12-4867

In the United States Court of Appeals for the Second Circuit

DPWN HOLDINGS (USA), INCORPORATED,

Plaintiff – Counter-Defendant – Appellee,

v.

UNITED AIRLINES, INC. D/B/A UNITED AIRLINES, UNITED CONTINENTAL HOLDINGS, INC., F/K/A UAL CORPORATION,

Defendants – Counter-Claimants – Appellants.

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

OPENING BRIEF FOR APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Appellant United Air Lines, Inc. is the wholly owned subsidiary of appellant 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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OPENING BRIEF FOR APPELLANTS

INTRODUCTION

Appellee DPWN Holdings (USA), Inc. ("DHL") alleges that appellants United Air Lines, Inc. and United Continental Holdings, Inc. ("United") participated in a global conspiracy to fix the price of transporting air cargo. But nearly 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. A107-137.[1] In its view, when a plaintiff alleges that "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 pendency of its bankruptcy and the relevant deadlines, but also "of the *character* of those claims prior to any discharge." A129 (emphasis added). The district court also concluded that, although "DHL could have sought relief in the bankruptcy proceeding" by filing of a late proof of claim

[1] We cite to the Appendix as "A#."

against United's bankruptcy estate after assertedly learning of its antitrust claim, DHL was not required to avail itself of that opportunity because "the lack of [notice] here deprived DHL of the opportunity to litigate its antitrust claim in the bankruptcy proceedings." A130-131 & n.14.

That decision is wrong in virtually every respect. Most notably, it focuses myopically on DHL's interests alone, taking no account of the balancing of interests that fundamental fairness and the Supreme Court's due process teachings require. It also runs counter to long-standing and wide-spread bankruptcy practice, imposes impractical new burdens on Chapter 11 debtors, and makes the discharge of many claims essentially impossible. It is therefore unsurprising that the district court's due process holding is at odds with the great weight of authority, which almost universally recognizes that Chapter 11 debtors like United have no obligation to inform potential creditors of conjectural causes of action that the claimant has yet to assert.

Moreover, even assuming that DHL had been entitled to notice of its then-unasserted antitrust claim, the district court further erred in holding that DHL was not required to assert its claim in United's bankruptcy once DHL discovered the claim. The universal rule is that when a creditor does not receive notice in time to assert a timely claim in bankruptcy, that creditor is entitled as of right to file a late notice of claim. That procedure afforded DHL a full and adequate opportunity to assert its antitrust cause of action against United in its bankruptcy case. Thus, regardless of the notice question, DHL received all the process it was due. The district court accordingly was wrong to hold that the Constitution offers DHL an

opportunity to pursue its claim outside the bankruptcy process, where it—unlike all of United's other creditors, whose claims were administered within the bankruptcy system—may seek 100 cents on the dollar.

JURISDICTION

DHL invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1337 and 15 U.S.C. §§ 15, 26. The district court denied United's motion to dismiss on May 18, 2012 (A107-137) and certified the dismissal order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) on July 31, 2012 (A138-140). This court granted defendants' petition for interlocutory appeal on December 12, 2012. This Court's jurisdiction rests on 28 U.S.C. § 1292(b).

ISSUE PRESENTED FOR REVIEW

Whether DHL is enjoined by Sections 1141(d) and 524(a)(2) of the Bankruptcy Code from prosecuting its antitrust claim against United insofar as the claim is based on conduct taking place prior to the effective date of United's plan of reorganization.

STATEMENT OF THE CASE

DHL alleges that United participated in a conspiracy to fix cargo fuel surcharges in violation of the Sherman Act, 15 U.S.C. § 1. United moved to dismiss the complaint, arguing in relevant part that all debts—including unsecured liabilities for alleged violations of the antitrust laws—based on conduct taking place before February 1, 2006, were discharged in United's bankruptcy. District Judge John Gleeson denied the motion, but certified the order for interlocutory review. This Court granted United's subsequent petition for immediate appeal.

STATEMENT OF FACTS

A. Statutory and legal background

1. The "central purpose" of the Bankruptcy Code is to allow "insolvent debtors [to] reorder their affairs, make peace with their creditors, and enjoy a new opportunity" for success "unhampered by the pressure and discouragement of preexisting debt." *Grogan v. Garner*, 498 U.S. 279, 286 (1991)). Chapter 11 of the Bankruptcy Code accomplishes that goal by allowing debtors to file a plan of reorganization (11 U.S.C. § 1121) and, upon "confirmation of [the] plan," to emerge "free and clear of all claims and interests of creditors" (11 U.S.C. § 1141(c)).

Thus, "the confirmation of a plan" of reorganization by issuance of a confirmation order "discharges the debtor from any debt that arose before the date of such confirmation." 11 U.S.C. § 1141(d)(1)(A). *See also In re Kalikow*, 602 F.3d 82, 94 (2d Cir. 2010) ("When there is a confirmation order of a reorganization plan in bankruptcy pursuant to Chapter 11, that confirmation order discharges the debtor from all pre-confirmation claims."). A "debt" thus discharged is defined to include any "liability on a claim"; a "claim," in turn, is defined as 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." 11 U.S.C. § 101(5)(A), (12).

Discharge of a debt "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor." 11 U.S.C. § 524(a)(2). Crucially for this appeal, "[t]he discharge injunction provisions in

the Code are written unequivocally and encompass all pre-confirmation claims, *known or unknown*." *In re Arch Wireless, Inc.*, 534 F.3d 76, 82 (1st Cir. 2008) (emphasis added) (citing 11 U.S.C. §§ 524, 1141(d)). Moreover, a "confirmed plan [of reorganization] binds both 'the debtor . . . and any creditor,'" including all "entities that have 'claim[s] against the debtor that arose at the time of or before the order for relief'" *Kalikow*, 602 F.3d at 94 (quoting 11 U.S.C. §§ 101-(10), 1141(a))), regardless whether the creditor files a proof of claim. 7 *Collier on Bankruptcy* ¶ 1109.02(2) (16th ed. 2012) (hereinafter "Collier").

2. Before pre-confirmation debts can be "discharged under the applicable provisions of the Bankruptcy Code," due process requires that creditors holding the debts "be afforded notice" and "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 (4th Cir. 2007). *See also* 7 Collier § 1109.01[4][b] (similar). As in any case, the notice must be "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 v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

As the Third Circuit has explained, "the purpose of the notice requirement is to advise individuals who will be affected by the outcome of [the] proceeding of the impending *hearing* so that they can take steps to safeguard their interests." *In re Penn Cent. Transp. Co.*, 771 F.2d 762, 768 (3d Cir. 1985) (citing *Memphis Light Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978)). Thus, it is universally accepted that due process requires notice of the pendency "of the debtor's bankruptcy case, as well as the deadline for

asserting any pre-petition claims against the debtor." *J.A. Jones*, 492 F.3d at 249. It "more than satisfie[s] [a creditor's] due process rights" when the creditor receives "actual notice" of a bankruptcy proceeding and of the "contents of [the debtor's] plan" in time to assert any claims it may have. *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1378 (2010) (emphasis omitted).

A debtor's due process notice obligations are reflected in the Bankruptcy Rules themselves. The Rules specify that known creditors must receive (1) notice of the deadlines for filing proofs of claims (the "bar date") (Fed. R. Bankr. P. 2002(a)(7)); (2) a copy of the reorganization plan (Fed. R. Bankr. P. 3017(d)); (3) notice of the confirmation hearing (*id.*); and (4) the confirmation order (Fed. R. Bankr. P. 2002(f)). But beyond that, neither the Code nor the Rules explain what information a notice must contain. Instead, the Code provides—consistent with the general due process standard—that "notice" and an "opportunity for a hearing" must be "appropriate in the particular circumstances." 11 U.S.C. § 102(1).

