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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)
Carolyn Fjord, Katherine R. Arcell, Keith Dean Bradt, Judy Bray, Jose' M. Brito, Jan Marie Brown, Robert D. Conway, Judy Crandall, Rosemary D'Augusta, Brenda K. Davis, Pamela Faust, Don Freeland, Donald V. Fry, Gabriel Garavanian, Harry Garavanian, Yvonne Jocelyn Gardner, Lee M. Gentry, Valarie Ann Jolly, Gail S. Kosach, Michael C. Malaney, Len Marazzo, Lisa McCarthy, Patricia Ann Meeuwsen, L. West Oehmig, Jr., Cynthia Prosterman, Deborah M. Pulfer, Dana L. Robinson, Robert A. Rosenthal, Bill Rubinsohn, Sondra K. Russell, Sylvia N.	Adv. No. 13-01392 (SHL)

Sparks, June Stansbury, Clyde D. Stensrud, Wayne Taleff, Gary Talewsky, Annette M. Tippetts, Diana Lynn Ultican, J. Michael Walker, Pamela S. Ward, Christine O. Whalen,)

Plaintiffs,)

v.)

AMR CORPORATION, AMERICAN AIRLINES, and US AIRWAYS GROUP, INC. and US AIRWAYS, INC.,)

Defendants.)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO WITHDRAW REFERENCE UNDER 28 U.S.C. § 157(d)

I. INTRODUCTION.

The Clayton Plaintiffs have filed this adversary proceeding under Section 7 of the Clayton Act and seek an injunction under Section 16 likewise under the Clayton Act. Section 7 provides as follows:

Section 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition; or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

. . .

The purpose of the Clayton Plaintiffs Action is to protect competition. Section 7 of the Clayton Act [28 U.S.C. § 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 323 or 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."

II. MANDATORY WITHDRAWAL OF REFERENCE.

Withdrawal of the reference from a bankruptcy court is governed by 28 U.S.C. § 157(d) which provides, in relevant part:

> "The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce."

Pursuant to 28 U.S.C. § 157(d), withdrawal of the reference is mandatory in any proceeding that involves "significant interpretation, as opposed to simple application, of federal laws apart from the bankruptcy statutes." *Picard v. HSBC Bank PLC*, 2011 WL 1544494, at *2 (S.D.N.Y. April 25, 2011) (citing *City of New York v. Exxon Corp.*, 932 F.2d 1020, 1026 (2d Cir. 1991)); *accord Shugrue v. Air Line Pilots Ass'n, Int'l (In re Ionosphere Clubs, Inc.)*, 922 F.2d 984, 995 (2d Cir. 1990) (requiring "substantial and material consideration" of federal non-bankruptcy law). "The purpose of § 157(d) is to assure that an Article III judge decides issues calling for more than routine application of [federal laws] outside the Bankruptcy Code." *Enron Power Mktg., Inc. v. Cal. Power Exch. Corp. (In re Enron Corp.)*, 2004 WL 2711101, at *2 (S.D.N.Y. Nov. 23, 2004) (quoting *Eastern Airlines, Inc. v. Air Line Pilots Ass'n (In re Ionosphere Clubs, Inc.)*, 1990 WL 5203, at *5 (S.D.N.Y. Jan. 24, 1990)). Issues on non-bankruptcy law raised in the proceeding need not be "unsettled." *In re McCrory Corp.*, 160 B.R. 502, 505 (S.D.N.Y. 1993). Rather, it is adequate if the claims asserted merely involved "substantial and material" issues under non-bankruptcy law. *In re Enron*, 2004 WL 2711101 at *2 (quoting *Shugrue v. Air Line Pilots Ass'n, Int'l (In re Ionosphere Clubs, Inc.)*, 922 F.2d at 995).

Withdrawal is also mandatory where there appears to be a conflict between the Bankruptcy Code and other federal laws. *See Picard v. HSBC Bank PLC*, 2011 WL 1544494 at *4; *see also In re Cablevision*, 315 B.R. at 821 ("The very existence of a dispute as to whether the rights of [investors] under the [Trust Indenture Act] and Williams Act supercede Section 304 [of the Bankruptcy Code] or whether the Bankruptcy Code overrides the TIA, regardless of the ultimate resolution of such dispute, mandates withdrawal."); *Gredd*, 2001 WL 840187, at *2-4 (withdrawing reference where federal securities laws "arguably conflict[ed]" with the Bankruptcy Code).

The conflict here is between the Clayton Act and the Bankruptcy Code. While the Bankruptcy Courts routinely hear non-bankruptcy matters, particularly in adjudicating claim objections which encompass the entire panoply of state law and federal claims, a Clayton Action which primarily seeks injunctive relief and divestiture is well outside the framework of the Bankruptcy Code, and specifically the plan-driven process of Chapter 11. The mere fact that the Clayton Act seeks to enjoin a merger and the merger itself is the core of the plan conflicts with the machinery of a Chapter 11.

