SO ORDERED.

SIGNED this 6th day of August, 2018.

Catharine R Aron

UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

In re:	)	
Dynamic International Airways, LLC,	)	**Case No. 17-10814**
Debtor.	)	
The Port Authority of New York and New Jersey,	)	
Plaintiff,	)	**Adv. Pro. No. 18-2011**
v.	)	
Dynamic International Airways, LLC,	)	
Defendant.	)	

ORDER GRANTING MOTION TO DISMISS COMPLAINT

This adversary proceeding came before the Court on June 25, 2018, to consider the Motion to Dismiss Complaint [Doc. #5] filed by Dynamic International Airways, LLC (the "Debtor" or the "Defendant") on April 27, 2018. At the hearing, Walter Pitt and Gerald Gordon appeared on behalf of the Debtor and Brian Hodgkinson appeared on behalf of the Port Authority of New York and New Jersey (the "Plaintiff"). After considering the Motion to Dismiss Complaint, the Supplement to Motion to Dismiss Complaint [Doc. #9], the Plaintiff's

Memorandum of Law in Opposition to Defendant's Motion to Dismiss the Complaint [Doc. #11], the Reply in Support of Motion to Dismiss Complaint [Doc. #16], the arguments of counsel, the record in this proceeding, and other matters of record in the Debtor's main bankruptcy case (Case Number 17-10814, the "Chapter 11 Case"),[1] the Court finds that the Motion to Dismiss Complaint should be granted for the reasons which follow.

JURISDICTION

This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334 and Local Rule 83.11 of the United States District Court for the Middle District of North Carolina. This is a "core proceeding" within the meaning of 28 U.S.C. § 157(b) that the Court may determine by final order, because it concerns an interpretation of the Debtor's plan of reorganization or the enforcement of an order of the Court.[2] *See Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151 (2009) (explaining that a bankruptcy court "plainly had jurisdiction to interpret and enforce its own prior orders").

BACKGROUND

(1) On July 19, 2017, the Defendant filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code [Chapter 11 Case Doc. #1].

(2) On August 9, 2017, the Defendant filed its Schedule A/B, listing, as amongst its assets, $107,527.24[3] in cash or cash equivalents [Chapter 11 Case Doc. #124].[4]

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[1] On April 27, 2018, the Debtor filed a Request for Judicial Notice [Doc. #6], specifically requesting that the Court take judicial notice of nine distinct documents docketed in the Chapter 11 Case. At the June 25, 2018 hearing, the Court granted that request. In addition to those docket entries enumerated in the request, the Court also takes judicial notice herein of several other docket entries in the Chapter 11 Case, including, without limitation, the proof of claim filed by the Plaintiff on January 8, 2018, as Claim Number 109. *See Witthohn v. Fed. Ins. Co.*, 164 F. App'x 395, 396 (4th Cir. 2006) (unpublished per curiam opinion) (explaining that the Court "may consider official public records, documents central to the plaintiff's claim, and documents sufficiently referred to in the complaint so long as the authenticity of these documents is not dispute[,]" without converting a motion to dismiss under Rule 12(b)(6) into a motion for summary judgment under Rule 56).

[2] Section 10.1.7 of the Confirmed Plan (as defined later herein) also reserved jurisdiction for the Court to decide or resolve any disputes arising in connection with its consummation or interpretation. [Chapter 11 Case Doc. #543].

[3] $48,105.42 of this sum was held in Produbanco, Quito, Ecuador.

(3) Also on August 9, 2017, the Defendant filed its Schedule E/F, listing the Plaintiff as the holder of a disputed, unsecured, non-priority claim in the amount of $2,605,901.00; the Defendant noted that the claim was not subject to offset [Chapter 11 Case Doc. #126].

