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DEPARTMENT OF JUSTICE
Antitrust Division

United States of America v. BBA Aviation plc, et al.;

Public Comment and Response on Proposed Final Judgment

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)-(h), the United States hereby publishes below the comment received on the proposed Final Judgment in United States of America v. BBA Aviation plc, et al., Civil Action No. 1:16-cv-00174, together with the Response of the United States to Public Comment.

Copies of the comment and the United States' Response are available for inspection on the Antitrust Division's website at http://www.justice.gov/atr, and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Patricia A. Brink
Director of Civil Enforcement

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff,* v. BBA AVIATION PLC, LANDMARK U.S. CORP LLC, and LM U.S. MEMBER LLC, *Defendants*.	Case#: 1:16-cv-00174 Judge: Amy Berman Jackson

RESPONSE OF PLAINTIFF UNITED STATES TO
PUBLIC COMMENT ON THE PROPOSED FINAL JUDGMENT

Pursuant to Sections 2(b)-(h) of the Antitrust Procedures and Penalties Act, 15 U.S.C. §16(b)-(h)("APPA" or "Tunney Act"), Plaintiff, the United States of America ("United States") hereby files the single public comment received concerning the proposed Final Judgment in this case and the United States's response to the comment. After careful consideration of the submitted comment, the United States continues to believe that the proposed Final Judgment ("PFJ") provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint. The United States will move the Court for entry of the proposed Final Judgment after the public comment and this Response have been published in the *Federal Register* pursuant to 15 U.S.C. § 16(d).

I. BACKGROUND

On February 3, 2016, the United States filed a civil antitrust Complaint alleging that the proposed acquisition by Defendant BBA Aviation plc ("Signature") of Defendants Landmark U.S. Corp LLC and LM U.S. Member LLC ("Landmark"), announced on September 23, 2015, would be likely to substantially lessen competition in the provision of full-service fixed-based operator ("FBO") services at six airports in the United States, in violation of Section 7 of the Clayton Act, 15 U.S.C. §18. The Complaint further alleged that, as a result of the acquisition as originally proposed, prices for these services in the United States would likely have increased and customers would have received services of lower quality.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order ("Hold Separate Order"); a Proposed Final Judgment ("PFJ"); and a Competitive Impact Statement ("CIS") that explains how the PFJ is designed to remedy the likely anticompetitive effects of the proposed acquisition. As required by the Tunney Act, the United States published the PFJ and CIS in the *Federal Register* on February 10, 2016. In addition, the United States ensured that a summary of the terms of the PFJ and CIS, together with directions for the submission of the written comments, were published in *The Washington Post* on seven different days during the period of February 6, 2016 to February 12, 2016. *See* 15 U.S.C. §16)(c). The 60-day waiting period for public comments ended on April 12, 2016. Following expiration of that period, the United States received one comment, which is described below and attached hereto as Exhibit 1.

II. STANDARD OF JUDICIAL REVIEW

The Tunney Act requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day public comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. §16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. §16(e)(1). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see also United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 10-11 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v. InBev N.V./S.A.*, No. 08-cv-1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (discussing nature of review of consent judgment under the Tunney Act; inquiry is limited to "whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable").

Under the APPA, a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the Complaint, whether the decree is sufficiently clear, whether the enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)). Instead, courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement in "*within the reaches of the public interest.*" More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).

In determining whether a proposed settlement is in the public interest, "the court 'must accord deference to the government's predictions about the efficacy of its remedies.'" *United States v. U.S. Airways Grp., Inc.*, 38 F. Supp. 3d 69, 76 (D.D.C. 2014) (quoting *SBC Commc'ns*, 489 F. Supp. at 17). *See also Microsoft*, 56 F.3d at 1461 (noting that the government is entitled to deference as to its "predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' "prediction as to the effect of the proposed remedies, its perception of the market structure, and its views of the nature of the case"); *United States v.*

Morgan Stanley, 881 F. Supp. 2d 563, 567-68 (S.D.N.Y. 2012) (explaining that the government is entitled to deference in choice of remedies).

Courts "may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns,* 489 F. Supp. 2d at 17. Rather, the ultimate question is whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.'" *Microsoft,* 56 F.3d at 1461. Accordingly, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns,* 489 F. Supp. 2d at 17; *see also United States v. Apple, Inc.* 889 F. Supp. 2d 623, 631 (S.D.N.Y. 2012). And, a "proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is within the reaches of the public interest." *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations and internal quotations omitted); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy).

In its 2004 amendments to the Tunney Act,[1] Congress made clear its intent to preserve the practical benefits of using consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). The procedure for the public interest determination is left to the discretion of the court, with the

[1] The 2004 amendments substituted "shall" for "may" in directing relevant factors for courts to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of the Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11; *see also United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) ("[T]he Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to public comments alone."); *US Airways*, 38 F. Supp. 3d at 76 (same).

