MAKE-WHOLE PROVISIONS IN CHAPTER 11

Presented By:
ROBIN RUSSELL
Andrews Kurth LLP

Written By:
TIMOTHY A. ("TAD") DAVIDSON II
ROBIN RUSSELL
PAUL DAVIS
Andrews Kurth LLP

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CHAPTER 2.1

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I. INTRODUCTION

During the last decade make-whole provisions, also referred to as "prepayment fees," "prepayment premiums," "prepayment penalties," or "yield maintenance amounts," became popular features in indentures and credit agreements. As the lenders who sought to benefit from those provisions find themselves as creditors in bankruptcy courts seeking to maximize recovery, the enforcement of these provisions has been called into question. This presentation reviews the economic and legal issues surrounding enforcement of make-whole provisions and the current status of the law in the Fifth Circuit and beyond.

II. MAKE-WHOLE PROVISIONS GENERALLY

Make-whole provisions are common in loan agreements and bond indentures. Their purpose is to compensate lenders if debt is prepaid.

Make-whole payments are typically calculated using one of two methods: (a) a fixed percentage of the prepaid amount or (b) a yield maintenance formula designed to approximate the lender's damages resulting from the prepayment. Yield maintenance formulas are more commonly used in fixed rate financings where yield protection is particularly important, while fixed fees are generally found in floating rate financings.

A. Fixed Fee

Fixed fees are the simplest method for calculating a make-whole amount. Fixed fees are either a set amount that must be paid upon a prepayment of the debt or are based on a stated percentage of the amount of the prepayment. As demonstrated in the discussion of recent case law below, courts may be more likely to enforce a make-whole provision when it reflects actual loss sustained by the lender as opposed to a fixed fee that is more arbitrary in nature.

B. Yield Maintenance Formula

Yield maintenance formulas, as an alternative to fixed fees, are formulas that attempt to calculate the actual future loss to the lender as a result of the prepayment. These formulas are usually based on the net present value of the interest and principal payments remaining at the time of the prepayment, using a discount rate that is usually tied to a comparable U.S. Treasury rate.

C. No Call Provisions Compared

No-call provisions prohibit borrowers from prepaying a loan during a specific period of time. Unlike make-whole provisions, no-call provisions do not typically provide for damages in the event of a breach. However, certain courts have awarded damages for breaches of no-call provisions, thus making them conceptually similar to make-whole provisions. *See Premier Entm't Biloxi LLC v. U.S. Bank Natl Assoc.*, 445 B.R. 582, 590-91 (Bankr. S.D. Miss. 2010); *but see Chemtura*, 439 B.R. at 603-604; *Calpine Corp.*, 2010 WL 3835200, at *4.

III. ISSUES IN CHAPTER 11

A make-whole provision can be triggered in several ways:

- the provision is triggered prior to bankruptcy but the make-whole amount remains unpaid at the time of filing
- the provision is triggered automatically by the filing of bankruptcy
- the provision is triggered during the bankruptcy but outside the Plan (*i.e.*, debt is repaid during the case but outside the Plan process)
- the provision is triggered by the terms of the Plan (*i.e.*, Chapter 11 plans often provide for the repayment of debt prior to its stated maturity)

Some make-whole provisions expressly provide that the filing of a bankruptcy petition triggers liability under the provision or otherwise address the effect on a filing, but many provisions are silent or ambiguous as to the effect of bankruptcy. Not surprisingly, such ambiguity is frequently the source of litigation or disputes as to whether the lender is entitled to include a make-whole amount as part of its allowed claim.

IV. ANALYSIS OF MAKE-WHOLE PROVISIONS IN BANKRUPTCY

Because make-whole provisions are contractual provisions, courts look first to state law contract interpretation in deciding whether a lender is entitled to a make-whole claim under the relevant contract, and, if so, in what amount. After analysis under state law, the court must then determine whether the make-whole claim survives applicable bankruptcy law for purpose of whether the lender's claim should be allowed for distribution under a Chapter 11 plan.

A. Contractual Analysis

The first relevant question is whether the agreement expressly provides for the payment of a make-whole amount upon repayment of the debt in bankruptcy or upon the borrower's bankruptcy filing.

If so, the second question is whether this provision is enforceable under state law. The analysis varies by state. As discussed in the *School Specialty* case below, New York law (which governs most bond indentures) analyzes make-whole provisions as liquidated damages provisions. It is clear, however, that if the contract unambiguously **excludes** payment of make-whole amounts as a result of a bankruptcy filing, no such amount may be claimed by the creditor.

1. Ambiguous Make-Whole Provisions

If the contract does not address the effect of a bankruptcy filing on payment of make-whole amounts or is otherwise ambiguous, the court will interpret the contract according to intent of the parties. In such cases, the courts have focused on the "voluntariness" of the repayment to determine whether the debtor's proposed debt repayment in bankruptcy qualifies as a voluntary or optional prepayment triggering a make-whole payment under the terms of the agreement. Courts generally hold that lenders who elect to accelerate a debt in response to a debtor's default are not entitled to a make-whole amount. *See Northwestern Mutual Life Ins. Co. v. Uniondale Realty Assocs.*, 816 N.Y.S.2d 831, 835–836 (N.Y. Sup. Ct. 2006); *In re Duralite Truck Body & Container Co.*, 153 B.R. 708, 715 (Bankr. D. Md. 1993).

In contrast, the court in *Sharon Steel* held that a **debtor** who triggered a default for the sole purpose of **avoiding** paying a make-whole amount was still required to pay the premium, especially given that the creditor did not voluntarily elect to accelerate the debt. *See Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1053 (2d Cir. 1982). Additionally, at least one court has held that repayment of a loan in bankruptcy was "voluntary" because the debtor could have reinstated the loan under Section 1124(2) of the Bankruptcy Code, but decided not to do so.[1] *See In re Imperial Coronado Partners, Ltd.*, 96 B.R. 997 (B.A.P. 9th Cir. 1989).

2. Automatic Acceleration

Courts have had difficulty reconciling the automatic acceleration of debt as a result of a bankruptcy filing and the concept of a "prepayment." While Section 502(b)(1) of the Bankruptcy Code is generally understood to cause debts to accelerate by operation of law upon a debtor's bankruptcy filing, reliance on Section 502(b)(1) is usually unnecessary because modern financing agreements almost always include the filing of a bankruptcy petition as an event of default that automatically accelerates the debt.

a. Is it a prepayment?

The question then is whether, without specific language in the contract, the repayment of debt in bankruptcy in response to an automatic acceleration of the debt qualifies as a "prepayment" that triggers a make-whole amount. Courts are not in agreement on this issue. Certain courts that have considered the issue found that a repayment of accelerated debt can qualify as a prepayment subject to an otherwise valid make-whole provision. *See In re Skyler Ridge*, 80 B.R. 500, 507 (Bankr. C.D. Cal. 1987); *In re Imperial Coronado Partners, LTD.*, 96 B.R. 997, 1000 (9th Cir. 1998). Other courts, however, have reached the opposite conclusion. *See In re LHD Realty Corp.*, 726 F.2d 327, 330-331 (7th Cir. 1984) (holding that "acceleration, by definition, advances the maturity date of the debt so that payment thereafter is not prepayment but instead is payment made after maturity."); *In re Solutia Inc.*, 379 B.R. 373, 484 (Bankr. S.D.N.Y. 2007).

b. Is deceleration allowed?

