UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

LM U.S. CORP ACQUISITION INC.,

and

ROSS AVIATION, LLC,

Defendants.

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

Defendant LM U.S. Corp Acquisition Inc. (with affiliated companies doing business as Landmark Aviation, "Landmark") and Defendant Ross Aviation, LLC ("Ross") (collectively, "Defendants") entered into an Agreement, dated April 19, 2014, pursuant to which Landmark will acquire the fixed base operators ("FBO") of Ross Aviation for approximately $330 million. The United States filed a civil antitrust Complaint on July 30, 2014, seeking to enjoin the

proposed acquisition. The Complaint alleges that the likely effect of this acquisition would be to combine the only providers of FBO services at Scottsdale Municipal Airport ("SDL"), thereby creating a monopoly in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. This loss of competition likely would result in both (1) higher prices for fuel and other FBO services and (2) a reduction in the quality of FBO services offered at SDL.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order ("Hold Separate") and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, Defendants are required to sell Ross's FBO assets at SDL, which currently operate as a wholly owned subsidiary: Ross Scottsdale LLC (the "Divestiture Assets"). Under the terms of the Hold Separate Stipulation and Order, Defendant Landmark will take certain steps to ensure that the Divestiture Assets are operated as a competitively independent, economically viable and ongoing business concern that will remain independent and uninfluenced by the consummation of the acquisition, and that competition is maintained during the pendency of the ordered divestiture.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II.

DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. *The Defendants and the Proposed Transaction*

LM U.S. Corp Acquisition Inc. is a Delaware corporation with its principal place of business in Houston, Texas. LM U.S. Corp Acquisition Inc. is a subsidiary of CP V Landmark II, L.P. CP V Landmark II, L.P. and CP V Landmark, L.P., which are both limited partnerships within the Carlyle Group, control all the companies doing business as Landmark Aviation. CP V Landmark II, L.P., CP V Landmark, L.P., and Carlyle Partners V, L.P. (collectively, "Landmark") are all limited partnerships within the Carlyle Group with the same or similar investors. Landmark owns and operates more than 40 FBO facilities in the United States, including its FBO operation at SDL, which it operates as Landmark Aviation–SDL.

Ross Aviation, LLC ("Ross") is a Delaware limited liability company with its principal place of business in Denver, Colorado. Ross is a subsidiary of Genossenschaft Constanter, a Swiss company. Ross owns and operates 19 FBO facilities in the United States, including its FBO operation at SDL, which it operates as Scottsdale AirCenter.

The proposed transaction, as initially agreed to by Defendants on April 19, 2014, would result in Landmark's acquisition of Ross's United States FBO locations for $330 million. SDL is the only airport at which Landmark and Ross currently compete in the provision of FBO services. Defendants are the only two full-service FBOs operating at SDL, and successful entry into the provision of FBO services at SDL by a new competitor would not be timely, likely, or sufficient to deter the anticompetitive effects resulting from this transaction. This acquisition is

the subject of the Complaint and proposed Final Judgment filed by the United States on July 30, 2014.

B. *The Competitive Effects of the Transaction on the FBO Services Market*

1. The Relevant Market

The Complaint alleges that the proposed transaction would eliminate competition in the provision of FBO services at SDL in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. FBOs are facilities located at airports that provide fuel and related support services to general aviation customers. General aviation customers include charter, private, and corporate aircraft operators, as distinguished from scheduled commercial passenger and cargo airline operators and military flying.

Fuel sales are the largest source of revenues for FBOs. FBOs often do not charge separately for services such as conference rooms, pilot lounges, newspapers, or baggage handling. Instead, they recover the cost of these services through fuel revenues. FBOs also derive income from hangar and office rentals, aircraft storage, tie-down and ground services, and deicing.

General aviation customers cannot obtain fuel, hangar, ramp, and related services at SDL except through an FBO authorized to sell such services by the local airport authority. Consequently general aviation customers departing from or landing at SDL have no option other than to use Landmark and Ross FBOs for these services. Obtaining FBO services at other airports in the Scottsdale region would not provide an economically practical alternative for these general aviation customers because many general aviation customers select SDL over other airports in the area for its proximity to Scottsdale. General aviation customers at SDL would not

switch to other airports in the Scottsdale region in sufficient numbers to prevent anticompetitive price increases for fuel and other FBO services at SDL.

2. The Proposed Merger Would Produce Anticompetitive Effects

Landmark and Ross are the only two providers for FBO services at SDL. Competition between them currently limits the ability of each to raise prices for FBO services. This head-to-head competition also forces each company to offer better service to general aviation customers at SDL. The proposed acquisition would eliminate the competitive constraint each provider imposes upon the other and lead to a monopoly at SDL. This would result in higher prices for fuel and other FBO services and a lower quality of services in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

Successful entry into the provision of FBO services at SDL by a new competitor would not be timely, likely, or sufficient to deter the anticompetitive effects resulting from this transaction. Entry sufficient to replace the market impact of Ross would be unlikely for several reasons. Landmark and Ross both hold long-term leases from SDL for their FBO Facilities. Additionally, the new FBO provider would need to get the approval of the airport authority, obtain permits, and construct facilities prior to beginning its operations at SDL. This process would require extensive lead time to complete and there is no guarantee that the new provider would be able to obtain the necessary approvals and permits. Thus, timely and successful entry at SDL by a new provider of FBO services would be unlikely to occur in response to a small but significant and non-transitory post-merger price increase.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

