

FILED

MAR 31 2016

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

In re:)	BAP No.	NV-14-1564-KiDJu
)		
BELTWAY ONE DEVELOPMENT)	Bk. No.	2:11-bk-21026-MKN
GROUP, LLC,)		
)		
Debtor.)		
)		
<hr/>			
WELLS FARGO BANK, N.A.,)		
)		
Appellant,)		
)		
v.)	O P I N I O N	
)		
BELTWAY ONE DEVELOPMENT)		
GROUP, LLC,)		
)		
Appellee.)		
)		
<hr/>			

Argued and Submitted on February 18, 2016,
at Las Vegas, Nevada

March 31, 2016

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Mike K. Nakagawa, Chief Bankruptcy Judge, Presiding

Appearances: Bryce A. Suzuki of Bryan Cave LLP argued for
appellant Wells Fargo Bank, N.A.; Gerald M. Gordon
of Garman Turner Gordon LLP argued for appellee
Beltway One Development Group, LLC.

Before: KIRSCHER, DUNN and JURY, Bankruptcy Judges.

1 KIRSCHER, Bankruptcy Judge:

2

3 Creditor Wells Fargo Bank, N.A., appeals the bankruptcy
4 court's decision to deny accrued postpetition, pre-effective date¹
5 default interest on Wells Fargo's allowed, oversecured claim
6 pursuant to the Debtor's chapter 11² plan of reorganization, which
7 did not cure the prebankruptcy default. We REVERSE and REMAND.

8

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

9

A. Events leading to the bankruptcy case

10

11

12

13

14

Chapter 11 debtor, Beltway One Development Group, LLC, owns
and operates the Desert Canyon Business Park, a 15-acre master
planned business park located in Las Vegas. Debtor is managed by
Beltway One Management Group, LLC, which in turn is managed by
Todd Nigro.

15

16

17

On May 16, 2008, Debtor and Wells Fargo's predecessor in
interest, Wachovia Bank, N.A., entered into a term loan agreement

18

19

20

21

22

23

24

25

26

¹ The postpetition, pre-effective date interest rate
determined under § 506(b) commences on the petition date and
continues until the effective date stated in the confirmed plan,
after which the cramdown interest rate, determined under § 1129,
commences if the plan is confirmed. Unless the plan provides a
specific date when it becomes effective, the effective date is the
confirmation date. See Countrywide Home Loans, Inc. v. Hoopai (In
re Hoopai), 581 F.3d 1090, 1101 (9th Cir. 2009) (although a
chapter 13 case, discussion on effective date is applicable under
§ 1325(a)(5)(B)(ii) and § 1129(b)(2)(A)(i)(II)). In this appeal
we refer to this postpetition, pre-effective date interest rate as
"pendency interest." This pendency interest may be the
prepetition contractual interest rate or the contractual default
interest rate depending on whether a cure or a noncure occurs in
the pending case and depending on what interest rate is provided
in any contractual provisions. The cramdown interest rate or
"plan interest" is not an issue on appeal.

27

28

² Unless specified otherwise, all chapter, code and rule
references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 wherein Wachovia agreed to lend Debtor \$10 million. In exchange
2 for the loan, Debtor executed a promissory note, a deed of trust
3 with assignment of rents and other documents in favor of Wachovia,
4 giving the lender a first position lien and security interest in
5 the real property and various personal property of Debtor.³ The
6 note matured on May 16, 2011, before the bankruptcy petition was
7 filed.

8 Per the terms of the agreement, the loan accrued interest at
9 a variable rate equal to 1-month LIBOR rate plus 2.10%. Upon
10 default, the interest rate would increase by 3% over the
11 nondefault rate of LIBOR plus 2.10%.⁴

12 In May 2010, Wells Fargo issued notices of default based on
13 an alleged loan-to-value ratio covenant default. Specifically,
14 Wells Fargo claimed the value of the property was \$10.15 million
15 and therefore, in order to comply with the covenant requiring a
16 LTV ratio of not less than 70%, demanded that Debtor immediately
17 tender a payment of \$2,793,419 to reduce the loan balance to
18 \$7.105 million. Debtor was unable to meet the demand and tried to
19 negotiate a resolution, which the parties failed to accomplish.