In some cases creditors have attempted to waive a bankruptcy default in an attempt to undo a contractual acceleration in order to assert a claim for a make-whole amount. Courts considering the issue, however, have held that such an attempt is barred by the automatic stay as an exercise of control over the property of the estate. *See Solutia*, 379 B.R. at 484; *In re AMR Corp.*, 485 B.R. 279, 294 (Bankr. S.D.N.Y. 2013).

B. Prepetition/Automatic Triggers: 502(b)(2) Analysis

Where the make-whole amount is triggered by the bankruptcy filing itself, the make-whole amount would be included in the amount of the creditor's pre-petition claim and is not subject to the "reasonableness" test set forth in Bankruptcy Code Section 506(b). Rather 502(b)(2) and a state law analysis applies.

Section 502(b)(2) prohibits creditors from collecting on claims for unmatured interest on prepetition debts which are unsecured or undersecured. *In re Cajun Elec. Power Co-Op, Inc.*, 185 F.3d 446, 455 (5th Cir. 1999). Fortunately for lenders, the majority of courts have analyzed make-whole amounts as fees and not as unmatured interest, thus allowing lenders to include the make-whole premium/fee as part of the lenders' allowed claim.

[1] Under Section 1124(2) of the Bankruptcy Code, a debtor can reinstate the debt of a creditor without that creditor's approval if the debtor cures all defaults that occurred under the underlying agreement prior to bankruptcy filing (other than any default arising as a result of such filing).

However, dicta from two recent cases, *Chemtura* and *Calpine* (discussed below), gives support to the minority position that make-whole amounts are claims for unmatured interest. It is not clear what impact, if any, such statements will have on how make-whole amounts are analyzed in the future.

There are two exceptions to the "no unmatured interest" rule. If the make-whole provision is viewed as interest rather than a fee and if the lender is oversecured it may be entitled to interest on its claim under 506(b) if it is. Additionally, courts recognize an exception to the prohibition on claims for unmatured interest where the debtor is able to pay all creditors in full. *In re Mirant Corp.*, 327 BR 262, 271 (Bankr. N.D. Tex 2005). In such cases, courts will "enforce the creditors' contractual rights," meaning that the only relevant question is whether the make-whole provision is enforceable under applicable state law.

C. Postpetition Triggers: 506(b) Analysis

Under section 506(b), where the value of the collateral securing the claim exceeds the amount of a creditor's claim, such a creditor is allowed to collect post-petition interest in addition to fees, costs, and charges that arise under the agreement or state statute under which the claim arose if those fees, costs and charges are "reasonable." The creditor will have a secured claim for such amounts up to the value of its collateral.

In this scenario the distinction between whether the make-whole premium is a fee or unmatured interest is not as critical. Either is allowed (although the fee must be reasonable) but only if the creditor is oversecured.

As previously noted, the majority of courts hold that make-whole claims constitute fees and not unmatured interest. This means that make-whole amounts that are enforceable under state law will be allowed as secured claims to the extent that the creditor is oversecured. Accordingly, unsecured and undersecured creditors typically are not able to assert make-whole claims based on repayment of their debt in bankruptcy.

The proper measure for determining whether a make-whole amount is a "reasonable" fee under Section 506(b) is an area of disagreement among courts and only comes into play when the triggering event occurs post-petition. *Compare In re Chemtura Corp.*, 439 B.R. 561, 605 (Bankr. S.D.N.Y. 2010) ("Chemtura") *and In re Skyler Ridge*, 80 B.R. 500, 505 (Bankr. C.D. Cal. 1987) *with In re Imperial Coronado Partners, Ltd.*, 96 B.R. 997 (B.A.P. 9th Cir. 1989).

V. RELEVANT CASE LAW

A. *In re AMR Corp.*: It Says What It Says

On September 12, 2013, the United States Court of Appeals for the Second Circuit affirmed the bankruptcy court's decision to deny payment of the make-whole amount at issue to American Airline bondholders under three separate indentures (the "Indentures") based on the plain language of those agreements. The relevant provisions of one of the Indentures is attached at page 18-23. Although the bankruptcy court denied recovery of the make-whole amount, its decision was based entirely on contract interpretation and it expressly held that "there is no dispute that make-whole amounts are permissible." *In re AMR Corp.* 485 B.R. 279, 303 (Bankr. S.D.N.Y. 2013).

The Second Circuit's decision focused on the plain language of the Indentures, which expressly and unambiguously excused American Airlines and its affiliates (collectively, "American") from paying the make-whole amount if the debt was automatically accelerated by virtue of a bankruptcy filing. Like the lower court, the Second Circuit found that American's bankruptcy filing constituted an "Event of Default," which in turn triggered an "automatic acceleration" of the debt. *In re AMR Corp.*, 730 F.3d 88, 100 (2nd Cir. 2013). In such a circumstance, the Indentures clearly provided that no make-whole amount would be due. *Id.* at 101. The Second Circuit then addressed each argument raised by the indenture trustee (the "Trustee") and found that none of those arguments could "refute the plain language of the Indentures." *Id.* at 101–05.

1. Enforceability of Automatic Debt Acceleration Provision

The Trustee tried to avoid the consequences of automatic acceleration under the Indenture and argued that it "never elected to accelerate the debt, and that such action [was] required under New York law." *Id.* at 100. The Second Circuit disagreed and affirmed the principle under New York law that "parties to a loan agreement are free to include provisions directing what will happen in the event of default . . . of the debt, supplying specific terms that super[s]ede other provisions in the contract if those events occur." *Id.* at 101 (citations and internal quotation marks omitted). The court also recognized the enforceability of self-operative automatic acceleration provisions. *Id.* at 101.

2. Automatic Stay Barred Trustee's Effort to Rescind Automatic Acceleration

The Trustee further argued that "even if acceleration took place, [it] can rescind this acceleration, obliging American to pay a make-whole

amount in connection with its refinancing, and that the bankruptcy court erred in concluding that such rescission is barred by the automatic stay." *Id.* at 100. The Second Circuit disagreed, and held that any attempt to rescind the acceleration would be an attempt to modify American's contract rights and therefore was subject to the automatic stay. *Id.* at 102.

3. Post-Maturity Payment Not a Voluntary Redemption

Finally, the Trustee argued that regardless of whether American's debt was accelerated upon the bankruptcy filing, "American's attempt to capitalize on favorable market conditions by paying off the debt nearly one year later, properly understood, [was] a voluntary redemption . . . requiring payment of the Make-Whole Amount." *Id.* at 100. The Second Circuit rejected this argument because the automatic acceleration "changed the date of maturity from some point in the future . . . to an earlier date based on the debtor's default under the contract.'" *Id.* at 103. The new maturity date, by virtue of the automatic acceleration, was Nov. 29, 2011 (the petition date). *Id.* at 105. Consequently, American's attempt to repay the debt in October 2012 was not a "voluntary prepayment because '[p]repayment can only occur prior to the maturity date.'" *Id.* at 103 (citing *In re Solutia Inc.*, 379 B.R. 473, 488 (Bankr. S.D.N.Y. 2007)).

