions apply "as of the date of the filing of the petition." On that day, the debtors did not owe the Make-Whole Amount or the underlying interest. The Note Agreement's acceleration clause doesn't change things because it operates as an *ipso facto* clause by keying acceleration to, among other things, the debtor's decision to file a bankruptcy petition. *See In re Lehman Bros. Holdings*

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[6] The Class 4 Creditors' principal objection is the Make-Whole Amount is not *actually* interest. For example, they note it compensates the Noteholders not for the use of their money, but for Resources' forbearance from using that money. They add it is paid in a lump sum rather than earned over time. But as already discussed, our precedent interpreting § 502(b)(2) does not require the Make-Whole Amount to *be* unmatured interest; it requires only that it walk, talk, and act like unmatured interest. *See Pengo,* 962 F.2d at 546. Neither party suggests this precedent has been overruled.

*Inc.,* 422 B.R. 407, 414-15 (Bankr. S.D.N.Y. 2010); *Ipso Facto Clause,* BLACK'S LAW DICTIONARY 957 (Del. 10th ed. 2014). And the parties agree that an *ipso facto* clause is unenforceable. "[W]hether interest is considered to be matured or unmatured for the purpose of [§ 502(b)(2)] is to be determined without reference to any *ipso facto* bankruptcy clause in the agreement creating the claim." 4 COLLIER, *supra,* ¶ 502.03[3][b]; *see* H.R. Rep. No. 95-595, at 352-53 (1977); *In re ICH Corp.,* 230 B.R. 88, 94 (N.D. Tex. 1999). The Class 4 Creditors' only response is the acceleration clause is not an *ipso facto* clause because it could also be triggered by something other than a bankruptcy petition. They cite nothing for that proposition.

Third, those decisions taking a different view are unpersuasive. Some courts have concluded§ 502(b)(2) does not cover make-whole provisions on the assumption "they fully mature pursuant to the provisions of the contract." *In re Outdoor Sports Headquarters, Inc.,* 161 B.R. 414, 424 (Bankr. S.D. Ohio 1993); *see In re Skyler Ridge,* 80 B.R. 500, 508 (Bankr. C.D. Cal. 1987). But *ipso facto* clauses count for nothing when deciding maturity under § 502(b)(2). Others have concluded make-whole provisions are better viewed as liquidated damages, rather than unmatured interest. *In re Trico Marine Servs., Inc.,* 450 B.R. 474, 480-81 (Bankr. D. Del. 2011); *In re Lappin Elec.* Co., 245 B.R. 326, 330 (Bankr. E.D. Wis. 2000). But those categories are not mutually exclusive. *Doctors Hosp.,* 508 B.R. at 706.

The Class 4 Creditors' most persuasive response is that none of these arguments applies to a *solvent*

debtor. First, they try the "absolute priority rule," insisting it bars a solvent debtor from paying stockholders any surplus before fully compensating its creditors. That is only half right. For starters, the absolute priority rule applies when asking whether a plan is "fair and equitable" in a cram-down scenario. 11 U.S.C. § 1129(b)(1). It is not a freewheeling exception requiring a debtor to pay amounts the Code otherwise prohibits. But more importantly, the rule itself builds in the Code's disallowance provisions. It stands for the proposition that a plan "may not allocate any property whatsoever to any junior class . . . unless all senior classes consent, or unless such senior classes receive property equal in value to the full amount of their *allowed claims*." 7 COLLIER, *supra,* ¶ 1129.03[4][a][i] (emphasis added). Thus, the Class 4 Creditors simply beg the question whether § 502(b)(2) disallows the Make-Whole Amount; if it does, the absolute priority rule takes that into account.

Their second argument fares better: If the pre-Code solvent-debtor exception survives in the background of the Code, then the Class 4 Creditors have a point. As explained above in Part III.A, English bankruptcy law gave the creditors of a solvent debtor the "right to interest wherever there is a contract for it." 1 COOKE, *supra,* at 198; *accord Bromley,* 26 Eng. Rep. at 50-52. And it appears undisputed the Class 4 Creditors would have a contractual right outside of bankruptcy to the interest specified in the Make-Whole Amount. Therefore, the pre-Code solvent-debtor exception would operate as a carve-out from § 502(b)(2)'s general bar on unmatured interest-in much the same way the exception operated as a carve-

out from the pre-Code rule barring contract interest after the commission date.

The only question then is whether the pre-Code solvent-debtor exception survives the enactment of § 502(b)(2). As discussed above in Part 111.B, Congress carefully incorporated some pre-Code principles but not others. And those principles it did incorporate, Congress sometimes modified. It might be true Congress chose not to codify the solvent-debtor rule as an absolute exception to § 502(b)(2). *See, e.g., Ron Pair Enters.,* 489 U.S. at 243-46; *Timbers of Inwood,* 484 U.S. at 373. On the other hand, we sometimes presume congressional silence leaves undisturbed certain long-established bankruptcy principles. *See, e.g., Midatlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.,* 474 U.S. 494, 500-01 (1986); *Kelly v. Robinson,* 479 U.S. 36, 44-47 (1986). The bankruptcy court's resolution of the Code-impairment question prevented it from considering these arguments. "[M]indful that we are a court of review, not of first view," we will not make the choice ourselves. *Cutter v. Wilkinson,* 544 U.S. 709, 718 n. 7 (2005).

One last note on our remand of the Make-Whole Amount. Much of the pre-Code law regarding solvent debtors-including our 1911 decision in Johnson-appears motivated by concerns over bad-faith filings. That is, courts worried that without the solvent-debtor exception, solvent debtors would seek bankruptcy protection in bad faith simply to avoid paying their debts. And many of the creditors' arguments before our Court have the same flavor. But Chapter 11 addresses this problem by creating a motion-to-

dismiss procedure for bad-faith filings. *See* 11 U.S.C. § 1112(b); *In re Integrated Telecom Express, Inc.,* 384 F.3d 108, 112, 118-20 (3d Cir. 2004). And as far as the record reveals, the Class 4 Creditors never availed themselves of that procedure or complained it was insufficient. That is presumably because the debtors are both solvent and good-faith filers. We trust the bankruptcy court on remand also will consider what effect (if any) § 1112(b) has on the solvent-debtor exception (if any exists).

2.

Finally, we turn to post-petition interest. Both parties agree the creditors are entitled to *some* post-petition interest. That agreement is founded on Congress's past amendments to the Code. "Before 1994, [the Code] specified that a creditor receiving full payment of an 'allowed claim' was not impaired." *PPI,* 324 F.3d at 205 (citing former 11 U.S.C. § 1124(3) (1988)). When "one bankruptcy court held that § 1124(3) allowed a solvent debtor to pay the 'allowed' claims of unsecured creditors in full, excluding postpetition interest, without risking impairment," Congress responded by repealing § 1124(3). *Id.* at 205-06 (citing *New Valley,* 168 B.R. at 77-80). Courts have interpreted the relevant legislative history as establishing that a creditor denied post-petition interest is "impaired, entitling [that creditor] to vote for or against the plan of reorganization." *Id.* at 206 (quoting H.R. Rep. No. 103-835, at 47-48).

Even if this entitles the Class 4 Creditors to at least some post-petition interest, it does not establish how much. The parties point to only one Code provision setting a rate for post-petition interest on

awards, § 726(a)(5), but for the reasons discussed above, it does not apply to the creditors here. Thus, we look outside the Code to see if a more general rule controls.

Here, the pre-Code practice provides no help. As far as we can tell, English bankruptcy law provided no right at all to interest on a bankruptcy award. *See Ex Parte Marlar,* 26 Eng. Rep. at 98. It merely allowed contractual interest that was accruing prior to the solvent debtor's bankruptcy to continue accruing at the contractual rate. *See Ex Parte Mills,* 30 Eng. Rep. at 644. That is why English creditors could recover post-petition interest *as part of* a claim (perhaps like the Make-Whole Amount). But it also is why the solvent-debtor exception does not answer whether the creditors can recover post-petition interest *on* a claim—or how much. As far as we can tell, the modern concept of post-petition interest *on* a claim had no analogy under pre-Code law.

In our view, that leaves two potential paths. The first is the general post-judgment interest statute. *See* 28 U.S.C. § 1961. Section 1961(a) allows interest "on any money judgment in a civil case recovered in a district court" and sets a rate by reference to certain Treasury yields. Courts have applied this provision to bankruptcy proceedings on the theory bankruptcy courts are units of district courts. *See In re Dow Corning Corp.,* 237 B.R. 380, 385-86 (Bankr. E.D. Mich. 1999) (collecting cases). Courts have also treated bankruptcy claims as equivalent to judgments entered on the day the petition was filed. *See, e.g.*, *Wasserman v. City of Cambridge,* 151 B.R. 4, 6 n.2 (D. Mass. 1993) ("Upon the filing of bankruptcy, claims of

creditors are treated as the functional equivalent of a federal judgment against the estate's assets."); *Dow Corning,* 237 B.R. at 393 ("Several courts have stated that a creditor's claim is deemed to be a 'judgment' entered on the date of the petition."); *In re Melenyzer,* 143 B.R. 829, 833 (Bankr. W.D. Tex. 1992) ("From and after the petition date, then, creditors hold the equivalent of a federal judgment against estate assets, enforceable only in federal court . . . . Bankruptcy gives all creditors what amounts to a judgment against the debtor as of the filing date."). This has led at least one court to conclude§ 1961 requires post-petition interest on the award at the judgment rate from the date the petition was filed. *See Dow Corning,* 237 B.R. at 393 ("If these courts are correct, then both 28 U.S.C. § 1961(a) and § 726(a)(5) start the interest clock running from the same date. This viewpoint is sensible given that unsecured claims are valued as of the petition date.").

