UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff,* v. SIGNATURE FLIGHT SUPPORT CORPORATION, *Defendant.*	CASE NUMBER 1:97CV00248 JUDGE: Royce C. Lamberth DECK TYPE: Antitrust DATE STAMP: 02/05/97

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 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

On February 5, 1997, the United States filed a Complaint alleging that the proposed acquisition of International Aviation Palm Beach, Inc. (hereinafter "International Aviation") by Signature Flight Support Corporation, (hereinafter "Signature") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint alleges that Signature and International Aviation are two of three providers of fixed base operator ("FBO") services for general aviation customers at

Palm Beach International airport ("PBI") located in West Palm Beach, Florida, and that this transaction will combine them. Signature and International Aviation compete head-to-head on price and quality of services to general aviation customers. This acquisition would eliminate this competition, reducing the number of competitors from three to two, creating an FBO duopoly at PBI. As a result, the effect of the merger would be to give Signature the market power to raise prices and lower the quality of services to PBI general aviation customers. The merger would also make coordinated behavior by Signature and Jet Aviation (the other remaining FBO) easier, resulting in higher prices. Thus, the proposed acquisition is likely to lessen competition substantially in the market for FBO services at PBI in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. The prayer for relief in the Complaint seeks (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act; and (2) a preliminary and permanent injunction preventing Signature and International Aviation from consummating the proposed acquisition.

At the same time the Complaint was filed, the United States also filed a proposed settlement that would permit Signature to complete its acquisition of International Aviation, but requires a divestiture that would preserve competition for general aviation customers at PBI. This settlement consists of a Stipulation and Order, and a proposed Final Judgment.

The proposed Final Judgment orders Signature to sell certain FBO assets (hereinafter "The Assets to be Divested") to a purchaser who has the capability to compete effectively in the provision of FBO services to general aviation customers at PBI. The Assets to be Divested include Signature's terminal building, four hangars, a fuel farm, and adjacent ramp and parking space. Signature must complete the divestiture of these FBO assets before the later of one hundred and eighty (180) calendar days after the consummation of the proposed acquisition of International Aviation or five (5) days after entry of the Final Judgment, in accordance with the procedures specified in the proposed Final Judgment. If Signature should fail to accomplish the divestiture, a trustee appointed by the Court would be empowered to divest these assets.

The Stipulation and Order and the proposed Final Judgment also impose a hold separate agreement that requires defendant to ensure that, until the divestiture mandated by the Final Judgment has been accomplished, The Assets to be Divested will be held separate and apart from, and operated independently of, Signature's other FBO assets and businesses.

The United States and Signature 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.

EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Parties and the Proposed Transaction

On March 22, 1996, Signature, International Aviation, International Aviation Teterboro Inc. and IAS Holdings, Inc. (the parent of International Aviation and International Aviation Teterboro, Inc.) entered into an agreement under which Signature would seek to acquire the assets of the three companies for approximately $18 million.

Signature is a wholly owned subsidiary of BBA Group PLC, a British holding company. Signature is a Delaware corporation with its principal place of business in Orlando, Florida. Signature operates a nationwide network of 34 FBOs throughout the United States, including one at PBI. Signature's total revenues for fiscal year 1995 were $233 million.

International Aviation operates an FBO at PBI airport in West Palm Beach, Florida. International Aviation is a subsidiary of IAS Holdings, Inc., which, in conjunction with its subsidiary International Aviation Teterboro, Inc., also operates FBO facilities at Westchester County (NY) airport, and Teterboro (NJ) airport.

B. The FBO Services Market

FBOs are facilities located at commercial airports that provide flight support services, including aircraft fueling, ramp and hangar rentals, office space rentals, and other services to general aviation customers. General aviation customers include charter, private and corporate aircraft operators, as distinguished from scheduled commercial airlines. Last year, general aviation customers purchased around $1 billion of jet fuel from FBOs nationwide.