(4) On August 11, 2017, the Plaintiff filed a proof of claim, listed in the claims registry as Claim Number 23-1, asserting an unsecured, non-priority claim in the amount of $1,785,288.87. On November 3, 2017, the Plaintiff amended the claim to $1,896,307.97. The amended claim, identified in the claims registry as Claim Number 23-2, makes specific reference to "f[l]ight fees, aircraft parking fees, and employee parking fees" for John F. Kennedy International Airport ("JFK").[5]

(5) Over the course of the Chapter 11 Case, the Defendant requested and received permission to obtain post-petition financing on several occasions; the Defendant did not have sufficient resources to continue initial post-petition operations without those funds and struggled to maintain an ability to operate without the funds as the case progressed. *See* [Chapter 11 Case Doc. #'s 16, 99, 185, 258, 344, and 430] (collectively, the "Post-Petition Financing Orders"). A budget attached to the first interim order allowing post-petition financing [Chapter 11 Case Doc. #99] (the "First Interim Financing Order"), docketed on August 3, 2017, indicated that as of the week ending on July 22, 2017, the Defendant's collections minus operating disbursements totaled -$615,802.[6]

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[4] Due to the complex nature of its financial affairs, the Defendant requested an extension of time to file its schedules [Chapter 11 Case Doc. #66]. The Court granted the motion, allowing the Defendant until August 9, 2017, to file all outstanding documents [Chapter 11 Case Doc. #75].

[5] The amended claim was also filed as an unsecured, non-priority claim.

[6] The Plaintiff received a copy of: the Defendant's Emergency Motion Seeking Interim and Final Orders: (1) Authorizing Debtor to Obtain Post-Petition Financing, (2) Granting Liens and Superpriority Administrative Expense, and (3) Setting and Prescribing the Form and Manner of Notice for a Final Hearing [Chapter 11 Case Doc. #16] (the "Post-Petition Financing Motion") and the Court's order expediting the hearing on the Post-Petition Financing Motion [Chapter 11 Case Doc. #20]. *See* [Chapter 11 Case Doc. #27].

(6) On August 30, 2017, the Defendant listed the Plaintiff in its Notification of Disputed, Contingent, and/or Liquidated Claims [Chapter 11 Case Doc. #205], with a claim in the amount of $2,605,901.00.[7]

(7) On December 14, 2017, the Defendant filed its Third Amended Plan of Reorganization (the "Third Amended Plan") [Chapter 11 Case Doc. #407]. The Third Amended Plan stated that holders of "General Unsecured Claims,"[8] would be treated under Class 5 of the plan, unless they elected to be treated under Class 4, the "Convenience Class." *Id.* § 3.2.5. The plan proposed an exit loan to fund its implementation and proposed a payment to general unsecured creditors in the amount of $2,750,000, less the aggregate amount of allowed professional fees for the creditors' committee. *See id.* §§ 1.1.49 and 1.1.22.

(8) On December 15, 2017, the Defendant filed its Disclosure Statement to Accompany Debtor's Third Amended Plan of Reorganization (the "Disclosure Statement") [Chapter 11 Case Doc. #411].

(9) On December 18, 2017, the Court held a hearing to consider the adequacy of the Disclosure Statement. The Plaintiff received notice of the hearing at the address listed in Proof of Claim 23-2. *See* [Chapter 11 Case Doc. #385]. The Court entered an order approving the Disclosure Statement on December 28, 2017 [Chapter 11 Case Doc. #424] (the "Disclosure Statement Order").

[7] The Plaintiff received this document at the address listed in Proof of Claim 23-2.
[8] Defined as those with claims "not secured by a Lien or other charge against or interest in property in which the Estate has an interest." Third Amended Plan § 1.1.56.

(10) On December 22, 2017, the Defendant filed an amended Schedule E/F and listed the Plaintiff[9] as having a disputed, unsecured, non-priority claim in the amount of "unknown" [Chapter 11 Case Doc. #420]. The Defendant added that the claim was not subject to offset.

(11) Also on December 22, 2017, the Defendant listed the Plaintiff in its Second Notification of Disputed, Contingent, and/or Liquidated Claims [Chapter 11 Case Doc. #421],[10] with a claim in the amount of "unknown."

(12) On December 28, 2017, the Defendant filed its Notice of: (i) Hearing to Consider Confirmation of Debtor's Third Amended Plan of Reorganization; (ii) Procedures for Objecting to Confirmation of the Plan; and (iii) Procedures and Deadlines for Voting on the Plan [Chapter 11 Case Doc. #425] (the "Hearing and Voting/Objections Notice").

(13) On the same date, the Defendant served upon the Plaintiff a solicitation package containing a copy of the Disclosure Statement with the Third Amended Plan attached thereto, the Disclosure Statement Order, the Hearing and Voting/Objections Notice, and a ballot specific to holders of general unsecured claims in Class 5, with the option to elect to be treated in Class 4 as a convenience claim [Chapter 11 Case Doc. #427].[11]

(14) The Plaintiff did not vote on and did not object to the plan. *See* [Chapter 11 Case Doc. #527] (summarizing ballots).