When a creditor elects to file a proof of claim, the bankruptcy court will either allow or disallow the claim for inclusion in the plan. *See generally* 4 Collier ¶ 502.02. Claims are allowed by default, unless a party-in-interest objects. *Id.* ¶ 502.02(1). One basis for objection is that the claim is not yet ripe, such as when "an injury has not [yet] manifested itself." *Id.* ¶ 502.02(c)(1). Once allowed, claims are categorized and prioritized in a number of ways, including by whether they are secured or unsecured; disputed or undisputed; contingent or non-contingent; and liquidated or unliquidated. *See generally Id.* ¶ 502. The decision whether to allow a claim and in what

amount falls to the bankruptcy court. *See In re Chateaugay Corp.*, 111 B.R. 67, 71 (Bankr. S.D.N.Y. 1990) (bankruptcy courts have authority "to 'allow', 'disallow', 'liquidate' or 'estimate'" cause-of-action claims).[2]

3. Bankruptcy Rules 3003(c)(3) and 9006(b)(1) permit creditors to file late proofs of claim in "situations where the failure to timely file is due to circumstances beyond the control of the filer." *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 391 (1993). Courts have uniformly held that, when a creditor does not receive notice in time to file a claim before the bar date or date of confirmation, the bankruptcy court must permit the creditor to file a late proof of claim under those rules. *In re Intaco Puerto Rico, Inc.*, 494 F.2d 94, 96-99 (1st Cir. 1974); *In re Harbor Tank Storage Co.*, 385 F.2d 111, 114 (3d Cir. 1967); *In re Emons Indus., Inc.*, 220 B.R. 182, 192 (Bankr. S.D.N.Y. 1998); *In re Pettibone Corp.*, 151 B.R. 166, 174 (Bankr. N.D. Ill. 1993). The courts reaching that conclusion have recognized that it would run counter to the due process principles of "equity" and fairness to allow such a late-notified creditor to advance its claim outside the bankruptcy process, where it could "avoid the effects of the Debtor's insolvency and recover 100 cents on the dollar"; unlike all other creditors, who would pursue their claims in the bankruptcy and would receive a greatly diminished recovery, a creditor who avoids the bank-

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[2] "A claim is liquidated when the amount due is capable of ascertainment by reference to an agreement or by computation." *In re Williams*, 51 B.R. 249, 250 (Bankr. N.D. Ind. 1984). A claim is undisputed when the debtor and creditor agree on the debtor's liability and the amount of the debt.

ruptcy process would receive a windfall simply because it did not receive adequate notice prior to the bar date. *Emons Indus.*, 220 B.R. at 193.

B. 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. A68 (¶ 154). United identified and sent notices and claim forms to more than 300,000 potential creditors, provided publication notice in numerous national and local publications, and received more than 44,000 proofs of claim against its estate. DHL was among those identified as a potential creditor, holding more than twenty disputed claims, including claims related to two pending environmental lawsuits. *See* A139-144. There is no dispute in this case that DHL received actual notice of United's bankruptcy and all relevant deadlines (A121-123); at least one DHL entity filed a claim.

On January 20, 2006, the bankruptcy court confirmed United's reorganization plan, which became effective on February 1, 2006. A68 (¶ 154). The plan provided pursuant to Section 1141(d) of the Bankruptcy Code that all "Claims and Causes of Action of any nature whatsoever, . . . whether known or unknown," against United, including all "Causes of Action that arose before the Confirmation Date," were discharged. Dist. Dkt. 20-9, at 119. All holders of general, unsecured claims—including liquidated, undisputed legal claims against United based on prepetition conduct—received stock in the reorganized company (A90-91) that was valued in United's disclosures at between 4 and 8 cents on the dollar (A89). United cancelled all of its prepetition stock, rendering it worthless (A88), and its employees saw their

pension plans terminated and significant reductions in compensation and benefits.

C. DHL's complaint

DHL filed suit on February 4, 2011, alleging that various air carriers, including United, engaged in a conspiracy to fix cargo fuel surcharges between 1997 and 2006. A1, 6, 23-43 (¶¶ 2, 51-95). DHL's complaint is based on the same facts underlying a coordinated, multinational government investigation and dozens of other civil class actions commenced in mid-February 2006—none of which resulted in any criminal or civil liability for United.

More specifically, the complaint describes Deutsche Lufthansa AG as the ringleader of the conspiracy and identifies a number of conspiratorial communications from Lufthansa, but not from United. A31-32, 39-41 (¶¶ 67-69, 83-87). DHL alleges that in January 2002, the conspirators implemented parallel methods for setting fuel surcharges. A30 (¶ 64). United is alleged to have introduced a fuel surcharge method six months later. *Id*. (¶ 66).

DHL's complaint says that, at the same time that it allegedly was leading the conspiracy, Lufthansa engaged in bilateral communications with United about air cargo pricing and strategy. A27-29, 54-56, 66-68 (¶¶ 61-62, 125, 129, 150-153). Since 1996, United and Lufthansa have been parties to a cooperative agreement called the Star Alliance; the agreement allows them to consult on pricing and strategy in all areas, including cargo, and has been immunized from antitrust liability. *See* Order 96-11-1 at 10 (Dep't of Transp. 1996). Nonetheless—although the alleged bilateral communications were immune from antitrust scrutiny—DHL alleges that United

knew or should have known that Lufthansa was coordinating a conspiracy and sharing United's information with other carriers. A12-13, 41-42, 52-53 (¶¶ 18-22, 89-90, 121-122). The complaint further alleges that United attended certain industry meetings where sensitive information was discussed (A22-23, 34-37, 49-51 (¶¶ 48-49, 74-79, 115-116)) and received fuel surcharge emails from Lufthansa and another alliance partner that were also sent to carriers outside the Star Alliance (A22, 29, 32-33 (¶¶ 46, 63, 70)). The complaint does not allege that United ever sent information to any carrier other than Lufthansa.

The only conduct the complaint attributes to United after February 1, 2006—the effective date of United's reorganization—is a single meeting between an unidentified United employee and an employee of just one other airline taking place on or around May 1, 2006, months after the alleged conspiracy was uncovered by the U.S. Department of Justice, the European Commission, and numerous other antitrust enforcement agencies. *See* A42 (¶ 91). Beyond that one vaguely described meeting, 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" (A69 (¶ 160)), and that United's "post-January 20, 2006, conduct . . . is sufficient standing alone to constitute an independent conspiracy to fix prices" (A80 (¶ 179)). DHL alleges no specific conduct or other factual detail to substantiate those conclusions and offers no explanation as to why United or any other carrier would have continued to participate in a conspiracy months after a highly publicized multinational criminal investigation and several civil class actions had been launched.

D. The district court's order

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 confirmation of United's reorganization plan, which discharged the claim.[3]

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 United's reorganization plan and the discharge of all its debts" (A121-122), 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." A123 (emphasis added). "[A]n unknowing victim of a debtor's secret unlawful conduct," according to the court, 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.* "Under [such] circumstances," the court explained, "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

[3] United also argued the complaint should be dismissed on statute of limitations grounds and because the allegations are implausible under the standard of *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007). We do not press those arguments in this appeal.

apprise the claimant of the *nature* of the claim to be discharged." A126 (emphasis added).

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 thus concluded that "due process require[d United to] notify [DHL] of the character of [its antitrust] claims prior to any discharge." A128-129. Because United failed to do so, the court held DHL's pre-confirmation antitrust claim not to have been discharged.

