

No. _____

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

DPWN HOLDINGS (USA), INC.,
Plaintiff-Respondent,

v.

UNITED AIR LINES, INC. d/b/a UNITED AIRLINES; UNITED
CONTINENTAL HOLDINGS, INC., f/k/a UAL CORP.,
Defendants-Petitioners.

On Petition for Interlocutory Appeal from an Order of the
United States District Court for the Eastern District of New York

John Gleeson, District Judge
Case No. 1:11-cv-564

PETITION FOR INTERLOCUTORY APPEAL

Richard J. Favretto
John Roberti
Charles A. Rothfeld
Michael B. Kimberly
Phillip R. Dupré
*Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000*

Counsel for Defendants-Petitioners

CORPORATE DISCLOSURE STATEMENT

Petitioner United Air Lines, Inc. is the wholly owned subsidiary of petitioner United Continental Holdings, Inc., a publicly held company. No publicly held company owns 10 percent or more of United Continental Holdings, Inc.

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INTRODUCTION

This interlocutory appeal presents an important and recurring question concerning what steps a debtor must take to obtain discharge of its debt in bankruptcy. Plaintiff-respondent DPWN Holdings (USA), Inc. (“DHL”) alleges that defendants-petitioners United Air Lines, Inc. and United Continental Holdings, Inc. (“United”) participated in a global conspiracy to fix the price of transporting air cargo. But almost all of DHL’s allegations concern conduct occurring before February 1, 2006, when all of United’s debts to claimants like DHL were discharged in bankruptcy. DHL had actual notice of United’s bankruptcy proceedings and actively participated in them, but asserts that it was unaware of its antitrust claim until after the effective date of United’s confirmed plan of reorganization. Insofar as DHL’s antitrust claim is based on conduct taking place prior to confirmation, it has been discharged and is now statutorily barred. *See* 11 U.S.C. §§ 524(a)(2), 1141(d)(1).

In nevertheless allowing DHL’s pre-confirmation claim to survive dismissal, the district court in this case found that discharging DHL’s antitrust claim would violate due process. A1-A26.¹ Focusing on DHL’s allegation that the claim was fraudulently concealed, the court concluded that, “where a debtor is aware of certain claims against it due to information uniquely within its purview, due process requires that it notify claimants” not just of the

¹ The district court’s order, together with its certification of the order for immediate appeal, are attached as an appendix, which we cite as A#.

pendency of its bankruptcy and the relevant deadlines, but also “of the *character* of those claims prior to any discharge.” A23 (emphasis added).

This Court should grant permission to appeal. As the district court recognized in certifying its order for immediate review, the question whether the Due Process Clause requires knowing debtors to notify unknowing creditors not only of the deadline for filing claims, but also of the *nature* of their potential claims, is a “particularly difficult” issue “of first impression for the Second Circuit.” A33. It also is a controlling question of law whose resolution by this Court would materially advance the litigation. Indeed, a reversal on appeal would likely “terminate the case at a relatively early stage.” *Id.*

The district court’s resolution of the question also is a matter of great practical significance. It is inconsistent with settled bankruptcy law; departs from the universal bankruptcy practice of *not* giving creditors notice of the nature of their claims; leaves debtors in a state of uncertainty about their obligations; invites manipulation by potential creditors; and, by making discharge of many claims a practical impossibility, undermines the finality that is essential to the effective functioning of the bankruptcy system. Interlocutory review of the order denying United’s motion to dismiss is warranted.

QUESTION PRESENTED

Whether the Due Process Clause requires a debtor reorganizing under Chapter 11 of the bankruptcy code to notify its potential creditors not only of

the pendency of the bankruptcy proceedings and the deadline to file claims, but also of the nature of their potential claims, when the nature of those claims is alleged to be within the debtor's, but not the creditor's, knowledge.

RELIEF SOUGHT

United seeks immediate review and reversal of the district court's order denying United's motion to dismiss and, specifically, its holding that DHL's claim, insofar as it is based upon pre-confirmation conduct, is not discharged because United failed to inform DHL of the nature of the claim.

BACKGROUND

A. United's bankruptcy

On December 9, 2002, more than eight years before the commencement of this suit, United filed a petition for relief under Chapter 11 of the bankruptcy code. Am. Compl. ¶ 154 (dkt. 8). United identified and sent notices and claim forms to more than 300,000 potential creditors, and more than 44,000 proofs of claim were filed against United's estate. DHL was among those identified as a potential creditor. It is undisputed that DHL received actual notice of United's bankruptcy and all relevant deadlines, and actively participated in the bankruptcy proceedings.

On January 20, 2006, the bankruptcy court confirmed United's reorganization plan, which became effective February 1, 2006. Am. Compl. ¶ 160. All general, unsecured claimants—those, for example, with tort

claims against United based on pre-petition conduct—received stock in the reorganized company that was valued in United’s disclosures at between 4 and 8 cents on the dollar. Dist. Ct. Dkt. No. 20-9, at 46. United cancelled all of its prepetition stock, rendering it worthless (Dist. Ct. Dkt. No. 20-8, at 41), and its employees saw their pension plans terminated and significant reductions in compensation and benefits.

B. The complaint

DHL’s complaint in this case alleges that various air carriers, including United, engaged in a conspiracy to fix cargo fuel surcharges. Am. Compl. ¶¶ 51-95. It describes Lufthansa (a German airline and airfreight carrier) as the ringleader of the conspiracy. *E.g., id.* ¶¶ 67-69, 83-87. DHL alleges that in January 2002 the conspirators implemented parallel methods for setting surcharges. *Id.* ¶ 64. United is alleged to have introduced a fuel surcharge method six months later. *Id.* ¶ 66. An MDL proceeding against the other carriers is pending before the district court, but this is the *only* case in which United is named as a defendant. Although United vigorously denies the allegations in the complaint (and, unlike other carriers, was not subject to U.S. government enforcement action regarding the conspiracy), the details of the conspiracy and United’s alleged role in it are not material to this appeal.

The complaint alleges many activities of other carriers (and some of United) that occurred *prior* to February 1, 2006, the effective date of United’s

reorganization. The only conduct the complaint attributes to United after that date, however, is a single meeting between an unidentified United employee and an employee of one other airline taking place on or around May 1, 2006. *See* Am. Compl. ¶ 91. The complaint offers almost no detail concerning the alleged meeting. Apart from that, DHL conclusorily asserts that United “remained a participant in the cartel” and “engaged in affirmative overt acts in furtherance of the conspiracy” even “[a]fter the bankruptcy court approved the plan of reorganization on January 20, 2006” (*id.* ¶ 160), and that United’s “post-January 20, 2006, conduct . . . is sufficient standing alone to constitute an independent conspiracy to fix prices” (*id.* ¶ 179). DHL alleges no specific conduct or other factual detail to substantiate these conclusions.

C. The order denying United’s motion to dismiss

United moved to dismiss DHL’s antitrust suit, arguing that DHL’s antitrust claim, insofar as it is predicated on conduct taking place prior to February 1, 2006, is barred by the bankruptcy court’s confirmation of United’s reorganization plan, which discharged the claim. *See* 11 U.S.C. § 1141(d).²

The district court denied the motion. Although recognizing that “DHL, a United customer, received actual notice of United’s bankruptcy proceedings, including the key procedural events leading up to the confirmation of

² United also argued the complaint should be dismissed under the statute of limitations and because the complaint’s allegations are implausible. Those aspects of United’s motion are not raised in this petition.

United’s reorganization plan and the discharge of all its debts” (A15-A16), the court determined that holding DHL’s claim discharged by United’s bankruptcy would violate DHL’s due process rights. In reaching that conclusion, the court reasoned that “a debtor should not be able to obtain the final discharge of all claims against it without giving [the creditor] any indication of *what* those claims might be.” A17 (emphasis added). That is because, according to the court, “an unknowing victim of a debtor’s secret unlawful conduct [is] not protected by . . . notice of the debtor’s bankruptcy proceedings” where the victim has no “practicable means of identifying what claim he might have.” *Id.* On the assumption that “DHL could not have discovered its antitrust claim against United” prior to “the confirmation of United’s reorganization plan,” the district court concluded that “due process require[d United to] notify [DHL] of the character of [its antitrust] claims prior to any discharge.” A23-A24. Because United failed to do so, the court held DHL’s pre-confirmation antitrust claim not discharged.

The district court subsequently certified its order for interlocutory appeal under 28 U.S.C. § 1292(b). The district court recognized that the due process question is a “particularly difficult” and controlling issue of law not previously addressed by this Court, and that “an immediate appeal would materially advance the ultimate disposition the case.” A32-34.

REASONS FOR PERMITTING THE APPEAL

This is precisely the kind of case that Section 1292(b) was meant to address: it involves a “pure question of law” that this Court can “decide quickly and cleanly,” and immediate appellate review “could head off protracted, costly litigation” because the question is “indeed a *controlling* issue.” *Ahrenholz v. Bd. of Trustees of Univ. of Ill.*, 219 F.3d 674, 677 (7th Cir. 2000). The courts of appeals have recognized a “duty . . . to allow an immediate appeal to be taken when the[se] statutory criteria are met,” as they are here. *Id.* And immediate appellate review is especially appropriate in this case because it would “assure the prompt resolution of [a] knotty legal problem[]” (*Weber v. United States*, 484 F.3d 154, 159 (2d Cir. 2007)), that involves a matter of “special consequence” (*Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 607 (2009)) to bankruptcy practice throughout the Nation. Absent immediate review by this Court, the law will remain in a state of confusion, and participants in the bankruptcy process will be unsure of their obligations.

A. The criteria for an interlocutory appeal are satisfied.

“To warrant [a] grant[of] leave to appeal pursuant to [§ 1292(b)], (a) the appeal must concern a question ‘of law,’ (b) that question must be one that is ‘controlling,’ and (c) that controlling question of law must be one ‘as to which there is substantial ground for difference of opinion.’” *Casey v. Long Island R.R.*, 406 F.3d 142, 146 (2d Cir. 2005) (quoting 28 U.S.C. § 1292(b)).

This Court regularly grants petitions for interlocutory review when these criteria are satisfied.³ It should do so here.

1. To begin with, the notice issue presents a question of “pure” law suitable for “quick[] and clean[]” appellate review without the need for “immersion” in a “detailed” trial record. *Ahrenholz*, 219 F.3d at 677. There is no doubt that DHL received notice of United’s bankruptcy proceedings and all relevant deadlines. The question here is whether that notice satisfied due process, assuming that United was, and DHL was not, aware of DHL’s anti-trust claim prior to confirmation of United’s reorganization. At this phase of the litigation, there are no factual disputes relevant to that question: “Whether notice satisfies the requirements of due process presents a question of law.” *Hilfiger v. Alger*, 582 F. Supp. 2d 418, 425 (W.D.N.Y. 2008).

