UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

In Re:	Chapter 11 Case No.
AMR CORPORATION, et. al.	11-15463 (SHL)
Debtors.	(Jointly Administered)

OBJECTION TO CONFIRMATION OF PROPOSED PLAN OF REORGANIZATION (DOCKET #8590)

1. Identity of objecting party.

The objecting parties are the Plaintiffs ("Clayton Plaintiffs") in that certain action entitled *Carolyn Fjord, et al. vs. US AIRWAYS GROUP, INC. and US AIRWAYS, INC.*, pending in the United States District Court, Northern District of California, San Francisco Division, Case No. CV 13 3041 ("Clayton Lawsuit"). This action was filed on 7/2/13 and is currently pending. A copy of the lawsuit is attached hereto, marked *Exhibit "A"* and incorporated by reference.

The address for the objecting parties is care of Alioto Law Firm, One Sansome Street, 35th Floor, San Francisco, CA 94104 ((415) 434-9800, Attn: Joseph M Alioto, Esq. The names are set forth in Exhibit "A" and which is attached hereto and incorporated herein as party plaintiffs.

2. Standing of objecting party.

The Clayton Plaintiffs will assert standing as defined under Bkrtcy.C. § 1109(b), which provides as follows:

> 11 USC § 1109 - Right to be heard
> . . .
> (b) A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

The Clayton Plaintiffs assert standing on the basis that the merger which is the means of implementation of the Plan (Docket #8950 at page 64, paragraph 6.1-6.2, page 65) is an anti-competitive and unlawful merger in violation of The Clayton Act. Section 7 of the Clayton Antitrust Act (15 U.S.C. § 18) which provides as follows:

§ 18. Acquisition by one corporation of stock of another

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition *may* be substantially to lessen competition, or to tend to create a monopoly. . . .

The Clayton Plaintiffs assert, as set forth below, that they have a right of injunction and damages as a result of the threatened and proposed unlawful combination given the disappearance of the competitor by virtue of the merger. The ensuing entity (American Airline Group Inc.) will collude with the remaining others creating market dominance. The Clayton Plaintiffs have a statutory right to enjoin the merger on anticompetitive grounds and therefore standing which is statutorily authorized by the right of an injunction under 15 U.S.C. § 26 [Section 16 of the Clayton Act] as follows:

> **§ 26. Injunctive relief for private parties; exception; costs**
> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of Title 49. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff. .. .

See *California v. Sutter Health System*, 130 F. Supp. 2d 1109, 1117-18 (N.D. Cal. 2001) in which the court stated as follows:

> Section 7 of the Clayton Act prohibits mergers or acquisitions "in any line of commerce or in any activity affecting commerce in any section of the country, [where] the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly." 15 U.S.C. 18. Section 7 was enacted to prevent anticompetitive mergers "in their incipiency." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963). Therefore, "[a]ll that is necessary [under Section 7] is that the merger create an appreciable danger of [anticompetitive] consequences in the future. A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable, is called for." *Hosp. Corp. of America v. Fed. Trade Comm'n.*, 807 F.2d 1381, 1389 (7th Cir.1986).

This is a statutory right due the Clayton Plaintiffs which clearly remains unresolved under Bankruptcy Code Section 1129. The Clayton Plaintiffs have standing under Section 1109(b) given the statutory right to enjoin the threatened and pending combination (i.e., the merger of US Airlines and American Airlines) under Section 16 of the Clayton Act.

3. Summary of rights under the Clayton Act.

Section 7 of the Clayton Act, 15 U.S.C. Section 18, prohibits acquisitions if their effect *may* be a substantial lessening of competition, or a tendency to create a monopoly. Since the thrust of the statute is prospective, designed "primarily to arrest apprehended consequences of inter-corporate relationships before those relationships could work their evil...," a transaction which *may* have the proscribed anticompetitive effects is prohibited. *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 597 (1957); *see also Brown Shoe Co. v. United States*, 370 U.S. 294, 317 (1962). Thus, if there is a "reasonable probability" that the acquisition will substantially lessen competition or tend to create a monopoly, it is prohibited under the Act. *Brown Shoe Co.* 370 U.S. at 323or even diminished by later opinions.