III. SUMMARY OF THE CLAYTON PLAINTIFFS ACTION.

The summary of the Clayton Plaintiffs Action is that the merger of the Debtor entities with US Airways is a violation of Section 7 of the Clayton Act on the grounds that such a merger might lessen competition and create a monopoly. The key allegations to the Clayton Plaintiffs Action are the following:

> "166. The conduct of defendants described hereinabove, specifically their agreement to merge with American, constitutes a violation of Section 7 of the Clayton Antitrust Act, 15 U.S.C. § 18, in that the effect of the proposed merger may be substantially to lessen competition, or to tend to create a monopoly in the transportation of airline passengers in the United States; by reason of which violation the plaintiffs are threatened with loss or damage in the form of higher ticket prices and diminished service, as well as irreparable harm for which damages will be inadequate to compensate plaintiffs, such that plaintiffs are entitled to bring suit under Section 16 of the Clayton Antitrust Act, 15 U.S.C. § 26, to obtain preliminary and permanent injunctive relief against defendants' merger, and to recover their cost of suit, including a reasonable attorney's fee."

The core of the Debtors' proposed plan of reorganization is the merger between the Debtors and US Airways, and related entities.

These Plaintiffs also note the pendency of the action filed by the United States in that action entitled *United States, et al. v. AMR Corporation, et al.*, USDC, D.C. Case No. 1:13-cv-01236 ("DOJ Action"). The DOJ Action seeks relief likewise under the Clayton Act, which itself further suggests that this current Clayton Plaintiffs Action is better suited in the USDC, S.D.N.Y., and subject to potential transfer.

IV. PROPER VENUE IS THE DISTRICT COURT.

This is a classic Clayton Action which are adjudicated by the District Courts. The Bankruptcy Code, and specifically Chapter 11, lacks any statutory basis to adjudicate a Section 7 Clayton Action claim. The heart of any Chapter 11 is plan confirmation under Bkrtcy.C. § 1129(a) which itself does not authorize the court to engage in fact-finding per se to determine whether or not a merger, constituting the means of implementation, would be anticompetitive. As classically stated, a Chapter 11 is a judgment, consent decree, and contract (*In re Bruce BARTLESON, Debtor*, 253 B.R. 75 (9th Cir.BAP (Cal.) 2000)) which would swap out the creditor's pre-petition claims in exchange for their rights under the confirmed plan.

The Bankruptcy Court in the confirmation process would have great difficulty, or even impossibility, in weighing the risks of the anticompetitive nature of a proposed plan of reorganization with a merger at its core, against the benefits ascribed to the creditors and equityholders under Bkrtcy.C. § 1129(a). In fact, a Clayton Action, whether brought by these Plaintiffs or the DOJ, becomes a factor in determining feasibility on the basis that the proposed plan of reorganization is not feasible at all. Bkrtcy.C. § 1129(a)(11) [debtor bears the affirmative burden of proof to demonstrate feasibility at the time of plan confirmation].

This is a case of mandatory withdrawal under 28 U.S.C. § 157(d) given the subject matter of these Plaintiffs is a Clayton Action, as the Bankruptcy Court would bear great difficulty in attempting to adjudicate the Clayton Action which would bar the merger, when on the other hand, facing the motion for plan confirmation which seeks to consummate the merger.

Additionally, Bankruptcy Courts bear a significant docket in which Bankruptcy Judges hear many matters on any given day, particularly post-financial meltdowns. On the other hand, a Clayton Action trial could easily consume 3-7 days.

The court likewise can view this withdrawal as permissive, given the efficient use of judicial resources, delay, cost to the parties, uniformity of bankruptcy administration, prevention of forum-shopping, and other related matters. *See Sec. Farms v. Intl. Broth. of Teamsters, Chauffers, Warehousemen & Helpers*, 124 F.3d 999 (9th Cir. 1997).

V. CONCLUSION.

The court has already heard and considered a significant portion of Plaintiffs' issues in the plan confirmation, which is ultimately reduced to the competition between consumer stakeholders seeking to prevent an anticompetitive merger under the Clayton Act against the claims of creditors and equityholders and the Debtor and third parties seeking to confirm the plan based upon the merger. The action of these Plaintiffs runs generally parallel to the action filed by the DOJ in the District of Columbia.

As indicated in the opposition to the plan confirmation, the proposed plan of reorganization is not feasible, given the pendency of the Clayton Plaintiffs Action and the DOJ Action is actively pursuing relief under Section 7 of the Clayton Act and an injunction under Section 16 of the Clayton Act. Even if the merger takes place, the Debtor faces divestiture under *U.S. v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961).

Accordingly, this motion should be granted and the reference withdrawn.

Dated: San Francisco, CA
August 27, 2013

COOK COLLECTION ATTORNEYS, PLC

By: /s/ David J. Cook
David J. Cook, Esq. (CA SBN 060859)

Dated: San Francisco, CA
August 27, 2013

COOK COLLECTION ATTORNEYS, PLC

By: /s/ David J. Cook

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