2. The notice question also is “controlling” within the meaning of Section 1292(b). A question generally is “controlling” if “interlocutory reversal might save time for the district court, and time and expense for the litigants” (16 Charles A. Wright, *et al.*, *Federal Practice & Procedure* § 3930 (2d ed. 2012) (“FPP”)), or when reversal would “speed the District Court’s consideration of the merits of the parties’ claims or defenses.” *In re City of New York*, 607 F.3d 923, 933 (2d Cir. 2010). There can be no doubt that the question

³ See, e.g., *NML Capital, Ltd. v. Banco Central de la Republica Argentina*, 652 F.3d 172 (2d Cir. 2011); *Doninger v. Niehoff*, 642 F.3d 334 (2d Cir. 2011); *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010); *Murray v. Metro. Life Ins. Co.*, 583 F.3d 173 (2d Cir. 2009).

here meets that standard: Reversal of the due process holding would eliminate the vast majority of DHL’s factual allegations from this suit, substantially narrowing the issues left to be litigated. As the district court put it, an interlocutory reversal would “make United’s post-confirmation participation in the conspiracy a threshold issue, the resolution of which could terminate the case at a relatively early stage.” A33. This is just the kind of issue Section 1292(b) was meant to address.⁴ See FPP § 3929 (interlocutory review intended especially to “avoid protracted and expensive litigation, as in anti-trust and similar protracted cases”).

3. Finally, whether due process required United to give DHL notice of the *nature* of its potential antitrust claim to ensure the claim’s discharge is, to say the least, contestable. As the district court recognized in certifying the order for immediate review, the question is a “particularly difficult” issue “of first impression for the Second Circuit.” A33. In fact, the district court’s resolution of that question runs counter to the great weight of authority and cannot be reconciled with fundamental due process principles.

a. The general due process standard governing the sufficiency of notice is familiar: The “notice [must be] reasonably calculated, under all the cir-

⁴ In arguing otherwise below, DHL maintained that the suit would survive reversal of the due process holding because the complaint alleges that United participated in the cartel post-confirmation. But even if that were so, the suit would not survive in anything like its current form; it would be vastly narrowed, from one dealing with an alleged decade-long conspiracy to a much more modest one addressing conduct taking place over a few months.

cumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). In the bankruptcy context, it is universally accepted that “a debtor’s creditors must be afforded notice of the debtor’s bankruptcy case, as well as the deadline for asserting any pre-petition claims against the debtor, so as to provide the creditors an adequate opportunity to assert any claims they may have against the debtor’s estate.” *In re J.A. Jones, Inc.*, 492 F.3d 242, 249-50 (4th Cir. 2007). *See also In re Penn Cent. Transp. Co.*, 771 F.2d 762, 768 (3d Cir. 1985) (similar). But the courts almost uniformly have *rejected* the notion that a debtor must provide notice of the *nature* of a potential creditor’s claim, even when a particular claim has been concealed by the debtor—rejected, that is, the district court’s holding in this case.

In *Penn Central*, for example, certain creditors asserted that they had received constitutionally deficient notice because—although they had been informed of the bankruptcy proceedings and bar date—the debtor’s alleged “misconduct contributed to, if not caused, [their] failure to learn of their anti-trust claims prior to entry of the Consummation Order.” 42 B.R. 657, 674 (E.D. Pa. 1984). The district court rejected that argument as a basis for avoiding discharge: Even “assuming [the creditors] neither knew nor had reason to know of their antitrust claims because of the alleged [concealment

of the] conspiracy, their lack of knowledge would not be a ground for exemption from the discharge.” *Id.* at 675.

The Third Circuit affirmed on appeal, explaining that notice must apprise the parties of “the impending *hearing* so that they can take steps to safeguard their interests.” 771 F.2d at 768. But the notice need not disclose “the *nature* of those interests,” the court added, even where the interests “were unknown and undisclosed . . . during the reorganization proceeding due to . . . fraudulent concealment.” *Id.* at 767-768 (emphasis added).⁵

Most other courts have followed *Penn Central*'s lead. The Eastern District of Virginia, for example, has explained that “[n]either due process nor the Bankruptcy Rules require [a debtor] to specifically inform parties of the existence or nature of their potential claims”; “to satisfy due process, the Debtors need only inform potential claimants of the ‘time allowed for filing claims,’ *not what claims those claimants might be able to assert.*” *In re Cir-*

⁵ The district court thought that *Penn Central*'s holding involved “starkly different” circumstances because the bankruptcy trustees there “were unaware of potential antitrust claims against the debtor.” A22-A23. The Third Circuit did observe that the trustees were not aware of the antitrust claims (*see* 771 F.2d at 768), but that observation was primarily relevant to the creditors’ unrelated contention that the trustees had shirked their obligation to conduct a full investigation into the debtor’s affairs. *See Penn Cent.*, 42 B.R. at 665 & n.5. Although the Third Circuit also noted the trustees’ lack of knowledge in connection with its due process analysis (*see* 771 F.2d at 768, 769), that observation was not essential to its due process holding. Tellingly, none of the other courts that have followed *Penn Central*'s even acknowledged the supposed distinction the district court found so critical here.

cuit City Stores, Inc., 2010 WL 2208014, at *8 (Bankr. E.D. Va. 2010) (emphasis added), *aff'd* 439 B.R. 652 (E.D. Va. 2010), *aff'd in relevant part*, 668 F.3d 83 (4th Cir. 2012). That is true regardless whether a creditor is “unlikely to be aware that [it has a] claim[] against the Debtors.” *Id.* Other bankruptcy courts likewise have found “unpersuasive” an argument that “due process required Debtor” not only “to provide written notice of the confirmation hearing” but also “to notify [creditors] of the very nature of their claims.” *In re Prod. Plating, Inc.*, 90 B.R. 277, 285 (Bankr. E.D. Mich. 1988).

In contrast, we are aware of just one other decision in which a court held that a claim was not discharged because the debtor failed to notify the creditor of the claim’s particulars. *See Acevedo v. Van Dorn Plastic Mach. Co.*, 68 B.R. 495 (Bankr. E.D.N.Y. 1986). That case was decided 25 years ago, before *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991), in which this Court held that claims may be discharged in bankruptcy even when the injury underlying the claim is not and could not have been discovered until after the debtor’s reorganization plan is confirmed. *Id.* at 1003-1004. What is more, *Acevedo*’s very brief discussion of the due process question gives no consideration to the very serious concerns raised in this petition. To our knowledge, no court other than the one below has followed *Acevedo*.

b. The contestability of the district court’s holding below is further confirmed by universal bankruptcy practice, which, for decades, has been *not* to

inform creditors of the particular nature of their claims. Instead, notices inform creditors only of the pendency of the action and of the so-called “bar dates” (the last date a creditor may file a claim). Notices are identical for each creditor and, as a matter of practice, are never customized to inform individual creditors of the particulars of their potential individual claims. *See, e.g.*, <http://tiny.cc/EDNYbank> (standard, court-approved notice form for the Bankruptcy Court of the Eastern District of New York). In fact, we are unaware of *any* proceeding in which a debtor provided the sort of notice required by the district court’s order, even where (as alleged in this case) the claim was one that the debtor would, and the creditor would not, have been aware of at the time of the bankruptcy. Although we made this observation at some length below, DHL did not dispute the point or purport to identify any proceeding in which such notice had been provided, much less required.

The uniform and settled nature of that practice has a significant bearing on the due process analysis. The Supreme Court has noted “the importance of history and widely shared practice as concrete indicators of what fundamental fairness and rationality require” (*Schad v. Ariz.*, 501 U.S. 624, 640 (1991) (plurality opinion)), and has “relied on history and ‘widely shared practice’ as a guide to determining whether” particular practices “so depart[] from an accepted norm as to be presumptively violative of due process.” *TXO Prod. Corp. v. Alliances Res. Corp.*, 509 U.S. 443, 457 (1993) (plurality opi-

nion). *See also Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 36 (1991) (“very few cases have used the Due Process Clause . . . to strike down a procedure concededly approved by traditional and continuing American practice”). Under this standard, that bankruptcy practitioners have not provided, and courts have not required, a particularized statement of claims prior to discharge in bankruptcy strongly suggests that a regime dispensing with such notice is fair and workable.

c. Most courts have held that notice of the sort provided by United comports with the constitutional standard for good reason: the district court’s contrary analysis understates the interests on the other side of the due process equation. As the district court recognized, the Due Process Clause guarantees litigants fair and adequate procedural safeguards. This guarantee does not rely on inflexible, categorical rules, but entails a “balancing analysis to determine ‘fundamental fairness’” with respect to *all* affected parties. *Pac. Mut.*, 499 U.S. at 36.

Here, DHL’s interests stand opposed to those of United’s other creditors, whose claims *were* addressed in United’s plan of reorganization and discharged in bankruptcy. Those creditors received pennies on the dollar for their known claims, and nothing for their unknown claims. By delaying the prosecution of its Section 1 suit until five years after United’s reorganization, DHL now seeks *three times the full* value of its claim, effectively mov-

ing its low-priority, unsecured claim to the front of the line, ahead of all of United's other pre-confirmation debts. Compounding this unfairness, United's other discharged creditors did not receive cash, and instead became owners of the reorganized company, meaning that any who continue to hold their shares not only are being indirectly disadvantaged by DHL's gamesmanship, but actually will bear the cost of DHL's claim *directly*.

Fundamental fairness requires DHL to play by the same rules as all of United's other creditors whose pre-confirmation debts were discharged in United's bankruptcy:

The goal of bankruptcy is to provide fairness among creditors and thereafter to give a debtor a fresh start. Such a goal "would be frustrated if creditors who failed to file timely claims tried to bring claims against a reorganized company after the close of bankruptcy. For this reason, the timely filing of claims is vital to the purposes underlying bankruptcy."

In re Envirodyne Indus., Inc., 214 B.R. 338, 349 (N.D. Ill. 1997) (quoting *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 974 F.2d 775, 779 (7th Cir. 1992)). The contestability of the district court's due process ruling is all the more apparent in light of these countervailing interests.⁶

⁶ The due process holding also is contestable because DHL "was arguably on notice of its antitrust claim less than two weeks after the effective date of United's reorganization," and there were "mechanisms through which DHL could have sought relief [then] in the bankruptcy proceeding." A25. *See, e.g., In re O'Shaughnessy*, 252 B.R. 722, 730-738 (Bankr. N.D. Ill. 2000) (allowing a late proof of claim where the creditor had not been given adequate notice). Due process did not entitle DHL to disregard these available bankruptcy

The statutory criteria for interlocutory review accordingly are satisfied: This case presents a debatable and controlling issue of law, the immediate resolution of which would materially advance disposition of the case.

B. The due process question is a matter of tremendous practical importance.

While satisfaction of the statutory criteria is, in itself, sufficient to warrant granting the petition, practical considerations make the need for interlocutory appellate review in this case especially acute. This Court's immediate intervention is necessary to dispel the uncertainty created by the district court's order and to settle the obligations and rights of those participating in the bankruptcy system.

1. The district court's holding that "due process requires notice not just that there is a pending case or hearing, but of the nature of the charges or claims that will be adjudicated" (A16), is inconsistent with long-settled bankruptcy practice. As noted above, debtors have *never* provided the kind of particularized notice of claims required by the district court's order, and no recent decision purports to impose such an obligation. The ruling thus creates great uncertainty about the responsibilities of debtors going forward, leaving them in doubt about the extent of their duty to uncover and disclose poten-

remedies, sit on its rights for many years, and then initiate a suit outside the bankruptcy process—and the district court was wrong not to evaluate DHL's due process argument within this broader statutory framework.

tial claims. And for completed bankruptcies like United's, this uncertainty undermines the finality of Chapter 11 reorganizations, throwing into question the status of claims long understood to be discharged. Such uncertainty is anathema to the bankruptcy code: this Court, time and again, has recognized the "uniquely important interest in assuring the finality" of bankruptcy proceedings to avoid "the risk of endless litigation" after they have concluded. *In re WestPoint Stevens, Inc.*, 600 F.3d 231, 248 (2d Cir. 2010).