Judge Posner of the Seventh Circuit observed in *Hospital Corp. of America v. Federal Trade Commission*, 807 F.2d 1381, 1385 (7th Cir. 1986), that the above line of Supreme Court precedent, taken together, prohibited "any nontrivial acquisition of a competitor."

4. Marathon Oil precludes a Plan of Reorganization from adjudicating, or resolving, Clayton Act Relief.

Title 11 does not anticipate nor authorize on its face a non Article III judge ***with*** issuing an injunction under Section 16 of the Clayton Antitrust Act, nor the statutory authority to enforce Section 7 of the Clayton Antitrust Act. *Northern Pipeline vs. Marathon Oil Oc.* 458 U.S. 50, 86-87 (1982) ("*Marathon Oil*") would bar this exercise of jurisdiction over the Clayton Act. Any exercise of the statutory rights due the Clayton Plaintiffs by a bankruptcy court itself would exceed the bankruptcy statutory grant of powers, but moreover contravene *Marathon Oil's* bright line. Likewise nothing in Bankruptcy Code, much less Chapter 11, other than relief of stay to proceed with an action under Bankruptcy Code Section 362(d) and abstention under 28 U.S.C. Section 1334 (c), provides for any remedy that seeks to preclude an unlawful combination, or adjudicate rights under the Clayton Act.

The core of Chapter 11 is Bkrtcy.C. § 1129 which authorizes the confirmation of a plan of reorganization ***enables*** a recovery to and on behalf of the creditors of the debtor. Chapter 11 plans operates as a contract between the reorganized debtor and its creditors, as expressed in *In re Troutman Enterprises, Inc.*, 244 B.R. 106, 109-10 (Bankr. S.D. Ohio 2000) order vacated, 253 B.R. 8 (Bankr. App. 6th Cir. 2000), in which the court stated as follows:

> "Once a Chapter 11 plan is confirmed, the plan operates similar to a contract between the reorganized debtor and its creditors. *See, e.g., Guardian Savs. & Loan Ass'n v. Arbors of Houston Assocs. Ltd. Partnership* (*In re Arbors of Houston Assocs. Ltd. Partnership*), 172 F.3d 47, 1999 WL 17649, (6th Cir. Jan. 4, 1999) (stating "[a] plan of reorganization, which resembles a consent decree, is akin to a contract between the debtor and its creditors that is approved by the bankruptcy court[.]" and holding that disputes over the meaning of a confirmed plan are settled by state contract law); *Benjamin Coal,* 978 F.2d at 826 (holding post confirmation creditors had only a contractual claim against the reorganized debtor based on the terms of the confirmed plan); *In re Xofox Indus., Ltd.,* 241 B.R. 541, 543 (Bankr.E.D.Mich.1999) (collecting cases and holding a confirmed Chapter 11 plan is a new and binding contract between creditors and the reorganized debtor).

Bkrtcy.C. § 1129 does not within the four corners of the statute necessarily adjudicate the Clayton Act, as confirmation does not involve nor inquire whether the merger itself is, or is not, anticompetitive or violates the Clayton Act or any other provision of antitrust law. The purpose of

Chapter 11 is to strike a balance between a debtor's interest in reorganizing and restructuring its debts and the creditor's interest in maximizing the value of the bankruptcy estate. *Toibb v. Radloff*, 501 U.S. 157, 163, 111 S.Ct. 2197, 115 L.Ed2d 145 (1991). The comprehensive and complex plan confirmation provisions of 1129 are designed to safeguard parties in interest. *See Committee of Equity Security Holders v. Lionel Corporation*, 722 F.2d 1063, 1071 (2d Cir. 1983). As classically stated, a confirmed plan swaps out the prepetition claims for a new claim based upon the treatment accorded in the plan. *See In re Benjamin Coal Co.*, 978 F.2d 823, 827 (3rd Cir. 1992).

