No. ______

In the
Supreme Court of the United States

THE HERTZ CORPORATION, et al.,

Petitioners,

v.

WELLS FARGO BANK, N.A., U.S. BANK NATIONAL ASSOCIATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Bankruptcy Code disallows claims for "unmatured interest," i.e., claims for interest that has not yet accrued when the bankruptcy petition is filed. 11 U.S.C. §502(b)(2). In the decision below, the Third Circuit unanimously (and correctly) held that this provision by its terms disallows respondents' claim for some $147 million in "make-whole" premiums that were designed to compensate respondents for future unmatured interest. But a two-judge majority then went on to hold that an unwritten "common law absolute priority rule" derived from pre-Code judicial practice overrides the plain statutory text in solvent-debtor cases, and allowed respondents to recover from petitioners both that $147 million in make-whole premiums and an additional $125 million in post-petition interest. The decision below is the third in as many years to hold, over vigorous dissent in each case and in conflict with numerous other courts, that a judicially-created pre-Code exception supersedes the plain language of the Bankruptcy Code and permits creditors in solvent-debtor cases to recover amounts that the Code expressly disallows—and the decision below reached that unlikely result by relying on a theory that no other court has adopted and no party below raised.

The question presented is:

Whether an unwritten pre-Code exception overrides the Bankruptcy Code's express statutory text and allows creditors in solvent-debtor cases to recover amounts that the Code explicitly disallows.

PARTIES TO THE PROCEEDING

Petitioners are: The Hertz Corporation, Hertz Global Holdings, Inc., Thrifty Rent-A-Car System, LLC, Thrifty, LLC, Dollar Thrifty Automotive Group, Inc., Firefly Rent A Car LLC, CMGC Canada Acquisition ULC, Hertz Aircraft, LLC, Dollar Rent A Car, Inc., Dollar Thrifty Automotive Group Canada Inc., SellerCo Corporation (f/k/a Donlen Corporation), SellerCo FSHCO Company (f/k/a Donlen FSHCO Company), Hertz Canada Limited, SellerCo Mobility Solutions, Inc. (f/k/a Donlen Mobility Solutions, Inc.), DTG Canada Corp., DTG Operations, Inc., Hertz Car Sales LLC, DTG Supply, LLC, (Hertz Global Services Corporation, Hertz Local Edition Corp., Hertz Local Edition Transportating, Inc., SellerCo Fleet Leasing Ltd. (f/k/a Donlen Fleet Leasing Ltd.), Hertz System, Inc., Smartz Vehicle Rental Corporation, Thrifty Car Sales, Inc., Hertz Technologies, Inc., TRAC Asia Pacific, Inc., Hertz Transporting, Inc., Rental Car Group Company, LLC, Rental Car Intermediate Holdings, LLC (collectively, "Hertz"). Petitioners were the debtors in the Chapter 11 cases below, defendants in the adversary proceeding below, and appellees in the Third Circuit.

Respondents are Wells Fargo Bank, N.A., as indenture trustee, and U.S. Bank National Association, as indenture trustee. Respondents were claimants in the Chapter 11 cases below, plaintiffs in the adversary proceeding below, and appellants in the Third Circuit.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Petitioners state as follows:

Hertz Global Holdings, Inc. owns one hundred percent of the equity interests of Rental Car Intermediate Holdings, LLC, which in turn owns one hundred percent of the equity interests of The Hertz Corporation ("Hertz").

Hertz owns one hundred percent of the equity interests of the following entities: (1) Hertz Transporting, Inc.; (2) Firefly Rent A Car, LLC; (3) SellerCo Corporation (f/k/a Donlen Corporation); (4) Hertz Technologies, Inc; (5) Hertz Car Sales, LLC; (6) Hertz System, Inc; (7) Smartz Vehicle Rental Corporation; (8) Hertz Global Services Corporation; (9) Hertz Local Edition Corporation; and (10) Rental Car Group Company, LLC.

Rental Car Group Company, LLC owns one hundred percent of the equity interests in Dollar Thrifty Automotive Group, Inc.

Dollar Thrifty Automotive Group, Inc. owns one hundred percent of the equity interests of the following entities: (1) Thrifty, LLC; (2) Dollar Rent A Car, Inc.; and (3) DTG Operations, Inc.

DTG Operations, Inc. owns one hundred percent of the equity interests of DTG Supply, LLC.

Hertz Local Edition Corporation owns one hundred percent of the equity interests of Hertz Local Edition Transporting, Inc.

Thrifty, LLC owns one hundred percent of the equity interests of the following entities: (1) Thrifty

Car Sales, Inc.; (2) Thrifty Insurance Agency, Inc.; and (3) Thrifty Rent-A-Car System, LLC.

No other publicly held company holds 10% or more of any Petitioner's stock or has a financial interest in the outcome of the proceeding.

STATEMENT OF RELATED PROCEEDINGS

This case is directly related to the following proceedings:

In re The Hertz Corporation, Nos. 23-1169 & 23-1170 (3d Cir.) (Nov. 6, 2024).

In re The Hertz Corporation, No. 20-11218, Adv. No. 21-50995 (Bankr. D. Del.) (Dec. 22, 2021).

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PETITION FOR WRIT OF CERTIORARI

The split decision below addresses a critically important and recurring question of bankruptcy law—and it gets the answer grievously wrong, relying on a theory that no other court has adopted (and no party below advanced) to elevate an unwritten pre-Code doctrine over the Bankruptcy Code's clear text. Over a spirited dissent, the panel majority held that a "pre-Code absolute priority rule" derived from decisions interpreting the since-superseded Bankruptcy Act overrides the Code's plain text in solvent-debtor cases, and requires petitioners (collectively "Hertz") to pay creditors some $272 million in unmatured interest that the Code explicitly disallows. That holding cannot be reconciled with the unambiguous statutory text or with settled principles of statutory interpretation. It conflicts with numerous decisions rejecting any such unwritten solvent-debtor exception, and contributes to rapidly growing confusion over an important and recurring issue. This Court's review is urgently warranted.

Hertz is a global vehicle-rental company that was rendered insolvent by the near-total collapse of the global travel industry during the COVID-19 pandemic and filed for bankruptcy protection under Chapter 11. No one doubted Hertz's insolvency or good faith at the time of that filing. During the bankruptcy proceedings, however, the COVID-19 pandemic abated and the global travel industry rebounded, enabling Hertz to regain solvency. Hertz therefore proposed a plan of reorganization that would give its creditors, including respondents, everything to which they were entitled under the Bankruptcy Code, paying them the remaining principal on their unsecured notes, pre-petition interest, and post-petition interest at the federal judgment rate in full and in cash. Respondents nevertheless asserted that they were entitled to hundreds of millions of dollars more in contractual obligations triggered by the bankruptcy filing, including (i) $147 million in "make-whole" premiums designed to compensate them for future interest, and (ii) another $125 million in post-petition interest at the notes' contractual default rates rather than at the federal judgment rate—despite the Bankruptcy Code's explicit disallowance of claims for unmatured interest. *See* 11 U.S.C. §502(b)(2).

In a divided decision, the Third Circuit ruled for respondents, albeit not on a theory respondents actually advanced. Instead, the panel began by unanimously rejecting respondents' arguments that their claims for the make-whole premiums here were not claims for unmatured interest. The panel thus unanimously recognized that all the claims here were disallowed by the express terms of §502(b)(2). At that point, however, the panel fractured. While Judge Porter concluded that the issue began and ended with the statutory text, the panel majority disagreed and embraced a novel theory that no other court has endorsed and that no party had advanced. In the panel majority's view, a pre-Code "common law absolute priority rule," subsumed by a Code provision that explicitly and concededly does not apply here, supersedes the clear text of §502(b)(2) and requires solvent debtors to pay claims that the Code explicitly disallows, including respondents' claims for their make-whole amounts and post-petition interest at their contractual default rates.

That divided decision disregards basic rules of statutory interpretation. As this Court has explained in case after case—including bankruptcy cases—statutory interpretation begins with the text, and ends there when the text is clear. Thus, when a panel unanimously agrees that the Code disallows claims for unmatured interest, it can go no further. Employing malleable concepts derived from since-repealed statutes to reach results perceived to be more equitable disregards critical limits on the proper judicial role. Worse still, the panel majority claimed that its decision to elevate pre-Code practice over clear statutory text was required by this Court's precedent. That the-Supreme-Court-made-me-do-it assertion is flatly wrong—it misreads a case applying the specific-controls-the-general canon to do pretty much the opposite—and magnifies the need for this Court's review.

The decision adds to the growing conflict and confusion in the lower courts on this important and oft-recurring question. While numerous courts have held, and continue to hold, that the plain text of the Code controls, the decision below joins other courts in rejecting that longstanding view in favor of an atextual exception drawn from pre-Code judicial decisions. And, in employing the absolute-priority principle that was superseded by a comprehensive Code enacted by Congress to justify disregarding the plain text of that Code, the decision below breaks from even those courts that have adopted a solvent-debtor exception and creates a square conflict with the Second Circuit. *See In re LATAM Airlines Group S.A.*, 55 F.4th 377, 387-89 (2d Cir. 2022). This Court should grant review now, reaffirm the controlling principles of statutory interpretation that the decision below disregards, and end the confusion in the lower courts on this significant and recurring issue.

OPINIONS BELOW

The Third Circuit's amended opinion below is reported at 120 F.4th 1181 and reproduced at App.1-49. The bankruptcy court's opinion granting in part and denying in part Hertz's motion to dismiss is reported at 637 B.R. 781 and reproduced at App.52-94. The bankruptcy court's opinion granting Hertz's motion for summary judgment and denying respondents' motions for summary judgment and for reconsideration is unreported but reproduced at App.95-113.

JURISDICTION

The Third Circuit issued its amended opinion and denied rehearing en banc on November 6, 2024. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced at App.116-19.

STATEMENT OF THE CASE

A. Factual and Procedural Background.

1. The Hertz Company first opened its doors in 1918, with a fleet of twelve Ford Model Ts. Hertz subsequently grew into one of the largest worldwide vehicle rental companies, with over 12,000 locations worldwide and more than 770,000 vehicles at the end of 2019.

The COVID-19 pandemic abruptly checked that growth. When airline travel evaporated, so did

Hertz's primary revenue stream, with reservations at its airport rental locations down approximately 90% in March, April, and May 2020 from the prior year. Hertz's non-airport locations also suffered as travelers first chose, and then were required, to stay home. Faced with these unprecedented challenges, Hertz was eventually compelled to file for bankruptcy under Chapter 11 on May 22, 2020. App.53.

2. Among Hertz's key liabilities in its bankruptcy were five series of unsecured notes maturing in 2022, 2024, 2026, and (for two series) 2028 (collectively, the "Notes"), on which Hertz owed respondents (the "Noteholders") over $2.8 billion in principal and accrued pre-petition interest. *See* App.54. U.S. Bank serves as indenture trustee for one series maturing in 2028; Wells Fargo serves as indenture trustee for the other four series (the "Senior Notes").[1] Each of the Notes bears a specified interest rate ranging from 5.5% to 7.125%. *See* C.A.App.127, 810.

The indentures governing the Senior Notes include voluntary redemption provisions that allow Hertz to redeem the Notes by paying the "applicable redemption price" set out in the indentures. For redemptions within the first three years after issuance, the indentures defined the "applicable redemption price" as (i) the amount of principal to be redeemed, plus (ii) accrued but unpaid interest

[1] Technically, respondents are Wells Fargo Bank, N.A. and U.S. Bank, N.A., as indenture trustees for the Noteholders, who are the real parties in interest. App.4 n.2. The amount owed on the Senior Notes was over $2.77 billion, *see* App.54, while the amount owed on the other Notes was over $28 million, *see* C.A.App.823, 1513.

through the date of redemption, plus (iii) a make-whole amount referred to as the "Applicable Premium." *See* App.4-5, 14-15 & n.8.

The indentures define the "Applicable Premium" (as relevant here) as the present value of the remaining future scheduled interest payments through three years after the relevant Notes were issued, plus the present value of the fixed redemption price set by the indentures for the date three years after the relevant Notes were issued, minus the principal amount being redeemed. *See* App.14-15 & n.8. The Applicable Premium thus represents additional compensation for the future scheduled interest payments that the Noteholders would not receive due to the early redemption of the Notes.

3. After Hertz's bankruptcy filing, the travel industry rebounded and Hertz proposed a plan of reorganization that would pay all allowed claims (including the Noteholders' claims) in full and in cash. App.53-54. In particular, Hertz proposed to pay the Noteholders all of their outstanding principal, all accrued and unpaid pre-petition interest, and post-petition interest at the federal judgment rate—over $2.8 billion in total. App.4-5, 7-8; *see supra* p.5 n.1. Because the Noteholders' allowed claims were paid in full (and with post-petition interest at the federal judgment rate), the plan classified them as unimpaired, meaning that the Noteholders were "conclusively presumed to have accepted the plan" and did not vote on it. 11 U.S.C. §1126(f).

The Noteholders objected, contending that they were entitled to hundreds of millions of dollars more. According to the Noteholders, in order to treat them as unimpaired, Hertz had to pay them not only principal and accrued interest on the Notes, but also the Applicable Premiums on the Senior Notes (an additional $147 million) and post-petition interest on the Notes at their contractual default rates rather than the federal judgment rate (another $125 million). *See* App.54. Hertz disagreed, explaining that the Noteholders' claims for the Applicable Premiums and for post-petition interest at their contract rates were barred by 11 U.S.C. §502(b)(2), which disallows any "claim … for unmatured interest" (i.e., interest maturing after the bankruptcy petition is filed). App.5. As a result, the Noteholders were entitled at most to post-petition interest on their allowed claims at the federal judgment rate—the rate that the Code contemplates for solvent-debtor cases. App.5; *see* 11 U.S.C. §726(a)(5).

4. In June 2021, the bankruptcy court confirmed the plan. App.8. The confirmed plan classified the Noteholders' claims as unimpaired, and provided that they would be paid "in the amount necessary to render them unimpaired." App.53. That approach allowed the bankruptcy court to confirm the plan before deciding whether the Noteholders must be paid the Applicable Premiums and post-petition interest at their contractual default rates. App.8.

When the bankruptcy court ultimately decided that question, it sided with Hertz. The bankruptcy court first rejected a broad solvent-debtor exception and held that Hertz's solvency entitled the Noteholders to post-petition interest only at the rate contemplated by the Code for unsecured creditors in solvent-debtor cases, namely, the federal judgment rate. App.77-94. The bankruptcy court found that the absolute priority rule was not implicated, as §1129(b) expressly does not apply to unimpaired creditors. App.78. Then, at summary judgment, the bankruptcy court held that the Applicable Premiums were "the equivalent of unmatured interest" and so were disallowed under §502(b)(2). App.104-05. The bankruptcy court also reaffirmed that the Code's explicit "prohibition" on claims for unmatured interest "is clearly stated in section 502(b)(2)," and that even in solvent-debtor cases the Code envisions post-petition interest only at the federal judgment rate. App.109. The court recognized that divided Fifth and Ninth Circuit panels had reached the opposite view, but found the dissenting opinions in those cases persuasive. App.107-08; *see In re Ultra Petroleum Corp.*, 51 F.4th 138, 160-64 (5th Cir. 2022) (Oldham, J., dissenting), *cert. denied*, 143 S.Ct. 2495 (2023); *In re PG&E Corp.*, 46 F.4th 1047, 1065-75 (9th Cir. 2022) (Ikuta, J., dissenting), *cert. denied*, 143 S.Ct. 2492 (2023).

Recognizing the need for further appellate guidance on this important and recurring issue, the bankruptcy court *sua sponte* certified its decision for direct review by the Third Circuit, which the Third Circuit granted. App.9.

B. The Third Circuit's Decision.

A divided panel of the Third Circuit affirmed in part and reversed in part. The panel unanimously concluded that the Applicable Premiums were unmatured interest both under "dictionary and caselaw definitions of interest" and as "the economic equivalent of interest," and so claims for those amounts "must be disallowed under §502(b)(2)." App.16-22, 40-41. The panel also unanimously agreed that disallowance of those claims by §502(b)(2) did not "impair" the Noteholders, agreeing with a "monolithic mountain of authority" that a creditor is not impaired *by the plan* when it is the disallowance provisions *of the Code* that limit the creditor's recovery. *In re Ultra Petroleum Corp.*, 943 F.3d 758, 760 (5th Cir. 2019); *see* App.30 n.20; App.43-44.

But despite their unanimity on those seemingly dispositive points, the panel then fractured. After agreeing that §502(b)(2) disallowed the Noteholders' claims for the Applicable Premiums and post-petition interest at their contract rates, the panel majority went on to hold that the Noteholders were nevertheless entitled to those exact same amounts by virtue of "the pre-Code absolute priority rule"—an argument that the Noteholders themselves never raised. App.24. According to the panel majority, that pre-Code common-law rule was tacitly "adopted" as an "enacted part of" the Code through 11 U.S.C. §1129(b), which provides that a plan must be "fair and equitable" to *impaired* creditors that reject the plan (a provision that by its terms is entirely inapplicable here given that the Noteholders were by definition unimpaired by the plan). App.24-25, 27-28. And that pre-Code common-law rule, the panel majority asserted, "requires creditors' obligations be paid in full before owners, with junior rights to the business, take anything at all." App.35. As such, in the panel majority's view, a creditor "is impaired if its treatment violates the absolute priority rule"—that is, a creditor is impaired if it receives anything less than its full contractual entitlements, *including entitlements* *explicitly disallowed by the Code*, while a lower-priority claimant receives a distribution. App.29.

The panel majority made little attempt to explain how its novel rule could be reconciled with the "monolithic mountain of authority" holding that the Code's disallowance provisions do not create plan impairment, even when the debtor is solvent. *Ultra*, 943 F.3d at 760; *see* App.30 n.20. Nor did it explain how an absolute priority rule could be imported into the Code via §1129(b) when that provision by its terms only applies to impaired creditors, and (even where it applies) is satisfied when, as here, the plan pays the full allowed amount of a claim. 11 U.S.C. §1129(b). Instead, the panel majority attributed its unprecedented approach to this Court, asserting that its holding "squarely follows" from *Czyzweski v. Jevic Holding Corp.*, 580 U.S. 451 (2017), even though that decision did not involve disallowance, impairment, or solvent debtors at all and entirely escaped the notice of respondents' highly skilled counsel and two other circuit courts. App.29. The panel majority then injected additional confusion and judicial discretion by declaring that "while the absolute priority rule can require payment of contract interest in solvent debtor cases, it does not always do so," and instead "imposes the equitable rate of post-petition interest, whatever that may be." App.35; *see* App.35-36 (asserting that unspecified "compelling equitable considerations" might warrant a different result in other cases).

Judge Porter dissented in relevant part, explaining that the Code "plainly disallows claims 'for unmatured interest' like the Noteholders' claims for the Applicable Premiums and post-petition interest," and so Hertz's plan did not impair the Noteholders by refusing to pay those same amounts. App.42 (citing *Ultra*, 51 F.4th at 160-64 (Oldham, J., dissenting); *PG&E*, 46 F.4th at 1065-75 (Ikuta, J., dissenting)). Judge Porter rejected the panel majority's novel absolute-priority theory, explaining that "treatment consistent with the absolute priority rule" is a "procedural protection," rather than one of "the rights to which the Noteholders' claims entitle them." App.43-44. Because the absolute priority rule "flows from a legal source other than the Noteholders' claims," it "is irrelevant to impairment." App.44.

Regardless, even if the Noteholders' claims somehow implied a substantive "right to treatment consistent with absolute priority," those claims "are nevertheless unimpaired because it is the Code that alters the Noteholders' right, not the Plan." App.45. Because "[i]t is the Code, not the Plan, that disallows the Noteholders' claims for the Applicable Premiums and post-petition contract-rate interest," and the Code, not the Plan, that "result[s] in treatment that the majority deems inconsistent with absolute priority," there is no plan impairment whatsoever. App.45.

Judge Porter also rejected the panel majority's reliance on this Court's decision in *Jevic* "for at least two reasons." App.47. First, this Court held in *Jevic* that a bankruptcy court could not "exercise[] a power without any express basis in the Code" to violate the absolute priority rule; it did *not* hold that the absolute priority rule allows a court to "disregard" the statutory text and "wield power that the Code expressly withholds." App.47. Second, unlike the bankruptcy court in *Jevic*, Hertz "has not violated the codified absolute priority rules because it has paid the Noteholders' allowed claims in full." App.48. After all, "codified absolute priority requires payment of allowed claims, not payment of disallowed contractual entitlements." App.48. Hertz's plan of reorganization "therefore fits comfortably with the codified absolute priority rules that were violated in *Jevic*." App.48.

In short, "even assuming that *Jevic* announces a clear-statement rule, it does not apply to the facts here." App.48. Instead, the proper approach is this Court's "typical approach to harmonizing pre-Code practice with the Code's text, under which pre-Code practice 'can be relevant to the interpretation of an ambiguous text' but is irrelevant if there is 'no textual ambiguity.'" App.48 (quoting *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 649 (2012)). And "[b]ecause the Code's disallowance of the Noteholders' claims is clear and unambiguous," any pre-Code common-law absolute-priority rule cannot serve as "an 'extratextual supplement' to supplant §502(b)(2)" here. App.48-49 (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 10 (2000)).

REASONS FOR GRANTING THE PETITION

The divided panel decision below addresses an exceptionally important question of bankruptcy law and statutory interpretation—and gets the answer exceptionally wrong, adopting a novel theory that no other court has espoused and that respondents never advanced below. That unprecedented decision deviates from bedrock principles of statutory construction, elevating a judicial gloss on the since-superseded Bankruptcy Act over the clear text of the subsequently enacted Bankruptcy Code. The resulting decision conflicts with the statutory text, this Court's settled precedent, and numerous decisions from other lower courts. The fact that the panel majority attributed its erroneous ruling to this Court's decision in *Jevic* only magnifies the need for this Court's intervention. This Court should grant review, correct the panel majority's Code-defying error, and end the growing confusion in the lower courts on this critically important issue.

As this Court has oft made clear, statutory interpretation begins with the statutory text—and ends there when the text is clear. There is no bankruptcy exception to this bedrock rule; indeed, this Court has repeatedly invoked these principles in the bankruptcy context. The decision below thus should have ended with the panel's unanimous conclusion that the plain text of §502(b)(2) disallows respondents' claims for unmatured interest. The panel majority's decision to continue and invoke an atextual absolute-priority rule derived from since-repealed text is deeply flawed, enormously consequential, and cries out for this Court's review and correction.

The decision below is in direct conflict with numerous other lower-court decisions, which have routinely held that the Bankruptcy Code's disallowance provisions apply equally to solvent and insolvent debtors without suggesting that applying those unambiguous disallowance provisions in solvent-debtor cases raises any absolute-priority concerns. Moreover, the decision here conflicts with the reasoning of the Fifth and Ninth Circuit majorities, who evaded the plain text without basing their decisions on the absolute-priority rule or citing *Jevic*. And by invoking the absolute-priority principle as the means for evading the clear text of §502(b)(2), the decision below creates a clear split with the Second Circuit. The different reasoning of the courts of appeals that have disregarded plain text in solvent-debtor cases is unsurprising, as once courts elevate judge-made doctrines over statutory text, conflict and confusion is inevitable.

Nor should this Court discount the dissenting opinions of three highly respected jurists, just because they were evenly distributed across the three decisions. Those dissents are persuasive and faithful to this Court's precedents on statutory interpretation and the proper judicial role. The majority decisions, by contrast, engage in unjustified bankruptcy-exceptionalism and, worse yet, attribute their atextual results to this Court. The question presented is extraordinarily important both financially and doctrinally. It implicates hundreds of millions of dollars in this case alone and fundamental principles of bankruptcy law and statutory interpretation. This Court should grant certiorari.

I. The Decision Below Contravenes Clear Text And Settled Precedent.

A. The Panel Majority Seriously Erred by Relying on Unwritten Pre-Code Practice to Override Clear Statutory Text.

Section 502(b)(2) of the Bankruptcy Code is unambiguous: A claim must be disallowed "to the extent that … such claim is for unmatured interest." 11 U.S.C. §502(b)(2). Nothing in that text draws any distinction between solvent and insolvent debtors; instead, "the Bankruptcy Code plainly disallows claims 'for unmatured interest'" in *all* cases, regardless of whether the debtor is solvent or whether disallowing those claims will lead to greater recovery for other equal- or lower-priority claimants. App.42. The "unmistakable clarity" of that text forecloses any alternative interpretation. App.49 n.2 (brackets omitted); *see Ultra*, 51 F.4th at 161 (Oldham, J., dissenting).

Section 1124(1) is equally unambiguous: A claim is unimpaired as long as "the plan … leaves unaltered the legal, equitable, and contractual rights to which such claim … entitles the holder." 11 U.S.C. §1124(1). As a "monolithic mountain of authority" holds, that language limits the impairment inquiry to whether *the plan* alters a creditor's rights; disallowance by *the Code* does not create impairment, regardless of the debtor's solvency. *Ultra*, 943 F.3d at 760 (applying that principle in a solvent-debtor case); *see In re PPI Enters. (U.S.), Inc.*, 324 F.3d 197, 204 (3d Cir. 2003) (same).

The decision below could not dispute the clarity of the relevant statutory text. Indeed, the panel began its analysis by unanimously recognizing that all the claims at issue here sought unmatured interest, that §502(b)(2) disallows claims for unmatured interest altogether, and that a creditor whose claim is disallowed by the Code is not impaired under §1124(1). *See* App.16-22, 30 n.20. But rather than ending its analysis there, the panel splintered when the majority went on to invoke "the pre-Code absolute priority rule" to deem creditors of solvent debtors entitled to "be paid in full" on their claims—including contractual claims to post-petition interest that §502(b)(2) expressly disallows—before junior claimants "take anything at all," and labeled any deviation from that rule "impairment." App.24, 29, 35.

The panel majority attempted to sidestep the primacy of statutory text over judge-made principles by claiming that the Code "adopted" the pre-Code absolute priority rule as "an enacted part of" the Code itself, now "housed in §1129(b)." App.24-25, 27-28. But whatever judge-made absolute priority rule might have prevailed as a gloss on the Bankruptcy Act before the enactment of the Code is not significant here. The Bankruptcy Code that Congress enacted in 1978 explicitly limits the application of the absolute priority rule to the evaluation of the treatment of *impaired* creditors in a rejecting class. 11 U.S.C. §1129(b)(1). The plain language of §1129(b) does not even hint that it trumps the Code's disallowance and impairment provisions in solvent-debtor cases. Indeed, §1129(b) does not distinguish between solvent and insolvent debtors at all; it affirmatively authorizes confirmation over the objection of an *impaired* class "if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class … *that is impaired under*, and has not accepted, the plan." 11 U.S.C. §1129(b)(1) (emphasis added). Thus, without regard to the debtor's solvency, §1129(b) is wholly irrelevant to unimpaired creditors (like respondents). The question of impairment is instead squarely addressed by §1124(1), which, as the panel majority recognized, does not treat claims that are disallowed by the Code (like the relevant claims here) as impaired. On top of that, §1129(b) specifically explains that its "fair and equitable" requirement can be satisfied if each impaired unsecured creditor receives "the allowed amount of [its] claim." *Id.* §1129(b)(2)(B)(i). Section 1129(b) is thus doubly irrelevant, since respondents *did* receive the full *allowed* amount of their claims. App.12-22; *see LATAM*, 55 F.4th at 388-89 (under §1129(b), "unsecured creditors … who will be paid the full allowed amount of their claim—cannot insist on compliance with the absolute priority rule").

