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Assessing Whether Past Airline Merger Remedies Could Impact JetBlue-Spirit Merger

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On March 7, the U.S. Department of Justice (DOJ), along with the attorneys general of Massachusetts, New York, and the District of Columbia (together the Government Enforcers), sued to block JetBlue Airways Corp.'s (JetBlue) planned $3.8 billion acquisition of Spirit Airlines, Inc. (Spirit). The Government Enforcers have alleged that JetBlue and Spirit fiercely compete head-to-head on dozens of routes and a merger would eliminate Spirit—an alleged maverick that has purportedly defied industry coordination to become the fastest-growing "ultra-low-cost carrier" in the United States—thus substantially lessening competition in violation of Section 7 of the Clayton Act. See Complaint at 1-3, *United States v. JetBlue Airways Corp. and Spirit Airlines, Inc.*, No. 1-23-cv-10511 (D. Mass. Mar. 7, 2023), ECF No. 1. Claiming that JetBlue plans to remove seats from planes, the Government Enforcers assert that the deal will result in anticompetitive effects that include the elimination of head-to-head competition between JetBlue and Spirit, an increase in ticket prices, the reduction in passenger capacity and consumer choice, and the facilitation of greater airline competitor coordination.

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In response to the Government Enforcers' suit, JetBlue and Spirit stated they were confident that "the proposed merger is procompetitive" and they would continue to advance their acquisition plans. Press Release, JetBlue, JetBlue and Spirit Will Continue to Advance Plan to Create Compelling National Low-Fare Challenger to the Dominant U.S. Carriers (Mar. 7, 2023), https://news.jetblue.com/latest-news/press-release-details/2023/JetBlue-and-Spirit-Will-Continue-to-Advance-Plan-to-Create-Compelling-National-Low-Fare-Challenger-to-the-Dominant-U.S.-Carriers/default.aspx. With trial set for Oct. 16, 2023, the airlines appear ready and willing to defend their position. However, if JetBlue and Spirit were to explore the possibility of a settlement agreement with the Government Enforcers, as they recently did with the state of Florida, they might benefit from looking back to the remedies that the DOJ previously accepted in connection with the merger of US Airways Group,

Inc. "US Airways) and AMR Corp. (American). To what degree those past remedies are acceptable today may also provide insight into the shift in antitrust enforcement under President Joe Biden's administration.

US Airways-American Merger

In 2013, American and US Airways—two of the four largest "legacy" airlines along with Delta and United—agreed to merge. At the time, American had filed for bankruptcy and was in the process of reorganization. The DOJ and many states' attorneys general sued to stop the merger. The DOJ claimed that US Airways and American competed directly on thousands of routes and a merger would eliminate US Airways' nonconformist business practice of offering Advantage Fares that lowered prices on legacy airline routes, thus substantially lessening competition in violation of Section 7 of the Clayton Act. See Amended Complaint at 3-5, *United States v. US Airways Group and AMR,* No. 1:13-cv-01236 (D.D.C. Sept. 5, 2013), ECF No. 73. Further, like the JetBlue-Spirit complaint, the complaint against US Airways and American alleged that head-to-head competition between the merging airlines would be eliminated, ticket prices and other fees would increase, industry passenger capacity would decrease, and competition generally would lessen as airline cooperation became easier.

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Eventually, the US Airways-American merger was allowed to proceed after the parties reached a settlement agreement. Under the terms of the agreed-upon final judgment, the airlines were required to divest air carrier slots—authorizations for a carrier to take-off or land—at a number of airports, including 104 slots at Reagan National Airport in Washington, D.C. and 34 slots at LaGuardia International Airport in New York, as well as two gates at airports in Chicago, Los Angeles, Boston, Miami, and Dallas to purchasers approved by the DOJ. Despite the DOJ's previous allegations that the merger would hurt competition, the settlement was determined to sufficiently overcome such harms by "requiring the divestiture of an unprecedented quantity of valuable facilities" that would "create network opportunities" and provide increased incentives for purchasing carriers to "invest in new capacity and expand into additional markets." Competitive Impact Statement at 8, *United States. v. US Airways Group and AMR,* No. 1:13-cv-01236 (D.D.C. Nov. 12, 2013), ECF No. 148.

A key to the DOJ's settlement was the agency's ability to approve the purchasing carriers, meaning that low-cost carriers—and not other legacy airlines—would be the primary beneficiaries. The DOJ reasoned that when low-cost carriers (including JetBlue and Spirit) begin operating on a legacy airline route, airline fares substantially drop. From this settlement, low-cost carriers would be granted valuable, and previously difficult-to-obtain, facilities at important airports allowing these carriers to increase capacity and expand operations. By accelerating the growth of low-cost carriers, the DOJ believed that the settlement would "impede the industry's evolution toward a tighter oligopoly" and guarantee a larger foothold for low-cost carriers that would, in turn, "deliver benefits to consumers that could not be obtained by enjoining the merger." Ultimately, the DOJ concluded that remedies that focused on strengthening low-cost carriers' ability to compete with legacy airlines provided enough consumer benefits to allow the merger of US Airways and American, which created the largest airline in the world.