One benefit of applying § 1961 to the claims of unimpaired creditors in Chapter 11 proceedings could be uniformity. If, as some courts hold, § 726(a)(5)'s reference to "the legal rate" incorporates the rate from § 1961, then all bankruptcy creditors could receive post-petition interest at the same rate. *See Dow Corning,* 237 B.R. at 393. On the other hand, a bankruptcy award back-dated to the petition filing date may prove a poor analogy to ordinary judgments. Or perhaps Congress's failure to apply § 1961 to unimpaired Chapter 11 creditors is meaningful. *See* SCALIA & GARNER, *supra*, at 93 (explaining "[t]he principle that a matter not covered [by a statute] is not covered").

A second potential path is equity. Bankruptcy courts have long been thought of as courts of equity, especially when it comes to awarding interest. *See Vanston Bondholders,* 329 U.S. at 241; *Consolidated Rock Prods. Co. v. Du Bois,* 312 U.S. 510, 527-28 (1941). That might not help where the Code's reticulated statutory scheme has displaced the bankruptcy courts' equitable authority. *See, e.g.*, *Law v. Siegel*, 571 U.S. 415, 421 (2014) ("[W]hatever equitable power remains in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." (quotation omitted)). But by all accounts, the Code says nothing about post-petition interest on unimpaired Chapter 11 claims. So equity might say something.

After all, we know the Class 4 Creditors are by stipulation unimpaired, and § 1124(1) says unimpaired creditors retain their "legal, equitable, and contractual rights." The creditors here have no *legal* right to post-petition interest at the default rates. They do not point to a New York law requiring them to receive post-petition interest. Nor do they have a *contractual* right to such interest. The contractual rates at issue here governed interest paid on amounts owed under the contract, not interest on a bankruptcy award. The contracts did not purport to fix an interest rate that would govern if the parties proceeded to protracted litigation, obtained the equivalent of a "judgment" in bankruptcy court, and then a court awarded interest. But they might have an *equitable* right to post-petition interest. At least one well-reasoned bankruptcy decision has so held: For creditors "to be unimpaired the plan must provide that the Court may award post-petition interest at an

appropriate rate if it determines to do so under its equitable power." *Energy Future,* 540 B.R. at 124. Because the bankruptcy court in this case erred in its Code-impairment analysis, we do not have the benefit of its wisdom on these questions.

* * *

As we have explained, Code impairment is not the same thing as plan impairment. Because the bankruptcy court found otherwise, it did not address whether the Code disallows the Make-Whole Amount or post-petition interest, and if not, how much the debtors must pay the Class 4 Creditors. To secure plan confirmation, the parties stipulated the debtors would do whatever is necessary to make the creditors unimpaired. The bankruptcy court, therefore, must make that stipulation a reality. For that reason and others explained above, we REVERSE in part, VACATE in part, and REMAND for further proceedings consistent with this opinion.

*Appendix E*

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

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No. 17-20793

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

*Debtors*,

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

*Appellants*,

v.

AD HOC COMMITTEE OF UNSECURED CREDITORS OF ULTRA RESOURCES, INCORPORATED; OPCO NOTEHOLDERS,

*Appellees*.

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Filed: Nov. 26, 2019

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Before: DAVIS, ENGELHARDT, and OLDHAM, Circuit Judges

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ORDER ON PETITION FOR REHEARING

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ANDREW S. OLDHAM, Circuit Judge:

Treating the Appellees' and Intervenors' Joint Petition for Rehearing En Banc as a Petition for Panel Rehearing, it is GRANTED. The prior opinion, *In re Ultra Petroleum Corporation*, 913 F.3d 533 (5th Cir. 2019), is withdrawn, and the following opinion is substituted:

These bankruptcy proceedings arise from exceedingly anomalous facts. The debtors entered bankruptcy insolvent and now are solvent. That alone makes them rare. But second, the debtors accomplished their unlikely feat by virtue of a lottery-like rise in commodity prices. The combination of these anomalies makes these debtors as rare as the proverbial rich man who manages to enter the Kingdom of Heaven.

The key legal question before us is whether the rich man's creditors are "impaired" by a plan that paid them everything allowed by the Bankruptcy Code. The bankruptcy court said yes. In that court's view, a plan impairs a creditor if it refuses to pay an amount the Bankruptcy Code independently disallows. In reaching that conclusion, the bankruptcy court split from the only court of appeals to address the question, every reported bankruptcy court decision on the question, and the leading treatise discussing the question. We reverse and follow the monolithic mountain of authority holding the Code—not the

reorganization plan—defines and limits the claim in these circumstances.

Because the bankruptcy court saw things differently, it did not consider whether the Code disallows certain creditors' contractual claims for a Make-Whole Amount or post-petition interest. Instead, it ordered the debtors to pay both amounts in full. We vacate and remand those determinations for reconsideration.

I.

Ultra Petroleum Corporation ("Petroleum") is an oil and gas exploration and production company. To be more precise, it's a holding company. Petroleum's subsidiaries—UP Energy Corporation ("Energy") and Ultra Resources, Inc. ("Resources")—do the exploring and producing. Resources took on debt to finance its operations. Between 2008 and 2010, Resources issued unsecured notes worth $1.46 billion to various noteholders. And in 2011, it borrowed another $999 million under a Revolving Credit Facility. Petroleum and Energy guaranteed both debt obligations.

In 2014, crude oil cost well over $100 per barrel. But then Petroleum's fate took a sharp turn for the worse. Only a year and a half later, a barrel cost less than $30. The world was flooded with oil; Petroleum and its subsidiaries were flooded with debt. On April 29, 2016, the companies voluntarily petitioned for reorganization under Chapter 11. *See* 11 U.S.C. § 301(a). No one argues the companies filed those petitions in bad faith. *See id.* § 1112(b).

During bankruptcy proceedings, however, oil prices rose. Crude oil approached $80 per barrel, and the Petroleum companies became solvent again. So,

the debtors proposed a rare creature in bankruptcy—a reorganization plan that (they said) would compensate the creditors in full. As to creditors with claims under the Note Agreement and Revolving Credit Facility (together, the "Class 4 Creditors"), the debtors would pay three sums: the outstanding principal on those obligations, pre-petition interest at a rate of 0.1%, and post-petition interest at the federal judgment rate. *In re Ultra Petroleum Corp.*, No. 4:16-bk-32202, ECF No. 1308-1 at 25-26 (Bankr. S.D. Tex. 2017). Accordingly, the debtors elected to treat the Class 4 Creditors as "unimpaired." Therefore, they could not object to the plan. 11 U.S.C. § 1126(f).

The Class 4 Creditors objected just the same. They insisted their claims *were* impaired because the plan did not require the debtors to pay a contractual Make-Whole Amount and additional post-petition interest at contractual default rates.

Under the Note Agreement, prepayment of the notes triggers the Make-Whole Amount. That amount is designed "to provide compensation for the deprivation of" a noteholder's "right to maintain its investment in the Notes free from repayment." A formula defines the Make-Whole Amount as the amount by which "the Discounted Value of the Remaining Scheduled Payments with respect to the Called Principal" exceeds the notes' "Called Principal." Remaining scheduled payments include "all payments of [the] Called Principal and interest . . . that would be due" after prepayment (if the notes had never been prepaid). And the discounted value of those payments is keyed to a "Reinvestment Yield" of 0.5% over the

total anticipated return on comparable U.S. Treasury obligations.

Under the Note Agreement, petitioning for bankruptcy automatically renders the outstanding principal, any accrued interest, and the Make-Whole Amount "immediately due and payable." Failure to pay immediately triggers interest at a default rate of either 2% above the normal rate set for the note at issue or 2% above J.P. Morgan's publicly announced prime rate, whichever is greater.

The Revolving Credit Facility does not contain a make-whole provision. But it does contain a similar acceleration clause that made the outstanding principal and any accrued interest "automatically . . . due and payable" as soon as Resources petitioned for bankruptcy. And it likewise provides for interest at a contractual default rate—2% above "the rate otherwise applicable to [the] Loan"—if Resources delayed paying the accelerated amount.