20 Debtor did not pay the loan in full by its maturity date of
21 May 16, 2011. Wells Fargo sent Debtor and the loan guarantors a
22 letter declaring Debtor's default and the acceleration of the
23

24 ³ Specifically, Wells Fargo's loan is secured by, among other
25 things, one building in the Desert Canyon complex known as
"Building 11."

26 ⁴ The 30-day LIBOR rate was 2.48% when the note was executed
27 in May 2008, resulting in an interest rate of 4.58%. The loan's
28 nondefault interest rate has not exceeded 3.4% since January 2009,
and remained at 2.4% throughout the bankruptcy case. Accordingly,
the default rate was 5.4% throughout the bankruptcy case.

1 debt, including the principal balance of \$9,789,494.72 and accrued
2 interest of \$18,011.56, for a total due of \$9,807,506.28. On
3 July 8, 2011, Wells Fargo recorded its Notice of Trustee's Sale
4 and advised Debtor it would be filing a complaint and seeking the
5 appointment of a receiver. To avoid foreclosure, Debtor filed its
6 chapter 11 bankruptcy petition on July 13, 2011.

7 **B. Debtor's bankruptcy case**

8 Pursuant to a stipulated cash collateral agreement, Debtor
9 paid Wells Fargo monthly adequate protection payments of \$30,000.
10 Debtor timely made each of these payments between July 2011 and
11 the Effective Date of Debtor's chapter 11 plan.

12 Meanwhile, Wells Fargo filed its proof of claim on
13 November 15, 2011, asserting a prepetition debt of \$9,877,741.20,
14 which consisted of \$9,789,494.72 in unpaid principal, \$36,060.70
15 in unpaid accrued nondefault interest, \$47,315.89 in default
16 interest, and \$4,869.89 in other charges.

17 **1. Debtor's plan and Wells Fargo's objection**

18 In Debtor's amended chapter 11 plan of reorganization (the
19 "Plan"), for Wells Fargo's claim Debtor proposed to: (1) extend
20 the loan term to March 31, 2017, with a balloon payment at the end
21 of the Plan term; (2) impose a cramdown interest rate of 4.25%;
22 (3) and eliminate various covenants (one being the LTV covenant)
23 and other loan terms. Debtor would make a \$200,000 payment to
24 Wells Fargo just after the Plan's Effective Date, and thereafter
25 make monthly payments for principal and interest (at the 4.25%
26 rate), amortized over 30 years.

27 The Plan expressly provided that Wells Fargo would "not be
28 entitled to any default interest, late fees, or other charges

1 resulting from a default occurring prior to the Effective Date.”
2 The Plan further provided that on the Effective Date, any pre-
3 Effective Date defaults under the Wells Fargo loan would be deemed
4 to have been “cured.”

5 In support of the Plan, Debtor offered a direct testimony
6 declaration from Mr. Nigro. He testified that even if Wells
7 Fargo’s claim were allowed as filed, including default interest,
8 Debtor would still have more than \$2 million in equity at the new
9 maturity of the restructured loan under the Plan.

10 In opposing confirmation, Wells Fargo contended the Plan
11 failed the general “fair and equitable” test under § 1129(b)(1)
12 because it treated Wells Fargo as fully secured but deprived Wells
13 Fargo of its contractual right to default interest, late fees and
14 other charges arising from any default prior to the Effective
15 Date. Citing Future Media Productions, Inc.,⁵ Wells Fargo
16 contended that as an oversecured creditor, § 506(b) authorized
17 recovery of postpetition default interest on its claim and any
18 reasonable fees, costs or charges arising under the loan
19 agreement. Wells Fargo further contended that Debtor’s proposed
20 “cure” attempt was not permissible; Debtor could not “magically
21 cure” the maturity date default as required by § 1124(2)(A).

22 **2. The Plan confirmation hearing and post-trial briefing**

23 Following the four day Plan confirmation hearing, the parties
24 filed post-trial briefs. Reiterating the same arguments it had
25 raised in its Plan objection and citing Future Media, Wells Fargo
26

27 ⁵ Gen. Elec. Capital Corp. v. Future Media Prods., Inc., 536
28 F.3d 969, 973 (9th Cir.), amended 547 F.3d 956, 960 (9th Cir.
2008).