B. *In re School Specialty, Inc.*: Fee in Nature of Liquidated Damage

In *School Specialty*, 2013 WL 1838513, (Bankr. D. Del., Apr. 22, 2013) the interim debtor-in-possession financing order stipulated as to the outstanding principal amount owed to the prepetition secured lender ("Bayside") under a not-fully-drawn $70 million term loan, which amount included a $23.7 million early payment fee. The Early Payment Fee provisions of School Speciality Credit Agreement are attached at pp 15-17. The unsecured creditors' committee moved to disallow the early payment fee.

In its decision, the bankruptcy court first examined applicable state law to determine whether the make-whole payment amount was enforceable in bankruptcy. Under applicable New York law governing the credit agreement, prepayment provisions are analyzed similarly to liquidated damages provisions. *Id.*

New York law provides that a liquidated damages provision is enforceable when (i) actual damages are difficult to determine, and (ii) the amount is not "plainly disproportionate" to the possible loss as determined with reference to the facts and circumstances in existence on the date the agreement was entered into. *Id.* The court noted that York courts have cautioned against interfering with parties' agreements absent overreaching or other unconscionable conduct. *Id.* at *3.

1. Fee Was Not Disproportionate

The unsecured creditors' committee's main argument in support of its motion to disallow was that the make-whole payment was plainly disproportionate to Bayside's possible loss. *Id.* at *3. To examine this issue in accordance with New York law, the court considered whether (i) the prepayment fee was calculated so that the lender would receive its bargained-for yield, and (ii) such fee was the result of an arm's-length transaction between represented, sophisticated parties. *Id.* at *3–4.

2. Fee Negotiated at Arm's Length

As to the first prong, the committee argued that the make-whole amount inflated Bayside's bargained-for yield because it included discounted interest payments through an extended maturity date. *Id.* at *3. In the committee's view, the make-whole payment should only include discounted interest payments through the initial maturity date because it was unlikely that certain convertible notes would be refinanced prior to the initial maturity date (and thus that the maturity date would be extended). *Id.* The court rejected this argument because (i) the likelihood that such notes would be refinanced was irrelevant since Bayside was obligated to keep adequate funds available through the extended maturity date and such commitment necessarily impacted Bayside's lending activity, and (ii) the make-whole payment was calculated using a discount rate that was tied to treasury note performance and New York courts have held that such a calculation method supports the conclusion that a prepayment fee is not plainly disproportionate to a lender's possible loss. *Id.* at *4. Further, while the make-whole payment was 37% of the term loan and such percentage gave the court pause, the court noted that the applicable standard governing the validity of the make-whole payment was whether such payment was plainly disproportionate to Bayside's possible loss and not whether such payment was plainly disproportionate to the amount of the term loan. *Id.* at *4 n.7.

As to the second prong, the court concluded that the term loan was an arm's-length transaction. *Id.* While it was undisputed that the debtors were in financial distress when they entered into the credit agreement, the court found that, under the facts and circumstances, there was no credible evidence to suggest overreaching by Bayside. *Id.*

The committee also argued that the make-whole payment must be reasonable under Bankruptcy Code section 506(b). *Id.* at *4. Bayside argued that the

reasonableness standard under such section did not apply given that such payment came due prepetition and, in its view, such standard only applies to post-petition fees, costs and charges. *Id.* The court did not rule on the applicability of this standard but concluded that, even if such standard applies, the make-whole payment was reasonable because, under New York law, it was not plainly disproportionate to Bayside's possible loss. *Id.* at *5.

The committee further argued that the make-whole payment was intended to compensate Bayside for lost future interest resulting from the prepayment and, therefore, should be disallowed under Bankruptcy Code Section 502(b)(2) because it was a claim for unmatured interest. *Id.* The court, following the reasoning in *In re Trico Marine Servs., Inc.*, 450 B.R. 474 (Bankr. D. Del. 2011), concluded that the make-whole payment was akin to a claim for liquidated damages rather than a claim for unmatured interest because the make-whole payment fully matured at the time of the breach (*i.e.*, when the debtors entered into the forbearance agreement). *Id.*

Finally, the committee contended that Bayside had a duty to mitigate the damages that it suffered as a result of the breach. The court also rejected this argument because, under New York law, courts have held that a valid liquidated damages claim obviates the duty to mitigate. *Id.*

C. *In re GMX Resources, Inc.*: Indenture Unambiguous and Liquidated Damage Reasonable

In *GMX Resources* Case No. 13-11456 (Bankr. W.D. Okla., Aug. 27, 2013)[2], holders of the debtors' first lien notes sought allowance and payment of the full amount of the make-whole redemption price, including the applicable premium, after the debtors filed for chapter 11 bankruptcy. The unsecured creditors committee objected.

The bankruptcy court ruled in an oral decision on August 27, 2013, that the first-lien lenders' claim properly included a make-whole premium in the amount of $66 million. Following the reasoning in *School Specialty* and *AMR*, the court relied chiefly on the unambiguous language of the governing indenture. The relevant provisions of the GMX First Supplemental Indenture are attached at pp 12-14.

Applying New York law, the court reasoned that the lenders' anticipated losses were difficult to estimate at the time the indenture was drafted; calculating the rate tied to U.S. Treasury bonds was not disproportionate to the anticipated losses; the make-whole premium was in the nature of liquidated damages and not unmatured interest subject to disallowance under section 502(b)(2) of the Bankruptcy Code; and Bankruptcy Code section 506(b)'s reasonableness standard did not apply. Unlike *School Specialty*, however, the court took testimony on whether the calculation of the make-whole premium followed industry practice and still held the amount was properly included as part of the claim.

D. *Calpine I and II*: No Call Provision Unenforceable/Equitable Award Not Allowed

Prior to the petition date, Calpine Corporation issued three tranches of secured notes with different terms and interest. In two classes of notes, there was a no-call provision that prohibited prepayment other than in the last two years of borrowing, at which time the make-whole provision became applicable. The last series of notes contained only a no-call provision. *Calpine* 365 B.R. at 395-96 *In re Calpine Corp.* (Bankr. S.D.N.Y. 2007) ("*Calpine I*"). Although the agreements provided that the filing of a bankruptcy was an event of default, none of the note agreements specifically required a prepayment premium in the event of repayment pursuant to acceleration. *Id.* at 398.

On December 20, 2005, the debtors filed for Chapter 11 in the Bankruptcy Court for the Southern District of New York and, in the course of their cases, filed an emergency motion seeking to refinance their debtor-in-possession facility and repay the outstanding secured notes while the no-call provision was still in effect for all three classes. *Id.* at 396. The lenders objected, requesting that either the no-call provisions be specifically enforced, or that they alternatively receive expectation damages for their breach. *Id.*

Judge Lifland allowed the debtors to repay the debt, holding that the no-call provision was unenforceable pursuant to bankruptcy law. *Id.* at 398. Because the terms of the contract did not explicitly require prepayment premiums in the event of repayment pursuant to acceleration, Judge Lifland did not award a prepayment fee. *Id.* However, Judge Lifland found that the secured lenders were nonetheless entitled to receive a general unsecured claim for expectation damages, as the lenders' "expectation of an uninterrupted payment stream ha[d] been dashed." *Id.* at 399. In calculating these damages, Judge Lifland relied on the as-yet-untriggered make-whole provisions contained in two classes of notes. *Id.* Under the majority view, the court analyzed the prepayment damages as liquidation damages, as opposed to unsecured interest, which is disallowed under Section 502(b)(2). *In re Chemtura Corp.*, 439 B.R. 561, 598 n.162 (Bankr. S.D.N.Y. 2010).

