IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

JETBLUE AIRWAYS CORPORATION & SUBSIDIARIES,

Plaintiff,

v. Case No. 2024 CA 1177

STATE OF FLORIDA, DEPARTMENT OF REVENUE,

Defendant.
_____/

DEPARTMENT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

Defendant, Florida Department of Revenue, files this Response in Opposition to Plaintiff's Motion for Judgment on the Pleadings and states:

BACKGROUND AND PROCEDURAL POSTURE

Plaintiff, JetBlue Airways Corporation and Subsidiaries, (JetBlue), filed the Complaint in this case on July 19, 2024. The Department timely filed a Motion to Dismiss on August 27, 2024. Before that Motion could be heard by this Court, JetBlue filed a Motion for Summary Judgment as to Counts 4 and 5 of the Complaint on September 26, 2024. On October 16, 2024, JetBlue filed its Response to the Department's Motion to Dismiss. The parties agreed to November 5, 2024, at 9:00 a.m. for a one-hour hearing on the Department's Motion to Dismiss. However, JetBlue insisted that its Motion for Summary Judgment be heard during that same one-hour hearing, even though the Motion to Dismiss was pending, and the Department had not yet filed an Answer to the

Complaint. Therefore, this Court set a case management conference for October 21, 2024, so that JetBlue could present its argument as to why its Motion for Summary Judgment should be heard at the same hearing as the Department's Motion to Dismiss. This Court held that the Motion for Summary Judgment was premature, but permitted JetBlue to file a Motion for Judgment on the Pleadings, which the Court would also hear during the November 5, 2024 hearing. This filing is the Department's response to that Motion for Judgment on the Pleadings.

Additionally, since the Complaint was filed, on August 28, 2024, the Department served JetBlue with a Request for Admissions, a Request to Produce, and Interrogatories, to which JetBlue timely responded on October 4, 2024.[1] However, JetBlue's responses include many objections that the Department considers improper. Therefore, after a conference with Counsel for JetBlue, the Department filed a Motion to Compel discovery on October 18, 2024. That Motion has been set for hearing on December 2, 2024. Additionally, the Department anticipates serving a second set of discovery requests on JetBlue in the very near future.

Because the pleadings are not yet closed, and for the other reasons explained below, JetBlue's Motion for Judgment on the Pleadings is premature and must be denied.[2]

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[1] JetBlue has also served discovery on the Department, to which the Department has responded.

[2] While the Department cannot properly respond to the substance of JetBlue's Motion for Judgment on the Pleadings, having not had a chance to submit its Answer, the Department notes that the Motion misstates and misapplies the law on apportionment to the state's airline income apportionment methodology.

ARGUMENT

I. THE MOTION FOR JUDGMENT ON THE PLEADINGS MUST BE DENIED BECAUSE IT IS PREMATURE.

Rule 1.140(c) of the Florida Rules of Civil Procedure provides that any party may move for a judgment on the pleadings *after the pleadings are closed.* In this case, the Department has filed a Motion to Dismiss. Because that Motion to Dismiss is still pending, the Department has not filed an answer to the Complaint. In *Navarra v. Central National Insurance Company of Omaha*, 213 So. 2d 612, 613 (Fla. 1st DCA 1968), the First District reversed the entry of a judgment on the pleadings where the Defendant had not filed an answer and where the court had not yet ruled upon the Defendant's motion to dismiss. The court stated: "Under these conditions we think that the court prematurely and without authority entered the final judgment on the pleadings appealed from herein." *Id.*

The reason Rule 1.140(c) requires that the pleadings be closed before a motion for judgment on the pleadings can be heard is to:

> allow a trial court to determine whether the [complaint] *and the answer* frame any factual issues and, therefore, require a plenary evidentiary hearing. In considering a motion for judgment on the pleadings, a trial court is to take as true *all material allegations of the opposing party's pleading.* As a result, entry of judgment on the pleadings prior to the filing of an answer, i.e., before the existence of factual issues can be ascertained, *is error as a matter of law.*

Shuler v. Darby, 786 So. 2d 627, 629 (Fla. 1st DCA 2001) (emphasis added). Here, the pleadings are not closed, and so the Department has not yet had the

opportunity to make *any* material allegations that could be dispositive of this case, including regarding the merits of JetBlue's Complaint, as well as standing and other potential affirmative defenses. Therefore, the Motion for Judgment on the Pleadings, like the Motion for Summary Judgment, is premature, and must be denied.

Additionally, the Court cannot convert the Motion for Judgment on the Pleadings to a Motion for Summary Judgment at this time. The Court has already determined that a motion for summary judgment is premature because the parties are still conducting discovery that is relevant to JetBlue's constitutional arguments and to JetBlue's standing. For example, if JetBlue is not harmed by the alleged constitutional infirmities of the challenged apportionment statute, such as the alleged potential of being taxed on more than 100% of its income, then JetBlue could not request this Court to address such a constitutional question. If this were not the case, then any person could bring a constitutional challenge against any statute whether the statute applied to that person or not. In adopting the new summary judgment rule, the Supreme Court stated, "[i]t is equally important to emphasize that, before being subjected to summary judgment because of the absence of evidence, the nonmovant must have been afforded 'adequate time for discovery.'" *In re Amendments 1.1510 II*, 317 So. 3d 72, 77 (Fla. 2021) (quoting *Celotex*, 477 U.S. 322, 106 S. Ct. 2548). "Where the information contained in outstanding discovery could create genuine issues of material fact, summary judgment would not be proper." *Patient Depot, LLC v. Acadia Enterprises, Inc.*, 360 So. 3d 399, 410 (Fla. 4th DCA 2023) (quoting

Babani v. Broward Auto, Inc., 348 So. 3d 608, 609 (Fla. 4th DCA 2022). In this case, the Plaintiff has refused to produce certain documents that are relevant to standing and its Commerce Clause arguments. Because discovery is still ongoing, the Department may have other affirmative defenses available to it that is has not yet had an opportunity to raise that would preclude entry of any summary judgment in favor of JetBlue.