The fact that a debtor files a Chapter 11 does not immunize the debtor or third party from potential liability for an unlawful combination under Section 7 of the Clayton Antitrust Act. This analysis naturally flows from an analysis of the "failing company defense." Examining this in great detail is *State of California vs. Sutter Health Systems* 84 F. Supp. 2nd. 1057 (USDC, ND,CA). In that case, the State of California brought suit to enjoin the proposed merger of two hospitals based on the assertion that the merger would have anticompetitive effect under the Clayton Act. The court denied relief based on the "failing company defense."(P. 1084). The court states as follows:

> "Plaintiff argues that in order to make the requisite showing that it faces a "grave risk of business failure", a defendant must show that the prospects of reorganization in bankruptcy proceedings are dim or nonexistent. There is disagreement among the courts as to whether this element is an actual requirement of the failing company defense. *See Citizen,* 394 U.S. at 138, 89 S.Ct. 927 (noting many companies successfully reorganize in bankruptcy and requiring defendant to show prospects of reorganization to be dim or nonexistent): *United States Steel Corp. v. F.T.C.*, 426 F.2d 592, 608 (holding *Citizen* requires showing that prospects of Chapter 11 reorganization must be dim or nonexistent) (6th Cir.1970); *United States v. Phillips Petroleum Co.*, 367 F.Supp. 1226, 1259 (C.D.Cal.1973) (acknowledging reorganization in bankruptcy requirement); *Merger Guidelines* at 5.1. . . . .
>
> In *Citizen Pub. Co. v. U.S.*, 394 U.S. 131, 138 (1969), the court stated as follows:
>
> The failing company doctrine plainly cannot be applied in a merger or in any other case unless it is established that the company that acquires the failing company or brings it under dominion is the only available purchaser. For if another person or group could be

> interested. a unit in the competitive system would be preserved and not lost to monopoly power. So even if we assume, arguendo, that in 1940 the then owners of the Citizen could not long keep the enterprise afloat, no effort was made to sell the Citizen; its properties and franchise were not put in the hands of a broker; and the record is silent on what the market. if any, for the Citizen might have been. Cf. United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176.
>
> Moreover. we know from the broad experience of the business community since 1930, the year when the International Shoe case was decided, that companies reorganized through receivership, or through Chapter X or Chapter XI of the Bankruptcy Act often emerged as strong competitive companies. ***The prospects of reorganization of the Citizen in 1940 would have had to be dim or nonexistent to make the failing company doctrine applicable to this case.*** *Citizen Pub. Co. v. U.S.*, 394 U.S. 131, 138 (1969) (Emphasis added)

The failing company doctrine plainly cannot be applied in a merger or in any other case unless it is established that the company that acquires the failing company or brings it under dominion is the only available purchaser. *Citizen Pub. Co. v. U.S.*, 394 U.S. 131, 138 (1969). If the prospects of reorganization are not "dim or non existence" as framed by *Citizen Pub. Co.* (as here for example). the "failing company defense" could *not* apply. The consequence is that a non "last resort driven merger" is vulnerable to an injunction under Section 16 of the Clayton Antitrust Act, whether or not the merger is consensual or prosecuted through a Chapter 11 case. To immunize non "last resort merger" through a Chapter 11 plan would vitiate Section 16 of the Clayton Act. Given the doctrine of mootness facing any appellant who is challenging an order of confirmation (*In Re Metromedia Fiber Networks* 426 F. 3rd. 136, 143-145 (Second Circuit, 2005). all Section 7 cases under the Clayton Act would never survive an unsuccessful challenge to the confirmation of anticompetitive Chapter 11 plan of reorganization. Therefore, Section 1129 does not, and cannot, allow for adjudication of the *Citizen Pub. Co.* requirement of "dim or non existence prospects" as the litmus test to launder out, and discharge, potential Clayton antitrust rights. The precise language of Section 1129 does not offer any mechanism for this type of fact finding or the application of the "dim or nonexistent standard" to the rights of third parties under antitrust law.