1 contended that Debtor's Plan failed the general "fair and
2 equitable" test under § 1129(b) by depriving it of default
3 interest prior to the Effective Date despite the loan documents'
4 allowance for such charges and that § 506(b) provided oversecured
5 creditors like Wells Fargo recovery of any pendency interest.

6 Debtor acknowledged the Plan was not "curing" the Wells Fargo
7 loan and not restoring its formerly effective terms; rather, it
8 was creating a "new loan" by restructuring the debt. Debtor did
9 not generally disagree with the authority cited by Wells Fargo for
10 the payment of default interest, late fees and other charges. The
11 only caveat, according to Debtor, was that § 506 did "not allow
12 any such interest to exceed the value of the collateral."

13 **3. The bankruptcy court confirms the Plan.**

14 With the Plan under submission for just over two years, the
15 bankruptcy court entered its Order and Memorandum Decision on
16 Final Approval of Disclosure Statement and Confirmation of
17 Chapter 11 Plan on March 25, 2014. The court adopted Debtor's
18 valuation of \$11.1 million for Building 11, which secured Wells
19 Fargo's claim of approximately \$9.9 million, and approved the
20 cramdown interest rate of 4.25%.⁶ In denying Wells Fargo pendency
21 interest, the court's ruling was brief:

22 Modification of default interest rates and elimination
23 of late fees and other costs is consistent with the Code
24 and supported by the case cited by Wells Fargo. In
[Future Media], the Ninth confirmed its previous holding
in Great Western Bank & Trust v. Entz-White Lumber and

25
26 ⁶ The bankruptcy court's valuation of Building 11 at \$11.1
27 million is not disputed on appeal. Therefore, it is undisputed
28 that Wells Fargo is an oversecured creditor. See United States v.
Ron Pair Enters., Inc., 489 U.S. 235, 239 (1989) (a creditor is
considered to be "oversecured" when the value of its collateral
exceeds the amount of the creditor's allowed claim).

1 Supply, Inc. (In re Entz-White Lumber and Supply, Inc.),
2 850 F.2d 1338 (9th Cir. 1988), "that an oversecured
3 creditor was not entitled to interest at the default
4 rate where its claim was paid in full pursuant to the
5 terms of a Chapter 11 plan." 536 F.3d at 973. The
6 circuit panel went on to emphasize that "the provision
7 allowing 'cures' under § 1124(2)(A) 'authorizes a plan
8 to nullify all consequences of default, including
9 avoidance of default penalties such as higher
10 interest.'" Id., citing Fla. Partners Corp. v.
11 Southeast Co. (In re Southeast Co.), 868 F.2d 335, 338
12 (9th Cir. 1989).

13 Based on the foregoing, Section 1129(b) is satisfied.

14 Mem. Decision (Mar. 25, 2014) 15:3-14.

15 **4. Wells Fargo's motion to reconsider the Confirmation**
16 **Order**

17 Wells Fargo moved to alter or amend judgment or for relief
18 from judgment respecting the Confirmation Order ("Motion to
19 Reconsider"). In short, Wells Fargo contended the Confirmation
20 Order had to be amended (1) to clarify that Entz-White and its
21 progeny were inapplicable in this case and (2) to require the
22 payment of postpetition default interest, charges, fees and
23 expenses as part of Wells Fargo's allowed claim under § 506(b).

24 Wells Fargo argued that because its claim was impaired and
25 the Plan did not effect a "cure" within the meaning of Entz-White
26 or § 1124(2)(A) allowing Debtor to eliminate Wells Fargo's right
27 to default interest, Wells Fargo could not be deprived of its
28 default interest recoverable under § 506(b) as an oversecured
29 creditor as set forth in Future Media. In other words, the
30 bankruptcy court was required under Future Media to enforce the
31 contractual default rate as to its pendency interest.

32 Alternatively, Wells Fargo argued that even if the Plan could be
33 interpreted to effect an Entz-White cure, the 1994 amendments to

1 the Code, namely § 1123(d), overturned Entz-White and its progeny,
2 and thus such "cures" eliminating default interest and other
3 charges available in the underlying agreement and applicable
4 nonbankruptcy law were no longer valid.