[2] Andrews Kurth LLP was counsel to the debtors in *GMX Resources*.

On appeal, the district court affirmed the lower court's ruling that the no-call provisions were unenforceable in bankruptcy. *HSBC Bank USA, Nat'l Assoc. v. Calpine Corp.*, 2010 WL 3835200 (S.D.N.Y. Sept. 15, 2010) ("Calpine II"). However, the district court reversed the award of unsecured claims for expectation damages previously granted from the breach of the no-call. *Id.* at *3. Despite the debtor's repayment prior to the date in question, the district court noted that expectation damages should not be awarded under an unenforceable contract provision in bankruptcy. *Id.* at *4. In addition, the court found that the claim for expectation damages amounted to a claim for unmatured interest, specifically disallowed for an undersecured creditor by Section 502(b)(2). *Id.* at *5.

E. *In re Solutia Inc.*: Automatic Acceleration + No Contractual Make-Whole = Nothing for Note Holders

On December 17, 2003, Solutia Inc., along with a number of its subsidiaries, filed for Chapter 11 protection in the Bankruptcy Court for the Southern District of New York. Solutia's debt included senior secured notes that were automatically accelerated upon bankruptcy by the terms of the indenture. The indenture also contained "plain vanilla" language requiring the debtor to pay principal and interest on the notes on the dates provided. *In re Solutia Inc.*, 379 B.R. 473 (Bankr. S.D.N.Y. 2007) 477–80.

Subsequent to the automatic acceleration of the debt, the noteholders sent the debtors a "Notice of Rescission of Acceleration," waiving all defaults and declaring the notes decelerated. *Id.* at 480. Judge Beatty, on behalf of the Bankruptcy Court of the Southern District of New York, held that this notice violated the automatic stay, as it was a direct attempt by the lenders to get more property from the debtor. *Id.* at 483. Additionally, because there was no language in the indenture requiring prepayment premiums in the event of automatic acceleration, Judge Beatty rejected the secured bondholders' claim for expectation damages. *Id.* The indenture provided for an automatic acceleration clause, allowing bondholders the option for immediate payment at the expense of the future interest income stream. *Id*. at 478. Judge Beatty reasoned that because the notes became fully mature upon acceleration, by definition there could be no prepayment. *Id.* at 478. And while recognizing that post-acceleration make-whole premiums can be contractually provided for, Judge Beatty found the plain vanilla language in the contract to not have the level of specificity expected of such a provision. *Id.* at 482 n.5. Disagreeing with the court in *Calpine I*, Judge Beatty refused to "read[] into agreements between sophisticated parties provisions that are not there." *Id.* at 484 n. 7.

F. *In re Premier Entertainment Biloxi LLC*: No Call Unenforceable but Equitable Claim Allowed

On September 19, 2006, Premier Entertainment Biloxi LLC filed a petition for bankruptcy under Chapter 11 in the Bankruptcy Court for the Southern District of Mississippi. The debtors had secured debt outstanding under an indenture, which had a no-call period for the first four years of the notes. After this period, the indenture provided the debtors the option to repay the notes with a make-whole amount. The indenture also provided for the automatic acceleration of the notes upon bankruptcy. *In re Premier Entertainment Biloxi LLC*, 445 B.R. 582 (Bankr. S.D. Miss. 2010) 590–91.

The debtor's plan of reorganization contemplated the full repayment of notes, with accrued and unpaid interest, but without payment of a make-whole amount. *Id.* at 609–10. The noteholders opposed repayment, however, insisting they were entitled to the make-whole amount, or alternatively, damages for breach of the no-call. *Id.* at 612. Looking at the written agreement, the bankruptcy court held that the indenture clearly stated that the debt was automatically accelerated upon the filing for bankruptcy, and thus the debt became immediately due. *Id.* at 627. Nothing in the indenture provided for a premium after acceleration in the event of a breach of the no-call. *Id.* Although the court found the no-call provision unenforceable in bankruptcy, it did not agree that the lenders were barred from receiving an unsecured claim for expectation damages as a remedy for the breach. *Id.* at 634. The court noted that the indenture expressly stated that "all remedies are cumulative to the extent permitted by law," and thus the court was not limited to the remedies provided for specifically in the indenture. *Id.* at 643. In this solvent debtor case, the court concluded that, "the equities strongly favor holding the debtor to his contractual obligations as long as those obligations are legally enforceable under applicable non-bankruptcy law." *Id.* at 637.

G. *In re Chemtura Corp.:* Gerber Guidelines

In *In re Chemtura Corp.*, 439 B.R. 561 (Bankr. S.D.N.Y. 2010) Judge Gerber of the United States Bankruptcy Court for the Southern District of New York considered the reasonableness of a settlement between Chemtura and two series of note holders with regard to the debtors' liability for the make-whole and no-call provisions contained within. The first series of notes contained make-whole provisions providing that the debtor could redeem the notes prior to maturity "at

the Make-Whole Price plus accrued and unpaid interest to the date of redemption." Id. at 596. The second series contained a no-call provision that provided the notes could not be paid before the stated maturity. *Id.*

The debtors' plan for reorganization stated that both series of notes would be paid, and the debtor agreed to pay $50 million to holders of notes with the make-whole provision (42% of the amount payable if the make-whole provision was found enforceable) and $20 million to holders of notes with the no-call provision (39% of the amount payable if the no-call provision was found enforceable) for potential claims for breach of such provisions. *Id.* at 597–98. The debtor's shareholders rejected the plan, contending that the settlement amount for the make-whole and no-call claims diverted value that would otherwise go to equity. *Id.* at 597 n.3.

Judge Gerber ultimately approved the settlement as reasonable (at least partly due to the fact that the case involved a solvent debtor) and did not decide the issue on the merits. *Id.* at 597. However, in making his decisions, Judge Gerber suggested that were he to decide such a case on the merits, he would employ the following two-prong analysis. *Id.* at 600–03.