(15) On January 8, 2018, the Plaintiff filed an additional proof of claim, listed in the claims registry as Claim Number 109, asserting an unsecured, non-priority claim in the amount of $562,315.10. Attached to the claim is a Schedule of Charges for Air Terminals

[9] The description "LGA Passenger Facility Charge (PFC)" was also added in front of the Plaintiff's name. The Plaintiff's address was amended to 2 Montgomery Street, Jersey City, NJ, 07302.
[10] Again, the description "LGA Passenger Facility Charge (PFC)" was added in front of the Plaintiff's name. The Plaintiff's address was also noted at 2 Montgomery Street, Jersey City, NJ, 07302.
[11] The Plaintiff received this package at both the address listed in Proof of Claim 23-2 and at 2 Montgomery Street, Jersey City, NJ, 07302.

for John F. Kennedy International Airport. The schedule explains those fees which are imposed by the airport on air carriers, including Passenger Facility Charges ("PFC"s). It notes that the Plaintiff is entitled to collect PFCs in the amount of $4.50 (effective 04/01/06) for each eligible enplaned passenger departing from any terminal at JFK. Also attached to the claim is a monthly traffic report, which includes emplaned revenue for the Defendant for passengers from 2014- 2017 at JFK.

(16) On February 8, 2018, the Court held a hearing to consider confirmation of the Third Amended Plan (the "Confirmation Hearing"). The Plaintiff did not participate in the hearing.

(17) On February 21, 2018, the Court entered its Findings of Fact and Conclusions of Law Regarding Confirmation of Debtor's Third Amended Plan of Reorganization and Order Confirming Debtor's Third Amended Plan of Reorganization [Chapter 11 Case Doc. #543] (the "Confirmation Order"), which confirmed the Defendant's Modified Third Amended Plan of Reorganization (the "Confirmed Plan"), as attached to the Confirmation Order.[12]

(18) Section 4.5 of the Confirmed Plan provides as follows:

> **Class 5 – General Unsecured Claims**. Except to the extent that a Holder of an Allowed General Unsecured Claim[13] agrees to less favorable treatment;
>
> **4.5.1.** Each Holder of an Allowed General Unsecured Claim, shall, in full and final satisfaction of such Claim, be paid in Cash its Pro Rata share of the Class 5 Distribution Amount.
>
> **4.5.2.** Deducted from the Class 5 Distribution Amount shall be (i) all costs and expenses of the Disbursing Agent and the Disbursing Agent Account, and (ii) the Allowed Professional Fees of the Creditor Committee approved after the Effective Date.
>
> **4.5.3.** On the Effective Date, provided that the Settlement and Restructuring Agreement is approved and this Plan as confirmed is consistent with the relief provided for in the Settlement and Restructuring Agreement, the

[12] The Confirmed Plan was also separately docketed as Doc. #575 in the Chapter 11 Case.
[13] Holders of "General Unsecured Claims" are defined as those with claims "not secured by a Lien or other charge against or interest in property in which the Estate has an interest." Confirmed Plan § 1.1.56.

Claims of Woolley, Kraus and Jet Midwest and the KMW Cure payments shall be subordinated to the payment of all other Allowed General Unsecured Claims and unclassified Allowed Claims and shall not receive any Distribution under this Plan.

Class 5 is Impaired under this Plan. The Holders of the Class 5 Allowed General Unsecured Claims are entitled to vote on this Plan.

(19) Section 9.3 of the Confirmed Plan provides as follows:

Discharge. On the Effective Date, except as otherwise provided in this Plan, the Debtor shall be discharged from any and all unclassified Claims and Claims in Classes 1, 2, 3, 4, 5, 6, and 7 to the fullest extent provided in sections 524 and 1141 of the Bankruptcy Code. The Discharge shall be to the fullest extent provided under section 1141(d)(1)(A) and other applicable provisions of the Bankruptcy Code, and, except as otherwise expressly provided by this Plan or the Confirmation Order, all consideration distributed under this Plan and shall be in exchange for, and in complete satisfaction, settlement, discharge, and release of, all Claims of any kind or nature whatsoever against the Debtor or any of its assets or properties, and regardless of whether any property shall have been distributed or retained pursuant to this Plan on account of such Claims. Except as otherwise expressly provided by this Plan or the Confirmation Order, upon the Effective Date as to unclassified Claims and Claims in Classes 1, 2, 3, 4, 5, 6, and 7, the Debtor shall be deemed discharged and released under and to the fullest extent provided under section 1141(d)(1)(A) of the Bankruptcy Code from any and all Claims of any kind or nature whatsoever, including, but not limited to, demands and liabilities that arose before the Confirmation Date, and all debts of the kind specified in section 502(g), 502(h), or 502(i) of the Bankruptcy Code. Nothing in this Plan or Confirmation Order shall operate to expand the Debtor's discharge as provided for in this Section 9.3 beyond those allowed by the Bankruptcy Code. Nothing in this Plan or Confirmation Order shall discharge any Claims of the United States arising after the Confirmation Date.[14]

(20) Section 9.1 of the Confirmed Plan provides as follows:

Vesting of Assets. Subject to the provisions of this Plan and as permitted by Section 1123(a)(5)(B) of the Bankruptcy Code, the Assets, including the Litigation Claims and right, title, and interest being assumed by Reorganized Debtor in the assumed Executory Contracts, shall be transferred to Reorganized Debtor on the Effective Date. As of the Effective Date, all such property shall be free and clear of all Liens, Claims, and Equity Securities except as otherwise provided herein. On and after the Effective Date, Reorganized Debtor may

[14] The Confirmation Order also states: "Except as otherwise provided in Section 1141(d) of the Bankruptcy Code, on and after the Confirmation Date, the provisions of the Plan shall bind any Holder of a Claim against, or Equity Security in, Debtor and its successors and assigns, or in the assets of Debtor, its successors and assigns, regardless of whether the Claim or Equity Security of such Holder is Impaired under the Plan and whether such Holder has accepted the Amended Plan." *Id.* 9.

> operate its business and may use, acquire, and dispose of property and compromise or settle any Claim without the supervision of or approval of the Bankruptcy Court and free and clear of any restrictions of the Bankruptcy Code or the Bankruptcy Rules, other than restrictions expressly imposed by this Plan or the Confirmation Order.

(21) "Assets" are defined in the Confirmed Plan as: "All of the assets, property, interests, and effects, real and personal, tangible and intangible, wherever situated, of Debtor, as they exist on the Effective Date." *Id.* § 1.1.9.

(22) Section 7.1 of the Confirmed Plan provides as follows:

> **Distributions.** Distributions to Holders of Class 5 Allowed Claims shall be the responsibility of the Disbursing Agent, and Reorganized Debtor shall be responsible for making the balance of Distributions described in this Plan. Reorganized Debtor and Disbursing Agent, as applicable, may make such Distributions before the allowance of each Claim has been resolved if Reorganized Debtor has a good faith belief that the Disputed Claims Reserve is sufficient for all Disputed Claims. Except as otherwise provided in this Plan or the Confirmation Order, the Cash necessary for Reorganized Debtor to make payments pursuant to this Plan may be obtained from existing Cash[15] balances or the Exit Loan, and the Cash necessary for Disbursing Agent to make payments pursuant to this Plan shall be obtained from the Disbursing Agent Account.

(23) On March 16, 2018, the Defendant filed its Notice of Effective Date and Occurrence of Substantial Consummation of Debtor's Modified Third Amended Plan of Reorganization [Chapter 11 Case Doc. #590] (the "Effective Date Notice"), explaining that the effective date and substantial consummation date of the Confirmed Plan was March 8, 2018.

(24) The 14 day period to appeal the Confirmation Order expired on March 7, 2018.

(25) On March 28, 2018, the Plaintiff instituted this adversary proceeding, requesting that the Court: (1) enter judgment against the Defendant, or the un-reorganized debtor, in the amount of $498,629.37 for pre-petition PFCs from passengers enplaned at JFK between

[15] Cash is defined in §1.1.17 of the Confirmed Plan as: "The legal tender of the United States of America or the equivalent thereof, including bank deposits, checks, negotiable instruments, wire transfers of immediately available funds, or other cash equivalents."

November 2014 and July 2017, or (2) enter an order that the $498,629.37 be set aside and withheld from distribution.

(26) On April 27, 2018, the Defendant filed its Motion to Dismiss Complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, made applicable in this proceeding via Rule 7012 of the Federal Rules of Bankruptcy Procedure. The motion asserts that the Complaint should be dismissed with prejudice, because confirmation bars the Plaintiff from attempting to revisit the treatment of its claim for PFCs.

