No. 12-3192

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

REPLY IN SUPPORT OF
PETITION FOR INTERLOCUTORY APPEAL

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United respectfully submits this reply in support of its petition for interlocutory review pursuant to Federal Rule of Appellate Procedure 27(a)(4).

There can be no serious doubt that the question presented here is "controlling" because interlocutory review would materially advance the litigation. That the appeal concerns a contestable question of pure law is, moreover, apparent from something that DHL conspicuously *fails* to say: DHL has been unable to cite a *single* instance in which a debtor provided the sort of particularized notice of inchoate, unasserted claims that the district court required in this case. Accordingly, interlocutory review of the important question presented in this case is warranted.

A. This case presents a pure question of law.

At the outset, DHL is wrong in contending that the issue presented here is a "highly fact dependent" (Opp. 1, 6) or somehow "hinges on fact-finding" (Opp. 9). Instead, the pure question of law decided below is—in DHL's own words—whether "allowing [a] claim to be discharged" in bankruptcy "violate[s] due process" when a creditor who receives actual notice "is unaware (and could not have learned) that it has a claim [prior to the discharge] and the debtor is aware of the claim but fails to disclose it." Opp. 15; *see also* Opp. 2. That also is how the district court characterized the question it decided: "Is notice of [a bankruptcy] proceeding[]" and the relevant filing deadlines "alone sufficient" to satisfy due process, or "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 discharge?" A16. That is a clean, discrete legal question.

It also, plainly, is not a question that asks for an "advisory opinion." *See* Opp. 6; *see also* Opp. 9-10. The question presented here is a concrete, threshold legal issue that will determine whether the lion's share of DHL's allegations, taken as true, should be dismissed at the outset of the case.[1] As the district court recognized, it is immaterial that further factual discovery could lead to dismissal of the case on different grounds at summary judgment. When a party brings a claim predicated on an inherently faulty legal theory—here, the idea that a creditor who received actual notice of a bankruptcy proceeding may avoid discharge of a claim in that proceeding by alleging that the debtor did, but it did not, know about the then-potential claim

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[1] This case is therefore unlike those cited by DHL at Opp. 7-9. In *New York City Health and Hospitals Corp. v. Blum*, 678 F.2d 392 (2d Cir. 1982), the district court's order itself included a "hypothetical, advisory opinion." *Id.* at 397. In asking for interlocutory review of the district court's contingent holding in that case, the petitioner effectively asked this Court for a further "advisory decision based on a [hypothetical] premise." *Id.* A similar situation arose in *Krishna Consciousness, Inc. v. Air Canada*, 727 F.2d 253 (2d Cir. 1984), where partial settlements of claims risked mooting certain elements of the case, and the complexity of the "indeterminate factual record" had "generated a kaleidoscope of hypothetical legal issues." *Id.* at 256. And the same was true in *Slade v. Shearson, Hammill & Co.*, 517 F.2d 398 (2d Cir. 1974), where "the precise question of law presented by the case" depended on the answers to "at least three factual questions," which risked "mak[ing] the question 'certified' not the controlling question." *Id.* at 400. None of those observations applies here.

prior to discharge—the proper course is to dismiss the claim *prior* to discovery.[2] It is beside the point that the claim could conceivably be dismissed later because it turns out that the evidence does not support the defective theory. That is especially so in a complex antitrust case like this one, where the prospect of engaging in sprawling discovery, at "potentially enormous expense," often will "push cost-conscious defendants to settle even anemic cases." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 559 (2007).

B. The question presented is controlling.

DHL also is wrong in claiming that "[t]he notice issue is not controlling because DHL's case against United will proceed in much the same manner regardless of the outcome of United's appeal." That is so, DHL maintains, because "United's pre-confirmation conduct" would be relevant to "establishing participation in [the post-confirmation] conspiracy." Opp. 12. But the overwhelming majority of DHL's allegations concern events taking place prior to the confirmation of United's plan of reorganization. As the district court itself recognized, a suit involving a conspiracy alleged to have taken place over just a *few weeks* hardly would "progress in substantially the same

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[2] *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863 (2d Cir. 1996) (cited at Opp. 7), is, for this reason, beside the point. That appeal did not involve a novel issue of pure law, but instead the district court's application of settled law to a fact-intensive question of personal jurisdiction. Recognizing that § 1292(b) review "was not meant to substitute an appellate court's judgment for that of the trial court" on mundane, fact-based rulings, this Court remanded for fuller factual development. *Id.* at 867.

manner" (Opp. 12) as one alleged to have taken place over a *decade*: Although a reversal "would not necessarily terminate this action," it "would affect the further course of this case" by substantially narrowing the issues and "potentially place dispositive significance on the issue of post-confirmation conduct." A33. There can be no serious doubt that interlocutory reversal would "save time for the district court, and time and expense for the litigants." 16 Charles A. Wright, *et al.*, *Federal Practice and Procedure* § 3930 (2d ed. 2012).[3]

C. There are substantial grounds for difference of opinion concerning the resolution of the question presented.

DHL dedicates the majority of its opposition brief (Opp. 13-20) to arguing the merits, suggesting that there is no room for a difference of opinion concerning the resolution of the question presented. But the district court acknowledged otherwise, candidly noting that there is "a substantial ground for difference of opinion as to the discharge issue." A33. This Court should reach the same conclusion.