5 In opposition to the Motion to Reconsider, Debtor conceded
6 that no Entz-White cure was effected or even contemplated for
7 Wells Fargo's claim under the Plan. Nonetheless, argued Debtor,
8 regardless of whether or not the Plan cured Wells Fargo's claim,
9 the bankruptcy court was permitted to disallow default interest
10 under its equitable discretion and the authority granted it by
11 Future Media. Debtor contended that under Future Media the
12 allowance of default interest is subject to equitable
13 considerations, which is consistent with the holding in Entz-White
14 that bankruptcy courts have "broad equitable discretion" in
15 awarding postpetition interest. Debtor contended Entz-White was
16 still good law despite the enactment of § 1123(d).

17 In reply, Wells Fargo argued that nowhere in its Memorandum
18 Decision did the bankruptcy court discuss equitable considerations
19 or any other basis for eliminating default interest other than a
20 "cure." However, if the bankruptcy court did rely on equitable
21 considerations to eliminate default interest, the Memorandum
22 Decision required amendment to articulate those considerations.
23 In any event, Wells Fargo contended that the "equities" in this
24 case clearly supported the enforcement of the parties' contractual
25 default interest provisions. The default rate was a mere 3%
26 higher than the nondefault rate, which remained at 2.4% throughout
27 the bankruptcy case. Thus, Debtor had enjoyed an extraordinary
28 low interest rate for the length of the case, thereby allowing it

1 to stockpile over \$2 million in cash. Eliminating Wells Fargo's
2 claim for default interest allowed Debtors' owners to reap
3 substantial equity in the property and over \$2 million in cash at
4 the expense of Wells Fargo. Even after paying its claim for
5 default interest of \$752,948.72, Wells Fargo argued that Debtor
6 would still be left with more than \$2.4 million of equity, which
7 was hardly an inequitable result.

8
9 **5. The bankruptcy court's ruling on the Motion to
Reconsider**

10 In its order denying the Motion to Reconsider, the bankruptcy
11 court's analysis was again brief. The court first noted that in
12 approving the Plan, it had reached the legal conclusion that the
13 treatment of Wells Fargo's claim was fair and equitable within the
14 meaning of § 1129(b)(1), and "[n]othing in the parties' dispute
15 over the continued vitality of Entz-White change[d] this result."
16 Order on Motion to Reconsider (Nov. 17, 2014) 6:5-6. The court
17 concluded that Entz-White was still good law, but even if it were
18 not, "its holding is not inconsistent with and is instructive in
19 the determination of whether a particular plan treatment is fair
20 and equitable to an objecting creditor."⁷ Id. at 7:11-14.

21 Wells Fargo timely appealed.

22 **II. JURISDICTION**

23 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
24 and 157(b)(2)(L). We have jurisdiction under 28 U.S.C. § 158(b).

25 ///

26 _____
27 ⁷ Wells Fargo had also requested amendment to require Debtor
28 to include fees and expenses as part of Wells Fargo's claim. The
bankruptcy court ultimately allowed Wells Fargo's professional
fees and expenses of \$166,850 as part of its oversecured claim.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

III. ISSUE

Did the bankruptcy court err in eliminating the prepetition default interest rate as the pendency interest for Wells Fargo's oversecured claim?

IV. STANDARD OF REVIEW

When the denial of a claim for default interest is based on statutory interpretation, a question of law, our review is de novo. CityBank v. Udhus (In re Udhus), 218 B.R. 513, 515 (9th Cir. BAP 1998).

V. DISCUSSION

Three categories of interest exist in bankruptcy cases: (1) interest accrued prior to the filing of the bankruptcy petition (prepetition interest); (2) interest accrued after the filing of a petition but prior to the effective date of a reorganization plan (pendency interest); and (3) interest to accrue under the terms of a reorganization plan (plan interest). Key Bank Nat'l Ass'n v. Milham (In re Milham), 141 F.3d 420, 423 (2d Cir.), cert. denied, 525 U.S. 872 (1998). The category of interest at issue in this appeal is pendency interest.

Generally, the Code does not provide for pendency interest to creditors, because the filing of the petition usually stops interest from accruing. Id. Section 506(b), however, provides an exception for oversecured creditors:

To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, 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 under which such claim arose.

