No. _____

In the Supreme Court of the United States

In Re: CAROLYN FJORD, *et al.*,
Petitioners,

On Petition for Writ of Mandamus and/or Prohibition to the United States Bankruptcy Court for the Southern District of New York

PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

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QUESTIONS PRESENTED

- Does the decision of the United States Bankruptcy Court for the Southern District of New York denying Petitioners the right to a jury trial for damages under Section 4 of the Clayton Act contravene the U.S. Supreme Court's ruling in *Beacon Theaters* and deprive Plaintiffs below of their fundamental right to a trial by jury guaranteed to them by this Court and by the Seventh Amendment of the United States Constitution?
- Will the Court reaffirm the teaching of *Beacon Theaters* and in so doing reaffirm the value and importance of the jury trial by requiring the bankruptcy court below to impanel a jury on the damage claims raised by plaintiffs in their complaint?
- Should a Writ of Mandamus and/or Prohibition issue to the United States Bankruptcy Court to require that court to impanel a jury for trial of the legal issues raised by the complaint?

PARTIES TO THE PROCEEDINGS

Petitioners in this Court, Plaintiffs below are:

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

Respondents in this Court, Defendants below, are:

AMR Corporation, American Airlines, US Airways Group, Inc. and US Airways, Inc.

Respondent Court is:

United State Bankruptcy Court for the Southern District of New York, Adversary No. 13-01392-SHL, Hon. Sean H. Lane, United States Bankruptcy Judge.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, no petitioner has a parent company and no publicly held company owns 10% or more of any petitioner's stock.

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REQUESTED RELIEF

This is an antitrust case brought under Sections 4 and 16 of the Clayton Act for violations of the anti-merger provisions of Section 7 of the Act. Petitioners Carolyn Fjord, *et al.* respectfully pray that a writ of mandamus and/or prohibition issue to stay the court trial below, now pending in the bankruptcy court for the Southern District of New York, while this court considers petitioners' request for an order requiring the bankruptcy court to grant petitioners' demand for a jury trial on their damage claims under Sections 4 of the Clayton Act.

OPINIONS BELOW

The opinion of the federal district bankruptcy court denying Plaintiffs' request for damages and jury trial is attached as Appendix A. The order of the Court of Appeals denying Plaintiffs' Petition for Writ of Mandamus is attached as Appendix B.

JURISDICTION

On February 26, 2019, the bankruptcy court issued its order denying Petitioners' request to amend for damages and for a jury trial of plaintiffs' damage claims for violation of Section 7 of the Clayton Act. On March 1, 2019, Petitioners filed a Petition for a Writ of Mandamus with the United States Court of Appeals for the Second Circuit. On March 11, 2019, notwithstanding the pending writ application, the bankruptcy court commenced a court trial of this case on the equitable issue of divestiture under Section 16 of the Clayton Act. On March 13, 2019, the Court of Appeals denied Petitioners relief under their Petition

for Mandamus. The jurisdiction of this Court is invoked under 28 U.S.C. §1651(a).

Petitioners now file this Petition for Writ of Mandamus and/or Prohibition to compel a jury trial for damages in the bankruptcy court.

PERSONS AGAINST WHOM RELIEF IS SOUGHT

Petitioners seek relief against Hon. Sean H. Lane, United States Bankruptcy Judge for the Southern District of New York.

REASONS WHY RELIEF SOUGHT IS NOT AVAILABLE IN ANY OTHER COURT

Relief is not available in any other court other than this Supreme Court because the matter in issue is presently on trial in the bankruptcy court of Judge Lane in the Southern District of New York without a jury. The trial began on March 11, 2019 and the court is presently taking evidence. It is anticipated that the evidence will continue through March 15, 2019 at which time the court will schedule the submission of proposed findings of fact and conclusions of law and closing arguments for later in the month. Plaintiffs have no other recourse but to seek the assistance of this Court since the Court of Appeals for the Second Circuit, on March 13, 2019, refused Plaintiffs' Petition for a Writ of Mandate addressed to that court.

In its Order, the Court of Appeals stated: "Petitioners have not demonstrated that they lack an adequate, alternative means of obtaining relief, that their right to the writ is clear and indisputable, or that

granting the writ is appropriate under the circumstances."