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[3] Contrary to DHL's suggestion (Opp. 12-13), DHL's allegations concerning United's post-confirmation conduct do not provide an "alternative basis" for reaching the same result as its allegations of United's pre-confirmation conduct: the discharge would significantly narrow the basis for United's liability and DHL's potential damages. *See FCC v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293, 303 (2003) ("a discharge in bankruptcy discharges the debtor from all debts that arose before bankruptcy") (emphasis omitted).

1. After offering a long series of boilerplate due process citations (Opp. 15-13),[4] the decisions that DHL relies upon in support of the specific legal rule it advances here are (other than *Acevedo*) unhelpful to its position. DHL places particular emphasis (Opp. 16) on *Wright v. Corning*, 679 F.3d 101 (3d Cir. 2012). But the only question in that case was whether a court may, consistent with due process, *retroactively* apply a fundamental change to longstanding bankruptcy law. *See id.* at 107-109. The court's answer to that question has no bearing here. Apart from that, the court observed that "persons exposed to a debtor's conduct or product pre-petition *are deemed to understand that they h[o]ld claims*" (*id.* at 109 (emphasis added))—an observation that strongly supports United's position, not DHL's. *See also id.* at 108 n.7 ("we express no opinion on the broader issue of whether discharging unknown future claims comports with due process").

DHL's further citations to *In re Johns-Manville Corp.*, 600 F.3d 135 (2d Cir. 2010), and *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991), are simi-

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[4] Those decisions are irrelevant here. Some involved the sufficiency of publication notice with respect to future unknown claims or unknown creditors (*In re Hexcel Corp.*, 239 B.R. 564 (N.D. Cal. 1999); *In re Waterman S.S. Corp.*, 141 B.R. 552 (Bankr. S.D.N.Y. 1992)), while others involved known creditors with known claims who received no notice at all (*In re Arch Wireless, Inc.*, 534 F.3d 76 (1st Cir. 2008)) or against whom the proper adversary proceedings were not initiated (*In re Mansaray-Ruffin*, 530 F.3d 230 (3d Cir. 2008); *In re Banks*, 299 F.3d 296 (4th Cir. 2002)). Here, in contrast, DHL was a known creditor that received actual notice of United's bankruptcy and of all the relevant deadlines.

larly puzzling. In *Johns-Manville*, this Court held that "the better analogy [for the settlement order addressed by DHL] in terms of notice and representation principles is to class action settlements, not *in rem* bankruptcy proceedings." 600 F.3d at 154. And in any event, the debtor in that case was specifically informed that it "was not an interested party" in the bankruptcy. *Id.* at 157. *Johns-Manville* therefore was decided under non-bankruptcy principles in circumstances quite different from those here. And in *Chateaugay*, the Court *upheld* the discharge of certain claims, even though the extent of the injury was unknown at the time of discharge. 944 F.2d at 1005-1006. The Court expressly left open the "difficult" question whether discharge "applies to tort victims injured by . . . pre-petition conduct that has not yet resulted in detectable injury." *Id.* at 1005.[5]

2. At the same time, DHL's efforts to distinguish the cases we cited in the petition are unavailing. Concerning *Penn Central*, DHL asserts simply that "the debtor lacked knowledge of the claims at issue." Opp. 17. But that is not so. The debtor in that case, just like United in this one, was alleged to

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[5] The Eighth Circuit's decision in *Sanchez v. Northwest Airlines, Inc.*, 659 F.3d 671 (8th Cir. 2011), is even further afield. There, the court found the plaintiff's claim "survived the plan confirmation" on due process grounds because the conduct giving rise to the claim occurred *post*-petition, after the "deadline for regular creditors to submit proofs of claim had long passed." *Id.* at 675-676. And the court found the claim not otherwise discharged because the express terms of the reorganization plan "carved out an exception . . . for liabilities incurred in the ordinary course of business" post-petition. *Id.* at 678. *Sanchez* bears no resemblance at all to this case.

have fraudulently concealed an anticompetitive conspiracy—an allegation that necessarily presumes knowledge. *In re Penn Cent. Transp. Co.*, 771 F.2d 762, 767-768 (3d Cir. 1985). It was the *trustee* who was alleged to be ignorant in *Penn Central*—a fact that we explained has no bearing on the question presented here. *See* Petn. 11 n.5. DHL offers no response to that argument.

DHL contends that in *Circuit City*, the identities and claims of the creditors were not "known or reasonably ascertainable." Opp. 17. That is false. Although a subset of creditors in that case were unknown, many *were* known and received "actual notice of the Bar Date." *Circuit City Stores, Inc.*, 2010 WL 2208014, at *8 (Bankr. E.D. Va. 2010). It was the *known* claimants who argued that the notice of the bar date "was inadequate because" they had not been "aware that they had claims against the Debtors" and *they* as to whom the district court explained:

> When it comes to sufficient notice of the Bar Date 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.