1. Was it Triggered and Is Award Appropriate?

The first prong laid out by Judge Gerber requires a court to interpret the contract and make a two-part inquiry under state law. *Id*. Initially, the court must determine whether the no-call provision was breached or the make-whole was triggered. *Id.* Next, the court must determine if damages were appropriately calculated. *Id.* The determination of the former requires the bankruptcy court to interpret the contract to establish if there was an actual prepayment before the "maturity" date or if there was a change in the maturity date. *Id.* The latter requires the bankruptcy court to determine if damages were appropriate under state law. *Id.* In making this assessment, the court must consider if there was a true estimation of future lost interest, or if the damages were used as a penalty. *Id.*

2. Does Claim Result from Breach of No Call?

The second prong requires the court to determine if the make-whole or no-call claims are enforceable under the more restrictive requirements of federal bankruptcy law. *Id.* Disagreeing with *Calpine II*, Judge Gerber stated that even if the no-call is unenforceable in bankruptcy, the court must determine if the lender should be awarded damages for breach of the no-call contract provision, as "bankruptcy courts allow claims for damages for breaches of contracts they won't specifically enforce with great frequency." *Id.* at 604. However, Judge Gerber favored the minority view that make-whole premiums are proxies for unmatured interest and thus must be disallowed under 502(b)(2) if a creditor is undersecured. *Id.* Judge Gerber found it "at least strongly arguable," however, that the reasoning in Section 502(b)(2) is inapplicable to cases where the debtor is solvent, noting that when a debtor is solvent "it is the role of the bankruptcy court to enforce the creditors contractual rights" and that, in such cases, the effect of make-whole provisions "should be an issue of state law alone." *Id.* at 605 (citing *In re Dow Corning Corp.*, 456 F.3d 668, 679 (6th Cir. 2006)).

H. *In re Trico Marine Services, et. al.*: Make-Whole Fee Not Unmatured Interest

In 1999, debtor Trico Marine issued approximately $18.9 million in unsecured notes to finance the construction of two supply vessels. The indenture governing these notes provided an optional redemption period in which a make-whole premium was due. Although the indenture was not secured by any of the debtor's property, the notes were guaranteed by the United States Secretary of Transportation, on behalf of the Maritime Administration ("MARAD"). The MARAD guarantee, which was secured by a first priority lien on the two supply vessels, specifically guaranteed payment of any unpaid interest or principal on the Trico notes. *In re Trico Marine Services, et. al.*, 450 B.R. 474, 476-77 (Bankr. D. Del. 2011).

On August 25, 2011, Trico Marine filed for Chapter 11 in the Bankruptcy Court for the District of Delaware. *Id.* at 476. As part of the company's liquidation, Trico Marine entered into an agreement to sell the two vessels which were the collateral for the secured guarantee. *Id.* at 476–77. MARAD consented to the sale, in exchange for the company paying off the outstanding notes, so as to ensure that the indenture trustee would not call upon the guarantee. *Id.* With regard to the payoff, the indenture trustee asserted it was entitled to the make-whole premium provided under the indenture, and further claimed that this premium was covered by the MARAD guarantee. *Id.* at 477–80. The debtor argued that the make-whole premium should be disallowed under Section 502(b)(2) as unmatured interest, or in the alternative, that the make-whole premium was a general unsecured claim that was not covered by the guarantee, which extended to only principal or interest. *Id.*

Agreeing with the majority view, Judge Shannon emphasized that make-whole payments are not payments of unmatured interest, but instead should be construed as liquidated damages. *Id.* at 481. However, the court ruled that the MARAD guarantee only applied to the payment of principal and interest

due on the notes. *Id.* at 480. Thus, the noteholders held only an unsecured claim for the make-whole premium, rather than the full amount of the premium from the proceeds of the sale of the vessels. *Id.* at 479-84.

VI. CONCLUSION

The right to payment of a make-whole amount is governed by applicable state law and the plain language of the parties' agreement. In the *AMR* case, the claim for the make-whole amount was not allowed because the indentures clearly provided that no make-whole amount would be due upon acceleration, and such denial of a make-whole amount should not be construed as a trending toward the position that make-whole provisions will not be enforced in bankruptcy (*see GMX Resources*).

Other than the *Biloxi* case, courts within the Fifth Circuit have not taken up the issue, but there is no reason to believe that courts within the Fifth Circuit will take a different approach than the New York and Delaware courts. Indeed, the *Biloxi* opinion focused on the plain language of the parties' agreement. It still remains to be seen whether Fifth Circuit courts will follow the majority in holding that claims based on make-whole premiums are not claims for unmatured interest, but the *Biloxi* court suggested in dicta that it would take the majority position. *In re Premier Entm't Biloxi LLC*, 445 B.R. 582, 618 (Bankr. S.D. Miss. 2010). Being that the amount of make-whole claims can impact the amount of debt a secured lender can credit bid or the amount that the debtor is required to restructure, it is likely that litigation over the allowance of make-whole provisions will continue.

Exhibit 4.1

FIRST SUPPLEMENTAL INDENTURE

This FIRST SUPPLEMENTAL INDENTURE, dated as of December 7, 2012 (this "Supplemental Indenture"), is entered into among GMX Resources Inc., an Oklahoma corporation (the "Issuer"), the Guarantors (as defined in the Original Indenture referred to herein) and U.S. Bank National Association, as trustee and collateral agent (the "Trustee").

W I T N E S S E T H

WHEREAS, the Issuer, the Guarantors and the Trustee have heretofore executed and delivered to each other an Indenture, dated as of December 19, 2011 (such indenture, including all exhibits thereto being referred to herein as the "Original Indenture"), providing for the issuance by the Issuer and guarantee by the Guarantors of Senior Secured Notes due 2017 (the "Existing Notes");

WHEREAS, Section 9.2 of the Original Indenture provides that the Issuer, the Guarantors and the Trustee may amend the Original Indenture and the Existing Notes, subject to certain exceptions, with the consent of the Holders of a majority in principal amount of the Existing Notes then outstanding;

WHEREAS, pursuant to its Consent Solicitation Statement dated November 16, 2012, the Issuer has conducted a solicitation (the "Consent Solicitation") of consents by the Holders of Existing Notes to the proposed amendments to the Original Indenture set forth in this Supplemental Indenture;

WHEREAS, in response to the Consent Solicitation, and in accordance with Section 9.2 of the Original Indenture, the Holders of a majority in principal amount of the Existing Notes then outstanding have duly provided their consents (the "Requisite Consents") to the proposed amendments to the Original Indenture effected by this Supplemental Indenture and reflected in Exhibit A hereto;

WHEREAS, the Issuer has delivered to the Trustee in accordance with Section 9.4, Section 11.4 and Section 12.5 of the Existing Indenture (i) evidence of the Requisite Consents and (ii) an Officers' Certificate (including certifying that the Holders of the requisite principal amount of Existing Notes have consented (and not theretofore revoked such consent) to

payment thereof.

Section 3.3 Mandatory and Optional Redemption.

(a) Except as required under Section 4.15 or 4.16, the Issuer will not be required to make any mandatory redemption or sinking fund payments with respect to the Notes. The Issuer may at any time and from time to time purchase Notes in the open market, in privately negotiated transactions or otherwise. Except as set forth in Section 3.3(b) and (c), the Issuer will not be entitled to redeem the Series A Notes at its option prior to December 1, 2014.