A. *Divestiture of Ross's FBO at SDL*

The divestiture requirement of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in the market for FBO services provided to general aviation customers at SDL by establishing a new, independent, and economically viable competitor. The proposed Final Judgment requires the Defendants to divest, as a viable ongoing business, the Divestiture Assets. The Divestiture Assets must be divested to Signature Flight Support Corporation ("Signature") or to another acquirer in such a way as to satisfy the United States in its sole discretion that the operations can and will be operated by the purchaser as a viable, ongoing business that can compete effectively in the relevant market. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly. In order to provide greater certainty and efficiency in the divestiture process, the United States has approved Defendants' proposed Acquirer, Signature Flight Support Corporation ("Signature"). If Defendants do not sell the assets to Signature, they shall cooperate with prospective purchasers to accomplish the divestiture expeditiously.

In antitrust cases involving acquisitions in which the United States requests a divestiture remedy, the United States seeks to require completion of the divestiture within the shortest period of time reasonable under the circumstances. Section IV(A) of the proposed Final Judgment requires the Defendants to complete the divestiture within ten (10) days after the Court signs the Hold Separate Stipulation and Order. The proposed Final Judgment also provides that this time period may be extended one or more times by the United States in its sole discretion for

a period not to exceed ninety (90) calendar days, and shall notify the Court in such circumstances. A prompt divestiture has the benefits of restoring competition lost as a result of the acquisition and reducing the possibility that the value of the assets will be diminished. Section V(B) of the Hold Separate Stipulation and Order specifies that the divestiture assets will be maintained as a viable business and that Landmark employees will not gain access to customer or supplier lists specific to the divestiture assets prior to divestiture.

Section IV(B) of the proposed Final Judgment requires the Defendants to furnish information to prospective acquirers in an attempt to sell the divestiture assets. In this instance, the United States has already approved Signature as an appropriate acquirer for the divestiture assets. If Defendants sell the divestiture assets to Signature, no additional time will be needed for the United States to approve the acquirer, and Defendants will not need to furnish information to prospective acquirers.

In the event that Defendants do not accomplish the divestiture within the periods prescribed in the proposed Final Judgment, Section V of the proposed Final Judgment provides that the Court will appoint a Divestiture Trustee selected by the United States to effect the sale of the Divestiture Assets. If a Divestiture Trustee is appointed, the proposed Final Judgment provides that Defendants will pay all costs and expenses of the Divestiture Trustee. The Divestiture Trustee's commission will be structured so as to incentivize the Divestiture Trustee to complete the divestiture as quickly as possible while trying to obtain the highest possible price for the Divestiture Assets. After his or her appointment becomes effective, the Divestiture Trustee will file monthly reports with the Court and the United States which set forth his or her efforts to accomplish the divestiture. At the end of six (6) months, if the divestiture has not been

accomplished, the Divestiture Trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate, in order to carry out the purpose of the trust, including extending the trust or the term of the Divestiture Trustee's appointment.

The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in the provision of FBO services at SDL.

B. ***Notification***

Section XI of the proposed Final Judgment requires Landmark to provide advance notification of certain future acquisitions from entities providing FBO services that would not otherwise be reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976. The notification provision of the proposed Final Judgment is intended to inform the Division of transactions that raise competitive concerns similar to those remedied here, and if necessary, to seek to enjoin any transaction pursuant to Section 7 of the Clayton Act, 15 U.S.C. § 18.

The proposed Final Judgment provides that Landmark shall not directly or indirectly acquire any leases from, assets of, or interests in any entity providing FBO services at an airport in the United States where Landmark is providing FBO services, without prior notification to the United States. Notification is not required if the value of the assets, interests, or leases is $20 million or less, or if there is another full service FBO facility at the airport that is not involved in the transaction. The proposed Final Judgment requires that notification shall be provided within five (5) business days of entering into a definitive assumption or acquisition agreement and at least thirty (30) calendar days prior to acquiring any such interest. If Landmark formally requests approval for a lease transfer from an airport authority in writing prior to entering into an agreement, Landmark shall report this request to the Antitrust Division within two (2) days;

however, the thirty (30) day waiting period shall not begin until the Antitrust Division receives the Notification and Report Form.

IV.

REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

V.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this

Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the Federal Register.

Written comments should be submitted to:

William H. Stallings
Chief, Transportation, Energy, and Agriculture Section
Antitrust Division
United States Department of Justice
450 5th St. NW
Suite 8000
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Landmark's acquisition of Ross's FBO assets at SDL. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the provision of FBO services at SDL. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the

United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII.

STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day 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)(A) & (B). 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 generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009–2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS

84787, at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable.").[1]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether 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) (quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460–62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. 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 is "*within the reaches of the public interest.*" More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

[1] The 2004 amendments substituted "shall" for "may" in directing relevant factors for court 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).

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's 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 proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[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 public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *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). To meet this standard, the United States "need only provide a

[2] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing 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'").

factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged."). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459–60. As this Court recently confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing 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 language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly

settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. John Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[3]

VIII.

DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: July 30, 2014

Respectfully submitted,

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[3] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, No. 73-CV-681-W-1, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980, at *22 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93-298, at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").