Id. That holding is in square conflict with the district court's decision below.[6]

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[6] Although DHL is correct that the debtor in *Production Plating* was deemed to have "had no knowledge" of the creditor's claim in that case (Opp. 18), it disregards that the court held that "a tort claimant is 'known' either by filing a complaint or by showing some intent to pursue legal remedies" and it does not otherwise fall to a debtor to "to exercise legal judgment as to theories interested parties may bring" later on, much less "to notify [creditors] of the very nature of the[] claims" supported by those potential theories. *In re Prod. Plating, Inc.*, 90 B.R. 277, 285 (Bankr. E.D. Mich. 1988).

3. DHL vaguely "disputes" our "characterization of current bankruptcy practices" (Opp. 10), but does not suggest that debtors in fact currently search for and disclose unasserted claims that do not appear in their books and records or legal files. Instead, DHL asserts evasively that "[n]o facts regarding bankruptcy practice have been developed." *Id*. That is a red herring. We supported our description of the prevailing bankruptcy practice with citations to case law, the relevant statutes, and judicially noticeable boilerplate notice forms available on the bankruptcy court's website. *See* Petn. 18-20. DHL does not take issue with any of the authorities we cited or suggest they should be read differently. And it very notably does not cite a *single* case in which the sort of notice contemplated by the holding below—that is, notice of potential, inchoate claims not appearing in the debtors' books—was actually filed by a debtor.

DHL points, instead, to United's bankruptcy proceedings, claiming that United gave notice of its Form 9F schedule and provided "a customized proof of claim for each creditor listed on its schedules." Opp. 10-11. That is misleading, for two reasons. *First*, United's boilerplate notice form did not apprise any recipients in a customized manner of the contents of United's multi-thousand-page Form 9F, which, as we explained (Petn. 18 n.7), did not disclose descriptions of any claims that did not appear in United's books in any event. *Second*, United's proof-of-claim forms, although pre-populated

with the creditor's name and claim amount (if known), did *not* disclose the nature of any creditor's potential claims. United did not provide—and no Chapter 11 debtor of which we are aware has ever provided—the kind of nature-of-claim notice required by the district court's holding here.

D. Proper resolution of the question presented is a matter of tremendous practical importance.

As we demonstrated in the petition (at 17-20), the district court's holding will impose unmanageable new burdens on debtors undergoing Chapter 11 reorganization. DHL tellingly does not dispute that employers generally are liable for the misbehavior of their supervisory employees (*Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764-765 (1998)) or that the knowledge of those employees generally is imputed to the employer (*Central Soya de Puerto Rico, Inc. v. Sec'y of Labor*, 653 F.2d 38, 39 (1st Cir. 1981)). It also does not (and could not) disagree that sprawling inquiries into the past conduct of a debtor's supervisory employees therefore will be necessary for a debtor to identify potential legal claims (no matter how speculative or remote) that it, but not its creditors, might be deemed "know." That is precisely the sort of "vast, open-ended investigation" (*Chemetron Corp. v. Jones*, 72 F.3d 341, 346 (3d Cir. 1995)) that other courts have held is *not* required. *See* Petn. 17-19.

Unable to deny any of this, DHL suggests, instead, that the question presented here is not a matter of any importance because the district court's

holding below "comports" with *Acevedo*, a decision it says has not "unsettled bankruptcy law or practice." Opp. 16. Unlike this case, however, *Acevedo* gave no serious consideration to the controlling due process principles; and no court, before the court below, had followed its due process holding in more than twenty years. But as this case demonstrates, if courts now embrace the rule announced in *Acevedo*, it will turn bankruptcy practice upside down, undercutting finality and inviting gamesmanship in the ways we described in the petition (at 17-20 & n.8).

DHL insists (Opp. 19) that the rule we advocate, and not the district court's holding below, will invite gamesmanship. But that makes no sense. Under our rule, a debtor benefits from identifying and notifying every possible creditor of its bankruptcy proceedings and all applicable deadlines to ensure that every possible claim is discharged. It has nothing to gain from hiding possible claims from anyone; the total estate divided among creditors is the same regardless of the number, size, or type of claims that are filed.

In sum, the question whether due process permits the discharge in bankruptcy of DHL's antitrust claim is a "particularly difficult" "threshold issue, the resolution of which could terminate the case at a relatively early stage." A33. It also is matter of tremendous practical importance, not only to the management of this litigation, but to bankruptcy practice nationwide. Immediate review is imperative.

Dated: September 4, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Federal Rules of Appellate Procedure 25(c)(1)(C) and (d)(1)(A), I hereby certify that that on September 4, 2012, a true and correct copy of the foregoing Reply in Support of Petition for Interlocutory Review was served by the Court's CM/ECF system and by email upon counsel of record for Plaintiff-Respondent:

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