Many Chapter 11's are filed specifically to jettison unfavorable contracts, labor contracts, onerous bond obligations, or unanticipated market gyrations, in which the debtor emerged very successfully, but freed of unforeseen market conditions, onerous financial burdens and changes in the marketplace. (Disclosure Statement, Doc. 8591, Page 35-36, "Events Leading to Commencement of the Chapter 11 Cases."). This Chapter 11 (American Airlines) does not suggest under any set of facts that the prospects of reorganization were "dim or non existence," as framed by *Citizens Pub Co.*

This is not the first time that a sale within the context of the Bankruptcy Court might be deemed anti-competitive in ensuing litigation. In *Gulf States Reorg. Group, Inc. v. Nucor Corp.*, 11-14983, 2013 WL 3490824 (11th Cir. 2013), an unsuccessful bidder at an auction sale of assets in a Chapter 7 brought a claim for relief against a higher bidder and against a competing manufacturer that funded its bid to recover for alleged violations of federal antitrust laws. On appeal, the Eleventh Circuit reversed a summary judgment and found that the sale of assets in a bankruptcy proceeding under Bkrtcy.C. § 362 can itself be the subject of an independent action for damages under The Sherman Act. The Sherman Act claim arose when the party with dominant market control acquired the assets in a bankruptcy auction. The synopsis of this case is found, as follows:

> "GSRG sued Nucor, Casey, and Park, alleging that they contracted and combined to purchase the steel-producing assets of Gulf States Steel in order to block competition in the black hot rolled coil steel market, in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. GSRG also alleged that, through its actions, Nucor created a dangerous probability that it would obtain monopoly power over the black hot rolled coil steel market in the Southeast, which, if true, would constitute an attempt to monopolize in violation of § 2 of the Sherman Act, 15 U.S.C. § 2. Finally, GSRG alleged that Nucor, Casey, and Park conspired to monopolize that same market, in violation of § 2.[2]

In that case, the fact that the defendants purchased the assets under the auspices of the bankruptcy did not immunize the acquisition form later antitrust scrutiny, even though the sale was ostensibly regular on its face and complied with Bankruptcy Code Section 363.

In summary, Bankruptcy Code Section 1129 does not seek to adjudicate anticompetitive claims and causes of action, including by way of injunction. The rights of the Clayton Plaintiffs lie in the District court under the Clayton Act, and are entitled to enjoin this merger. Relief of stay is sought to permit such relief. If Section 1129 did allegedly wash out antitrust claims, nothing would stop ostensibly any party to an anticompetitive merger from filing Chapter 11, and proceed with a merger, free from antitrust liability under the Clay ton Act.

5. Relief sought.

The Clayton Plaintiffs seek the following relief before this court:

A. The court continues the hearing on the confirmation of the Proposed Plan of Reorganization (Docket #8590) until, at least, the hearing on Section 16 injunction in the Clayton Lawsuit.

B. That, based upon the continuance, that the Clayton Plaintiffs move this court for relief from the automatic stay under Bkrtcy.C. § 362(d) to prosecute their rights of injunction in The Clayton Lawsuit in the USDC, N.D.Cal.

C. That the court abstains from adjudication necessarily of the Clayton Plaintiffs' under The Clayton Act. 28 USC Section 1334 (c) (1)

6. No prejudice to the Debtor and/or related parties.

The Clayton Plaintiffs acknowledge the seminal nature of this Chapter 11 of the stakes involved. The disclosure statement indicates, save and except the Department of Justice that multiple parties are in favor of the plan. which include many, if not all, of the labor unions. *In Re AMR Corporation* 490 B.R. 158, 161 (Bankr. Court, SD NY, 2013) "*AMR*" The court already approved the merger (*AMR* at 170). All rights to object to the plan confirmation have been reserved (*AMR* at 164, footnote 9)

