# THE VALUE OF BEING REJECTED: DETERMINING THE APPROPRIATE DISCOUNT RATE FOR REJECTION DAMAGES

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*When a debtor terminates a contract in bankruptcy, the counterparty should be compensated for the resulting damages. However, damages for the loss of future payments under the contract are discounted to present value because the counterparty (now creditor) is receiving a lump sum today, meaning it should not be compensated for the risk and time value of a stream of future payments. The few cases that have ruled on the appropriate discount rate have based that rate on either (a) the debtor's prepetition interest rates or (b) the creditor's weighted average cost of capital (WACC). This article discusses the cases and the two approaches, and argues that using the creditor's WACC is a more precise way for courts to capture risk in most cases.*

I. BACKGROUND

Section 502(b) of the Bankruptcy Code provides that courts shall determine the amount of a claim "as of the date of the filing of the petition."[1] This includes claims for future payments a party did not receive and/or future losses it incurred due to a rejected (*i.e.*, terminated) executory contract.[2] Courts interpret this provision to require a determination of the "present value" of the claim as of the petition date.[3]

As the name implies, calculating the present value of a claim is meant to convert the value of future payments a party was supposed to receive under, or losses it will incur due to, a rejected contract into an equivalent value as of the date of the calculation.[4] This is done by dividing each future payment by a discount rate that grows exponentially the further in the future the payment is made.[5] The discount rate is therefore the central component of the present value calculation. The higher the discount rate, the lower the resulting net present value. In payments that will be made far in the future, relatively small changes in the discount rate significantly impact their present value. For example, assuming a 5% discount rate, the net present value of a 30-year stream of $1,000,000 in annual payments is approximately $15.6 million. Assuming a 7% discount rate, it is approximately $12.5 million.[6]

Courts consider a variety of factors when determining the appropriate discount rate, but generally, the rate is meant to reflect two

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1.      11 U.S.C. § 502(b) (2021).

2.      *See id.* § 502(g).

3.      *E.g., In re* CSC Indus., Inc., 232 F.3d 505, 508 (6th Cir. 2000); *In re* CF & I Fabricators of Utah, Inc., 150 F.3d 1293, 1300 (10th Cir. 1998).

4.      Robert M. Lloyd, *Discounting Lost Profits in Business Litigation: What Every Lawyer and Judge Needs to Know*, 9 TRANSACTIONS: TENN. J. OF BUS. L. 9 (2007).

5.      *Id.* at 12-13.

6.      *Id.* at 12-16.

principles: (1) the time value of money (*i.e.*, a smaller amount could be invested today and yield the same amount in the future); and (2) the risk associated with a particular investment (*i.e.*, the higher the risk, the higher the return required to compensate for the risk, and generally longer-term investments carry higher risk than shorter-term investments because more is unknown).[7]

## II. CASELAW

There is no mandated method of calculating the present value of rejection damages,[8] and courts have exercised considerable discretion in determining the appropriate discount rate. For instance, courts will often consider expert testimony advocating for the use of precise numbers but ultimately choose their own number.[9] Nevertheless, the handful of cases with substantive discussions on the issue generally agree on two principles of risk that should be reflected in the discount rate. First, the relevant time for determining the risk is the time at which the contract was entered into.[10] Second, the rate should reflect the risk associated with the particular debtor in question.[11] These principles

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7. *E.g.*, *In re* Mirant Corp., 332 B.R. 139, 156 (Bankr. N.D. Tex. 2005). *See also* Lloyd, *supra* note 4, at 19-23 (explaining the concept of "risk" as the term is used in financial theory, which can be thought of as volatility, *i.e.*, "the likelihood that the actual outcome will be close to the expected value . . . .").

8. *In re* Fed.-Mogul Glob., Inc., 330 B.R. 133, 162 (Bankr. D. Del. 2005) (citing St. Louis Sw. Ry. Co. v. Dickerson, 470 U.S. 409, (1985)).

9. *E.g.*, Bench Ruling at 22, *In re* MSR Resort Golf Course, LLC, No. 11-10372 (Bankr. S.D.N.Y. Aug. 31, 2012) (No. 1397) (rejecting rates proposed by debtors (13.6%-14.6%) and creditor (8%), and picking 11.69% based on creditor's weighted average cost of capital plus 1% for the risk associated with the debtor); *In re* Mirant, 332 B.R. at 159 (rejecting rates proposed by debtors (14.25%) and creditor (1.07% to 5.14%), and picking a rate of 8% after looking to debtors' prepetition unsecured interest rates of 7.4%-9.125%).