STANDARD OF REVIEW

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "In other words, the factual allegations in the complaint 'must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact).' " *Walter v. Freeway Foods, Inc. (In re Freeway Foods of Greensboro, Inc.)*, 467 B.R. 853, 860 (Bankr. M.D.N.C. 2012) (quoting *Sherman v. Litton Loan Servicing, L.P.*, 796 F. Supp. 2d 753, 757 (E.D. Va. 2011)). If it is, however, clear from the face of a complaint and undisputed facts of which the Court may take judicial notice that a plaintiff's claims are barred as a matter of law by the affirmative defense of *res judicata*, then dismissal under Rule 12(b)(6) is appropriate. *Andrews v. Daw*, 201 F.3d 521, 524 n.1 (4th Cir. 2000).

DISCUSSION

While the Plaintiff insists that this adversary proceeding may proceed notwithstanding the procedural posture of the Chapter 11 Case, this Court disagrees. " 'A bankruptcy court's order of confirmation is treated as a final judgment with *res judicata* effect,' binding the parties

by its terms and precluding them 'from raising claims or issues that they could have or should have raised before confirmation.' " *Valley Historic Ltd. P'ship v. Bank of New York*, 486 F.3d 831, 838 (4th Cir. 2007) (quoting *First Union Commercial Corp. v. Nelson, Mullins, Riley & Scarborough (In re Varat Enters., Inc.)*, 81 F.3d 1310, 1315 (4th Cir. 1996)). "The binding effect of a chapter 11 plan is in fact premised on statutory and common law . . . preclusion," *Lawski v. Frontier Ins. Grp., LLC (In re Frontier Ins. Grp., Inc.)*, Ch. 11 Case No. 05-36877(CGM), Adv. No. 14-9022(RDD), 2018 WL 922194, at *4 (Bankr. S.D.N.Y. Feb. 15, 2018); under 11 U.S.C. § 1141(a), "the provisions of a confirmed plan bind the debtor . . . and any creditor, . . . whether or not the claim or interest of such creditor . . . is impaired under the plan and whether or not such creditor . . . has accepted the plan."[16] Thus, "federal courts have consistently applied *res judicata* principles to bar a party from asserting a legal position after failing, without reason, to object to the relevant proposed plan of reorganization or to appeal the confirmation order." *Varat*, 81 F.3d at 1315.

Res judicata encompasses two related concepts, claim preclusion and issue preclusion. *Id.* Claim preclusion occurs when:

> 1) the prior judgment was final and on the merits, and rendered by a court of competent jurisdiction in accordance with the requirements of due process; 2) the parties are identical, or in privity, in the two actions; and, 3) the claims in the second matter are based upon the same cause of action involved in the earlier proceeding.

Id. (citing *Kenny v. Quigg*, 820 F.2d 665, 669 (4th Cir.1987)).

In the context of this adversary proceeding, the Court finds that all three claim preclusion criteria are satisfied. First, the Confirmed Plan constitutes a final judgment on the merits, issued based on proper jurisdiction. The deadline to appeal the Confirmed Plan has passed, and the plan

[16] Confirmation also discharges the debtor from any debt that arose before the confirmation date, and property "dealt with" by the plan is deemed "free and clear of all claims and interests of creditors." 11 U.S.C. § 1141(c)-(d).

has been substantially consummated. The Plaintiff also participated in the Chapter 11 Case by filing two proofs of claim[17] and received notice of: (1) the Defendant's Schedule E/F, wherein it was listed as the holder of a disputed, unsecured, non-priority claim, (2) the Defendant's notifications of disputed, contingent, and/or liquidated claims, wherein it was twice listed as the holder of a disputed, unsecured, non-priority claim, (3) the Disclosure Statement, (4) the Third Amended Plan, (5) the ballot for Class 5 General Unsecured Claims, and (6) the Confirmation Hearing. Thus, the Plaintiff qualifies as a party for purposes of former adjudication under *res judicata*. *See In re Weidel*, 208 B.R. 848, 851(Bankr. M.D.N.C. 1997) (explaining that a creditor which (1) participated in the plan confirmation process or had the opportunity to do so and (2) filed a claim but chose not to object to a plan or its treatment under the plan constituted a party for purposes of *res judicata*).