Conversely, even as it requires particularized disclosure, the district court's holding invites manipulation by encouraging creditors deliberately to *avoid* discovering causes of action so that their claims can be preserved for litigation after the debtor is reorganized and again solvent. This gamesmanship similarly undercuts finality and is, for the reasons we have discussed, fundamentally unfair to those creditors who participate fully in the bankruptcy proceedings and relinquish their claims for pennies on the dollar. This Court previously has found such considerations to weigh in favor of finding notice constitutionally sufficient, lest a contrary conclusion—and the uncertainty it injects into the proceedings—make it impossible for a debtor "to reorganize at all." *Chateaugay*, 944 F.2d at 1005.

2. Attempts by future debtors to comply with the district court's due process standard also will place tremendous, unmanageable burdens on companies undergoing Chapter 11 reorganization. The kind of inquiry now

undertaken by debtors to identify potential creditors (and the only kind of inquiry that, in our view, is required by due process) is quite different from that contemplated by the district court's order. Although debtors typically conduct a search for creditors that "focuses on the debtor's own books and records" (*Chemetron Corp. v. Jones*, 72 F.3d 341, 347 (3d Cir. 1995)), debtors do not inquire beyond the face of these materials: "Efforts beyond a careful examination of these documents are generally not required." *Id.*

Consistent with this settled practice, large debtors like United ordinarily conduct a two-pronged investigation: *First*, they review their books and records (including financial statements, accounting records, and billing systems) for transaction-based claims; any creditor identified is listed on the debtor's schedules, but the specific debt is not. *Second*, debtors review their legal files for *existing* or *actually threatened* legal claims.⁷ But debtors do not, and have never been thought obligated to, conduct "a vast, open-ended investigation" (*Chemetron*, 72 F.3d at 346) into all company conduct that might conceivably be asserted as the basis for a lawsuit. *See Envirodyne Indus.*,

⁷ In this respect, the district court was mistaken to think that debtors already must disclose the nature of their debts on schedules filed in bankruptcy court. A22. In fact, 11 U.S.C. §§ 521(a)(1)(B)(i) and 523(a)(3) together obligate a debtor to list on certain "schedules" the debtor's known potential *creditors*, not the nature of their claims. As a matter of practice, these schedules do not include potential claims that do not appear in the debtor's books. And creditors do not receive notice of a debtor's scheduled disclosures, which can be tens of thousands of pages long (as they were in United's case).

214 B.R. at 349 (debtors must use “reasonably diligent efforts to determine . . . known creditors” but need not “search out [all conceivable creditors] and create reasons for [them] to make a claim”).

The district court’s order turns this long-accepted bankruptcy practice upside down. To be sure, the court attempted to limit its holding in this respect by stating that debtors “should not have to engage in inefficient, exhaustive investigations in an attempt to identify and catalog every conceivable claim against them, and then invite claimants to assert them.” A19. But that observation offers little practical protection to companies like United when it comes to uncovering *known* potential claims. That is because “[k]nowledge’ by a corporate entity is necessarily a fiction; the corporation can only be said to ‘know’ information by imputing to it the knowledge of [its] . . . supervisory employees.” *Central Soya de Puerto Rico, Inc. v. Sec’y of Labor*, 653 F.2d 38, 39 (1st Cir. 1981).

Thus, protracted investigations will be necessary under the district court’s order, not to uncover what the company does *not* know, but instead to determine what it is deemed *already to* know—including every supervisory employee’s knowledge of any fact that might support any conceivable claim, such as wrongful termination claims, discrimination and harassment suits, securities actions, consumer protection claims, fiduciary duty claims, and so on. For a company as large as United, with tens of thousands of employees,

this would be a crushing burden, which then would be compounded by having to prepare *hundreds of thousands of individualized* notices to potential creditors rather than the generic bar date notices now universally approved by the bankruptcy courts. See <http://tiny.cc/EDNYbank>. And it is not at all apparent where the line must be drawn in determining when and what kind of notice of potential claims is required, making it impossible for a debtor to be confident that its debts will be discharged.⁸

At bottom, the district Court's due process holding defies the great weight of precedent, undermines the proper functioning of the bankruptcy system, and creates pervasive uncertainty that will persist until the matter is resolved by this Court. An immediate appeal accordingly is imperative.

CONCLUSION

The petition for interlocutory review should be granted.

⁸ We acknowledge that the district court attempted to limit its holding to circumstances in which the potential claim is known only to the debtor and not the creditor. A23. But because virtually any cause of action turns on conduct undertaken by the defendant's employees or agents (and thus deemed known to the defendant); and because a debtor will almost never be able to determine, *ex ante*, when the facts underlying a potential cause of action are "uniquely" within its knowledge and not the creditor's, claim-specific notice *always* will be necessary as a hedge against later claims of concealment. Indeed, such later claims would be *certain* to follow absent claim-specific notice: according to the district court's holding below, any claim not asserted in the bankruptcy proceedings would survive discharge so long as the creditor simply alleged that the debtor knew of the claim and the creditor did not. No more would be necessary to survive a motion to dismiss, and the bankruptcy code's statutory injunction against the commencement of suits to enforce discharged claims (11 U.S.C. § 524(a)(2)) would become worthless.

Respectfully submitted,

Richard J. Favretto
John Roberti
Charles A. Rothfeld
Michael B. Kimberly
Phillip R. Dupré
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000

Counsel for Defendants-Petitioner

Dated: August 9, 2012

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ELECTRONIC PUBLICATION ONLY

-----X
 :
 DPWN HOLDINGS (USA), INC., :
 :
 Plaintiff, :
 :
 - versus - :
 :
 UNITED AIR LINES, INC. d/b/a UNITED :
 AIRLINES; UNITED CONTINENTAL :
 HOLDINGS, INC., f/k/a UAL CORP., :
 :
 Defendants. :
 -----X

MEMORANDUM AND ORDER

11-CV-564 (JG) (VVP)

A P P E A R A N C E S :

ORRICK, HERRINGTON & SUTCLIFFE LLP
 1152 15th Street, N.W.
 Washington, District of Columbia 20005
 By: Garret G. Rasmussen
 Antony P. Kim
 Ryan K. Quillian

J. PETER COLL, JR.
 51 West 52nd Street
 New York, New York 10019

Attorneys for Plaintiff

MAYER BROWN LLP
 1999 K Street, N.W.
 Washington, District of Columbia 20006
 By: Richard J. Favretto
 John Roberti
 Charles A. Rothfeld
 Phillip R. Dupré

Attorneys for Defendants

JOHN GLEESON, United States District Judge:

Plaintiff DPWN Holdings (USA), Inc. (“DHL”) brings this action against United Air Lines, Inc. and United Continental Holdings, Inc. (collectively, “United”), asserting a claim

that United was part of a conspiracy to fix the price of air cargo shipments, in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. United moves to dismiss DHL’s amended complaint on the grounds that (a) the claim is time-barred; (b) the claim was discharged by the confirmation of United’s plan of reorganization in proceedings pursuant to Chapter 11 of the Bankruptcy Code; and (c) the amended complaint has not alleged facts sufficient to state a plausible claim that United participated in an illegal price-fixing conspiracy. For the reasons set forth below, the motion is denied.

BACKGROUND

A. *Factual Background*¹

1. *The Parties*

DHL is a business providing “logistics and freight-forwarding services” both to and from the United States. First Am. Compl. ¶ 14, ECF No. 8. United is an airline that provides shipping services for mail and freight to a variety of shippers. *Id.* ¶ 16. DHL is a major shipper of air cargo and has contracted with United for air cargo shipping services. *Id.* ¶¶ 14, 16.

2. *The Alleged Conspiracy*

Over a period of several years, United conspired with other airlines to fix the prices charged for air cargo shipments. *See, e.g., id.* ¶ 18. In particular, the conspiracy was focused on fixing surcharges for fuel and security costs that were added to the base rates for shipments. *See, e.g., id.* ¶¶ 19, 21.²

¹ The facts are drawn from the well-pleaded allegations of the First Amended Complaint, which are assumed to be true for purposes of this motion.

² Though the complaint also alleges a conspiracy to fix a customs surcharge, *see, e.g.*, First Am. Compl. ¶¶ 19, 21, the parties’ briefs in connection with this motion focus on the fuel surcharge and DHL’s counsel confirmed at oral argument that the fuel surcharge is the focus of the case along with a “small claim” relating to the security surcharge. Tr. of Argument, Dec. 22, 2011, at 15; *see also id.* at 16 (“The customs surcharges and

The conspiracy to fix fuel surcharges can be traced back to late 1996 and early 1997, when airlines became concerned about the rising price of aviation fuel. *See id.* ¶¶ 33–35. At least one airline had attempted to unilaterally impose a fuel surcharge on its air cargo shipments, “but it was unable to maintain that surcharge in the face of price competition from other [airlines].” *Id.* ¶ 30. The airlines turned to the International Air Transport Association (“IATA”), an industry group of which United was a member, to collectively address the problem of fuel costs. *Id.* ¶ 27.

United and other IATA members developed a resolution, known as Resolution 116ss, under which member airlines would introduce a fuel surcharge tied to the price of aviation fuel. *Id.* ¶ 37. Resolution 116ss called for the creation of a Fuel Price Index (“FPI”) to track changes in fuel costs, which would then trigger changes in the fuel surcharge charged by each member airline. *Id.* ¶¶ 37–38.

With United’s support, IATA adopted Resolution 116ss in April 1997. *Id.* ¶ 40. Pursuant to the adopted resolution, airlines would begin charging a \$0.10 per kilogram surcharge if the FPI exceeded 130 on or after October 1, 1997.³ *Id.* ¶ 41. In early 2000, fuel prices first exceeded the 130 FPI threshold. *Id.* ¶ 42. United informed its competitors that it intended to begin imposing a fuel surcharge of \$0.10 per kilogram on February 1, 2000. *Id.* ¶ 47. United and other airlines began charging this fuel surcharge on that date. *Id.* ¶ 51.

Recognizing their potential antitrust liability, the airlines sought approval of Resolution 116ss from the U.S. Department of Transportation (“DOT”). *Id.* ¶¶ 36, 43, 50. The DOT, pursuant to the authority granted to it by 49 U.S.C. §§ 41308–09, had already given certain

everything else we don’t care about.”). DHL also alleges that the conspiracy involved the base rates, but only to the extent that the conspirators agreed not to adjust their base rates in a manner that would offset the surcharges.

³ The FPI was set to equal 100 when fuel prices were at their June 1996 levels. First Am. Compl. ¶ 37. Thus, a FPI of 130 indicated that fuel prices were 30% higher than their June 1996 levels.

IATA activity immunity from U.S. antitrust laws. *See* First Am. Compl. ¶¶ 25, 27. However, the airlines believed that they would violate those laws if they implemented Resolution 116ss without DOT approval. *Id.* ¶ 43.