FBO services include sales of jet aviation ("Jet A") fuel and aviation gasoline ("avgas"), and ramp, hangar and office space rental. FBOs do not charge separately for many services offered to general aviation customers, such as use of customer and pilot lounges, baggage handling, and flight planning support; rather, they recover the costs for these services in the price that they charge for fuel. There are some services for which FBOs do charge separately, such as hangar rental, office space rental, ramp parking fees, catering, cleaning the aircraft, arranging ground transportation and maintenance on the aircraft. General aviation customers generally buy fuel from the same FBO from which they obtain other services.

The largest source of revenue for an FBO is its fuel revenues. FBOs sell Jet A fuel for jet aircraft, turboprops and helicopters, and avgas for smaller, piston driven planes. In 1995, Jet A fuel sales at PBI were approximately $15 million; avgas sales were less than $1 million. Revenues for hangar rentals and parking fees at PBI in 1995 were approximately $1 million.

The Complaint alleges that the provision of FBO services to general aviation customers at PBI is a relevant market (i.e., a line of commerce and a section of the country) under Section 7 of the Clayton Act. General aviation customers cannot obtain fuel, hangar, ramp and other services offered at PBI, except through an FBO authorized to sell such products and services by the local airport authority. Thus, general aviation customers have no alternatives to FBOs for these products and services when they land at PBI.

FBOs at other airports would not provide economically practical alternatives for general aviation customers who currently use PBI. Although there are a number of smaller airports in the region, they are not economically viable substitutes for PBI general aviation customers. General aviation customers use PBI because of its location, convenience and facilities. General aviation customers have chosen PBI because of its proximity to their ultimate destination (whether their residence, business or other place); using a different airport would significantly increase their driving time. PBI has facilities that other airports lack: longer runways, precision instrument landing capability, a 24-hour landing tower, and a U.S. Customs facility. Because of these and other factors, there are not enough general aviation customers who have selected PBI as their airport who would switch to other airports to prevent anticompetitive price increases for fuel and other services at PBI resulting from this acquisition.

In addition, post-acquisition price increases at PBI for fuel would not be prevented by efforts of general aviation customers to decrease fuel purchases at PBI by increasing fuel purchases at airports outside the region. Carrying more fuel than is necessary to reach the next destination is referred to in the industry as "tankering." Most pilots tanker to some extent in response to fuel prices; that is, they buy more fuel at their origin if it is significantly cheaper so they can buy less at their destination (or vice versa). Tankering, however, would prevent a post-merger fuel price increase only if it would increase significantly after the merger, resulting in significant lost fuel sales at PBI. For a number reasons, PBI general aviation customers are not likely to change their current tankering practices enough to prevent a post-merger fuel price increase at PBI. First, tankering is not possible on all flights, particularly on those that are near the aircraft's maximum range. Second, some pilots are unwilling to carry around excess fuel due to safety concerns. Third, tankering itself is costly: fuel is heavy and the extra weight requires that more fuel be burned, and there is additional wear and tear on the engine and landing gear. These added costs mean that only large fuel price differences can induce tankering.

Available data confirmed that tankering is unlikely to prevent a post-merger fuel price increase at PBI. Using information on average prices and quantities of jet fuel sold at PBI, we estimated the elasticity of demand for Jet A fuel at PBI. The demand for Jet A fuel at PBI is inelastic. The elasticity was estimated to be about .7, which indicates that tankering, and all other forms of substitution, would not lead to a fuel sales decrease at PBI sufficient to deter a price increase.

C. Competition Between Signature and International Aviation

Signature and International Aviation are direct competitors in the provision of FBO services to general aviation customers at PBI. All three FBOs at PBI compete over price and service packages.

General aviation customers have benefited from competition between Signature and International Aviation at PBI, receiving lower prices and improved

FBO services. The elimination of this competition would reduce competition significantly in the market for FBO services to general aviation customers at PBI. Because Signature and International Aviation's facilities are close competitive alternatives for a substantial number of general aviation customers at PBI, competition between these FBOs limits the ability of each FBO to raise prices. This merger would eliminate the price constraining impact each has on the other.