Under these two agreements, the creditors argued the debtors owed them an additional $387 million—$201 million as the Make-Whole Amount and $186 million[1] in post-petition interest. Both sides chose to kick the can down the road. Rather than force resolution of the impairment issue at the plan-confirmation stage, the parties stipulated the bankruptcy court could resolve the dispute by deeming the creditors unimpaired and confirming the proposed

[1] This amount includes $106 million in interest on the outstanding principal under the notes, $14 million in interest on the Make-Whole Amount, and $66 million in interest on the outstanding principal under the Revolving Credit Facility, all accruing after the debtors filed their petitions.

plan. Meanwhile, the debtors would set aside $400 million to compensate the Class 4 Creditors if necessary "to render [the creditors] Unimpaired." The bankruptcy court agreed and confirmed the plan.

After confirmation, the parties (and the bankruptcy court) turned back to the question of impairment. The debtors acknowledged the plan did not pay the Make-Whole Amount or provide post-petition interest at the contractual default rates. But they insisted the Class 4 Creditors were not "impaired" because federal (and state) law barred them from recovering the Make-Whole Amount and entitled them to receive post-petition interest only at the federal judgment rate.

The Bankruptcy Code provides that a class of claims is not impaired if "the [reorganization] plan . . . leaves unaltered the legal, equitable, and contractual rights to which such claim . . . entitles the holder." 11 U.S.C. § 1124(1). Elsewhere the Code states that a court should disallow a claim "to the extent that [it seeks] unmatured interest." *Id.* § 502(b)(2). The debtors argued the Make-Whole Amount qualified as unmatured interest. But even if it didn't, they said, it was an unenforceable liquidated damages provision under New York law. In either case, something *other than* the reorganization plan itself—the Bankruptcy Code or New York contract law—prevented the Class 4 Creditors from recovering the disputed amounts.

The debtors' argument as to post-petition interest was much the same: The Bankruptcy Code entitles creditors, at most, to post-petition interest at the "legal rate," not the rates set by contract. 11 U.S.C.

§ 726(a)(5). And the legal rate, they said, is the federal judgment rate under 28 U.S.C. § 1961. Once again, the Code—not the plan—limited the Class 4 Creditors' claims.

The bankruptcy court rejected the premise that it must bake in the Code's provisions before asking whether a claim is impaired. Instead it concluded unimpairment "requires that [creditors] receive all that they are entitled to under state law." *In re Ultra Petroleum Corp.*, 575 B.R. 361, 372 (Bankr. S.D. Tex. 2017). In other words, if a plan does not provide the creditor with all it would receive under state law, the creditor is impaired even if the Code disallows something state law would otherwise provide outside of bankruptcy. So, the bankruptcy court asked only whether New York law permits the Class 4 Creditors to recover the Make-Whole Amount (concluding it does), and whether the Code limits the contractual post-petition interest rates (concluding it does not). *Id.* at 368-75. It never decided whether the Code disallows the Make-Whole Amount as "unmatured interest" under § 502(b)(2) or what § 726(a)(5)'s "legal rate" of interest means. It ordered the debtors to pay the Make-Whole Amount and post-petition interest at the contractual rates to make the Class 4 Creditors truly unimpaired.

The debtors sought a direct appeal to this Court (rather than the district court) because the case raises important and unsettled questions of law. *See* 28 U.S.C. § 158(d)(2)(A). The bankruptcy court agreed, and so did we. *In re Ultra Petroleum Corp.*, No. 16-32202, 2017 WL 4863015, at *1 (Bankr. S.D. Tex. Oct. 26, 2017). On appeal, we review those legal questions

anew. *In re Positive Health Mgmt.*, 769 F.3d 899, 903 (5th Cir. 2014).

II.

We consider first whether a creditor is "impaired" by a reorganization plan simply because it incorporates the Code's disallowance provisions. We think not.

A.

Chapter 11 lays out a framework for proposing and confirming a reorganization plan. Confirmation of the plan "discharges the debtor from any debt that arose before the date of such confirmation." 11 U.S.C. § 1141(d)(1). Because discharge affects a creditor's rights, the Code generally requires a debtor to vie for the creditor's vote first. *Id.* § 1129(a)(8). And when it does, the creditor may vote to accept or reject the plan. *Id.* § 1126(a). But the creditor's right to vote disappears when the plan doesn't actually affect his rights. If the creditor is "not impaired under [the] plan," he is "conclusively presumed to have accepted" it. *Id.* § 1126(f). The question, then, is whether the Class 4 Creditors were "impaired" by the plan.

Let's start with the statutory text. Section 1124(1) says "a class of claims or interests" is not impaired if "the plan . . . leaves unaltered the [claimant's] legal, equitable, and contractual rights." The Class 4 Creditors spill ample ink arguing their rights have been altered. But that's both undisputed and insufficient. The plain text of § 1124(1) requires that "the plan" do the altering. We therefore hold a creditor is impaired under § 1124(1) only if "*the plan*" itself alters a claimant's "legal, equitable, [or] contractual rights."

The only court of appeals to address the question took the same approach. In *In re PPI Enterprises (U.S.), Inc.*, a landlord (creditor) argued the reorganization plan of his former tenant (debtor) impaired his claim because it did not pay him the full $4.7 million of rent he was owed over the life of the lease. 324 F.3d 197, 201-02 (3d Cir. 2003). The Third Circuit disagreed. Because the Bankruptcy Code caps lease-termination damages under § 502(b)(6), the plan merely reflected the *Code's* disallowance. *Id.* at 204. At the end of the day, "a creditor's claim outside of bankruptcy is not the relevant barometer for impairment; we must examine whether the plan itself is a source of limitation on a creditor's legal, equitable, or contractual rights." *Ibid.* It simply did not matter the landlord "might have received considerably more if he had recovered on his leasehold claims before [the debtor] filed for bankruptcy." *Id.* at 205. The debtor's plan gave the landlord everything the law entitled him to once bankruptcy began, so he was unimpaired.

Decisions from bankruptcy courts across the country all run in the same direction. *See, e.g.*, *In re Tree of Life Church*, 522 B.R. 849, 861-62 (Bankr. D.S.C. 2015); *In re RAMZ Real Estate Co.*, 510 B.R. 712, 717 (Bankr. S.D.N.Y. 2014); *In re K Lunde, LLC*, 513 B.R. 587, 595-96 (Bankr. D. Colo. 2014); *In re Mirant Corp.*, No. 03-46590, 2005 WL 6440372, at *3 (Bankr. N.D. Tex. May 24, 2005); *In re Coram Healthcare Corp.*, 315 B.R. 321, 351 (Bankr. D. Del. 2004); *In re Monclova Care Ctr., Inc.*, 254 B.R. 167, 177 (Bankr. N.D. Ohio 2000), *rev'd on other grounds*, 266 B.R. 792 (N.D. Ohio 2001); *In re Am. Solar King Corp.*, 90 B.R. 808, 819-22 (Bankr. W.D. Tex. 1988). All agree that "[i]mpairment results from what the *plan* does,

not what the [bankruptcy] statute does." *Solar King*, 90 B.R. at 819.

The creditors cannot point to a single decision that suggests otherwise. That's presumably why Collier's treatise states the point in unequivocal terms: "Alteration of Rights by the Code Is Not Impairment under Section 1124(1)." 7 COLLIER ON BANKRUPTCY ¶ 1124.03[6] (16th ed. 2018). "We are always chary to create a circuit split." *United States v. Graves*, 908 F.3d 137, 142 (5th Cir. 2018) (quotation omitted). That's especially true "in the context of bankruptcy, where uniformity is sufficiently important that our Constitution authorizes Congress to establish 'uniform laws on the subject of bankruptcies throughout the United States.'" *In re Marciano*, 708 F.3d 1123, 1135 (9th Cir. 2013) (Ikuta, J., dissenting) (quoting U.S. CONST. art. I, § 8, cl. 4). We refuse to create one today.

B.

The Class 4 Creditors' counterarguments do not move the needle. First, they focus on § 1124(1)'s use of the word "claim." They note the Code elsewhere speaks of "*allowed* claims." *See, e.g.*, 11 U.S.C. §§ 506(a)(1), 506(a)(2), 510(c)(1), 1126(c). Then they suggest the absence of "allowed" in § 1124(1) means "claim" there refers to the claim *before* the Code's disallowance provisions come in and trim its edges.

But the broader statutory context cuts the other way. Section 1124 is not just (or even primarily) about the allowance of claims. It is about rights—the "legal, equitable, and contractual rights to which [the] claim . . . entitles the holder." *Id.* § 1124(1). That means we judge impairment after considering

everything that defines the scope of the right or entitlement—such as a contract's language or state law. *See In re Energy Future Holdings Corp.*, 540 B.R. 109, 121 (Bankr. D. Del. 2015); 11 U.S.C. § 502(b)(1). Even the bankruptcy court recognized this to some extent because it asked whether New York law permitted the Noteholders to recover the Make-Whole Amount. *See Ultra Petroleum*, 575 B.R. at 368-72. "The Bankruptcy Code itself is a statute which, like other statutes, helps to define the legal rights of persons." *Solar King*, 90 B.R. at 819-20.

Finding no help in § 1124(1)'s statutory text, the Class 4 Creditors turn to the legislative history of a different provision. In 1994, Congress repealed § 1124(3), which provided that a creditor's claim was not impaired if the plan paid "the *allowed amount* of such claim." 11 U.S.C. § 1124(3) (1988) (emphasis added). This proves, they say, that disallowance should now play no role in the impairment analysis.