On March 14, 2000 – after United and other airlines had begun charging the fuel surcharge – the DOT rejected IATA’s application for approval of Resolution 116ss. *Id.* ¶ 53. It concluded that the proposal “appear[ed] fundamentally flawed and unfair to shippers and other users of cargo air transportation.” *Id.* (internal quotation marks and citation omitted) (emphasis removed).

Despite the DOT’s disapproval of Resolution 116ss and their awareness of their potential antitrust liability, United and other airlines continued charging the \$0.10 fuel surcharge and coordinating their fuel surcharges in accordance with the general terms and principles of Resolution 116ss. *Id.* ¶¶ 54–56. The airlines also continued to meet and discuss their fuel surcharging policies, *see, e.g.*, ¶¶ 57, 59–61, and raised their fuel surcharges “in a coordinated, largely parallel fashion.” *Id.* ¶ 58. Despite the purported rationale for the surcharges, *i.e.*, to recover the increased costs of aviation fuel, they were disproportionate to actual fuel costs. *See, e.g., id.* ¶¶ 5, 20. Indeed, because the surcharges were not tied to the distance shipped, they were not correlated with fuel usage. *Id.* ¶ 177c.

The airlines did not want to give up the revenue from these fuel surcharges even after their fuel costs decreased in late 2001. *See id.* ¶ 60. By that time, the FPI had fallen to a level that required suspending the surcharges pursuant to Resolution 116ss. *Id.* United and Lufthansa Cargo (“Lufthansa”), another airline, began discussions about modifying their fuel surcharge policies. *See id.* ¶¶ 60–62. United, Lufthansa and a third airline, Scandinavian Airlines System (“SAS”), had already entered into an alliance that had received limited antitrust

immunity from the DOT. *See id.* ¶¶ 31–32. United and Lufthansa, “purporting to ‘tak[e] advantage of [their] anti-trust immunity,’” coordinated a new schedule of fuel surcharges tied to the FPI. *Id.* ¶ 62 (citation omitted) (first alteration in original).

Lufthansa, with United’s knowledge, coordinated the implementation of this new methodology with other airlines that were not part of the DOT-approved alliance. *Id.* ¶ 63. Pursuant to this new methodology, United and other airlines increased their fuel surcharges in a coordinated fashion throughout the period between Spring 2002 and the end of 2006. *See id.* ¶¶ 64–65, 68, 70, 72–76, 78–82, 85, 90, 92, 94. Essentially, United coordinated its surcharging with Lufthansa, and Lufthansa coordinated it with other airlines. *See, e.g., id.* ¶¶ 67–70.

On February 14, 2006, law enforcement authorities raided the offices of several of the airlines involved in the conspiracy. *Id.* ¶ 88. United’s offices were not included in these so-called “dawn raids.” *Id.* ¶ 26; *see also id.* ¶ 88. Despite the raids, United and other airlines continued to coordinate their fuel surcharges for several more months. *See id.* ¶¶ 89–95.

Twenty of the airlines involved in the conspiracy and four of their executives subsequently pleaded guilty and paid criminal fines in connection with the conspiracy. *See id.* ¶ 152. Lufthansa entered the corporate leniency program offered by the U.S. Department of Justice, which required it to admit its role in the conspiracy. *Id.* ¶¶ 149–50.

3. *United’s Bankruptcy*

On December 9, 2002, United petitioned for bankruptcy pursuant to Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Illinois.⁴ *Id.* ¶ 154. The bankruptcy court confirmed United’s plan of reorganization in an order on

⁴ Both of the defendants in this action – United Air Lines, Inc. and its corporate parent United Continental Holdings, Inc. – were among the debtors in the bankruptcy case.

January 20, 2006. *Id.*; see also Dupré Decl. Ex. 5 (Order Confirming Debtors' Second Am. Joint Plan of Reorganization Pursuant to Ch. 11 of the U.S. Bankr. Code, *In re UAL Corp.*, No. 02-B-48191 (Bankr. N.D. Ill. Jan. 20, 2006)), ECF Nos. 20-8 to 20-9.

B. *Procedural Background*

1. *The Multidistrict Proceedings*

On February 17, 2006 – three days after the dawn raids – a putative class action was commenced against United and others asserting antitrust violations arising from alleged price-fixing of air-cargo shipments. DHL was a member of the putative class. Numerous similar cases were filed and, on June 20, 2006, the Judicial Panel on Multidistrict Litigation transferred the cases to this Court for coordinated pre-trial proceedings. See Transfer Order, *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775 (J.P.M.L. June 20, 2006).

The class plaintiffs reached a non-monetary settlement with United in late 2006. However, they never sought judicial approval of the settlement, nor did they stipulate to a dismissal of United from the *Air Cargo* class action. United was effectively dropped from the case on February 8, 2007, when the class plaintiffs filed an amended complaint in which United was not named as a defendant.

2. *The Present Action*

DHL commenced this action on February 4, 2011. It thereafter filed an amended complaint on June 8, 2011. DHL asserts a single claim: that United violated § 1 of the Sherman Act. It seeks both monetary and injunctive relief.

On September 15, 2011, United moved to dismiss the amended complaint. United's motion is based on three independent grounds: (1) the claim is barred by the four-year statute of limitations applicable in antitrust actions; (2) the claim was discharged when the

bankruptcy court confirmed United's plan of reorganization; and (3) the allegations in the amended complaint do not state a plausible antitrust claim.

DISCUSSION

A. *The Timeliness of the Claim*

DHL's antitrust claim is subject to a four-year statute of limitations. 15 U.S.C. § 15b. The parties agree that the limitations period should be measured from February 14, 2006, the date of the dawn raids. DHL commenced this action on February 4, 2011. United argues that DHL's claim is time-barred because it was filed nearly five years after the limitations period started running and tolling is not available for the full extent of DHL's lateness.

“The filing of a class action tolls the statute of limitations ‘as to all asserted members of the class’” *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350 (1983) (quoting *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974)). While a potential class claim is pending, absent class members may “rely on the named plaintiffs to press their claims.” *Id.* at 353. Thus, tolling continues until it absent class members' reliance on the class action is no longer reasonable. *See id.* at 354; *see also Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1380 (11th Cir. 1998). For example, reliance on the class is unreasonable when a motion for class certification is denied, *Crown, Cork & Seal*, 462 U.S. at 354, or the putative class claim is dismissed, *see, e.g., Choquette v. City of New York*, --- F. Supp. 2d ----, No. 10-CV-6485 (JGK), 2012 WL 906680, at *9 (S.D.N.Y. Mar. 19, 2012).

United was named as a defendant in the *Air Cargo* class action on February 17, 2006. United concedes that DHL was a member of the putative class and, thus, that the commencement of the class action tolled the limitations period. However, the parties dispute how long this tolling lasted.

DHL contends that the limitations period was tolled until February 8, 2007, when the *Air Cargo* class plaintiffs filed an amended complaint that did not name United as a defendant. United argues that tolling ended months earlier, when the class plaintiffs' settlement with United was announced in September 2006, or when the class plaintiffs formally executed their agreement with United in January 2007. If tolling ceased on February 8, 2007, then DHL commenced its case on the last day of the limitations period. But if tolling ceased any earlier, DHL's claim is time-barred.

I agree with DHL that tolling continued until February 8, 2007, when United was dropped from the *Air Cargo* class action. Prior to that date, there could be no certainty that the settlement had been consummated. Even after the settlement agreement was executed, there was no formal indication on the *Air Cargo* docket that United was no longer a part of the case until the February 8, 2007 amended complaint was filed. Absent class members were entitled to rely on the class action to press their claims against United until they had a definitive indication that such claims would not go forward. The first such indication was the omission of United from the amended complaint.

A holding that settlement discussions or even the execution of a settlement agreement end the tolling of claims with respect to a settling defendant would only encourage "a needless multiplicity of actions." *Crown, Cork & Seal*, 462 U.S. at 351; *see also Choquette*, 2012 WL 906680, at *9. If an announced settlement is not consummated, the class claims might then go forward. By that time, however, absent class members may have already commenced a separate action and there would be two (or more) cases instead of one. *See Choquette*, 2012 WL 906680, at *9. On the other hand, once there is a definitive indication that a defendant has been dropped from a class action, it is reasonable to expect any absent class member who wants to

press its claim against that defendant to commence a separate action within the remaining limitations period.

Furthermore, a holding that the mere execution of a settlement agreement could restart the running of the limitations period would be unfair to absent class members who are unaware of that event. Even a class member that was actively monitoring the docket to ensure its interests were being pursued might be unaware of the settlement until the filing of an order, stipulation, pleading or other document clearly indicating that a defendant had been dropped. United conceded at oral argument that there was no such indication on the docket sheet in the class action until the amended complaint was filed on February 8, 2007. *See* Tr. of Argument, Dec. 22, 2011, at 12. I conclude that tolling continued until the absent class members could have reasonably determined from a review of the docket that United was no longer a defendant in the case.

Since the limitations period was tolled from February 17, 2006, until February 8, 2007, DHL's claim is timely.

B. *Whether DHL's Claim Was Discharged in United's Bankruptcy Proceeding*

1. *The Scope of Discharge Under the Bankruptcy Code*

“[T]he confirmation of a [Chapter 11 bankruptcy] plan . . . discharges the debtor from any debt that arose before the date of such confirmation.” 11 U.S.C. § 1141(d)(1)(A). “A ‘debt’ is defined to mean ‘liability on a claim,’ and, in turn, a ‘claim’ is defined to include any ‘right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.’” *Browning v. MCI, Inc. (In re WorldCom, Inc.)*, 546 F.3d 211, 216 (2d Cir. 2008) (quoting 11 U.S.C. § 101(5)(A), (12)).

A debtor that has completed Chapter 11 proceedings may use the bankruptcy court's confirmation order as an affirmative defense in subsequent lawsuits. If a plaintiff asserts a claim that arose before the confirmation of the debtor's reorganization plan, the claim will generally be dismissed as having been discharged. *See, e.g., Delgado v. Derecktor Shipyards, Inc.*, No. 08-CV-316 (VLB), 2012 WL 162301, at *2–3 (D. Conn. Jan. 18, 2012); *Holmes v. Air Line Pilots Ass'n, Int'l*, 745 F. Supp. 2d 176, 196–97 (E.D.N.Y. 2010); *Carter v. Safety-Kleen Corp.*, No. 06-CV-12947 (CM) (GAY), 2007 WL 1180581, at *5 (S.D.N.Y. Mar. 14, 2007); *Tadic v. Stolt-Nielsen S.A.*, No. 01-CV-6814 (SJ), 2005 WL 946567, at *1 (E.D.N.Y. Apr. 18, 2005).

The word “claim” has “the broadest available definition” under the Bankruptcy Code, *Fed. Commc'ns Comm'n v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 302 (2003) (internal quotation marks and citation omitted), and includes “unliquidated,” “contingent,” “unmatured” and “disputed” rights, 11 U.S.C. § 101(5)(A). The legislative history indicates that Congress defined “claim” broadly so that “all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case” and to “permit[] the broadest possible relief in the bankruptcy court.” H.R. Rep. No. 95-595, at 309 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6266; *see also United States v. LTV Corp. (In re Chateaugay Corp.)*, 944 F.2d 997, 1003 (2d Cir. 1991). Given this definition, a claim may have arisen for purposes of a bankruptcy discharge even if it could not yet be asserted as a viable claim in a non-bankruptcy proceeding. *See In re Rodriguez*, 629 F.3d 136, 139 (3d Cir. 2010), *cert. denied*, 132 S. Ct. 573 (2011).