Other information sought in discovery could rebut JetBlue's claims that the challenged methodology is unfair, that the State of Florida provides no benefit to JetBlue's flights outside of the geographic boundaries of Florida and other arguments. The Department is entitled an opportunity to examine the facts prior to any summary judgment motion being entertained by this Court.

II. EVEN IF THE COURT WERE TO CONSIDER THE MERITS OF THE MOTION FOR JUDGMENT ON THE PLEADINGS, THE MOTION SHOULD BE DENIED.

A. The same reasons that warrant dismissal of the Complaint preclude entry of a judgment on the pleadings. The Court should deny JetBlue's argument that the statute violates the internal consistency requirement of the Commerce Clause.

JetBlue argues that section 220.15(2)(c) of the Florida Statutes violates the internal consistency requirement of the Commerce Clause because the statute risks double taxation of JetBlue's revenues. However, there are no allegations in the Complaint to sustain standing to raise this argument. Additionally, the non-taxability of flyover miles all but guarantees that JetBlue will never be taxed on more than 100% of its income by all states.

B. The Court should deny JetBlue's argument that the statute violated the external consistency requirement of the Commerce Clause.

Regarding the external consistency requirement of the Commerce Clause, JetBlue again raises the specter of double taxation. However, again, JetBlue has failed to allege facts sufficient to show that it has standing to raise this argument. Additionally, JetBlue's contradictory allegations in the Complaint regarding flyover miles, as explained above, mean that JetBlue's Motion must be denied.

C. Many of the cases cited by JetBlue are not applicable to this case.

Plaintiff cites to *FedEx Ground Packaging Systems, Inc. v. Pennsylvania*, 922 A.2d 978 (Penn. Commw. 2007), stating that the facts substantially mirror those in this case. However, the *FedEx* ruling addressed the *plain meaning* of the *apportionment statute* in Pennsylvania. No constitutional challenge was made to the statute. Additionally, the apportionment methodology at issue in FedEx was also different from Florida's, as Pennsylvania's statute factored in average receipts, which Florida does not include.

Similarly, Plaintiff cites to *ASARCO, Inc. v. Idaho State Tax Commission*, 458 U.S. 307, 315 (1982), stating, "It is a fundamental constitutional precept that a state is not permitted to tax value earned outside [the taxing state's] borders. However, ASARCO did not address the validity of an apportionment formula, but rather confirmed that apportionment is not appropriate for *non-business income*. However, non-business income is not at issue in this case. Regarding the apportionment of *unitary business income*, the Court recognized that "[G]eographic accounting, in purporting to isolate income received in various

States, 'may fail to account for contributions to income resulting from functional integration, centralization of management, and economies of scale.' [...] The **fact that "these factors of profitability arise from the operation of the business as a whole,"** therefore could **justify a State's otherwise impermissible inclusion of corporate income derived from corporate activities beyond the State's borders."** *Id.* at 316 (citations omitted, emphasis added.) Additionally, the Court held, "[The] linchpin of apportionability in the field of state income taxation is the unitary-business principle[...] In the absence of any proof of *discrete business enterprise,* [state] was entitled to conclude that the dividend income's **foreign source did not destroy the requisite nexus** with in-state activities." *Id.* (emphasis added).

The Plaintiff also cites to *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), regarding double taxation. However, the issue in *Armco* was whether a tax was discriminatory against multistate businesses as opposed to businesses solely within the state, not an issue of double taxation. Moreover, the case is not even about apportionment, rather it is about a facially discriminatory tax statute.

Plaintiff also cites to *Comptroller of the Treasury of Maryland v. Wynne*, 575 U.S. 542 (2015) and *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232 (1987), as cases where the state apportionment formula failed the internal consistency test. However, both of these cases were actually challenges to facially discriminatory statutes that taxed in-state businesses more advantageously than out-of-state businesses. Neither case was testing the apportionment formula of the state.

Moreover, JetBlue attempts to avoid standing issues by arguing that it is not challenging Florida's apportionment formula, but only one component of that formula. However, the cases JetBlue cites do not make this distinction, and, in fact, the argument is a distinction without a difference.

Because many of the cases cited by JetBlue do not stand for the propositions claimed by JetBlue, and because there is no difference between a challenge to an apportionment formula and a challenge to a portion of an apportionment formula, the Court should deny JetBlue's Motion for Judgment on the Pleadings.

CONCLUSION

This case is not ripe for a Motion for Judgment on the Pleadings. First, the pleadings are not closed because the Department has not filed an answer. Second, the Department should be allowed time to complete discovery, especially as to the standing issue. Third, JetBlue may lack standing to raise at least some of the constitutional challenges it is raising in its Motion. Thus, this Honorable Court should deny JetBlue's Motion for Judgment on the Pleadings.

Respectfully submitted this 4th day of November, 2024,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of November 2024, a true and correct copy of the foregoing was filed via the Florida E-Portal, which I understand will automatically serve a copy of the foregoing on all counsel of record.

/s/ Lisa Kuhlman
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