10. *In re* Mirant, 332 B.R. at 158-159 ("the risk to be taken into account is the risk of non-performance *at the time* Debtors contracted with [the creditor]") (emphasis added); *In re* B456 Systems, Inc., No. 12-12859, 2017 WL 6603817, at *25 (Bankr. U.S.D. Dec. 22, 2017); Bench Ruling at 17-18, *In re* MSR, No. 11-10372 (No. 1397). The author is aware of one exception to this general principle, where a court found the relevant time for determining risk to be when it was valuing the claim (*i.e.*, after the petition date). *But see In re* USGen New England Inc., 429 B.R 437, 490 (Bank. D. Md. 2010) [hereinafter *USGen II*] *aff'd sub. nom.* Trans Canada Pipelines Ltd. v. USGen New England, Inc., 458 B.R. 195 (D. Md. 2011) (applying a risk-free rate to a claim against a solvent debtor for a claim arising out of the debtor's rejection of gas transportation contract with a pipeline operator and relying on Kucin v. Devan, 251 B.R. 269, 273 (D. Md. 2000) which found that the benefits in a non-executory retirement "are a legal certainty and need not be further discounted for the risk of nonpayment"); *see also In re* USGen, 429 B.R. at 490-91 (stating that the debtor "is a solvent bankruptcy estate and [the creditor's] claim, like all claims, will be paid in full with interest according to [debtor]'s confirmed plan"). *See In re* USGen New England, Inc., No. 03-30465, 2007 WL 1074055, at *4 (Bankr. D. Md. Jan. 23, 2007) [hereinafter *USGen I*] (demonstrating the discretion courts exercise when determining the appropriate discount rate) (following *In re* Mirant and using the interest rate under the debtor's prepetition credit facility as the discount rate).

11. *In re* Mirant, 332 B.R. at 157-58; *In re* B456 Systems, 2017 WL 6603817, at *24; *In re* M Waikiki LLC, No. 11-02371, 2012 WL 2062421, at *4 (Bankr. D. Haw. June 7, 2012) (incorporating risk associated with debtor into discount rate); Bench Ruling at 17-18, *In re* MSR, No. 11-10372 (No. 1397).

reflect the idea that the creditor agreed to bear a certain amount of risk by entering into a contract with a particular debtor at a particular time.

Where the cases diverge is on the underlying basis for the discount rate. On the one hand, three cases (the Interest Rate Cases) base the discount rate on the interest rates charged on the debtor's prepetition debt: *In re Mirant*[12], along with subsequent cases that relied heavily on the reasoning therein, *In re USGen New England* (*USGen I*)[13] and *In re B456 Systems*[14] On the other hand, two cases (the WACC Cases) base the discount rate on the creditor's weighted average cost of capital: [15] *In re MSR Resort*[16] and *In re M Waikiki*[17] As explained below, each of the two approaches reflects a different theory of how risk should be captured in the discount rate. The approach adopted by the court can lead to significantly different discount rates and therefore significantly different claim amounts.

## A. The Interest Rate Cases

In *In re Mirant*, the debtors rejected an agreement with the owner of a pipeline, Kern River Gas Transmission Company, to pay for transmission capacity for a period of 15 years.[18] Under the agreement, the debtors, who were merchant energy providers, were required to pay for the capacity regardless of whether it was used.[19]

Within a few months of the beginning of the term of the contract, the debtors filed for Chapter 11 bankruptcy.[20] Kern River filed a claim for rejection damages, which represented the total remaining payments due under the contract, less mitigation, discounted to present value.[21] The discount rates it proposed ranged from 1.07% to 5.14%, which were derived from the federal judgment rate, the FERC refund rate, and the interest rate on debt issued by Kern River.[22] The debtors objected,

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12. *In re* Mirant, 332 B.R. at 160.

13. *USGen I*, *supra* note 10, at *8.

14. *In re* B456 Systems, 2017 WL 6603817, at *25.

15. A firm's WACC is the weighted average cost of its combined equity and debt, and is calculated by adding the cost of the firm's equity (multiplied by the ratio of its equity to its total debt and equity) to the cost of its debt (multiplied by the ratio of its debt to its total debt and equity). *See generally* Lloyd, *supra* note 4, at 32-43 (discussing WACC, the financial theory, and the reasons it us used to discount damages in detail).