Petitioners submit that there is no adequate, alternative means of relief, except to petition this court, since once the pending trial is concluded below without a jury, plaintiffs will have irrevocably been denied their right to a jury trial guaranteed to them under the Seventh Amendment to the Constitution and guaranteed to them by this Court in its ruling in *Beacon Theatres, Inc. v. Westover*, 359 U. S. 500 (1959). As was succinctly recognized by Justice Black in *Beacon*, once the trial has concluded, any appeal of the denial of the right to jury trial is illusory since a court decision on facts which would otherwise be the purview of the jury may be res judicata or collateral estoppel upon Petitioners even if their appeal is eventually successful.[1]

Petitioners submit that their right to the writ is clear since the Court in *Beacon* confirmed that the writ process was the appropriate procedure to use for raising the issue of denial of jury trial.[2]

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[1] "Thus the effect of the action of the District Court could be, as the Court of Appeals believed, "to limit the petitioner's opportunity fully to try to a jury every issue which has a bearing upon its treble damage suit," for determination of the issue of clearances by the judge might "operate either by way of res judicata or collateral estoppel so as to conclude both parties with respect thereto at the subsequent trial of the treble damage claim." 252 F. 2d, at 874." *Beacon* at 504.

[2] "Respondent claims mandamus is not available under the All Writs Act, 28 U. S. C. § 1651. Whatever differences of opinion there

Finally, granting the writ would be appropriate under the circumstances since an order to impanel a jury to consider the evidence of damages at this stage of the proceedings would conserve judicial resources and obviate the need for retrial after appeal.

EXCEPTIONAL CIRCUMSTANCES WARRANT THE EXERCISE OF THIS COURT'S DISCRETIONARY POWERS

The exceptional circumstance that warrants the exercise of this Court's discretionary powers is the fact that, unless this Court will act, plaintiffs will be deprived of their right to a trial by jury on an important antitrust question that is pending before the bankruptcy court for the Southern District of New York. Unless this Court will exercise its discretionary powers, the bankruptcy judge will conclude the pending trial and decide factual issues relating to defendants' violation of Section 7 of the Clayton Act that should be decided by the jury. It should not be the case that the constitutional right to jury trial of legal issues should be lost through prior determination by the court of equitable claims. "'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.'" *Beacon, supra* at 501, quoting from *Dimick v. Schiedt*, 293 U. S. 474, 486 (1935).

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may be in other types of cases, we think the right to grant mandamus to require jury trial where it has been improperly denied is settled." *Beacon* at 511.

THE WRIT WILL BE IN AID OF THE COURT'S APPELLATE JURISDICTION

Art. III, § 2 of the Constitution vests appellate jurisdiction in the Supreme Court. Appellate jurisdiction refers to the power of a higher court to review and revise a lower court's decision. In this case the Court's appellate jurisdiction is invoked to review the order of the Second Circuit Court of Appeals and the decision of the federal bankruptcy court for the Southern District of New York. The Court's appellate jurisdiction is invoked pursuant to 28 U.S.C. Section 1651, the All Writs Act. In *Beacon* this Court held that mandamus was available pursuant to the appellate jurisdiction of the Court under the Act where jury trial had been improperly denied.

STATUTORY PROVISIONS INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. §15, which is implicated by this Petition, states, in pertinent part, as follows:

> Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 7 of the Clayton Act, 15 U.S.C. §18, which is implicated by this Petition, states, in pertinent part, as follows:

> 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.

STATEMENT OF THE CASE

This Petition for Writ of Mandamus and/or Prohibition ("Petition") arises out of a complaint filed by 40 travel agents who are also consumers of scheduled air passenger service in the United States ("Petitioners" or "Plaintiffs") in the United States Bankruptcy Court for the Southern District of New York. The suit was filed to enjoin the merger of American Airlines, Inc. with US Airways, Inc. at a time when American Airlines was in bankruptcy proceedings in New York. Plaintiffs' application for an injunction against the merger was denied by the bankruptcy judge and the merger was subsequently approved by the bankruptcy court. Thereafter, on five separate occasions, Plaintiffs sought to amend and

supplement their complaint to demand trial by jury on their claims for damages, but on each occasion the bankruptcy court denied the Plaintiffs' motions to amend.[3]

In response to Plaintiffs' most recent attempt to demand trial by jury in advance of the scheduled trial date of March 11, 2019, the bankruptcy court stated on February 26, 2019 in its order in support of its decision denying leave to amend to claim damages and jury trial that ". . . as plaintiffs are well aware, cases before a Bankruptcy Court are tried before the Judge, not a jury." (Apx. A at App. 15).

Contrary to the judge's statement, the bankruptcy court may not, by its order, deny the plaintiffs the right to a trial by jury under the Seventh Amendment by trying the equitable claims to the court while excluding plaintiffs' damage claims and demand for jury trial. This is the very essence of this Court's decision in *Beacon Theatres v. Westover*, 359 U.S. 500, at 504 (1959), also a mandamus action, in which Justice Black, on the identical issue of the right to trial by jury before trial of the equitable issues, said[4]:

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[3] A copy of the most recent Proposed Second Amended and Supplemental Complaint and Demand for Jury Trial dated January 11, 2019 is available at docket Entry No. 191-1 on the electronic docket for the Adversary Proceeding in the bankruptcy court below, Adversary No. 13-01392-SHL.