The district court further held that DHL was not required to avail itself of procedures in bankruptcy designed to protect creditors who have not received notice. Although recognizing that "DHL could have sought relief in the bankruptcy proceeding," including by filing of a late proof of claim (A129-130 & n.14), the court held that DHL was not required to avail itself of that opportunity to be heard. Because "the lack of [notice] here deprived DHL of the opportunity to litigate its antitrust claim in the bankruptcy proceedings," the court reasoned, there was "no need for DHL to seek relief from the bankruptcy court because the bankruptcy court's order" of confirmation did not discharge DHL's claim and thus "does not pose an obstacle to its claim." A131.

The district court subsequently certified its order for interlocutory appeal under 28 U.S.C. § 1292(b), describing the bankruptcy issue as "'particularly difficult.'" A204.

SUMMARY OF THE ARGUMENT

I. The balance of interests here leaves little room for doubt: The district court erred by holding that bankruptcy debtors must notify potential claimants

of the nature of speculative legal claims. To begin with, the district court's due process holding imposes massive new investigative burdens on debtors like United. That is because corporations are deemed to share the knowledge of the corporation's employees; thus, vast investigations will be necessary simply for corporate debtors to determine what they will be deemed already to know. Making matters worse, because a debtor will be unable to predict when a plaintiff's misapprehension of fact will lead the plaintiff to file a factually unfounded lawsuit after the bankruptcy bar date, the district court's order will make the discharge of many meritless legal claims virtually impossible. The result will undercut the bankruptcy system's goal of providing finality and a fresh start to reorganized debtors, and will be fundamentally unfair to those creditors who play by the rules and see their claims discharged for pennies on the dollar.

In light of the tremendous costs of the district court's due process holding, it is no wonder that courts almost universally have held that Chapter 11 debtors like United have no obligation to inform potential creditors of the facts underlying conjectural causes of action, even when the creditor claims that the debtor wrongfully concealed those facts. Under ordinary circumstances, an unasserted legal claim, like DHL's antitrust claim in this case, entitles its holder to mere publication notice. That DHL had other claims against United, entitling it to actual mailed notice, does not change the calculation. When due process does not require actual notice, actual notice satisfies due process.

It also is unsurprising that the district court's due process holding is out of step with long-standing

bankruptcy practice. The Supreme Court has said time and again that history and widely-shared procedures are persuasive indicators of what fundamental fairness and rationality require; yet the district court's order declares unconstitutional a practice that has been approved by the traditional, long-standing, and continuing approach to notice in bankruptcy cases.

II. Even supposing that DHL had been entitled to notice of the facts underlying its then-speculative antitrust claim, the district court erred for an independent reason when it held that DHL was not required to assert its claim *in United's bankruptcy* after the alleged fraudulent concealment ended.

Due process ensures the opportunity to be heard at a meaningful time and in a meaningful manner. The bankruptcy system offers a creditor that does not receive adequate notice prior to the debtor's bar date exactly that: the system guarantees an opportunity to file a late proof of claim. That procedure places the creditor in the same position that it would have been in had received the required notice at the outset. Due process requires nothing more. A contrary conclusion—one that would allow creditors like DHL to file suit outside the bankruptcy system, seeking 100 cents on the dollar—would be fundamentally unfair both to United's other creditors, whose claims were discharged in bankruptcy (and many of whom are now stockholders in the company), and to United itself, whose efforts to obtain a fresh start would be frustrated. The Due Process Clause does not permit such an unfair outcome, much less require it.

ARGUMENT

I. DHL RECEIVED SUFFICIENT NOTICE OF UNITED'S BANKRUPTCY.

Due process "is a flexible concept, intended to ensure fundamental fairness." *In re Agent Orange Prod. Liability Litig.*, 996 F.2d 1425, 1435 (2d Cir. 1993), *overruled in part on other grounds by Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28 (2002). The determination what is fair, and thus "[w]hat process is due in a given instance," ordinarily implicates conflicting interests, and therefore "requires [a] balancing" analysis that weighs those respective interests against one another. *Id.* The balancing of interests recognizes that "the marginal gains from affording an additional procedural safeguard" in a given case "may be outweighed by the . . . cost of providing" it. *Id.* (quoting *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 320-321 (1985)).

With respect to notice, due process ordinarily "requires that a deprivation of property be preceded by notice that is 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action,' and an 'opportunity for hearing appropriate to the nature of the case.'" *Brody v. Vill. of Port Chester*, 434 F.3d 121, 127 (2d Cir. 2005) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313-314 (1950)). The central purpose of the notice requirement is to inform each interested party "that the matter is pending [so he] can choose for himself whether to appear or default, acquiesce or contest." *Mullane*, 339 U.S. at 314. And here, too, in determining what kind of notice is "reasonable [under] the particular circumstances" to ensure such an opportunity, a court must "balance" the general interest in an efficient and final resolution of the pro-

ceedings against "the individual interest sought to be protected" by the notice. *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 484 (1988). In this case, that balancing analysis yields a clear answer: The enormous costs that would be imposed on debtors, their other creditors, and the bankruptcy system as a whole by providing specific notice of theoretically possible but unasserted legal claims to potential creditors—the sort of notice demanded by DHL here—would vastly outweigh the marginal benefits such notice would provide.

A. The balance of interests weighs decisively against requiring Chapter 11 debtors to provide specific notice of potential legal claims.

"[T]here 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 confirmation of United's reorganization plan and the discharge of all its debts." A121-122. That was enough to inform DHL "of the impending *hearing* so that [it could] take steps to safeguard [its] interests." *In re Penn Cent. Transp. Co.*, 771 F.2d 762, 768 (3d Cir. 1985). No more was required to afford DHL "an adequate opportunity to assert any claims [it] may have against [United]'s estate." *In re J.A. Jones, Inc.*, 492 F.3d 242, 249 (4th Cir. 2007).

The district court nevertheless determined that due process required United to provide DHL notice not only "of the pendency" of United's bankruptcy and all other "required information" necessary for DHL "to make [an] appearance" (*Mullane*, 339 U.S. at 314), but also "of the *character* of [any] claims" about which United *may* have, but DHL may *not*

have, known. A129 (emphasis added). In reaching that conclusion, the district court reasoned that, without "notice of the [specific] claims to be discharged," notice to United's creditors of the pendency of United's bankruptcy and the necessary deadlines "would amount to a meaningless gesture" with respect to any claims that were not "ascertainable to the claimant through reasonable efforts." A127. The ostensible benefit of providing that notice would not come at excessive cost, the district court added, because "a rule requiring debtors to notify unsuspecting claimants of the nature of their claims [would] not impose any burdens on the debtor that are materially greater than what is already required under the Bankruptcy Code and Rules." A128.

That is manifestly wrong. In actuality, the district court's order will impose massive new investigative burdens on debtors undergoing Chapter 11 bankruptcy, requiring them to uncover and disclose all facts that may underlie almost any potential legal claim against them, no matter how remote or speculative. What is more, because a debtor plainly cannot uncover and disclose facts that do not exist, this rule will make it impossible for debtors to discharge conjectural legal claims predicated on misapprehensions of fact. The result will be a fundamental undermining of the bankruptcy system's essential interest in efficiency and finality. Against that backdrop, it is clear that "the marginal gains from affording [the] additional procedural safeguard" imposed by the district court's order are vastly "outweighed by the . . . cost of providing" it. *Agent Orange*, 996 F.2d at 1435 (quoting *Walters*, 473 U.S. at 320-321).