16. Bench Ruling at 18, *In re* MSR Resort Golf Course, LLC, No. 11-10372 (Bankr. S.D.N.Y. Aug. 31, 2012) (No. 1397).

17. *In re* M Waikiki LLC, No. 11-02371, 2012 WL 2062421, at *4 (Bankr. D. Haw. June 7, 2012).

18. *In re* Mirant Corp., 332 B.R. 139, 145 (Bankr. N.D. Tex. 2005).

19. *Id.*

20. *Id.* at 145-46.

21. *Id.* at 146.

22. *Id.* at 157.

arguing that a rate of 15.92% should be used to properly reflect the risk of lending to an entity *already* in bankruptcy.[23]

The court rejected Kern River's proposed federal judgment rate and the FERC refund rate as risk-free rates that only provided compensation for the passage of time.[24] The court also rejected the interest rate on Kern River's debt, noting that "it would be apt for assessing the correct discount rate on an obligation *from* Kern River than one *to* Kern River" (but noting this rate was "closer to the mark").[25] The Court also rejected the discount rate proposed by the debtors, stating that the risk that should be taken into account in determining the interest rate should be the risk of non-performance at the time they entered into a contract with the debtors and not the non-performance by a bankrupt entity.[26]

In determining the appropriate rate, the court stated that the discount rate should reflect the "risk of non-performance faced by Kern River before bankruptcy."[27] However, the court did not have "extensive evidence" on what that rate should be.[28] Accordingly, the court looked generally to the interest rates on the debtors' prepetition debt, which ranged from 7.4% to 9.125%.[29] The court found these rates "provided some guidance" and settled on 8%, which it found "will fairly compensate Kern River but will not overcompensate it at the expense of all other similarly situated creditors."[30] In doing so, the court explained its view of the underlying goal of discounting:

> The purpose of application of the discount rate is to reduce the Claim to an amount consistent with the allowed amounts of other claims. Just as 11 U.S.C. § 502(b)(2) provides for disallowance of a claim to the extent of unmatured interest, including an original issue discount…to ensure that a creditor is not compensated for time passage (and the concomitant risk) that will never be faced, so, too, a discount rate must be applied to a claim for rejection damages to compensate for the absence of future risk of non-performance.[31]

In *USGen I*, a case that had similar facts but little additional reasoning, the court applied *In re Mirant* to discount the damages arising from the debtor's rejection of a transmission capacity contract on the claimant's pipeline.[32] The court used the interest rate on the debtor's

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23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 158.
27. *Id.*
28. *Id*. at 158-59.
29. *Id.*
30. *Id*. at 159.
31. *Id*. at 158 (citations omitted).
32. *USGen I*, *supra* note 10, at *23.

credit facility in the same year the contract was entered into as the discount rate.[33]

In *In re B456 Systems*, the debtors rejected a contract with Daimler pursuant to which the debtors would manufacture and supply car batteries to Daimler.[34] Daimler filed a proof of claim alleging damages equal to the difference between the price of the batteries under the contract and the replacement batteries it will acquire as a result of the debtors' rejection.[35] The debtors filed an objection to the amount.[36] Daimler's expert argued the risk-free rate on the petition date should be used (2.51%).[37] The debtors' expert, however, argued that the discount rate should account for the risk of the debtors' non-performance and used the interest rate on the debtors' loans at the time the contract was entered into to arrive at a rate of 13.71%.[38] The court ultimately rejected both proposed rates to await further analysis.[39] However, citing *In re Mirant*, the court concluded that "an appropriate discount rate must be determined based upon the debtors' weighted average cost of debt as of the date of the [contract]."[40]

### B. The WACC Cases

In *In re MSR Resort*, Hilton filed a claim for damages based on the debtor's rejection of three management agreements with Hilton.[41] Under the management agreements, Hilton was entitled to, among other things, a fixed fee based on revenue and an incentive fee if the hotels exceeded certain performance thresholds.[42]

The court evaluated expert testimony on the rate that should be used to discount the future expected net profits to present value.[43] Both sets of experts applied a discount rate that was based on Hilton's WACC.[44] Hilton's expert argued for an 8% discount rate.[45] The expert argued this was appropriate because, among other things, it was the WACC Hilton used to value its own management contracts.[46] The expert pointed to several other sources, including Bloomberg, that arrived at a