[4] Also, see *Steves and Sons, Inc. vs. Jeld-Wen, Inc.,* a recent Section 7 merger case in which the damage claims were tried to the jury before the divestiture claims.

> "Since the right to trial by jury applies to treble damage suits under the antitrust laws, and is, in fact, an essential part of the congressional plan for making competition rather than monopoly the rule of trade, see *Fleitmann* v. *Welsbach Street Lighting Co.,* 240 U. S. 27, 29, the Sherman and Clayton Act issues on which Fox sought a declaration were essentially jury questions."

Trial by jury in antitrust cases has long been recognized as a vital and important freedom of this democracy guaranteed to its citizens by the Seventh Amendment to the Constitution. In *Parklane Hosiery*, Chief Justice William Rehnquist wrote:

> "[W]hat many of those who oppose the use of juries in civil trials seem to ignore [is that [t]he founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary." *Parklane Hosiery Co. v. Shore* (1979) 439 U.S. 322, 343.

The decisions of the bankruptcy court below now threaten not only to thwart the effective and important enforcement of the antitrust laws by private citizens,[5]

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[5] Plaintiffs filed their complaint against the merger of American and USAir prior to the filing by the Department of Justice. After the Department of Justice sanctioned the merger, the bankruptcy

but also to deny to them their constitutional right to trial by jury on their damages. It is black-letter law from *Beacon* through its progeny that damages are to be tried to the jury before the equitable issues may be considered by the court.

This is an emergency Petition that Petitioners bring to the attention of this Court because the court trial of this case has already begun in the bankruptcy court in the Southern District of New York.[6] The bankruptcy court intends to try this case without a jury on the equitable issue of divestiture, notwithstanding Petitioners' many (five) demands that their legal claims for damages be tried to the jury ahead of their request for divestiture.[7] Petitioners contend that the issue of

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court denied plaintiffs motion for a temporary restraining order to enjoin the merger on November 27, 2013 and the merger was consummated on December 9, 2013.

[6] The parties stipulated that all proceedings through trial and judgment would be decided in the bankruptcy court and that the bankruptcy court may preside over trial. The bankruptcy court has interpreted this stipulation as agreement by plaintiffs to a bench trial. Plaintiffs never stipulated to a bench trial. The quote attributed by the bankruptcy judge to Plaintiffs in its decision was in fact a quote from the defendants' argument. Plaintiffs never did, nor would they ever, concede to a bench trial on a question of damages. The bankruptcy judge apparently misunderstood the distinction between presiding at trial and being the fact-finder. In any case, the bankruptcy court, as it must, has admitted in its order (Apx. A) that there has been no waiver by Plaintiffs throughout these proceedings of their right to jury trial.

[7] The latest Order of the Bankruptcy Court for the Southern District of New York, Honorable Sean H. Lane, was entered

plaintiffs' damages and their constitutional right to trial by jury must be held "inviolate" as demanded by Rule 38, Federal Rules Civil Procedure.

Contrary to the Order denying mandamus of the Second Circuit Court of Appeals in which the appellate court observed that Plaintiffs have not demonstrated "that they lack an adequate, alternative means of obtaining relief", an appeal after judgment is no reasonable alternative to denial of the Plaintiffs' right to trial by jury since that right will not be preserved once the bankruptcy court has made its own findings of fact and because any appeal from a judgment thereafter on the issue of Petitioners' right to damages may well operate, as this Court observed in *Beacon*, as collateral estoppel on Petitioners' damage claims. At the very least, any such appeal will be colored in advance by the bankruptcy court's findings of fact - findings that should be made by a jury and not by the court. Petitioners are entitled to a trial by jury on their claims for compensation for the damages that have resulted from Defendants' anticompetitive acts.

Course of Proceedings

This case was originally filed by plaintiffs in August of 2013 to enjoin the merger of American Airlines with US Airways.

Plaintiffs' initial complaint, which sought injunctive relief under section 16 of the Clayton Act to enjoin defendants' merger as a violation of section 7 of the

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February 26, 2019 (Apx. A at App. 1). It is this order that is the subject of this emergency writ.

Act, 15 U.S.C. §§ 18 and 26, was filed in the bankruptcy court for the Southern District of New York on August 6, 2013, prior to the filing by the Department of Justice. On November 27, 2013, the bankruptcy court denied plaintiffs' Motion for a Temporary Restraining Order to prevent defendants from consummating their merger, and defendants then proceeded to close their merger on December 9, 2013.