However, the Clayton Plaintiffs have a statutory right to enjoin this combination, based upon anti-competitive grounds [Section 7], notwithstanding the fact that the merger might benefit other parties, such as creditors, employees, management and shareholders. Mergers by and of themselves routinely benefit a multitude of parties, such as creditors of a potentially "weak merger partner" who would enjoy the benefits of equity in a stronger entity, shareholders in the weaker entity whose equity would be enhanced by the combined successor. along with the entities themselves who would share an economy of scale, reduced expense factor. and new identity. However, mergers by themselves are necessarily subject to anti-competitive scrutiny under the Section 7of the Clayton Act and the right of an injunction under Section 18 of the Clayton Act. Given the statutory right of in junction under the Clay ton Act, and potential of antitrust scrutiny, the creditors and other parties in interest in this Chapter 11 would not have a settled expectation that the confirmation of the proposed plan or reorganization would as a matter of law immunize the transaction from antitrust scrutiny. Under no set of fact could any of these parties enjoy a settled expectation that a ***confirmed plan discharges or*** authorizes unlawful anticompetitive combination in contravention to the statutory rights under Section 7 of the Clayton Antitrust Act.

7. Why relief of stay is necessary?

Necessarily, these Clayton Plaintiffs would move this court for relief of stay, given that The Clayton Lawsuit seeks to enjoin the merger of fundamentally the assets. ***and stock,*** of American Airlines into a successor entity constituting the combination of U.S. Air assets and American Airline assets.

This is well understood territory in the case of *In Re Adelphia Communications Corp.* 345 B.R. 69 (Bankr. S.D.N.Y. 2006) which held on point that an injunction action seeking to enjoin a merger in which the seller was in the midst of a Chapter 11 is subject to the automatic stay. The relief from the automatic stay would permit the litigation of this matter to proceed in the District Court which in the light of *In Re: Aldephia Communications Corporation.*

Relief of stay, and ensuing abstention, ***to litigate*** the antitrust claims in USDC is not constrained by Section 1129 given that Section 1129 offers creditors, and third parties, an opportunity for payment of claims and interests. Section 1129(a)(7)(A)&(B). Section 1129 does not authorize the bankruptcy to consider the threat to ***competition***, as authorized under the Section 7 of the Clayton Antitrust Act. *In re Lear Corp.*, 09-14326 ALG, 2012 WL 443951 (Bankr. S.D.N.Y. 2012) the court stated as follows:

> "Nevertheless, bankruptcy courts have abstained in favor of a federal court, as § 1334(c)(1) provides for abstention "*in the interest of justice."* *See In re Motors Liquidation Co.*, 457 B.R. 276 (Bankr.S.D.N.Y.2011) (discretionary abstention in favor of U.S. District Court for Eastern District of Michigan in Labor–*Management Relations Act dispute); *In re Portrait Corp. of Am.*, 406 B.R. 637 (Bankr.S.D.N.Y.2009) (discretionary abstention in favor of U.S. District Court for Northern District of Ohio in trademark action)."

8. Summary of District Court action.

The District Court (USDC, N.D.Cal.) before the Honorable Sandra Armstrong-Brown would hear and consider a preliminary injunction motion under Section 16 of the Clayton Antitrust Act. The Clayton Lawsuit was filed on July 2, 2013, and as indicated, the normal

turnaround time is anywhere between 90-180 days subject to the scheduling, docket and management by the District Court.

9. Status of this case.

The court already approved the merger in *In re AMR supra* in which the court approved the merger which would be deemed effective upon entry of an order providing for plan confirmation. (*AMR* at page 161-161). Accordingly, the court is now faced with the prospect of the parties reconstructing the merger, negotiating significant issues, or for that matter, any other administrative necessity in the merger of these two airlines. The court approved the merger as a practical matter in April 2013, but subject to confirmation through the plan itself, and ensuing objections (*AMR*, page 160-161 etc.). The plan confirmation is set for August 15, 2013, given a 5-month gap of time (*AMR* at page 161), no prejudice could occur. The disclosure statement and subsequent filings do not suggest any undue prejudice, given another 90-120 days of a plan continuance.