1. The district court's due process holding will impose unreasonable new burdens on Chapter 11 debtors.

This Court repeatedly has cautioned that the "due-process notice requirement should not be interpreted 'so inflexibly as to make it an impractical or impossible obstacle.'" *Oneida Indian Nation of N.Y. v. Madison Cnty.*, 665 F.3d 408, 435 (2d Cir. 2011) (citing *Baker v. Latham Sparrowbush Assocs.*, 72 F.3d 246, 254 (2d Cir. 1995)), *petition for cert. filed,* 81 U.S.L.W. 3277 (U.S. Nov. 12, 2012) (No. 12-604). Yet the district court's decision below applies the due process requirement in precisely that way.

a. The kind of inquiry now undertaken by debtors to identify known 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. As the Third and Fourth Circuits have explained, "what is required is not a vast, open-ended investigation." *J.A. Jones*, 492 F.3d at 250 (quoting *Chemetron Corp. v. Jones*, 72 F.3d 341, 346-347 (3d Cir. 1995)). Instead, "the requisite search focuses [only] on the debtor's own books and records." *Id.* (quoting same). A debtor's review of those materials must be "reasonably diligent," but "[e]fforts *beyond* a careful examination of these documents are generally not required." *Id.* (emphasis added) (quoting same).

Consistent with that 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 details of the claim are not.

E.g., A139-144. *Second*, debtors review their legal files for *existing* or *actually threatened* legal claims. *Cf. In re Prod. Plating, Inc.*, 90 B.R. 277, 285 (Bankr. E.D. Mich. 1988). 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 yet-to-be-filed lawsuit. The understanding and practice has been that 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." *In re Envirodyne Indus., Inc.*, 214 B.R. 338, 348 (N.D. Ill. 1997). "[S]uch impracticable and extended searches [simply] are not required in the name of due process." *Mullane*, 339 U.S. at 317-318.

b. The district court's order turns that reasonable and workable regime upside down, imposing massive new burdens on debtors undergoing Chapter 11 reorganization.

To be sure, the court acknowledged 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." A125. But that acknowledgement offers little solace to large corporate entities like United that must comply with the court's holding 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 of the character of those claims prior to any discharge." A129 (emphasis added). 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). That means sprawling and 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 conceivably support any conjectural 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 more than one hundred thousand employees at the time of its bankruptcy filing, that would be an impossible burden.

Compounding the burden even further, the district court's understanding of due process will require claim-specific notice for virtually *every* potential legal claim. Because 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 post-confirmation claims of concealment. After all, any claim as to which a debtor did not give claim-specific notice would survive discharge so long as the creditor merely *alleged* that the debtor knew of the claim and the creditor did not.

And even then, it is unclear what degree of claim-specific detail would be necessary to satisfy due process. No debtor could be certain that provid-

ing claim-specific notice would in fact guarantee a fresh start; creative plaintiffs likely would continue to find ways to argue that the notice they *did* receive was in some way deficient.

c. The district court nevertheless thought that, because "a debtor is required to prepare schedules of its debts, and should include potential legal claims against it, even if disputed. . . . 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." A128. But that is flatly incorrect.

In fact, the universal practice in bankruptcy cases is *not* to inform creditors of the nature of their particular claims. Instead, the Bankruptcy Rules require debtors to provide only (1) notice of deadlines for filing proofs of claims (Fed. R. Bankr. P. 2002(a)(7)); (2) a copy of the reorganization plan (Fed. R. Bankr. P. 3017(d)); (3) notice of the confirmation hearing (*id.*); and (4) a copy of the confirmation order (Fed. R. Bankr. P. 2002(f)). But "nothing in [the Bankruptcy Code] requires trustees to provide information to creditors as to the character of their claims." *Penn Cent.*, 771 F.2d at 768. *Cf. Gentry v. Siegel*, 668 F.3d 83, 86 (4th Cir. 2012) ("The bankruptcy court also approved the contents of notice to interested persons, which described *the bankruptcy procedures and announced the bar date*." (emphasis added)).

Indeed, notices sent in most bankruptcies are, as a matter of practice, nearly identical for each creditor and never inform individual creditors of specific facts underlying any of their claims. Standard bankruptcy notice forms provided by the various bankruptcy

courts and approved by the Judicial Conference of the United States very notably do *not* prompt debtors to provide information concerning the nature of a creditors' claim. *See* Official Form 9F bar date notice, http://tinyurl.com/UnitedDHL3. In fact, we are unaware of *any* proceeding in which a debtor provided the sort of notice required by the district court's order in this case, even where (as DHL alleges here) the claim was one that the debtor would, and the creditor would not, have been aware of at the time of the bankruptcy. Thus, other courts unsurprisingly have concluded that notice to creditors of information "analogous to that contained in Official Bankruptcy Form 9" is all that due process requires. *In re Amdura Corp.*, 170 B.R. 445, 452-453 (D. Colo. 1994). Although we made these observations before the district court, DHL has never disputed the point or purported to identify any proceeding in which such notice has been provided, much less required.

As a consequence, the notice demanded by DHL and required by the district court will impose enormous and unprecedented costs on bankruptcy debtors. That in itself strongly suggests that the district court's due process ruling is wrong. The Supreme Court has noted repeatedly that fairness is not an entirely "freeform" concept "divorced from traditional practice." *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011). "[V]ery few cases have used the Due Process Clause . . . to strike down a procedure concededly approved by traditional and continuing American practice." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 36 (1991) (Scalia, J., concurring). That is because "history and widely shared practice [are] concrete indicators of what fundamental fairness and rationality require." *Schad v. Ariz.*, 501 U.S. 624, 640 (1991) (plurality). Thus, when a "par-

ticular [procedure] has a long history, or is in widespread use, it is unlikely" to offend due process. *Id.* That bankruptcy practitioners have not provided, and courts have not required, a disclosure to specific creditors of the nature of their potential claims strongly suggests that no such disclosure is required by the Due Process Clause.

2. The decision below will make the discharge of many claims impossible, undermining the core purpose of the bankruptcy system.

The district court's order not only will impose impractical burdens on debtors in Chapter 11 bankruptcy; it also will make discharge of many legal claims simply impossible, undercutting the "central purpose of the Bankruptcy Code" of guaranteeing debtors a fresh start, "unhampered" by suits asserting claims based on pre-confirmation conduct. *Grogan v. Garner*, 498 U.S. 279, 286 (1991)).

It is fundamental that "all factual allegations in [a] complaint must be assumed true for the purposes of a motion to dismiss." *Bryant v. N.Y. State Educ. Dep't*, 692 F.3d 202, 210 (2d Cir. 2012), *petition for cert. filed,* 81 U.S.L.W. 3436 (U.S. Jan. 2, 2013) (No. 12-932). The assumption of truth is essential to the court's decision whether to "unlock the doors of discovery," permitting the plaintiff to (attempt to) uncover evidence in support of its allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). But the assumption of truth also means that the district court's due process holding in this case will apply at the motion-to-dismiss stage *regardless* whether the allegations underlying a plaintiff's pre-confirmation claim turn out to be true or false. The result is to place Chapter 11 debtors in the impossible situation that United finds itself in here: being held responsible for not dis-

closing facts that it insists *did not exist to begin with*. The claim here is not discharged under the district court's rule because United did not disclose the claim—but United did not disclose the claim because, United maintains, there *was no claim to disclose*. That result makes no sense—due process assuredly does not require debtors to predict when a potential creditor's misapprehension of the facts might lead it to file a meritless lawsuit some time later on.

It is easy to see that problem here. The district court "assumed for purposes of this motion" both the truth of the facts underlying DHL's antitrust cause of action and "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." A130. In these circumstances, the court explained, only "[i]f United is able to demonstrate *after discovery*" that DHL's allegations are, in fact, "wrong," would "a different conclusion regarding the discharge of DHL's claims" be warranted. *Id.* (emphasis added).