Those limitations are precisely why this Court has already explained that §1129(b) "does not codify any authoritative pre-Code version of the absolute priority rule." *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 448 (1999); *see LATAM*, 55 F.4th at 388 ("[T]he Code's treatment of absolute priority is so different from the prior Bankruptcy Act that the old practice simply cannot be imported *in toto* into practice under the new Code."). And that is also presumably why the Noteholders barely mentioned §1129(b) in their briefs below, and never suggested that it carries over any controlling pre-Code absolute-priority rule. Put simply, §1129(b) assumes an impaired class and addresses its proper treatment; it says nothing whatsoever about *whether* a creditor is impaired in the first place. That issue is instead addressed in §1124(1), which (as even the panel majority conceded) makes clear that a creditor is *not* impaired by operation of the Code's disallowance provisions, App.30 n.20—even though their application almost always benefits more junior claimants (especially in solvent-debtor cases), contrary to the panel majority's understanding of the absolute-priority rule.

The panel majority's reliance on pre-Code practice to depart from the Code's clear text cannot be squared with this Court's precedent. As this Court has explained time and again, statutory interpretation "begins with the statutory text"—and when that text is unambiguous, "ends there as well." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. 109, 127 (2018). That fundamental rule leaves no room for a bankruptcy exception. Instead, as this Court has made clear in numerous bankruptcy cases, "pre-Code practice" is "a tool of construction, not an extratextual supplement." *Hartford*, 530 U.S. at 10. While it can be used to clarify "ambiguity" in the Code's text, "it cannot overcome that language." *Id.* Thus, "[w]here the meaning of the Bankruptcy Code's text is itself clear its operation is unimpeded by contrary prior practice." *Id.* (ellipses omitted) (quoting *BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 546 (1994)); *see, e.g.*, *RadLAX*, 566 U.S. at 649 (pre-Code practice is irrelevant where there is "no textual ambiguity"); *Dewsnup v. Timm*, 502 U.S. 410, 419-20 (1992) (pre-Code practice has no role to play "where the language is unambiguous"); *see also* App.48-49. Under that clear and controlling precedent, the panel majority seriously erred by *sua sponte* relying on a pre-Code common-law rule to depart from the unambiguous language of §502(b)(2) and §1124(1).

The panel majority's attempt to justify its holding based on this Court's decision in *Jevic*, *see* App.29, is equally misguided. In *Jevic*, this Court reversed the Third Circuit and reaffirmed that a bankruptcy court cannot order dismissal of a bankruptcy case on terms that would violate "the basic priority rules that apply under" the Code, even in a rare case. This Court reasoned that the bankruptcy court's general authority to alter the effect of a dismissal "for cause" does not empower courts to alter the specific distribution priorities that the Code sets. 580 U.S. at 455, 464-66. That was just a straightforward application of the basic statutory interpretation principle that the specific controls the general. The Code has a host of specific distribution priorities that could not be evaded through a structured dismissal under the Code's general (and plainly inapplicable) dismissal provision. *Id.* By invoking a more general provision like §1129(b) to disregard the specific provision addressing whether claims for unmatured interest are allowed—namely, §502(b)(2)—the panel majority does just what *Jevic* warns against. Indeed, it does the Third Circuit's rejected approach in *Jevic* one better by invoking not an actually applicable general provision—like the dismissal provision in *Jevic*—but a specific, and by its own terms inapplicable, provision dealing with *impaired* classes to trump the plain language of the specific and on-point language of §502(b)(2), which unambiguously disallows all claims for unmatured interest without any hint of an exception for solvent debtors. *See* App.45-49.

Jevic also confirms that the panel majority's decision fundamentally misunderstands the operation of absolute priority under the Code. As *Jevic* explained, the priority rules that matter under the Code are not some pre-Code vestige but "the basic priority rules that apply under the primary mechanisms the Code establishes for final distributions of estate value." 580 U.S. at 455; *see id.* at 457 ("The Code … sets forth a basic system of priority, which ordinarily determines the order in which the bankruptcy court will distribute assets of the estate."); *id.* ("the Code's priority rules"); *id.* ("the ordinary priority rules that would apply to a Chapter 7 liquidation or a Chapter 11 plan"). And the mechanisms that the Code establishes for final distributions of estate value *include* its disallowance and impairment rules—which is why, until the decision below, no court had ever held that refusing to pay amounts disallowed by the Code would somehow violate absolute-priority principles. Put simply, absolute priority demands only that a claimant receive amounts it is entitled to recover *under the Code* before junior claimants are paid, not that it should receive even amounts the Code expressly disallows. The panel clearly erred by reading *Jevic* to require the latter.

Making matters even worse, the panel majority carried its textually unconstrained approach to its logical conclusion by proclaiming an unwritten "equitable" exception to its unwritten rule. App.35. Rather than squarely hold that creditors in solvent-debtor cases are entitled to their contractual rights regardless of the Code's disallowance provisions—which would at least provide a clear rule, albeit one irreconcilable with the statutory text—the majority prioritized its own ability to do equity in future cases, concluding that "while the absolute priority rule can require payment of contract interest in solvent debtor cases, it does not always do so," and instead requires "the equitable rate of post-petition interest, whatever that may be." App.35. That injects still more uncertainty into the bankruptcy process, depriving debtors of any *ex ante* basis to predict what their obligations for unmatured interest might be under the panel majority's rule, and injecting chaos into a system that relies upon stability and certainty to facilitate emergence from bankruptcy. The panel majority's felt need (and presumed authority) to layer on that additional exception only underscores the folly of its entire atextual enterprise.

In short, the panel majority seriously erred by elevating pre-Code judicial practice over clear statutory text. Even if pre-Code courts might have believed themselves entitled to create unwritten exceptions to the text Congress enacted, that is hardly a sound reason to continue that practice today. Disregard of clear legislative text in favor of judicial conceptions of remedial justice was common in the pre-Code era, and was hardly limited to bankruptcy cases. But whatever limited license there may be today to consult pre-Code practice in cases of genuine statutory ambiguity, it is not an invitation to return to the bad old days of statutory construction when courts treated clear congressional commands as mere suggestions subject to unwritten equitable exceptions. Now that courts have "sworn off the habit of venturing beyond Congress's intent," they should not "accept [the] invitation to have one last drink." *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001). The panel majority's relapse to a previous era of statutory interpretation should not be left uncorrected.

B. The Panel Majority's Decision Creates Havoc Across the Code.

The panel majority's reinvention of the absolute-priority rule as a wide-ranging, judicially-created solvent-debtor exception to the Bankruptcy Code not only resulted in overriding clear statutory text in this case, but creates havoc across the Code.

The novel understanding of the absolute-priority rule that the panel majority adopted below is not limited to §502(b)(2). It is as far-ranging as it is atextual. According to the panel majority, "the absolute priority rule requires creditors' obligations be paid in full before owners, with junior rights to the business, take anything at all," regardless of Code provisions to the contrary. App.35; *see* App.27 (absolute-priority rule prevents debtors "from recovering anything unless creditors are paid in full or consent" (ellipsis omitted)). That rule would override not only the Code's disallowance of unmatured interest in §502(b)(2), as the panel majority held here, but all the other disallowance provisions in §502(b) as well, creating numerous departures in solvent-debtor cases from the explicit limitations Congress placed on certain bankruptcy claims—even though none of the Code's disallowance provisions by its terms distinguishes in any way between solvent and insolvent debtors, or suggests in any way that it applies only to the latter.

Section 502(b)(4), for instance, disallows claims by any "insider or attorney of the debtor" for their services, to the extent those claims "exceed[] the reasonable value of such services." 11 U.S.C. §502(b)(4). Under the panel majority's view, however, the absolute-priority rule would override that disallowance in solvent-debtor cases, leaving the debtor's CEO and lawyers free to claim whatever unreasonable amounts they were contractually entitled to demand. So too even for the disallowance of *untimely claims* under §502(b)(9), throwing the court-issued claims bar date and the bankruptcy process into chaos in every solvent-debtor case. *See* 11 U.S.C. §502(b)(9) (disallowing claims that are "not timely filed").

That sweeping reinvention of the absolute-priority rule is as unnecessary as it is atextual. The Code already controls for the risk that the bankruptcy process could be abused by a bad-faith filing by a fully solvent debtor. *See, e.g.*, 11 U.S.C. §1112(b)(1) (allowing dismissal of bankruptcy case "for cause," including bad faith); *id.* §1129(a)(3) (plan of reorganization must be proposed "in good faith"). But there is no bad faith in a case like this, where the debtor was insolvent when it sought Chapter 11 protection and only became solvent later based on post-filing developments outside of its control. In those circumstances, there is nothing inequitable in giving creditors their full entitlement under the Code and no basis for courts to deviate from the Code based on equitable considerations or pre-Code judicial decisions.

All of this simply underscores the dangers of layering judge-made doctrines carried over from the *ancien regime* on top of the finely reticulated Code. By promoting pre-Code practice over the plain text of the Code, the panel majority departed from ordinary principles of statutory construction and produced all the adverse consequences that one might expect from that kind of unwarranted judicial improvisation. This Court should not allow the panel majority's serious errors to persist.

II. The Decision Below Contributes To The Growing Confusion In The Lower Courts Over This Issue.

The divided decision below not only is wrong, but deepens an ongoing conflict in the lower courts and contributes to growing confusion on this issue. In case after case, the majority of courts, including expert bankruptcy courts (like the bankruptcy court here), have regularly applied the disallowance provisions of §502(b) to limit or disallow claims as dictated by the plain language of the Code, even when the debtor is solvent. Those decisions cannot be squared with the panel majority's adoption of a broad, atextual rule that "creditors' obligations [must] be paid in full" if the debtor is solvent, even if those obligations are explicitly disallowed by the Code. App.35. Moreover, by seizing on an absolute-priority rule derived from §1129(b) as the means to treat solvent debtors differently, the decision below not only parts company with the reasoning of the Fifth and Ninth Circuits, but creates a square split with the Second Circuit.

1. Numerous courts across the country have rejected the panel majority's view, holding that the Code's disallowance provisions control even if the debtor is solvent. *See, e.g.*, *In re LATAM Airlines Grp.*, 2022 WL 2206829, at *21 (Bankr. S.D.N.Y. June 18, 2022) (section 502(b)(2) "is not limited to cases other than solvent debtors"), *aff'd*, 643 B.R. 741 (S.D.N.Y. 2022), *aff'd*, 55 F.4th 377 (2d Cir. 2022); *In re Ancona*, 2016 WL 828099, at *6 (Bankr. S.D.N.Y. Mar. 2, 2016) (rejecting the argument that "a court must first find a debtor to be insolvent" before applying §502(b), which would "effectively rewrite" the Code); *HSBC Bank*

USA, Nat'l Ass'n v. Calpine Corp., 2010 WL 3835200, at *5, *10 (S.D.N.Y. Sept. 15, 2010) (applying §502(b)(2) even though the debtor was "very solvent"); *In re Farley, Inc.*, 146 B.R. 739, 747-48 (Bankr. N.D. Ill. 1992) (whether the debtor is solvent is "irrelevant" under §502(b)); *In re Federated Dep't Stores, Inc.*, 131 B.R. 808, 817 (S.D. Ohio 1991) (rejecting the argument that "a bankruptcy court may depart from [§502(b)] any time the debtor is solvent"). Those decisions cannot be reconciled with the panel majority's view that "pre-Code absolute priority caselaw and practice" create an unwritten exception to the statutory text and entitle creditors in solvent-debtor cases to claim amounts that the Code expressly disallows. App.34.

The panel's decision also directly conflicts with numerous decisions addressing post-petition interest. Its holding that creditors in solvent-debtor cases are entitled to "the equitable rate of post-petition interest, whatever that may be," App.35, contradicts multiple cases limiting creditors in solvent-debtor cases to post-petition interest at the federal judgment rate, not their contractual default rates or other unspecified "equitable" rates. *See, e.g.*, *In re Cardelucci*, 285 F.3d 1231, 1234-35 (9th Cir. 2002); *In re Kravitz*, 2001 WL 36381905, at *2-3 (B.A.P. 1st Cir. Feb. 16, 2001); *LATAM*, 2022 WL 2206829, at *18-25; *In re Augé*, 559 B.R. 223, 228 (Bankr. D.N.M. 2016); *In re Premier Ent. Biloxi LLC*, 445 B.R. 582, 645-46 (Bankr. S.D. Miss. 2010); *In re Smith*, 431 B.R. 607, 610-11 (Bankr. E.D.N.C. 2010); *In re Melenyzer*, 143 B.R. 829 (Bankr. W.D. Tex. 1992). As those decisions correctly recognize, Congress provided in the Code for post-petition interest in solvent-debtor cases "at the legal rate"—which means the federal judgment rate, not a creditor's contractual rate or whatever rate the bankruptcy court may deem most equitable. 11 U.S.C. §726(a)(5); *see, e.g.*, *Cardelucci*, 285 F.3d at 1234-35. The panel majority's holding that the absolute-priority rule instead gives creditors in all solvent-debtor cases the right to post-petition interest at their contractual or state-law rates unless "compelling equitable considerations" counsel otherwise, App.35-36, cannot be reconciled with those decisions or with the statutory text.

2. The panel majority's understanding of the absolute-priority rule squarely conflicts with the Second Circuit's reasoning in *LATAM*. In that case, LATAM proposed a plan of reorganization that depended on raising over $5.4 billion through a new equity offering (including to existing shareholders), and that treated its unsecured creditors as unimpaired by paying them the full amount of their allowed claims but not paying them post-petition interest. 55 F.4th at 381. Certain unsecured creditors objected, asserting that they could not be deemed unimpaired unless they received post-petition interest at their contractual default rates. *Id.* The bankruptcy court confirmed the plan, holding those creditors were not entitled to post-petition interest at their default rates because (i) LATAM was insolvent, and (ii) even if it were solvent, its creditors' claims for post-petition interest at their default rates were disallowed by §502(b)(2), leaving them entitled at most to post-petition interest at the federal judgment rate. *See LATAM*, 2022 WL 2206829, at *9-25.

The Second Circuit affirmed. It recognized that it had previously "applied [a] 'solvent-debtor' exception" allowing creditors to claim post-petition interest from solvent debtors "in cases arising under pre-Code bankruptcy laws," but found no need to decide "whether the solvent-debtor exception survived the enactment of the Code." *LATAM*, 55 F.4th at 383. Instead, the Second Circuit concluded that any such unwritten exception to the plain terms of the Code would not apply regardless, because LATAM was insolvent. *Id.* at 387-89.

But while the *LATAM* court could avoid definitively reaching the solvent-debtor question, it could not avoid rejecting the absolute-priority rule embraced by the decision below. To the contrary, the Second Circuit squarely rejected the creditors' attempt to evade the plain text of §502(b)(2) by arguing that a "solvent-debtor exception aris[ing] from the absolute priority rule" requires paying creditors post-petition interest "whenever a plan will return value to equity." *Id.* at 387. As the Second Circuit explained, "the Code's treatment of absolute priority is so different from the prior Bankruptcy Act that the old practice simply cannot be imported *in toto* into practice under the new Code." *Id.* at 388; *see 203 N. LaSalle*, 526 U.S. at 448 ("[T]he Code does not codify any authoritative pre-Code version of the absolute priority rule."). Under the Code, the absolute priority rule "is codified at Section 1129(b)(2)(B)," and "comes into effect only when a class of impaired creditors votes to reject a plan." *LATAM*, 55 F.4th at 388. And under the plain language of that statute, "unsecured creditors such as [the Noteholders]—who will be paid the full allowed amount of their claim—cannot insist on compliance with the absolute priority rule." *Id.* at 388-89; *see* 11 U.S.C. §1129(b)(2)(B)(i)-(ii) (allowing confirmation if each objecting impaired creditor receives "the allowed amount of [its] claim" *or* "any claim or interest that is junior … will not receive or retain" property under the plan).

As the Third Circuit panel majority itself recognized, its reasoning cannot be squared with *LATAM*. *See* App.34 n.22 (acknowledging that "[t]he Second Circuit disagreed in *LATAM*" with the panel majority's approach). The panel majority's conclusion that "the Bankruptcy Code incorporates the common law absolute priority rule" in §1129(b), App.32, directly contradicts the Second Circuit's (and this Court's) conclusion that the Code "does not codify any authoritative pre-Code version of the absolute priority rule," *LATAM*, 55 F.4th at 388 (quoting *203 N. LaSalle*, 526 U.S. at 448). Nor is it an accident that *LATAM* invoked this Court's decision in *203 N. LaSalle*, which actually involved §1129(b) and noted its deviation from the pre-Code absolute-priority decision, while the majority below invoked *Jevic*, which is inapposite for all the reasons explained above.

The panel majority's application of the absolute priority rule to the Noteholders also directly conflicts with the Second Circuit's (and §1129(b)'s) instruction that creditors "who will be paid the full allowed amount of their claim" have no further right to "insist on compliance with the absolute priority rule," 55 F.4th at 388-89. And the panel majority's ultimate holding that the Noteholders must be paid post-petition interest at their contractual rates before Hertz "take[s] anything at all," App.35, cannot be reconciled with the Second Circuit's contrary holding that the *LATAM* creditors were not entitled to post-petition interest at their contract rates even though the *LATAM* plan would "return value to equity," 55 F.4th at 387. That conflict warrants this Court's review.

3. The decision below conflicts with numerous contrary cases and its entirely unprecedented reasoning based on the absolute-priority rule and *Jevic* opens a square conflict with the Second Circuit. At the same time, its bottom-line conclusion that atextual equitable principles derived from pre-Code practice trump plain text when it comes to solvent debtors does not stand alone. In just the past three years, divided panels of the Fifth and Ninth Circuits have likewise held—over spirited dissents—that an atextual solvent-debtor exception drawn from pre-Code judicial decisions supersedes the plain text of the Code and can authorize creditors to claim post-petition interest at their contractual default rates in solvent-debtor cases. *See Ultra*, 51 F.4th at 150-56; *PG&E*, 46 F.4th at 1057-64; *see also Ultra*, 51 F.4th at 160-64 (Oldham, J., dissenting); *PG&E*, 46 F.4th at 1065-75 (Ikuta, J., dissenting).

Like the Third Circuit here, the Fifth and Ninth Circuits in those cases unanimously recognized that §502(b)(2)'s explicit "prohibition on the inclusion of 'unmatured interest' as part of a claim" disallows any "contractual right to [post-petition] interest" at the contractual default rate. *PG&E*, 46 F.4th at 1063; *see Ultra*, 51 F.4th at 145-46. But like the Third Circuit here, both circuits split at that point, with the majority in each case relying on pre-Code practice to supersede that clear statutory text and give unimpaired creditors in solvent-debtor Chapter 11 cases an "equitable right" to post-petition interest at their contractual or state-law default rates. *Ultra*, 51 F.4th at 150-56; *PG&E*, 46 F.4th at 1057-61.

Those antitextual decisions drew sharp dissents from Judges Oldham and Ikuta (and failed to persuade the panel below, which despite having their benefit charted its own path). In *Ultra*, Judge Oldham rejected the majority's holding that an "unwritten solvent-debtor exception" supersedes the "clear statutory text," explaining that §502(b)(2) makes "unmistakably clear" that it disallows all claims for unmatured interest and so "is incompatible with the preexisting solvent-debtor exception." 51 F.4th at 160 (Oldham, J., dissenting). Given the "stark contradiction" between §502(b)(2) and the historical solvent-debtor exception, he explained, only one conclusion is possible: The Code "overrides" pre-Code practice. *Id.* at 161. And in *PG&E*, Judge Ikuta likewise explained that this Court has "directed [lower courts] to take the exact opposite approach" to interpreting the Code from the panel majority's: "[S]o long as the Code is clear, we do not refer to pre-Code practice." *PG&E*, 46 F.4th at 1065 (Ikuta, J., dissenting); *see id.* at 1069 (rejecting any "presumption that the Code incorporates pre-Code practice"). Because "the text of the Code is clear," pre-Code practice cannot justify awarding post-petition interest at contractual default rates that the Code specifically disallows, much less presumptively awarding that interest subject to unspecified equitable considerations. *Id.* at 1065. Here, too, Judge Porter penned a passionate dissent drawing on the reasoning of Judges Ikuta and Oldham and laying bare the panel majority's departure from plain text and this Court's instructions about statutory construction. *See* App.42-49. Those dissenting views should not be discounted just because these three respected jurists were evenly distributed across three different panels.

As noted, despite having the benefit of the Fifth and Ninth Circuit majority opinions, the panel below charted its own course based on absolute-priority principles that were mentioned only in passing by the Fifth and Ninth Circuits. *See Ultra*, 51 F.4th at 160; *PG&E*, 46 F.4th at 1054. And the decision below also breaks with the Fifth Circuit (and joins the Ninth Circuit) in improvising a new atextual exception to its atextual rule, holding that courts need not always award post-petition interest in solvent-debtor cases at contractual or state-law rates, but can instead impose a different "equitable rate … whatever that may be" whenever "compelling equitable considerations" warrant it. App.35-36; *see PG&E*, 46 F.4th at 1064. *But see Ultra*, 51 F.4th at 157-60 (not recognizing any such exception). That additional layer of judge-empowering discretion not only deepens the conflict in the lower courts, but underscores the dangers of deviating from the statutory text. After all, once courts abandon the text of the Code as a guide, there is nothing left to constrain their ability to impose their own views of fairness on debtors and creditors alike in the name of equitable discretion. That is the opposite of the uniform and predictable regime that should govern in bankruptcy.

In sum, "trial and appellate courts have reached different conclusions" as to whether the pre-Code solvent-debtor exception "survived the Code's enactment," and they "will likely continue to do so until the issues are finally determined by the Supreme Court or Congress amends the statute." *In re Mullins*, 633 B.R. 1, 3-4 (Bankr. D. Mass. 2021). Although this Court previously denied petitions for certiorari in *Ultra* and *PG&E*, the panel majority's novel and unprecedented absolute-priority approach opens up a clear split with the Second Circuit's *LATAM* decision and conflicts with *Ultra* but agrees with *PG&E* in embracing a further equitable authority to deviate from the contractual interest rate. This Court should not allow that confusion to remain unresolved—especially in the bankruptcy context, where the Constitution itself calls for "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, §8, cl.4; *see also Siegel v. Fitzgerald*, 596 U.S. 464, 478 (2022) (recognizing that the Bankruptcy Clause "does not permit the arbitrary, disparate treatment of similarly situated debtors based on geography").

III. The Question Presented Is Exceptionally Important.

The exceptionally important and recurring nature of the question presented underscores the need for this Court's review. Fluctuations in commodities prices and extraordinary events like the COVID-19 pandemic have forced numerous companies into bankruptcy, only to have subsequent developments render them solvent before the bankruptcy proceedings have run their full course. As a result, numerous courts in jurisdictions across the country have confronted the question of whether unwritten pre-Code practice survived the enactment of the Code and allows creditors in solvent-debtor cases to recover amounts that the Code explicitly disallows. *See, e.g.*, *Ultra*, 51 F.4th at 150-56; *PG&E*, 46 F.4th at 1057-64; *LATAM*, 2022 WL 2206829, at *18-25. That question carries far more than academic interest; as this case demonstrates, it can determine the distribution of hundreds of millions of dollars. App.4-5 ("more than $270 million"); *see, e.g.*, *Ultra*, 51 F.4th at 142 ("some $387 million"); *PG&E*, 46 F.4th at 1052 ("roughly $200 million").

The decision below not only works havoc across the Code, *see supra* pp.22-24, but also creates serious adverse consequences in practice. Under the panel majority's rule, each unimpaired creditor in a solvent-debtor case will be entitled to seek whatever contractual or state-law rate of post-petition interest applies to its particular claims—or "the equitable rate of post-petition interest, whatever that may be." App.35. That will distort incentives long before the bankruptcy process starts, encouraging creditors to insist on punitive make-whole provisions and steep default rates of interest to obtain outsized recoveries if and when a bankruptcy occurs. And if and when a bankruptcy does occur, the panel majority's approach will produce an "administrative nightmare" in solvent-debtor cases that will "overwhelm what could otherwise be a relatively simple process," *Cardelucci*, 285 F.3d at 1236, forcing bankruptcy courts to calculate countless different rates for different creditors and then determine whether "compelling equitable considerations" require any adjustment to any of those rates, App.35-36. That amorphous standard will invite costly litigation in future cases and create widespread uncertainty for debtors trying to propose confirmable plans—harms that are only multiplied because the Third Circuit's decision below will now control for all bankruptcies filed in Delaware, home of nearly 70% of all Fortune 500 companies and more than 40% of all large corporate bankruptcy filings. *See Delaware Division of Corporations: 2023 Annual Report*, https://perma.cc/3LY8-4XAF (last visited Apr. 4, 2025); Cornerstone Research, *Trends in Large Corporate Bankruptcy and Financial Distress* 10 (2024), https://perma.cc/6RVD-TPD5.

Nor are those the end of the problems that the panel majority's approach raises. Its departure from the Code in solvent-debtor cases also creates further complexities when a debtor who would otherwise be solvent will be pushed into insolvency if it must pay contractual make-wholes or default rates. *See, e.g.*, *Ultra*, 51 F.4th at 152 n.16 (recognizing this "gray area"). While the decline of the COVID-19 pandemic and the resumption of global travel rendered Hertz solvent despite the high stakes of this dispute, the nearly $272 million at issue here could make the difference between solvency and insolvency in many cases. And in still other cases, there will be robust debate about whether the debtor is solvent and what obligations and assets count for purposes of assessing solvency, *see LATAM*, 2022 WL 2206829, at *18 (describing multiple solvency tests), and unsecured creditors with contractual make-wholes or steep default rates will push for higher valuations that result in just enough solvency to pay those amounts and disproportionately advantage those creditors. In addition, the panel majority's opinion undermines the "overriding policy consideration" of "equitable treatment of creditors," and disincentivizes good-faith bankruptcy filings by imposing harsh default rates of interest. *Cardelucci*, at 1235-36. These manifold problems are all avoided by the simple expedient of adhering to the statutory text, because the Code disallows contractual claims to unmatured interest altogether regardless of solvency.

Denying review now would also entrench the panel majority's error in ways that would make it difficult to correct in the future. While numerous future bankruptcies will involve debtors who become solvent during the bankruptcy and implicate matters like make-whole amounts and post-petition interest, debtors in the Third, Fifth, and Ninth Circuits will have little practical choice but to accede to mistaken circuit law in structuring their plans. That dynamic underscores not only the disruptive consequences of the divided panel decision below, but also the pressing need for this Court to grant immediate review. This case is an ideal vehicle for doing so, as the issue is outcome-dispositive and is cleanly presented without any disputed facts.