Even for those who think legislative history can be relevant to statutory interpretation, this particular history is not. It does not say that every disallowance causes impairment. Rather, Congress repealed § 1124(3) in response to a specific bankruptcy court decision. *See In re New Valley Corp.*, 168 B.R. 73 (Bankr. D.N.J. 1994). That decision held unsecured creditors who received their allowed claims from a solvent debtor, but who did not receive post-petition interest, were unimpaired. *Id.* at 77-80. In debating the proposed repeal of § 1124(3), the House Judiciary Committee singled out *New Valley* by name as the justification for the repeal. *See* H.R. Rep. No. 103-835, at 47-48 (1994) (citing *New Valley* and explaining the

intent to repeal § 1124(3) "to preclude th[e] unfair result" of "den[ying] the right to receive postpetition interest"). It is noteworthy the committee report does not cite other bankruptcy cases—such as *Solar King*—that addressed Code impairment under § 1124(1). That is why the Third Circuit rejected appellees' legislative-history argument in *PPI* and held the repeal of § 1124(3) "does not reflect a sweeping intent by Congress to give impaired status to creditors more freely outside the postpetition interest context." 324 F.3d at 207 (noting the committee report cited *New Valley* but not *Solar King*).

Next, the Class 4 Creditors attempt to distinguish *PPI*. True, that case involved disallowance under § 502(b)(6), not § 502(b)(2). But that's a distinction without a difference. *See In re W.R. Grace & Co.*, 475 B.R. 34, 161-62 (Bankr. D. Del. 2012); *Energy Future*, 540 B.R. at 122. Section 502 states that "the court . . . *shall allow* [a] claim in [the requested] amount, *except to the extent that*" any one of nine conditions apply. If any of the enumerated conditions applies, the court shall not allow the relevant portion of the claim. *PPI* reasoned that where one of those conditions applies, the Code—not the plan—impairs the creditors' claims. *See* 324 F.3d at 204. That reasoning applies with equal force to § 502(b)(2).

The Class 4 Creditors (like the bankruptcy court) also point to the mechanics of Chapter 11 discharge to suggest the plan itself, not the Code, is doing the impairing. They note the Code's disallowance provisions are carried into effect only if the plan is confirmed, and "confirmation of the plan . . . discharges the debtor from any debt that

arose before" confirmation. 11 U.S.C. § 1141(d). In one sense, plan confirmation limits creditors' claims for money by discharging underlying debts. But in another sense, the Code limits the creditors' claims for money and imposes substantive and procedural requirements for plan confirmation. The Class 4 Creditors' argument thus begs the critical question: What is doing the work here? We agree with *PPI*, every reported decision identified by either party, and Collier's treatise. Where a plan refuses to pay funds disallowed by the Code, the Code—not the plan—is doing the impairing.

III.

That leaves the questions of 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 specified in the Note Agreement and the Revolving Credit Facility. The creditors say their contracts entitle them to both amounts, and that their contracts should be honored under bankruptcy law's longstanding "solvent-debtor" exception. The debtors argue no such exception exists in modern bankruptcy law. And the debtors further argue both claims are governed by the Bankruptcy Code, not the pre-Code law or the parties' contracts.

The bankruptcy court never reached either question. The issue of make-whole premiums, like the Make-Whole Amount, has become "[a] common dispute" in modern bankruptcy. DOUGLAS G. BAIRD, ELEMENTS OF BANKRUPTCY 84 (6th ed. 2014). Sometimes it is "comparatively easy to tell" whether such premiums are effectively unmatured interest, and therefore disallowed under § 502(b)(2). *Id*. at 84-

85. Other times, "it is much harder." *Id.* at 85. Accordingly, "much depends on the dynamics of the individual case." *Ibid.* The bankruptcy court is often best equipped to understand these individual dynamics—at least in the first instance. *Cf. U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Village at Lakeridge, LLC*, 138 S. Ct. 960, 968 n.6 (2018) (noting a bankruptcy court is often best equipped to consider "multifarious, fleeting, special, narrow facts that utterly resist generalization"). So too is the bankruptcy court best able to consider the post-petition interest question. *See ibid.*

Our review of the record reveals no reason why the solvent-debtor exception could not apply. As other circuits have recognized, "absent compelling equitable considerations, when a debtor is solvent, it is the role of the bankruptcy court to enforce the creditors' contractual rights." *In re Dow Corning Corp.*, 456 F.3d 668, 679 (6th Cir. 2006); *see also In re Chicago, Milwaukee, St. Paul and Pac. R.R. Co.*, 791 F.2d 524, 528 (7th Cir. 1986). That might be the case here.[2] But "mindful that we are a court of review, not of first view," we will not make the choice ourselves or weigh the equities on our own. *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

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[2] Of course, we follow the Supreme Court's command that any "equitable powers [that] remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Law v. Siegel*, 571 U.S. 415, 421 (2014) (quotation omitted). While we express no view on the matter, 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." *See, e.g.*, *In re Energy Holdings*, 540 B.R. 109, 123-24 (Bankr. D. Del. 2015).

Accordingly, the bankruptcy court should consider the Make-Whole Amount, the appropriate post-petition interest rate, and the applicability of the solvent-debtor exception on remand.

* * *

As we have explained, Code impairment is not the same thing as plan impairment. Because the bankruptcy court found otherwise, it did not address whether the Code disallows the Make-Whole Amount or post-petition interest, and if not, how much the debtors must pay the Class 4 Creditors. The bankruptcy court, therefore, must consider these issues on remand. For that reason and others explained above, we REVERSE in part, VACATE in part, and REMAND for further proceedings consistent with this opinion.

*Appendix F*

**UNITED STATES COURT BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS**

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Nos. 16-32202, 16-03272, 16-32204, 16-32205, 16-32206, 16-32207, 16-32208, 16-32209

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IN RE: ULTRA PETROLEUM CORP., et al.
ULTRA RESOURCES, INC.
ULTRA WYOMING, INC.
ULTRA WYOMING LGS, LLC
UP ENERGY CORPORATION
UPL PINEDALE, LLC
UPL THREE RIVERS HOLDINGS, LLC
*Debtors*.

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Filed: Sept. 21, 2017

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MEMORANDUM OPINION

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The Ad Hoc Committee of Unsecured Creditors of Ultra Resources, Inc. (the "Senior Creditor Committee") filed a complaint against Debtors Ultra Resources ("OpCo"), Ultra Petroleum Corp. ("HoldCo"), and UP Energy Corporation ("MidCo") seeking a judgment declaring: (i) that the Debtors' filing for chapter 11 bankruptcy triggered an obligation under the terms of a Master Note Purchase

Agreement (the "Note Agreement") to pay a Make-Whole Amount to certain noteholders of OpCo; and (ii) the amount of that obligation. The Debtors objected to the Senior Creditor Committee's claim for the Make-Whole Amount, post-petition interest at the contract default rate, and other related fees and expenses. Debtors' objection is denied.

**BACKGROUND**

OpCo issued multiple series of unsecured notes (the "Notes") totaling approximately $1.46 billion pursuant to the Note Agreement dated March 6, 2008, and three Note Agreement supplements dated March 5, 2009, January 28, 2010, and October 12, 2010. (ECF No. 44 at 13; ECF No. 880 at 8; ECF No. 1215 at 15). These Notes, along with funds borrowed under the OpCo RCF Credit Agreement, are known as the "OpCo Funded Debt Claims." (ECF No. 1393 at 18). HoldCo and MidCo each guaranteed OpCo's obligations under the Note Agreement and its supplements. (ECF No. 880 at 2; ECF No. 1215-1 at 8).

Pursuant to the Note Agreement, OpCo "may, at its option, upon notice . . . prepay . . . one or more series or tranches of fixed rate Notes . . . at 100% of the principal amount so prepaid, plus the Make-Whole Amount determined for the prepayment date . . . ." (ECF No. 1215-1 at 24). Section 8.7 of the Note Agreement defines a "Make-Whole Amount" as "an amount equal to the excess, if any, of the Discounted Value of the Remaining Scheduled Payments with respect to the Called Principal of such fixed rate Note over the amount of such Called Principal . . . ." (ECF No. 1215-1 at 27). "Called Principal" is "the principal of such Note that . . . has become or is declared to be

immediately due and payable pursuant to Section 12.1 . . . ." (ECF No. 12151 at 27). "Remaining Scheduled Payments" includes "all payments of such Called Principal and interest thereon that would be due after the Settlement Date," which is "the date on which such Called Principal . . . has become or is declared to be immediately due and payable pursuant to Section 12.1 . . . ." (ECF No. 1215-1 at 28). The "Discounted Value" of such Remaining Scheduled Payments is comprised of "the amount obtained by discounting all Remaining Scheduled Payments with respect to such Called Principal from their respected scheduled due dates to the Settlement Date . . . in accordance with accepted financial practice and at a discount factor . . . equal to the Reinvestment Yield" of 0.5% over the yield to maturity of specified United States Treasury obligations. (ECF No. 1215-1 at 27).