After the merger was consummated, Plaintiffs, on January 10, 2014 moved to amend their Complaint to convert their injunctive relief claim to one for divestiture. However, this Court prohibited the Plaintiffs from including a demand for a jury trial and a claim for damages in that complaint because, according to the Court, "the proposed amendments failed to assert a sufficient basis for the damages suffered by the individual Plaintiffs." *See Fjord v. AMR Corp. (In re AMR Corp),* 506 B.R. 368, 386 (Bankr. S.D.N.Y. 2014).

Immediately thereafter on April 4, 2014, in conformance with the Court's ruling (Bankruptcy Docket No. 102), Plaintiffs filed a First Amended Complaint (Bankruptcy Docket No. 103) requesting injunctive relief as had been permitted by the Court, but specifically reserving their right to seek damages and a jury trial. In the last paragraph of that April, 2014 first amended complaint, which is still the operative complaint (Bankruptcy Docket No. 103), plaintiffs included a demand for jury trial as follows: "If and when one or more of the plaintiffs experiences damages by reasoning (sic) of the lessening of competition, plaintiffs will move to amend or

supplement this complaint to request treble damages and a trial by jury."[8]

A second motion to amend was rejected as boilerplate and plaintiffs thereafter immediately filed a third motion to amend and supplement filed on May 5, 2014. (Bankruptcy Docket No. 105). That motion also demanded trial by jury and included a more detailed record of the damages that had accrued since the filing of the First Amended Complaint. That motion was heard on July 17, 2014 (Bankruptcy Docket No. 113) but not decided until eight months later on March 31, 2015 at which time the Court again denied Plaintiffs' demand for jury trial and to add claims for section 4 damages (Bankruptcy Docket No. 115) ruling that the proposed amended and supplemental complaint did "not plausibly define a relevant market for the alleged antitrust violation and [did not plausibly define] personal harm to the majority of the Plaintiffs." (Bankruptcy Docket No. 115, at p. 10).

In August, 2015, Plaintiffs filed a fourth motion to amend to add claims under Section 1 of the Sherman Act. This motion was withdrawn when the underlying claim became the subject of an MDL class action proceeding that was consolidated in Washington, DC.

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[8] This first amended complaint contains specific allegations supporting plaintiffs' claims for damages due to merger-related overcharges paid by plaintiffs on defendants' airline tickets purchased by plaintiffs after the merger. See, *e.g.*, First Amended Complaint, Docket No. 103 at page 2 (very first line of the complaint) and at Paras. 3, 5, 9, 54, 56, 64, 107, 117, 136, 138, 143, 150, 164 and 190.

The parties conducted discovery and engaged experts. In May, 2017, Plaintiffs and Defendants filed cross-motions for summary judgment based upon the facts that had been discovered to that date. More than fifteen months after the summary judgment motions were first filed, on August 29, 2018, the Court delivered its bench decision in open court. In that decision the Court found that Plaintiffs had in fact submitted evidence of the heretofore allegedly missing elements of "relevant market"[9] and "personal harm"[10] by finding that Plaintiffs had submitted proof of discreet City-Pair markets that could potentially support a finder-of-fact's conclusion that Defendants, by their merger, had created "presumptively illegal market concentration levels, which tends to injure customers through increased prices or reduced quality of service" (August 29, 2018, Transcript at page 41, Doc. No. 177). The Court also found "that at least some of the Plaintiffs ha[d] submitted sufficient information in their declarations to establish themselves as regular customers of domestic air travel" in those affected markets. (August 29, 2018, Transcript at page 45, Doc. No. 177.)

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[9] The relevant product and geographic markets alleged in the complaint are the transportation of airline passengers in the United States within well-defined city-pair submarkets. PSASC ¶¶ 32,33

[10] The SASC alleges with great specificity how several of the plaintiffs have paid higher prices as a consequence of the defendants' merger. PSASC ¶¶356-358 and Appendices to Complaint, Doc. No. 191-1.

At that time the Court recognized that Plaintiffs had submitted evidence of the merger's anticompetitive effects as well as evidence to support the conclusion that Plaintiffs had personally been damaged as passengers of the airlines.[11]

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[11] With regard to the relevant market and anticompetitive effect of the merger, the Court found in its Bench Decision (Doc. No. 177):