1 § 506(b). Thus, an oversecured creditor can recover pendency
2 interest as part of its allowed claim, at least to the extent it
3 is oversecured. Rake v. Wade, 508 U.S. 464, 471 (1993),
4 superseded on other grounds by §§ 1123(d) and 1322(e); Ron Pair
5 Enters., Inc., 489 U.S. at 241; In re Hoopai, 581 F.3d at 1099-
6 1101 (pendency period includes from the petition date to the date
7 of plan confirmation as opposed to the “effective date,” unless
8 the plan specifically provides an effective date). Any
9 accumulated pendency interest determined under § 506(b) is added
10 to the allowed claim of an oversecured creditor and then paid
11 pursuant to the terms of the confirmed plan with plan interest
12 determined under § 1129(b) (2) (A) (i) (II). See 4 COLLIER ON BANKRUPTCY
13 ¶ 506.04[2] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.
14 2016).

15 The issue before us is a narrow one: whether the bankruptcy
16 court was required to apply the default rate of interest to Wells
17 Fargo’s claim during the pendency period. While § 506(b) entitles
18 an oversecured creditor to recover pendency interest on its claim,
19 the statute does not specify the rate of interest to be applied.
20 Ron Pair held that a creditor’s entitlement to interest is not
21 dependent upon an agreement or contract between the parties, but
22 it did not address the question of the rate of interest to which a
23 creditor is entitled when an agreement exists. Arguably, this
24 Panel and the Ninth Circuit Court of Appeals have weighed in on
25 this issue.

26 **A. Entz-White is inapplicable.**

27 In the Ninth Circuit case, Entz-White, the chapter 11 debtor,
28 pursuant to a plan and upon confirmation, paid the oversecured

1 creditor the full principal balance owed and accrued interest at
2 the contract rate (the pre-default rate of prime plus 1.5%) under
3 the promissory note, which matured prepetition. The debtor argued
4 that by paying the arrearage on the creditor's obligation, it had
5 cured the default under § 1124 and, thus, the plan could treat the
6 creditor's claim as unimpaired under § 1124(2) (A) and eliminate
7 the consequences of default. The creditor objected to
8 confirmation because the plan did not allow for its claim of
9 default interest (a rate of 18%). The creditor contended the
10 § 1123(a) (5) (G)⁸ "cure" of the debtor's default did not relieve
11 the debtor from paying default interest on the matured note. 850
12 F.2d at 1339-40.

13 The Ninth Circuit rejected the creditor's argument.
14 Recognizing the Code does not define "cure," the court adopted the
15 definition of "cure" adopted by the Second Circuit in Di Pierro v.
16 Taddeo (In re Taddeo), 685 F.2d 24 (2d Cir. 1982), that "[a]
17 default is an event in the debtor-creditor relationship which
18 triggers certain consequences Curing a default commonly
19 means taking care of the triggering event and returning to
20 pre-default conditions. The consequences are thus nullified.
21 This is the concept of 'cure' used throughout the Bankruptcy
22 Code." Entz-White, 850 F.2d at 1340 (quoting In re Taddeo, 685
23 F.2d at 26-27). The court reasoned that "curing" a default
24 returns the parties to pre-default conditions, as if the default
25 had never occurred. Accordingly, because the oversecured

26
27 ⁸ Section 1123(a) (5) (G) provides: "Notwithstanding any
28 otherwise applicable nonbankruptcy law, a plan shall provide
adequate means for the plan's implementation, such as curing or
waiving of any default."

1 creditor's claim was paid in full immediately on the plan's
2 effective date and "cured," the debtor was "entitled to avoid all
3 consequences of the default - including higher post-default
4 interest rates." Id. at 1342.

5 In denying default interest under § 506(b), the Ninth Circuit
6 stated that the more "natural reading" of §§ 506 and 1124 is that
7 "the interest awarded should be at the market rate or at the
8 pre-default rate provided for in the contract." Id. at 1343.

9 Despite this apparent bright-line rule of no default interest in
10 the case of a complete cure, the court stated in a footnote: "We
11 continue, of course, to recognize bankruptcy courts' 'broad
12 equitable discretion' in awarding post-petition interest." Id. at
13 1343 n.9 (citing Bank of Honolulu v. Anderson (In re Anderson),
14 833 F.2d 834, 836 (9th Cir. 1987)).