Section 11 of the Note Agreement specifies a number of conditions constituting an "Event of Default" that consequently affects the rights of the parties under the Agreement. (ECF No. 1215-1 at 35-38). If an Event of Default occurs, Section 12.1(a) of the Note Agreement provides that "all the Notes then outstanding shall automatically become immediately due and payable." (ECF No. 1215-1 at 38). Each Note incorporates by reference the Event of Default, Acceleration, and Make-Whole Amount provisions of the Note Agreement. (ECF No. 1215-1 at 158-59). Under Paragraph (g) of Section 11, OpCo's filing of a bankruptcy petition constitutes an Event of Default. (ECF No. 1215-1 at 37).

In the event that any of the Notes become due under the Note Agreement, those Notes "mature and

the entire unpaid principal amount of such Notes, plus . . . all accrued and unpaid interest thereon . . . [and] any applicable Make-Whole Amount determined in respect of such principal amount (to the full extent permitted by applicable law) . . . shall all be immediately due and payable . . . ." (ECF No. 1215-1 at 38). The Note Agreement is governed by New York law. (ECF No. 1215-1 at 47).

On April 29, 2016, OpCo, MidCo, and Holdco filed chapter 11 bankruptcy petitions. (ECF No. 1). On April 30, 2016, the Court ordered the joint administration of the Debtors' bankruptcy cases under this case number. (ECF No. 40). The commencement of these chapter 11 bankruptcy cases constituted Events of Default under the Note Agreement that automatically accelerated the balance of the underlying Notes under Section 12.1. The balance following acceleration included the principal, pre-petition interest, post-petition interest, and Make-Whole Amounts. (ECF No. 1215-1 at 37, 38). Consequently, $1.46 billion of OpCo Notes became due pursuant to the Note Agreement while $999 million became due under the OpCo Notes. (ECF No. 1215 at 12).

During the course of this case, the Debtors became solvent due in part to commodity prices rising after their petition date. (ECF No. 1215 at 18). Consequently, the Debtors proposed a chapter 11 plan paying all unsecured claims, in full and in cash, and providing a substantial recovery for their equity owners. (ECF No. 1308; *see also* ECF No. 1215 at 18). The proposed chapter 11 plan treated the OpCo Noteholders as unimpaired. As holders of unimpaired

claims, the Noteholders were "*conclusively* presumed to have accepted the plan." 11 U.S.C. § 1126(f) (*emphasis added*).

The Senior Creditor Committee objected to confirmation of OpCo's proposed plan on the grounds that, for the Noteholders' claims to be unimpaired, OpCo must pay the Make-Whole Amount and post-petition interest on the OpCo Notes at the default rates listed in the Note Agreement until the Noteholders' claims are fully satisfied. (ECF No. 1393 at 25). The Senior Creditor Committee consists of senior unsecured creditors of OpCo that collectively hold or control the various OpCo Notes. (ECF No. 1393 at 14 n. 1).

The Debtors objected to the Senior Creditor Committee's asserted entitlement to the Make-Whole Amount, post-petition interest at the Note Agreement's default rate, and other related fees and expenses on March 3, 2017. (ECF No. 1214). In their memorandum in support of their objection, the Debtors specifically assert that the Senior Creditor Committee's claims for the Make-Whole Amount should be disallowed because: (i) the claims seek unmatured interest, which is expressly barred by 11 U.S.C. § 502(b)(2); and (ii) the Make-Whole Amount is an unenforceable liquidated damages provision under New York law. (ECF No. 1215 at 21-36).

Debtors also argue that any post-petition interest awarded on the Senior Creditor Committee's claims should be assessed, at most, at the Federal Judgment Rate because: (i) post-petition interest on unsecured claims is awarded, if at all, at the "legal rate," which is the Federal Judgment Rate; and (ii) the Court

should reject the minority view that state law governs post-petition interest. (ECF No. 1215 at 36-47). Should the Court award the OpCo Noteholders both the Make-Whole Amount and post-petition interest at the contract default rate, the Debtors claim that the Noteholders' claims should be disallowed to the extent necessary to avoid a duplicative recovery. (ECF No. 1215 at 47-49). The Ad Hoc Committee of HoldCo Noteholders and the Ad Hoc Equity Committee joined in Debtors' objection. (ECF No. 1216; ECF No. 1217). The Ad Hoc Equity Committee also filed an objection to the Noteholders' claims. (ECF No. 1217).

On March 13, 2017, the Senior Creditor Committee and the Debtors entered into a stipulation. (ECF No. 1314). Pursuant to that stipulation, the parties agreed that, among other things, the quantification of post-petition interest would be addressed in conjunction with the Make-Whole Amount dispute. (ECF 1314 at 7).

The Court confirmed the Debtors' chapter 11 plan on March 14, 2017. (ECF No. 1324). The confirmation order provided that the Noteholders' claims included any amounts necessary to make the holders of the allowed claims unimpaired. (ECF No. 1324 at 69). The plan itself classified the Noteholders' claims as unimpaired and provided that the members of the Committee would receive payment of all outstanding principal on the Notes in cash, pre-petition interest at the rate listed within the Note Agreement, post-petition interest at the Federal Judgment Rate, and a forbearance fee. (ECF No. 1324-1 at 26).

The Senior Creditor Committee filed a response in opposition to Debtors' objection to the Noteholders'

claims on March 24, 2017. In its response, the Senior Creditor Committee argued that the Make-Whole Amount must be allowed in its entirety because: (i) for the Noteholders' claims to be unimpaired, Debtors must pay the full Make-Whole Amount due under state law; (ii) § 502(b)(2) is inapplicable to the Noteholders' claims because the Make-Whole Amount is matured rather than unmatured interest; and (iii) the Make-Whole Amount is fully enforceable under New York law. (ECF No. 1393 at 27-65). The Senior Creditor Committee also claims that post-petition interest should be allowed on the Noteholders' claims at the Note Agreement's default rates, not the Federal Judgment Rate, because: (i) 11 U.S.C. § 726(a)(5) is not applicable in these chapter 11 cases; and (ii) even if § 726(a)(5) were applicable in the Debtors' bankruptcy case, the circumstances of the bankruptcy require that post-petition interest be paid at the contract default rates. (ECF No. 1393 at 65-76). The OpCo Noteholders, consisting of 42 holders of senior unsecured notes issued by OpCo, filed a joint response to the Debtors' claims objections. (ECF No. 1390).

On May 16, 2017, the Court heard oral arguments on the Debtors' claims objections. Following supplemental briefing on the question of whether the Court could rely on its own illustrative calculations as part of its reasoning, the Court took this matter under advisement on June 16, 2017.

## JURISDICTION

The district court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334. The allowance or disallowance of a proof of claim against

the estate is a core matter as defined in 28 U.S.C. § 157(b)(2)(B). This case was referred to the Bankruptcy Court pursuant to 28 U.S.C. § 157(a). Accordingly, the Court has congressional authority to render a final order on the Debtors' objections to the OpCo Funded Debt and OpCo RCF Claims.

Although subject-matter jurisdiction is proper in this Court, this Court may not issue a final order or judgment in matters within the exclusive authority of Article III courts. *Stern v. Marshall*, 564 U.S. 462, 502 (2011). This Court has constitutional authority to enter a final order on the OpCo Funded Debt and OpCo RCF Claims because they stem "from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Id.* at 499. As claims against the Debtors' bankruptcy estates, the OpCo Funded Debt and OpCo RCF Claims directly stem from the Debtors' bankruptcy and the adjudication of Debtors' objections will necessarily resolve whether those claims are allowed. *See, e.g.*, *In re Brown*, 521 B.R. 205, 213 (Bankr. S.D. Tex. 2014), *adopted*, 2014 WL 7342435 (S.D. Tex. Dec. 23, 2014), *aff'd in part, appeal dismissed in part*, 807 F.3d 701 (5th Cir. 2015). Therefore, this Court possesses constitutional authority to enter a final order with respect to the allowance or disallowance of the OpCo Funded Debt and OpCo RCF Claims. Moreover, the parties have expressly or implicitly consented to the Bankruptcy Court's determination of this dispute. *See Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1949 (2015).

## ANALYSIS

### *Proof of Claim Standard*

A proof of claim is a written statement setting forth a creditor's claim. FED. R. BANKR. P. 3001(a). The filing of "a proof of claim is analogous to the commencement of an action within the bankruptcy proceeding." *In re Ira Haupt & Co.*, 253 F. Supp. 97, 98-99 (S.D.N.Y.), *modified sub nom. Henry Ansbacher & Co. v. Klebanow*, 362 F.2d 569 (2d Cir. 1966). "The filing of a proof of claim effectively commences a proceeding within the bankruptcy proceeding to establish its provability, priority, amount, etc." *Id.* A party that files a proof of claim in accordance with the Federal Rules of Bankruptcy Procedure is deemed to have established a prima facie case against the debtor's assets. 11 U.S.C. § 502(a); FED. R. BANKR. P. 3001(f); *see also In re Fid. Holding Co., Ltd.*, 837 F.2d 696, 698 (5th Cir. 1988).