The broad discharge of claims afforded by § 1141(d)(1)(A) is justified by the purpose of bankruptcy law to give debtors a “fresh start.” *WorldCom*, 546 F.3d at 221; *see also*

Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 363–64 (2006) (“Critical features of every bankruptcy proceeding [include] . . . the ultimate discharge that gives the debtor a ‘fresh start’ by releasing him, her, or it from further liability for old debts.”). This goal is “made more feasible by maximizing the scope of a discharge.” *Chateaugay*, 944 F.2d at 1002.

However, the goal of giving debtors a fresh start may conflict with other important interests. *See id.* “[A] broad discharge may disadvantage potential claimants, such as tort claimants, whose injuries were allegedly caused by the debtor but which have not yet manifested and who therefore had no reason to file claims in the bankruptcy.” *Jeld-Wen, Inc. v. Van Brunt (In re Grossman’s Inc.)*, 607 F.3d 114, 122 (3d Cir. 2010) (en banc). As discussed below, there may also be constitutional problems from discharging the rights of unknown potential claimants without giving them adequate notice and an opportunity to be heard. *See id.* (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Unfortunately, “[t]hese competing considerations have not been resolved consistently by the cases decided to date.” *Id.*

Thus, determining whether a claim arose before the bankruptcy court’s confirmation is not always a straightforward task. The Second Circuit addressed whether claims that were unknown at the time of bankruptcy could be discharged by a confirmation order in *Chateaugay*. The asserted claim was the right of the Environmental Protection Agency (“EPA”) to seek reimbursement of environmental clean-up costs under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”), 42 U.S.C. § 9601 *et seq.* The EPA argued that its right to seek reimbursement could be discharged only to the extent it had already incurred such costs at the time of confirmation.

The Second Circuit disagreed, holding that any clean-up costs incurred in the future as a result of released or threatened releases of hazardous materials that occurred prior to the filing of the bankruptcy petition were dischargeable claims. *See Chateaugay*, 944 F.2d at 1005. The court focused on the fact that the EPA and the debtor had an existing relationship, which “provide[d] sufficient ‘contemplation’ of contingencies to bring most ultimately maturing payment obligations based on pre-petition conduct within the definition of ‘claims.’” *Id.*

True, EPA does not yet know the full *extent* of the hazardous waste removal costs that it may one day incur and seek to impose upon [the debtor], and it does not yet even know *the location of all the sites* at which such wastes may yet be found. But the location of these sites, the determination of their coverage by CERCLA, and the incurring of response costs by EPA are all steps that may fairly be viewed, in the regulatory context, as rendering EPA’s claim “contingent,” rather than as placing it outside the Code’s definition of “claim.”

Id. (emphasis added); *see also Olin Corp. v. Riverwood Int’l Corp. (In re Manville Forest Prods. Corp.)*, 209 F.3d 125, 129 (2d Cir. 2000) (“A ‘claim’ may exist even where, as in this case, the parties lack complete knowledge about the *scope* of [the] potential liability.” (citing *Chateaugay*, 944 F.2d at 1004–05) (emphasis added)). Thus, *Chateaugay* holds that even unknown claims may be discharged so long as there is a sufficient relationship between the debtor and the claimant such that the potential future claims might be contemplated and addressed in the bankruptcy proceeding. *See In re Chi., Milwaukee, St. Paul & Pac. R.R. Co.*, 974 F.2d 775, 784 (7th Cir. 1992) (“In short, [*Chateaugay*] involved [a] claimant[] who had some knowledge about the release or threatened release of a hazardous substance and who had some idea that the bankruptcy debtor was a potentially responsible party under CERCLA.”).

While *Chateaugay* provides guidance on the scope of the discharge under § 1141(d), this case is significantly distinct. Although DHL and United had a contractual

relationship prior to the confirmation of United’s reorganization plan, the nature of that relationship was not such that DHL might have contemplated antitrust claims against United.⁵ Indeed, it is undisputed for purposes of this motion that DHL could not have discovered United’s alleged antitrust violations until after confirmation of the plan. The situation in *Chateaugay* was quite different. The EPA had already incurred clean-up costs and sought reimbursement at the time of confirmation. Thus, while the EPA merely lacked knowledge as to the scope of its unknown claims, DHL lacked knowledge as to the *existence* of any claim whatsoever. *Cf. Big Yank Corp. v. Liberty Mut. Fire Ins. Co. (In re Water Valley Finishing, Inc.)*, 139 F.3d 325, 328–29 (2d Cir. 1998) (claim for attorney’s fees in litigation was not discharged because claimant could not have contemplated the award would be made prior to confirmation of the reorganization plan); *AM Int’l, Inc. v. Datacard Corp.*, 106 F.3d 1342, 1348 (7th Cir. 1997) (CERCLA claim was not discharged because claimant “did not have sufficient information to tie [the debtor] to environmental contamination before [the debtor’s] bankruptcy was confirmed”).

Nevertheless, DHL does not seriously dispute that its antitrust claim, to the extent it is premised on pre-confirmation acts, is within the scope of the discharge provided by

⁵ Some have described *Chateaugay* as adopting a “relationship test,” under which claims arising from pre-petition conduct can be discharged only if the debtor and the claimant had some existing relationship at the time of bankruptcy. *See, e.g., Epstein v. Official Comm. of Unsecured Creditors of Estate of Piper Aircraft Corp.*, 58 F.3d 1573, 1577 (11th Cir. 1995); Ryan M. Murphy, *Revisiting Treatment of Environmental Cleanup Obligations Under the Bankruptcy Code: Using Chapter 11 To Create a Clean Slate*, 19 Norton J. Bankr. L. & Prac. 395, 398 & 409 n.32 (2010). However, it was not the relationship between the debtor and the EPA *per se* that the Second Circuit found significant in *Chateaugay*, but rather the fact that the relationship allowed them to “contemplate” contingencies concerning unknown future clean-up costs. *See Chateaugay*, 944 F.2d at 1005. Thus, the Second Circuit’s standard for assessing the discharge of unknown claims is perhaps closer to the “fair contemplation” test adopted by the Ninth Circuit in *California Department of Health Services v. Jensen (In re Jensen)*, 995 F.2d 925 (9th Cir. 1993). *See, e.g.,* Hon. Barbara J. Houser *et al.*, *Section 363 Issues – Acquiring Troubled Companies and Assets*, Am. L. Inst. – Am. Bar Assoc. Continuing Legal Educ. 281, 333 (2011) (“Some jurists do not see a significant distinction between the two standards, and put Ninth Circuit ‘fair contemplation’ cases such as *Jensen* . . . in the same category as *Chateaugay* . . .”); *see also, e.g., Morgan Olson, LLC v. Frederico (In re Grumman Olson Indus., Inc.)*, 445 B.R. 243, 252 (Bankr. S.D.N.Y. Feb. 25, 2011) (describing *Chateaugay* as having adopted the fair contemplation test), *aff’d*, No. 11-CV-2291 (JPO), 2012 WL 1038672 (S.D.N.Y. Mar. 29, 2012); Irina Gomelskaya *et al.*, *Current Developments in Allowance and Priority of Claims; Expenses of Administration; Late Claims; CERCLA Claims; Equitable Subordination*, 849 Practising L. Inst. Com. L. & Prac. Course Handbook Series 469, 479–80 (2003) (same).

§ 1141(d)(1). Thus, I need not address *Chateaugay*'s application to the circumstances in this case. As explained below, however, the conclusion that DHL's antitrust claim (at least partially) falls within the scope of § 1141(d)(1) does not necessarily mean that DHL's claim has been discharged.

2. *Whether Discharge of DHL's Claim Comports With Due Process*

Any determination of whether a claim has been discharged "cannot be divorced from fundamental principles of due process." *Grossman's*, 607 F.3d at 125. Before a claim may be discharged in a bankruptcy proceeding, the claimant must therefore be afforded notice and an opportunity to be heard. *See Sanchez v. Northwest Airlines, Inc.*, 659 F.3d 671, 675–76 (8th Cir. 2011); *Arch Wireless, Inc. v. Nationwide Paging, Inc. (In re Arch Wireless, Inc.)*, 534 F.3d 76, 82–83 (1st Cir. 2008); *Banks v. Sallie Mae Servicing Corp. (In re Banks)*, 299 F.3d 296, 302 (4th Cir. 2002) ("We agree a bankruptcy court confirmation order generally is afforded a preclusive effect. *But we cannot defer to such an order if it would result in a denial of due process . . .*" (footnote omitted) (emphasis added)), *abrogated on other grounds by United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010); *Am. Bank & Trust Co. v. Jardine Ins. Servs. Tex., Inc. (In re Barton Indus., Inc.)*, 104 F.3d 1241, 1245 (10th Cir. 1997) ("[A] creditor's claim is not subject to a confirmed bankruptcy plan when the creditor is denied due process because of inadequate notice."); *Reliable Elec. Co. v. Olson Constr. Co.*, 726 F.2d 620, 623 (10th Cir. 1984) ("[W]e hold that notwithstanding the language of section 1141, the discharge of a claim without reasonable notice of the confirmation hearing is violative of the fifth amendment to the United States Constitution.").⁶ Thus, a court considering whether a claim has been discharged by the

⁶ In *Chateaugay*, the EPA's reimbursement claims were included on the debtor's schedule of liabilities and the EPA had notice and an opportunity to be heard on its claims in the bankruptcy proceedings. *See*

confirmation of a bankruptcy plan should engage in a two-step inquiry, determining (1) whether the claim falls within the Bankruptcy Code’s definition of a dischargeable claim; and, if so, (2) whether the discharge would comport with due process.⁷ See *Grossman’s*, 607 F.3d at 125–26; *Arch Wireless*, 534 F.3d at 82–83.⁸

Due process requires “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane*, 339 U.S. at 314; see also *Jones v. Flowers*, 547 U.S. 220, 226 (2006). Furthermore, “[t]he notice must be of such nature as reasonably to convey the required information,” *i.e.*, the nature and purpose of the proceeding. *Mullane*, 339 U.S. at 314; see also *Brody v. Vill. of Port Chester*, 434 F.3d 121, 130 (2d Cir. 2005). “The basic standard is one of reasonableness.” *In re Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp. 2d 503, 517 (E.D.N.Y. 2003), *aff’d sub nom., Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 (2d Cir. 2005).

Here, there is no dispute that DHL, a United customer, received actual notice of United’s bankruptcy proceedings, including the key procedural events leading up to the

Chateaugay, 944 F.2d at 999. Thus, *Chateaugay* does not address the question of whether a claim can be discharged absent constitutionally adequate notice to the claimant.

⁷ In the case of individual debtors, the Bankruptcy Code expressly prevents the discharge of claims held by creditors who were not given an adequate opportunity to object to the reorganization plan. See 11 U.S.C. § 523(a)(3); Nicholas A. Franke, *The Code and the Constitution: Fifth Amendment Limits on the Debtor’s Discharge in Bankruptcy*, 17 Pepp. L. Rev. 853, 863 (1990) (“[W]hen the debtor is an individual, section 523(a)(3) of the Bankruptcy Code generally excepts from discharge the claims of creditors who do not receive notice of the case soon enough to file a timely proof of claim.”). Although there is no such provision for cases involving corporate debtors – implying a congressional intent that lack of notice not affect the discharge in such cases – the Code cannot override the constitutional protections of the Due Process Clause.