Finally, review is warranted to make clear that nothing in *Jevic* compels a bankruptcy exception to textualism. It is bad enough that the panel majority deviated from bedrock principles of statutory construction. It is worse still that it perceived itself as compelled to do so by a decision of this Court. When the lower courts attribute their error to this Court's precedent, only this Court can correct that error and make clear that in interpreting the Bankruptcy Code, as with any other statute, the proper inquiry begins—and generally ends—with the statutory text.

In short, the decision below is wrong both for its holding that an unwritten solvent-debtor exception suspends the plain text of the Code, and for the method of statutory interpretation that allowed it to reach that holding—and both errors are critically important. Justice Thomas long ago warned against a mode of interpretation that amounted to pointing to "'ambiguous' statutory language and then cramming into the Code any good idea that can be garnered from pre-Code practice." *203 N. LaSalle*, 526 U.S. at 461 (Thomas, J., joined by Scalia, J., concurring). That describes the decision below to a T, with the caveats that the relevant Code language is not even ambiguous and deviating from §502(b)(2)'s treatment of unmatured interest is not a good idea. Allowing that mode of interpretation to stand invites all manner of mischief in a context where rules should be uniform, clear and textually based. This Court should not leave unsettled a recurring and consequential question at the heart of bankruptcy law and of proper statutory construction in general.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 23-1169, 23-1170

IN RE: THE HERTZ CORPORATION, et al.,
Reorganized Debtors.

WELLS FARGO BANK, N.A., as Indenture Trustee,
Appellant,

v.

THE HERTZ CORPORATION, DOLLAR RENT A CAR, INC.; DOLLAR THRIFTY AUTOMOTIVE GROUP, INC.; DONLEN CORPORATION; DTG OPERATIONS, INC.; DTG SUPPLY, LLC; FIREFLY RENT A CAR LLC; HERTZ CAR SALES LLC; HERTZ GLOBAL SERVICES CORPORATION; HERTZ LOCAL EDITION CORP.; HERTZ LOCAL EDITION TRANSPORTING, INC.; HERTZ SYSTEM, INC.; HERTZ TECHNOLOGIES, INC.; HERTZ TRANSPORTING, INC.; RENTAL CAR GROUP COMPANY, LLC; SMARTZ VEHICLE RENTAL CORPORATION; THRIFTY CAR SALES, INC.; THRIFTY, LLC; THRIFTY INSURANCE AGENCY, INC.; THRIFTY RENT A CAR SYSTEM, LLC; and TRAC ASIA PACIFIC, INC.
Appellants.

U.S. BANK NATIONAL ASSOCIATION,
as Indenture Trustee,
Appellant,

v.

IN RE: THE HERTZ CORPORATION,

Appellant.

Argued: Oct. 25, 2023
Amended Opinion Filed: Nov. 6, 2024

Before: KRAUSE, PORTER, and AMBRO,
Circuit Judges

OPINION

AMBRO, *Circuit Judge*

Bankruptcy is a lesson in leverage. It involves money and to whom it goes. The more advantage (leverage) a party has, the more it influences who gets paid. In a Chapter 11 case, the parties with more leverage control the reorganization, while those with less often must sit on the sidelines and await their fate. The debtors here, able to pay their creditors in full, believe they have the leverage to deny their unsecured noteholders more than a quarter billion dollars of interest they promised to pay pre-bankruptcy, all while giving lower priority equityholders four times that amount. Does the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*,[1] give the debtors enough leverage to do that?

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[1] Unless otherwise noted, citations to § <•> are to the Bankruptcy Code.

The debtors say so because of the Bankruptcy Code's general rule barring interest accruing post-petition (in bankruptcy lingo, "unmatured interest"). That is one way the Code deals with the difficult distributional problems of the typical case, where there is not enough money to go around. But this is not the typical case. At the end of the reorganization, the debtors here were so flush that they paid their former stockholders (the "Stockholders") roughly $1.1 billion. While the parties agree that the Code requires debtors to pay post-petition interest if they are solvent, they disagree whether this entitles creditors to post-petition interest at the federal judgment rate or the contract rate—a dispute with teeth, because the latter exceeds the former by more than 30 times in this case.

What happened here is that the Hertz Corporation and certain affiliates (collectively, "Hertz"), crippled by the COVID pandemic, filed for protection under Chapter 11 of the Bankruptcy Code in May 2020. To give a sense of its then-bleak prospects, Hertz warned in an SEC filing of "a significant risk that the [Stockholders] will receive no recovery under the Chapter 11 [c]ases and that our common stock will be worthless." Hertz Glob. Holdings, Inc., Prospectus Supplement (to Prospectus Dated June 12, 2019) S-4 (2020), https://perma.cc/9RJE-R6KT (June 15, 2020).

As the economy recovered, however, so did Hertz's financial prospects. It emerged from bankruptcy a year later via a confirmed plan of reorganization (the "Plan") that sold the company to a group of private equity funds. The Plan promised to leave all of Hertz's creditors unimpaired—in other words, it would not alter any of their rights. (Compare that to a normal bankruptcy plan, which typically discharges creditors' claims for cents on the dollar.) Therefore, none of Hertz's creditors could vote on the Plan; as a matter of law, they were all conclusively presumed to accept it.

To be precise, the Plan paid off Hertz's pre-petition debt, including unsecured bonds maturing biennially from 2022 to 2028 (the "Notes"). But the Plan did not pay holders of the Notes (the "Noteholders"[2]) contract rate interest for Hertz's time in bankruptcy. Instead, it paid interest for that period at the much lower applicable federal judgment rate. Hertz also did not pay the Noteholders certain charges provided in the Notes, specifically, variable fees (calculated using financial formulas) designed to compensate lenders for their lost profits when a borrower pays them back ahead of schedule. These fees are generically called make-wholes. (To distinguish between make-wholes generally and the particular make-whole fees at issue here, we call the latter the "Applicable Premiums"—their title under those Notes.) If Hertz had redeemed the Notes in mid-2021 without filing for Chapter 11, it would have owed

[2] Wells Fargo Bank, National Association is nominally the appellant here, not the Noteholders. It participates only in its capacity as indenture trustee under the Notes. As the real parties in interest are the Noteholders, we instead refer to them in this opinion.

U.S. Bank National Association also appeals in its capacity as indenture trustee for other unsecured notes; its only issue is whether Hertz should have paid post-petition interest on its notes at their contract rate rather than the federal judgment rate. Beyond adopting the arguments made by the Noteholders, it did not offer any arguments of its own.

the Noteholders the Applicable Premiums and contract rate interest, combined totaling more than $270 million. The savings effectively went to the Stockholders: The Plan gave them roughly four times that amount in a combination of cash and equity in the reorganized Hertz. The Noteholders, unsurprisingly, object to that result.

Among the issues we address are two questions of bankruptcy law unresolved in this Circuit: Does § 502(b)(2)'s prohibition on claims "for unmatured interest" cover make-whole fees like the Applicable Premiums, and does the Bankruptcy Code as a whole require solvent debtors to pay unimpaired creditors interest accruing post-petition at the contract rate?[3]

Hertz argues that make-whole fees are the economic equivalent of interest and must be disallowed under § 502(b)(2). It concedes, however, that the Bankruptcy Code requires solvent debtors to pay unimpaired creditors like the Noteholders post-petition interest, but, in its view, only at the federal judgment rate. So the company tells us the Noteholders received everything they were entitled under the Code.

The Noteholders disagree. They claim the Applicable Premiums should not be disallowed as

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[3] Throughout this opinion, we refer to contract rate interest. But we really mean the applicable non-bankruptcy rate, whatever it may be. *See, e.g.*, *Ad Hoc Comm. of Holders of Trade Claims v. Pac. Gas & Elec. Co. (In re PG&E Corp.)*, 46 F.4th 1047, 1064 (9th Cir. 2022) (solvent debtor exception may require award of "contractual or state law default" interest). Hertz does not contest the Notes' validity under governing state law (New York), hence our use of the contract rate here.

unmatured interest because they do not fit the dictionary definition of that term. In any event, they say that pre-Bankruptcy Code caselaw grants them an equitable right to payment in full (*i.e.*, both contract rate interest and the Applicable Premiums) because Hertz is solvent. So, since the confirmed Plan classified them as unimpaired, they must receive interest at the contract rate. Per the Noteholders, if we side with Hertz and cancel the otherwise enforceable fees and interest at issue, we will bless an outcome anathema to our law—a windfall to the Stockholders, who sit at the lowest rung of payment priority, by letting them "pocket[] hundreds of millions of dollars that Hertz had promised to [pay] the Noteholders" that it "could easily afford to repay . . . in full[.]" Noteholder Br. 1. They reject Hertz's view that we are addressing only subtleties of insolvency law and see this dispute as more fundamental.

We determine that the Applicable Premiums must be disallowed under § 502(b)(2), for they fit both the dictionary definition of interest and are its economic equivalent. But we agree with the Noteholders that they have a right to receive contract rate interest and the Applicable Premiums because Hertz was solvent. Thoughtful opinions issued by the Fifth and Ninth Circuits in quite similar cases support the Noteholders. *Ultra Petroleum Corp. v. Ad Hoc Comm. of Opco Unsecured Creditors (In re Ultra Petroleum Corp.)*, 51 F.4th 138 (5th Cir. 2022), *cert. denied,* 143 S.Ct. 2495 (2023); *Ad Hoc Comm. of Holders of Trade Claims v. Pac. Gas & Elec. Co. (In re PG&E Corp.)*, 46 F.4th 1047 (9th Cir. 2022), *cert.*

denied, 143 S.Ct. 2492 (2023).[4] We end as they do, though for us the primary support for that result is in absolute priority, "bankruptcy's most important and famous rule[.]" *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 465 (2017) (quoting Mark J. Roe & Frederick Tung, *Breaking Bankruptcy Priority: How Rent-Seeking Upends the Creditors' Bargain*, 99 Va. L. Rev. 1235, 1236 (2013)). Allowing Hertz to cancel more than a quarter billion dollars of interest otherwise owed to the Noteholders, while distributing a massive gift to the Stockholders, would impermissibly "deviate from the basic priority rules . . . the Code establishes for final distributions of estate value in business bankruptcies." *Jevic*, 580 U.S. at 455.

I. Background

A. Procedural History

Hertz's Plan proposed to pay the Noteholders about $2.7 billion, reflecting the Notes' principal, contract rate interest that accrued before Hertz filed for bankruptcy, post-bankruptcy interest at the federal judgment rate (as applied in this case, 0.15% annually), and certain other fees. It would not pay them post-petition interest at the contract rate or any fees for redeeming the Notes early, including the Applicable Premiums. The Plan offered the Stockholders a package of stock, warrants, and cash

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[4] The parties never cite the Second Circuit's ruling in *In re LATAM Airlines Group S.A.,* which also examined post-petition interest in solvent debtor cases. 55 F.4th 377 (2d Cir. 2022), *cert. denied*, 143 S.Ct. 2609 (2023). In our view, that discussion was *dicta*, as the decision "affirm[ed] the Bankruptcy Court's finding that [the debtor] was insolvent." *Id.* at 389.

that it valued in the aggregate at around $1.1 billion. App. 1514-15; Bankr. D.I. 4759 at 12, 18-19.[5]

Hertz and the Noteholders were aware of their disputes about contract rate interest and early redemption fees but did not let those issues delay emergence from Chapter 11. Instead, the Plan designated the Noteholders unimpaired, reserved their right to litigate their disagreements post-confirmation, and committed to pay whatever was necessary to ensure they were unimpaired under the Plan. The Noteholders were not allowed to vote on the Plan because, as unimpaired creditors, they were conclusively presumed to accept it. § 1126(f). The Plan was confirmed in early June 2021, and Hertz emerged from Chapter 11 later that month.

In July 2021, the Noteholders filed a complaint seeking payment of post-petition interest at the contract rate, the Applicable Premiums, and the flat fees for early redemptions found in the 2022 and 2024 Notes. The Bankruptcy Court dismissed their claims for contract rate interest. It concluded that, as unimpaired creditors of a solvent debtor, they were entitled to interest at the "legal rate," per §§ 1129(a)(7)(A)(ii) & 726(a)(5), and that rate is the federal judgment rate. The Court rejected the Noteholders' argument that a "solvent debtor exception," following from pre-Bankruptcy Code

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[5] Specifically, the Plan offered the Stockholders $1.53 in cash per share (with approximately 156 million shares outstanding, that was about $240 million), 3% of reorganized Hertz's equity (valued at $141 million), and warrants for further equity that the Plan estimated were worth $769 million. Bankr. D.I. 4759 at 12, 18-19.

caselaw, required Hertz to pay them interest at the contract rate. It also dismissed their claims for flat redemption fees on the 2022 and 2024 Notes because those fees were not triggered as a matter of contract law. But over Hertz's objection, it concluded the opposite as to the Applicable Premiums. While Hertz also argued those Premiums were disallowed by § 502(b)(2)'s prohibition on claims for unmatured interest, the Bankruptcy Court did not then resolve that issue. Whether the claims were for interest for purposes of § 502(b)(2), it explained, was a "factual" question that required record development. App. 31.

After discovery, Hertz and the Noteholders cross-moved for summary judgment on that issue. Because the Bankruptcy Court concluded that the "economic substance" of the Applicable Premiums was interest, it disallowed the claims of the Noteholders. App. 73. They moved for reconsideration on post-petition interest in light of the intervening decisions in *Ultra* and *PG&E*, which both required solvent debtors to pay unimpaired creditors post-petition interest at the contract rate. The Bankruptcy Court did not change its mind: It had "considered all [the] arguments" on post-petition interest "and simply reached a different conclusion from that reached by the Fifth and Ninth Circuits." App. 77. It then *sua sponte* certified its decision for direct appeal to us. 28 U.S.C. § 158(d)(2). We agreed to review the appeal rather than requiring the parties to proceed first in the District Court.

The Noteholders ask us to reverse the Bankruptcy Court by ruling that Hertz owes them the fixed redemption fee on the 2024 Notes, the Bankruptcy Code does not prohibit payment of the Applicable

Premiums, and (as unimpaired creditors of the very solvent Hertz) they are entitled to post-petition interest at the contract rate.

B. Jurisdiction, Standard of Review

We have jurisdiction under 28 U.S.C. § 158(d). The Bankruptcy Court's rulings on Hertz's motion to dismiss and the cross-motions for summary judgment are both subject to our plenary review. *In re Klaas*, 858 F.3d 820, 827 (3d Cir. 2017).

II. Analysis

A. The 2024 Notes' Fee

The Noteholders appeal the ruling that they were not entitled to an early redemption fee on the 2024 Notes.[6] Those Notes required Hertz to pay a flat fee if they were redeemed "after October 15, 2019 and prior to maturity[.]" App. 520. We agree with the Bankruptcy Court; this fee was not triggered because the 2024 Notes by their terms matured when Hertz filed bankruptcy and their redemption followed around a year later when it left Chapter 11.

True, the Bankruptcy Court's ruling allows Hertz to redeem the 2024 Notes well before 2024 without a fee. But, viewed in the complex context of modern leveraged finance, that is not as "bizarre" a result as the Noteholders suggest. Noteholder Br. 54. Those Notes only mature early upon an acceleration approved by the lenders or a bankruptcy filing, which would not happen unless the lenders threatened to

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[6] In their papers, the Noteholders concede that they are not owed an early redemption fee on the 2022 Notes. Noteholder Br. 53 n.10.

accelerate. There is fierce debate whether borrowers should pay fees in that case, and both sides have valid points.[7] So this result, likely stemming from extensive negotiations around the terms of the 2024 Notes as a whole, is not absurd. That background illustrates why, given our limited familiarity with the intricacies of technical debt contracts, we should rule based on their terms alone, not our (perhaps uninformed) views of fairness. *Cf. Cortland St. Recovery Corp. v. Bonderman*, 96 N.E.3d 191, 198 (N.Y. 2018) (bonds must be enforced "according to the plain meaning of [their] terms" (citation omitted)). What might appear fair to an unfamiliar court could be unfair when understood in full.

The Noteholders also argue that certain provisions of the 2024 Notes "refer to maturity arising 'on acceleration' or 'otherwise[,]'" so maturity here must mean the day they are scheduled to mature in 2024. Noteholder Br. 54. We disagree. The referenced sections of the 2024 Notes do not use the word "maturity" but the defined term "Stated Maturity," which means "the fixed date [here, October 15, 2024]

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[7] *See* Matt Levine, *Bond Covenants and Skeptic Skepticism*, Bloomberg: Money Stuff (Jan. 12, 2017, 9:23 A.M.), https://www.bloomberg.com/opinion/articles/2017-01-12/bond-covenants-and-skeptic-skepticism; *compare* Adam Cohen, *The End of Covenants: The "No Premium on Default" Language Is Spreading Like Wildfire – Your Future Covenant Enforcement Is Being Destroyed*, Covenant Rev., (Jan. 11, 2017) (claiming borrowers will abuse creditors if bonds do not require early redemption fees upon default), *with* Steven A. Cohen et al., Wachtell, Lipton, Rosen & Katz, *Default Activism in the Debt Markets* (2018), https://perma.cc/82EL-PBJX (alleging that aggressive lenders are demanding early redemption premiums in response to technical defaults).

on which the payment of principal . . . is due[.]" App. 404. That is different from maturity, which occurs whenever a debt obligation "become[s] due." *Mature*, Black's Law Dictionary (12th ed. 2024). And, when interpreting contracts, we read defined and undefined terms as having distinct meanings. *See Derry Fin. N.V. v. Christiana Cos., Inc.*, 797 F.2d 1210, 1214-15 (3d Cir. 1986); *see also Robertshaw US Holding Corp. v. Invesco Senior Secured Mgmt. Inc. (In re Robertshaw US Holding Corp*), No. 24-90052, Adv. No. 24-03024, slip op. at 11-14 (Bankr. S.D.Tex. June 20, 2024) (deciding debt dispute on the basis that "subsidiary" and "Subsidiary" have different meanings in the same document).

In sum, Hertz never promised to pay the Noteholders a fee in this situation. Contract law does not bind parties to promises they did not make. If the commercially sophisticated Noteholders think this outcome is unfair, they should not have agreed to the terms of the 2024 Notes that compel it. *Cf. Schron v. Troutman Sanders LLP*, 986 N.E.2d 430, 434 (N.Y. 2013) ("[H]ad these sophisticated business entities . . . intended [a different result], they easily could have included a provision to that effect[.]" (citations omitted)).

B. The Applicable Premiums

We turn to whether the Bankruptcy Court should have allowed the Noteholders' claims for the Applicable Premiums, which were triggered by Hertz's early payoff of the 2026 and 2028 Notes when it emerged from bankruptcy in 2021.

A bit of corporate finance knowledge is helpful here. Many bonds—including the 2026 and 2028

Notes—pay interest semi-annually via so-called coupons while outstanding. So, if a bond is redeemed before its scheduled maturity, lenders lose interest they otherwise would have received. In a compromise, many bonds—again, including the Notes—allow borrowers to redeem them before they are scheduled to mature in return for a flat fee. William J. Whelan III, *Bond Indentures and Bond Characteristics* in Leveraged Financial Markets: A Comprehensive Guide to High-Yield Bonds, Loans, and Other Instruments 171, 173 (William F. Maxwell & Mark R. Shenkman eds., 2010). It offers some compensation for lost interest income, but it does not attempt to be an exact substitute. We refer to this fee as the "Redemption Fee," and the first date when a borrower can redeem a bond by paying the Redemption Fee as the "Redemption Date." (The charge at issue for the 2024 Notes was a Redemption Fee.) But the 2026 Notes have a Redemption Date in August 2022 and the 2028 Notes' Redemption Date is in January 2023. Both Redemption Dates fall after Hertz's redemption of the Notes in June 2021—so, by contract, Hertz could not simply pay a Redemption Fee to rid itself of those Notes at that time.

However, there is another early release mechanism. Bonds sometimes allow borrowers to pay them off before the Redemption Date if lenders are "made whole," *i.e.*, if they receive the present value of the profits they would have booked in the alternate world where they were paid off on the Redemption Date. These make-whole fees guarantee lenders a minimum return, no matter how quickly a borrower pays them back. *See* Davis Polk & Wardwell LLP, *Creditors' Guide to Make-Whole Enforceability in*

Bankruptcy 7 (2d ed. 2023), https://perma.cc/HZ2U-RL4F (a "make-whole provision ensures that creditors receive a minimum return on their investment . . . independent of when the debt instrument is repaid"); *In re Energy Future Holdings Corp. (EFH II)*, 842 F.3d 247, 250-51 (3d Cir. 2016) (make-wholes are "meant to give the lenders the interest yield they expect" in the event of an early redemption); *In re MPM Silicones, L.L.C.*, 874 F.3d 787, 801-02 (2d Cir. 2017) (make-wholes provide "additional compensation to make up for the interest [lenders] would not receive" if bonds are redeemed early).

As noted above, the Applicable Premiums are make-whole fees. While their language appears complicated,[8] their substance is not. The Premiums

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[8] For readers interested in digging deeper, we offer the relevant text from the 2026 Bonds below (the 2028 Bonds are substantially identical).

> "Applicable Premium" means, with respect to a 2026 Note at any Redemption Date . . .[,] the excess of (A) the present value at such Redemption Date, calculated as of the date of the applicable redemption notice, of (1) the redemption price of such 2026 Note on August 1, 2022 (such redemption price being that described in Section 6(a)), plus (2) all required remaining scheduled interest payments due on such 2026 Note through such date (excluding accrued and unpaid interest to the Redemption Date), computed using a discount rate equal to the Treasury Rate plus 50 basis points, over (B) the principal amount of such 2026 Note on such Redemption Date . . . .

App. 622 (cleaned up).

To clarify further, the Applicable Premiums can be calculated by summing (a) the present value of a redemption on the Redemption Date (*i.e.*, principal and Redemption Fee) and (b) the are made of three parts: interest coupons owed through the Redemption Date, the Redemption Fee, and a present value discount.[9] They seek to ensure that Noteholders receive the return they expected for their investment in the Notes Hertz redeemed before their Redemption Date.

With that background, we can now consider the parties' positions. Hertz argues that the Applicable Premiums must be disallowed under § 502(b)(2)'s explicit prohibition on claims for unmatured interest because that is exactly what they are. By contrast, the Noteholders say the Applicable Premiums are not interest at all. Before us, Hertz does not dispute the Bankruptcy Court's conclusion that it owes the Applicable Premiums under the terms of the relevant Notes. The Noteholders do not dispute that the Applicable Premiums did not accrue before Hertz's bankruptcy filing and therefore are unmatured as a matter of bankruptcy law. Whether the Applicable

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present value of unaccrued interest through the Redemption Date, and then subtracting (c) the Notes' undiscounted principal. Ross Hallock, *The Math of Make-Wholes*, Covenant Rev., May 22, 2023, at 10. Doing some math, the Applicable Premiums can be restated as (a) the present value of the Redemption Fee and unpaid interest minus (b) the present value discount applicable to the early payment of the Notes' principal.

[9] To redeem the Notes before their scheduled maturity, Hertz must also pay all accrued but unpaid interest. App. 662. (This is interest for the time the Notes have been outstanding since the last payment: for example, if Hertz paid interest on April 1 and redeemed the Notes on July 31, this would be interest from April through July.) But because we require Hertz to pay post-petition contract rate interest, *infra* Section II.C, there will be no accrued but unpaid interest owing on the Notes after our decision. Thus, we ignore that requirement in our discussion above.

Premiums are interest is the issue here. The Bankruptcy Court, for its part, ruled that they were interest in "economic reality[.]" App. 73.

Because make-whole fees are common in bonds and can be quite large, Chapter 11 debtors and creditors have repeatedly and vigorously disputed whether they must be paid in bankruptcy. *See, e.g.*, *Ultra*, 51 F.4th at 144 (challenge to $201 million make-whole); *EFH II*, 842 F.3d at 252 ($431 million make-whole); *MPM*, 874 F.3d at 805 (nearly $200 million make-whole). Practitioners and academics have written extensively on the subject as well, including the issue here—whether make-whole fees must be disallowed under § 502(b)(2) as "unmatured interest[.]"[10]

There are two common approaches to this question. One suggests that the appropriate analysis is whether a make-whole fee best fits within dictionary and caselaw definitions of interest. *See, e.g.*, *In re Trico Marine Servs., Inc.*, 450 B.R. 474, 480-81 (Bankr. D. Del. 2011). The other approach, reflecting a concern that the definitional test puts form over

[10] We found many articles on the subject helpful, including the pieces below (ordered by publication date): Scott K. Charles & Emil A. Kleinhaus, *Prepayment Clauses in Bankruptcy*, 15 Am. Bankr. Inst. L. Rev. 537 (2007); Patrick M. Birney, *Toward Understanding Make-Whole Premiums in Bankruptcy*, 24 Norton J. of Bankr. L. and Prac., no. 4, 2015; Bruce A. Markell, *"Shoot the . . .": Holes in Make Whole Premiums*, 36 Bankr. L. Letter, no. 5, 2016; Sam Lawand, *Make-Whole Claims in Bankruptcy*, 27 Norton J. of Bankr. L. and Prac., no. 4, 2018; Bruce A. Markell, *Dead Funds and Shipwrecks:* Ultra Petroleum, 39 Bankr. L. Letter, no. 4, 2019; Douglas G. Baird, *Making Sense of Make-Wholes*, 94. Am. Bankr. L.J. 567 (2020).

substance, asks whether the make-whole at issue is the economic equivalent of interest. *Ultra*, 51 F.4th at 145-46 (warning the definitional approach is "susceptible to easy end-runs by canny creditors").

The Bankruptcy Court used the latter approach, concluded the Applicable Premiums are the economic equivalent of interest, and disallowed the Noteholders' claims. Hertz backs that rationale to us. The Noteholders primarily argue that the Applicable Premiums are not interest using the definitional approach, though they also disclaim any economic equivalency.[11] To us, the Applicable Premiums are interest under both approaches, though they must be disallowed under § 502(b)(2) if they fit under either. We handle each in turn.

The Noteholders' implicit definitional argument, boiled down, is that interest is a fee accruing while borrowed money is used. By contrast, the Applicable

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[11] The Noteholders also cite non-bankruptcy cases concluding that prepayment penalties are not interest. They particularly draw our attention to *Prudential Ins. Co. of Am. v. Comm'r of Internal Revenue*, 882 F.2d 832, 837 (3d Cir. 1989), where we "reject[ed the] position that prepayment charges are interest equivalents." Appealing language, but on further review the case is not relevant—the question was whether "prepayment charges upon the retirement of certain corporate mortgages should be characterized as long-term capital gain" or interest for tax purposes. *Id.* at 833. As *Prudential* demonstrates, whether a prepayment charge is interest for purposes of another field of law does not automatically resolve the question for bankruptcy. Subject-specific considerations irrelevant in bankruptcy may have driven the analysis in those cases. And, in any event, many non-bankruptcy decisions agree with our broader view of interest. *See* Bruce A. Markell, *"Shoot the . . .": Holes in Make Whole Premiums*, 36 Bankr. L. Letter, no. 5, 2016 (citing cases).

Premiums do not slowly and steadily accrue over the life of the Notes; they come into being fully formed upon an early redemption. In their words, the Applicable Premiums are "not compensation for Hertz's ongoing use of the Noteholders' money," one of their preferred definitions of interest, "but rather compensation for the termination of Hertz's obligations to the Noteholders[.]" Noteholder Br. 45 (emphasis omitted).