A proof of claim must "be executed by the creditor or the creditor's authorized agent." FED. R. BANKR. P. 3001(b). A proof of claim that conforms substantially to the appropriate Official Form, and that is filed in accordance with Rule 3001, constitutes prima facie evidence of validity of the claim. 11 U.S.C. § 502(a); FED. R. BANKR. P. 3001(f). Accordingly, a creditor's proof of claim is prima facie valid if the creditor completes all required portions of the Official Bankruptcy Proof of Claim Form, attaches all supporting documents available for that claim, and meets the requirements of any applicable subparagraph of FED. R. BANKR. P. 3001. *See In re Harris*, 492 B.R. 225, 227-28 (Bankr. S.D. Tex. 2013) (discussing the required use of the Official Proof of

Claim Form under Rule 3001, as well as the Form's requirements). Ultimately, a proof of claim must fulfill its "essential purpose of providing objecting parties with sufficient information to evaluate the nature of the claims." *In re Wyly*, 552 B.R. 338, 378 (Bankr. N.D. Tex. 2016).

If a proof of claim is prima facie valid, a party-in-interest may nevertheless object to the claim to disprove its validity. To successfully object to a claim that has prima facie validity, the objecting party must produce evidence rebutting the claim and establish that the claim should be disallowed pursuant to 11 U.S.C. § 502(b). *In re Fid. Holding Co., Ltd.*, 837 F.2d at 698; *In re Depugh*, 409 B.R. 125, 135 (Bankr. S.D. Tex. 2009). Rebuttal evidence must be equal in probative value to successfully rebut a creditor's proof of claim. *In re Wyly*, 552 B.R. at 379. "This can be done by the objecting party producing specific and detailed allegations that place the claim into dispute, by the presentation of legal arguments based upon the contents of the claim and its supporting documents, or by the presentation of pretrial pleadings . . . ." *In re Fid. Holding Co., Ltd.*, 837 F.2d at 698.

If the objecting party produces evidence equal in probative force to the claimant's proof of claim, or the claimant fails to prove its claim's prima facie validity, the claimant must present additional evidence to "prove the validity of the claim by a preponderance of the evidence." *Id.* The ultimate burden of proof always rests upon the claimant. *Id.*

The OpCo Noteholders have filed proofs of claim seeking amounts under the Note Agreement and the OpCo RCF. (ECF No. 1214-11 at 5-122). Each proof of

claim filed by the Noteholders constitutes prima facie evidence of the validity of that claim. Accordingly, as the objecting parties, the Debtors bear the burden of rebutting the Noteholders' claims represented by the valid proofs of claim.

The following issues remain in dispute in this matter:

i. Whether the Make-Whole Amount is fully enforceable under New York law;

ii. Whether the Noteholders are entitled to all of their non-bankruptcy rights under 11 U.S.C. § 1124(1) because they are treated as unimpaired by Debtors' chapter 11 plan;

iii. Whether the Make-Whole Amount should be disallowed as unmatured interest under 11 U.S.C. § 502(b)(2); and

iv. At what rate should post-petition interest be calculated?

(ECF No. 1478 at 2-3).

***Is the Make-Whole Amount Fully Enforceable under New York Law?***

In order to carry their burden of rebutting the Noteholders' claims and establishing that those claims should be disallowed, the Debtors argue that the Make-Whole Amount represents an improper liquidated damages provision. (ECF No. 1215 at 32). This argument is made under New York law because the Note Agreement is governed by New York law. (ECF No. 1215-1 at 47). In general, if a claim is not allowed under applicable non-bankruptcy law, it is not allowed as a claim against the estate. 11 U.S.C. § 502(b)(1). The Debtors argue that the Note

Agreement does not provide a reasonable measure of probable actual loss because it is designed to double count any actual harm the Noteholders might suffer upon the automatic acceleration of the Notes. (ECF No. 1215 at 32). The Make-Whole Amount formula is intended to compensate the Noteholders for the difference between the rate stated in the now-accelerated Notes and a hypothetical reinvestment rate. (ECF No. 1215 at 12; ECF No. 1393 at 40). The Debtors claim that the Make-Whole formula actually overcompensates the Noteholders because they will be able to reinvest their principal at higher rates than that reflected in the formula. (ECF No. 1215 at 33).

Because of the alleged overcompensation, the Debtors argue that the Make-Whole Amount is grossly disproportionate to the Noteholders' probable loss at the time that they entered the Note Agreement and is therefore invalid under New York law. *Quadrant Structured Prod. Co. v. Vertin*, 16 N.E.3d 1165, 1172 (N.Y. 2014).

Typically, New York contract law requires courts to enforce unambiguous contract terms. This principle rings particularly true where the contract was negotiated by sophisticated and represented parties in an arms-length and equal negotiation. *AXA Inv. Managers UK Ltd. v. Endeavor Capital Mgmt. LLC*, 890 F. Supp. 2d 373, 388 (S.D.N.Y. 2012). A narrow exception to this rule of contract interpretation applies where a court is asked to enforce a liquidated damages provision that is proven to be a penalty and thus unenforceable by the party opposing it. *JMD Holding Corp. v. Cong. Fin. Corp.*, 4 N.Y.3d 373, 380 (N.Y. 2005).

A liquidated damages provision is a "contractual provision that determines in advance the measure of damages if a party breaches the agreement." *Liquidated-Damages Clause*, BLACK'S LAW DICTIONARY (10th ed. 2014). Contractual make-whole provisions and other, similar provisions are typically considered liquidated damages provisions. *See, e.g.*, *In re United Merchants & Mfrs., Inc.*, 674 F.2d 134 (2d Cir. 1982) (recognizing a "pre-payment charge" as a liquidated damages provision); *JMD Holding Corp.*, 4 N.Y.3d at 380 (equating an early termination fee to a liquidated damages provision). The Note Agreement explicitly lists the Noteholders' remedies that automatically arise upon the occurrence of an Event of Default, including the acceleration of the Make-Whole Amount. (ECF No. 1215-1 at 38-39). Based upon the existence of such provisions in the Note Agreement, as well as the weight of New York case law considering make-whole provisions to be liquidated damages provisions, the Make-Whole Amount constitutes a liquidated damages provision.

A liquidated damages provision is enforceable under New York law "if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation. If, however, the amount fixed is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced." *JMD Holding Corp.*, 4 N.Y.3d at 380. "The soundness of such a clause is tested in light of the circumstances existing as of the time that the agreement is entered into rather than at the time that the damages are incurred or become payable." *Walter E. Heller & Co. v.*

*Am. Flyers Airline Corp.*, 459 F.2d 896, 898 (2d Cir. 1972).

Whether damages in a particular case constitute enforceable liquidated damages is a question of law with the burden of proof on the party seeking to avoid paying the liquidated damages. *JMD Holding Corp.*, 4 N.Y.3d at 379-80. In order to meet this burden, the burdened party must demonstrate either that "damages flowing from a prospective early termination were readily ascertainable at the time" the parties entered into the liquidated damages provision, or that the provision is conspicuously disproportionate to those foreseeable damages. *Id.* at 380. "Absent some element of fraud, exploitive overreaching or unconscionable conduct . . . to exploit a technical breach, there is no warrant, either in law or equity, for a court to refuse enforcement of the agreement of the parties." *Fifty States Mgmt. Corp. v. Pioneer Auto Parks, Inc.*, 46 N.Y.2d 573, 577 (N.Y. 1979). Nonetheless, "where there is doubt as to whether a provision constitutes an unenforceable penalty or a proper liquidated damage clause, it should be resolved in favor of a construction which holds the provision to be a penalty." *Willner v. Willner*, 145 A.D.2d 236, 240-41 (N.Y. 1989).

Debtors fail to rebut the Noteholders' claim for the Make-Whole Amount because they fail to prove that the damages resulting from prepayment were readily ascertainable at the time the parties entered into the Note Agreement or that they were conspicuously disproportionate to foreseeable damage amounts. Debtors put forward no evidence or argument claiming that the prepayment damages were easily

calculable as of the time the Note Agreement was finalized. As set forth below, the difficulty in forecasting damages in this case is consistent with the difficulty seen in other cases when quantifying damages under long-term debt instruments and contrasts sharply with cases in which damages could easily have been calculated at the time an agreement was created. *See In re United Merchants & Mfrs., Inc.*, 674 F.2d at 143 ("[I]t is apparent that the potential damages from breach of the loan agreements in this case were difficult to determine."); *In re Vanderveer Estates Holdings, Inc.*, 283 B.R. 122, 130 (Bankr. E.D.N.Y. 2002) ("Potential losses from prepayment of a large fixed-rate, long-term mortgage are 'not subject to easy calculation.'"). *But see Evangelista v. Ward*, 308 A.D.2d 504, 505 (2003) (finding plaintiff's actual loss susceptible to calculation).

