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The Antitrust Implication of the Proposed Frontier-Spirit Merger

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In February 2022, Frontier Airlines (“Frontier”) and Spirit Airlines (“Spirit”) announced a merger valued at more than six and a half-billion dollars.¹ The deal would integrate Spirit into Frontier, forming the fifth-largest commercial airline carrier in the United States.² The merger comes as the Federal Trade Commission (the “FTC”), the federal agency charged with regulating antitrust matters, has ramped up scrutiny of mergers and acquisitions.³ The FTC’s increased focus on antitrust is partly due to its current chairperson, Lina Khan. Khan, who was nominated under the Biden administration in 2021, is a staunch opponent of monopolies and has openly criticized our modern framework of antitrust law.⁴ Under her leadership, the FTC has notably increased its attention on antitrust matters.⁵

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¹ Alison Sider & Will Feuer, *Frontier to Buy Spirit Airlines in Cash-and-Stock Deal*, THE WALL STREET JOURNAL (Feb. 7, 2022), https://www.wsj.com/articles/frontier-group-spirit-airlines-merge-in-6-6-billion-deal-11644236133?mod=Searchresults_pos4&page=1.

² *Id.*

³ See generally David Benoit, *Deals are Booming but Antitrust scrutiny has Deal Traders Worried*, THE WALL STREET JOURNAL (Feb. 12, 2022), <https://www.wsj.com/articles/deals-are-booming-but-antitrust-scrutiny-has-deal-traders-worried-11644678001> (where the author discusses increased antitrust scrutiny in various American industries).

⁴ See Shannon Bond, *New FTC Chair Lina Khan Wants to Redefine Monopoly Power For The Age Of Big Tech*, NAT’L PUB. RADIO (Jul. 1, 2021), <https://www.npr.org/2021/07/01/1011907383/new-ftc-chair-lina-khan-wants-to-define-monopoly-power-for-the-age-of-big-tech>.

⁵ See generally *supra* note 3 (where the author discusses increased antitrust scrutiny in various American industries).

The nearly three-billion-dollar stock and cash deal might prompt the FTC to file suit blocking the transaction under federal antitrust law.⁶ The Clayton Act prohibits mergers and acquisitions where “the effect of such acquisition may be substantially to lessen competition.”⁷ This language has been construed broadly to include the future probable effects of the merger or acquisition.⁸ The inquiry is context-specific, meaning the court will look to the “character and scope” of the transaction to determine its anticompetitive effect.⁹

Frontier and Spirit have justified their merger as a measure to help the two companies better compete with their larger rivals, as well as save their customers an estimated one billion dollars on flight charges per year.¹⁰ This is what is known as an efficiencies argument. An efficiencies argument justifies a merger or acquisition by claiming that the corporation will be in a better position to provide their good or service to consumers post-merger (i.e., without the merger/acquisition it would be arduous to compete at the same level the corporation will compete at when the merger/acquisition effectuates).¹¹

The efficiencies argument has a complicated history and is not ubiquitously recognized.¹² Specifically, in the Third Circuit, which would have jurisdiction in a suit involving Frontier,¹³ the court remains “skeptical” that the efficiencies argument even exists.¹⁴ As such, if the FTC indeed files an antitrust claim to block the Frontier-Spirit merger, Frontier faces an uphill battle rebutting it by presenting its efficiencies argument in court.

To successfully defend against an antitrust action, Frontier will need to demonstrate that the merger’s anticompetitive effect would be negligible. Frontier will likely emphasize that the merger forms only the *fifth* largest airline in the United States. Additionally, Frontier should highlight that the four larger airlines, in aggregate, cover nearly eighty percent of the market;¹⁵ bolstering the argument that the proposed merger will not significantly alter the market dynamic or

⁶ *Supra* note 1.

⁷ 15 U.S.C. § 18.

⁸ *Brown Shoe Co. v. United States*, 82 S. Ct. 1502, 1522 (1962).

⁹ *Id.* at 1529.

¹⁰ Niraj Chokshi, *Frontier and Spirit Airlines Plan to Merge*, The New York Times (Feb. 7, 2022), <https://www.nytimes.com/2022/02/07/business/frontier-spirit-airlines-merger.html?searchResultPosition=1>.

¹¹ Specifically, an efficiencies defense provides that reductions in production costs or gains in innovation from a merger will ultimately benefit consumers in the form of lower prices or higher quality goods and services. Isaac Weingram, *The Status and Availability of the Efficiencies Defense in Antitrust Law*, N.Y. UNIV. L. MOOT CT. BD. PROC. (Apr. 10, 2016), <https://proceedings.nyumootcourt.org/2016/04/the-status-and-availability-of-the-efficiencies-defense-in-antitrust-law/>.

¹² *Id.*

¹³ Frontier is incorporated in Delaware which is within the Third Circuit’s jurisdiction.

¹⁴ *FTC. v. Penn State Hershey Medical Center*, 838 F.3d 327, 348 (3rd Cir. 2016).

¹⁵ *Supra* note 1.

restrain competition. In short, to prevail against an antitrust claim, Frontier will need to shift its argument away from the efficiencies defense to instead stress the other factors that demonstrate competition will not be restrained by the proposed merger.