10. Scope of discharge.

Likewise, the Clayton Plaintiff necessarily object to the broad discharge under Bkrtcy.C. § 1141(d) are which is found at page 91, paragraph 10.2, as follows:

> **10.2 Discharge of Claims and Termination of Equity Interests.**
>
> Except as otherwise provided herein or in the Confirmation Order, the rights afforded herein and the payments and distributions to be made hereunder shall discharge all existing debts and Claims and terminate all Equity Interests of any kind, nature, or description whatsoever against or in the Debtors or any of their assets or property to the fullest extent permitted by section 1141 of the Bankruptcy Code. Except as otherwise provided herein, upon the Effective Date, all existing Claims against the Debtors and Equity Interests in the Debtors shall be, and shall be deemed to be, discharged and terminated, and all holders of Claims and Equity Interests (and all representatives, trustee, or agents on behalf of each holder) shall be precluded and enjoined from asserting against the Reorganized Debtors, or any of their assets or property, any other or further claim or Equity Interest based upon any act or omission, transaction, or other activity of any kind or nature that occurred prior to the Effective Date, whether or not such holder has filed a proof of

Claim or proof of Equity Interest and whether or not the facts or legal bases therefore were known or existed prior to the Effective Date.

In addition, the plan provides for a broad-based injunction at page 92, paragraph 10.6, as follows:

> **10.6** **Injunction**. Except as otherwise expressly provided herein, all Persons or Entities who have held, hold, or may hold Claims or Equity Interests and all other parties in interest, along with their respective present or former employees, agents, officers, directors, principals, and affiliates, shall be permanently enjoined, from and after the Effective Date, from (I) commencing or continuing in any manner any action or other proceeding of any kind with respect to any such Claim or Equity Interest against the Debtors or the Reorganized Debtors or property of any of the Debtors or the Reorganized Debtors other than actions to enforce the Plan or with respect to the allowance of Clams and Equity Interests, (ii) the enforcement, attachment, collection, or recovery by any manner or means of any judgment, award, decree, or order against the Debtors or the Reorganized Debtors or property of any of the Debtors or the Reorganized Debtors, (iii) creating, perfecting, or enforcing any encumbrance of any kind against the debtors or the Reorganized Debtors or (iv) asserting any right of setoff, subrogation, or recoupment of any kind against any obligation due from the Debtors or the Reorganized Debtors or against property or interests in property of the Debtors or the Reorganized Debtors, with respect to any such Claim or Equity Interest. Such injunction shall extend to any successors of the Debtors and the Reorganized Debtors and their respective property and interests in property.

A plan of reorganization is a judgment, consent decree, and contract. (In re ***In re Bruce BARTLESON, Debtor,*** 253 B.R. 75 (9th Cir.BAP (Cal.) 2000), in which the court stated as follows:

> ""A chapter 11 plan is a contract between the debtor and its creditors in which general rules of contract interpretation apply." *Aino v. Maruko, Inc. (In re Maruko, Inc.),* 200 B.R. 876, 881 (Bankr.S.D.Cal.1996), *citing Hillis,* 997 F.2d at 588, and *Affordable Housing,* 175 B.R. at 329. The law of the state in which the plan was confirmed governs its interpretation. *Hillis,* 997 F.2d at 588; *Affordable Housing,* 175 B.R. at 329.In re Bartleson, 253 B.R. 75, 84 (Bankr. App. 9th Cir. 2000)

A plan of reorganization is both res judicata and collateral estoppel in ensuing litigation. ***Levy v. Cohen***, 19 Cal.3d 165, 137 Cal.Rptr. 162, 561 P.2d 252 (1977) [confirmed plan of arrangement is collateral estoppel and res judicata upon all persons and parties]. Accordingly,

these provisions might preclude potential litigation of or claims arising from and anti-competitive nature of this merger.

The Clayton Plaintiff likewise object to the "Release and discharge of debtors" (paragraph 10.3, page 91). the "Term of Injunction or Stays" (paragraph 10.4), the "Injunction against Interference with the Plan" (paragraph 10.5) and "Injunction" itself (paragraph 10.6). These provisions directly or indirectly might thwart the Clayton Plaintiffs in continuing to litigate their claims under Section 7 and right to an injunction under Section 16 with the claims for relief in favor of the Clayton Plaintiffs for damages that arise from this merger if deemed anti-competitive in a later District Court proceeding.