In addition, as a result of Signature's acquisition of International Aviation, a duopoly would be created at PBI, making it easier for the two remaining firms to coordinate with one another and raise prices and lower the quality of FBO services to general aviation customers at PBI.

New entry is not likely to check Signature's ability to raise prices or reduce service as a result of the acquisition. The airport has set aside land for an additional FBO. Although that site is currently in use as the airport's antennae farm, the antennae farm could, at a cost, be relocated. There are additional sunk costs of entering, including costs associated with construction of ramp, terminal, hangar and fueling facilities. In this case, all of this necessary preparation could be completed within a reasonable period of time; that is, there are no insurmountable obstacles to timely entry. That new entry *could* occur within a reasonable period of time, however, is a necessary but not sufficient condition for new entry to prevent the anticompetitive effects of the merger.

The ultimate issue is whether a firm *would* enter the market on a scale sufficient to cause prices to fall to pre-merger levels. The answer depends not only on whether entry on that scale is *possible*, but whether it would be *profitable* in the post-acquisition environment. Here, after taking into account the sunk costs required for entry on the airport, the likely margins an entrant would earn over time at pre-merger prices, and the discount or "hurdle" rates typically used in the FBO industry to make similar investment decisions, it appears that entry at PBI would be profitable only if the entrant could build a significantly smaller facility but still achieve a market share similar to that of the three current competitors, all without significantly underpricing its PBI rivals. Because an entrant is not likely to be able to lure customers away from incumbents without offering significant discounts or providing a better facility, post-merger entry is unlikely to occur at PBI.

D. Anticompetitive Consequences of the Acquisition

The Complaint alleges that the combination of Signature and International Aviation would substantially increase concentration in the market for the provision of FBO services at PBI, using the Herfindahl-Hirschman Index ("HHI")[1] as a

[1] The Herfindahl-Hirschman Index, or "HHI," is a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of thirty, thirty, twenty, and twenty percent, the HHI is 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). The HHI takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. Markets in which the HHI is between 1000 and 1800 are considered to be moderately concentrated, and those in which the HHI is in excess of 1800 points are considered to be concentrated.

measure of market concentration. The post-merger HHI, based on Jet A gallons sold in 1995 at PBI, would be approximately 5450 with a change in HHI of about 2000 points. For that year, International Aviation sold approximately 40% of the throughput at PBI, and Signature accounted for approximately 25% of sales. If the proposed acquisition were consummated, the combined company would account for 65% of the jet fuel sales at PBI.

The Complaint further alleges that the acquisition of International Aviation by Signature would substantially lessen competition. The transaction would have the following effects, among others:

1. actual competition between Signature and International Aviation in the market for FBO services at PBI will be eliminated;

2. competition generally in the market for FBO services at PBI is likely to be substantially lessened;

3. prices for fuel sold to general aviation customers at PBI are likely to increase.

Several sources of data were examined in this case to determine the likely effect of reducing the number of FBOs at PBI from three to two. Using estimates of the PBI Jet A fuel demand elasticity and other information, a standard economic model of competition among sellers of differentiated products predicted an overall average increase in the price of Jet A fuel at PBI on the order of four percent in the event that the merger were allowed to occur without a divestiture. Also, an analysis of margins earned by Signature at its many different airports suggested that reducing the number of competitors from three to two tends to increase average price by about five percent.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The United States brought this action because the effect of the acquisition of International Aviation by Signature may be substantially to lessen competition, in violation of Section 7 of the Clayton Act, in the market for FBO services to general aviation customers at PBI. The risk to competition posed by this acquisition, however, would be eliminated if certain assets and leases currently held by Signature to operate its PBI FBO business were sold and assigned to a purchaser that could operate them as an active, independent and financially viable competitor. To this end, the provisions of the proposed Final Judgment are designed to accomplish the sale and assignment of certain assets and leaseholds to such a purchaser and thereby prevent the anticompetitive effects of the proposed acquisition.