(b) The Series A Notes will be redeemable, at the Issuer's option, in whole at any time or in part from time to time, on and after December 1, 2014 upon not less than 30 nor more than 60 prior days' notice, at the following Redemption Prices (expressed as a percentage of the principal amount of such Notes) plus accrued and unpaid interest on such Notes, if any, to, but not including, the applicable Redemption Date (subject to the right of Holders of record on the relevant Record Date to receive

interest due on the relevant Interest Payment Date), if redeemed during the twelve-month period beginning on December 1 of the years set forth below (in the aggregate, the "Optional Redemption Price"):

Year	Series A Percentage
Prior to December 1, 2014	N/A
2014	105.500%
2015	102.750%
2016 and thereafter	100.000%

The Series B Notes will be redeemable at any time, at the Issuer's option, in whole or in part from time to time upon not less than 30 nor more than 60 prior days' notice, at a Redemption Price equal to 100.000% of the principal amount of the Series B Notes that are redeemed plus accrued and unpaid interest thereon, if any, to, but not including, the applicable Redemption Date (subject to the right of Holders of record on the relevant Record Date to receive interest due on the relevant Interest Payment Date)

(c) At any time prior to December 1, 2014, the Issuer may, at its option, on any one or more occasions redeem up to 35% of the aggregate principal amount of the Series A Notes (including Additional Notes of such Series but without duplication for Exchange Notes) issued under this Indenture with the Net Cash Proceeds of one or more Equity Offerings at a Redemption Price of 111.0% of the aggregate principal amount thereof, plus accrued and unpaid interest to, but not including, the Redemption Date (subject to the right of Holders of record on the relevant Record Date to receive interest due on the relevant Interest Payment Date); *provided* that:

(1) at least 65% of the original principal amount of the Series A Notes issued under this Indenture (including Additional Notes but without duplication for Exchange Notes) remains outstanding after each such redemption; and

(2) the redemption occurs within 90 days after the closing of the related Equity Offering.

(d) In addition, the Series A Notes may be redeemed (a "Make-Whole Redemption"), in whole or in part, at any time prior to December 1, 2014 at the option of the Issuer upon not less than 30 nor more than 60 days' prior notice mailed by first-class mail to each Holder at its registered address, at a Redemption Price (the "Make-Whole Redemption Price") equal to 100% of the principal amount of such Notes redeemed plus the Applicable Premium as of, and accrued and unpaid interest to, but not including, the applicable Redemption Date (subject to the right of Holders of record on the relevant Record Date to receive interest due on the relevant Interest Payment Date).

Section 3.4 Notice of Redemption. In connection with a redemption pursuant to Section 3.3, at least 30 days but not more than 60 days before a Redemption Date, the Issuer shall mail or cause to be mailed a notice of redemption by first-class mail

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to each Holder of Notes to be redeemed at its registered address, with a copy to the Trustee and any Paying Agent. At the Issuer's request, the Trustee shall give the notice of redemption in the Issuer's name and at the Issuer's expense. The Issuer shall provide such notices of redemption to the Trustee at least

EXECUTION VERSION

$70,000,000

CREDIT AGREEMENT

Dated as of May 22, 2012

among

SCHOOL SPECIALTY, INC.,

CLASSROOMDIRECT.COM, LLC,

DELTA EDUCATION, LLC,

SPORTIME, LLC,

CHILDCRAFT EDUCATION CORP.,

BIRD-IN-HAND WOODWORKS, INC.,

CALIFONE INTERNATIONAL, INC.,

and

PREMIER AGENDAS, INC.,

as Borrowers,

SELECT AGENDAS, CORP.,

FREY SCIENTIFIC, INC.,

and

SAX ARTS & CRAFTS, INC.,

as Guarantors,

THE LENDERS,

as defined herein,

and

BAYSIDE FINANCE, LLC,

as Administrative Agent and as Collateral Agent

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(I) ninth, to the Administrative Borrower or such other Person entitled thereto under Applicable Law.

(iii) In each instance, so long as no Application Event has occurred, Section 2.10(f)(i) shall not apply to any payment made by the Borrowers to the Administrative Agent and specified by the Administrative Borrower to be for the payment of specific Obligations then due and payable (or prepayable) under any provision of this Agreement.

(iv) For purposes of Section 2.10(f)(ii), "paid in full" means payment in cash in Dollars of all amounts owing under the Loan Documents according to the terms thereof, including loan fees, service fees, professional fees, interest (and specifically including interest accrued after the commencement of any Insolvency Proceeding), default interest, interest on interest, Early Payment Fees and expense reimbursements, whether or not any of the foregoing would be or is allowed or disallowed in whole or in part in any Insolvency Proceeding.

(v) In the event of a direct conflict between the priority provisions of this Section 2.10(f) and any other provision contained in any other Loan Document, it is the intention of the parties hereto that such provisions be read together and construed, to the fullest extent possible, to be in concert with each other. In the event of any actual, irreconcilable conflict that cannot be resolved as aforesaid, the terms and provisions of this Section 2.10(f) shall control and govern.

(g) Early Payment Fee. Each prepayment of Term Loans pursuant to Section 2.9(a), each prepayment of Term Loans pursuant to Section 2.9(b), and each repayment of, or distribution in respect of, Term Loans after acceleration thereof pursuant to Section 7.2 or such amount otherwise becoming or being declared immediately due and payable pursuant to the terms hereof (each such prepayment, repayment, distribution, amount becoming or being declared immediately due and payable, an "Early Payment Fee Event"), in each case shall be accompanied by, and there shall become due and payable automatically upon any such Early Payment Fee Event, a fee (the "Early Payment Fee") payable in cash on the principal amount so prepaid or on the principal amount that has become or is declared to be immediately due and payable pursuant to Section 7.2 or otherwise, or in respect of which such claim in any Insolvency Proceeding has arisen, or otherwise constituting Called Principal, as applicable, in an amount equal to (x) in the case of a prepayment during the Limited Call Period (other than from the Net Cash Proceeds of a Permitted Divestiture (other than of the Designated Divestiture Business Unit) consummated prior to the first anniversary of the Closing Date), or an amount of Term Loans becoming due and payable pursuant to Section 7.2 or otherwise, in each such case during the Limited Call Period, the Make Whole Amount, and (y) in the case of a prepayment of the Term Loans from the Net Cash Proceeds of a Permitted Divestiture (other than of the Designated Divestiture Business Unit) consummated prior to the first anniversary of the Closing Date, 10.0% of the amount of such prepayment, and (z) in the case of a prepayment after the Limited Call Period or an amount of Term Loans becoming due and payable pursuant to Section 7.2 or otherwise, in each such case after the Limited Call Period, the Applicable Term Loan Percentage.

or received in respect of Term Loan Priority Collateral, in an amount equal to 100% of such amounts, (5) Extraordinary Receipts attributable to or received in respect of Revolving Credit Priority Collateral, in an amount equal to 0% of such amounts that are received prior to Payment in Full of the ABL Priority Debt (as each such term is defined in the Intercreditor Agreement) and 100% of such amounts that are received thereafter, (6) other Extraordinary Receipts, in an amount equal to 50% of such amounts, (7) any proceeds of business interruption insurance, in an amount equal to 50% of such amounts, (8) any proceeds of all other insurance in respect of loss or destruction of property and of the proceeds of all awards and other recoveries in respect of condemnation and analogous events in respect of property, in each case attributable to or received in respect of Term Loan Priority Collateral, in an amount equal to 100% of such amounts, and (9) any proceeds of all other insurance in respect of loss or destruction of property and of the proceeds of all awards and other recoveries in respect of condemnation and analogous events in respect of property, in each case attributable to or received in respect of Revolving Credit Priority Collateral (calculated as determined in Section 5.2 of the Intercreditor Agreement), in an amount equal to 0% of such amounts that are received prior to Payment in Full of the ABL Priority Debt (as each such term is defined in the Intercreditor Agreement) and 100% of such amounts that are received thereafter (in each case in clauses (8) and (9) above, subject to exceptions for repairs and replacements effected within 60 days of receipt of such insurance proceeds or other award by any Group Member and costing up to $200,000 per casualty event (or such greater amount as the Administrative Agent may approve, to the extent commercially reasonable)).