> "So relying primarily on HHI data, Plaintiffs present a prima facie Section 7 claim, establishing the presumption that the effect of the merger may be to substantially lessen competition, or tend to create a monopoly, see 15 U.S.C. Section 18. First, the Plaintiffs here have articulated a geographic antitrust market to which the Defendants have admitted in the same judicial proceeding. Second, given this market-framing concession, Plaintiffs have presented market concentration statistics that raise a presumption of illegality. Third, these statistics are buttressed by clear trends towards concentration in the industry over the last several years. Initially, where Plaintiffs established standing as customers, injury from an anticompetitive merger is threatened directly in the form of higher price and/or lower quality of service." (Reporter's Transcript if Bench Decision dated August 29, 2018 [hereinafter referred to as Transcript] at p. 68-69.)
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> "Several other plaintiffs attest extensively not only to their pre- and post-merger travel generally but specifically their travel on American and U.S. Airways as well as their travel on City Pair routes included in Annex A to the first amended complaint. See, e.g., Garvanian [sic] declaration, Paragraph 4-5. (In the past eight years I have flown numerous times on both American Airlines and U.S. Airways and have flown on multiple routes listed on Exhibit C to the report of Carl Lundgrend [sic].) (Transcript at page 45.)
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> "Stansbury declaration, Paragraphs 5, 6, 7, 8. (From 2013 to (indiscernible) I have taken 53 airline flights

Based upon the court's findings that Plaintiffs had in fact provided evidence that shows that Plaintiffs had purchased tickets and flown on routes where average airfares had increased and where the disputed merger was presumptively illegal, Plaintiffs once again in January of this year renewed their motion to demand jury trial on the evidence that had previously been alleged in the First Amended Complaint and presented to the Court as evidence in the summary judgment motion - evidence that would be presented at trial. (Plaintiffs' Proposed Second Amended and

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including on American and/or U.S. Airways. I have flown at least 13 of the routes listed in the expert report of Carl Lundgrend [sic]. I currently have paid airfare with tickets to fly from Reno to Columbus, Ohio in July of 2017 and from Reno to Tucson, Arizona in November 2017.)" (Transcript at page 45.)

"Moreover, at least one Plaintiff, Gabriel Garavanian, declares that he has flown post-merger on American on City Pair routes, including in the annex to the first amended complaint, and alleges in detail the post- merger impact on him from changes in flight capacity and lower quality service on American out of Boston and his preferred home airport in Manchester, New Hampshire. See Garavanian declaration, Paragraphs 4-5, 11-16, 19 and 20." (Transcript at page 46.)

"Accordingly, because the Court finds City Pairs to be a proper market framing, Plaintiffs demonstrate standing sufficiently to survive summary judgment." (Transcript at page 46-47.) [emphasis added.]

"In sum, the Court finds the Plaintiff has established the burden of a prima facie Section 7 case, based on Dr. Lundgren's HHI calculations and industry trends." (Transcript at page 55.)

Supplemental Complaint (PSASC) is set out at Docket Entry No. 191-1 in the bankruptcy proceeding below, Adversary No. 13-01392-SHL)

The PSASC alleges damage claims - and a demand for a jury trial on those claims - based upon the specific facts that had already been alleged in the First Amended Complaint (Docket Entry No. 103) and also based upon the evidence that had been presented in the motion for summary judgment. (See especially paragraphs 355 – 358 of the PSASC, Docket Entry No. 191-1).

REASONS FOR GRANTING THE PETITION

Because the effect of the bankruptcy court's order refusing Plaintiffs' demand for jury trial is immediate and irreparable in that, should Petitioners be denied their right to try their claims for damages to a jury prior to trying the equitable claims for divestiture to the court, Petitioners will have been denied their right to a jury trial under the Seventh Amendment in violation of the prohibition set out in this Court's decision in *Beacon Theaters* where the Court required, in an antitrust context, that all damage claims must be tried to the jury ahead of any equitable claims that may be presented to the judge.[12]

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[12] See footnote 16 to Justice Black's majority opinion in *Beacon Theaters*: "[16] Fed. Rules Civ. Proc., 38 (a). In delegating to the Supreme Court responsibility for drawing up rules, Congress declared that: "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution." 28 U. S. C. § 2072. The Seventh Amendment reads: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,

The Court took the case in *Beacon* on mandamus and granted certiorari in that case because of the importance of the jury trial in American jurisprudence:

> "We granted certiorari, 356 U. S. 956, because 'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.' *Dimick* v. *Schiedt*, 293 U. S. 474, 486" *Beacon Theaters*, at p. 501.

The bankruptcy court has veered sharply from this well-marked path and that court's decision will, in effect, not only deny Petitioners their constitutional right, but will also subvert the goals of judicial economy since the effect of the court's order will be to require the trial of the antitrust issues to the judge first, without a jury, pending the ultimate later appeal of the court's denial of Petitioners' damage claims.

The bankruptcy court has proceeded on the erroneous assumption that a jury trial is not necessary to the full and complete resolution of Petitioners' antitrust action. Nothing could be farther from the truth as this Court and lower courts have repeatedly explained.