The problem with the Noteholders' definitional approach is that the definitions are broader than that. Look at their prime cases on the subject. *Deputy v. du Pont* defines interest as "compensation for the use or forbearance of money." 308 U.S. 488, 498 (1940). *Love v. State* marks it as "the cost of having the use of another person's money for a specified period[.]" 583 N.E.2d 1296, 1298 (N.Y. 1991). Black's Law Dictionary says it is "[t]he compensation fixed by agreement or allowed by law for the use or detention of money, or for the loss of money by one who is entitled to its use; esp[ecially] the amount owed to a lender in return for the use of borrowed money." *Interest*, Black's Law Dictionary (12th ed. 2024). *See* Bruce A. Markell, *"Shoot the . . .": Holes in Make Whole Premiums*, 36 Bankr. L. Letter, no. 5, 2016 (collecting definitions of interest and concluding that "payments which the lender collects for itself" above cash actually extended are interest).

These definitions of interest do not require that a charge accrue daily or be contingent on "ongoing" use of money. Contrary to the Noteholders' claims that the Applicable Premiums are not definitionally interest, they are "compensation" Hertz committed to pay (upon a contingency) in order to borrow (*i.e.*, use) the Noteholders' money. That the relevant contingency occurred—redemption of the Notes and the early return of the Noteholders' capital—does not change this conclusion. *Cf. Ultra*, 51 F.4th at 146 & n.8. To state it even from the Noteholders' perspective, the Applicable Premiums are among the suite of fees they extracted from Hertz in return for their credit. So Hertz's commitment to pay them was "compensation" for its use of their funds.[12]

The Noteholders also claim that the Applicable Premiums are definitionally not interest because they reflect the "reinvestment costs" that the Noteholders will suffer from redeploying their capital earlier than anticipated. Noteholder Br. 42. Presuming the Applicable Premiums perfectly match the Noteholders' reinvestment costs, we still conclude they must be disallowed under the definitional approach because a claim can simultaneously fit both the definition of interest and something else. *In re Dr.'s Hosp. of Hyde Park, Inc.*, 508 B.R. 697, 706 (Bankr. N.D. Ill. 2014) (rejecting "false dichotomy"

[12] Supporting our conclusion, several decisions have held that original issue discount must be disallowed under § 502(b)(2) to the extent unmatured. *See, e.g.*, *In re Pengo Indus.*, 962 F.2d 543, 546 (5th Cir. 1992); *In re Chateaugay Corp.*, 961 F.2d 378, 380-81 (2d Cir. 1992). It is an amount tacked on to principal above the cash extended to a borrower. *Ultra*, 51 F.4th at 147 n.9. (For example, a loan with $100 of "principal" in return for an advance of $90 has $10 of original issue discount.) Like a make-whole, original issue discount is a large fee that does not accrue over time—rather, it is owing (but not due) the day funds are extended. But courts rule that it is interest because it is "paid to compensate for the delay and risk involved in the ultimate repayment of monies loaned." *Chateaugay*, 961 F.2d at 381.

between describing a make-whole fee as liquidated damages or interest "because [it] may well be both"); *Ultra*, 51 F.4th at 148 ("interest labeled 'liquidated damages' is still interest" for § 502(b)(2) analysis). Interest by any other name does, in fact, smell as sweet.[13]

This case is a good example. The Noteholders describe their reinvestment costs as the losses they will suffer when "reinvest[ing] their prepaid principal in a less-advantageous market environment." Noteholder Br. 42. That is, the reinvestment costs are the unmatured interest the Noteholders will not recover in the market.

We also think the Applicable Premiums (which, to repeat, are composed of interest coupons owed through the Redemption Date, the Redemption Fee, and a present value discount) are the economic equivalent of interest. They are mathematically equivalent to the unmatured interest the Noteholders would have received had Hertz redeemed the Notes on their Redemption Dates. We take each component in turn.

The coupons that would come due before the Redemption Date are no doubt interest. Applying the logic we used above, the Redemption Fee is interest; it

[13] Without prejudging any case, we note that creditors are hard at work creating new forms of make-wholes that may also be interest by another name. *See, e.g.*, Elizabeth R. Tabas, *et al.*, *Equity-Like Sweeteners Go Mainstream*, Am. Bar Ass'n: Bus. L. Today (Oct. 12, 2023), https://perma.cc/E45H-T3ZE (discussing growth of multiple on invested capital and internal rate of return-based make-wholes instead of "traditional" make-wholes "expressly calculated by reference to future interest").

is a fee for the Noteholders' profit that Hertz agreed to as a condition for issuing the Notes. The Bankruptcy Court reached the same result, noting that the Redemption Fee is equal to "one semiannual interest payment" on the Notes. App. 74. To the Noteholders, this is "entirely arbitrary" because a larger Redemption Fee without a superficial similarity to a coupon would survive under that logic. Noteholder Br. 50. But our conclusion that the Redemption Fee is interest—because it is a fee for the Noteholders' ultimate return that Hertz committed to pay in exchange for the right to use the Notes' principal—has nothing to do with its relationship to the Notes' annual interest rate: § 502(b)(2) would disallow unmatured Redemption Fees of $0.01 and $1 billion alike.

That leaves the significant present value discount (accounting for early payment of principal, coupons, and the Redemption Fee). Correctly adjusting for present value, however, does not defeat the mathematical identity. Because a "dollar today is worth more than a dollar tomorrow," *Ultra*, 51 F.4th at 148, discounts are applied to early payments to account for risk of default and the time value of money, thus making sure that lenders receive the benefit of their bargain— the value they would expect to receive through a scheduled, rather than premature, paydown. If early payments were not discounted, lenders would receive an unjustified windfall. In other words, accounting for present value makes the Applicable Premiums even more mathematically equivalent to the disallowed unmatured interest by correctly pegging its actual worth. Applying a present value discount is not sufficiently "transformative" to turn the sum of interest coupons and the Redemption Fee into something other than interest. *Id.*

In any event, a claim for less than all the unmatured interest owed by a debtor (like the Applicable Premiums, here discounted by present value) is still a claim for unmatured interest. Self-imposed discounts do not defeat § 502(b)(2).

To sum up, § 502(b)(2) disallows a claim for unmatured interest if it is either definitionally interest or its economic equivalent. Because the Applicable Premiums are both, the Bankruptcy Court correctly disallowed the Noteholders' claims for those Premiums.

C. Solvent Debtors and Post-Petition Interest

Despite our holding above, does the Bankruptcy Code as a whole nonetheless require solvent debtors to pay unimpaired creditors interest accruing post-petition at the contract rate? It is a technical question of bankruptcy law, and we give that issue its nuanced due below. We can rephrase it in a way that makes the answer predictable: Can Hertz use the Bankruptcy Code to force the Noteholders to give up nine figures of contractually valid interest and spend that money on a massive dividend to the Stockholders? The answer is no. As the Supreme Court told us more than a century ago, "the rule is well settled that stockholders are not entitled to any share . . . until all the debts of the corporation are paid." *Chi., Rock Island & Pac. R.R. v. Howard*, 74 U.S. 392, 409-10 (1868).

We start, however, with the Fifth and Ninth Circuits' decisions on which the parties spend a significant portion of their briefs. *Ultra* and *PG&E* are close analogues, each involving solvent debtors who sought to save immense amounts by paying unimpaired unsecured creditors post-petition interest at the federal judgment rate instead of the higher rates applicable outside bankruptcy. In both cases, the creditors won.

The Fifth and Ninth Circuits took similar approaches to the issue. Both Courts found in Supreme Court decisions a requirement to respect pre-Code practice absent a clear statement in the Bankruptcy Code, *Ultra*, 51 F.4th at 153-54; *PG&E*, 46 F.4th at 1057-58, concluded that pre-Code practice required solvent debtors pay contract rate interest, *Ultra*, 51 F.4th at 150-52; *PG&E*, 46 F.4th at 1053-55, and decided that the enacted Bankruptcy Code did not clearly reject that tradition, *Ultra*, 51 F.4th at 154-56; *PG&E*, 46 F.4th at 1058-59. They therefore ruled that the Code gives creditors of solvent debtors the equitable right to contractual or state law default rate interest "before allocation of surplus value" to equityholders "absent compelling equitable considerations[.]" *PG&E*, 46 F.4th at 1064; *see also Ultra*, 51 F.4th at 159-60.

The *PG&E* Court backstopped its decision with the Bankruptcy Code's logic of impairment. 46 F.4th at 1060-61. "[I]mpaired" creditors—those whose bundle of "legal, equitable, and contractual rights" are "[]altered" by a bankruptcy plan—are entitled to a host of procedural protections. Bankruptcy Code § 1124(1). (The classic impaired creditor receives cents on the dollar for its claims.) The Ninth Circuit thought limiting unimpaired creditors to interest at the federal judgment rate ran contrary to the Code's system of impairment; doing so would offer PG&E the best of both worlds by "pay[ing the relevant unimpaired creditors] the same, reduced interest rate as impaired creditors, while depriving them of the statutory protections that impaired creditors enjoy." *PG&E*, 46 F.4th at 1061. The Court rejected this effort to let equity "have its cake and eat it too"; it could not let PG&E "reap[] a windfall of hundreds of millions of dollars" at creditors' expense while denying them both the statutory protections offered to impaired creditors and their equitable right to contract rate interest. *Id.*

Hertz primarily challenges those decisions by suggesting they misread Supreme Court precedent. Rather than require us to continue pre-Code practices absent a clear statement to the contrary, Hertz says the Supreme Court relegates historical bankruptcy law to a minor role; it is a mere "tool of construction" relevant only when the Code is genuinely ambiguous. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 10 (2000). Instead, the argument continues, the Circuits impermissibly used it as an "extratextual supplement[,]" *id.*, to require contract rate interest without reference to the Bankruptcy Code's actual text.

But we do not think those decisions disregard *Hartford* or the statutory text. As the *PG&E* court correctly noted, pre- Code solvent debtor practice sprung from the pre-Code absolute priority rule. 46 F.4th at 1054. And, as we explain below, the Bankruptcy Code adopted the pre-Code version of that rule. So the common law absolute priority rule is not an "extratextual supplement" to the Bankruptcy Code. It is an enacted part of it that we must respect.

What is that rule? Our quote from *Chicago, Rock Island & Pacific* at the beginning of this section sums it up well: in bankruptcy, equity comes after debt (unless the latter consents). The absolute priority rule serves as an essential governor on the bankruptcy process to protect creditors. "Shareholders retain substantial control" over the debtor during Chapter 11, which gives them a "significant opportunity for self-enrichment at the expense of creditors." *In re DBSD N. Am., Inc.*, 634 F.3d 79, 100 (2d Cir. 2011). One of those opportunities comes from the debtor's functionally exclusive right[14] to propose the plan of reorganization that determines creditors' ultimate treatment. *Id.*; *see* Stephen G. Moyer, Distressed Debt Analysis: Strategies for Speculative Investments, 329-31 (2005) (Exclusivity is a "powerful weapon wielded by management in the battle with creditors[.]"). A "danger inherent in any reorganization plan proposed by a debtor" (including this Plan proposed by Hertz) is

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[14] Debtors have the exclusive right to file a plan for the first 120 days of a case, a period that can be extended for up to 18 months. Bankruptcy Code §§ 1121(a) & (d). They often obtain significant extensions of the exclusivity period. Stephen G. Moyer, Distressed Debt Analysis: Strategies for Speculative Investments, 330 (2005) ("[B]ankruptcy courts usually will have a predisposition toward allowing the debtor time to present a plan[.]"); Vincent S.J. Buccola, *Sponsor Control: A New Paradigm for Corporate Reorganization*, 90 U. Chi. L. Rev. 1, 9 (2023) (Bankruptcy courts often "grant[] managers serial extensions of the exclusivity period[.]"). Hertz had the exclusive right to propose a plan through the whole case. Bankr. D.I. 3905 (extending exclusivity period through July 2021, more than a year after Hertz filed for bankruptcy).

that it might "turn out to be too good a deal for the debtor's owners." *Bank of Am. Nat'l Tr. and Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 444 (1999) (citing H.R. Rep. No. 93-137, pt. 1, at 225 (1973)); *DBSD*, 634 F.3d at 100 (noting that debtor's proposed plan offered its shareholder almost thirty times more value than "unsecured creditors . . . despite the latter's technical seniority").

History proves that to be a substantial risk. Around the turn of the 20th century, American railroad owners used so-called "equity receiverships" to restructure otherwise untenable debts.[15] A combination of pro-management receivers and bank-controlled "protective committees" gave a sliver of corporate insiders (including equity) near-complete control of the reorganization. William O. Douglas, *Protective Committees in Railroad Reorganizations*, 47 Harv. L. Rev. 565, 567-68 (1934); John D. Ayer, *Rethinking Absolute Priority After Ahlers*, 87 Mich. L. Rev. 963, 969-71 (1989). The result of these equity-controlled reorganizations was that outside creditors were wiped out, while insider equityholders retained control of a reinvigorated business. Bruce A. Markell, *Owners, Auctions, and Absolute Priority in Bankruptcy Reorganizations*, 44 Stan. L. Rev. 69, 74-77 (1991) [hereinafter Markell, *Absolute Priority*]; David A. Skeel, Jr., Debt's Dominion: A History of Bankruptcy Law in America, 56-69 (2001).

[15] While the 1898 Bankruptcy Act was in force at that time, it only contemplated corporate liquidation. Amendments in the 1930s added business reorganization procedures. *SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 448-49 (1940).

The Supreme Court unequivocally rejected those tactics, most prominently in *Northern Pacific Railway Co. v. Boyd*, 228 U.S. 482 (1913). It ruled that creditors have "superior rights against the subordinate interests of . . . stockholders . . . . [Therefore,] [a]ny device . . . whereby stockholders [of an insolvent business] were preferred before the creditor [is] invalid." *Id.* at 504. *Boyd* is seen as announcing the absolute priority rule, which promptly "thereafter passed into the language and lore of the corporate lawyer." Ayer, *supra*, at 973.[16] Applied in bankruptcy, it prevents business owners, "the most junior claimants[,]" from recovering anything "unless creditors . . . are paid in full" or consent. Markell, *Absolute Priority*, *supra* at 72.

Today, the absolute priority rule is housed in § 1129(b). That section protects impaired creditors from overreaching plans. Unlike unimpaired creditors, whose rights are left unaltered and thus are "conclusively presumed" to accept a proposed plan, § 1126(f), impaired creditors may vote on it. A plan rejected by a class of impaired creditors can nonetheless be approved, but only if a court finds that it is "fair and equitable" to that class, with the burden on the plan proponent. § 1129(b); *Heartland Fed. Sav. & Loan Assoc. v. Briscoe Enters., Ltd., II (In re Briscoe*

[16] But perhaps it was announced earlier. *See Chi., Rock Island & Pac. R.R.*, 74 U.S. at 409-10; *Louisville Tr. Co. v. Louisville, New Albany & Chi Ry. Co.*, 174 U.S. 674, 684 (1899) ("[T]he familiar rule [is] that the stockholder's interest in the [bankrupt company] is subordinate to the rights of creditors. . . . [A]ny arrangement of the parties by which the subordinate rights [are] secured at the expense of . . . creditors comes within judicial denunciation.").

Enters., Ltd., II.), 994 F.2d 1160, 1168-70 (5th Cir. 1993). That process is known as "cramdown." *See generally* Kenneth N. Klee, *All You Ever Wanted to Know About Cram Down Under the New Bankruptcy Code*, 53 Am. Bankr. L.J. 133 (1979) [hereinafter Klee, *Cram Down*].[17] In practical terms, that offers plan proponents a choice: "compensate creditors in full[,]" leaving them unimpaired, or confirm a plan paying them less (*i.e.*, impairing them) in the face of "the Code's substantive and procedural protections" for impaired creditors—including the ballot box and § 1129(b). *PG&E*, 46 F.4th at 1061.

With that throat-clearing complete, we turn to our case. The Plan promised to pay the Noteholders whatever amount was necessary to "render [them u]nimpaired" (*i.e.*, to leave their rights unaltered). App 1512. Hertz submits that the "critical question . . . is [what interest rate] an unimpaired class in a solvent debtor case is entitled to." Tr. of Oral Arg. at 30. But that "elides the antecedent question of what constitutes unimpairment in the first place." *PG&E*, 46 F.4th at 1062.[18]

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[17] In addition, a gateway requirement for a cramdown of an impaired rejecting class of creditors is that there be an acceptance of that plan by another class of impaired creditors. § 1129(a)(10).

[18] Hertz's position may have been supported by former § 1124(3), which declared creditors unimpaired if they received "cash equal to . . . the allowed amount" of their claim. But, after a bankruptcy court used that section to deny post-petition interest to an unimpaired creditor in a solvent debtor case, Congress promptly repealed it. *Solow v. PPI Enters. (U.S.)*, Inc. (*In re PPI Enters. (U.S.), Inc.*), 324 F.3d 197, 205-07 (3d Cir. 2003)

A creditor is impaired if its treatment violates the absolute priority rule because every creditor has a right to treatment consistent with that principle. This squarely follows the Supreme Court's recent decision in *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451 (2017). There, a debtor sought to pay friendly junior creditors while giving nothing to hostile creditors with higher priority. *Id.* at 459-60. It could not do so via a plan because this distribution would violate the Bankruptcy Code's absolute priority rule. *Id.* at 460-61. So it instead obtained an order from the Bankruptcy Court dismissing the case and distributing the cash to the junior creditors. *Id.* at 461. Our Court affirmed, reasoning that "Congress codified the absolute priority rule . . . in the specific context of plan confirmation . . . [,] and neither Congress nor the Supreme Court has ever said that the rule applies" to dismissals. *Off. Comm. of Unsecured Creditors v. CIT Grp./Bus. Credit, Inc. (In re Jevic Holding Corp)*, 787 F.3d 173, 183 (3d Cir. 2015) (citing § 1129(b)(2)).

The Supreme Court reversed. Whereas our Court saw the absolute priority rule as a procedural protection that applied only when § 1129(b) is invoked (where the Code explicitly mentions it), the Supreme Court concluded it applied everywhere absent a clear statement authorizing a departure. *Jevic*, 580 U.S. at 465. It "expect[ed] to see some affirmative indication of intent if Congress actually meant to [authorize] backdoor means to achieve the exact kind of nonconsensual priority-violating final distributions that the Code prohibits[.]" *Id.* "[S]imple statutory

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(discussing legislative overruling of *In re New Valley Corp.*, 168 B.R. 73 (Bankr. D.N.J. 1994)).

silence," the Court declared, is not enough to allow a "major departure" from the Code's basic principle. *Id.* In other words, the Bankruptcy Code entitles every creditor—not just the dissenting impaired creditors who can invoke § 1129(b)[19]—to treatment consistent with absolute priority absent a clear statement to the contrary. *Id.* That sounds like a right to us, at least for purposes of the Bankruptcy Code.[20]

This conclusion tracks the basic principles of impairment in bankruptcy. "Congress define[d] impairment in the broadest possible terms," *L & J Anaheim Assocs. v. Kawasaki Leasing Int'l, Inc.* (*In re L & J Anaheim Assocs.)*, 995 F.2d 940, 942 (9th Cir. 1993) (quoting *In re Madison Hotel Assocs.*, 749 F.2d

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[19] *Contra* App. 48 (Bankruptcy Court here announcing that the absolute priority rule is not relevant in this case because § 1129(b)(2) "on its face is not applicable to unimpaired creditors"). The Second Circuit concluded in *LATAM* that "the absolute priority rule comes into effect only when a class of impaired creditors votes to reject a plan[.]" 55 F.4th at 388 (citing *DBSD*, 634 F.3d at 105). But the opinion never discusses the Supreme Court's decision in *Jevic*.

[20] Impairment is the alteration of a creditor's rights by a plan, not alterations to those rights as directed by the Bankruptcy Code. *PPI*, 324 F.3d at 204. Contrary to the Noteholders' argument, this means that disallowance by § 502(b)(2) does not result in impairment. *Id.*; *Ultra Petroleum Corp. v. Ad Hoc Comm. of Unsecured Creditors of Ultra Res. (In re Ultra Petroleum Corp.)*, 943 F.3d 758, 763-64 (5th Cir. 2019); *PG&E.*, 46 F.4th at 1063 n.11; *LATAM*, 55 F.4th at 384-85. Though the Code may limit a creditor's legal, equitable, and contractual rights and yet leave it unimpaired, it also grants all creditors, including those a plan might otherwise deem unimpaired, the right to treatment consistent with the Code's "fundamental" absolute priority rule absent "some affirmative indication" to the contrary. *Jevic*, 580 U.S. at 465.

410, 418 (7th Cir. 1984)), to ensure that creditors affected by a bankruptcy plan can vote on it. *Solow v. PPI Enters. (U.S.), Inc. (In re PPI Enters. (U.S.), Inc.)*, 324 F.3d 197, 203 (3d Cir. 2003). If receiving payment in full a few months after confirmation renders a creditor impaired under § 1124(1), *W. Real Est. Equities, L.L.C. v. Vill. at Camp Bowie I, L.P. (In re Vill. at Camp Bowie I, L.P.)*, 710 F.3d 239, 243-46 (5th Cir. 2013), it must be the case that a creditor faced with a plan denying it bankruptcy's fundamental protection (in the Noteholders' case, to the tune of hundreds of millions of dollars) is affected enough to be impaired under that subsection.[21]

That result also flows from *Jevic*'s condemnation of "backdoor means" to defeat the absolute priority rule. 580 U.S. at 465. The Bankruptcy Code offers a creditor consent at the ballot box as a "front door" to confirm a plan that violates absolute priority. § 1129(a)(8); Markell, *Absolute Priority*, *supra* at 88-89. Concluding that absolute priority is a right that must be respected in the § 1124(1) analysis directs noncompliant plans through the front door, as *Jevic* intended. Ruling as Hertz requests, by contrast, leaves the back door wide open in solvent debtor cases like this one and gives plan proponents the unintended power to force creditors to accept a "priority-violating" distribution. *Jevic*, 580 U.S. at 465; *cf. PG&E,* 46 F.4th

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[21] While not briefed by the parties, we note the effective consequence of classifying the Noteholders impaired. They would have been the sole impaired class of creditors under the Plan, and so would have had the veto power awarded by § 1129(a)(10). Without their consent, Hertz could not confirm the Plan. It seems plausible to think the Noteholders would not have accepted a penny less than their contractual entitlement.

at 1061 (rejecting "a reading of the Code that permits . . . end-run[s]" around creditor protections to benefit equity). Creditors could be compelled to accept—without even the chance to vote or explicit statutory authorization— treatment that falls so short of the Code's basic guarantees that it could not be "crammed down" on them if they rejected it at the polls. § 1129(b); *Off. Comm. of Unsecured Creditors v. Dow Corning Corp. (In re Dow Corning Corp.)*, 456 F.3d 668, 677-80 (6th Cir. 2006). That theory also lacks explicit statutory support and is therefore contrary to *Jevic*.

Accordingly, the Noteholders' right to treatment consistent with absolute priority must be honored to leave them unimpaired. Hertz still maintains that any such right does not require post-petition interest at the contract rate. In its view, we cannot rule based on the principle announced in *Boyd*—that equity cannot recover until debt is paid in full—because the Code's treatment of absolute priority lists "very specific principles about . . . priorities," and that list is silent on post-petition interest. Tr. of Oral Arg. at 47. It argues there is a "common law absolute priority rule," *id.*, following *Boyd* and its progeny, and a separate absolute priority rule enumerated in the Code that we are bound to follow. § 1129(b)(2). But we reject this view because no such dichotomy exists. In fact, the Bankruptcy Code incorporates the common law absolute priority rule articulated in *Boyd*.

As noted above, a plan satisfies the enacted absolute priority rule only if it is "fair and equitable." § 1129(b). "Congress chose [those] words with care. . . . [They] stand proxy for over a century of judicial decision-making, and over half a century of legislative guidance." *Collier on Bankruptcy* ¶ 1129.03[4] (16th ed. 2024). That is not just the commentary of a well-regarded treatise; it is supported by legislative history. Markell, *Absolute Priority, supra*, at 88-89 & n.134; Klee, *Cram Down*, *supra* at 142. And, much more importantly, it tracks the language of the statute.

When interpreting "fair and equitable" in the Bankruptcy Act (the Code's immediate predecessor), the Supreme Court concluded that those words incorporated the common law absolute priority rule. *Case v. L.A. Lumber Prods. Co.*, 308 U.S. 106, 118-19 (1939) (fair and equitable is a "term of art" that includes *Boyd* and its progeny); Markell, *Absolute Priority, supra* at 85 & nn.102-04. Congress very deliberately included those exact words in the Bankruptcy Code. And the Supreme Court is clear: When Congress imports into a statute a "judicially created concept," it takes that concept whole unless it makes its contrary "intent specific," a rule "followed . . . with particular care in construing" the Bankruptcy Code. *Midlantic Nat'l Bank v. N.J. Dep't of Envt'l Prot.*, 474 U.S. 494, 501 (1986). We thus see Congress's choice to reuse "fair and equitable" as deliberately incorporating the common law absolute priority rule into the enacted Bankruptcy Code.

Further support comes from the precise language of § 1129(b)(2), which notes that the fair and equitable test "includes" certain enumerated requirements. But that does not reflect an intent to limit absolute priority to just the listed conditions: "Includes" in the Bankruptcy Code is "not limiting." § 102(3). So a plan is not automatically fair and equitable under the Bankruptcy Code merely because it complies with the requirements in that section. *In re Sandy Ridge Dev. Corp.*, 881 F.2d 1346, 1352 (5th Cir. 1989) (citing *In re D & F Constr., Inc.*, 865 F.2d 673, 675 (5th Cir. 1989)); *Collier on Bankruptcy* ¶ 1129.03[4][b][ii] (16th ed. 2024); Kenneth N. Klee, *Cram Down II*, 64 Am. Bankr. L.J. 229, 229- 31 (1990). The use of "includes" suggests that the full meaning of fair and equitable is located elsewhere; as explained above, it is found in pre-Code absolute priority caselaw and practice.[22]

That jurisprudence required solvent debtors to pay contract rate interest before making distributions to equity. *See, e.g.*, *Consol. Rock Prods. Co. v. Du Bois*, 312 U.S. 510, 527-28 (1941) (citing absolute priority cases, including *Boyd*);[23] *see generally PG&E*, 46 F.4th at 1054 (pre-Code solvent debtor jurisprudence flowed from "[t]he common-law absolute priority rule"); Chaim J. Fortgang & Lawrence P. King, *The 1978 Bankruptcy Code: Some Wrong Policy Decisions*, 56 N.Y.U. L. Rev. 1148, 1159 (1981) (the Bankruptcy Act's absolute priority rule required "post-petition interest . . . at the full, contractually agreed-upon

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[22] The Second Circuit disagreed in *LATAM*, 55 F.4th at 388-89 (concluding that the absolute priority rule's requirements are fully codified in § 1129(b)(2)). But *LATAM* does not address the specific language of the Code, which controls our analysis here.