(b) Voluntary Prepayments. The Borrowers may prepay the outstanding principal amount of any Term Loan in whole at any time and/or in part, at par, from time to time, upon not less than thirty (30) days', and not more than sixty (60) days' prior written notice to the Administrative Agent, which notice shall be irrevocable once given, provided that (i) the Borrowers will remain liable for any breakage costs that may be owing pursuant to Section 2.13 after giving effect to such prepayment, (ii) each partial prepayment that is not of the entire outstanding amount of Term Loans shall be in an aggregate amount that is an integral multiple of $1,000,000, and (iii) each prepayment of Term Loans shall be accompanied by an Early Payment Fee in respect of the principal amount prepaid, in accordance with Section 2.10(g).

(c) Prepayments Generally. The following provisions shall apply to all prepayments under Section 2.9(a) and (b), to the extent specified below:

(i) any prepayment of the Term Loans under Section 2.9(a) and (b) shall be applied against outstanding Term Loans of each Lender pro rata according to each Lender's Percentage of Term Loans;

(ii) at any time that an Application Event has occurred, prepayments under Section 2.9(a) shall be applied in accordance with the terms of Section 2.10(f)(ii);

(iii) prepayments of Term Loans under Section 2.9(a) and Section 2.9(b) shall be accompanied by an Early Payment Fee in respect of the principal amount so prepaid, in accordance with Section 2.10(g);

INDENTURE AND SECURITY AGREEMENT

([Reg. No.])

Dated as of _____ ___, 20___[1]

between

AMERICAN AIRLINES, INC.,

and

WILMINGTON TRUST COMPANY,

as Loan Trustee

*

One Boeing [Model]
(Generic Manufacturer and Model [Generic Manufacturer and Model]) Aircraft
U.S. Registration No. [Reg. No.]

[1] To insert the relevant Closing Date.

before the Loss Payment Date at a redemption price equal to 100% of the unpaid principal amount thereof, together with all accrued and unpaid interest thereon to (but excluding) the date of redemption, but without any Premium Amount, and all other Secured Obligations owed or then due and payable to the Noteholders.

Section 2.11. Voluntary Redemption of Equipment Notes. (a) Except as provided in Section 2.11(b), all, but not less than all, of the Equipment Notes may be redeemed by the Company at any time upon at least 15 days' revocable prior written notice to the Loan Trustee and the Noteholders, and such Equipment Notes shall be redeemed in whole at a redemption price equal to 100% of the unpaid principal amount thereof, together with accrued and unpaid interest thereon to (but excluding) the date of redemption and all other Secured Obligations owed or then due and payable to the Noteholders, plus Make-Whole Amount, if any; provided that no redemption shall be permitted under this Section 2.11(a) unless, simultaneously with such redemption, the Related Equipment Notes shall also be redeemed.

(b) If issued, all of the Series B Equipment Notes or all of the Additional Series Equipment Notes (or both) may be redeemed by the Company upon at least 15 days' revocable prior written notice to the Loan Trustee and the Noteholders of each Series to be redeemed, and such Series of Equipment Notes being redeemed pursuant to this Section 2.11(b) shall be redeemed in whole at a redemption price equal to 100% of the unpaid principal amount thereof, together with accrued and unpaid interest thereon to (but excluding) the date of redemption and all other Secured Obligations owed or then due and payable to the Noteholders of such Series, plus Make-Whole Amount, if any; provided that:

(i) no redemption shall be permitted under this Section 2.11(b) unless, simultaneously with such redemption, the Related Series B Equipment Notes (in the case of redemption hereunder of Series B Equipment Notes) or the Related Additional Series Equipment Notes in respect of the Additional Series Equipment Notes being redeemed (in the case of redemption hereunder of any Additional Series Equipment Notes), as the case may be, shall also be redeemed; and

(ii) if, simultaneously with such redemption, new Series B Equipment Notes (in the case of redemption hereunder of Series B Equipment Notes) or new Additional Series Equipment Notes (in the case of redemption hereunder of Additional Series Equipment Notes), which, in any such case, may have terms that may be the same as or different from those of the redeemed Equipment Notes, are being issued, such new Equipment Notes shall be issued in accordance

with Section 2.02 of the Participation Agreement, Section 4(a)(v) of the Note Purchase Agreement and Section 8.01(c) of the Intercreditor Agreement.

(c) Notwithstanding anything to the contrary in Section 2.11(a) or (b), so long as the Company or any of its Affiliates beneficially owns 100% of the Pass Through Certificates issued by any Pass Through Trustee, the redemption price shall not include, and no Noteholder shall have any right to otherwise claim, any Make-Whole Amount with respect to the Series of Equipment Notes issued to the Subordination Agent for the benefit of such Pass Through Trustee.

Section 2.12. Redemptions; Notice of Redemptions; Repurchases. (a) No redemption of any Equipment Note may be made except to the extent and in the manner expressly permitted by this Indenture. The Company may at any time repurchase any of the Equipment Notes not held by the Subordination Agent at any price and may hold or resell such Equipment Notes or surrender such Equipment Notes to the Loan Trustee for cancellation.

(b) Notice of redemption with respect to the Equipment Notes shall be given by the Loan Trustee by first-class mail, postage prepaid, mailed not less than 15 nor more than 60 days prior to the applicable redemption date, to each Noteholder of such Equipment Notes to be redeemed, at such Noteholder's address appearing in the Equipment Note Register; provided that such notice shall be revocable by written notice from the Company to the Loan Trustee given no later than three days prior to the redemption date. All such notices of redemption shall state: (1) the redemption date, (2) the applicable basis for determining the redemption price, (3) that on the redemption date, the redemption price will become due and payable upon each such Equipment Note, and that, if any such Equipment Notes are then outstanding, interest on such Equipment Notes shall cease to accrue on and after such redemption date and (4) the place or places where such Equipment Notes are to be surrendered for payment of the redemption price.

(c) On or before the redemption date, the Company (or any person on behalf of the Company) shall, to the extent an amount equal to the redemption price for the Equipment Notes to be redeemed on the redemption date shall not then be held in the Collateral, deposit or cause to be deposited with the Loan Trustee by 11:00 a.m. (New York City time) on the redemption date in immediately available funds the redemption price of the Equipment Notes to be redeemed.