For example, Chief Justice William Rehnquist emphasized the important role of the jury in American

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and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." *Beacon Theaters*, at p. 510.

jurisprudence in his antitrust opinion in *Parklane Hosiery Co. v. Shore* (1979) 439 U.S. 322, 344:

> "The guarantees of the Seventh Amendment will prove burdensome in some instances; the civil jury surely was a burden to the English governors who, in its stead, substituted the vice-admiralty court. But, as with other provisions of the Bill of Rights, the onerous nature of the protection is no license for contracting the rights secured by the Amendment. Because '[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence . . . any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.' *Dimick v. Schiedt, supra*, at 486, quoted in *Beacon Theatres, Inc. v. Westover*, 359 U. S. 500, 501 (1959)."

The fundamental issue raised by this petition is whether the Plaintiffs should be permitted a jury trial on their evidence of damages which had been previously presented to the bankruptcy court in opposition to defendants' motion for summary judgment, and which the bankruptcy court has found to have raised substantial questions of fact for the trier of fact. Allegations of this evidence have been made in Plaintiffs' First Amended Complaint, which remains the operative complaint, as well as in all of the iterations of plaintiffs' subsequently proposed amended complaints. The plaintiffs introduced this evidence in cross-motions for summary judgment as early as June of 2017. The evidence presented at that time consisted of Plaintiffs' declarations that they had purchased

tickets and had flown, post-merger, on routes within the relevant markets that were recognized by the court to have demonstrated presumptively illegal market concentrations in which average airfares had increased and in which plaintiffs had therefore been damaged.

I. THE SECOND CIRCUIT, BY NOT GRANTING PETITIONERS' APPLICATION FOR A WRIT OF MANDAMUS, HAS SANCTIONED THE DEPARTURE BY THE BANKRUPTCY COURT BELOW FROM THE HISTORIC SUPREME COURT DECISION IN *BEACON THEATER* GUARANTEEING A RIGHT TO TRIAL BY JURY IN ANTITRUST CASES. A WRIT IS NECESSARY TO COMPEL THE BANKRUPTCY COURT TO GRANT PLAINTIFFS THEIR CONSTITUTIONAL RIGHT TO TRIAL BY JURY AS MANDATED BY THE SUPREME COURT'S DECISION IN *BEACON THEATERS*

A. Mandamus Review Is Appropriate When a Jury Trial Has Been Denied.

In *Beacon Theaters*, the Supreme Court, accepted certiorari from the Court of Appeals in a case where, like here, the plaintiff below had sought mandamus to compel the district court to conduct a jury trial on its antitrust claim for damages. In his decision, Justice Black specifically held that mandamus was the appropriate procedural avenue to bring this issue to the attention of the court:

> "Respondent claims mandamus is not available under the All Writs Act, 28 U. S. C. § 1651. Whatever differences of opinion there may be in

> other types of cases, we think the right to grant mandamus to require jury trial where it has been improperly denied is settled." *Beacon Theaters*, *supra* at 511.

For the reasons discussed below, the bankruptcy court's orders plainly deviate from settled legal principles on jury trial. Correcting the bankruptcy court's departure from these basic principles is necessary to preserve the fundamental right of these (and other) plaintiffs to a jury trial on the issue of damages.

The bankruptcy court's orders disregard this Court's unequivocal admonitions in *Beacon Theaters* that court review of the equitable issues in an antitrust violation may never precede a jury's determination of the facts at law.

B. This Court Should Vacate the Order of the Bankruptcy Court Below and Compel the Bankruptcy Court to Grant to Plaintiffs Their Right to Trial by Jury as Stated in the Seventh Amendment, as Required by Rule 38 and as Mandated by this Court in *Beacon Theatres*.

1. The Bankruptcy Court's Order upends fundamental principles related to the amendment of pleadings. Leave should freely be granted to update the evidence of damages as the plaintiffs have attempted on five separate occasions over the last five years.

Federal Rule of Civil Procedure 15(a) provides that leave to amend a pleading "shall be freely given when

justice so requires." *See Ellis v. Chao*, 336 F.3d 114, 127 (2d Cir. 2003); *United States, ex rel. Kirk v. Schindler Elevator Corp.*, 926 F.Supp.2d 510, 516 (S.D.N.Y. 2013).

Similarly, leave to file a supplemental pleading "is normally granted, especially when the opposing party is not prejudiced." *Quaratino v. Tiffany & Co.*, 71 F.3d 58, 66 (2d Cir. 1995). The use of Rule 15(d) is favored. *City of Hawthorne v. Wright*, 493 U.S. 813 (1989).