But that gets matters backwards. As we have explained, the discharge of a debt "operates as an injunction against the *commencement*" of any lawsuit to "recover" a debt based on the pre-confirmation "liability of the debtor." 11 U.S.C. § 524(a)(2) (emphasis added). Just like immunity from suit, the Code's injunction against the commencement of post-confirmation actions would be defeated if, to avail themselves of the injunction, debtors were required first to disprove the plaintiff's allegations. It is the "potentially disabling *threats* of liability," and the "undue interference" that those threats cause, that immunity from suit is meant to forestall. *Elder v. Holloway*, 510 U.S. 510, 514 (1994) (emphasis added)

(discussing qualified immunity). That same purpose applies to the Code's statutory injunction: A debtor will not have an "opportunity to make a financial fresh start" (*Green v. Welsh*, 956 F.2d 30, 33 (2nd Cir. 1992)) if it continues to face lawsuits complaining about pre-confirmation conduct and alleging fraudulent concealment.

Those concerns have special force in cases like this one. United categorically denies participation in any cargo surcharge cartel. Indeed, both the U.S. and European competition agencies have determined that United is not guilty of price fixing. Yet as the Supreme Court has recognized, it is common for plaintiffs in sprawling price-fixing cases to use the threat of expensive discovery as a club against "multibillion dollar corporation[s] with legions of management level employees." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 560 n.6 (2007). The prospect of engaging in such discovery, at "potentially enormous expense," "push[es] cost-conscious defendants to settle even anemic cases." *Id.* at 559. Thus, under the district court's approach, debtors like United will emerge from bankruptcy facing abusive claims (claims that, because they are not grounded in real misbehavior, could not have been anticipated, disclosed, and discharged) that they will face tremendous pressure to settle for vastly more than the plaintiffs would have recovered as creditors under the debtor's plan of reorganization. An outcome like that would sabotage the bankruptcy system and be fundamentally unfair to those creditors who participate fully in the bankruptcy proceedings, relinquishing their claims for pennies on the dollar.

3. The countervailing interest of potential creditors like DHL is minimal.

Against these fundamental interests in efficiency, finality, fairness to other creditors, and granting debtors a fresh start, the Court must weigh the interest of potential creditors in receiving actual notice of the nature of conjectural legal claims. Because that interest is insignificant in comparison, it is clear that "the marginal gains from affording [the] additional procedural safeguard" imposed by the district court's order is "outweighed by the . . . cost of providing" it. *Agent Orange*, 996 F.2d at 1435 (quoting *Walters*, 473 U.S. at 320-321)).

The purpose and effect of the bankruptcy system is *not* to make creditors whole; a debtor enters bankruptcy precisely because that objective cannot be achieved. So far as creditors are concerned, the purpose of bankruptcy is therefore to ensure fair and "equal distribution of the debtor's property among his creditors." *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 587 (1935); *see also Envirodyne Indus.*, 214 B.R. at 349 (a "goal of bankruptcy is to provide fairness among creditors"). Once the debtor's property has been distributed, the "bankruptcy power" of the Constitution grants Congress the authority to eliminate the balance of the "debtor's personal obligation[s]." *Radford*, 295 U.S. at 589.

That means the interest weighing in the balance against efficiency, finality, and fairness to United and United's other creditors is *not* DHL's interest in obtaining three-fold damages on its antitrust claim. Even if DHL had received the detailed notice it says it was entitled to, had filed a proof of claim based on United's alleged participation in the fuel surcharge price-fixing conspiracy, and had prevailed on that

claim, it would have received a miniscule fraction of the face value of the claim, *if anything at all*. The interest at stake here accordingly is DHL's interest in being apprised of facts that *might* have prompted it to file a claim in United's bankruptcy based upon a disputed, unliquidated legal claim that *might* have been approved by the bankruptcy court.

That interest is manifestly insufficient to justify the enormous costs that the district court's order imposes on debtors and the bankruptcy system. To be sure, there is no denying "the harsh realities of barring claims held by persons who may not reasonably have been aware of their claims on or before the bar date." *In re Chateaugay Corp.*, 2009 WL 367490, at *6 (Bankr. S.D.N.Y. 2009). But even under the best of circumstances, bankruptcy is "harsh on creditors." *In re Young*, 82 F.3d 1407, 1422-1423 (8th Cir. 1996), *vacated sub nom. on unrelated grounds*, *Christians v. Crystal Evangelical Free Church*, 521 U.S. 1114 (1997). The bare "fact that some [creditors] may lose their rights [in a debtor's bankruptcy] does not mean that an initial notification program is unreasonable." *Vancouver Women's Health Collective Soc'y v. A.H. Robins Co.*, 820 F.2d 1359, 1364 (4th Cir. 1987). It often means, instead, that the cost of providing the notice required to avoid that result—here, including the profound unfairness to United's *other* creditors who took stock in the reorganized entity in exchange for their prepetition claims—outweighs the unfairness of not providing such notice in the first place.

4. Other courts have rejected the conclusion reached by the district court in this case.

In light of the clear balance of interests, it is unsurprising that virtually every court, including the only federal court of appeals, to have addressed the

specific question presented here has held that due process does *not* require debtors to provide notice of the nature of a potential creditor's claim, even when a particular claim was unknown to the debtor.

a. That was the Third Circuit's holding in *Penn Central*. There, as here, certain plaintiffs brought suit against Penn Central alleging that it had engaged in a price-fixing conspiracy, in "violation[] of [the] antitrust laws." 771 F.2d at 765. Penn Central, however, had filed a petition for reorganization under section 77 of the Bankruptcy Code; it obtained a "final decree in the reorganization process" in 1978, after the alleged price-fixing conspiracy had ended but before suit was filed. *Id.* at 736-764. As part of the bankruptcy process, Penn Central's trustee had "completed an exhaustive search of [Penn Central's] accounting records" and sent "mail notice" of "the standard proof of claim forms and schedules, and subsequent orders regarding the proof of claim program" to all potential creditors. *Id*. at 768. Precisely as in this case, the plaintiffs there "received mail notice of the proof of claim program and the bar date" "because of their other claims" against the debtor. *Id.* at 768-769.

The plaintiffs in *Penn Central* (just like DHL in this case) nevertheless argued that their antitrust claim had not been discharged by the confirmation order. As they saw it, the traditional bankruptcy notice procedures, although "adequate for [their] ordinary commercial claims," were "completely *in*adequate for their antitrust claims because" those "claims were unknown and undisclosed to them during the reorganization proceeding due to [Penn Central]'s fraudulent concealment of the conspiracy." *Penn Cent.*, 771 F.2d at 767-768 (emphasis added).

Thus, they claimed, due process principles obligated Penn Central to provide notice not only of the pendency of the proceedings and the relevant deadlines, but also "that they had bankruptcy claims based specifically upon an antitrust conspiracy." *Id.* at 768.

The Third Circuit squarely rejected that argument. "[T]he purpose of the notice requirement," the court explained, "is to advise individuals who will be affected by the outcome of any proceeding of the impending *hearing* so that they can take steps to safeguard their interests." *Penn Cent.*, 771 F.2d at 768. It is not to disclose "the nature of those interests," even where the interests are alleged to have been "unknown and undisclosed" by reason of the debtor's "fraudulent concealment." *Id.* at 767-768. Nothing in the Bankruptcy Code or the case law "requires [debtors or their] trustees to provide information to creditors as to the character of their claims," and to hold that the Constitution imposes such a requirement would undermine "the policy of finality" that is essential to the proper functioning of the bankruptcy system. *Id.* at 768-769. That decision is squarely at odds with the district court's order below.