At the point of prepayment (whether as a result of acceleration or otherwise), a lender would lose all future interest under its notes. The loss of that future interest would ordinarily be offset by the reinvestment of the prepaid proceeds in an alternative investment. However, the measurement difficulty comes from determining the selection of an alternative investment. If the perceived risk at issuance of the debt was low, may the lender quantify its reinvestment alternatives by looking at alternatives that have low risk? What if the lender invested in an industry for diversification purposes and offered a lower rate as a result? Would the reinvestment rate, at a low risk, necessarily be in the same industry? How do you measure perceived risks at the date of issuance and the date of prepayment? Other factors are more precise. Market fluctuations in interest rates are

easily quantifiable. Nevertheless, changes in the yield curve are constant. *See generally* Tao Wu, *What Makes the Yield Curve Move?*, FRBSF ECON. LETTER (Fed. Reserve Bank of S.F.), June 6, 2003. How does one calculate a reinvestment rate with a fluctuating yield curve? Additionally, yield curves change based on the general risks of the loans. *Id.* What yield curve would be examined? The parties agreed on a simple measurement. The reinvestment rate was set at 0.5% in excess of the yield reported two business days before the Settlement Date "for the most recently issued actively traded on-the-run U.S. Treasury securities having a maturity" equal to the remaining tenor of the relevant OpCo Note as of the date it was accelerated. (ECF No. 1215-1 at 27).

The Debtors also fail to rebut the Noteholders' claim for the Make-Whole Amount by unsuccessfully proving that the Make-Whole Amount is conspicuously disproportionate to the foreseeable losses at the time the parties entered into the Note Agreement. To prove that the Make-Whole Amount is conspicuously disproportionate by attempting to collect both liquidated and actual damages, the Debtors attempt to compare it to the liquidated damages provision invalidated in *Agerbrink v. Model Serv. LLC*, 196 F. Supp. 3d 412 (S.D.N.Y. 2016). The liquidated damages provision in *Agerbrink* guaranteed defendants a "'minimum recovery' regardless of actual damages, while preserving their right to pursue actual damages if they so desire . . . ." *Id.* at 418. Because of such a double recovery for the same wage-related injury, the district court determined that this provision constituted an unfair

penalty and resulted in unjust enrichment of the defendants. *Id.* at 418-19.

Unlike the liquidated damages provision in *Agerbrink*, the Make-Whole Amount does not lead to a double recovery of actual and liquidated damages for the same injury. The Make-Whole Amount liquidates the Noteholders' damages stemming from the early termination of their investment in OpCo. (ECF No. 1215-1 at 27, 38). In other words, the Make-Whole Amount is an agreed measure of damages between the parties. The calculation of the Make-Whole Amount is performed as of the date of acceleration. Although the Make-Whole Amount references future payments that would have been due on the Notes, it also references future hypothetical reinvestment rates. It then liquidates the differences in returns as of the acceleration date.

The Debtors argue that the default interest rate double counts the amounts captured through the Make-Whole Amount. This argument fails. Had the Debtors paid the principal, the interest, and the Make-Whole Amount on the date of acceleration, there would have been no default interest due. The post-petition default interest that the Noteholders seek 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*. (ECF No. 1215-1 at 37). Such interest comports with the fact that the Notes directed that any overdue payment of the Make-Whole Amount would include interest accrued at the Note Agreement's default rate. (ECF No. 1215-1 at 38). Accordingly, these two forms of damages do not represent a double recovery of

actual and liquidated damages for the same injury to the Noteholders.

An illustration is in order. This illustration reflects that the Make-Whole Amount captured only excess interest due under the Notes in a hypothetical reinvestment. The default rate only applies to the non-payment of the excess interest and not to the non-payment of the hypothetical reinvested amount. Assume the following:

- A $1,000,000,000 loan at a 5% interest rate, with 12 equal monthly installments of $85,607,482;
- A reinvestment rate of .5% over the treasury rate;
- A treasury rate for securities with a comparable maturity of 1.5%;
- A prepayment after month 6.

The original amortization of the hypothetical loan is represented in this table:

| Month | Beginning Principal | Interest | Payment | Ending Principal |
|---|---|---|---|---|
| | | | | |
| 1 | $1,000,000,000 | $4,166,667 | ($85,607,482) | $918,559,185 |
| 2 | $918,559,185 | $3,827,330 | ($85,607,482) | $836,779,033 |
| 3 | $836,779,033 | $3,486,579 | ($85,607,482) | $754,658,131 |
| 4 | $754,658,131 | $3,144,409 | ($85,607,482) | $672,195,058 |
| 5 | $672,195,058 | $2,800,813 | ($85,607,482) | $589,388,389 |
| 6 | $589,388,389 | $2,455,785 | ($85,607,482) | $506,236,692 |
| 7 | $506,236,692 | $2,109,320 | ($85,607,482) | $422,738,530 |
| 8 | $422,738,530 | $1,761,411 | ($85,607,482) | $338,892,458 |
| 9 | $338,892,458 | $1,412,052 | ($85,607,482) | $254,697,028 |
| 10 | $254,697,028 | $1,061,238 | ($85,607,482) | $170,150,784 |
| 11 | $170,150,784 | $708,962 | ($85,607,482) | $85,252,264 |
| 12 | $85,252,264 | $355,218 | ($85,607,482) | ($0) |

As shown above, the principal balance would have been $506,236,692 at the end of 6 months. If the prepayment occurs at that time, and the $506,236,692 is hypothetically reinvested for the remaining 6 months at 2% (i.e., 0.5% above the 1.5% hypothetical reinvestment rate), the lender would receive monthly payments of only $84,865,640:

| Month | Beginning Principal | Interest | Payment | Ending Principal |
|---|---|---|---|---|
| | | | | |
| 1 | $506,236,692 | $843,728 | ($84,865,640) | $422,214,780 |
| 2 | $422,214,780 | $703,691 | ($84,865,640) | $338,052,832 |
| 3 | $338,052,832 | $563,421 | ($84,865,640) | $253,750,614 |
| 4 | $253,750,614 | $422,918 | ($84,865,640) | $169,307,892 |
| 5 | $169,307,892 | $282,180 | ($84,865,640) | $84,724,432 |
| 6 | $84,724,432 | $141,207 | ($84,865,640) | $0 |

Because the hypothetical reinvestment rate is lower, the monthly payment is reduced from $85,607,482 to $84,865,640. This is a shortfall of $741,842 per month. The present value of the $741,842, discounted at a 2% annual rate, is $4,425,204.

However, the *actual* missed interest payments would have been $7,408,199. Because the formula recognizes the hypothetical receipt of $2,957,145 of interest over the 6 months, it does not double count interest. The proof is in the calculation. The difference between $7,408,199 and $4,425,204 is $4,451,054. Because that $4,451,054 is hypothetically received over 6 months, its present value is slightly less and results in a Make-Whole Amount of $4,425,204 (a difference of $25,850).

Although this example is for only 6 months, it is intended to provide a straightforward explanation of how the math is performed. Once that understanding

is achieved, it is apparent that there is no double counting.

The Make-Whole Amount in this case is enormous. However, the mere size of the Make-Whole Amount fails to prove that the Make-Whole Amount is conspicuously disproportionate to the foreseeable losses at the time the parties entered into the Note Agreement. As stated above, courts applying New York law analyze liquidated damages provisions at the time that the underlying agreement was executed. *JMD Holding Corp. v. Cong. Fin. Corp.*, 4 N.Y.3d 373, 380 (N.Y. 2005). "It thus makes no difference whether the actual damages are ultimately higher or lower than the sum stated in the clause." *Walter E. Heller & Co. v. Am. Flyers Airline Corp.*, 459 F.2d 896, 899 (2d Cir. 1972). Because the Make-Whole Amount does not lead to a double recovery of actual and liquidated damages for the same injury, there is no reason for the Court to conclude that this provision is in any way disproportionate or invalid only because it is higher than potentially contemplated at the time the parties entered into the Note Agreement.

Accordingly, the Debtors failed to prove that either the Make-Whole Amount or the default interest amounts are unenforceable liquidation damages provisions under New York law.

***Are the Noteholders entitled to all of their non-bankruptcy rights under 11 U.S.C. § 1124(1) because they are treated as unimpaired?***

The Debtors argue that "impairment" should be applied only to the Noteholders' "allowed" claims under the Bankruptcy Code, not to their state law claims. (ECF No. 1215 at 21). In this instance, Debtors

argue 11 U.S.C. § 502(b)(2) precludes the allowance of the Make-Whole Amount because the Make-Whole Amount is merely a proxy for unmatured interest. (ECF No. 1215 at 21). In opposition, the Noteholders focus on the language of 11 U.S.C. § 1124 to support the position that "unimpairment" under § 1124 requires that the Noteholders receive all that they are entitled to receive under state law. (ECF No. 1390 at 29). The Noteholders also emphasize that Congress amended § 1124 in 1994 to eliminate an "Allowed" claim standard barring full recovery of their state law rights in a chapter 11 solvent debtor case. (ECF No. 1390 at 35).