(d) Notice of redemption having been given as aforesaid (and not revoked as permitted by this Section 2.12), the Equipment Notes to be redeemed shall, on the redemption date, become due and payable at the Corporate Trust Office of the Loan

permitted by, and subject to compliance with the requirements of, applicable law then in effect (provided that during any period the Airframe or any Engine is subject to the CRAF Program and is in possession of or being operated under the direction of the United States government or an agency or instrumentality of the United States, the Loan Trustee shall not, on account of any Event of Default, be entitled to exercise or pursue any of the powers, rights or remedies described in this Section 4.02 in such manner as to limit the Company's control under this Indenture (or any Permitted Lessee's control under any Lease) of the Airframe, any Engines installed thereon or any such Engine, unless at least 60 days' (or such lesser period as may then be applicable under the CRAF Program of the United States government) prior written notice of default hereunder shall have been given by the Loan Trustee by registered or certified mail to the Company (and any such Permitted Lessee) with a copy addressed to the Contracting Office Representative or other appropriate person for the Air Mobility Command of the United States Air Force under any contract with the Company or such Permitted Lessee relating to the Aircraft):

(i) declare by written notice to the Company all the Equipment Notes to be due and payable, whereupon the aggregate unpaid principal amount of all Equipment Notes then outstanding, together with accrued but unpaid interest thereon and all other amounts due thereunder (but for the avoidance of doubt, without Premium Amount), shall immediately become due and payable without presentment, demand, protest or other notice, all of which are hereby waived; provided that if an Event of Default referred to in Section 4.01(f), Section 4.01(g), Section 4.01(h), Section 4.01(i) or Section 4.01(l) shall have occurred and be continuing, then and in every such case the unpaid principal amount of the Equipment Notes then outstanding, together with accrued but unpaid interest thereon and all other amounts due thereunder (but for the avoidance of doubt, without Premium Amount), shall immediately and without further act become due and payable without presentment, demand, protest or notice, all of which are hereby waived; provided, further, that if an Event of Default referred to in Section 4.01(m) shall have occurred and be continuing, then in such case the unpaid principal amount of the Equipment Notes then outstanding, together with accrued but unpaid interest thereon, the Section 4.02 Premium, if any, in respect thereof, and all other amounts due thereunder (but for the avoidance of doubt, without Make-Whole Amount), shall immediately and without further act become due and payable without presentment, demand, protest or notice, all of which are hereby waived; and, following such declaration or deemed declaration:

(ii) (A) cause the Company, upon the written demand of the Loan Trustee, at the Company's expense, to deliver promptly, and the Company shall

excluded from the indemnification provided by Section 4.02 of the Participation Agreement pursuant to said Section 4.02 or (iv) claims against WTC or the Loan Trustee arising out of the transfer by any such party of all or any portion of its interest in the Aircraft, the Collateral, the Operative Documents or the Pass Through Documents, except while an Event of Default is continuing and prior to the time that the Loan Trustee has received all amounts due to it pursuant to the Indenture.

"Long-Term Rating" has the meaning specified in the Intercreditor Agreement.

"Loss Payment Date" has the meaning specified in Section 7.05(a) of the Indenture.

"Majority in Interest of Noteholders" means, as of a particular date of determination and subject to Section 2.16 of the Indenture, the holders of at least a majority in aggregate unpaid principal amount of all Equipment Notes outstanding as of such date (excluding any Equipment Notes held by the Company or any Affiliate thereof, it being understood that a Pass Through Trustee shall be considered an Affiliate of the Company as long as more than 50% in the aggregate face amount of Pass Through Certificates issued by the corresponding Pass Through Trust are held by the Company or an Affiliate of the Company or a Pass Through Trustee is otherwise under the control of the Company or such Affiliate of the Company (unless all Equipment Notes then outstanding are held by the Company or any Affiliate thereof, including the Pass Through Trustees which are considered Affiliates of the Company pursuant hereto)); provided that for the purposes of directing any action or casting any vote or giving any consent, waiver or instruction hereunder, any Noteholder of an Equipment Note or Equipment Notes may allocate, in such Noteholder's sole discretion, any fractional portion of the principal amount of such Equipment Note or Equipment Notes in favor of or in opposition to any such action, vote, consent, waiver or instruction.

"Make-Whole Amount" means, with respect to any Equipment Note, the amount (as determined by an independent investment banker selected by the Company (and, following the occurrence and during the continuance of an Event of Default, reasonably acceptable to the Loan Trustee)), if any, by which (i) the present value of the remaining scheduled payments of principal and interest from the redemption date to maturity of such Equipment Note computed by discounting each such payment on a semiannual basis from its respective Payment Date (assuming a 360-day year of twelve 30 day months) using a discount rate equal to the Treasury Yield plus the Make-Whole Spread exceeds (ii) the outstanding principal amount of such Equipment Note plus accrued but unpaid interest thereon to the date of redemption. For purposes of determining the Make-Whole Amount, "Treasury Yield" means, at the date of determination, the interest rate (expressed as a semiannual equivalent and as a decimal rounded to the number of decimal

places as appears in the Debt Rate of such Equipment Note and, in the case of United States Treasury bills, converted to a bond equivalent yield) determined to be the per annum rate equal to the semiannual yield to maturity for United States Treasury securities maturing on the Average Life Date and trading in the public securities market either as determined by interpolation between the most recent weekly average constant maturity, non-inflation-indexed series yield to maturity for two series of United States Treasury securities, trading in the public securities markets, (A) one maturing as close as possible to, but earlier than, the Average Life Date and (B) the other maturing as close as possible to, but later than, the Average Life Date, in each case as reported in the most recent H.15(519) or, if a weekly average constant maturity, non-inflation-indexed series yield to maturity for United States Treasury securities maturing on the Average Life Date is reported in the most recent H.15(519), such weekly average yield to maturity as reported in such H.15(519). "H.15(519)" means the weekly statistical release designated as such, or any successor publication, published by the Board of Governors of the Federal Reserve System. The date of determination of a Make-Whole Amount shall be the third Business Day prior to the applicable redemption date and the "most recent H.15(519)" means the latest H.15(519) published prior to the close of business on the third Business Day prior to the applicable redemption date. "Average Life Date" means, for each Equipment Note to be redeemed, the date which follows the redemption date by a period equal to the Remaining Weighted Average Life at the redemption date of such Equipment Note. "Remaining Weighted Average Life" of an Equipment Note, at the redemption date of such Equipment Note, means the number of days equal to the quotient obtained by dividing: (i) the sum of the products obtained by multiplying (A) the amount of each then remaining installment of principal, including the payment due on the maturity date of such Equipment Note, by (B) the number of days from and including the redemption date to but excluding the scheduled Payment Date of such principal installment by (ii) the then unpaid principal amount of such Equipment Note.

"Make-Whole Spread" means, with respect to any Series of Equipment Notes, the percentage specified for the applicable Series as such in **Schedule I** to the Indenture (as, in the case of any Series B Equipment Notes or any Additional Series Equipment Notes issued after the Closing Date, such **Schedule I** may be amended in connection with such issuance).

"Manufacturer" means The Boeing Company, a Delaware corporation, and its successors and assigns.

"Manufacturer's Consent" means the Manufacturer's Consent and Agreement to Assignment of Warranties, dated as of the Closing Date, substantially in the form of Exhibit D to the Participation Agreement.