15 Wells Fargo argues, and Debtor has conceded, that no "cure"
16 within the meaning of Entz-White occurred here. Wells Fargo's
17 claim was expressly impaired and the Plan did not provide for the
18 immediate payment of the outstanding indebtedness to Wells Fargo
19 upon confirmation, as was the case in Entz-White. Rather, under
20 the Plan, the original maturity date of the note was extended for
21 an additional five years; a new amortization schedule was
22 implemented; and new terms were substituted in lieu of the prior
23 obligation. Because Debtor's Plan did not cure the default under
24 the Wells Fargo note, Entz-White is inapplicable. Accordingly, to
25 the extent the bankruptcy court relied upon Entz-White to deny
26 Wells Fargo any pendency interest at the default rate on the basis
27 that the prepetition default was "cured" pursuant to the terms of
28 the Debtor's Chapter 11 plan, it erred.

1 Debtor contends that even if no Entz-White cure occurred
2 here, the bankruptcy court still had authority to modify the
3 default interest under its "broad equitable discretion" as
4 recognized in Entz-White, which the bankruptcy court appropriately
5 employed under § 1129(b)'s "fair and equitable" requirement. The
6 bankruptcy court did not "modify" the default rate; it eliminated
7 it, applying instead the pre-default rate. In its brief analysis,
8 the bankruptcy court did seem to employ the "fair and equitable"
9 standard for plan confirmation as a basis for denying default
10 interest under § 506(b). It appears to have done the same thing
11 in ruling on the Motion to Reconsider. Perhaps this is because
12 Wells Fargo had argued repeatedly that the Plan was not fair and
13 equitable due to Debtor's treatment of Wells Fargo's claim in not
14 paying default interest.

15 In any event, to the extent the bankruptcy court utilized the
16 "fair and equitable" test under § 1129(b) to deny default interest
17 under § 506(b), it erred. Determining pendency interest to be
18 included as part of an allowed secured claim as of the date of
19 confirmation under § 506(b) is an issue separate and distinct from
20 the fair and equitable test for plan confirmation under § 1129(b).
21 Essentially, application of the default rate to pendency interest
22 is a claims issue. The "fair and equitable" test under § 1129(b)
23 is a plan issue and concerns only the treatment of the allowed
24 claim after confirmation. Therefore, the bankruptcy court erred
25 in conflating the fair and equitable standard of § 1129(b) with
26 the elimination of pendency default interest under § 506(b).

27 Finally, we agree with Wells Fargo and interpret the footnote
28 in Entz-White regarding the court's "broad equitable discretion"

1 in awarding postpetition interest as being limited to the very
2 narrow circumstance of a plan which cures and nullifies all
3 consequences of default but fails to establish the appropriate
4 postpetition interest rate under the contract or applicable state
5 law. That is not the case here.⁹

6 **B. Hassen Imports**

7 In a case presenting facts similar to those here, this Panel
8 held that when the debt is not being cured within the meaning of
9 Entz-White, the oversecured creditor is entitled to default
10 interest that reasonably compensates it for losses arising from
11 the default. Hassen Imps. P'ship v. KWP Fin. VI (In re Hassen
12 Imps. P'ship), 256 B.R. 916, 924-25 (9th Cir. BAP 2000),
13 superseded by § 506(b) (2005). In other words, entitlement to
14 contractual default interest is not automatic but may be allowed
15 upon demonstrating that it meets certain requirements. Id. at
16 924.

17 The Panel in Hassen Imports reviewed decisions from other
18 circuits, which presume reasonableness of contractual default
19 interest unless the debtor introduces evidence in rebuttal. In re
20 Hassen Imps. P'ship, 256 B.R. at 924 (citing Southland Corp. v.
21 Toronto-Dominion (In re Southland Corp.), 160 F.3d 1054 (5th Cir.
22 1998) (default interest rate is generally allowed unless the
23 higher rate would produce inequitable result); In re Terry Ltd.
24 P'ship, 27 F.3d 241, 243 (7th Cir.), cert. denied, 513 U.S. 948
25 (1994) ("What emerges from the post-Ron Pair decisions is a

26
27 ⁹ Because we have determined Entz-White is not applicable, we
28 need not determine whether it remains good law, which the parties
dispute.