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33.    *Id.*
34.    *In re* B456 Systems, Inc., No. 12-12859, 2017 WL 6603817, at *2 (Bankr. U.S.D. Dec. 22, 2017).
35.    *Id.*
36.    *Id.*
37.    *Id.* at *24.
38.    *Id.*
39.    *Id.* at *25.
40.    *Id.*
41.    Bench Ruling at 3, *In re* MSR Resort Golf Course, LLC, No. 11-10372 (Bankr. S.D.N.Y. Aug. 31, 2012) (No. 1397).
42.    *Id.* at 5.
43.    *Id.* at 4.
44.    *Id.* at 19-20.
45.    *Id.* at 10.
46.    *Id.* at 19.

similar WACC for Hilton.[47]  He argued that the risk associated with the contracts was minimal and, therefore, his proposed WACC should be the discount rate.[48]

The debtors' expert argued that higher discount rates should be used: 14.6% for one hotel and 13.6% for the other two.[49]  The expert argued these numbers should be used because: (a) they incorporated a higher beta [50] (than Bloomberg's WACC did, for example), which was appropriate because Hilton's portfolio was riskier than the market as a whole; and (b) they accounted for property-specific risks at each of the hotel locations.[51]

The court found that Hilton's WACC was a good "starting point" but should be adjusted for debtor-specific risk.[52]  The court began by using a WACC on Hilton's form 10-K from the same year it entered into the contracts (10.69%), which was consistent with the 1.29 beta provided by the debtors' expert.[53]  The court then adjusted the beta upward by one percent for two of the properties and by two percent for one of the properties to account for the specific risk associated with each property.[54]

In *In re M Waikiki*, the debtor rejected an up-to-50-year management agreement with Marriott and filed a motion to estimate Marriott's rejection damages claim for purposes of voting and feasibility.[55]  The management agreement provided that Marriott would receive a management fee equal to a fixed percentage of revenue and an incentive fee equal to a fixed percentage of operating profits that exceeded a certain threshold.[56]  After less than a year of opening, during which the hotel suffered an operating loss, the debtor removed Marriott's employees from the hotel, inserted a new management company, and filed for bankruptcy.[57]

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47.   *Id.*

48.   *Id.*

49.   *Id.* at 19-20.

50.   Beta is central to determining the equity component of the WACC calculation.  The capital asset pricing model (CAPM) is typically used to derive a firm's cost of equity, which in turn uses beta as a measure of how much a firm's equity fluctuates with the market.  It is often referred to as the "risk premium."  A beta of 1 implies that a stock has the same volatility as the market as a whole, and a beta of 2, for example, implies twice the amount of volatility as the market.  *See generally* Lloyd, *supra* note 4, at 37-43 (discussing how Bloomberg's WACC calculation used a beta of 1, while the debtor's expert argued a beta of 1.29 should be used).

51.   *Id.* at 20.

52.   *Id.* at 18.

53.   *Id.* at 21.

54.   *Id.* at 22.

55.   *In re* M Waikiki LLC, No. 11-02371, 2012 WL 2062421, at *1 (Bankr. D. Haw. June 7, 2012)

56.   *Id.*

57.   *Id.* at *2.

In determining the present value of Marriott's claim, the court applied two discount rates for the management fee to different parts of the term of the contract.[58] For the first seven years of the contract, the court used a 7.5% discount rate.[59] The court arrived at the discount rate by adding 1% to Marriott's WACC (6.5%) to account for some risk to reflect that a portfolio carries less risk than one hotel contract, but also noting that the risk was minimal during this period because Marriott was guaranteed a percentage of revenue for the first seven years (*i.e.*, irrespective of profitability).[60] For the remaining 43 years, the court used a 13.5% discount rate to account for the additional risk of the debtor terminating the contract due to failure to meet certain metrics (because the debtor had that right after the seventh year).[61] The court also applied a 13.5% discount rate for the incentive fees for the full 50 years of the contract, noting that the poor performance of the hotel in the months before it filed for bankruptcy demonstrated the high risk that Marriott would not earn the incentive fees.[62]

III. ANALYSIS OF CASE LAW

### A. Overview

A debtor's interest rate and a creditor's WACC each reflect a different view of how much risk a counterparty agreed to assume by contracting with the debtor. On the one hand, the Interest Rate Cases "reduce the claim to an amount consistent with the allowed amounts of other prepetition unsecured claims."[63] These courts use the cost of borrowing based on the theory that the interest rate represents the "market's assessment of risk" of contracting with the debtor.[64] Implicit in this one-size-fits-all approach is that all creditors took on substantially the same level of risk regardless of whether they were providing financing to the debtor *or* entering into a contract with the debtor.[65]

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58. *Id.* at *4-5.