This Supreme Court and the United States Courts of Appeals have repeatedly affirmed that leave to amend is to be granted "freely." See *Foman v. Davis*, 371 U.S. 178, 182 (1962), (leave to amend should be freely given); *Ruffolo v. Oppenheimer*, 987 F.2d 129, 131 (2d Cir. 1993), ("the district court is required to heed the command of Rule 15(a) to grant leave to amend freely; see also Moore, 3-15 Moore's Federal Practice - Civil § 15.14 ("A liberal, pro-amendment ethos dominates the intent and judicial construction of Rule 15(a).").

The bankruptcy court's justification for denial of plaintiffs' motion for leave for a jury trial and to amend to supplement the damages is no justification at all. Plaintiffs were permitted to file a First Amended Complaint after the bankruptcy court had denied plaintiffs motion for an injunction and the merger was allowed to proceed. A First Amended Complaint (which remains the operative complaint in this case) was permitted to reflect the change from an action for an injunction against the merger to an action for the equitable relief of divestiture. Plaintiffs had sought but were not permitted to pursue a claim for damages at that time under Section 4 of the Clayton Act. Plaintiffs

nevertheless alleged facts supporting damages and made a demand for jury trial in the First Amended Complaint to the extent that damages would later be proved.[13] (App. at 74.)

Plaintiffs thereafter continually sought to have the bankruptcy court recognize their demand for trial by jury based upon the facts that had ensued since the merger in December of 2013 – facts that had been presented to and considered by the bankruptcy court at least as early as June of 2017 and that had been found by him to be admissible evidence of the very violation that is the subject and heart of Plaintiffs' case for damages in connection with his denial of the motion for summary judgment brought by defendants. These are not new facts and these are not new claims. The bankruptcy court simply has refused to recognize that these facts and these claims have supported plaintiffs' demand for a trial by jury from the beginning – perhaps because it is his belief, as he stated in his order, that "cases before a Bankruptcy Court are tried before the Judge, not a jury." (Apx. A at App. 15.)

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[13] "If and when one or more of the plaintiffs experiences damages by reasoning (sic) of the lessening of competition, plaintiffs will move to amend or supplement this complaint to request treble damages and a trial by jury." (Docket No.103 at p. 38, Para. E).

2. Plaintiffs Have Continually Sought to Conform the First Amended Complaint to the Evidence That Was Presented in Opposition to the Motion for Summary Judgment and to Conform the Allegations of the Complaint to the Findings of the Court

In its bench decision, the Bankruptcy Court acknowledged Plaintiffs' evidence linking their injury as consumers and passengers to the relevant City Pair markets affected by the Defendants' merger. In particular, the court cited the declarations of several Plaintiffs who indicated that, since the merger, they had paid for airfare and had purchased tickets for flights within the City Pairs identified by Plaintiffs' expert, Carl Lundgren. In its decision, the Court recognized that these City Pairs were relevant markets that, subject to proof at trial, had experienced an increase in prices resulting from the Defendants' merger. (See Transcript of Bench Decision, at page 55, Bankruptcy Docket 177): "Initially, where Plaintiffs established standing as customers, injury from an anticompetitive merger is threatened directly in the form of higher price and/or lower quality of service." And at page 70: "Plaintiffs also point to increased prices, and at least some admissible evidence that presents an issue for trial, when viewed in a light most favorable to Plaintiff."

In the First Amended Complaint, Plaintiffs alleged that since the merger of USAir and American, they had experienced increased airfares and ancillary fees imposed by the new American Airlines that caused

them damage. (Doc. No. 103, ¶¶ 3, 5, 9, 107, 117, 136, 138, 143, 150, 164, 190.).

In the proposed SASC, beginning at page 68 at paras. 355-358 (Doc. No. 191-1, at pps. 67-68), the plaintiffs added specific facts illustrating the extent to which many of them have been directly injured because they have paid higher fares following – and as a result of – the defendants' merger on tickets purchased for flights within the relevant City Pair markets identified by their expert Dr. Lundgren and referenced by the Court in its Bench Decision. (Bench Decision Transcript at page 46, Bankruptcy Docket 177).

Plaintiffs specifically alleged that, after the merger, they had purchased airline tickets and ancillary services from the defendants at the higher prices that were predicted to result from the lessening of competition caused by the merger. (PSASC, Doc. No. 191-1, at pps. 67-68).

The Second Circuit has long held that a Clayton Act section 7 violation will support a claim for section 4 money damages. *Gottesman v. General Motors Corp*., 414 F.2d 956, 960-61 (2d Cir. 1969) ("a violation of section 7 of the Clayton Act does furnish a basis for a claim of money damages under the broad language of section 4 of the Act").