[23] The Bankruptcy Court's opinion suggests *Consolidated Rock* is inapplicable here because the creditors in that case had collateral for their claims, unlike the Noteholders. App. 46-47. But the logic of *Consolidated Rock* does not focus on the security held by the lenders; rather, it emphasizes the amounts the junior stockholders will recover. 312 U.S. at 527 (noting that the "plan does not satisfy the fixed principle of the *Boyd* case").

rate" before equityholders could recover). Reviewing "three centuries of bankruptcy law," the *Ultra* Court saw a simple rule: "When a debtor can pay its creditors interest on its unpaid obligations in keeping with the valid terms of their contract, it must." 51 F.4th at 150.

That makes sense. To repeat, the absolute priority rule requires creditors' obligations be paid in full before owners, with junior rights to the business, take anything at all. So it should be no surprise that several thoughtful decisions conclude that the Bankruptcy Code's absolute priority rule, which incorporates common law and Bankruptcy Act jurisprudence, can require payment of contract rate interest in solvent debtor cases. *Dow Corning*, 456 F.3d at 678-80; *In re Energy Future Holdings Corp. (EFH I)*, 540 B.R. 109, 117-18 (Bankr. D. Del. 2015); *In re Mullins*, 633 B.R. 1, 10-16 (Bankr. D. Mass. 2021); *cf. PG&E*, 46 F.4th at 1060-61. We join their reasoning.

But while the absolute priority rule can require payment of contract interest in solvent debtor cases, it does not always do so. Rather, it imposes the equitable rate of post-petition interest, whatever that may be. *See, e.g.*, *Dow Corning*, 456 F.3d at 678-80; *EFH I*, 540 B.R at 117-18. This equitable concern is not for former owners. Rather, courts primarily worry that paying one creditor contract rate interest might give it an inequitable leg up over its peers if there is not enough to pay everyone their full rate. *See, e.g.*, *PG&E*, 46 F.4th at 1064. The ordinary course, with which we generally agree, thus would be to remand to the Bankruptcy Court and ask it to determine whether any "compelling equitable considerations" counsel against awarding the Noteholders their contract rate. *Id.* (citations omitted).

For two reasons, however, we do not do so here. The first is procedural: Hertz never suggested we remand to the Bankruptcy Court rather than award the Noteholders their requested interest. Our forfeiture doctrine counsels against rewarding that choice. *Barna v. Bd. of Sch. Dirs. of Panther Valley Sch. Dist.*, 877 F.3d 136, 146-48 (3d Cir. 2017).

The second is equitable. In the normal case, the equitable rate of post-petition interest will be determined before plan confirmation—*i.e.*, before the money goes out the door. But here, the Stockholders received $1.1 billion in value from Hertz when the Plan went effective more than three years ago. No party suggests we unscramble that egg. So our equitable calculus must reflect that the Stockholders already took their dividend. Therefore, the equities demand the Noteholders recover post-petition interest at the contract rate. It would be profoundly unfair to scrimp on the Noteholders' interest when the junior Stockholders already received a billion dollar distribution. To be clear, the post-petition interest we award includes the Applicable Premiums, which Hertz persuaded us were contractual interest accruing after the bankruptcy filing. *Supra II.B*; *Ultra*, 51 F.4th at 160 ("[T]he traditional solvent-debtor exception compels payment of the Make-Whole Amount[.]"); *cf. Dow Corning*, 456 F.3d at 680 ("[T]here is a presumption that default interest should be paid to unsecured claim holders in a solvent debtor case.").

Our result is supported by the requirement that we interpret the Bankruptcy Code "holistic[ally.]"

United Sav. Ass'n of Tex. v Timbers of Inwood Forest Assoc's, 484 U.S. 365, 371 (1988). We do so with an eye to "produc[ing] a substantive effect that is compatible with the" Code. *Id.* Hertz's theory that the Noteholders should not recover contract rate interest creates significant tensions with the Code's basic structure. We briefly note two of them. First, when a plan sticks only one class of creditors with losses, it cannot be confirmed over their objection. § 1129(a)(10). That "critical confirmation requirement[]" prevents "abuse of creditors" by ensuring that plan proponents cannot force one unlucky class to bear the entire brunt of the bankruptcy against its will. *John Hancock Mut. Life Ins. Co v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 158 (3d Cir. 1993). Hertz's proposed result would do just that by forcing the Noteholders alone to sacrifice over their vigorous dissent. Concluding they are impaired by payment of interest at the federal judgment rate makes (a)(10) effective in this case by protecting them from a plan that, at their expense alone, pays everyone else. Second, impaired rejecting creditors of solvent debtors may receive contract rate interest through the absolute priority rule. *Dow Corning*, 456 F.3d at 678-680.[24] But, under Hertz's rule, unimpaired creditors like the Noteholders would receive only the federal judgment rate. In effect, they would recover significantly less than is fair and

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[24] *Contra* App. 53 (Bankruptcy Court stating that "[i]f the Noteholders had been treated as impaired and [rejected] the Plan, they would have received . . . post-petition interest in accordance with sections 1129(a)(7) and 726(a)(5)[,]" which the Bankruptcy Court concluded awarded interest only at the federal judgment rate).

equitable (and so less than objecting impaired creditors must receive). And "creditors who are *unimpaired* . . . cannot be treated any worse than *impaired* creditors, who at least get to vote[.]" *Ultra*, 51 F.4th at 158 (emphases in original); *PG&E*, 46 F.4th at 1060- 61; *EFH I*, 540 B.R. at 123.

Our colleague dissenting in part believes that we offer short shrift to § 502(b)(2), which "plainly disallows" post-petition interest in any form. Partial Dissent 1. Not so. Even Hertz agrees that "[u]nsecured creditors may indeed receive post-petition interest *on* their allowed claims" in a solvent debtor case like this one. Hertz Br. 30 (emphasis in original). That concession "forecloses the notion that § 502(b)(2) alone limits unimpaired creditors' ability to collect post[-]petition interest," *PG&E*, 46 F.4th at 1059. This must be the case because "reading . . . § 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." *Ultra*, 51 F.4th at 159 n.27 (emphases in original)*; see also EFH I*, 540 B.R. at 111 ("[T]here is a distinction between the payment of interest *on an allowed claim* as opposed to *as an allowed claim*. . . . The claim itself does not change. What may change is what the holder of a claim is entitled to receive under a confirmed plan.") (emphases in original); *In re Dow Corning Corp.*, 244 B.R. 678, 685 (Bankr. E.D. Mich. 1999) ("[S]ince § 502(b)(2) speaks only to claim *allowance* . . ., [it] does not rule out the possibility of interest *on* allowed claims pursuant to § 1129(b).") (emphases in original); *Mullins*, 633 B.R. at 15.

And this difference explains why *PPI*, which held that creditors are not impaired under § 1124(1) when a bankruptcy plan gives them everything they could receive under the Code, is consistent with our decision.[25] 324 F.3d at 204. The

Noteholders would be impaired by receiving interest at the federal judgment rate because the Bankruptcy Code, § 502(b)(2) included, permits (and, in this case, requires) the Plan to pay them contract rate interest on their claims via the absolute priority rule. As *PPI* says, the barometer for impairment is "whether *the plan itself* is a source of limitation on a creditor's legal, equitable, or contractual rights." 324 F.3d at 204 (emphasis added).

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[25] Hertz reads *PPI*'s specific holding on § 502(b)(6) to apply equally to § 502(b)(2). It does not. In a side argument, the *PPI* landlord attempted to rely on Congress's repeal of § 1124(3)'s post-petition interest provision to support his claim. *See* 324 F.3d at 205-07; *see also* n.18, *supra*. Our Court noted that "§ 1124(1) and § 1124(3) were different exceptions to the presumption of impairment, and the repeal of one should not affect the other. . . . [U]nlike some other Code sections," we explained, "the limitation on damages under § 502(b)(6) is 'absolute.'" *Id.* at 204 (quoting 4 *Collier on Bankruptcy* § 502.03 (15th ed. 2002)). Section 502(b)(2) is one of those "other Code sections." Moreover, there was "not . . . a sweeping intent by Congress to give impaired status to creditors more freely outside the postpetition interest context." *Id.* at 207. Thus Hertz cannot rely on *PPI*—a decision affirming the capping of lease-termination damages against a solvent debtor under § 502(b)(6)—to argue that our narrow holding there automatically cuts off a solvent debtor's obligation to pay post-petition interest at the applicable pre-petition rate under §502(b)(2).

III. Conclusion

The Noteholders loaned Hertz billions and received back a contractually valid promise to pay fees and interest. The COVID pandemic resulted in a liquidity crisis and a Chapter 11 filing. Bankruptcy gave the then-insolvent Hertz, among other things, the opportunity to disallow claims for interest not yet mature at its filing. But the pandemic's vise eased and the bounceback to Hertz's business made it so financially strong at confirmation of its Plan a year later that Hertz concedes it must pay post-petition interest on the Noteholders' allowed claims. But at what rate? Two holdings in similar circuit court cases say it is the rate imposed by the relevant nonbankruptcy law. We agree and expand further on our primary reasoning for that result.

With more than a quarter billion dollars at stake, it is no shock that Hertz looked to maximize its leverage over the Noteholders rather than simply giving in. Its argument was creative and reflects a deep familiarity with the details of the Bankruptcy Code. But it misses the bigger picture. The Code does not award leverage arbitrarily. Rather, it assigns it in ways that ensure the "plan will achieve a result consistent with the objectives and purposes of the . . . Code." *Madison Hotel*, 749 F.2d at 425 (internal quotation marks omitted).

And there is no question that Hertz's proposal—paying the Noteholders a fraction of the interest they were contractually promised, while distributing more than a billion dollars to the Shareholders—is contrary to those objectives and purposes. Once again, "the familiar rule [is] that the stockholder's interest in the [bankrupt company] is subordinate to the rights of creditors. . . . [A]ny arrangement of the parties by which the subordinate rights . . . [are] secured at the expense of . . . creditors comes within judicial denunciation." *Louisville Tr. Co. v. Louisville, New Albany & Chi. Ry. Co.*, 174 U.S. 674, 684 (1899). The accretional array of cases, topped by *Jevic*, carries this "fixed principle," *Boyd*, 228 U.S. at 507, through to today. Marbled in the Bankruptcy Code, it disfavors nonconsensual distributions to equity over creditors.

So it should be no surprise in this solvent debtor case that Hertz's strategic maneuvering comes to naught. The Code's careful design does not give Hertz enough leverage to subvert that law's foundational goals. We thus affirm in part and reverse in part the Bankruptcy Court's decisions. To comply with the absolute priority rule, and thus fulfill the Plan's promise to "leave[] unaltered the [Noteholders'] legal, equitable, and contractual rights[,]" § 1124(1), Hertz must pay the post-petition interest at the Notes' applicable contract rate, including the Applicable Premiums on the 2026 and 2028 Notes.

PORTER, *Circuit Judge*, concurring in part and dissenting in part.

I join the majority's opinion except for Part II.C, which holds that Hertz must pay the Applicable Premiums and post-petition contract-rate interest to the Noteholders. The Fifth and Ninth Circuits have reached the same result as the majority. *See Ultra Petroleum Corp. v. Ad Hoc Comm. of Opco Unsecured Creditors (In re Ultra Petroleum Corp.)*, 51 F.4th 138 (5th Cir. 2022); *Ad Hoc Comm. of Holders of Trade Claims v. Pac. Gas & Elec. Co. (In re PG&E Corp.)*, 46 F.4th 1047 (9th Cir. 2022). But I largely agree with the dissents in those cases, which recognize that the Bankruptcy Code plainly disallows claims "for unmatured interest" like the Noteholders' claims for the Applicable Premiums and post-petition interest. 11 U.S.C. § 502(b)(2); *see Ultra*, 51 F.4th at 160-64 (Oldham, J., dissenting); *PG&E*, 46 F.4th at 1065-75 (Ikuta, J., dissenting). To the extent that the majority's reasoning tracks that of the Fifth and Ninth Circuits, I have little to add to those thoughtful dissents. But to the extent that it differs, I write separately.

I.

The majority's core argument concerns 11 U.S.C. § 1124, which governs when "a class of claims or interests is impaired under a plan." A class of claims is unimpaired if, "with respect to each claim or interest of such class, the plan leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest." *Id.* § 1124(1). Hertz's Plan promised to pay the Noteholders' claims "in the amount necessary to render them unimpaired." J.A. 12.

To honor that promise, the majority concludes that Hertz must pay contract-rate interest. That is because, according to the majority, one of the "rights" protected under § 1124(1) is treatment consistent with bankruptcy law's "absolute priority rule." Roughly speaking, the absolute priority rule requires creditors to be paid in full before equityholders receive a penny. *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 464-65 (2017) (explaining the rule and describing it as "fundamental to the Bankruptcy Code's operation"). Because Hertz has paid over $1 billion to its former equityholders, the majority believes that Hertz must pay its creditors' claims in full to render them unimpaired, including the Applicable Premiums and post-petition interest to which the Noteholders are contractually entitled.

I disagree with the majority for two reasons. First, treatment consistent with the absolute priority rule is not one of the "rights" protected under § 1124(1). Impairment does not depend on whether the Plan alters *any* of the Noteholders' "legal, equitable, and contractual rights," regardless of the legal source from which the right springs. *Id.* It depends on whether the Plan alters the "rights to which" the Noteholders' *claims* "entitle[]" the Noteholders. *Id.* Here, the rights to which the Noteholders' claims entitle them do not include the right to treatment consistent with absolute priority. *See PG&E*, 46 F.4th at 1073 (Ikuta, J., dissenting) ("[T]he language of § 1124(1) . . . explains only when a *claim* is impaired" and "does not [otherwise] describe when a *holder's* equitable rights have been impaired[.]"). The Code defines a "claim" as any "right to payment" and any "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." 11 U.S.C. § 101(5). These are the "rights to which" a claim "entitles [its] holder," *id.* § 1124(1), and they may include "equitable rights such as restitution" and "quantum meruit," *see PG&E*, 46 F.4th at 1074 (Ikuta, J., dissenting). But the Noteholders' right to treatment consistent with absolute priority is a "procedural protection," Maj. Op. 33, not a substantive "right to payment" or "right to an equitable remedy for breach of performance," § 101(5). Assuming that the absolute-priority right exists, it flows from a legal source other than the Noteholders' claims—like pre-Code practice, the Code itself, or background principles of bankruptcy law—and therefore is irrelevant to impairment under § 1124(1). *See* Maj. Op. 33 (stating that "the Bankruptcy Code," not claims themselves, "entitles every creditor . . . to treatment consistent with absolute priority").[1]

[1] Interestingly, Hertz believes that it must pay post-petition interest *on* the Noteholders' claims at the federal judgment rate to render them unimpaired. This view rests in part on the premise that § 502(b)(2) disallows post-petition interest as part of a claim but does not affect post-petition interest accruing on an allowed claim. *See, e.g.*, *Ultra*, 51 F.4th at 159 n.27. However, I see "no [textual] basis for the . . . interpretation of § 502(b)(2) as prohibiting interest *as part of* an allowed claim but not prohibiting interest *on* a claim once it is allowed." *PG&E*, 46 F.4th at 1067 (Ikuta, J., dissenting). While some other provisions in the Code provide for post-petition interest on allowed claims, 11 U.S.C. § 726(a)(5), I tend to view such provisions as "exceptions to [a] general rule disallowing post-petition interest," *PG&E*, 46 F.4th at 1067 (Ikuta, J., dissenting), not as evidence that § 502(b)(2) does not generally apply to post-petition interest

Second, even if § 1124(1) implies the Noteholders' right to treatment consistent with absolute priority, the Noteholders' claims are nevertheless unimpaired because it is the Code that alters the Noteholders' right, not the Plan. *See Solow v. PPI Enters. (U.S.), Inc. (In re PPI Enters. (U.S.), Inc.)*, 324 F.3d 197, 204 (3d Cir. 2003) ("[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 . . . rights."). It is the Code, not the Plan, that disallows the Noteholders' claims for the Applicable Premiums and post-petition contract-rate interest, § 502(b)(2), resulting in treatment that the majority deems inconsistent with absolute priority.

II.

In making the argument discussed in the previous section, the majority relies on *Jevic* to support the proposition that treatment consistent with absolute priority is "a right . . . for purposes of the Bankruptcy Code." Maj. Op. 33. But the majority separately appears to rely on *Jevic* for an argument that does not depend on impairment under § 1124(1). My colleagues describe the *Jevic* Court as "conclud[ing]" that absolute priority "applie[s] everywhere absent a clear

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on allowed claims. In any event, we need not decide whether Hertz could have paid no post-petition interest whatsoever without impairing the Noteholders' claims. Hertz paid post-petition interest at the federal judgment rate to the Noteholders and does not ask the Noteholders to return that amount. Following the principle of party presentation, I would "rely on the parties to frame the issues for decision" and hold only that Hertz need not pay more than it has already paid. *Greenlaw v. United States*, 554 U.S. 237, 243 (2008) statement authorizing a departure." Maj. Op. 33. Under this view, Hertz might be required to pay contract-rate interest because the Code does not clearly state that absolute priority should be violated here, regardless of whether the Noteholders' claims are impaired under § 1124(1).

Jevic dealt with a bankruptcy court's power to dismiss a case under 11 U.S.C. § 1112(b). Ordinarily, a dismissal results in a restoration of the pre-petition status quo, "revest[ing] the property of the estate in the entity in which such property was vested immediately before the commencement of the case." *Id.* § 349(b)(3). But the Code permits a bankruptcy court, "for cause," to "order[] otherwise," *id.* § 349(b), in a so-called "structured dismissal." The bankruptcy court in *Jevic* ordered a structured dismissal "that gave money to high-priority secured creditors and to low-priority general unsecured creditors but which skipped certain dissenting mid-priority creditors." 580 U.S. at 454. This dismissal violated the absolute priority rule as codified for Chapter 7 liquidations and Chapter 11 plans because it compensated low-priority creditors before mid-priority creditors received anything on their $8.3 million claim. *Id.* at 460; *see* 11 U.S.C. §§ 725, 726, 1129.

The Supreme Court held that the bankruptcy court lacked the power to order such a dismissal. *Jevic*, 580 U.S. at 464. As the majority emphasizes, the Court noted "[t]he importance of the priority system," which requires "more than simple statutory silence if, and when, Congress were to intend a major departure." *Id.* at 465. But the Court did not rest its decision on that reasoning alone, proceeding to observe that there is scant basis for "priority-violating" structured dismissals in the Code. *Id.* The Code's baseline is for dismissals to return the parties to the pre-petition status quo, which does not violate absolute priority. *Id.* at 466. Deviations from this baseline are permitted only "for cause." § 349(b). The Court considered "cause" to be "to weak a reed upon which to rest [a] weighty . . . power" like a priority-violating dismissal. *Jevic*, 580 U.S. at 466. It reached this conclusion because of the meaning of "cause" in context, which "appears designed to give courts the flexibility to make the appropriate orders to protect rights acquired in reliance on the bankruptcy case," not to "make general end-of-case distributions of estate assets" that violate priority. *Id.* (internal quotation marks and quoted source omitted).

I disagree that *Jevic* requires Hertz to pay contract-rate interest for at least two reasons. First, the posture of this case is distinguishable from that of *Jevic*. There, the bankruptcy court exercised a power without any express basis in the Code, thereby violating absolute priority, so the Supreme Court concluded that the bankruptcy court was not so empowered. *Jevic*, 580 U.S. at 464-67. Here, the Code expressly *disempowers* courts from allowing claims for post-petition contract-rate interest over an objection. § 502(b)(2). The majority concludes that because this disempowerment violates absolute priority, we may disregard it and wield power that the Code expressly withholds from us. I find no support for that conclusion in *Jevic*, where the bankruptcy court was not expressly empowered to violate absolute priority.

Second, even if the majority is correct that Hertz violates the common law absolute priority rule, Hertz's violation differs significantly from the violation in *Jevic*. There, the structured dismissal violated the *codified* absolute priority rules for Chapter 7 liquidations and Chapter 11 plans, insofar as low-priority creditors were paid something but some mid-priority creditors were paid nothing. *Jevic*, 580 U.S. at 460. Here, Hertz has not violated the codified absolute priority rules because it has paid the Noteholders' allowed claims in full. For both Chapter 7 liquidations and Chapter 11 plans, codified absolute priority requires payment of allowed claims, not payment of disallowed contractual entitlements. *See, e.g.*, § 726(a)(3) (giving third priority to "payment of any *allowed* unsecured claim proof of which is tardily filed" (emphasis added)); § 1129(b)(2)(B)(i) (requiring, for a plan to be "fair and equitable," that each unsecured creditor "receive or retain on account of such claim property of a value . . . equal to the *allowed* amount of such claim" (emphasis added)). Hertz's Plan therefore fits comfortably with the codified absolute priority rules that were violated in *Jevic* and on which that opinion was based.

For those two reasons, even assuming that *Jevic* announces a clear-statement rule, it does not apply to the facts here. Instead of a clear-statement rule, I would apply the Supreme Court's typical approach to harmonizing pre-Code practice with the Code's text, under which pre-Code practice "can be relevant to the interpretation of an ambiguous text" but is irrelevant if there is "no textual ambiguity." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 649 (2012). Because the Code's disallowance of the

Noteholders' claims is clear and unambiguous,[2] I would not use the common law absolute priority rule as an "extratextual supplement" to supplant § 502(b)(2). *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 10 (2000).

III.

In addition to their arguments regarding impairment and *Jevic*, my colleagues appeal more generally to policy. They argue that treating the Noteholders as unimpaired and allowing Hertz to pay them less than contract-rate interest would produce odd results. For example, they argue that the unimpaired Noteholders would be treated worse than impaired, dissenting creditors, insofar as the latter would be entitled to "fair and equitable" treatment that would include contract-rate interest. My colleagues may well be correct that "unimpaired creditors [will] be treated worse than impaired creditors" under Hertz's interpretation, but we are bound to "enforce[] the Code's express terms" regardless of such policy considerations. *PG&E*, 46 F.4th at 1075 (Ikuta, J., dissenting).

* * *

For these reasons, I respectfully concur in part and dissent in part.

[2] Assuming that *Jevic*'s clear-statement rule applies here, it is satisfied because § 502(b)(2) disallows post-petition interest with "unmistakabl[e]" clarity. *Cohen v. de la Cruz*, 523 U.S. 213, 222 (1998).

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 23-1169, 23-1170

IN RE: THE HERTZ CORPORATION, et al.,
Reorganized Debtors.

WELLS FARGO BANK, N.A., as Indenture Trustee,
Appellant,

v.

THE HERTZ CORPORATION, DOLLAR RENT A CAR, INC.; DOLLAR THRIFTY AUTOMOTIVE GROUP, INC.; DONLEN CORPORATION; DTG OPERATIONS, INC.; DTG SUPPLY, LLC; FIREFLY RENT A CAR LLC; HERTZ CAR SALES LLC; HERTZ GLOBAL SERVICES CORPORATION; HERTZ LOCAL EDITION CORP.; HERTZ LOCAL EDITION TRANSPORTING, INC.; HERTZ SYSTEM, INC.; HERTZ TECHNOLOGIES, INC.; HERTZ TRANSPORTING, INC.; RENTAL CAR GROUP COMPANY, LLC; SMARTZ VEHICLE RENTAL CORPORATION; THRIFTY CAR SALES, INC.; THRIFTY, LLC; THRIFTY INSURANCE AGENCY, INC.; THRIFTY RENT A CAR SYSTEM, LLC; and TRAC ASIA PACIFIC, INC.
Appellants.

U.S. BANK NATIONAL ASSOCIATION,
as Indenture Trustee,
Appellant,

v.

IN RE: THE HERTZ CORPORATION,
Appellant.

Filed: Nov. 6, 2024

Before: CHAGARES, *Chief Judge*, JORDAN, SHWAWRTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG, and AMBRO*, *Circuit Judges*

ORDER

The petition for rehearing en banc filed by appellees, The Hertz Corporation, et al., having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and no judge of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

By the Court,

s/Thomas L. Ambro

Circuit Judge

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* Judge Ambro's vote is limited to panel rehearing only.

Appendix C

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

No. 20-11218
Adv. No. 21-50995

IN RE: THE HERTZ CORPORATION, et al.,
Reorganized Debtors.

WELLS FARGO BANK, N.A., as Indenture Trustee,
Plaintiffs,
and
US BANK, as Indenture Trustee,
Intervenor-Plaintiff,
v.
THE HERTZ CORP., et al.,
Defendants.

Filed: Dec. 22, 2021

MEMORANDUM OPINION[1]

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[1] The Court is not required to state findings of fact or conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure. Instead, the facts recited are those averred in the Complaint, which must be accepted as true for the purposes of the Motion to Dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Before the Court is the Debtors' Motion to Dismiss the complaint filed by the Indenture Trustees, on behalf of the holders of a series of unsecured notes issued by the Debtors prepetition (the "Noteholders"), for recovery of a redemption premium and/or post-petition interest allegedly due under the Notes. For the reasons stated below, the Court will grant in part and deny in part the Debtors' Motion to Dismiss the redemption premium count and grant the Debtors' Motion to Dismiss the post-petition interest count.

I. Background

On May 22, 2020, the Hertz Corporation and its affiliates (collectively "the Debtors") filed voluntary petitions under chapter 11 of the Bankruptcy Code. The filing was due in large part to the disruption caused to travel and its business operations by the Covid-19 pandemic. (D.I. 28 ¶¶ 3-9.)[2] After a downsizing of their fleet and a sale of a non-core part of their business, the Debtors obtained an offer from a proposed plan sponsor. After designating a stalking horse bidder and conducting an auction process, the Debtors selected a winning bidder and filed the Second Modified Third Amended Plan of Reorganization ("the Plan") to effectuate a reorganization in accordance with that bid. (D.I. 5178.) The Plan provided generally for payment in full in cash on the effective date to creditors plus post-petition interest to the effective date at the federal judgment rate or in the amount necessary to render them unimpaired and a distribution to shareholders of cash and new warrants

[2] References to the docket in this adversary proceeding are to "Adv. D.I. #" while references to the docket in the main case are to "D.I. #."

or subscription rights. (*Id.* at Art. III.B.) The Plan was accepted by the shareholders. (D.I. 5181.) On June 10, 2021, the Court confirmed the Plan. (D.I. 5261.) The Confirmation Order preserved the rights of the Noteholders to assert entitlement to a make-whole premium and additional interest and other claims as necessary to render their claims unimpaired, as well as the Debtors' right to object to those claims. (*Id.* at ¶¶ 26 & 27.) The Plan went effective on June 30, 2021 (the "Effective Date"). (D.I. 5477.)

On July 1, 2021, Wells Fargo Bank, N.A. ("Wells Fargo"), as Indenture Trustee for a series of unsecured notes issued by the Debtors pre-petition (the "Senior Notes"), filed a complaint seeking a declaratory judgment that, in addition to the principal and pre-petition interest paid to the Senior Noteholders on the Effective Date (in excess of $2.7 billion), the Debtors must pay approximately $272 million consisting of (1) a make-whole premium due under the Senior Notes (totaling approximately $147 million) and (2) post-petition interest on their claims at the contract default rate in excess of the federal judgment rate (approximately $125 million). (Adv. D.I. 1 at Ex. A.) US Bank, N.A. ("US Bank"), as Indenture Trustee for the 7% Unsecured Promissory Noteholders, intervened as a plaintiff seeking relief only on the second claim. (Adv. D.I. 14.)