Potential Remedies for the JetBlue-Spirit Merger

If JetBlue and Spirit attempt to reach a settlement with the Government Enforcers, the US Airways-American merger settlement agreement provides a helpful remedies playbook. The rationale underlying the US Airways-American merger settlement—that the empowerment and expansion of low-cost carriers increases competition among the legacy airlines and drives down prices, benefiting consumers—is still relevant today. The U.S. airline industry has four major legacy carriers—American, Delta, United and Southwest—that comprise about 80% of the industry. JetBlue and Spirit may argue that, by allowing the two carriers to merge, the Government Enforcers will create a strong national, low-cost carrier that can grow and vigorously challenge these "Big Four" airlines, ultimately benefiting consumers. In fact, the DOJ recently confirmed this logic, acknowledging the so-called "JetBlue Effect": when JetBlue enters an airline route, overall fares for that route decline, resulting in substantial savings for consumers. See Complaint at 4-5, United States, et al., v. American Airlines Group Inc. and JetBlue Airways Corp., No. 1-21-cv-11558 (D. Mass. Sept. 21, 2021), ECF No. 1.

The Government Enforcers argue in their complaint that the "Spirit Effect" is more powerful than the "JetBlue Effect" in driving down competitor fares, including JetBlue's fares. See Complaint at 2-3, JetBlue Airways, No. 1-23-cv-10511. The Government Enforcers argue that the merger would eliminate the more potent "Spirit Effect," leaving consumers worse off. Further, the Government Enforcers may question how long the "JetBlue Effect" would continue to exist if JetBlue no longer needed to compete with Spirit's lower fares. Indeed, the Government Enforcers have already cast doubts as to JetBlue's self-described role as a low-cost disruptor to the airline industry, accusing JetBlue of integrating itself into the pool of legacy players through its recent NorthEast Alliance with American, which is currently the subject of a separate antitrust suit that alleges that the companies entered into an unlawful de facto merger.

In support of the proposed JetBlue-Spirit merger, JetBlue has stated that "JetBlue is 3x more effective than Spirit at bringing down competitor fares." Press Release, JetBlue. According to JetBlue, the proposed merger with Spirit will allow for expansion with new routes, new cities, and increased capacity with more flights. JetBlue and Spirit can point to their settlement with the state of Florida as an indicator of the expansion possibilities under the merger. In their Florida settlement, JetBlue and Spirit will increase seat capacity in Fort Lauderdale and Orlando by at least 50%, increase aggregate seat capacity at all other Florida airports by at least 50%, bring hundreds of new daily flights to Florida, increase frequencies at over 35 airports, and add service to almost 50 new routes. JetBlue claims that consumers will benefit from an enhanced and expanded low-cost network that is better able to compete against the larger carriers.

Additionally, JetBlue appears poised to follow the divesture roadmap laid out in the US Airways-American settlement agreement, indicating a willingness to divest all of Spirit's holdings in Boston, New York, and Fort Lauderdale, thereby significantly reducing the overlap of nonstop routes. See id. It is not clear whether this divestiture package would be enough to satisfy the Government Enforcers. In any event, the DOJ embraced the divestitures from US Airways and American because the agency could direct those divestitures to benefit low-cost carriers and provide significant competition to the new American and other legacy airlines. In the same way, an agreement that all of the divestitures following the JetBlue-Spirit merger would go to other ultra-low-cost carriers would provide those ultra-low-cost carriers the opportunity and incentive to grow their operations

and fill Spirit's vacant shoes, driving further competition with the Big Four and the new JetBlue.

DOJ Position Regarding Remedies

On Jan. 24, 2022, Assistant Attorney General Jonathan Kanter, in his first address as head of the DOJ's Antitrust Division, stated that he was "concerned that merger remedies short of blocking a transaction too often miss the mark," meaning that the DOJ often "cannot accept anything less than an injunction blocking the merger—full stop." Speech, United States Department of Justice, Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks to the New York State Bar Association Antitrust Section (Jan. 24, 2023), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york. Kanter promised an aggressive approach from antitrust enforcers where divestitures "are the exception, not the rule."

While antitrust enforcers have been reluctant to accept any settlement remedies under this administration, continued losses may result in a realization that presumptively rejecting all settlements is not sustainable.

The JetBlue-Spirit merger stands as an interesting case to test the DOJ's resolve against remedies. In the time since Kanter's first remarks, the DOJ has followed through on its declaration and rarely entered proposed settlement agreements for mergers. Instead, the DOJ has chosen to litigate many deals, resulting in a string of recent defeats. As an alternative, JetBlue and Spirit can offer the DOJ a compelling settlement proposal based on past remedies from the US Airways-American merger that the DOJ itself found sufficient to preserve competition. Further, the DOJ's belief regarding those remedies was affirmed when United States Bankruptcy Judge Sean Lane rejected a private challenge to the US Airways-American merger based in part on expert testimony that "the Merger has expanded airline output, and that it has resulted in a reduction of average fares, an increase in the number of total passengers, and an increase in the number of seats available … demonstrat[ing] that competition in the relevant markets and the airline industry generally remains robust and that the Merger has not substantially lessened competition." *In re AMR,* 625 B.R. 215, 256 (Bankr. S.D.N.Y. 2021).

Conclusion

In sum, JetBlue and Spirit may credibly argue that, because the US Airways-American merger settlement remedies were sufficient to preserve competition even when the merger created the largest airline in the world, the same type of remedies should be acceptable for a merger between much smaller airlines that together make up less than 10% of the domestic airline industry. While antitrust enforcers have been reluctant to accept any settlement remedies under this administration, continued losses may result in a realization that presumptively rejecting all settlements is not sustainable. The JetBlue-Spirit merger could provide antitrust enforcers the perfect opportunity to change their tune and begin to acknowledge that settlements and consent decrees can be good policy. However, a rejection may reinforce that antitrust enforcers are digging in their heels and remedies or settlement agreements, even those proven to have worked in the past, are no longer acceptable.