No. 24-1092

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA; COMMONWEALTH OF MASSACHUSETTS; DISTRICT OF COLUMBIA; STATE OF NEW YORK; STATE OF CALIFORNIA; STATE OF NORTH CAROLINA; STATE OF MARYLAND; STATE OF NEW JERSEY,
Plaintiffs – Appellees
v.
JETBLUE AIRWAYS CORPORATION; SPIRIT AIRLINES, INC.,
Defendants – Appellants.

On Appeal from the United States District Court for the District of Massachusetts in Case No. 1:23-cv-10511-WGY, Judge William G. Young

JETBLUE AIRWAYS CORPORATION AND SPIRIT AIRLINES, INC.'S REPLY IN SUPPORT OF MOTION TO EXPEDITE APPEAL

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Appellants' Motion to Expedite showed that there are substantial grounds for reversal of the District Court's decision enjoining the merger of Appellants JetBlue Airways Corporation ("JetBlue") and Spirit Airlines, Inc. ("Spirit"), the benefits of which will inure to the majority of the flying public. Of central relevance, Appellants demonstrated that expedition of the appeal is necessary because, absent expedition, the appeal is unlikely to be decided before the July 24, 2024, outside closing date in the merger agreement.

Nothing in the Government's opposition provides any reason why this Court should deny the Motion. Although the Government protests that the schedule proposed by Appellants "threatens to rush the briefing of a complex appeal," the opposition proposes a briefing schedule that would make it unlikely that the appeal would be decided before the July 24, 2024, outside closing date. That result would irreparably harm Appellants and be contrary to the public interest of the millions of airline passengers who would benefit from the merger.

Two arguments in the opposition merit a brief response:

First, the Government argues that Appellants can reset the outside closing date by mutual consent. The Government's argument is divorced from commercial reality. For example, the suggestion that Appellants can simply extend the date by the stroke of the pen ignores that the completion of this merger is dependent upon $3.5 billion of financing obtained by JetBlue. That financing agreement *also* expires

on the July 24, 2024, outside closing date, unless the lenders, Goldman Sachs and Bank of America, "in [their] sole discretion, agree to an extension." *See* Ex. A, May 23, 2022 Form 8-K attaching Commitment Letter from lenders. Moreover, managing the operations of two standalone airlines in the period between signing and closing a merger is complex, requiring detailed operating covenants governing and restricting how Spirit can conduct its business pending completion of the merger. Those operating covenants cannot be easily extended. *See* Ex. B, Excerpt from Merger Agreement, § 5.1

Second, the Government argues that it is somehow unfair for Appellants to have 41 days from the District Court's decision to file its opening brief if the Government will have only 30 days for a response.[1] *See* Opp. at 3. But Appellants would have had more time to file—and the Government would have had the same amount of time to file—under the default briefing schedule. Appellants' proposed briefing schedule shortens the time for filing for Appellants, who would otherwise be required to file their brief within 40 days after the record is filed. *See* 1st Cir. R. 31(a)(1). And the Government would have to file its brief within 30 days of Appellants' brief anyway. *See id.* There is nothing unfair about requiring the Government to abide by the default deadlines. After hundreds of pages of pre- and

[1] Appellants' proposed deadline for their opening brief is less than 40 days after they filed the Notice of Appeal.

post-trial briefing, the Government can hardly complain that it is unaware of the arguments Defendants will advance in this appeal. Effectively, the Government is requesting that its time be doubled under the Rules, while Appellants' time is curtailed. That is unfair and unwarranted given the exigencies.

For these reasons, as well as those set forth in the Motion to Expedite, Appellants respectfully request that the Court order that briefs on this appeal be filed in accordance with the schedule set out on page 3 of Appellants' Motion and set oral argument for the May sitting to permit a decision to be issued in advance of July 24, 2024.

Dated: January 29, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLAINCE

Pursuant to Fed. R. App. P. 27(d) and 32(g), the undersigned hereby certifies that this Reply complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 27(d)(2) and any accompanying documents as authorized by Fed. R. App. P. 27(a)(2)(B), the Reply contains 590 words.

The Reply has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font as provided by Fed. R. App. P. 32(a)(5)-(6). As authorized by Fed. R. App. P. 32(g), the undersigned has relied upon the word count feature of the word processing system in preparing this certificate.

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2024, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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I further certify that on February 1, 2024, I served a copy of the foregoing document on the following parties or their counsel of record by email and U.S. first-class mail, postage prepaid:

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