On August 2, 2021, the Debtors filed a Motion to Dismiss both counts for failure to state a claim. The Motion was fully briefed and oral argument was held on November 9, 2021. The matter is ripe for decision.

II. Jurisdiction

The Court has subject matter jurisdiction over this adversary proceeding. 28 U.S.C. §§ 157, 1334. The Court has the power to enter a final judgment in this adversary because it concerns the allowance of claims against the estate. 28 U.S.C. § 157(2)(A) & (O). *Stern v. Marshall*, 564 U.S. 462, 499 (2011). In addition, the parties have consented to entry of a final order by this Court. (Adv. D.I. 1 at ¶ 39, 5 at ¶12 & 14 at ¶ 15.) *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665 (2015) (holding that even where Article III concerns would preclude the bankruptcy court from entering final judgment over a party's opposition, a court may do so if the parties consent).

III. Discussion

A. Standard of Review

A Rule 12(b)(6) motion challenges the sufficiency of the factual allegations in the complaint. *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993). To survive a motion to dismiss, the complaint must contain sufficient factual matter, accepted as true, "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). The court must draw all reasonable inferences in favor of the plaintiff. *E.g.*, *Alpizar-Fallas v. Favero*, 908 F.3d 910, 914 (3d Cir. 2018).

In weighing a motion to dismiss, the court should undergo a three-part analysis. "First, the court must take note of the elements needed for a plaintiff to state a claim." *Santiago v. Warminster Twp.*, 629 F.3d 121, 130 (3d Cir. 2010) (citing *Iqbal*, 556 U.S. at 675). Second, the court must separate the factual and legal elements of the claim, accepting all of the complaint's well-pled facts as true and disregarding any legal conclusions. *Id.*; *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (citing *Iqbal*, 556 U.S. at 679). Third, the court must determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a plausible claim for relief. *Santiago*, 629 F.3d at 130.

The Court may consider documents to which the complaint refers if they are central to the claim and no party questions their authenticity. *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). *See also Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 n.3 (2d Cir. 2002).

B. Redemption Premium

In Count 1 of the Complaint, Wells Fargo seeks a declaratory judgment that the Debtors must pay the redemption premium provided in the Senior Notes because they were redeemed prior to their maturity.

The Debtors seek to dismiss this count for failure to state a claim asserting that (a) no redemption premium is allowed under the express language of the Indentures or (b) the redemption premium is unmatured interest which must be disallowed under the Bankruptcy Code. Wells Fargo disputes both of these contentions.

1. Terms of the Indentures[3]

a. Acceleration Clause

The Debtors rely initially on section 602 of the Indentures which provides that upon the filing of a bankruptcy petition the Senior Notes are automatically accelerated and "the principal of and accrued but unpaid interest on all Outstanding Notes of such series will *ipso facto* become immediately due and payable without any declaration or other act on the part of the Trustee or any Holder." Because section 602 does not provide for the payment of any redemption premium on acceleration, the Debtors contend that none is due.

Wells Fargo responds that the Debtors' argument must be rejected based on controlling Third Circuit precedent. *In re Energy Future Holdings Corp.*, 842 F.3d 247 (3d Cir. 2016) (hereafter "*EFH*"). In *EFH*, Wells Fargo contends, the Third Circuit considered similar language in acceleration clauses under New York law[4] and concluded that the issue of whether a redemption premium was due depended not on the terms of the acceleration clause, but on the terms of the redemption provision. 842 F.3d at 257-60.

The Debtors seek to distinguish *EFH* by noting that the language in the two series of notes at issue in that case provided that on acceleration all "outstanding Notes" were due or all "principal,

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[3] The Indentures and Supplemental Indentures for the Senior Notes contain substantially identical terms for purposes of the issues at bar. (Adv. D.I. 5 at Exs. A-H.)

[4] The Indentures in this case are also governed by New York law. (Adv. D.I. 5, Exs. A & C, § 115, Exs. E & G, § 113.)

interest, and applicable premium" were due. *Id.* at 254, 257. Therefore, they assert that the Third Circuit held that the acceleration clause and the redemption provision were not in conflict. *Id.* at 256. In contrast, they contend that the acceleration clause in this case, which provides for payment only of "the principal of and accrued but unpaid interest," cannot be read in harmony with the redemption provision which requires payment of an additional premium.

The Court finds that argument is a distinction without significance. While the Third Circuit rejected the *EFH* debtor's argument that the acceleration and redemption provisions in that case were in conflict, it concluded that the two sections "simply address different things: § 6.02 causes the maturity of EFHI's debt to accelerate on its bankruptcy, and § 3.07 causes a make-whole to become due when there is an optional redemption before" the maturity date. *Id.* The Third Circuit concluded that the redemption provision "is the only provision that specifically addresses redemption." *Id.* That conclusion applies to the Senior Notes in this case, as well. Therefore, the Court concludes that the acceleration clause in the Indentures is not the operative provision in determining whether the redemption premium is due.

b. Redemption Provision

The Debtors argue that, even under the language of the redemption provision, no redemption premium is due on the Senior Notes for several reasons.

i. At the Debtors' Option

The Debtors argue, initially, that for any redemption premium to be due, the redemption must have been "at the [Debtors'] option."[5] They contend that the Senior Notes were not redeemed at the Debtors' option. They assert that they were forced to file bankruptcy because of the collapse of their business due to the pandemic. The Debtors argue that, upon the bankruptcy filing, the Senior Notes were automatically accelerated and required to be paid in full. *E.g.*, *In re MPM Silicones, L.L.C.*, 874 F.3d 787, 803 (2d Cir. 2017) (holding that payment was mandated by acceleration of the notes on the filing of bankruptcy and therefore that payment was not a voluntary redemption by the debtor).

Wells Fargo disagrees, arguing that the *MPM* case on which the Debtors rely is contrary to the decision in *EFH* which is binding on this Court. It argues that the Third Circuit in *EFH* specifically concluded that the automatic acceleration caused by a bankruptcy filing did not make any later redemption nonvoluntary. *EFH*, 842 F.3d at 255.

The Court agrees with Wells Fargo. The Third Circuit in *EFH* expressly held that the mere acceleration of notes as a result of a bankruptcy filing does not mean that the debtor in that case could not be liable for a redemption premium upon subsequently redeeming the notes. *Id.* Although *MPM* is to the contrary, it is not the law in this Circuit. The Third Circuit in *EFH* disagreed with the bankruptcy court's decision which was upheld in *MPM* and distinguished the *AMR* decision (on which the Second Circuit relied in *MPM*). 842 F.3d at 258-60 (citing *In re AMR Corp.*, 730 F.3d 88 (2d Cir. 2013)).

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[5] Adv. D.I. 5, Exs. B, D, F, H at § 6.

The Debtors assert, nonetheless, that *EFH* is distinguishable because, unlike the debtor in that case, they did not file bankruptcy in a strategic effort to avoid the payment of a redemption premium. *Id.* at 251.[6]

Wells Fargo disagrees, noting that there is nothing in *EFH* requiring an intent to avoid the make-whole obligation in order to find that a redemption of notes is voluntary. Wells Fargo argues that no court has held that if an issuer does not have an intent to avoid the redemption provision, its action is not voluntary. Instead, Wells Fargo asserts that the cases which find a redemption involuntary are predominately cases where the acceleration was at the lenders' option.[7]

The Court agrees with Wells Fargo. The *EFH* Court did not conclude that the voluntariness of the redemption was dependent on a finding that the debtor filed bankruptcy to avoid the obligation to pay the noteholders a redemption premium. Instead, the

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[6] *See also Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1053 (2d Cir. 1982) (enforcing make-whole where debtor filed a voluntary plan of liquidation in an attempt to substitute the buyer for the debtor as obligor under low-interest debentures); *Wilmington Sav. Fund Soc'y v. Cash Am. Int'l, Inc.*, No. 15-CV-5027 (JMF), 2016 WL 5092594, at *7 (S.D.N.Y. Sept. 19, 2016) (enforcing make-whole where issuer breached indenture in connection with a spinoff).

[7] *E.g.*, *In re Granite Broad. Corp.*, 369 B.R. 120, 144 (Bankr. S.D.N.Y. 2007) (citing *In re LHD Realty Corp.*, 726 F.2d 327, 330 (7th Cir. 1984)). *See also EFH*, 842 F.3d at 260 (noting that "by electing to accelerate the debt, a lender forgoes its right to a stream of payments in favor of immediate repayment" and cannot claim a redemption premium).

Third Circuit found that the debtor had filed a voluntary petition in bankruptcy and once in bankruptcy, had the option to reinstate the notes. *EFH*, 842 F.3d at 255. The other cases cited by the Debtors are similarly distinguishable.[8] In fact, several cases have found a redemption voluntary even where the issuer acted in the utmost good faith.[9]

Finally, the Debtors argue that any option to reinstate the Senior Notes was hypothetical at best. They contend that they could not continue to operate without filing bankruptcy because they lost over 90% of their revenues as a result of the pandemic. Further, they argue that they had no ability to formulate a plan that reinstated the Senior Notes because they received no offers that allowed that option. Rather, the Debtors assert that, once in bankruptcy, they had a fiduciary duty to accept the highest and best bid they received at the auction, which precluded the reinstatement of the Senior Notes. Therefore, the Debtors argue that

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[8] *E.g.*, *Sharon Steel*, 691 F.2d at 1053 (simply holding that where issuer breached the indenture, the trustee had the option to enforce the redemption provision rather than accelerate the notes); *WSFS*, 2016 WL 5092594, at *7 (concluding that cases interpreting *Sharon Steel* as requiring bad faith intent to avoid redemption premium were incorrect and no such intent was necessary to allow enforcement of redemption clause).

[9] *E.g.*, *Chesapeake Energy Corp. v. Bank of N.Y. Mellon Tr. Co. N.A.*, 837 F.3d 146 (2d Cir. 2016) (enforcing redemption provision even though company acted in good faith, in reliance on a declaratory judgment, later reversed on appeal, that its actions would not trigger the provision); *In re Imperial Coronado Partners, Ltd.*, 96 B.R. 997, 1000 (9th Cir. BAP 1989) (concluding that decision to sell property was voluntary even though debtor did not have the financial means to reinstate the note and the sale made good business sense).

the repayment of the Senior Notes pursuant to the terms of the Plan was not a redemption "at the Company's option" which is necessary to trigger the requirement to pay the redemption premium.

Wells Fargo argues that the Debtors' bankruptcy filing was a strategic, voluntary decision and that the Debtors had many options for restructuring their obligations once in bankruptcy, including specifically the choice to reinstate the Senior Notes. 11 U.S.C. § 1124(2). It, therefore, contends that the Plan which was filed by the Debtors and ultimately confirmed was a redemption of the Senior Notes at the Debtors' option.

The Court agrees with Wells Fargo. The Third Circuit found, in concluding that the redemption of notes in *EFH* was voluntary, that the debtor there "filed for Chapter 11 protection voluntarily. Once there, it had the option, per its plan of reorganization, to reinstate the accelerated notes' original maturity date under Bankruptcy Code § 1124(2) rather than paying them off immediately. It chose not to do so." *EFH*, 842 F.3d at 255.

Similarly, in this case the Debtors filed a voluntary petition in bankruptcy. It was perhaps the best option for the Debtors in light of the drastic effects on their business caused by the pandemic, but it was not the only option. Further, while the Debtors chose to conduct an auction for a plan sponsor and ultimately selected the highest and best offer, that too was not the Debtors' only option. At numerous junctures in any bankruptcy case, a debtor in possession has multiple paths from which to choose. That the Debtors here chose a path that resulted in a fantastic result for all of their creditors and shareholders does not mean that it was not a voluntary choice. Even though the Debtors acted in good faith and in the fulfillment of their fiduciary duties, the Court concludes that their actions were voluntary. As noted above, courts have found that even actions taken in good faith and in fulfillment of a debtor's fiduciary duty can be voluntary resulting in liability for a redemption premium. *See* cases discussed in note 9, *supra*.

Therefore, the Court concludes that Wells Fargo has alleged sufficient facts which, accepted as true, state a facially plausible claim that the redemption of the Senior Notes was at the Debtors' option. *Twombly*, 550 U.S. at 570.

ii. Applicability of Section 6(a)

The Debtors further argue that, even if the redemption is determined to be voluntary, no redemption premium is due under the express terms of the Indentures because they were redeemed after they matured upon the bankruptcy filing. The Debtors rely preliminarily on section 6(a) of the Supplemental Indentures which provides that the "[Senior] Notes will be redeemable, at the Company's option, in whole or in part, at any time and from time to time on or after [a specified date] and *prior to maturity* thereof at the applicable redemption price set forth below." (Adv. D.I. 5, Exs. B, D, E & G (emphasis added).)

a. 2022/2024 Senior Notes

Wells Fargo concedes that section 6(a) is the provision applicable to the 2022/2024 Senior Notes. It argues, however, that the term "prior to maturity" in section 6(a) means prior to the original maturity date of the Senior Notes in 2022 and 2024. Because the Debtors redeemed the Senior Notes before the date that they were due to mature, Wells Fargo contends that the redemption premium is due.

The Debtors respond that the Indentures contained a defined term (the "Stated Maturity") for the date when each of the series of Senior Notes was originally due. They argue that the failure to use that defined term in section 6(a) establishes that the phrase "prior to maturity" must mean something broader than that specific date. They cite several other sections of the Indentures which distinguish Stated Maturity from maturity arising "on acceleration" or "otherwise." (Adv. D.I. 5, Exs. A, C, E, G at §§ 1301(a), 601(ii), 301(6).) The Debtors also argue that if "prior to maturity" simply meant the Stated Maturity date, that it would have been unnecessary (and mere surplusage)[10] to include the term at all because the chart in section 6(a) makes reference to what premium is due at all times prior to the Stated Maturity date.

The Court agrees with the Debtors' analysis. The date when the Senior Notes are due is a defined term, Stated Maturity. If section 6(a) was meant to apply only to redemptions before the Stated Maturity date, rather than prior to a maturity caused by some other event, such as a bankruptcy filing, it would have used the term Stated Maturity. Further, if the phrase simply meant redemption prior to the Stated Maturity it would have been surplusage, because the chart

[10] *E.g.*, *Burlington Ins. Co. v. NYC Transit Auth.*, 79 N.E.3d 477, 482 (N.Y. 2017) (holding that courts should interpret contracts in a manner that does not render a portion of a provision superfluous or meaningless).

included in that section stated what needed to be paid at any time before the Stated Maturity date.

Accordingly, the Court concludes that the undefined term "maturity" in section 6(a) must refer to the common meaning of maturity, which under the terms of the Senior Notes includes upon the acceleration caused by a bankruptcy filing. *E.g.*, *Sapp v. Indus. Action Servs., LLC*, C.A. No. 19-912-RGA, 2020 WL 2813176, at *3 (D. Del. May 29, 2020) ("[W]hen the same term appears in different sections of the agreement and is capitalized in one section but not the other, the non-capitalized term will have its 'ordinary, plain meaning.'") (citing *Derry Finance N.V. v. Christiana Cos.*, 797 F.2d 1210, 1214 (3d Cir. 1986)). This interpretation is confirmed by sections 601(ii) and 301(6) of the Indentures which use the lower case term "maturity" in reference to acceleration of the Senior Notes on bankruptcy or a default.

Therefore, under the express terms of section 6(a) of the redemption provision, the Court concludes that Wells Fargo has failed to state a plausible claim that a redemption premium is due on the 2022/2024 Senior Notes because they were redeemed after the initial period stated therein but not prior to the maturity arising as a result of the bankruptcy filing. Therefore, the Court will grant the Motion to Dismiss Count 1 as to the 2022/2024 Senior Notes.

b. 2026/2028 Senior Notes

The Debtors argue that the same result applies to the Senior Notes originally due to mature in 2026 and 2028.

Wells Fargo responds that section 6(a) is not applicable to those Senior Notes because they were *not* redeemed "on or after" the date specified in that section. Instead, it contends that section 6(c) governs, which provides that "At any time prior to [the specified date], the [Senior Notes] may also be redeemed (by the Company or any other person) in whole or in part, at the Company's option, at . . . the Redemption Price . . . ."

The Debtors assert, however, that section 6(a) is incorporated in full into section 6(c) because the latter provides circumstances under which the Senior Notes may "also" be redeemed.

Wells Fargo responds that if "also" meant that all of section 6(a) was incorporated into section 6(c) then there would have been no need to repeat provisions from section 6(a) in section 6(c) such as "at the Company's option" and "in whole or in part."

The Court agrees with Wells Fargo that the use of "also" in section 6(c) does *not* mean that all of section 6(a) is incorporated into section 6(c). If it did, section 6(c) would contain surplusage, which is to be avoided in contract interpretation. *E.g.*, *Burlington Ins.*, 79 N.E.3d at 482. It would also create an internal contradiction: section 6(a) is only applicable if redemption occurs *after* a specified date, while section 6(c) applies only if redemption occurs *before* that date, and each section provides a different redemption price. Rather than accept the Debtors' tortured reading, the Court reads section 6(c) as simply providing the Debtors with the ability to redeem under the circumstances in that section, in addition to their redemption rights under section 6(a). While redemption under section 6(a) requires that it occur before maturity, section 6(c) contains no such requirement.

Therefore, the Court concludes that Wells Fargo has stated a plausible claim, under the express terms of section 6(c) of the redemption provision, that a premium would be due on the 2026/2028 Senior Notes because they were redeemed before the initial period stated therein.

2. Economic Equivalent of Interest

The Debtors argue that, even if the redemption premium is due under the terms of the 2026/2028 Senior Notes, however, it cannot be an allowed claim because section 502(b)(2) of the Bankruptcy Code expressly provides that any claim for unmatured interest must be disallowed. Although that term is not defined in the Code, the Debtors assert that courts look to substance over form and have disallowed claims that are the "contractual equivalent" of future interest.[11] The Debtors also note that, although the Third Circuit did not directly address this issue in

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[11] *E.g.*, *In re Chateaugay Corp.*, 961 F.2d 378, 380 (2d Cir. 1992) (concluding that unamortized portion of original issue discount was unmatured interest disallowed by § 502(b)(2)); *In re Doctors Hosp. of Hyde Park, Inc.*, 508 B.R. 697, 705-06 (Bank. N.D. Ill. 2014) (holding that yield maintenance premium was a liquidated damages provision in the nature of disallowable unmatured interest); *In re Ridgewood Apts.*, 174 B.R. 712, 721 (Bank. S.D. Ohio 1994) (prepayment penalty could be disallowed as unmatured interest because it was meant to compensate lender for loss of interest income). *See also In re Ultra Petroleum Corp.*, 943 F.3d 758, 765 (5th Cir. 2019) (noting that make-whole premium could be unmatured interest and remanding to bankruptcy court for determination based on the unique dynamics of the case).

EFH, it characterized a redemption premium as the "contractual substitute for interest lost on Notes redeemed before their expected due date." 842 F.3d at 251.[12]

Wells Fargo argues that the redemption premium is not interest. It contends that interest is a payment for the "use" of money, while the redemption premium is being paid to the Senior Noteholders for the Debtors' "failure to use" their money. Wells Fargo asserts that, unlike interest, the redemption premium does not accrue over time but is a fixed one-time charge upon redemption, and, unlike interest, the redemption premium is contingent: it is only due if the Debtors redeem the Senior Notes in accordance with the terms of the redemption provision. Wells Fargo contends that the redemption premium is intended to compensate the Senior Noteholders for the uncertainty and potential losses incurred in reinvesting that money in a different market environment, which implicates numerous factors beyond simply the periodic payment of interest. It argues that the majority of courts agree, holding that redemption premiums are not unmatured interest.[13]

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[12] *See also MPM*, 874 F.3d at 802 (noting that a 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.")

[13] *E.g.*, *In re Ultra Petroleum Corp.*, 624 B.R. 178, 188-95 (Bankr. S.D. Tex. 2020) (on remand, concluding that make-whole premium was not the economic equivalent of unmatured interest and not disallowed under § 502(b)(2)); *In re School Specialty, Inc.*, Bank. No. 13-10125 (KJC), 2013 WL 1838513, at *5 (Bank. D. Del. 2013) (agreeing with *Trico* and holding that make-whole

While the cases cited by Wells Fargo are useful, the Court notes that there is a minority of courts who disagree.[14] Further, although the Third Circuit in *EFH* described a redemption premium as the "contractual substitute for interest lost on Notes redeemed before their expected due date," it was not addressing the issue of whether it could be characterized as such to preclude its payment under section 502(b)(2). 842 F.3d at 251, 253 n.1. Similarly, while the Fifth Circuit in *Ultra Petroleum* suggested that some make-wholes may be the equivalent of unmatured interest, it did not decide whether the ones in that case were, instead remanding the issue to the bankruptcy court. 943 F.3d at 765.[15]

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premium should not be disallowed as unmatured interest); *In re Trico Marine Servs. Inc.*, 450 B.R. 474, 481 (Bank. D. Del. 2011) (reviewing cases and concluding that "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 also* 4 Collier on Bankruptcy ¶ 502.03 (16th ed 2021) (collecting cases).

[14] *E.g.*, *Doctors Hosp.*, 508 B.R. at 706 (disagreeing with the *Trico* analysis because liquidated damages may well include unmatured interest); *In re MPM Silicones LLC*, Bankr. No. 14-22503 (RDD), 2014 WL 4436335, at *17-18 (Bankr. S.D.N.Y. Sept. 9, 2014) (concluding that noteholders claim to a make-whole based on debtor's breach of no call provision was unmatured interest disallowed under § 502(b)(2)), *aff'd in part and rev'd in part on other grounds*, 874 F.3d 787 (2d Cir. 2017).

[15] Although the Bankruptcy Court held on remand that make-whole premium was not unmatured interest, that decision is currently on appeal. *Ultra Petroleum Corp. v. Ad Hoc Comm. Of OpCo Unsecured Creditors*, Case No. 21-20008 (oral argument was held before the Fifth Circuit on 10/04/2021).

The Court is not prepared to conclude, as a legal matter, that make-wholes cannot be disallowed as unmatured interest as Wells Fargo, the cases it cites, and academics[16] suggest. Calling a make-whole a contract right or a liquidated damages provision does not answer the question of whether it is unmatured interest.[17] In deciding whether a charge is unmatured interest "courts look to the economic substance of the transaction to determine what counts as interest." *Doctors Hosp.*, 508 B.R. at 705. If it were enough to just label a make-whole claim liquidated damages, damages for breach of contract, or a "separate contract right" from the obligation to pay interest, then a contract 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. This is contrary to the express provisions of the Code and, consequently, the Court concludes that the characterization of a make-whole as a contract right or liquidated damages is not dispositive.

Instead, the Court concludes that the determination of whether the redemption premium that Wells Fargo seeks in this case is, in fact, the economic equivalent of unmatured interest is not a legal question, but is instead a factual one: namely whether the redemption provision in the 2026/2028 Senior Notes is actually the economic equivalent of unmatured interest.

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[16] *See* Douglas Baird, *Making Sense of Make-Wholes*, 94 Am. Bankr. L.J. 567 (2020).

[17] *In re Long John Silver's Rests., Inc.*, 230 B.R. 29, 33 n.4 (Bankr. D. Del. 1999) (quoting William Shakespeare, *Romeo & Juliet*, Act II, scene ii).

In considering the actual language of the redemption premium in this case, the Court finds it significant that it is calculated, in large part, on the present value of the unmatured interest due on the Senior Notes as of the Redemption Date.[18] At oral argument, Wells Fargo presented a powerpoint that appeared to suggest, however, that the redemption provision was much less than a simple present value of the unmatured interest and very favorable to the Debtors because it is tied to the Treasury rate. That

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[18] The Supplemental Indenture provides in relevant part that prior to the stated date, the Debtors may redeem the 2028 Senior Notes for a price "equal to 100.0% of the principal amount thereof plus the Applicable Premium (as defined below) as of, and accrued but unpaid interest, if any, to, but not including, the Redemption Date." (Adv. D.I. 5, Ex. H, § 6(c)). That section further defines the Applicable Premium to mean

> with respect to a 2028 Note at any Redemption Date, the greater of (i) 1.00% of the principal amount of such 2028 Note and (ii) the excess of (A) *the present value* at such Redemption Date, calculated as of the date of the applicable redemption notice, of (1) the redemption price of such 2028 Note on January 15, 2023 (such redemption price being that described in Section 6(a)), plus (2) *all required remaining scheduled interest payments* due on such 2028 Note through such date (excluding accrued and unpaid interest to the Redemption Date), computed using a discount rate equal to the Treasury Rate plus 50 basis points, over (B) the principal amount of such 2028 Note on such Redemption Date, as calculated by the Company in good faith (which calculation shall be conclusive) or on behalf of the Company by such Person as the Company shall designate; provided that such calculation shall not be a duty or obligation of the Trustee.

(*Id.* (emphasis added)).

was, of course, merely argument and no evidence was presented to support that assertion. Nor did the Debtors have an opportunity to rebut the assertion with any evidence. Instead, the Debtors argued that the test is not whether the redemption premium equals the unpaid interest but whether it is the economic equivalent of the interest which the Senior Noteholders will not receive because of the early redemption of the Senior Notes. *Doctors Hosp.*, 508 B.R. at 705-06.

The presentation by Wells Fargo (and the language of the redemption provision itself), however, are sufficient to convince the Court that Wells Fargo has stated a plausible claim for relief. *Santiago*, 629 F.3d at 130. While the redemption premium clearly was not due until the redemption occurred on the Effective Date of the Plan and, therefore, was "unmatured" as of the petition date, the Court concludes that Wells Fargo may be able to present evidence that the redemption premium in the 2026/2028 Senior Notes is not, in fact, the economic equivalent of unmatured interest due under those Senior Notes.

Accordingly, the Court concludes that Count 1 of the Complaint states a claim that is plausible on its face that the Debtors must pay the redemption premium on the 2026/2028 Senior Notes but does not state a plausible claim that the Debtors must pay the redemption premium on the 2022/2024 Senior Notes. Accordingly, the Court will grant the Debtors' Motion to Dismiss Count 1 as to the 2022/2024 Senior Notes but deny the Debtors' Motion as to the 2026/2028 Senior Notes.

3. Other Arguments

Wells Fargo also contends, however, that regardless of how the redemption provision is characterized, that portion of the Senior Noteholders' claim cannot be disallowed because the Debtors treated their class as unimpaired in the Plan, thereby precluding them from voting on the Plan. As a result, Wells Fargo contends that the Debtors cannot impair any of the Senior Noteholders' legal, contractual, or equitable rights and must pay the Senior Noteholders all that they are entitled to receive under the Indentures and under equity. 11 U.S.C. § 1124(1). The failure to pay the Senior Noteholders their contractual entitlement to the redemption premium, Wells Fargo contends, impairs the Senior Noteholders' contractual and equitable rights. It also argues that, because the Debtors were "wildly solvent" (returning in excess of $ 1.5 billion to equity holders), the Senior Noteholders are entitled to all of their contract rights (including the make-whole even if it is unmatured interest) under the "solvent debtor exception."

The Debtors argue that the "impairment" and the "solvent debtor exception" arguments are relevant only if the make-whole is determined to be unmatured interest. If it is not unmatured interest, then the Debtors apparently concede that it is not impaired by the Code or by the Plan and is due to the Senior Noteholders.