The district court thought *Penn Central* distinguishable because Penn Central's trustees "were unaware of potential antitrust claims against the debtor" in that case. A128. But that distinction is irrelevant. Penn Central (just like United here) was alleged to have fraudulently concealed an anticompetitive conspiracy. That, of course, presumed that Penn Central had knowledge of the alleged conspiracy; it therefore would have had a duty to notify its creditors of the nature of their potential antitrust claims under the district court's holding in this case. Although the *trustees* were found to be ignorant in that

case (771 F.2d at 768), that observation was relevant primarily to an issue that the plaintiffs lost in the district court and abandoned on appeal (*id*. at 767 n.7); it was not essential to the Third Circuit's due process holding.

b. The Eastern District of Virginia has followed *Penn Central*'s lead. That court recently considered the sufficiency of notice with respect to a purported class of former Circuit City employees who were "unlikely to be aware that they had claims against" Circuit City in its bankruptcy proceedings. *In re Circuit City Stores, Inc.*, 2010 WL 2208014, at *8 (Bankr. E.D. Va. 2010), *aff'd in relevant part,* 668 F.3d 83 (4th Cir. 2012). Because the "purported class members" all were recent former employees, Circuit City had "served actual notice of the Bar Date" on all of them. *Id*. But the named plaintiffs, arguing on behalf of the unidentified members of the purported class, contended that the notice was "inadequate" as to the absent class members, who likely had no knowledge of their claims. *Id*.

The district court rejected that argument: "Neither due process nor the Bankruptcy Rules require [a debtor] to specifically inform parties of the existence or nature of their potential claims." *Circuit City,* 2010 WL 2208014, at *8. Instead, "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*. (emphasis added). That is so regardless whether the

creditor is "unlikely to be aware [of its] claim[] against the Debtors." *Id.*[4]

c. The district court's decision below is flatly inconsistent with *Penn Central* and *Circuit City*. In the district court's view, "[t]he 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" alone. A123. According to the court, "a debtor [cannot] obtain the final discharge of all claims against it without giving any indication of what those claims might be." *Id.* On this view, "where a debtor is aware of cer-

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[4] Two other courts have come to similar conclusions on somewhat different facts. In *In re Amdura Corp.*, 170 B.R. 445 (D. Colo. 1994), the court agreed with the Third Circuit that due process never requires debtors to inform creditors of "the nature of [their] interests" in a bankruptcy proceeding. *Id.* at 452-453. And in *In re Production Plating, Inc.*, 90 B.R. 277 (Bankr. E.D. Mich. 1988), the court found "unpersuasive" an argument that "due process require[s] [d]ebtor[s]" not only "to provide written notice of the confirmation hearing" but also "to notify [creditors] of the very nature of their claims." *Id.* at 285.

By contrast, we are aware of just one case, apart from this one, in which a court held that a claim was not discharged because the debtor failed to notify the creditor of the nature of the claim. *See Acevedo v. Van Dorn Plastic Mach. Co.*, 68 B.R. 495 (Bankr. E.D.N.Y. 1986). That court's brief discussion of the notice question gave no consideration to the very serious concerns we discuss in text. To our knowledge, no court other than the one below has followed *Acevedo*'s due process holding.

tain claims against it due to information uniquely within its purview, due process requires that it notify claimants of the character of those claims." A129. That is precisely the conclusion that *Penn Central* and *Circuit City* rejected. The district court did not, and could not, explain why those cases were wrongly decided.

B. With respect to its speculative antitrust claim, DHL was an unknown creditor entitled to mere publication notice.

Courts also have applied these principles in a closely related context to hold, uniformly, that actual notice of a bankruptcy proceeding (and, of course, of all claims that might be asserted in that proceeding) need not be provided to potential creditors whose claims are conjectural and speculative. The holding below cannot be reconciled with this constitutional understanding.

1. It is fundamental that "[t]he type of notice that is reasonable or adequate for purposes of . . . due process [in bankruptcy cases] . . . depends on whether a particular creditor is known or unknown to the debtor." *J.A. Jones*, 492 F.3d at 249; *see also Chemetron*, 72 F.3d at 346 ("For notice purposes, bankruptcy law divides claimants into two types, 'known' and 'unknown.'"). "[T]o achieve a constitutionally permissible discharge of a *known* creditor's claim against a debtor, actual notice of the bankruptcy filing and applicable bar date is required"; but "where a creditor is *unknown* to the debtor, constructive notice—typically in the form of publication—is

generally sufficient to pass constitutional muster." *J.A. Jones*, 492 F.3d at 249-250 (emphasis added).[5]

Crucially for present purposes, not "everyone who may conceivably have a claim" is deemed a known creditor "entitled to actual notice." *Tulsa Prof'l Collection Servs.*, 485 U.S. at 490. On the contrary, those creditors "whose claims are merely conceivable, conjectural or speculative" (*In re Arch Wireless, Inc.*, 534 F.3d 76, 81 (1st Cir. 2008)) are universally regarded as *unknown* for due process purposes, and therefore "not entitled to actual notice of the debtor's bankruptcy filing" (*J.A. Jones*, 492 F.3d at 250). As the Supreme Court put it in *Mullane*, creditors "whose interests are either conjectural or future" are not entitled to any "more certain notice" than by "publication." 339 U.S. at 317. *See also In re Crystal Oil Co.*, 158 F.3d 291, 297 (5th Cir. 1998) ("there can be no basis for concluding that a debtor is required to send notices to any [entity] that possibly may have a claim against it").

In light of these settled principles, a creditor with a legal claim will be deemed *known* and entitled to actual notice of the proceeding and bar date only when it has "fil[ed] a complaint" or "show[n] some intent to pursue legal remedies." *Prod. Plating, Inc.*, 90 B.R. at 285. And even then, the creditor's intent to seek these remedies must be "reasonably ascertainable" to the debtor. *Crystal Oil*, 158 F.3d at 297-298

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[5] The "form and manner" of notice by publication is determined by the bankruptcy court (Fed. R. Bank. 9008) and ordinarily includes the debtor's name, the court in which the proceedings are taking place, the date the debtor's petition was filed, and the bar date.

(creditor who had simply "contacted" the debtor and "asked about" the relevant property was deemed "unknown").

The distinction between known and unknown creditors reflects the long-accepted rule that due process does not require debtors "to search out each *conceivable* or *possible* creditor and urge that person or entity to make a claim against it" (*Envirodyne Industries*, 214 B.R. at 348 (emphasis added)) or "to exercise legal judgment as to theories interested parties *may* bring" at some point in the future (*Prod. Plating*, 90 B.R. at 285 (emphasis added)). Because "such impracticable and extended searches are not required in the name of due process" (*Mullane*, 339 U.S. at 317-318), there is no constitutional requirement "to notify [creditors] of the very nature of the[] claims" that the theories turned up by such searches may, conceivably, support (*Prod. Plating*, 90 B.R. at 285).

2. The district court's decision cannot be squared with that framework. At the time of United's bankruptcy, whatever legal claim DHL may have had against United based on United's alleged participation in the price-fixing conspiracy was, at most, a *conceivable* one. But DHL had not yet "fil[ed] a complaint" or otherwise manifested an "intent to pursue legal remedies." *Prod. Plating*, 90 B.R. at 285. Even taking all of the complaint's allegations as true—that is, assuming (contrary to fact) that United had engaged in a price-fixing conspiracy and had fraudulently concealed its participation—any thought that DHL *might* file an antitrust suit against it at some

point in the future was, at the time, "conjectural [and] speculative." *Arch Wireless*, 534 F.3d at 81.[6]

In these circumstances, DHL was an unknown creditor with respect to its antitrust claim. If DHL had no other claims against United entitling it to actual, mailed notice, due process therefore would not have required United to provide DHL with mailed notice *at all*; mere publication notice would have been enough. *J.A. Jones*, 492 F.3d at 250.