III. SUMMARY OF PUBLIC COMMENT AND THE UNITED STATES'S RESPONSE

The United States received one public comment from the City of Dallas ("Dallas"). Though the comment was submitted after the deadline for comments had passed, the United States has nevertheless issued a full response. Dallas submitted the comment to express concern about the possible anticompetitive effects of Signature's acquisition of Landmark at Love Field Airport ("Love Field"), which Dallas operates. Combined, Signature and Landmark have 54 percent of the FBO market and lease nearly 70 percent of the FBO facilities at Love Field. Dallas submitted the comment to provide additional information about the situation at Love Field and highlight what Dallas believes to be competitive concerns the PFJ does not address. In particular, Dallas is concerned that the PFJ would not require Signature to report future FBO acquisitions at Love Field to the United States. Dallas does not, however, argue in favor of a divesture of FBO assets at Love Field.

The United States appreciates Dallas's advocacy efforts on behalf of competition at Love Field. The United States carefully considered the effects of the acquisition at Love Field and chose not to take enforcement action against such acquisition. Over the course of a five-month investigation, the United States reviewed party and third-party documents, conducted economic data analysis, and talked with dozens of industry participants including the Aviation Director for

the City of Dallas. As a result of this investigation, the United States did not allege a violation of the Clayton Act resulting from the acquisition of Love Field in its Complaint. Therefore, the comment submitted by Dallas is not a comment addressing the question before the Court, which is whether the proposed remedy will cure the antitrust violations alleged in the Complaint. Should any future acquisitions by Signature at Love Field raise a possibility of competitive harm, Dallas or any other affected party may raise those concerns with the United States to be evaluated at such future date.

IV. CONCLUSION

After reviewing the public comment, the United States continues to believe that the PFJ, as drafted, provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint, and is therefore in the public interest. The United States will move this Court to enter the PFJ soon after the comment and this response are published in the *Federal Register*.

Dated: May 27, 2016

Respectfully submitted,

/s Patricia L. Sindel

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KAPLAN KIRSCH ROCKWELL

April 20, 2016

James J. Tierney, Chief
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Re: BBA Aviation, PLC and Landmark U.S. Corp LLC
Case No. 1:16-cv-00174

Dear Mr. Tierney:

As counsel to the City of Dallas ("City"), Kaplan Kirsch & Rockwell LLP ("Firm") submits these comments in the matter of *United States v. BBA Aviation, et al.*, case no. 1:16-cv-00174, concerning the merger of BBA Aviation (parent corporation to Signature Flight Support Corporation ("Signature")), and Landmark U.S. Corp LLC ("Landmark"). The Firm and the City recognize that the deadline for comments on this matter has passed, but respectfully request that the Department of Justice accept these comments despite their tardiness.[1]

The City owns and operates Dallas Love Field Airport ("Love Field"). The City is concerned about the possible anticompetitive effects of the merger between Landmark and Signature at Love Field, where both Landmark and Signature currently operate.

Presently, there are six (6) fixed base operator ("FBO") locations at Love Field, operated by five different FBO entities. Landmark operates one (1) of the FBO locations, and Signature operates two (2) of the locations.[2] In 2015, Signature's two (2) locations combined sold 40 percent of the total aviation fuel[3] at Love Field (by FBOs), and Landmark's single location sold 14 percent of the total aviation fuel. This, after the proposed merger, would result in 54 percent of the fuel at Love Field being provided by the "new" Signature.

The remaining three (3) FBOs sold 46 percent of the fuel, with two smaller locations selling approximately 9 percent each, and one larger entity selling 28 percent. In addition to conducting a majority of the fuel sales, Landmark and Signature together lease nearly 70 percent of the total hangar, general aviation terminal facilities, and office space at Love Field. A chart with a

[1] *See* 81 Fed. Reg. 7144 (Feb. 10, 2016) (setting 60-day comment period).
[2] Signature operates both Signature Flight Support (also known as Signature North) and Dalfort Fueling.
[3] 100LL and Jet-A.

breakdown of the data used to calculate these percentages is enclosed with this letter as Attachment A.

Under the Department of Justice and Federal Trade Commission's *Horizontal Merger Guidelines*, markets with an initial score over 2500 on the Herfindahl-Hirschman Index ("HHI") are considered "highly concentrated."[4] When a prospective merger in a highly concentrated market would result in an HHI increase of 200 or more, the transaction "will be presumed to be likely to enhance market power."[5] Such increases in HHI are considered indicators of transactions "for which it is particularly important to examine whether other competitive factors confirm, reinforce, or counteract the potentially harmful effects of increased concentration."[6]

At Love Field, the fuel flowage data suggests that the existing market is already highly concentrated, and that a merger of Signature and Landmark would increase the HHI by well over 200 points.[7] Despite this potential effect, there are no indications that the Department of Justice examined any of the competitive effects of the merger at Love Field. In fact, it appears that the Department of Justice failed to consider the impact on Love Field whatsoever, or, alternatively, failed to adequately explain why it chose to ignore those impacts.