The Court agrees with the Debtors that it is only if the redemption premium is determined to be the economic equivalent of unmatured interest that Wells Fargo's other arguments would be relevant. However, if it is unmatured interest, then the claim would be subject to the same analysis as the claims of all Noteholders' to post-petition interest. Therefore, the Court considers the parties' arguments on impairment and the solvent debtor exception together below.

C. Unmatured Interest

In Count 2 of the Complaint, Wells Fargo and US Bank (collectively, the "Indenture Trustees") seek a declaratory judgment that the Noteholders are entitled to post-petition interest on their claims, from the petition date to the date they were paid in full, at the contract rate. As noted above, Wells Fargo also asserts that to the extent the Court concludes that the make-whole claim is unmatured interest, the Senior Noteholders are nonetheless entitled to it under the express terms of the Indentures.

The Debtors seek to dismiss both the claim for post-petition interest and any claim for the redemption premium that is properly characterized as unmatured interest, contending that general unsecured claims for unmatured interest are disallowed under the Bankruptcy Code. 11 U.S.C. § 502(b). They contend that at most the Noteholders are entitled to interest from the petition date to the date the claims were paid in full only at the federal judgment rate as allowed in section 726(a)(5).

1. Unimpaired

The Indenture Trustees contend, however, that the Noteholders were treated as unimpaired under the Plan and, therefore, their claims for post-petition interest and/or the redemption premium must be paid in accordance with the terms of the Indentures. They rely on section 1124(1) which provides in relevant part that

> a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan–
>
> (1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest . . . .

11 U.S.C. § 1124(1).

The Debtors disagree. Because any claim for unmatured interest is disallowed by operation of the Bankruptcy Code, rather than the Plan, the Debtors argue that the Noteholders' claims are not impaired. *In re PPI Enters. (US), Inc.*, 324 F.3d 197, 204 (3d Cir. 2003) (holding that a creditor is unimpaired if it is the effect of the Bankruptcy Code that modifies its rights, not the debtor's plan).

The Indenture Trustees argue that *PPI* is distinguishable because it dealt with the effect of section 502(b)(6) rather than section 502(b)(2). They assert that section 502(b)(6) imposes an absolute cap on a landlord's claim, while section 502(b)(2) is not absolute and, in fact, is not effective where the debtor is solvent as it is here (pursuant to sections 726(a)(5) and 1129(a)(7)).

The Court finds the distinction illusory. Section 502(b) addresses the allowance of claims; sections 1129(a)(7) and 726(a)(5) address the treatment of claims where the debtor is solvent. The Indenture Trustees are conflating the allowance of claims with the treatment of claims. If one considers only the allowance issue, the Court concludes that section 502(b)(2) is as absolute as section 502(b)(6), because it disallows all unmatured interest on general unsecured claims.

It is true that in the rare solvent chapter 11 debtor case, some claims may be entitled to post-petition interest under sections 1129(a)(7) and 726(a)(5).[19] However, those sections do not reinstate the creditors' contract or state law rights to unmatured interest that has been disallowed by section 502(b)(2). Instead as discussed below, sections 1129(a)(7) and 726(a)(5) require the treatment of claims in accordance with the mandates of those sections which courts have concluded require the payment of post-petition interest only at the federal judgment rate.[20]

In *Ultra Petroleum*, the creditors made the same argument as the Indenture Trustees do in this case. They contended that they were impaired because the debtor's plan did not pay their make-whole amount or post-petition interest at their contract rate. The Bankruptcy Court agreed. *In re Ultra Petroleum Corp.*, 575 B.R. 361, 373 (Bank. S.D. Tex. 2017). On direct appeal, the Fifth Circuit reversed, concluding that "[w]e agree with *PPI*, every reported decision identified by either party, and Collier's treatise.

[19] *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 379 (1988).

[20] *E.g.*, *In re Cardelucci*, 285 F.3d 1231, 1234 (9th Cir. 2002) (concluding that post-petition interest on general unsecured claims is payable under sections 726(a)(5) and 1129(a)(7) only at the federal judgment rate, not at the contract rate); *In re PG&E Corp.*, 610 B.R. 308, 315 (Bank. N.D. Cal. 2019) (same); *In re Washington Mutual, Inc.*, 461 B.R. 200, 242 (Bank. D. Del. 2011) (same), vacated on other grounds, 2012 WL 1563880 (Bank. D. Del. Feb. 24, 2012).

Where a plan refuses to pay funds disallowed by the Code, the Code—not the plan—is doing the impairing." *Ultra Petroleum*, 943 F.3d at 762-64.

Following binding precedent in this Circuit (and the analysis of the Fifth Circuit with respect to claims similar to the Noteholders' claims), the Court concludes that any modification of the Noteholders' claim to unmatured interest or to the redemption premium (if it is the economic equivalent of unmatured interest) is an impairment of the Noteholders' contract claims by operation of section 502(b)(2) of the Bankruptcy Code, not the Debtors' Plan. Consequently, the Noteholders' claims are not impaired within the meaning of section 1124(1). *E.g.*, *PPI*, 324 F.3d at 204; *Ultra Petroleum*, 943 F.3d at 765; *PG&E*, 610 B.R. at 315.

2. Solvent Debtor Exception

The Indenture Trustees argue, nonetheless, that they are entitled to their contract rate of interest under the equitable doctrine known as the "solvent debtor exception." They contend that the Bankruptcy Code incorporated that equitable concept which arose under the Bankruptcy Act and provided that creditors were entitled to their full contract rights, if a debtor was solvent. The Indenture Trustees assert that the equities of this case clearly support their claims: the Debtors are awash in cash, paid all creditors in full, and provided a substantial return on investment to equity (in cash and warrants).

a. Express Terms of the Code

The Debtors argue that equitable principles cannot override express provisions of the Code, such as section 502(b)(2) which disallows all unmatured interest on general unsecured claims, without regard to whether a debtor is solvent. They contend that, while sections 726(a)(5) and 1129(a)(7)[21] require the payment of post-petition interest on general unsecured claims where the debtor is solvent, courts have held that the interest is set at the federal judgment rate, not at the contract rate.[22]

The Indenture Trustees respond that section 1129(a)(7) only incorporates section 726(a)(5) in chapter 11 cases with respect to impaired claims. Because the Noteholders' claims are unimpaired under the Debtors' Plan, they assert that any limitation of post-petition interest to the federal judgment rate contained in those sections is not applicable to them.

The Court agrees with the Indenture Trustees, in part. By their express terms, sections 1129(a)(7) and 726(a)(5) provide what treatment impaired creditors are entitled to receive, not what treatment unimpaired claims are entitled to receive in a solvent chapter 11 debtor case. In essence, the Code is silent on what treatment unimpaired creditors must receive in a solvent chapter 11 debtor case.

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[21] 11 U.S.C. §§ 726(a)(5) (providing payment of post-petition interest at "the legal rate" to creditors, before any distribution to the debtor (or equity), in the event there are funds left after paying all other claims in a chapter 7 liquidation case), & 1129(a)(7) (providing that with respect to each impaired class of claims or interests, each holder of such claim has either accepted the plan or will receive at least what it would have received in a liquidating chapter 7 case).

[22] *E.g.*, *Cardelucci*, 285 F.3d at 1234; *PG&E*, 610 B.R. at 315; *Washington Mutual*, 461 B.R. at 242.

b. Repeal of § 1124(3)

The Indenture Trustees argue, however, that Congress has made it clear that unimpaired creditors are entitled to receive post-petition interest at their contract rate by its repeal of section 1124(3). Before it was repealed, section 1124(3) had provided that a creditor is unimpaired if "the holder of such claim . . . receive[s] . . . cash equal to the allowed amount of such claim" on the effective date of the plan. 11 U.S.C. § 1124(3) (1988). Its repeal was prompted by the decision of a Bankruptcy Court that because sections 726(a)(5) and 1129(a)(7) were only applicable to impaired creditors and because section 1124(3) required only the payment of the allowed amount of their claims, unimpaired creditors were not entitled to post-petition interest. *In re New Valley Corp.*, 168 B.R. 73, 79-81 (Bankr. N.J. 1994). The Indenture Trustees contend that the Legislative History makes it clear that denial of post-petition interest to unimpaired creditors in the *New Valley* case was "unfair."[23] Thus, the Indenture Trustees conclude that the repeal of section 1124(3) makes it clear that unimpaired creditors must receive interest at their contract rate.

The Debtors argue that the repeal of section 1124(3) is irrelevant to the issue at hand. They note that the repeal occurred before the Third Circuit's decision in *PPI* and did not affect its conclusion that creditors are unimpaired if their rights are altered by the Bankruptcy Code rather than the plan. *PPI*, 324 F.3d at 206-07. Thus, they contend that the repeal of

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[23] H.R. Rep. No. 103-835, at 48 (1994) (emphasis added), reprinted in 1994 U.S.C.C.A.N. 3340, 3356-57.

section 1124(3) does not alter the fact that section 502(b)(2) does not permit the payment of post-petition interest on the Noteholders' claim.

The Court disagrees with the Debtors' analysis of *PPI*. The Third Circuit in *PPI* agreed with the bankruptcy court's conclusion in that case that the repeal of section 1124(3) meant that unimpaired creditors were entitled to the payment of post-petition interest if the debtor was solvent. *Id.* However, the Court does not read the repeal of section 1124(3) as expansively as the Indenture Trustees to mandate that unimpaired creditors must receive their contract rate of interest. Congress explained the repeal's effect, as follows:

> The principal change in this section is set forth in subsection (d) and relates to the award of postpetition interest. In a recent Bankruptcy Court decision in *In re New Valley Corp.*, 168 B.R. 73 (Bankr. D.N.J. 1994), *unsecured creditors were denied the right to receive postpetition interest on their allowed claims even though the debtor was liquidation and reorganization solvent. . . . In order to preclude this unfair result in the future*, the Committee finds it appropriate to delete section 1124(3) from the Bankruptcy Code.
>
> As a result of this change, if a plan proposed to pay a class of claims in cash in the full allowed amount of the claims, the class would be impaired, entitling creditors to vote for or against the plan of reorganization. If creditors vote for the plan of reorganization,

> it can be confirmed over the vote of dissenting class of creditors only if it complies with the "fair and equitable" test under section 1129(b)(2) of the Bankruptcy Code and it can be confirmed over the vote of dissenting individual creditors only if it complies with the "best interests of creditors" test under section 1129(a)(7) of the Bankruptcy Code.
>
> The words "fair and equitable" are terms of art that have a well established meaning under the case law of the Bankruptcy Act as well as under the Bankruptcy Code. Specifically, courts have held that where an estate is solvent, in order for a plan to be fair and equitable, unsecured and undersecured creditors' claims must be paid in full, including postpetition interest, before equity holders may participate in any recovery.

H.R. Rep. No. 103-835, at 48 (1994) (emphasis added), reprinted in 1994 U.S.C.C.A.N. 3340, 3356-57.

Thus, in its repeal of section 1124(3), Congress did express its belief that the Bankruptcy Code contained an exception in cases where the debtor is solvent to the principle that creditors are not entitled to post-petition interest. The Legislative History, however, suggests that Congress believed that this solvent debtor exception is embodied in the "fair and equitable" and "best interests of creditors" tests contained in sections 1129(b) and 1129(a)(7).

While Congress stated that it would be unfair in a solvent chapter 11 debtor case for unimpaired creditors to receive no interest, it did not point to any provision of the Code that would allow interest to be paid to unimpaired creditors. Instead, it suggested that the failure to pay any interest to unsecured creditors in a solvent chapter 11 debtor would make them impaired and thus eligible to be paid interest by application of sections 1129(a)(7) and 1129(b)(2).

The Indenture Trustees argue, however, that Congress made it clear that unimpaired creditors under section 1124(1) would not be limited to the interest due under sections 1129(a)(7) and 726(a)(5).[24] While the Court agrees that Congress did state that the repeal of section 1124(3) was not meant to modify the 1984 amendment to section 1129(a)(7) which excluded unimpaired creditors, the Court does not conclude that it was intended to suggest that any interest due to unimpaired creditors cannot be capped at the federal judgment rate applicable under section 726(a)(5). *Id.* The 1984 amendment to section 1129(a)(7) was made in conjunction with an amendment of section 1129(a)(10) to require the vote of "impaired" claims, rather than all claims.[25] The Legislative History to those amendments reveals that they were meant to require that debtors only need

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[24] H.R. Rep. 103-835, 48 (1994), reprinted in 1994 U.S.C.C.A.N. 3340, 3357 ("With respect to section 1124(1) and (2), subsection (d) would not change the beneficial 1984 amendment to section 1129(a)(7) of the Bankruptcy Code, which excluded from application of the best interests of creditors test classes that are unimpaired under section 1124.").

[25] *See* An Act to amend title 28 of the United States Code regarding jurisdiction of bankruptcy proceedings, to establish new Federal judicial positions, to amend title 11 of the United States Code, and for other purposes, Pub. L. 98-353, § 512(a)(7) & (10), 98 Stat. 333 (1984) (amending 11 U.S.C. § 1129(a)(7) & (10)).

obtain the requisite vote (or satisfaction of the best interest of creditors test) with respect to "real" creditors, i.e., those impaired by the plan, rather than intended to assure that unimpaired creditors get more than the federal judgment rate in the case of the debtor's solvency. *See* S. Rep. No. 98-65, at 80 (1983) ("Paragraph (10) makes clear the intent of section 1129(a)(10) that one "real" class of creditors must vote for the plan of reorganization.")

Nowhere in the repeal of section 1124(3) or its Legislative History did Congress state what the Indenture Trustees argue, namely that unimpaired creditors must be paid their contract rate of interest in a solvent chapter 11 debtor case. Congress could have so provided (1) by amending section 1124(3) to require that unimpaired creditors receive their contract rate of interest, in addition to payment in full of their allowed claim, or (2) by amending section 502(b)(2) to provide that unmatured interest is disallowed "except in the case of a solvent debtor." It did neither.

Thus, the repeal of section 1124(3) does not support the Indenture Trustees' argument that an unimpaired creditor must receive post-petition interest at its full contract rate.

c. Solvent Debtor Exception Cases

The Indenture Trustees argue that, because there is no express answer in the Bankruptcy Code or Legislative History, the answer lies in the solvent debtor exception articulated by the courts. While that concept arose under the Bankruptcy Act, they contend that it survives under the Bankruptcy Code because it has not been repudiated by any of the provisions of the

Code. *E.g.*, *Cohen v. de la Cruz*, 523 U.S. 213, 221 (1998) (interpreting dischargeability provisions consistently with practice under the Bankruptcy Act because the Court "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure"). The Indenture Trustees assert that the solvent debtor exception (as articulated by courts under the Act and the Code) mandates that, because the Debtors are solvent, all of the Noteholders' contract rights must be preserved, including the right to be paid post-petition interest at their contract rate.[26]

The Debtors contend that none of the Supreme Court cases cited by the Indenture Trustees support their contention, because they were all cases dealing with the entitlement of secured creditors to post-petition interest.[27] The Debtors further argue that the Bankruptcy Code expressly incorporated the rulings of those cases in sections 506(b) and 1129(b)(2)(A). They contend that cases granting secured creditors post-petition interest cannot be extended to unsecured creditors in the face of specific provisions of the Code,

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[26] *E.g.*, *City of New York v. Saper*, 336 U.S. 328, 330 n.7 (1949); *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156 (1946); *Consolidated Rock Prods. Co. v. Dubois*, 312 U.S. 510 (1941); *Am. Iron & Steel Mfg. Co. v. Seaboard Air Line Ry.*, 233 U.S. 261, 264 (1914); *In re Ultra Petroleum*, 943 F.3d at 765; *Gen. Elec. Capital Corp. v. Future Media Prods., Inc.*, 547 F.3d 956, 961 (9th Cir. 2008); *In re Gencarelli*, 501 F.3d 1, 7 (1st Cir. 2007); *In re Dow Corning Corp.*, 456 F.3d 668, 679-80 (6th Cir. 2006); *In re Terry Ltd. P'ship*, 27 F.3d 241, 243 (7th Cir. 1994); *In re Laymon*, 958 F.2d 72, 75 (5th Cir. 1992).

[27] *Vanston Bondholders*, 329 U.S. 156; *Consolidated Rock*, 312 U.S. 510; *Am. Iron*, 233 U.S. 261.

such as sections 502(b) and 506(b). *Law v. Siegel*, 571 U.S. 415, 421 (2014) (holding that "equitable powers [that] remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code").

The Court agrees with the Debtors that cases cited by the Indenture Trustees which mandate the payment of interest to secured creditors at their contract rate when a debtor is solvent[28] are not applicable to the instant case which concerns unsecured creditors' rights. *Timbers of Inwood*, 484 U.S. at 379 (holding that the right to post-petition interest provided under section 506(b) is not applicable to undersecured creditors but that, instead, section 726(a)(5) provides the rule for treatment of unsecured creditors in the rare solvent debtor case).

The other Supreme Court case cited by the Indenture Trustees is *Saper*, which is also not supportive of their argument. *City of New York v. Saper*, 336 U.S. 328, 331 (1949) (holding that interest on tax claims, like other unsecured claims, stopped accruing on the bankruptcy filing date). The Court in *Saper* relied on English law from which the Bankruptcy Act was derived and did note, albeit in dicta, that English law had an exception to that rule, in the event that a debtor was solvent. *Id.* at 330 n.7 (1949). The Supreme Court made no comment,

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[28] *Vanston Bondholders*, 329 U.S. 156; *Consolidated Rock*, 312 U.S. 510; *Am. Iron*, 233 U.S. 261; *GECC*, 547 F.3d at 961; *Gencarelli*, 501 F.3d at 5, 8; *Terry Ltd.*, 27 F.3d at 242-43; *Laymon*, 958 F.2d at 75; *Ruskin v. Griffiths*, 269 F.2d 827, 830-832 (2d Cir. 1959).

however, on what post-petition interest was required by that exception.

Although the Indenture Trustees cite Circuit Court cases which hold that unsecured creditors in solvent chapter 11 debtor cases are also entitled to post-petition interest at their contract rate, a closer reading of those cases show that many of them (1) relied on Supreme Court and other authority mandating such treatment for secured creditors, without explaining why it applies to unsecured creditors,[29] (2) relied on the fair and equitable test embodied in section 1129(b) which on its face is not applicable to unimpaired creditors,[30] and/or (3) expressly acknowledged that any right of an

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[29] *Dow Corning*, 456 F.3d at 679 (relying on *In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 791 F.2d 524, 528 (7th Cir. 1986), *Ruskin*, 269 F.2d at 831, and *Debentureholders Protective Comm. of Cont'l Inv. Corp. v. Cont'l Inv. Corp.*, 679 F.2d 264, 269 (1st Cir. 1982)); *Chicago*, 791 F.2d at 528 (simply stating the solvent debtor exception applied to unsecured creditors without citation to any caselaw in support, while also acknowledging that "[t]he fact that a proceeding is equitable does not give the judge a free-floating discretion to redistribute rights in accordance with his personal views of justice and fairness, however enlightened those views may be."); *Debentureholders*, 679 F.2d at 269 (relying on *Vanston*, 329 U.S. 156 and *Ruskin*, 269 F.2d 827).

[30] *Dow Corning*, 456 F.3d at 678-80 (ruling was premised on section 1129(b), because the court was considering the rights of impaired creditors, not unimpaired creditors, in a solvent chapter 11 debtor case). Further, *Dow Corning* is contrary to the many cases that conclude that impaired creditors are only entitled to post-petition interest at the federal judgment rate under sections 1129(a)(7) and 726(a)(5). *E.g.*, *Cardelucci*, 285 F.3d at 1234; *PG&E*, 610 B.R. at 315; *Washington Mutual*, 461 B.R. at 242.

unsecured creditor to interest is subject to section 502(b).[31]

In a recent case, the Bankruptcy Court on remand in *Ultra Petroleum* also concluded that the passage of the Bankruptcy Code did not abolish the solvent debtor exception. 624 B.R. at 296- 200. The *Ultra Petroleum* Court determined that under that exception, unimpaired creditors in a solvent chapter 11 debtor case were entitled to post-petition interest at the default rates provided in their contracts because they were entitled to have their equitable rights fully enforced under section 1124(1). *Id.* at 203-04.

The *Ultra Petroleum* Court's analysis is not persuasive. A bankruptcy court cannot use equitable principles to modify express language of the Code. *United States v. Noland*, 517 U.S. 535, 538 (1996). Section 502(b)(2) expressly disallows claims of unsecured creditors for unmatured interest. When a debtor is solvent, the Bankruptcy Code does not waive the application of section 502(b)(2). The Third Circuit has held that section 1124(1) does not mandate that unimpaired creditors receive all of their contract rights where those rights are expressly disallowed by section 502(b) of the Code. *PPI*, 324 F.3d at 202-03.[32]

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[31] In *Gencarelli*, the First Circuit held that the contractual claims of unsecured creditors should be enforced in solvent chapter 11 debtor cases "unless one of the section 502 exceptions applies" and remanded the case to determine if any provision of that section did apply. 501 F.3d at 5, 8.

[32] Significantly, in *PPI*, the Third Circuit held that a landlord's claim was capped by section 502(b)(6) even though that conclusion meant that the debtor's equity would be getting a

Therefore, under Third Circuit precedent, this Court cannot agree with the Bankruptcy Court in *Ultra Petroleum* that being unimpaired mandates that the Noteholders receive their contract rate of interest in contravention of section 502(b)(2).

The Indenture Trustees also rely on the Bankruptcy Court's decision in *Energy Future*. *In re Energy Future Holdings Corp.*, 540 B.R. 109 (Bankr. D. Del. 2015). In that case the Bankruptcy Court was considering an objection to the unsecured PIK noteholders' claims to post-petition interest and concluded that any claim for post-petition interest must be disallowed as a result of section 502(b). *Id.* at 111. The Court, however, then elaborated on what the debtors' plan would have to provide in order for those creditors to be unimpaired. It concluded that the "plan in this case need not provide for the payment in cash on the effective date of post-petition interest at the contract rate in order for the PIK Noteholders to be unimpaired." *Id.* (citing *PPI*, 324 F.3d at 205). Nonetheless, the Court concluded that under the equitable concepts embodied in the fair and equitable test under section 1129(b), "the Court has the discretion to exercise its equitable power to require, among other things, the payment of post-petition interest, which may be at the contract rate or such other rate as the Court deems appropriate." *Id.* at 124.

The Court finds the test articulated by the Bankruptcy Court in *Energy Future*, however, to be problematic. First, the Court relied on the fair and

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distribution (i.e., it was a solvent chapter 11 debtor case). 324 F.3d at 200-04.

equitable test of section 1129(b), which by its express terms does not apply to unimpaired creditors.[33] Further, it provides no guidance to debtors or creditors as to precisely how unimpaired creditors must be treated and thus will result in endless litigation. Finally, leaving the determination of what interest, if any, an unimpaired creditor is entitled to receive in a solvent chapter 11 debtor case completely within the discretion of the bankruptcy court also runs counter to recent Supreme Court jurisprudence (and Congressional amendments) that have sought to curb the bankruptcy court's exercise of equitable discretion.[34]

d. Proper Treatment of Unimpaired Creditors in Solvent Chapter 11 Debtor Cases

The Court is not persuaded that the Bankruptcy Code incorporated the solvent debtor exception to the

[33] 11 U.S.C. § 1129(b) (mandating that the court "shall confirm the plan . . . if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is *impaired* under, and has not accepted, the plan.") (emphasis added). *See also PPI*, 324 F.3d at 205 n.14.

[34] *E.g.*, *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988) (rejecting equitable arguments that absolute priority rule did not apply to the case at bar, the Court concluded that "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."); *In re Frederickson*, 545 F.3d 652, 658 (8th Cir. 2008) ("In enacting BAPCPA, Congress reduced the amount of discretion that bankruptcy courts previously had over the calculation of an above-median debtor's income and expenses . . . . to eliminate what it perceived as widespread abuse of the system. . . .").

extent suggested by the Bankruptcy Courts in *Ultra Petroleum* (to mandate the reinstatement of all contract rights to interest notwithstanding their disallowance by section 502(b)) and in *Energy Future* (to permit the exercise of broad equitable discretion by the bankruptcy court to determine what interest, if any, unimpaired creditors are entitled to receive). Rather, after consideration of the cases cited by the parties, the express language of the Bankruptcy Code, and its Legislative History, the Court is convinced that the solvent debtor exception survived passage of the Bankruptcy Code only to a limited extent. The Bankruptcy Code expressly codified the solvent debtor exception in section 506(b) as to oversecured creditors and in section 1129(a)(7) and 726(a)(5) as to unsecured creditors. While the latter sections currently only apply to impaired creditors, when the Bankruptcy Code was originally enacted they applied to all unsecured creditors, impaired and unimpaired.[35] As the Court concluded above, when the 1984 amendment made section 1129(a)(7) applicable to impaired creditors only, Congress was motivated by the desire to require voting only by impaired creditors, rather than by a desire to assure that unimpaired creditors get their contract rate of interest.[36]

Significantly, neither the Bankruptcy Code nor the Legislative History expressly state that unimpaired creditors are entitled to their contract rate of interest or even to *more* than impaired creditors in

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[35] An Act to Establish a uniform Law on the Subject of Bankruptcies, Pub. L. No. 95-598, § 1129(a)(7), 92 Stat. 2549 (1978).

[36] *See* discussion in Part C.2.b, *supra*.

the case of a solvent debtor. Instead the Legislative History provides strong evidence Congress intended that unimpaired creditors in a solvent chapter 11 debtor case should receive post-petition interest only in accordance with sections 1129(a)(7) and 726(a)(5).[37] That is what the Debtors contend the Noteholders are entitled to receive in this case. The Indenture Trustees complain, however, that the Debtors treated the Noteholders not as impaired, but as unimpaired, thereby depriving them of the right to vote. The Court finds that the result would have been no different. If the Noteholders had been treated as impaired and if they had voted against the Plan, they would have received the same treatment: payment in full in cash of their allowed claim plus post-petition interest in accordance with sections 1129(a)(7) and 726(a)(5).[38]

It is important to emphasize that the Court's ruling in this case is limited to the issue of what post-petition interest unimpaired creditors must receive in the rare case when a chapter 11 debtor proves to be solvent and their claims are being paid in full in cash on the effective date of the plan. Concluding that sections 1129(a)(7) and 726(a)(5) apply to both impaired and unimpaired unsecured creditors where the debtor is solvent does not offend the basic policy of the Bankruptcy Code to assure that creditors of the

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[37] *Id.*

[38] Of course, even unimpaired creditors have the right to object to confirmation of the plan. It appears that the Indenture Trustees agreed that, rather than object to confirmation of the Debtors' Plan in this case, their objection to treatment of the Noteholders' claims would be decided in this adversary (or the claims resolution process). (D.I. 5261 at ¶¶ 26 & 27.)

same priority generally receive like treatment. While section 726(a)(5) is made applicable in chapter 11 cases only to impaired creditors, when a debtor is solvent, impaired creditors essentially are unimpaired, in the sense that they are entitled to payment in full of their allowed claims and post-petition interest, albeit at the federal judgment rate, before any distribution can be made to equity. 11 U.S.C. §§ 726(a)(5) & 1129(a)(7). The Legislative History to section 1124(3)'s repeal suggests that Congress believed that there is no legitimate reason when a debtor is solvent to distinguish between impaired and unimpaired unsecured creditors who are receiving payment of their claims in cash in full. Consequently, the Court concludes that both should receive the same treatment: payment of their allowed claim plus post-petition interest at the federal judgment rate in accordance with section 726(a)(5).