1 presumption in favor of the [default] contract rate subject to
2 rebuttal based upon equitable considerations.”); Bradford v.
3 Crozier (In re Laymon), 958 F.2d 72, 74 (5th Cir.), cert. denied,
4 506 U.S. 917 (1992); Equitable Life Assurance Soc’y v. Sublett (In
5 re Sublett), 895 F.2d 1381 (11th Cir. 1990)). The Panel then held
6 that the debtor had sufficiently shifted the burden to the lender
7 when the lender’s officer testified that one purpose of the
8 default rate is to encourage timely payment – i.e., it was a
9 penalty as opposed to compensating the lender for any demonstrated
10 losses due to the default. Consequently, the Panel remanded for a
11 determination of whether the default rate reasonably compensated
12 the lender for actual loss. If so, then the bankruptcy court was
13 free to award such interest. 256 B.R. at 925.

14 **C. Future Media**

15 Finally, in Future Media, lender GECC loaned the debtor
16 \$10.5 million with a \$5 million revolving line of credit, secured
17 by a first priority security interest in substantially all of the
18 debtor’s assets. 547 F.3d at 958. The loan agreement provided
19 for a pre-default interest rate of the Index Rate plus 1.5% per
20 annum and a default rate of an additional 2% per annum. An event
21 of default occurred and the loans began to bear interest at the
22 default rate. After additional default events occurred, the
23 debtor filed a chapter 11 bankruptcy case. Id.

24 Subsequently, the debtor needed cash to wind down its
25 operations and prepare for a sale of its assets. GECC agreed to
26 debtor’s use of cash collateral, subject to a stipulation to which
27 the creditors’ committee objected. To stop the accrual of
28 interest on GECC’s unpaid claim, the parties agreed GECC would be

1 paid in full at the default interest rate and that any dispute
2 about default interest would be resolved at a later date. The
3 committee argued that GECC was only entitled to interest at the
4 pre-default rate and that GECC should return the amount it had
5 collected over that. The bankruptcy court, relying on Entz-White,
6 agreed and ordered GECC to return the difference. Id. at 958-59.

7 On appeal, the Ninth Circuit reversed and remanded. Because
8 the only dispute was what type of interest was due to GECC under
9 § 506(b), the court determined that the two relevant issues on
10 appeal were: (1) whether Entz-White applied; and (2) if it did
11 not, how the bankruptcy court should evaluate the viability of the
12 contractual default interest rate on remand. Id. at 959-60.

13 Distinguishing Entz-White on its facts, the court determined that
14 the bankruptcy court had erred in extending the per se rule from
15 Entz-White to the case at bar. Id. at 960. The court found that
16 “[c]reditors’ entitlements in bankruptcy arise in the first
17 instance from the underlying substantive law creating the debtor’s
18 obligation, subject to any qualifying or contrary provisions of
19 the Bankruptcy Code.” Id. (quoting Travelers Cas. & Sur. Co. of
20 Am. v. Pac. Gas & Elec. Co., 549 U.S. 443, 450 (2007)). Such a
21 “qualifying or contrary” provision of the Code was present in
22 Entz-White – the ability to cure a default in a chapter 11 plan
23 under § 1124(2)(A) – but was not present in the instant case –
24 paying the oversecured creditor’s claim in full through a § 363
25 asset sale. Id. In reviewing the Panel’s decision in Casa Blanca
26 Project Lenders, L.P. v. City Commerce Bank (In re Casa Blanca
27 Project Lenders, L.P.), 196 B.R. 140 (9th Cir. BAP 1996),
28 abrogated by Future Media Prods., Inc., 547 F.3d 956 (9th Cir.

1 2008), a similar asset sale case, the Ninth Circuit found that the
2 Panel had improperly extended Entz-White by “transposing” the
3 concept of “cure” from § 1124 and § 365 into § 363. Id. at 961.
4 The court reasoned that in the context of an asset sale, there is
5 no “cure” of events of default. Id.