These facts and the Department's own guidelines demonstrate the need to carefully scrutinize the merger's potential effects at Love Field. Yet, the materials published by the Department of Justice in the *Federal Register* and filed with the United States District Court for the District of Columbia make no reference to operations at Love Field.

The proposed consent decree requires Signature and Landmark to divest their assets from six airports where both currently operate, but there is not even an acknowledgement that both firms operate FBOs at Love Field.[8] While the City does not necessarily advocate for a divestiture of Signature or Landmark's assets at Love Field, the lack of discussion or findings on the issue is troubling, especially when such an absence is inconsistent with the Department's own guidance on this issue.

The proposed consent decree not only imposes no constraints on Signature-Landmark operations at Love Field, but would effectively allow Signature-Landmark to acquire another FBO at Love Field. The proposal allows such an acquisition at "an airport where [the merged entity] is already providing FBO Services in the United States *unless* (1) the assumption or acquisition is valued at less than $20 million dollars, or (2) at least two Full-Service FBOs not involved in the

[4] Horizontal Merger Guidelines § 5.3.
[5] *Id.*
[6] *Id.*
[7] The City recognizes that HHI is typically calculated using revenue data, but such information is proprietary and unavailable to the City.
[8] The City also notes that there is no discussion of San Antonio International Airport or Teterboro Airport, the two other U.S. airports where both Signature and Landmark presently operate.

transaction provide FBO Services at the airport where the assumption or acquisition will take place."[9] This provision will be insufficient to protect the competitive environment at Love Field[10] because BBA could acquire the remaining FBOs without Department of Justice scrutiny or permission. The new Signature-Landmark entity could acquire the next-largest FBO at Love Field because of the exception allowing such acquisition when there are two other FBOs at the airport, and could then acquire the other entities if they are valued below $20 million.[11] By failing to address this potential issue now, the Department of Justice leaves open the possibility that BBA could later acquire an exclusive right at Love Field.

The City urges the Department of Justice to include more specific protections for Love Field and other airports that are not proposed for divestiture, but where the market power of the merged entity could pose a serious threat of further market concentration. Specifically, the City suggests including provisions that would serve to prevent the future purchase of FBOs at any airport where Signature and Landmark both operated prior to the merger, regardless of the value of the transaction or presence of additional FBOs. As explained above, the current provision in the proposed consent decree is too narrow to adequately protect Love Field. A broader provision would better protect Love Field and other airports from potential anticompetitive environments.

Thank you for your time and consideration in this matter. If you have any questions about any of the comments in this letter, please do not hesitate to contact me.

Sincerely,

/s/

Peter J. Kirsch by Nicholas M. Clabbers

On behalf of:
City of Dallas
Department of Aviation
8008 Herb Kelleher Way, LB16
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[9] 81 Fed. Reg. at 7155 (emphasis added).
[10] The City is also concerned that even greater concentration of FBO business at Love Field may result in violations of the Federal Aviation Administration Grant Assurances, which specifically prohibit the granting of "exclusive rights" to aeronautical service providers. *See* FAA Order 5.190.6B, ¶8.1. The City has an affirmative obligation to ensure that an exclusive right is not created at Love Field.
[11] The City presently has no information about the value of any of the other FBOs at Love Field, but all are small entities that operate only at Love Field.

ATTACHMENT A

FBO Fuel Sales at Dallas Love Field (2015 totals)			
FBO	**100 LL (gals)**	**Jet A (gals)**	**Total**
Signature Flight Support	9,992	4,126,136	4,136,128
Signature Dalfort	8,335	3,935,851	3,944,186
Landmark Aviation	37,380	2,881,685	2,919,065
Total Signature + Landmark	55,707	10,943,672	10,999,379
All Other FBOs	101,600	9,238,107	9,339,707
S+L Market Share Post-Merger[1]	35.4%	54.2%	54%

FBO Facility Leaseholds at Dallas Love Field (as of 2015)			
FBO	**Hangars (sqft)**	**Terminal and Offices (sqft)**	**Total**
Signature Flight Support	220,500	97,688	318,188
Signature Dalfort	400,703	14,212	414,915
Landmark Aviation	106,890	79,848	186,738
Total Signature + Landmark	728,093	191,748	919,841
All Other FBOs[2]	N/A	N/A	432,108
S+L Percentages Post-Merger	Unknown	Unknown	68%

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[1] The calculations of approximate market share are based solely on the fuel quantities sold, as the City does not have access to proprietary revenue data.

[2] The data available for the other FBOs does not delineate between hangar and office space.