Finally, the Plaintiff's claim in this adversary proceeding stems from the same cause of action at issue in the Confirmation Hearing; the claim revolves around the same facts which gave rise, in part, to the Confirmed Plan. *See Varat*, 81 F.3d at 1316 (explaining that a claim objection, asserted post-confirmation, constituted later litigation arising from the same cause of action as the confirmed plan); *Frontier*, 2018 WL 922194, at *5 (noting that for purposes of *res judicata*, something would arise from the same cause of action as a confirmed plan if it concerned an allocation of the debtor's property or claims against it); *Weidel*, 208 B.R. at 851 (observing that, in light of the fact that confirmation of a plan is based upon the plan's treatment of claims, an objection to claim would arise from the same cause of action as the confirmed plan).[18]

[17] As discussed later herein, one of those claims was undoubtedly with respect to the same monies at issue in this adversary proceeding.

[18] In the *Weidel* case, the Court went on to find that litigation regarding the claim objection at issue had not actually been precluded, because the debtor had reserved the right to object to claims in its confirmed plan. The Confirmed

In short, the Plaintiff already asserted the claim it now seeks to re-characterize as a right to trust fund monies in Claim Number 109.[19] Claim Number 109 explicitly references PFCs for JFK and makes no reference to any secured or priority claim, or any funds held in trust; Claim Number 109 was filed as a general unsecured claim. Despite filing that unsecured claim; receiving several notifications that the Defendant considered it to be a general unsecured creditor; being implicitly classified as the holder of a Class 5 General Unsecured Claim;[20] and receiving a ballot for Class 5 creditors, the Plaintiff failed to object to the Third Amended Plan and did not appear at the Confirmation Hearing. The Plaintiff cannot now attempt to assert that its claim in this adversary proceeding[21] for pre-petition PFCs for JFK was not treated as a Class 5 General Unsecured Claim or otherwise object to the Confirmed Plan and its vesting of property in the reorganized debtor.[22] *See Weidel*, 208 B.R. at 851 (finding that generalized treatment

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Plan in the Chapter 11 Case similarly preserved the right for parties with standing to assert post-confirmation claim objections. *Id.* § 12.1. It also noted that no creditor would be allowed to amend its claim after the claims bar date to increase the claimed amount. *Id.* § 12.1.3. For the reasons as discussed herein, the Court simply cannot conceive of such language as allowing the Plaintiff to re-classify its own claim by amending its self-described unsecured status post-confirmation.

[19] It is unclear to the Court if Claim Number 23-2 also includes charges for PFCs at JFK.

[20] A review of the entire plan reveals Class 5 to be the only class which conceivably contemplated the Plaintiff's claim for PFCs for JFK.

[21] A "claim" is defined broadly under the Bankruptcy Code and includes any right to payment. 11 U.S.C. § 101(5)(A). "Claims" subject to discharge under the Confirmed Plan are defined to include any right to payment from the Defendant arising before the effective date. *Id.* §1.1.20. As the Defendant posits, this definition unambiguously captures the Plaintiff's asserted right in Claim Number 109 and this adversary proceeding to pre-petition PFCs. Moreover, having asserted a claim, the Plaintiff cannot deny it is a creditor, capable of being bound by *res judicata* or 11 U.S.C. § 1141.

[22] The Plaintiff appears to dispute that *res judicata* or § 1141(c) applies with respect to the $107,527.24 in cash or cash equivalents listed by the Defendant on its petition, because the Confirmed Plan could not—and thus did not—confer upon the Defendant title to monies which were held in trust for the Plaintiff. In other words, in the least, the Plaintiff attempts to assert that those monies held by the Defendant as of the petition date in cash or cash equivalents constituted monies which were excluded from the estate under 49 U.S.C. § 40117 and 14 C.F.R. § 158.49 and, therefore, were monies which escaped the effects of the Confirmed Plan. (In fact, the Plaintiff requests that the Court set aside $498,629.37 from distribution. Nevertheless, the Plaintiff's claim for pre-petition monies could have only attached to those monies which existed as of the petition date.)