This matter was directly addressed by the Third Circuit in *In re PPI Enterprises (U.S.), Inc.*, 324 F.3d 197 (3d Cir. 2003). *PPI* held that the § 502(b)(6) cap on a landlord's claim would be applied before determining whether the claim was impaired. *Id.* at 207. In that case, the plan proposed to pay the landlord's claim in full, but only at the substantially reduced amount set by § 502(b)(6). *Id.* at 205. The Third Circuit ultimately held that the creditor's loss of payment did not arise as a result of the plan—it arose because of § 502(b)(6). *Id.* at 204.

This Court rejects the reasoning in *PPI*. The *PPI* opinion correctly holds that the disallowance of the lease rejection claim occurs as a result of § 502 rather than as a result of confirmation of the plan. However, the issue confronting the Debtors in this case is whether the Make-Whole Amount will be enforceable following confirmation of the Debtors' plan. In a chapter 11 case, a discharge is granted under 11 U.S.C. § 1141(d). Under § 1141(d), the extent of the

discharge is governed by the terms of the confirmed plan. 11 U.S.C. § 1141(d)(1)(A) ("Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan . . . discharges the debtor from any debt that arose before the date of such confirmation . . . ."). Because the *PPI* Court failed to analyze the fact that the issue is one of discharge rather than allowance, the Court rejects its conclusions. It is the plan that results in the discharge of the state-law based Make-Whole Amount—not § 502(b)(2).

Because the extent of a chapter 11 discharge is governed by the relevant plan, the issue of the Make-Whole Amount's post-confirmation enforcement in this case is governed by the Debtors' confirmed Plan. The Plan provides that the Noteholders' claims are not impaired and shall be paid whatever amount necessary to make them unimpaired. (ECF No. 1324 at 26). The Debtors' liability on the Make-Whole claims is thus not discharged under § 1141(d) unless the Make-Whole claims are actually paid in their state law amount. Treating the Noteholders' claims in this way is far more consistent with the mandate of the Fifth Circuit, which has held that "even the smallest impairment nonetheless entitles a creditor to participate in voting." *In re Vill. at Camp Bowie I, L.P.*, 454 B.R. 702,708 (Bankr. N.D. Tex. 2011), *aff'd*, 710 F.3d 239 (5th Cir. 2013).

Regardless of the application of § 502(b)(2), the Court must determine the date on which acceleration occurred. The Court initially questioned whether, notwithstanding acceleration on account of an *ipso facto* clause, a claim may be unimpaired by the

restoration of the creditors' rights pursuant to § 1124(2). However, the Debtors explicitly acknowledge that their chapter 11 plan treats the Noteholders' claims as unimpaired under § 1124(1). (ECF No. 1566 at 21). Because § 1124(1) applies in this case instead of § 1124(2), the prohibition against an *ipso facto* default present in § 1124(2) does not apply to the Make-Whole Amount. Debtors' obligation to pay the Noteholders the Make-Whole Amount thus arose on the Debtors' petition date, the applicable date of the Debtors' default under the Note Agreement. Consequently, interest payments on the outstanding balance of the Notes are calculated based upon the Debtors' petition date.

***At what rate should post-petition interest be calculated?***

The issue remains as to what post-confirmation rate of interest must apply to the unpaid portion of the Noteholders' claims.

The Debtors argue that any interest on the Noteholders' claims should be assessed, at most, at the "legal rate," as stated in 11 U.S.C. § 726(a)(5). (ECF No. 1215 at 37). Based upon federal case law, the language of § 726, and legal policy, the Debtors claim that the term "legal rate" is defined as the federal judgment rate of interest. (ECF No. 1215 at 39-44). *See In re Gulfport Pilots Ass'n, Inc.*, 434 B.R. 380, 392 (Bankr. S.D. Miss. 2010) (applying the federal judgment rate to a post-petition interest claim); *In re Dow Corning Corp.*, 237 B.R. 380, 401 (Bankr. E.D. Mich. 1999) ("'[I]nterest at the legal rate' was, and is, commonly understood to mean a rate of interest fixed by statute, and not by contract."); *see also In re*

*Cardelucci*, 285 F.3d 1231, 1235 (9th Cir. 2002) ("[U]sing the federal rate promotes uniformity within federal law."). Post-petition interest on unsecured claims is awarded, if at all, at the federal judgment rate because § 502(b)(2) prohibits claims for such unmatured interest. (ECF No. 1215 at 37). *Matter of W. Texas Mktg. Corp.*, 54 F.3d 1194, 1197 (5th Cir. 1995) ("[I]nterest stops accruing at the date of the filing of the petition.").

Debtors recognize that unsecured creditors may receive post-petition interest on their claim if a debtor is solvent. (ECF No. 1215 at 37). *In re Cont'l Airlines Corp.*, 110 B.R. 276, 277 (Bankr. S.D. Tex. 1989). Nonetheless, pursuant to § 726(a)(5), the Debtors argue that such creditors receive interest at the legal or federal judgment rate. (ECF No. 1215 at 38). The Debtors cite to multiple cases—including Fifth Circuit precedent—and legal policy stating that the term "legal rate" in § 726 refers to the federal judgment rate of interest in 28 U.S.C. § 1961. (ECF No. 1215 at 39-42). Additionally, the Debtors argue that state law does not govern the rate of post-petition interest on unsecured claims in a solvent debtor case because such practice relies on pre-Bankruptcy Code practice, which defies the plain language of § 726(a)(5) and thus should not be followed. (ECF No. 1414 at 29). The Debtors finally assert that, pursuant to 11 U.S.C. § 1141(d), the Noteholders' claims were discharged under the Debtors' chapter 11 plan. (ECF No. 1478 at 2). Consequently, the Noteholders are entitled only to what the chapter 11 plan provides them—what the Bankruptcy Code and New York law entitles them to receive. (ECF No. 1478 at 2).

In opposition to the Debtors' position, the Senior Creditor Committee asserts that the Noteholders' unsecured claims fall squarely within the solvent debtor exception to disallowance of post-petition interest on unsecured claims under 11 U.S.C. § 502(b)(2). (ECF No. 1393 at 66). The exception of the Noteholders' post-petition interest claims to disallowance is not limited by § 726(a)(5) because that provision of the Code is not applicable to chapter 11 cases, the claims are unimpaired, and the Debtors are solvent. (ECF No. 1393 at 66-70). Even if § 726(a)(5) were applicable to the Noteholders' post-petition interest claims, the Senior Creditor Committee argues that post-petition interest should still be paid at the Note Agreement's default rates because cases holding that the "legal rate" referred to in that provision are distinguishable as chapter 7 or 11 liquidation cases, as cases where no contract default rate existed, and as cases involving cramdown interest rates. (ECF No. 1393 at 72-74).

Joining the Senior Creditor Committee, the OpCo Noteholders claim that post-petition interest on the Noteholders' claims should be allowed at the Note Agreement's default rate because: Congress's repeal of 11 U.S.C. § 1124(3) in 1994 requires unsecured creditors to receive post-petition interest at the underlying contract rate in order to be unimpaired; this Court ruled in *In re Moody Nat. SHS Houston H, LLC*, 426 B.R. 667 (Bankr. S.D. Tex. 2010) that, for a claim to be unimpaired, interest must be paid at the contract default rate pursuant to § 1124(2); the Bankruptcy Code does not supplant the clearly established pre-code practice of awarding default interest at the contract rate in solvent debtor cases; if

interest is awarded pursuant to § 726(a)(5), the Court should follow precedent holding that the "legal rate" is the contract rate of interest; and equitable principles merit awarding the contract rate of interest because the claims of the structurally subordinated creditors of the Debtors include post-petition interest at the rate included in the Note Agreement. (ECF No. 1390 at 36-37).

The Debtors fail to rebut the Noteholders' claim for post-petition interest at the rate listed in the Note Agreement because the Noteholders' claims are treated as unimpaired under the Debtors' chapter 11 plan. Paying post-petition interest on the Make-Whole Amount at the federal judgment rate instead of the rate within the Note Agreement would cause the Noteholders to be impaired.

Section 726(a)(5) is not applicable to the Noteholders' post-petition claims because its only application in a chapter 11 case—through the "best interest of creditors" test in 11 U.S.C. § 1129(a)(7)—limits *impaired*, not unimpaired, claims. 11 U.S.C. § 1129(a)(7); *see also In re Energy Future Holdings Corp.*, 540 B.R. 109, 124 (Bankr. D. Del. 2015) ("[T]he applicability of Section 726(a) is limited to its incorporation in Section 1129(a)(7) and does not create a general rule establishing the appropriate rate of post-petition interest."). The Noteholders are therefore entitled to their contractual rate of interest under the Note Agreement regardless of any disallowance provisions in the Bankruptcy Code. *See In re Moody Nat. SHS Houston H, LLC*, 426 B.R. at 678 (finding that unimpairment of a creditor's claim requires the payment of interest at the default rate).

## CONCLUSION

The Court will issue an Order consistent with this Memorandum Opinion.

Signed September 21, 2017

[handwritten signature]

Marvin Isgur
UNITED STATES
BANKRUPTCY JUDGE

*Appendix G*

## RELEVANT STATUTORY PROVISIONS

### 11 U.S.C. § 502(b)(2)

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

. . .

(2) such claim is for unmatured interest;

. . .