Chapter 11 plans and bankruptcy have previously crossed paths in this court in ***In re Lear***, 2012 WL 443951 (USBC, SD NY, 2012. In that case the court was faced with a claims that arose before and potentially after the date of confirmation (*3-*4). The court that claims arising post effective date of confirmation are subject to adjudication in the antitrust court follows:

> "The nature and extent of Lear's conduct after the Effective Date of the Plan in violation of the antitrust laws, if any, and its effect are issues that can and should be decided by the antitrust court in connection with the prosecution of a consolidated amended complaint. They involve intensely factual inquiries and are not susceptible to determination on the existing record. If antitrust law imposes joint and several damages on a conspirator for prior harm caused by his co-conspirators, it is premature for Lear to contend it is entitled to an injunction barring lawsuits alleging liability for claims based on post-Effective Date conduct. Bankruptcy policy affords debtors a fresh start, but a debtor is responsible for the consequences of its actions after it emerges from chapter 11, and if bankruptcy law discharges a liability, but the debtor takes new action and incurs a similar liability after receiving its discharge, there may be no entitlement to an injunction against prosecution of the latter. *See Browning v. MCI, Inc. (In re WorldCom, Inc.)*, 546 F.3d 211, 220–*21 (2d Cir.2008) (putative class action claim discharged because claimant failed to allege illegal post-confirmation conduct by debtor); *O'Loghlin v. County of Orange*, 229 F.3d 871, 875 (9th Cir.2000) ("A 'fresh start' means only that; it does not mean a continuing license [sic] to violate the law."). The questions of Lear's antitrust liability for post-Effective Date conduct and the scope of damages, if any, are for the antitrust court to decide on a more complete record. In re Lear Corp., 09-14326 ALG, 2012 WL 443951 (Bankr. S.D.N.Y. 2012).

Lear did hold that the pre-confirmation claims might be the subject of a discharge, absent notice issues. (*Lear,* page *7-*8). This proposed Plan of Reorganization therefore, should carve out the Clayton Antitrust claims. including injunctive relief. At a minimum, the "Discharge of Claims and Termination of Equity Interests," "Release and Discharge of Debtor," "Terms of Injunctions to Stays," "Injunction Against Interference with Plan, and "Injunction," (Doc. 8591. Page 142-142) should not bar, nor preclude post effective date conduct that is violates antitrust laws.

11. This Objection is Statutory authorized under the Clayton Act.

This objection should not come as a surprise. See the Attached GAO REPORT. "AIRLINE MERGERS, Issues Raised by the Proposed Merger of American Airlines and US Airways" dated June 19, 2013 which is attached hereto as *Exhibit "B"* and incorporated by reference. These are comments by Tom Horton:

As of July 20, 2012, AA CEO, Tom Horton, "***Resists US Airways' pressure and asserts American can compete on it own.***"

Horton tells media," ***This company i s going to be very successful. I think that we have a very powerful company coming out of restructuring. And I want to be sure that anything that we do only makes it better and stronger - not weaker - and more valuable.***"

Horton deprecates USAir operation at USAir's hub, Charlotte, " ***What that airline (USAir)does is carry a lot of connecting traffic over Charlotte and does so in a way that I would suggest is somewhat unrewarding.***" This foreshadows the shut down or cut back of Charlotte.

Horton admits "***that he didn't think US Airways' route map would give American a strategic advantage.***"

Countering Horton's criticism, US Air's President Scott Kirby states "***We have a business model that works that is profitable , and generates margins that are far superior to American's. Our results prove that."***

In February, 2013, reports emerged that American might merge with US Air, notwithstanding that "***After American parent company AMR filed for bankruptcy protection in 2011, Chairman and CEO Tom Horton said repeatedly that he wanted the company to continue to go it alone, emerging from the restructuring as an independent airline. Just last month [January, 2013] the carrier revealed a new logo and look for its fleet. It was the airline's first external redo in more than 40 years."***

The merger of near two airlines near equals that will create the largest airline will draw antitrust scrutiny from the regulators and the private sector. See the following cases:

1. *Brown Shoe Co. v US*, 370 US 294 (1962). Seminal case. #3 in mfg market with 6% share bought #12 with .05% = 6% of mfg, 9.5% retail. Four largest firms = 23%. DIVESTITURE ordered. VIOLATION OF THE CLAYTON ACT. TREND TOWARD CONCENTRATION.
2. *US v. Philadelphia National Bank*. 374 US 321 (1963). #2 bought #3 for 36%. Four largest = 78% Trial in favor of defendants. REVERSED AND REMANDED. VIOLATION OF THE CLAYTON ACT. TREND TOWARD CONCENTRATION.
3. *US V. Aluminum Co. of America*, 377 US 271 (1964). #1 in market with 27.8% bought #9 with 1.3% = 29.1%. Four largest =76%. Trial in favor of defendants. REVERSED AND REMANDED. VIOLATION OF THE CLAYTON ACT. TREND TOWARD CONCENTRATION.
4. *US v. Von's Grocery Co.*, 384 US 270 (1966). #3 in market with 4.7% buys #6 with4.2% = #2 with 7.5%. Four largest = 28.8%. Trial in favor of the defendants. REVERSED. VIOLATION OF THE CLAYTON ACT. TREND TOWARD CONCENTRATION.
5. *US v. Pabst Brewing Co.*, 384 US 546 (1966). #10 in market buys #18 = #5 with 4.49%. Four largest = 59%. Trial in favor of the defendants. REVERSED AND REMANDED. VIOLATION OF CLAYTON ACT. TREND TOWARD CONCENTRATION.
6. *US v. Falstaff Brewing Co.*, 410 US 526 (1973). #4 in the market with 5.9% wanted to buy brewer in New England that had 20% in New England. Four largest = 50%.

Trial in favor of the defendants. REVERSED AND REMANDED. VIOLATION OF CLAYTON ACT. TREND TOWARD CONCENTRATION. POTENTIAL COMPETITOR COULD HAVE ENTERED NEW ENGLAND ON ITS OWN.

7. Citizens Publishing Co. v. US, 394 US 131 (1969). Morning newspaper buying afternoon newspaper. DIVESTITURE ORDERED. AFFIRMED. VIOLATION OF THE SHERMAN AND THE CLAYTON ACTS.

Chapter 11 is not a Constitutionally authorized forum to adjudicate Clayton Antitrust claims under Section 7 and necessarily the right of injunction under Section 16. *Marathon Oil* likewise divests the bankruptcy court of jurisdiction to adjudicate these Clayton claims through Chapter 11 plan confirmation and ensuing res judicata and collateral estoppel consequences based on the terms of the plan, much less the discharge authorized under Section 1141(d).

No doubt the continuance of plan confirmation might inconvenience the parties to the merger, along with a large constituency of creditors, employees, shareholders and the public at large. However, this merger was approved by the court after months of negotiation by many parties (AMR at page 161), but the "merger is subject to and effective upon confirmation and consummation of the Debtor's chapter 11 plan or reorganization. Specifically, the merger will be implemented by the plan and value achieved by the merger will be distributed through the plan. The closing of the merger and the effective date of the plan will occur at the same time. (*AMR*, page 160-161). No parties is prejudiced by any delay as the court stated that the " . . .approval of the Merger Agreement by the Court will bind the Debtors to its terms retroactive to its execution date of February 13, 2013." (*AMR*, page 161)

WHEREFORE, the Clayton Plaintiffs request that the court continue the Plan Confirmation hearing to permit the Clayton Plaintiff the opportunity to move this court for relief from the automatic stay and moreover abstention to permit the Clayton Plaintiff the opportunity litigate their injunctive relief and other claim in the action pending in the United States District.. Northern District of California and provide other relief as the court might direct.

Dated: Buffalo, New York
July 30. 2013

Respectfully Submitted,

By: /s/ David J. Cook. Esq.

David J. Cook, Esq.
Cook Collection Attorneys
165 Fell Street
San Francisco. California 94102
Telephone: (415) 989-4730