The district court's decision that DHL's speculative antitrust claim nevertheless required *more* than the traditional notice of the bankruptcy and bar date is inexplicable. The court held, in effect, that because DHL had *other* claims against United entitling it to actual notice, due process required United to provide *additional* notice concerning the "nature" and "character" (A126) of its conjectural antitrust claim—a claim that otherwise would have entitled DHL to mere publication notice of the pendency of the bank-

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[6] As a practical matter, United had no reason to suspect that DHL would file the present complaint. For the reasons developed fully in our motion to dismiss, DHL's allegations against United are entirely implausible. *See* Dist. Dkt. 20-1. The complaint's implausibility is confirmed by the fact that—although more than twenty airfreight carriers pled guilty and paid criminal fines in connection with the investigation of the air cargo conspiracy—neither the U.S., European, nor any other antitrust agencies ever found United liable for any wrongdoing, and United ultimately was dropped as a defendant from tens of civil class actions that were consolidated in an earlier-filed MDL. *See id.* at 4-5.

ruptcy proceeding. That is wrong: Where "due process does not require actual notice, actual notice satisfies due process." *Oneida*, 665 F.3d at 429.

II. DHL'S RIGHT TO FILE A LATE PROOF OF CLAIM IN UNITED'S BANKRUPTCY PROVIDED DHL WITH AN ADEQUATE OPPORTUNITY TO BE HEARD.

The decision below should be reversed for the reasons set out above. But there is, in addition, a separate and independent ground for reversal: DHL *had*, and failed to use, an opportunity to assert its claim in United's bankruptcy.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). As we have explained, the point of notice is to allow parties whose interests are at stake to "choose for [themselves] whether to appear or default, acquiesce or contest." *Mullane*, 339 U.S. at 314. But that is the extent of the choice that the Due Process Clause guarantees; when a particular procedure provides a party an opportunity to present its objections "at a meaningful time and in a meaningful manner," the party is not free to eschew that opportunity and choose, instead, to file a separate civil suit.

As relevant here, the bankruptcy system guarantees a creditor that does not receive adequate notice *before* a debtor's bar date an opportunity to file a proof of claim *after* the bar date. That procedure places the creditor in the same position as though it had received the required notice at the outset. Due process requires nothing more. Indeed, a contrary

conclusion—allowing creditors like DHL to file suit outside the bankruptcy system, seeking 100 cents on the dollar—would grant such a dilatory creditor a windfall that is unfair both to United's other creditors, whose claims were discharged in bankruptcy, and to United itself, whose efforts to obtain a fresh start would be frustrated.

A. DHL had an adequate opportunity to assert its claim in United's bankruptcy.

1. There is no question that DHL had a complete and adequate opportunity to assert its antitrust claim in United's bankruptcy. Under Bankruptcy Rules 3003(c)(3) and 9006(b)(1), late proofs of claim—that is, proofs of claim filed after the bar date, and even after the confirmation of a plan of reorganization—are permitted in "situations where the failure to timely file is due to circumstances beyond the control of the filer." *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 391 (1993). So far as we are aware, every court to address the question has held that, when a creditor does not receive adequate notice in time to file a claim prior to confirmation, the bankruptcy court *must* permit the creditor to file a late proof of claim, at least so long as the creditor acts diligently upon learning of the bankruptcy case and its claim.

The Third Circuit reached that conclusion in *In re Harbor Tank Storage Co.*, 385 F.2d 111 (3d Cir. 1967). There, just as DHL alleges here, the creditor had not received "the various notices required" by the Bankruptcy Code. *Id.* at 114. Consistent with the Supreme Court's settled due process precedents, the Third Circuit thus rejected the debtor's contention that the creditor's claim had been discharged. *Id.* But the court did not say that the creditor was therefore

entitled to pursue its claim against the reorganized debtor in a separate civil suit, seeking 100 cents on the dollar. On the contrary, "under the circumstances, [the creditor] had an absolute right to file and prove its claim" *in the bankruptcy proceedings*, "despite the fact that the bar date had passed and the plan was confirmed." *Id.*[7]

The First Circuit reached the same conclusion in *In re Intaco Puerto Rico, Inc.*, 494 F.2d 94, 99 (1st Cir. 1974). There, again, "no formal notice of any kind concerning the pendency of [the bankruptcy] proceedings, the developments therein, or the time and manner in which to file claims, was ever given to the Creditor." *Id.* at 96. The First Circuit held that the creditor's claim therefore had not been discharged. *Id.* at 98. But, like the Third Circuit, that court explained that "the effect of the failure to give notice to a known creditor" is simply to "preclude[] a finding that the Creditor is barred by confirmation of the reorganization plan from presenting his claim to the bankruptcy court" after the confirmation date. *Id.* at 99.

The bankruptcy courts uniformly have followed the First and Third Circuit's leads. The Bankruptcy

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[7] The Third Circuit later qualified that holding, explaining that once a creditor who did not receive notice learns of a bankruptcy case and its interest in it, it must "act[] promptly and diligently" and "cannot wait indefinitely before filing a [late] proof of claim." *In re Remington Rand Corp.*, 836 F.2d 825, 833 (3d Cir. 1988). It is doubtful that DHL has complied with that requirement here. But that would be a question for the bankruptcy court in the first instance.

Court for the Southern District of New York, for example, has explained that, "[w]hen a creditor does not receive the requisite notice of the bar date and its claim is not [discharged], the appropriate remedy should be to put the creditor in the same position it would have been had notice been properly served by allowing the creditor to file a late claim against the estate." *In re Emons Indus., Inc.*, 220 B.R. 182, 192 (Bankr. S.D.N.Y. 1998). Thus, as that court recently reiterated, "[i]f 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." *In re Lear Corp.*, 2012 WL 443951, at *9 (Bankr. S.D.N.Y. 2012).[8]

Those cases make clear that when a creditor entitled to actual notice does not receive it, the bankruptcy system guarantees that creditor an opportunity to file a late proof of claim, even after the bar date and the effective date of the debtor's confirmation. So long as the creditor "act[s] promptly and diligently" (*In re Remington Rand Corp.*, 836 F.2d 825, 833 (3d Cir. 1988)), the question whether to allow a late claim under such circumstances is *not* "dependent on the district court's discretion" (*Harbor Tank Storage*, 385 F.2d at 114). To the contrary, such relief is available as of "absolute right" (*id.*), because constitutionally inadequate notice "precludes a finding

[8] Many other bankruptcy courts have accepted late proofs of claim under similar circumstances. *See, e.g.*, *In re Washington*, 483 B.R. 871 (Bankr. E.D. Wis. 2012); *In re O'Shaughnessy*, 252 B.R. 722 (Bankr. N.D. Ill. 2000); *In re Pettibone Corp.*, 151 B.R. 166 (Bankr. N.D. Ill. 1993); *In re May's Family Ctrs., Inc.*, 54 B.R. 256 (Bankr. N.D. Ill. 1985).

that the Creditor is barred by confirmation of the reorganization plan from presenting [a late] claim to the bankruptcy court" (*Intaco*, 494 F.2d at 99).

In these circumstances, there is no question that DHL had an "opportunity to be heard at a meaningful time and in a meaningful manner" (*Mathews*, 424 U.S. at 333) in the United bankruptcy proceeding: it could have filed its claim at the time that it (assertedly) learned of the claim's existence. That was all that the Due Process Clause required.[9]

2. The district court recognized that "DHL could have sought relief in the bankruptcy proceeding," including by filing of a late proof of claim. *See* A130-131 & n.14. But it held that DHL was not required to avail itself of that opportunity to be heard. Because "the lack of [notice] here deprived DHL of the opportunity to litigate its antitrust claim in the bankruptcy proceedings," the court reasoned, there was "no need for DHL to seek relief from the bankruptcy court because the bankruptcy court's order" of confirmation did not discharge DHL's claim and thus "does not pose an obstacle" to the prosecution of a separate civil suit. A131.