6 Because Entz-White did not apply, the Future Media court
7 instructed the bankruptcy court on remand to apply the “rule
8 adopted by the majority of federal courts. That rule simply
9 stated is: The bankruptcy court should apply a presumption of
10 allowability for the contracted for default rate, ‘provided that
11 the rate is not unenforceable under applicable nonbankruptcy
12 law.’” Id. (quoting 4 COLLIER ON BANKRUPTCY, ¶ 506.04[2][b][ii] (15th
13 ed. 1996)). To reach its decision in favor of applying default
14 interest under § 506(b), the court relied specifically on two
15 circuit cases: the Fifth Circuit case, In re Laymon, and the
16 Seventh Circuit case, In re Terry Limited Partnership. Id. The
17 court declined GECC’s invitation to create a bright-line rule that
18 a default rate differential of 2% is reasonable. Id. at 962.

19 **D. The bankruptcy court misapplied the law.**

20 Clearly then, Future Media allows oversecured creditors to
21 recover pendency interest at the default rate, at least in some
22 instances. First, the presumption of the contractual default rate
23 applies only to those oversecured creditors whose claims to the
24 higher interest rate are enforceable under nonbankruptcy law.
25 Further, the court’s reliance on Laymon and Terry limited the
26 presumptive rule and gave bankruptcy courts discretion as to
27 whether the default rate will be applied. Laymon and Terry
28 expressly allowed bankruptcy courts to assess whether the higher

1 default rate was reasonable or otherwise equitable under the
2 circumstances. See In re Laymon, 958 F.2d at 75 (allowing default
3 rate interest depending on "the equities involved in [the]
4 bankruptcy proceeding"); In re Terry Ltd. P'ship, 27 F.3d at 243
5 (presumption in favor of contractual default rate is "subject to
6 rebuttal based on equitable considerations"). That is essentially
7 the rule the Panel set forth in Hassen Imports and Casa Blanca.
8 However, we recognize that to the extent these cases placed the
9 burden on the creditor to establish that the default rate
10 reasonably compensated the creditor for its losses arising from the
11 default, Future Media has overruled those decisions and has
12 shifted the burden to the debtor to demonstrate the rate's
13 unreasonableness, or that it is not enforceable under
14 nonbankruptcy law.

15 One could arguably interpret the rule favoring default
16 interest set forth in Future Media as applying only to those cases
17 involving an asset sale under § 363. Although that case did not
18 involve a confirmed chapter 11 plan as did Entz-White, the real
19 focus in Future Media was the fact that no "cure" under
20 § 1124(2)(A) was being effected. Further, the court did not
21 appear to limit its holding to § 363 asset sale cases, even though
22 it did make the distinction between sale cases and cases involving
23 a confirmed chapter 11 plan. We do not see any reason why Future
24 Media would not apply in this case, where the plan does not
25 provide for a cure.

26 Accordingly, the bankruptcy court was required to apply the
27 presumptive rule that Wells Fargo was entitled to the default rate
28 for its pendency interest, provided that such rate is not

1 unenforceable under Nevada law. Nothing suggests the bankruptcy
2 court applied this rule. We decline Wells Fargo's invitation to
3 make any findings as to what default rate may be appropriate in
4 determining the pendency interest in this appeal.

5 However, the presumptive rule for default interest is also
6 subject to rebuttal based on equitable considerations. The
7 bankruptcy court made no such "equity" findings here, other than
8 finding that denying default interest was "fair and equitable"
9 under § 1129(b), which we have concluded was error. Contrary to
10 Debtor's position, and for the reasons stated above, § 1129(b) is
11 not the "qualifying or contrary provision" of the Code the Future
12 Media court was referencing.

13 **VI. CONCLUSION**

14 The bankruptcy court appears to have denied default interest
15 on either the erroneous basis that even though no cure was
16 effected in the Plan, Entz-White applied, or that it could deny
17 such interest on the basis that the Plan allowing for the
18 nondefault rate was fair and equitable under § 1129. Either way,
19 the court applied an incorrect standard of law. It also did not
20 articulate any findings as to the equitable considerations it
21 applied, if any. Accordingly, we REVERSE and REMAND the
22 Confirmation Order with respect to the bankruptcy court's denial
23 of default interest so that it can apply the proper rule under
24 Future Media and make the appropriate findings.