Such a rule promotes several important policies of the Bankruptcy Code. First, as noted, it is consistent with the underlying principle of the Bankruptcy Code that creditors with the same priority (such as unsecured creditors) should be similarly treated. Providing that all general unsecured creditors are entitled to the same post-petition interest in a solvent chapter 11 debtor case prevents a debtor from paying preferred creditors more than others simply by classifying them as unimpaired.

Second, it is an easy and predictable rule to apply (as opposed to determining interest based on each creditor's contract rights or relying on discretion exercised by the court on a case by case basis). This promotes predictability and the efficient administration of the bankruptcy estate.[39]

The Court in *PG&E* reached a similar conclusion. 610 B.R. at 315. That Court addressed the arguments of numerous unimpaired creditors that they were entitled to post-petition interest at various rates, determined by contracts between the debtors and the respective claimants, different state's judgment rates, or some other rate. *Id.* at 310. It rejected those arguments noting that

> *Cardelucci*, in answering the narrow question [of what the proper rate of post-petition interest is in a solvent chapter 11 debtor case], drew no distinction as to whether the rule it announced was confined only to impaired claims. The clear and unequivocal analysis based on section 726(a)(5) is obvious: it applies to all unsecured and undersecured claims in a surplus estate.

Id. at 315.

Consequently, the Court concludes that the Indenture Trustees have not stated a plausible claim that the Debtors must pay post-petition interest on the Notes at the rates specified in the Indentures rather than at the federal judgment rate. As a result, the

[39] While the Indenture Trustees assert that the calculation of their contract interest claim is a relatively simple math exercise, in large cases with multiple unimpaired creditors that would not be true. *E.g.*, *PG&E*, 610 B.R. at 310.

Court will grant the Debtors' Motion to Dismiss Count 2 of the Complaint.[40]

IV. Conclusion

For the reasons set forth above, the Court will grant the Debtors' Motion to Dismiss Count 1 as to the 2022/2024 Senior Notes, but deny it as to the 2026/2028 Senior Notes, and grant the Debtors' Motion to Dismiss Count 2.

An appropriate Order follows.

Dated: December 22, 2021 BY THE COURT:

[handwritten: signature]

Mary F. Walrath
United States Bankruptcy Judge

[40] As a result of this conclusion, to the extent that the Court determines that the redemption premium is the economic equivalent of interest, that claim too would be limited by the application of the federal judgment rate.

Appendix D

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

No. 20-11218
Adv. No. 21-50995

IN RE: THE HERTZ CORPORATION, et al.,
Reorganized Debtors.

WELLS FARGO BANK, N.A., as Indenture Trustee,
Plaintiffs,
and
US BANK, as Indenture Trustee,
Intervenor-Plaintiff,
v.
THE HERTZ CORP., et al.,
Defendants.

Filed: Nov. 21, 2022

OPINION[1]

Before the Court are several motions filed by the Parties in this adversary proceeding. The first are

[1] This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

cross motions by the Debtors and Wells Fargo for summary judgment on the issue of whether the Redemption Price owed on the Senior Notes due in 2026 is unmatured interest, or its economic equivalent, within the meaning of section 502(b)(2) of the Bankruptcy Code. The second is a motion by the Indenture Trustees for reconsideration of the Memorandum Opinion and Order issued on December 22, 2021, which held that Indenture Trustees are entitled only to the federal judgment rate of interest, rather than their contract rate, for any post-petition interest due on their claims. For the reasons stated below, the Court will grant Debtors' motion for summary judgment, deny Wells Fargo's motion for summary judgment, and deny the Indenture Trustees' motion for reconsideration.

I. Background

The Hertz Corporation and its affiliates (collectively "the Debtors") filed voluntary petitions under chapter 11 of the Bankruptcy Code in May 2020, shortly after the onset of the COVID-19 pandemic disrupted the vehicle rental industry and jeopardized the company's ability to timely pay its lenders.[2] After downsizing its fleet and selling a non-core part of its business, the Debtors obtained an offer from a proposed plan sponsor. After a competitive sales process, the Debtors filed the Second Modified Third Amended Plan of Reorganization (the "Plan") to effectuate a reorganization in accord with the winning

[2] D.I. 28 ¶¶ 3-9. References to the docket in this adversary proceeding are to "Adv. D.I. #" while references to the docket in the main case are to "D.I. #."

bid.[3] The Plan was confirmed in June 2021 and went effective on June 30, 2021.[4]

The Plan provided for payment in full of the principal amount of the Senior Notes on the Effective Date of the Plan, together with post-petition interest at the federal judgment rate.[5] The Confirmation Order specifically provided that the Noteholders' rights "to fully seek allowance against the Debtors of all make-whole premium, and or contract issues under the Indentures [were] fully preserved to the extent necessary to render the Noteholders' claims unimpaired."[6]

In July 2021, Wells Fargo Bank, N.A. ("Wells Fargo"), the Indenture Trustee for the Senior Notes due in 2026, filed a complaint seeking a declaratory judgment that, in addition to the principal and pre-petition interest paid to Senior Noteholders on the effective date of the Plan, the Debtors must pay them approximately $272 million consisting of a make-whole premium of $147 million and post-petition interest on their claims at the contract default rate.[7]

In August 2021, the Debtors filed a motion to dismiss the complaint for failure to state a claim. The

[3] D.I. 5178.

[4] D.I. 5261 & 5477.

[5] D.I. 5178 at Art. III.B.

[6] D.I. 5261 at ¶¶ 26 & 27.

[7] U.S. Bank Association, the Indenture Trustee for the Senior Notes due 2028, intervened in the adversary by filing a complaint seeking a declaratory judgment that they are owed post-petition interest on their claims at the contract default rate. Adv. D.I. 1 & 14.

Court granted that motion in part and denied it in part. The Court concluded that the requirement to pay the Redemption Price had been triggered for the Senior Notes due in 2026 and 2028, but that there was a factual issue as to whether the claim was for the economic equivalent of unmatured interest, which is disallowed under section 502(b)(2).[8] The Court further held that any interest, including the Redemption Price to the extent it was determined to be the economic equivalent of interest, was to be paid at the federal judgment rate, not the contract rate.[9]

Following the Court's ruling, the Debtors and Wells Fargo filed cross motions for summary judgment to resolve the narrow remaining issue of the nature of the Redemption Price. Wells Fargo also filed a motion for reconsideration of the Memorandum Opinion and Order to the extent that it held that the Senior Noteholders are entitled only to the federal judgment rate on any post-petition interest they assert under the Indenture Agreements.[10]

The Court held oral argument on the motions on November 9, 2022, after which it announced that it would grant the Debtors' motion for summary judgment, deny Wells Fargo's motion for summary judgment, and deny the Indenture Trustees' motion for reconsideration. The Court also stated that it would certify a direct appeal of the ruling to the Third

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[8] Adv. D.I. 28 at 20-21.

[9] *Id.* at 46.

[10] U.S. Bank joined in the Motion for Reconsideration. Adv. D.I. 63.

Circuit Court of Appeals. This decision is to clarify that ruling.

II. Jurisdiction

The Court has subject matter jurisdiction over this adversary proceeding. 28 U.S.C. §§ 157, 1334; Amended Standing Order of Reference, Feb. 29, 2012. This is a core proceeding dealing with the allowance of claims against the estate. 28 U.S.C. § 157(2)(A) &(O); *Stern v. Marshall*, 564 U.S. 462, 499 (2011). Additionally, the parties have consented to the entry of a final order by this Court. *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 686 (2015) (holding that the bankruptcy court may enter a final order without offending Article III so long as the parties consent).

III. Discussion

A. Summary Judgment

1. General Standard

A court should grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[11] The court must make its determination based upon the record made.[12]

The movant bears the initial burden of proving that there is no genuine dispute of material fact,[13] and the court must view the record "in the light most favorable to the party opposing the motion."[14] A fact is material when, under the applicable substantive law,

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[11] Fed. R. Civ. P. 56(a); Fed R. Bankr. P. 7056.

[12] Fed. R. Civ. P. 56(c).

[13] *Celotex Corp. v. Cartrett*, 477 U.S. 317, 323 (1986).

[14] *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

it "might affect the outcome of the suit."[15] A dispute over a material fact is genuine when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[16] When the movant has met its burden, "its opponent must do more than simply show there is some metaphysical doubt as to the material facts."[17] Where a court ultimately finds that there is no genuine dispute of material fact, it may enter judgment as a matter of law, either for or against the movant, in full or in part, applying the applicable substantive law.[18]

2. Issue Addressed by Summary Judgment Motions

In the Memorandum Opinion, the Court concluded that section 502(b)(2) of the Bankruptcy Code disallowed unmatured interest despite any contractual interest provisions in the Indenture Agreements. The Court's decision was premised on the explicit language of section 502(b)(2) which provides that a claim is disallowed to the extent "such claim is for unmatured interest."[19] Courts have interpreted that provision to include the "economic equivalent of unmatured interest" because to find otherwise would make the provision susceptible to end-runs by canny

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[15] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[16] *Id.*

[17] *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

[18] Fed. R. Civ. P. 56(a), (f).

[19] 11 U.S.C. § 502(b)(2).

creditors.[20] The Court was unable to decide on the record made, however, whether the Redemption Price on the 2026 and 2028 Notes was unmatured interest.

Make-whole or redemption premiums, which are common in debt securities indentures, compensate creditors for damages incurred by the repayment of the notes prior to maturity.[21] Those damages typically are incurred when the noteholders are required to reinvest their funds in a market with lower prevailing interest rates. Determining whether a make-whole premium is the economic equivalent of interest, however, depends on the facts of each case.[22] Courts look to the economic substance of the transaction rather than "dictionary definitions or formalistic labels" when making that determination.[23]

3. Characterization of the Redemption Price

The Debtors argue that because labels do not matter and all three components of the Redemption Price formula in this case are interest or its economic equivalent, the output of the formula is similarly interest. Under the formula, the first component is

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[20] *In re Ultra Petro. Corp.*, 51 F.4th 138, 146 (5th Cir. 2022) ("*Ultra III*").

[21] *See In re Chemtura Corp.*, 439 B.R. 561, 596 (Bankr. S.D.N.Y. 2010).

[22] *In re Ultra Petro. Corp.*, 943 F.3d 758, 765 (5th Cir. 2019) (quoting Douglas G. Baird, *Elements of Bankruptcy* 84 (6th ed. 2014)).

[23] *Ultra III*, 51 F.4th at 147-49 (holding that the make-whole was unmatured interest or its economic equivalent when its formula "simply account[ed] for the time-value of money" and that the economic reality of the transaction was determinative).

accrued and unpaid interest through the Redemption Date, which the Debtors contend is clearly interest. The second component is the present value of future interest payments from the Redemption Date to the Initial Call Date,[24] which the Debtors also assert is clearly nothing but interest. The third component is the net present value of the Redemption Price that the Debtors agreed to pay the Noteholders on the Initial Call Date, minus the undiscounted principal amount, which is mathematically the equivalent of one semi-annual interest payment. Thus, the Debtors argue that all three components of the Redemption Price are interest, leading to the conclusion that it is as well.

Furthermore, the Debtors argue that the fact the Redemption Price does not account for all the interest that would have been paid if the Notes had remained outstanding through their stated maturity date, does not change the fact that the formula consists entirely of interest and should therefore be disallowed under section 502(b)(2).

Wells Fargo argues that the Redemption Price is not unmatured interest as defined in the dictionary because it is not consideration for the use or forbearance of money nor compensation for the delay and risk associated with the ultimate repayment of money.[25] Instead, it asserts that the Redemption Price

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[24] The Initial Call Date is the first call date in the respective Supplemental Indenture Agreement: August 1, 2022, for the 2026 Senior Notes and January 15, 2023, for the 2028 Senior Notes. *See* Adv. D.I. 46, Ex. A at ¶¶ 3-6 & Ex. B at ¶¶ 3-6.

[25] *See* Adv. D.I. 42 at 16 ("interest" means "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

is to compensate it for the reinvestment costs it will incur as a result of the premature termination of the Notes. It argues that a mere return of principal is not sufficient to compensate the Noteholders for reinvestment costs incurred in a different market environment and that the compensation for reinvestment costs embodied in the Redemption Price is calibrated to provide incremental recovery for those costs and is not a simple acceleration of unmatured interest. Thus, Wells Fargo argues that permitting recovery of reinvestment costs would not conflict with the equitable principles behind the disallowance of unmatured interest.[26]

Lastly, Wells Fargo argues that equating reinvestment costs with unmatured interest ignores the fact that the Debtors made two contractual promises: (1) an agreement to pay interest while the Notes were outstanding; and (2) an agreement to compensate the Noteholders for early redemption of the Notes according to the Applicable Premium based on the lending environment at the time of redemption. Wells Fargo asserts that because the obligation to pay reinvestment costs did not accrue until prepayment,

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the amount owed to a lender in return for the use of borrowed money") (citing *Black's Law Dictionary* (11th ed. 2019)).

[26] 4 Collier on Bankruptcy ¶ 502.03 [3][a] (16th ed. 2022) (unmatured interest is disallowed in part because the delay in liquidation and subsequent distribution necessitated by the bankruptcy process should result in neither gain nor loss for similarly situated creditors and avoids the administrative inconvenience that would result from continuously recalculating unsecured creditors' claims to reflect the ongoing accrual of interest).

which was post-petition, it was not unmatured interest at the time of the bankruptcy filing.

The Court concludes that the economic substance of the transaction governs, not the formalistic labels or dictionary definitions of the terms used.[27] Simply asserting that the Redemption Price is compensation for reinvestment costs that Wells Fargo may incur upon the premature payment of the Notes does not change the economic reality of what the Redemption Price is. Most courts agree that fees or penalties that are the economic equivalent of interest are disallowed regardless of their name.[28]

In this case, the Court concludes that each of the three components of the Redemption Price is the equivalent of unmatured interest. Contrary to Wells Fargo's argument, the Redemption Price is not at all tied to the reinvestment costs that Wells Fargo or the Noteholders may incur in reinvesting their money upon early payment of the Notes, such as the costs associated with marketing or finding a replacement borrower. Instead, the formula is tied entirely to the unpaid interest on the Notes at the time of redemption. The first component is the unmatured

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[27] *Ultra III*, 51 F.4th at 147 ("[w]hat matters is the underlying economic reality of the thing—not dictionary definitions or formalistic labels").

[28] *See, e.g.*, *In re Pengo Indus., Inc.*, 962 F.2d 543, 546 (5th Cir. 1992); *In re Chateaugay Corp.*, 961 F.2d 378, 381 (2d Cir. 1992); *In re Public Service Co. of New Hampshire*, 114 B.R. 800, 803 (Bankr. D.N.H. 1990) ("[t]he word interest in the statute is clearly sufficient to encompass the OID variation in the 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.").

interest as of the Redemption Date. The second component is the present value of all required remaining interest. The third component is the equivalent of one semi-annual interest payment. Although Wells Fargo asserts that the formula produces a different result from just discounting unpaid interest because it steps down in increments over time as opposed to decreasing steadily as interest accrues, the Court concludes that because the input is entirely interest, the application of the formula does not change its nature.[29]

The Court also rejects Wells Fargo's argument that the Redemption Price is not unmatured interest but is instead a contingent right to the payment of a contractual claim that did not accrue until post-petition when the Notes were redeemed. The Bankruptcy Code broadly defines a claim as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent [or] matured."[30] The right to payment of the Redemption Price is a claim, although contingent, that arose on the petition date. Because all the components of the Redemption Price are unmatured interest or its economic equivalent, the Court concludes that the claim is disallowed under the provisions of section 502(b)(2). The Court will, therefore, grant the Debtors' motion for summary judgment and deny Wells Fargo's motion for summary judgment.

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[29] *See Ultra III*, 51 F.4th at 148 (concluding that the make-whole in that case was unmatured interest because its formula did nothing to its unmatured interest component to render it different from unmatured interest).

[30] 11 U.S.C. § 101(5)(A) (emphasis added).

B. Indenture Trustees' Motion for Reconsideration

1. Standard of Review

Reconsideration of interlocutory orders is available where: (1) there has been an intervening change in the controlling law,[31] (2) new evidence has become available, or (3) there is a need to prevent manifest injustice or to correct a clear error of fact or law.[32]

2. Analysis

The Indenture Trustees ask the Court to reconsider its Memorandum Opinion dated December 22, 2021, to the extent it held that the Indenture Trustees are entitled to the federal judgment rate, rather than their contract rate, for post-petition interest they are entitled to receive on their claims.[33] The Indenture Trustees argue that reconsideration is warranted based on recent decisions from the Fifth and Ninth Circuits which held that the solvent-debtor exception survived passage of the Bankruptcy Code and entitles unimpaired unsecured creditors to their

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[31] *Calyon N.Y. Branch v. Am. Home Mortg. Corp.*, 383 B.R. 585, 589 (Bankr. D. Del. 2008).

[32] *See* Fed. R. Civ. P. 54 & 59(e), made applicable by Fed. R. Bankr. P. 9023. *See also In re Energy Future Holdings Corp.*, 904 F.3d 298, 307 (3d Cir. 2018) (holding that bankruptcy courts have the inherent authority to reconsider prior interlocutory orders at any point in the litigation so long as the court retains jurisdiction over the case).

[33] *Wells Fargo Bank, N.A. v. The Hertz Corp. (In re The Hertz Corp.)*, 637 B.R. 781, 793-801 (Bankr. D. Del. 2021).

contract rate of interest if the debtor is solvent.[34] The Indenture Trustees contend those decisions reflect an emerging consensus which is contrary to the Court's prior decision.

The Debtors respond that reconsideration is not warranted for several reasons. First, they note that the recent decisions are not binding on this Court. Second, they contend that both decisions addressed the same arguments that the Indenture Trustees raised, but were rejected, by this Court in its decision. Third, they argue that in rendering its decision the Court relied on binding Third Circuit law.

After considering the Fifth and Ninth Circuit decisions and the argument of the parties, the Court concludes that it should deny the Motion for Reconsideration for the following reasons.

First, the Fifth and Ninth Circuit decisions did not rely on any argument that was not considered by the Court in its December 22 decision. In fact, counsel for both sides in this case have expertly and exhaustively articulated the statutory, policy, and common law bases that support the positions on both sides of the issue. This Court considered all those arguments and simply reached a different conclusion from that reached by the Fifth and Ninth Circuits.

Second, both the Fifth and the Ninth Circuit opinions had dissenting opinions. The majority opinions concluded that in the event a debtor is solvent, an equitable principle extant under pre-Code common law (the solvent-debtor exception) required

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[34] *Ultra III*, 51 F.4th at 160; *In re PG&E Corp.*, 46 F.4th 1047, 1064 (9th Cir. 2022).

the payment to unimpaired unsecured creditors of post-petition contract interest (and the enforcement of other contract rights).[35] The dissenting opinions concluded, however, that the solvent-debtor exception did not survive the passage of the Bankruptcy Code and that section 502(b)(2) expressly disallowed any claim for unmatured interest.[36]

Both the majority and the dissenting opinions rely on Supreme Court precedent to determine the proper standard to apply in deciding whether the solvent-debtor exception survived. The majority decisions state that courts should "not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure."[37]

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[35] *See Ultra III*, 51 F.4th at 160 (holding that although the make-whole premium in that case was disallowed unmatured interest under the Bankruptcy Code, the solvent-debtor exception compelled payment of it and post-petition interest at the contract rate); *PG&E*, 46 F.4th at 1064 (holding that creditors of a solvent debtor enjoy an equitable right to contractual or state law default post-petition interest before the bankruptcy estate can retain surplus value).

[36] 11 U.S.C. § 502(b)(2). *See Ultra III*, 51 F.4th at 164 (Oldham, J., dissenting) (concluding that neither the "solvent-debtor exception's historical pedigree nor its policy underpinnings . . . can overcome Congress' clear, and clearer-than-ever command" in § 502(b)(2) that a claim cannot include unmatured interest, and thus stating that unimpaired unsecured creditors should receive post-petition interest only at the federal judgment rate); *PG&E*, 46 F.4th at 1069 (Ikuta, J., dissenting) ("unsecured creditors holding unimpaired claims are governed by the 'general rule disallowing postpetition interest,' even in a solvent debtor case.").

[37] *See PG&E*, 46 F.4th at 1058 (quoting *Cohen v. de la Cruz*, 523 U.S. 213, 221 (1998); Ultra III, 51 F.4th at 154 (same). *See also Midlantic Nat'l Bank v. N.J. Dep't of Env't Prot.*, 474 U.S.

The dissenting opinions cite the Supreme Court to require courts to "begin with the understanding that Congress 'says in a statute what it means and means in a statute what it says there'" and "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms."[38]

In its December 22 decision, this Court found that the prohibition on the allowance of post-petition interest is clearly stated in section 502(b)(2).[39] The Court concluded that the Bankruptcy Code did codify the solvent-debtor exception, but only in three limited circumstances: (1) when a secured creditor is over-secured, i.e., its collateral has a value in excess of its

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.").

[38] *See PG&E*, 46 F.4th at 1066 (Ikuta, J., dissenting) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)); *Ultra III*, 51 F.4th at 154 (Oldham, J., dissenting) (citing *Cohen v. de la Cruz*, 523 U.S. 213, 221 (1998) ("If it's 'unmistakably clear' that a Code provision is incompatible with a prior bankruptcy practice, then the Code overrides that prior practice.")).

[39] Adv. D.I. 28 at 39.

claim,[40] (2) when a chapter 7 debtor is solvent,[41] and (3) when an impaired creditor has not accepted the debtor's chapter 11 plan.[42] The Court found, however, that in Congress' repeal of section 1124(3), it evinced an intent to require that unimpaired creditors receive at least the same treatment as impaired creditors, namely post-petition interest at the federal judgment rate, in the event the debtor is solvent.[43] Congress could have stated at the time it repealed section 1124(3) that the solvent-debtor exception had survived the passage of the Bankruptcy Code or that unimpaired creditors were entitled to their contract rate of interest, but it did not. Instead, Congress

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[40] 11 U.S.C. § 506(b) ("To the extent that an allowed secured claim is secured by property the value of which, after any recovery [of the reasonable, necessary costs and expenses of preserving, or disposing of, such property], is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute"). *See also United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 379 (holding that the right to post-petition interest provided under section 506(b) is not applicable to under-secured creditors but that, instead, section 726(a)(5) provides the rule for treatment of unsecured creditors in the rare solvent debtor case).

[41] 11 U.S.C. § 726(a)(5) (providing for payment of post-petition interest at the legal rate to priority, unsecured, late-filed, and non-compensatory penalty claims before any distribution can be made to the debtor from property of the estate).

[42] 11 U.S.C. § 1129(a)(7) (providing that to confirm a plan, it must provide to the holder of an impaired claim, who has not accepted the plan, an amount "that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7.").

[43] Adv. D.I. 28 at 31-32.

simply stated in the legislative history that unimpaired creditors could not be treated less favorably than impaired creditors. This led the Court to conclude that unimpaired creditors were entitled to receive at least post-petition interest at the federal judgment rate because that is what impaired creditors are entitled to receive.

In addition, the Court disagrees with the Indenture Trustees' argument that, because section 1124(1) mandates that they receive all their legal and equitable rights to be unimpaired, section 502(b)(2) cannot disallow their interest claim. The definition of claims under the Bankruptcy Code includes all equitable as well as legal claims.[44] It is that "claim" that section 502(b)(2) mandates must not include unmatured interest. Because it is section 502(b)(2) which disallows interest on that claim, section 1124(1)'s definition of unimpairment cannot be read to add it back.[45]

Consequently, the Court stated that it would deny the Motion for Reconsideration filed by the Indenture Trustees.

C. Certification of Direct Appeal

At oral argument, the Court stated that it felt that this case warranted a direct appeal to the Court of Appeals. To make such a certification, the Court must find that:

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[44] 11 U.S.C. § 101(15).

[45] *In re PPI Enters. (U.S.), Inc.*, 324 F.3d 197, 204 (3d Cir. 2003) (holding that a creditor is unimpaired if it is the effect of the Bankruptcy Code that modifies its rights, not the debtor's plan).

> (2) (A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all of the appellants and appellees (if any) acting jointly, certify that—
>
> > (i) the judgment, order or decree involves a question of law as to which there is no controlling decisions of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;
> >
> > (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or
> >
> > (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken; and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.[46]

In the present case, the Court finds that the statutory criteria are met. There is no controlling decision from the Third Circuit on the issue before the Court. The issue is one which has resulted in two Circuit decisions, both of which have dissenting

[46] 28 U.S.C. § 158(d)(2).

opinions. The Ninth Circuit decision has been stayed pending the filing of a petition for writ of certiorari.[47] The latter would be more likely if additional Circuits opine on the issue. Therefore, a prompt consideration of the appeal may serve to advance the resolution of this important issue which impacts successful chapter 11 reorganization proceedings.

Accordingly, the Court deems it appropriate to certify its decision sua sponte for direct appeal to the United States Court of Appeals for the Third Circuit.

IV. Conclusion

For the foregoing reasons, the Court will grant the Debtors' cross motion for summary judgment, deny Wells Fargo's cross motion for summary judgment, and deny Indenture Trustees' motion for reconsideration.

An appropriate Order follows.

Dated: November 21, 2022 BY THE COURT:

[handwritten: signature]

Mary F. Walrath
United States Bankruptcy Judge

[47] Order at 57, *In re PG&E Corp.*, No. 21-16043 (9th Cir. Oct. 27, 2022) (granting the Appellee's motion for a stay of the mandate pending the filing of a petition for a writ of certiorari).

Appendix E

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

No. 20-11218
Adv. No. 21-50995

IN RE: THE HERTZ CORPORATION, et al.,
Reorganized Debtors.

WELLS FARGO BANK, N.A., as Indenture Trustee,
Plaintiffs,
and
US BANK, as Indenture Trustee,
Intervenor-Plaintiff,
v.
THE HERTZ CORP., et al.,
Defendants.

Filed: Nov. 21, 2022

ORDER

AND NOW this 21st day of November 2022, for the reasons set forth in the accompanying Opinion, it is hereby

ORDERED that the Debtor's cross motion for summary judgment is GRANTED; and it is further

ORDERED that Wells Fargo's cross motion for summary judgment id DENIED; and it is further

ORDERED, that the Indenture Trustees' motion for reconsideration is DENIED.

Dated: November 21, 2022 BY THE COURT:

[handwritten: signature]

Mary F. Walrath
United States Bankruptcy Judge

Appendix F

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;

…

11 U.S.C. §1124(1)

Except as provided in section 1123(a)(4) of this title, a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan—

(1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest; or

…

11 U.S.C. §1129(b)

(b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides--

(i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

(B) With respect to a class of unsecured claims--

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

(C) With respect to a class of interests--

(i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.