59. *Id.* at *4.

60. *Id.*

61. *Id.* at *5.

62. *Id.*

63. *In re* B456 Systems, Inc., No. 12-12859, 2017 WL 6603817, at *24 (Bankr. U.S.D. Dec. 22, 2017); *see also In re* O.P.M. Leasing Serus., Inc., 56 B.R. 678, 681 (Bankr. S.D.N.Y. 1986) (although discount rate was not disputed, Chapter 11 Trustee applied a uniform discount rate to all claims and court stated that discounting is "mandated by the Code and treats [creditor] on par with other similarly classified general unsecured creditors.").

64. *See In re* Mirant Corp., 332 B.R. 139, 159 n.54 (Bank. N.D. Tex. 2005).

65. *Id.*

On the other hand, the WACC Cases use a claimant's cost of capital as the basis for the discount rate.[66]  This means courts determine the present value of the claim in the same way the creditor would have valued its initial investment, including the risk inherent in that investment.  A creditor's WACC, in addition to serving as the discount rate for calculating a creditor's own net present value, is the hurdle rate it uses "to evaluate investment opportunities, as it is considered to represent the [creditor's] opportunity cost."[67]  The creditor would only enter into a contract (*i.e.*, investment opportunity) if the present value of the contract, which is arrived at based on an assessment of risk, is greater than the hurdle rate.  Therefore, these cases capture the risk a particular creditor anticipated it would assume by entering into a contract with the debtor, which may be a very different level of risk than another contract counterparty anticipated.  At the same time, the WACC cases, like the Interest Rate Cases, take into account debtor-specific risk: the courts adjusted the WACC upward to account for the risk of contracting with the debtor because the risk in Hilton's or Marriott's WACC represents the risk of their entire diversified portfolios (*i.e.*, having one contract with one counterparty is theoretically more risky than a diversified portfolio of contracts with multiple counterparties).[68]

### B. The Better View

The WACC Cases' approach represents a more precise method of capturing risk that takes into account the particular context of the executory contract and the particular debtor.  *In re M Waikiki* and *In re MSR Resort* demonstrate this point particularly well because the courts were valuing management contracts that debtors had with international hotel chains.  Each hotel chain held a portfolio consisting of a large number of such contracts.  Each contract within the portfolio can be thought of as an investment, and Marriott or Hilton would not have made these investments if the anticipated returns did not exceed their internal hurdle rate costs of capital.  Similarly, the creditor WACC would also be appropriate for a pipeline owner that relies on future revenue from multiple capacity contracts (like those in *In re Mirant* and *USGen I*) and uses its WACC to calculate how much to charge on each capacity contract.

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66.     Bench Ruling at 18, *In re* MSR Resort Golf Course, LLC, No. 11-10372 (Bankr. S.D.N.Y. Aug. 31, 2012) (No. 1397); *In re* M Waikiki LLC, No. 11-02371, 2012 WL 2062421, at *4-5 (Bankr. D. Haw. June 7, 2012).

67.     CFI Team, *WACC*, CFI, https://corporatefinanceinstitute.com/resources/valuation/what-is-wacc-formula/ (last updated Sept. 27, 2023).

68.     While both these cases adjusted WACC upward to reflect that a diversified portfolio of contracts reduces risk, it is conceivable that a court could adjust the WACC downward.  For example, a creditor may rely on only a few contracts for its entire revenue stream (*i.e.*, not a sufficient number for diversification to meaningfully reduce overall risk) and the contract with the debtor may have carried the least amount of risk.

The WACC approach also still achieves the core bankruptcy policy objective of treating similarly situated creditors similarly.[69]   Simply discounting future claims to present value is how this objective is achieved because it makes future unliquidated claims comparable to claims that are liquidated today.  The Bankruptcy Code does not suggest that this policy should translate into discounting all claims by the *same* discount rate.[70]  Indeed, using a uniform rate for all creditors may result in inequitable treatment because claims of creditors who agreed to assume a low amount of risk may be discounted to reflect far higher amount of risk, and vice versa.