⁸ While some courts have responded to the seeming unfairness of discharging unknown claims by narrowing the meaning of “claim,” this approach may conflict with the congressional purpose to give the word its broadest possible definition. See *NextWave Pers. Commc’ns*, 537 U.S. at 302. Indeed, while creditors might appear to suffer from the broad definition of claim, this will not always be so. In cases where a debtor is liquidating rather than reorganizing, “the creditor may very well find himself trying to persuade the court that he does have a claim, so he can share in the (finite and terminable) asset pool.” John D. Ayer & Michael L. Bernstein, *Bankruptcy in Practice* § 13.17, at 290 (4th ed. 2007). The better approach is to faithfully apply Congress’s broad definition of “claim” while also enforcing constitutional limitations on discharge.

confirmation of United's reorganization plan and the discharge of all its debts. United argues that due process was thus satisfied, and DHL's antitrust claims have been discharged. DHL argues that this notice was insufficient, because United fraudulently concealed its participation in the antitrust conspiracy. DHL argues that since United did not notify it of a potential antitrust claim prior to the confirmation, notice of the bankruptcy proceedings was essentially meaningless.

While litigation over due process often turns on the form of notice, *e.g.*, whether notice by publication sufficed, here the issue boils down to what the notice must contain. Is notice of the proceedings alone sufficient, as United argues? Or, as DHL argues, must the notice provide some indication of the nature of the existing claims subject to discharge, at least if the claimant could not otherwise discover the existence of the claims prior to the time of the discharge?

As a general matter, due process requires notice not just that there is a pending case or hearing, but of the nature of the charges or claims that will be adjudicated. *See In re Ruffalo*, 390 U.S. 544, 551 (1968) (failure to notify party of issues to be raised at hearing was a "procedural violation of due process [that] would never pass muster in any normal civil or criminal litigation" (internal quotation marks and citation omitted)); *Chi. Cable Commc'ns v. Chi. Cable Comm'n*, 879 F.2d 1540, 1546 (7th Cir. 1989) ("Parties must be notified of the precise issues to be raised in the hearing . . ."). For example, the government could not simply inform a criminal defendant that his guilt or innocence with respect to any conceivable crime he may have committed will be determined at a particular time and place. *See Bousley v. United States*, 523 U.S. 614, 618 (1998) ("[A] criminal defendant [must] receive[] 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of

due process.” (quoting *Smith v. O’Grady*, 312 U.S. 329, 334 (1941)); see also *Wong Tai v. United States*, 273 U.S. 77, 80–81 (1927). Similarly, an absent class member cannot merely be notified that he is a member of a class whose unspecified claims are to be settled on a given date. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (due process requires that notice to absent class members “describe the action and the plaintiffs’ rights in it”); see also *Wal-Mart Stores*, 396 F.3d at 113–14. In an ordinary civil action, a plaintiff cannot merely serve a summons directing the defendant to appear in court to answer any and all claims the plaintiff may have against it, but must instead provide fair notice of the particular claims being asserted. See Fed. R. Civ. P. 4(c)(1), 8(a).⁹

Applying these general principles in the context of a bankruptcy reorganization, a debtor should not be able to obtain the final discharge of all claims against it without giving any indication of what those claims might be. The due process rights of an unknowing victim of a debtor’s secret unlawful conduct are not protected by the victim’s receipt of notice of the debtor’s bankruptcy proceedings. Absent any practicable means of identifying what claim he might have, such a victim is no more able to become a claimant in the bankruptcy proceeding than if he had not received notice at all. See *Acevedo v. Van Dorn Plastic Mach. Co.*, 68 B.R. 495, 499 (Bankr. E.D.N.Y. 1986) (“A creditor who is notified of the bankruptcy but not of his claim is in the same position as a creditor who has notice of his claim, but not of the bankruptcy.”). Notice of the proceedings would be “a mere gesture,” not due process. *Mullane*, 339 U.S. at 315.

However, other considerations need to be taken into account. The ability to discharge all claims is essential to an effective reorganization because it allows the debtor to

⁹ Although in this instance the content of the notice is required by rule rather than the Constitution, the rules themselves are “are designed to further the due process of law that the Constitution guarantees.” *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 465 (2000).

attract fresh capital. *See, e.g.*, Laura B. Bartell, *Due Process for the Unknown Future Claim in Bankruptcy – Is This Notice Really Necessary?*, 78 Am. Bankr. L.J. 339, 341 (2004). And the inability to obtain a complete discharge would encourage liquidation rather than reorganization, which would eliminate the value of the debtor as a going-concern while still leaving future claimants without the possibility of any recovery. *See* Ralph R. Mabey & Jamie Andra Gavrin, *Constitutional Limitations on the Discharge of Future Claims in Bankruptcy*, 44 S.C. L. Rev. 745, 783 (1993); John D. Ayer & Michael L. Bernstein, *Bankruptcy in Practice* § 13.16, at 289 (4th ed. 2007); *see also* Mark J. Roe, *Bankruptcy and Mass Tort*, 84 Colum. L. Rev. 846, 901 (1984).

Furthermore, the discharge of less than all claims disadvantages those creditors who do assert their claims in the bankruptcy proceedings. *See* J. Maxwell Tucker, *The Clash of Successor Liability Principles, Reorganization law, and the Just Demand That Relief Be Afforded Unknown and Unknowable Claimants*, 12 Bankr. Dev. J. 1, 76 (1995). It allows claimants who assert their claims after the bankruptcy proceedings have ended to potentially recover their claims in full from the reorganized company, while other creditors may have received just pennies on the dollar. And those very same creditors may now be the owners of the reorganized company, so their recovery is further reduced to the extent the reorganized company remains liable for any pre-confirmation claims. *See* Mabey & Gavrin, *supra*, at 783 n.159; *see also Ind. State Police Pension Trust v. Chrysler LLC (In re Chrysler LLC)*, 576 F.3d 108, 126 (2d Cir.) (“To allow the claimants to assert successor liability claims . . . while limiting other creditors’ recourse to the proceeds of the asset sale would be inconsistent with the Bankruptcy Code’s priority scheme.” (internal quotation marks and citation omitted)), *vacated and remanded*

with instructions to dismiss appeal as moot, 130 S. Ct. 1015 (2009), *judgment vacated and appeal dismissed as moot*, 592 F.3d 370 (2d Cir. 2010).

Thus, the ability to discharge *all* debts – including claims that may be unknown or undiscoverable at the time of the reorganization – is vital to the purposes of Chapter 11. “A construction of the Due Process Clause which would place impossible or impractical obstacles in the way” of this vital interest “could not be justified.” *Mullane*, 339 U.S. at 313–14; *see also Tulsa Prof'l Collection Servs. v. Pope*, 485 U.S. 478, 490 (1988); *Roe, supra*, at 901.

Given that the ultimate standard for notice is reasonableness, a rule that balances the competing interests of fairness to claimants and the fresh start offered by Chapter 11 is desirable. Such a rule might vary with the parties’ respective access to information regarding the existence of claims against the debtor at the time of bankruptcy.

In one scenario, the debtor may be unaware of, and unable to discover through reasonably diligent efforts, claims against it. Since due process demands only what is reasonable, not what it is impossible or impracticable, debtors are not required to give notice of such claims. They should not have to engage in inefficient, exhaustive investigations in an attempt to identify and catalog every conceivable claim against them, and then invite claimants to assert them.¹⁰ *See Chemetron Corp. v. Jones*, 72 F.3d 341, 346 (3d Cir. 1995) (“A debtor does not have a ‘duty to search out each conceivable or possible creditor and urge that person or entity to make a claim against it.’” (quoting *Charter Crude Oil Co. v. Petroleos Mexicanos (In re*

¹⁰ The “unknown claims” that a debtor is unable to discover through reasonable means can be analogized to “unknown creditors,” *i.e.*, those creditors whose identities cannot “be discovered through ‘reasonably diligent efforts.’” *Arch Wireless*, 534 F.3d at 81 (quoting *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 n.4 (1983)). Since actual notice cannot be provided to unknown creditors, due process is satisfied through constructive notice. *See id.* at 80–81. Similarly, since a debtor cannot give actual notice of unknown claims, these claims may be discharged even absent the particularized notice that might otherwise be required.

Charter Co.), 125 B.R. 650, 654 (M.D. Fla. 1991)); *see also Mullane*, 339 U.S. at 317–18 (“[I]mpracticable and extended searches are not required in the name of due process.”).

In a second scenario, where the claimant knew or should have known of its claim at the time of the bankruptcy proceedings, a lack of notice of the character of the claims also should not violate due process and prevent discharge of the claims. A claimant that receives notice of bankruptcy proceedings has a duty to reasonably investigate what debts it is owed. *Cf. Am. Bank & Trust Co. v. Jardine Ins. Servs. Tex., Inc. (In re Barton Indus., Inc.)*, 104 F.3d 1241, 1246 (10th Cir. 1997) (“[C]reditors have a responsibility to take an active role in protecting their claims . . .”). Claimants should not have an incentive to delay asserting their claims until after the debtor is reorganized, in the hopes of obtaining a complete recovery rather than the partial recovery they would likely get as part of the reorganization plan. In addition, this rule relieves debtors of the burden of providing more extensive notice with respect to run-of-the-mill claims.

I need not determine what notice is required in the preceding scenarios, however, because this case presents a different scenario. Accepting the allegations in the complaint as true, the debtor was well aware of its involvement in a conspiracy to fix surcharges and, thus, of the antitrust claim against it. On the other hand, the claimant was completely unaware of the antitrust conspiracy and could not have learned of its antitrust claim through the exercise of reasonable diligence until after the confirmation of the reorganization plan. Under these circumstances, discharge of the claim satisfies due process only if the debtor notified the claimant not only of the pending bankruptcy proceedings, but also provided sufficient information to apprise the claimant of the nature of the claim to be discharged. *See Acevedo*, 68 B.R. at 499 (“[D]ue process should . . . require that a debtor notify a creditor of his claim when the creditor is unlikely to know about the claim otherwise.”).

This rule ensures that claimants receive meaningful notice, without unduly interfering with the purposes of reorganization proceedings. A debtor may gain the fresh start offered by the Bankruptcy Code by giving claimants sufficient information to assert their claims in the bankruptcy proceedings. If the debtor does so, it can rest assured that the claims will be discharged. If it does not do so, there is no reason the debtor should be afforded the benefit of a discharge simply because it has given its unsuspecting victims notice of the bankruptcy proceedings while concealing the basis of its liability. *Cf. In re Tabibian*, 289 F.2d 793, 795 (2d Cir. 1961) (“[D]ischarge is a privilege granted the honest debtor and not a right accorded to all bankrupts.”). Those victims would have no way of identifying and asserting their claims in the bankruptcy proceedings. The generic notice they received would amount to a meaningless gesture, not notice reasonably calculated to “afford them an opportunity to present their objections” to the discharge of their claims. *Mullane*, 339 U.S. at 314; *see also Acevedo*, 68 B.R. at 499. On the other hand, creditors are not relieved of their responsibility to diligently investigate what claims they may have against the debtor – a lack of particularity in the notice will not defeat discharge if the claims were ascertainable to the claimant through reasonable efforts.