The plaintiffs who are alleged in the proposed SASC to have been injured because of the lessened competition resulting from the defendants' merger are all consumers who have been injured by higher prices and reduced services on flights since the defendants merged: "the prototypical example of antitrust injury is

an allegation by consumers that they have had to pay higher prices (or experienced a reduction in the quality of service) as a result of a defendant's anticompetitive conduct." *Mathias v. Daily News, L.P.*, 152 F. Supp.2d 465, 478 (S.D.N.Y. 2001).

The proposed SASC alleges a litany of price increases on tickets purchased by Plaintiffs for flights within identified relevant, presumptively illegal, City Pairs that have resulted in direct and personal injury to at least thirteen of the forty Plaintiffs. (Doc. No. 191-1 at pps. 67-68).

3. The Plaintiffs are Entitled to a Jury Trial on Their Damage Claims under *Beacon Theaters*

In the proposed SASC the Plaintiffs have demonstrated questions of fact showing how and to what extent several of the Plaintiffs have been injured following – and as a result of – the Defendants' merger. These claims present issues at law. Plaintiffs' right to a jury trial on these issues at law is protected by the Seventh Amendment.

Justice Black, in his opinion in *Beacon Theatres v. Westover*, 359 U.S. 500, at 504 (1959), held that

> "Since the right to trial by jury applies to treble damage suits under the antitrust laws, and is, in fact, an essential part of the congressional plan for making competition rather than monopoly the rule of trade, see *Fleitmann* v. *Welsbach Street Lighting Co.,* 240 U. S. 27, 29, the Sherman and Clayton Act issues on which Fox sought a declaration were essentially jury questions." [emphasis added.]

The rule as stated by this Court is that any equitable issues calling for injunctive relief (such as in this case, divestiture) that may be presented along with the legal issues must be considered and decided by the jury. "Whatever permanent injunctive relief Fox might be entitled to on the basis of the decision in this case could, of course, be given by the court after the jury renders its verdict. In this way, the issues between these parties could be settled in one suit giving Beacon a full jury trial of every antitrust issue." *Beacon, supra* at 508.

In *Beacon*, this Court drew upon history and precedent to note in no uncertain terms that a jury trial is a fundamental right guaranteed under the Seventh Amendment:

> "Fed. Rules Civ. Proc., 38 (a) [provides:] In delegating to the Supreme Court responsibility for drawing up rules, Congress declared that: "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution." 28 U. S. C. § 2072. The Seventh Amendment reads: 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.'" *Beacon*, *supra* at fn 16.

Since Plaintiffs have alleged in their proposed supplemental pleading and will testify at trial if

allowed that they have personally experienced actual injury due to the higher prices that resulted from the Defendants' merger, and since Plaintiffs seek compensation for these injuries at law, Plaintiffs are entitled to a jury trial on the issue of damages. To the extent that Plaintiffs' claim of divestiture is founded upon a violation of Section 7 of the Clayton Act, *Beacon* demands that the underlying facts of that claim be submitted to the jury. The proper procedure under *Beacon* would be for the parties to try the case to the jury on liability and damages, reserving to the Court the question of enforcement of the equitable demand for divestiture upon conclusion of the jury verdict. The jury verdict would be advisory to the Court's decision with regard to the equitable remedy of divestiture.[14]

CONCLUSION

For the foregoing reasons, this Court should grant this petition for writ of mandamus and or prohibition and should stay the proceedings in the bankruptcy

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[14] This procedure was recently followed in a Section 7 trial before the United States District Court in the Eastern District of Virginia. In that case, Steves and Sons, Inc. vs. Jeld-Wen, Inc., (Civil Action No. 3:16cv545) 2018 U.S. Dist. LEXIS 173704, 2018 WL 4855459, 2018 WL 4855459 (E.D. Va. Oct. 5, 2018), the plaintiff alleged a violation of Section 7 of the Clayton Act and sought both damages under Section 4 and injunctive relief under Section 16. The case was filed over three years after the merger had been completed and went to trial over 5 years after the merger went into effect. The case was tried to a jury and the jury returned a verdict in favor of plaintiff Steves on both the antitrust claim and on an ancillary claim for breach of contract. After the jury verdict, the court conducted a three-day evidentiary hearing during which the parties presented additional evidence on the issues of the equitable relief of divestiture.

court pending this Court's review of the merits of plaintiffs' demand for jury trial.

Ultimately the Petitioners request that this Court reverse the bankruptcy court's denial of Plaintiffs' right to trial by jury, directing the bankruptcy court to recognize and concede the Petitioners' constitutional right to trial by jury and to impanel a jury to try the legal issues related to plaintiffs' Section 4 claim for damages prior to reaching a court decision on the equitable issue of divestiture.

Respectfully submitted,

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