The Plaintiff's position lacks merit. Chapter 11 plans "may, and frequently do, propose restructuring that is contrary to the terms of the debtor's pre-petition relationships, duties, and obligations." *In re DeCoro USA, Ltd.*, No. 09-10846C-11G, 2012 WL 1237558, at *3 (Bankr. M.D.N.C. Apr. 12, 2012) (explaining that a Chapter 11 plan was *res judicata* with respect to whether a debtor held an ownership interest in certain property, or, instead, was merely holding the property as an agent for another). Thus, "a creditor with a claim to, or an asserted interest in, an asset may lose that interest if, knowing the debtor's contrary claim, it lets a plan be confirmed without contesting the

under a plan as a general unsecured creditor does not "preclude a finding that the plan is *res judicata* as to [the creditor's] claim"). If the Plaintiff disagreed with its classification under the Third Amended Plan, it should have and could have objected before confirmation. It did not, and on the effective date of the Confirmed Plan, the Plaintiff's claim was treated and discharged; no assets remain with the Defendant, an entity which, in fact, no longer exists as it previously did. Thus, the Court finds that the Plaintiff's claims are barred as a matter of law by the affirmative defense of *res judicata* and that the proceeding should be dismissed under Rule 12(b)(6).[23]

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debtor's position." *Frontier*, 2018 WL 922194, at *6; *see also Baeshen v. Arcapita Bank B.S.C.(c) (In re Arcapita Bank B.S.C.(c))*, 520 B.R. 15, 23 (Bankr. S.D.N.Y. 2014) (explaining that a party has a right to contest what constitutes property of the estate but that the issue may also be resolved in a confirmed Chapter 11 plan).

In this case, the Confirmed Plan explained that those "Assets" which vested upon confirmation in the reorganized debtor included "[a]ll of the assets, property, interests, and effects, real and personal, tangible and intangible, wherever situated, of Debtor, as they exist[ed] on the Effective Date." *Id.* § 1.1.9. Analysis of the remainder of the plan leads to the conclusion that this definition encompassed any and all of the $107,527.24 remaining as of the effective date. Under section 7.1 of the Confirmed Plan, the reorganized debtor proposed to make plan payments using "existing Cash balances," or existing cash/cash equivalents. Thus, if any of the $107,527.24 remained as of the effective date—an in fact doubtful proposition in light of the fact that the budget attached to the First Interim Financing Order reflected that the Defendant's collections minus operating disbursements totaled -$615,802 for the week ending on July 22, 2017—the Confirmed Plan implicitly determined that those funds constituted property belonging to the Defendant, or property which would vest in the reorganized debtor and be available for distribution under the plan. Otherwise stated, regardless of the continuing existence of any pre-petition funds, the plan specifically provided for the use of the Defendant's cash to pay its creditors, a use irreconcilable with any putative claimed property interest in that cash by the Plaintiff. The Plaintiff did not object to the plan, and, indeed, did not contradict the Defendant's distribution of the $107,527.24. Despite its failure to object to the plan, the Plaintiff actively participated in the case by filing a proof of claim for PCFs for JFK. Therefore, the elements of § 1141(c) were met with respect to those funds. *See generally City of Concord v. N. New Eng. Tel. Operations LLC (In re N. New Eng. Tel. Operations LLC)*, 795 F.3d 343, 348 (2d Cir. 2015) (explaining that in order for the requirements of § 1141(c) to be met with respect to a creditor, the creditor must have participated in the case; finding that filing a proof of claim which seems to relate to the interest at issue constitutes participation); *Universal Suppliers, Inc. v. Reg'l Bldg. Sys. (In re Reg'l Bldg. Sys., Inc.)*, 254 F.3d 528, 529, 532 (4th Cir. 2001) (emphasizing that a creditor who (1) actively participated in a Chapter 11 case as a member of the creditors' committee, (2) filed several proofs of claim, and (3) knew that a plan did not expressly preserve its lien but did not object to confirmation "fell asleep at the switch" and thus could not "escape the consequences of its inaction" under § 1141(c)).

[23] The Court also notes that waiver principles apply in this instance; the Plaintiff "voluntarily or intentionally relinquishe[d]" an alleged right, *Varat*, 81 F.3d at 1317; *see also Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 n.1 (2017) (explaining that, unlike forfeiture, waiver involves the intentional relinquishment or abandonment of a right). The Plaintiff essentially argues that the Confirmed Plan misclassified a claim it filed as unsecured as an unsecured claim.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

(1) the Motion to Dismiss Complaint is GRANTED; and

(2) the Complaint is DISMISSED WITH PREJUDICE.

[END OF DOCUMENT]

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