

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:	:	Chapter 11
	:	
Southern Air Holdings Inc, <i>et al.</i> ,	:	
	:	
	:	Case No. 12-12690 (CSS)
Debtors.	:	
	:	
	:	Hearing Date: March 14, 2013, at 2:00 PM
	:	Objections Due: March 1, 2013, at 5:00 PM
	:	

**IRS OBJECTION TO THE DEBTORS' SECOND AMENDED JOINT PLAN OF  
AFFILIATED DEBTORS PURSUANT TO CHAPTER 11 OF  
THE UNITED STATES BANKRUPTCY CODE**

The United States, on behalf of its Internal Revenue Service ("IRS"), by and through the undersigned attorneys, in support of its objection to the Debtors' Second Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code ("Plan") [Docket No. 470], avers as follows:

1. On September 28, 2012, the debtors filed voluntary bankruptcy petitions seeking relief under Chapter 11 of the Bankruptcy Code.
2. IRS filed an estimated unsecured priority claim against Southern Air, Inc., in the amount of \$1,062,779.70.
3. IRS records indicate that Southern Air, Inc., failed to file federal tax form 720 for the 2010, 2011 and 2012 years.
4. IRS objects to the third party, non-debtor limitation of liability, exculpation, injunction and release provisions set forth in the Plan to the extent that the rights of the IRS are not protected by the language in Section 31.6(a) of the Plan. The IRS is concerned because



Section 31.11 of the Plan appears to be dueling for priority with Section 31.6(a) and creates ambiguities in the Plan which may prove detrimental to the IRS. Absent an effective Section 31.6(a), the injunction provisions in the Plan violate the Anti-Injunction Act, I.R.C. Section 7421(a). See American Bicycle Association v. United States, 895 F.2d 1277 (9<sup>th</sup> Cir. 1990); United States v. Prescription Home Health Care, Inc., 316 F.3d 542 (5<sup>th</sup> Cir. 2002); In re Plainwell, Inc., 2004-2 USTC Paragraph 50, 393 (D. Del. 2004). Section 524(e) of the Bankruptcy Code addresses the scope of a bankruptcy discharge and states, in relevant part, that “discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for such debt.” The Bankruptcy Code contemplates that a discharge only affects the debts of those submitting to its burdens. The weight of case authority is consistent with the view that provisions that effect a discharge of non-debtor liability run afoul of the limitations on discharge set forth in Section 524(e) of the Bankruptcy Code. See e.g., In re Continental Airlines, 203 F.3d 203, 217 (3<sup>rd</sup> Cir. 2000); In re Lowenschuss, 67 F.3d 1394, 1401 (9<sup>th</sup> Cir. 1995), cert. denied, 517 U.S. 1243 (1996) (“Section 524 does not...provide for the release of third parties from liability”); In re Zale Corp., 62 F.3d 746, 760-761 (5<sup>th</sup> Cir. 1995) (“Section 524 prohibits the discharge of debts of non-debtors”); First Fidelity Bank v. McAteer, 985 F.2d 114, 117-18 (3d Cir. 1993) (Section 524(e) specifically limits the effect of a discharge...This section assures creditors that the discharge of a debtor will not preclude them from collecting the full amount of a debt from co-debtors or other liable parties.”); Green v. Welsh, 956 F.2d 30, 33 (2d Cir. 1992) (“the language of [Section 524(e)] reveals that Congress sought to free the debtor of his personal obligations while ensuring that no one else reaps a similar benefit”); In re Western Real Estate Fund, Inc., 922 F.2d 592, 602 (10<sup>th</sup> Cir. 1990), modified sub nom., Abel v. West, 932 F.2d 898 (10<sup>th</sup> Cir. 1991) (permanent injunction

purporting to release non-debtors from liability improperly insulates non-debtors in violation of Section 524(e)); In re American Hardwoods, Inc., 885 F.2d 621, 626 (9<sup>th</sup> Cir. 1989) (In affirming the denial of a permanent injunction against a claim against third party non-debtor, court noted: “Section 524(e), therefore, limits the court’s equitable power under section 105 to order the discharge of liabilities of non-debtors.”).

5. IRS objects to Article I, Section 1.2 of the Plan to the extent the debtors intend to set an administrative claims bar date for taxes described in 11 U.S.C. Section 503(b)(1)(B) and (C) in violation of Section 503(b)(1)(D) of the Bankruptcy Code.

6. IRS objects to Article I, Section 1.6 of the Plan to the extent the Plan fails to provide for the payment of interest on IRS administrative expense claims. See 11 U.S.C. Section 503(b)(1)(C); United States v. Friendship College, Inc., 737 F.2d 430 (4<sup>th</sup> Cir. 1984); In re Mark Anthony Construction, Inc., 886 F.2d 1101 (9<sup>th</sup> Cir. 1989).

7. IRS objects to Article XXVI of the Plan to the extent that it provides for the retention of exclusive jurisdiction over matters involving the IRS.

**WHEREFORE**, IRS respectfully requests that the Court deny confirmation of the Plan and grant such other and further relief as the Court deems necessary and just.

CHARLES M. OBERLY, III  
United States Attorney

By: /s/ Ellen W. Slights  
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Assistant United States Attorney  
Delaware State Bar No. 2782

Dated: March 1, 2013

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**AFFIDAVIT OF SERVICE**

I, Brittany Kennedy, an employee in the Office of the United States Attorney for the District of Delaware, hereby attest under penalty of perjury that on March 1, 2013, a copy of the **IRS OBJECTION TO THE DEBTORS' SECOND AMENDED JOINT PLAN OF AFFILIATED DEBTORS PURSUANT TO CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE** was served, as indicated, upon:

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