Contrary to United’s contention, a rule requiring the debtor to provide notice of the claims to be discharged, limited to the circumstances outlined above, would not “wreak havoc” on the bankruptcy system. In order to identify known creditors who must receive actual notice, a debtor already has a responsibility to conduct “a careful search of the debtor’s own records” for “some specific information that reasonably suggests both the claim for which the debtor may be liable and the entity to whom he would be liable.” *Arch Wireless*, 534 F.3d at 81 (quoting *La. Dep’t of Env’tl. Quality v. Crystal Oil Co. (In re Crystal Oil Co.)*, 158 F.3d 291, 297

(5th Cir. 1998)) (internal quotation marks omitted); *see also Chemetron*, 72 F.3d at 346–47. In addition, a debtor is required to prepare schedules of its debts, and should include potential legal claims against it, even if disputed. *See* 11 U.S.C. § 521(a)(1)(B)(i); Fed. R. Bankr. P. 1007(b)(1)(A); *Zurich Am. Ins. Co. v. Tessler (In re J.A. Jones, Inc.)*, 492 F.3d 242, 252 (4th Cir. 2007); *Ossen v. First Software Corp. (In re Ne. Software, Inc.)*, 111 B.R. 387, 391 (Bankr. D. Conn. 1990) (“[W]hen a debtor knows that the elements of a potential cause of action against it exist, it should list that cause of action as an unliquidated, contingent claim.”); *see also* 11 U.S.C. § 1125(a)(1), (b) (requiring disclosure of “adequate information” regarding a claim before acceptance or rejection of a plan may be solicited from the claimant); *Sure-Snap Corp. v. State St. Bank & Trust Co.*, 948 F.2d 869, 873 (2d Cir. 1991). Thus, a rule requiring debtors to notify unsuspecting claimants of the nature of their claims does not impose any burdens on the debtor that are materially greater than what is already required under the Bankruptcy Code and Rules.

In light of the foregoing, the cases United relies on – *In re Penn Central Transportation Co.*, 771 F.2d 762 (3d Cir. 1985), *Eisenberg Brothers, Inc. v. Clear Shield National, Inc. (In re Envirodyne Industries, Inc.)*, 214 B.R. 338 (N.D. Ill. 1997), and *Bowen v. Residential Financial Corp. (In re Bowen)*, 89 B.R. 800 (Bankr. D. Minn. 1988) – are distinguishable. In *Penn Central*, the trustees that were running the debtor during its reorganization were unaware of potential antitrust claims against the debtor. *See Penn Central*, 771 F.2d at 768 (“[D]espite their opportunity to gain information through extensive discovery, [the claimants] admit that the trustees had no knowledge of facts which would suggest that the instant alleged antitrust claims existed.”). The situation in *Bowen* was similar. *See Bowen*, 89 B.R. at 806 (“[The claimant] has failed to produce any evidence that [the debtor] was aware of the basis for [the claimant’s] fraud claim . . .”). In *Envirodyne*, regardless of what the debtor

knew, the claimant knew or should have known of its claims before the bankruptcy proceeding had ended. *See Envirodyne*, 214 B.R. at 350 (“[A]ppellants’ antitrust allegations against appellee Clear Shield were capable of detection prior to their being discharged by the Confirmation Order.”); *see also id.* at 350 n.3. Thus, while in these cases the discharge of the claims may have been consistent with due process, the facts alleged here present a starkly different situation and demand a different outcome.¹¹

In sum, where a debtor is aware of certain claims against it due to information uniquely within its purview, due process requires that it notify claimants of the character of those claims prior to any discharge.¹² If such notice is not provided, then the claim cannot have been discharged, unless the claimant could have discovered the existence of the claim through the exercise of reasonable diligence prior to the discharge.

Of course, United’s perspective is undoubtedly that it had no obligation to notify DHL of a potential antitrust claim because there is no such claim. If that is true, then United will prevail on the merits and will not be liable just as it would not be liable if DHL’s antitrust claim had been discharged. While United will have to incur the costs of defending itself on the merits,

¹¹ In addition, it is unclear whether *Penn Central* and decisions relying on it, such as *Envirodyne* and *Bowen*, remain good law. More recently, the Third Circuit sitting *en banc* has taken a more nuanced view of what due process requires, holding that “[w]hether a particular claim has been discharged by a plan of reorganization depends on factors applicable to the particular case.” *Jeld-Wen, Inc. v. Van Brunt (In re Grossman’s Inc.)*, 607 F.3d 114, 127 (3d Cir. 2010) (*en banc*). The court identified a number of factors that might be considered in determining whether the claim at issue – injuries from exposure to asbestos that did not manifest themselves until after the confirmation of the asbestos seller’s reorganization plan – had been discharged:

the circumstances of the initial exposure to asbestos, whether and/or when the claimants were aware of their vulnerability to asbestos, whether the notice of the claims bar date came to their attention, whether the claimants were known or unknown creditors, whether the claimants had a colorable claim at the time of the bar date, and other circumstances specific to the parties

Id.

¹² It is unnecessary to determine with greater specificity what adequate notice would consist of, since it is undisputed in this case that the notice to DHL did not give any indication that it might have an antitrust claim against United.

that is true of any defendant with a valid affirmative defense that cannot be established at the pleadings stage.¹³

Moreover, I have assumed for purposes of this motion that DHL could not have discovered its antitrust claim against United through the exercise of reasonable diligence until after the confirmation of United's reorganization plan. If United is able to demonstrate after discovery that this assumption is wrong, then a different conclusion regarding the discharge of DHL's claims might result.

3. *Whether DHL Must Seek Relief From the Discharge in the Bankruptcy Court*

United argues that DHL can challenge the effectiveness of the bankruptcy discharge only in the bankruptcy court that issued the confirmation order. According to United, DHL should have moved in the bankruptcy court either to revoke confirmation of United's reorganization plan, *see* 11 U.S.C. § 1144, or for relief from the bankruptcy court's final judgment, *see* Fed. R. Civ. P. 60(b); Fed. R. Bankr. P. 9024 – avenues for relief that are, according to United, no longer available.¹⁴ United asserts that DHL cannot collaterally attack the bankruptcy court's confirmation order through this civil action.

United is correct that a bankruptcy court's confirmation order is *res judicata* and bars relitigation of issues or claims that should have been raised in the bankruptcy proceedings. *See Sure-Snap*, 948 F.2d at 873; *see also Celli v. First Nat'l Bank of N. N.Y (In re Layo)*, 460

¹³ Unlike defenses such as sovereign immunity, there is nothing to indicate a congressional intent that the discharge of claims in bankruptcy proceedings would immunize debtors from suit rather than just eliminate their liability. *Cf. Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (sovereign immunity "is an *immunity from suit* rather than a mere defense to liability [and] is effectively lost if a case is erroneously permitted to go to trial" (internal quotation marks and citation omitted)).

¹⁴ Another potential remedy for a party in DHL's situation would be to seek leave to file a late proof of claim. *See* Fed. R. Bankr. P. 9006(b); *see also Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 389 & n.4 (1993); *In re Lear Corp.*, No. 09-14326 (ALG), 2012 WL 443951, at *9 (Bankr. S.D.N.Y. Feb. 10, 2012) ("If a party who has a 'claim' asserts lack of adequate notice of the applicable Bar Date, its recourse should ordinarily be to request permission to file a late proof of claim.").

F.3d 289, 293–94 (2d Cir. 2006). But an exception to *res judicata* applies if there was not a full and fair opportunity to litigate a claim in the prior proceeding, and the lack of due process here deprived DHL of the opportunity to litigate its antitrust claim in the bankruptcy proceedings. *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481–83 (1982); *Brawders v. Cnty. of Ventura (In re Brawders)*, 503 F.3d 856, 867 (9th Cir. 2007); *see also Whelton v. Educ. Credit Mgmt. Corp.*, 432 F.3d 150, 154–55 (2d Cir. 2005) (confirmed bankruptcy plan does not have *res judicata* effect to the extent notice provided to a claimant was constitutionally deficient), *abrogated on other grounds by United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010).

This Court has jurisdiction over DHL’s federal antitrust claim against United. Although United has asserted discharge as an affirmative defense, I have concluded that DHL’s claim was not discharged by the confirmation order on due process grounds. Thus, there is no need for DHL to seek relief from the bankruptcy court because the bankruptcy court’s order does not pose an obstacle to its claim.

There may be sound policy reasons in favor of requiring a party seeking to avoid the preclusive effect of a prior judgment to seek relief from the court that issued the judgment. *See generally Restatement (Second) of Judgments* §§ 78–82 (1982). Bankruptcy courts in particular are in a better position to resolve belatedly asserted claims with an eye to protecting the interests of other creditors and ensuring the continued effectiveness of the reorganization plan. Certainly, there are mechanisms through which DHL could have sought relief in the bankruptcy proceeding, especially since it was arguably on notice of its antitrust claim less than two weeks after the effective date of United’s reorganization.¹⁵ But United has not pointed to

¹⁵ United notes that the bar date for “administrative claims” was March 3, 2006 – *after* DHL was on notice of its claims. But United has not explained the significance of this.

anything that makes those mechanisms the exclusive means for DHL to assert its antitrust claim.¹⁶

C. *Whether DHL Has Alleged a Plausible Antitrust Claim*

1. *Standard of Review*

To survive a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A plausible claim must be based on “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Id.* at 1949. A motion to dismiss should be granted if a complaint offers only “‘labels and conclusions,’” “‘a formulaic recitation of the elements of a cause of action’” or “‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Id.* (quoting *Twombly*, 550 U.S. at 555, 557) (alteration in original).

In considering a Rule 12(b)(6) motion, a court should first identify any allegations in the complaint that “are no more than conclusions” and therefore “are not entitled to the assumption of truth.” *Id.* at 1950; *see also Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010). A court should assume that any remaining well-pleaded allegations are true and “then determine whether they plausibly give rise to an entitlement to relief.” *Iqbal*, 129 S. Ct. at 1950; *see also Ruston v. Town Bd. for Skaneateles*, 610 F.3d 55, 59 (2d Cir.), *cert. denied*, 131 S. Ct. 824 (2010). “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of ‘entitlement to relief.’”

¹⁶ Because I have concluded, at this stage, that DHL’s antitrust claim was not discharged, I need not address DHL’s alternative argument that United remains liable for all damages caused by the antitrust conspiracy due to its continued participation in the conspiracy post-confirmation.

Iqbal, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 557). However, “a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and that a recovery is very remote and unlikely.” *Twombly*, 550 U.S. at 556 (internal quotation marks and citation omitted).

2. *Application*

Section 1 of the Sherman Act prohibits any “contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.” 15 U.S.C. § 1. “The crucial question in a Section 1 case is therefore whether the challenged conduct ‘stem[s] from independent decision or from an agreement, tacit or express.’” *Starr v. Sony BMG Music Entm’t*, 592 F.3d 314, 321 (2d Cir. 2010) (quoting *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954)) (alteration in original), *cert. denied*, 131 S. Ct. 901 (2011). This is, indeed, the crucial question in this case, as United challenges the sufficiency of the allegations regarding its participation in any kind of unlawful agreement.