Furthermore, comparing the interest rate charged on unsecured debt to the discount rate on a rejection damages claim for lost profits is an apples-to-oranges comparison of risk.  The risk a typical lender accepts when lending to a company, which is central to calculating the resulting interest rate, is the risk of the debtor's non-repayment.  The risk a contract counterparty accepts, however, also includes a variety of other risks specific to the contract.  Prior to — and particularly in — bankruptcy, these risks may be greater (*e.g.*, if it is a non-competitive contract or one associated with a poor-performing segment of the debtor's business) or smaller (*e.g.*, when the contract is critical to a debtor's going concern and will almost certainly be assumed).

Moreover, as a practical matter, depending on the number and type of creditors and their treatment under a reorganization plan, using a uniform prepetition borrowing rate to discount all claims may do little to ensure equal treatment of unsecured creditors.  One such scenario is where a large rejection damages claim dwarfs – and is separately classified from – other unsecured claims.  In this scenario, trade creditors can be separately classified and be paid in full; unsecured bondholders can also be separately classified and receive equity in the reorganized company, while the rejection damages claimant will receive a small percentage recovery on the effective date that may very well prove to be less valuable than what other unsecured creditors are receiving.[71]  Indeed, the WACC Cases exemplify this fact pattern.  The damages claims from the hotel management contracts were far larger than the remaining combined unsecured claims, were separately classified, and were anticipated to receive different recoveries than other unsecured claimants.[72]

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69.    *In re Mirant*, 332 B.R. at 158-59.

70.    *In re Mirant*, 332 B.R. 139, 158 n.52 (Bank. N.D. Tex. 2005) (relying on the overarching bankruptcy goal that similarly situated creditors should be treated equally).

71.    *See* Jesse M. Fried, *Executory Contracts and Performance Decisions,* 46 Duke L.J. 517 (1996).

72.    Marriott Int'l., Inc. and Marriott Hotel Serv., Inc.'s Proposed Disclosure Statement for the Chapter 11 Plan of Reorganization of M Waikiki LLC at 19-20, *In re* M Waikiki, No. 11-02371 (Bankr. D. Haw. Feb. 27, 2012) (No. 1577) 2012 WL 2062421; Disclosure Statement for the First Amended

*C. The Better View: Sometimes Just Another View?*

While using a creditor's WACC to discount future payments is the most appropriate approach in many cases, in some cases, it is arguably only a proxy that is not any more precise than the interest rate. To use *In re B456 Systems* as an example, WACC may not be particularly well-suited for discounting the additional cost a car manufacturer will incur under a battery supply agreement because its original contract was rejected. Because batteries are only one part that Daimler needed to achieve its ultimate source of revenue (*i.e.*, manufacturing automobiles), it is unlikely Daimler relied heavily on its WACC in deciding whether to contract with the particular debtor. Rather, Daimler likely looked to other factors such as the market price of batteries and the manufacturer's reliability and quality control. While the cost of batteries ultimately affects Daimler's profitability and cash flows, Daimler will manufacture cars regardless of the price of batteries because manufacturing cars will still be a profitable business that overcomes Daimler's WACC "hurdle rate" (in part because it will probably pass some or all of any additional battery prices to its customers). Accordingly, in that case, and absent a more scientific measure, the interest rate on the manufacturer's debt is an acceptable approximation of risk.

## IV. CONCLUSION

Determining the appropriate discount rate for a rejection damages claim will likely continue to be a fact-specific question over which bankruptcy courts will, and should, exercise considerable discretion. Nevertheless, the WACC Cases illustrate how courts can more precisely achieve a central goal of discounting — to reduce damages to present value by the amount of risk a creditor agreed to assume but will no longer be assuming. Moreover, adjusting the WACC to account for debtor-specific risk achieves the policy goal of treating similarly situated creditors similarly by capturing the same risk that all creditors agreed to assume – the risk of contracting with the debtor.

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Joint Plan of Reorganization of MSR Resort Golf Course LLC, *et al.*, Pursuant to Chapter 11 of the Bankr. Code at 49, *In re* MSR Resort Golf Course LLC, No. 11-10372 (Bankr. S.D.N.Y. Sept. 25, 2012).