That conclusion, however, put the cart before the horse. Our point—missed entirely by the district court—is that any lack of notice could *not* have "de-

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[9] United's bankruptcy already has been reopened twice since the company emerged from chapter 11 on February 1, 2006. *See* Order Granting Motion To Reopen Chapter 11 Case, No. 02-B-48191 (Bankr. N.D. Ill Aug. 17, 2011) (Dkt. 17449); Order Granting Motion To Reopen Chapter 11 Case, No. 02-B-48191 (Bankr. N.D. Ill Aug. 21, 2012) (Dkt. 17476).

prived DHL of the opportunity to litigate its antitrust claim in the bankruptcy proceedings" (A131) because a creditor that does not receive complete and adequate notice is entitled, as of right, to file a late proof of claim. Nothing in the Due Process Clause entitled DHL to disregard its available bankruptcy remedies and prosecute this suit outside the bankruptcy process, just as a creditor who learns of its claim prior to the bar date may not ignore the bankruptcy process and choose to instead bring a civil action in court. That is especially so because, as the district court itself put it, "[b]ankruptcy 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." *Id.*

Congress, in approving the Bankruptcy Rules, anticipated situations in which creditors like DHL might have to file late proofs of claim. For their part, the courts have made clear that leave to file a late proof of claim *must* be granted when a creditor does not receive adequate notice in time to file a timely claim and acts diligently upon learning of the case and its interest in it. The inclusion of the late-claim remedy in the Bankruptcy Code reflects a self-evident intent that it be used in cases like this one. That, of itself, should be an end to the matter: "The role of the judiciary is limited to determining whether the [available] procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy." *Landon v. Plasencia*, 459 U.S. 21, 34-35 (1982).

B. Allowing DHL to pursue its antitrust claim outside the bankruptcy process would be fundamentally unfair.

A contrary holding not only would ignore the procedures available to DHL in United's bankruptcy; it also would be fundamentally unfair to United's other creditors and to United itself. Even assuming United had been obligated to inform DHL of the nature of its potential claim, DHL simply is not entitled to pursue its claim outside the bankruptcy system, seeking 100 cents on the dollar.

1. As we explained earlier, a central purpose of the bankruptcy system is to achieve an equitable "distribution of assets among similarly situated creditors" (*Musso v. Ostashko*, 468 F.3d 99, 104 (2d Cir. 2006)) and thereby "to provide fairness among creditors" (*Envirodyne Indus.*, 214 B.R. at 349). Accordingly, the courts "ha[ve] an obligation" to take account of the interests not only of "*potential* claimants" in bankruptcy, like DHL, "but also [of] *existing* claimants and the petitioner's stockholders." *Vancouver Women's Health Collective*, 820 F.2d at 1364 (emphasis added).

The balancing of those interests indicates that, entirely apart from the adequacy of the notice that DHL received, DHL may not pursue its antitrust claim outside United's bankruptcy. On the one side of the scale, a late notice of claim would have "put [DHL] in the same position it would have been had notice been properly served" in the first place. *Emons Indus.*, 220 B.R. at 192. Because that is all DHL could have asked for if it *had* received (what it believes would have been) sufficient notice, "there can be no question of the basic good sense of treating" DHL's antitrust claim "as [a] general unsecured

claim[]" in United's bankruptcy. *In re Miracle Mart, Inc.*, 396 F.2d 62, 63 (2d Cir. 1968).

On the other side of the scale, "[t]here are no equities in favor of [a] creditor receiving more than it would have received if it had filed a timely claim." *Emons Indus.*, 220 B.R. at 192. On the contrary, "[t]o accept [DHL]'s position" that it should be allowed to pursue full recovery on its antitrust claim now that United has reorganized and is again solvent, would be "a windfall for [DHL] and unfair to the other creditors." *Miracle Mart*, 396 F.2d at 63. As the Bankruptcy Court for the Southern District of New York has explained, it would run counter to the due-process principles of equity and fairness—to say nothing of the express purposes of the Bankruptcy Code—for a creditor "to avoid the effects of the Debtor's insolvency and recover 100 cents on the dollar," simply because it did not receive adequate notice prior to the bar date. *Emons Indus.*, 220 B.R. at 193. Of course, creditors filing post-confirmation suits against reorganized debtors may "not [be] satisfied with this equality of treatment," but fundamental fairness does not "favor [allowing a creditor to] recover[] *more* than [other creditors] who were required to file claims by the bar date." *Id.*

That is exactly what DHL is attempting here. Its interests stand opposed to those other United creditors whose claims *were* addressed in United's plan of reorganization and discharged in bankruptcy. Those creditors received stock in the reorganized debtor (valued at confirmation at just pennies on the dollar) for their allowed claims, and nothing for their unknown or disallowed claims. *See* A88-91. By declining to exercise its right to file a late proof of claim, and instead by filing a separate suit outside the

bankruptcy process, DHL now seeks the *full* value of its claim, effectively attempting to move its low-priority, unsecured, unliquidated, disputed legal claim to the front of the line, ahead of all of United's other pre-confirmation debts. Compounding that 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. That is, in a word, *unfair*.

2. United's own interests also point strongly away from permitting DHL to pursue its claim outside United's bankruptcy. As we explained, a "central purpose of the [Bankruptcy] Code" is to allow "insolvent debtors [to] reorder their affairs, make peace with their creditors, and enjoy a new opportunity" for success "unhampered by the pressure and discouragement of preexisting debt." *Grogan*, 498 U.S. at 286. The statutory injunction against suits predicated on pre-confirmation conduct is essential to the achievement of that goal. As the Sixth Circuit has noted, it not only "would be unjust and unfair to those who had accepted and acted upon a reorganization plan" for the courts to permit "the assertion of old claims against discharged and reorganized debtors," but the prospect of such claims likely would lead both debtors and creditors "not [to] participate in reorganizations" at all. *Duryee v. Erie R.R.*, 175 F.2d 58, 63 (6th Cir. 1949). That is especially so because to "subject [a] rehabilitated company to an immense claim" like DHL's would risk "return[ing] it into bankruptcy and undo[ing] the Chapter XI proceeding" altogether. *Miracle Mart*, 396 F.2d at 63. That outcome—which would push insolvent debtors

toward liquidation rather than reorganization—is not one that due process would tolerate, much less require.

The Court accordingly should reverse the district court's order, even if it agrees that DHL was entitled to notice of the facts underlying its then-unasserted antitrust cause of action. The bankruptcy system provided DHL with a clear and adequate opportunity to present its antitrust claim in United's bankruptcy once United's supposed fraudulent concealment ended and DHL became aware of the claim. Due process did not entitle DHL to disregard that procedure in favor of seeking full recovery on its claim in a post-confirmation civil suit.

CONCLUSION

The Court should hold that United was not constitutionally obligated to provide DHL with notice of the alleged facts underlying its antitrust claim. If the Court concludes otherwise, it should hold that DHL has a constitutionally adequate opportunity to assert its claim in United's bankruptcy under Bankruptcy Rules 3003(c)(3) and 9006(b)(1). Either way, the Court should hold that DHL's antitrust claim in this suit is limited to conduct taking place after February 1, 2006. On that basis, the Court should vacate the district court's order denying United's motion to dismiss and remand with instructions for the district court to consider whether the remaining allegations are sufficient to state a claim.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel for appellants certifies that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 12,204 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)-(B)(iii); and

(ii) complies with the formatting requirements of Local Rule 32.1(a)(2) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in 12-point Century Schoolbook font with 2-point leading between lines and 6-point leading between paragraphs.

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