In *Twombly*, the Supreme Court discussed the pleading requirements for a Sherman Act conspiracy claim. *See Twombly*, 550 U.S. at 556–57. It explained that “an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality.” *Id.* Thus, allegations of parallel conduct “must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.” *Id.* at 557; *see also Starr*, 592 F.3d at 322. However, these allegations need not “tend[] to exclude independent self-interested conduct.” *Starr*, 592 F.3d at 325 (internal quotation marks and citation omitted)

(alteration in original). Nor must a “plaintiff identify the specific time, place, or person related to each conspiracy allegation.” *Id.*

DHL’s amended complaint provides sufficient “context” and “factual enhancement,” *Twombly*, 550 U.S. at 557, to plausibly allege United’s participation in a price-fixing conspiracy. In essence, the amended complaint alleges as follows: United and competing airlines developed Resolution 116ss to coordinate fuel surcharges charged by competing airlines; recognizing that this price-fixing would violate the antitrust laws, the airlines sought DOT approval of their plan; they nevertheless implemented the plan before the DOT issued its decision and even after it rejected the plan; United and its competitors thereafter endeavored to charge identical fuel surcharges and repeatedly modified the fuel surcharges at the same time by the same amount over a period of several years; and these fuel surcharges were not reasonably tied to the airlines’ actual fuel costs. This alleged conduct, if proven, establishes a “garden-variety price-fixing conspiracy.” *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 661 (7th Cir. 2002).

United argues that the amended complaint does not plausibly allege its participation in an unlawful conspiracy for three reasons. First, United argues it cannot be held liable for the unlawful acts of other carriers. While there may have been a price-fixing conspiracy in the air cargo industry, United argues that the amended complaint does not adequately allege its participation in that conspiracy. Second, United argues that it cannot have violated the antitrust laws by engaging in conduct for which it was granted antitrust immunity by the DOT pursuant to its statutory authority. Thus, United argues that its communications with Lufthansa and its discussions with other airlines at IATA meetings cannot have been part of an

unlawful conspiracy. Third, United argues that the allegations concerning its contact with competitors do not adequately plead its participation in a cartel.

While I agree with many of United's general legal propositions, I do not believe they mandate dismissal in this case. First, I agree with United that DHL must allege more than just the existence of a cartel – it must allege United's participation in that cartel. *See, e.g., In re Citric Acid Litig.*, 191 F.3d 1090, 1093–94, 1106 (9th Cir. 1999). But I conclude that DHL has done so. DHL alleges United's active role in developing, advocating and following the fuel surcharge practices collectively developed by the airlines.

Second, I agree with the tautological proposition that United cannot be liable under the antitrust laws for conduct that is immune from the antitrust laws. *See LaFlamme v. Société Air France*, 702 F. Supp. 2d 136, 149 (E.D.N.Y. 2010) (discussions at IATA meeting cannot give rise to antitrust liability); *Hall v. United Air Lines, Inc.*, 296 F. Supp. 2d 652, 669–70 (E.D.N.C. 2003) (airline is immune from antitrust liability for its coordinated action as part of an alliance approved by DOT), *aff'd sub nom., Hall v. Am. Airlines, Inc.*, 118 F. App'x 680 (4th Cir. 2004). However, whatever immunity United had in its discussions at IATA meetings or through its alliance with Lufthansa could not possibly extend to a conspiracy to fix fuel surcharges that involved dozens of other carriers.

The allegations in the amended complaint are that the coordination of fuel surcharges began through IATA. But this does not immunize the subsequent decision by the airlines to coordinate their fuel surcharges. Conduct at “IATA trade association meetings enjoy[s] limited antitrust immunity under federal law so long as the defendants submitted any proposed resolutions and agreements to the DOT for approval and received approval prior to implementation.” *LaFlamme*, 702 F. Supp. 2d at 149 (emphasis added); *see also* 49 U.S.C.

§ 41308(b) (limiting immunity to the “transaction specifically approved by the [DOT’s] order and . . . any transaction necessarily contemplated by the order”). Here, DHL alleges that United and other airlines began coordinating their fuel surcharges *before* the DOT acted on their application for approval of their surcharging plan and even *after* the DOT *rejected* this plan. Their limited immunity does not extend to that alleged conduct.

Similarly, any immunity arising out of United’s alliance with Lufthansa does not extend so far as to allow United to coordinate its pricing with dozens of other airlines. The allegations in the amended complaint are that United coordinated its fuel surcharges with Lufthansa while knowing that Lufthansa was then coordinating those surcharges with other airlines. This is nothing other than a conspiracy involving United and all the other airlines, with Lufthansa acting as an intermediary.¹⁷ Thus, even assuming that United is immune from antitrust liability for its agreements with Lufthansa, it is not immune from liability for agreeing to fix prices with other airlines merely because it used Lufthansa as an intermediary.

United’s arguments that the various meetings and communications alleged to have taken place do not plausibly establish an antitrust claim are beside the point. DHL has plausibly alleged United’s participation in a conspiracy to fix fuel surcharges. United’s discussions and emails with other airlines relating to pricing policies is, at least, indicative of a conspiracy even if they would not establish a conspiracy on their own. *See, e.g., In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 445–47 (9th Cir. 1990).

¹⁷ Contrary to United’s argument, the antitrust claim against it is not premised on United’s mere knowledge of Lufthansa’s conspiracy with other airlines. United’s active participation in the conspiracy through its agreements with Lufthansa make it a co-conspirator as much as if it were actively dealing with the other co-conspirators itself. *See, e.g., United States v. Otibu*, No. 02-CR-104 (AGS), 2002 WL 1033882, at *2 (S.D.N.Y. May 21, 2002) (“[C]onnection through a common intermediary is sufficient to establish that two defendants were both part of a conspiracy.” (citing *United States v. Maldonado-Rivera*, 922 F.2d 934, 963 (2d Cir. 1990); *United States v. Vanwort*, 887 F.2d 375, 383 (2d Cir. 1989))).

United also emphasizes the fact that, despite extensive scrutiny of surcharging practices by government regulators and private plaintiffs, United has thus far avoided any criminal or civil liability relating to the conspiracy alleged here. While United does not argue that this alone warrants dismissal of the case, it does argue that “DHL’s assertion that it alone perceives illegal conduct that has escaped the attention of the rest of the world is wholly implausible.” Defs. Mem. of Law 8, ECF No. 20-1.

As in *Starr*, United “cite[s] no case to support the proposition that a civil antitrust complaint must be dismissed because an investigation undertaken by the Department of Justice found no evidence of conspiracy,” or, as relevant here, evidence of the defendant’s involvement in an undisputed conspiracy. *Starr*, 592 F.3d at 325. Moreover, while it might be unlikely that DHL has uncovered wrongdoing by United that other sophisticated parties have overlooked, I cannot conclude that DHL’s claim is implausible on this basis. Since the facts alleged, if true, would establish United’s violation of § 1, I cannot dismiss the case even if “actual proof of the facts alleged is improbable” or “a recovery is very remote and unlikely.” *Twombly*, 550 U.S. at 556 (internal quotation marks and citation omitted).

CONCLUSION

For the reasons stated above, United’s motion to dismiss is denied.

So ordered.

John Gleeson, U.S.D.J.

Dated: May 18, 2012
Brooklyn, New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NOT FOR PUBLICATION

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 :
 DPWN HOLDINGS (USA), INC., :
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 Plaintiff, :
 :
 - versus - :
 :
 UNITED AIR LINES, INC. d/b/a UNITED :
 AIRLINES; UNITED CONTINENTAL :
 HOLDINGS, INC., f/k/a UAL CORP., :
 :
 Defendants. :
 -----X

ORDER

11-CV-564 (JG) (VVP)

JOHN GLEESON, United States District Judge:

This is an antitrust action brought by DPWN Holdings (USA), Inc. (“DHL”). Defendants United Air Lines, Inc. and United Continental Holdings, Inc. (collectively, “United”), have moved for reconsideration of the order denying United’s motion to dismiss, *see DPWN Holdings (USA), Inc. v. United Air Lines, Inc.*, No. 11-CV-564 (JG) (VVP), 2012 WL 1821409 (E.D.N.Y. May 18, 2012), or, in the alternative, certification of that order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

The motion is denied insofar as it seeks reconsideration.

To certify an order for interlocutory appeal, a district court must find that the order “involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b); *see also Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 921 F.2d 21, 23–25 (2d Cir. 1990).

“[T]he resolution of an issue need not necessarily terminate an action in order to be ‘controlling’” *Klinghoffer*, 921 F.2d at 24. A controlling question of law may also exist if “reversal of the district court’s opinion, even though not resulting in dismissal, could significantly affect the conduct of the action.” *S.E.C. v. Credit Bancorp, Ltd.*, 103 F. Supp. 2d 223, 227 (S.D.N.Y. 2000).

A reversal on the issue of whether DHL’s claim was discharged by the confirmation of United’s reorganization plan would not necessarily terminate this action. However, a reversal would affect the further course of this case. It would potentially place dispositive significance on the issue of post-confirmation conduct. If the Court were to subsequently conclude that DHL had failed to sufficiently allege United’s post-confirmation participation in the antitrust conspiracy, or if DHL was unable to provide sufficient evidence of post-confirmation conduct at the summary judgment stage, then this case would end.

There is also a substantial ground for difference of opinion as to the discharge issue. As the parties agree, the issue is one of first impression for the Second Circuit. Although that, “standing alone, is insufficient to demonstrate a substantial ground for difference of opinion,” *Flor v. Bot Fin. Corp. (In re Flor)*, 79 F.3d 281, 284 (2d Cir. 1996), it is sufficient where, as here, “the issue is particularly difficult.” *Aspen Ford, Inc. v. Ford Motor Co.*, No. 01-CV-4677 (CPS), 2008 WL 163695, at *2 (E.D.N.Y. Jan. 15, 2008) (internal quotation marks and citation omitted).

Finally, an immediate appeal would materially advance the ultimate disposition of the case. As noted above, a reversal would make United’s post-confirmation participation in the conspiracy a threshold issue, the resolution of which could terminate the case at a relatively early stage.

Accordingly, the motion is granted insofar as it seeks certification of the Court's May 18, 2012 memorandum and order for interlocutory appeal pursuant to § 1292(b).¹

So ordered.

John Gleeson, U.S.D.J.

Dated: July 31, 2012
Brooklyn, New York

¹ DHL argues that the § 1292(b) certification should not prevent discovery from proceeding. The determination as to whether discovery should be stayed should be made, in the first instance, by the magistrate judge supervising discovery.

CERTIFICATE OF SERVICE

Pursuant to Federal Rules of Appellate Procedure 25(c)(1)(C) and (d)(1)(A), I hereby certify that that on August 9, 2012, a true and correct copy of the foregoing Petition for Interlocutory Review was served by third-party commercial carrier for delivery within 3 days upon counsel of record for Plaintiff-Respondent:

Antony P. Kim
Garrett G. Rasmussen
Ryan K. Quillian
Orrick, Herrington & Sutcliffe LLP
Columbia Center
1152 15th St NW
Washington, DC 20005

J. Peter Coll , Jr.
Orrick, Herrington & Sutcliffe LLP
51 West 52nd Street
New York, NY 10019

Dated: August 9, 2012

Michael B. Kimberly
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006