Section IV of the proposed Final Judgment requires defendant Signature, within one hundred and eighty (180) calendar days after acquiring International Aviation, to divest the bulk of its FBO business, as set out in Section II.C (hereinafter "The Assets to be Divested") of the proposed Final Judgment. Unless the United States otherwise consents in writing, Signature is required to divest its interests in its terminal building, four hangars, its fuel farm, and ramp and parking space adjacent to these facilities. In addition, Signature shall divest such equipment and supplies as is necessary and appropriate to operate a viable FBO at PBI. Finally, Signature shall transfer its contracts, including customer contracts, and customer lists, for providing FBO services at PBI.

Divestiture of the assets and leaseholds will cure the potential anticompetitive consequences of Signature's acquisition of International Aviation. The Assets to be Divested include all the ramp, hangar, terminal, parking, and fuel farm assets that have been used by Signature in providing FBO services at PBI. Together with the equipment, supplies and customer contracts and lists, these assets will give a qualified purchaser the means to establish itself as a competitive alternative to Signature and Jet Aviation. Thus, as a result of the divestiture required by the proposed Final Judgment, general aviation consumers at PBI will continue to have a choice among three competitive FBOs.

Under the proposed Final Judgment, Signature must take all reasonable steps necessary to accomplish quickly the divestiture of The Assets to be Divested, and shall cooperate with *bona fide* prospective purchasers by supplying all information relevant to the proposed sale. Should Signature fail to complete its divestiture within one hundred and eighty (180) calendar days, the Court will appoint, pursuant to Section V, a trustee to accomplish the divestiture. The United States will have the discretion to delay the appointment of the trustee for up to an additional three months should it appear that the assets can be sold in the extended time period.

Following the trustee's appointment, only the trustee will have the right to sell the divestiture assets, and defendant Signature will be required to pay for all of the trustee's sale-related expenses. The trustee's compensation will be structured so as to provide an incentive for the trustee to obtain the highest price for the assets to be divested, and to accomplish the divestiture as quickly as possible.

Section VI of the proposed Final Judgment would assure the United States an opportunity to review any proposed sale, whether by Signature or by the trustee, before it occurs. Under this provision, the United States is entitled to receive complete information regarding any proposed sale or any prospective purchaser prior to consummation. Upon objection by the United States to a sale of the divestiture assets by the defendant Signature, a proposed divestiture may not be completed. Should the United States object to a sale of the divested assets by the trustee, that sale shall not be consummated unless approved by the Court.

Pursuant to Section V.E, should the trustee not accomplish the divestiture within six months of appointment, the trustee and the parties will make recommendation to the Court, which shall enter such orders as it deems appropriate to carry out the purpose of the trust, which may include extending the trust of the term of the trustee's appointment.

Under Section IX of the proposed Final Judgment, defendant Signature must take certain steps to ensure that, until the required divestiture has been completed, the divestiture assets will be maintained as a separate, ongoing, viable business and kept distinct from Signature's other FBO operations. Until such divestiture, Signature must also continue to maintain and operate the divestiture assets as a viable, independent competitor at PBI, using all reasonable efforts to maintain and increase sales of FBO services to general aviation customers. Signature must maintain the business, so that it continues to be stable, including maintaining all records, loans, and personnel necessary for its operation.

Section X requires the defendant to make available, upon request, the business records and the personnel of its business. This provision allows the United States to inspect its facilities and ensure that the defendant is complying with the requirements of the proposed Final Judgment. Section XII of the proposed Final Judgment provides that it will expire on the tenth anniversary of its entry by the Court.

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 attorney's 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 the defendant.

V.

PROCEDURE FOR COMMENTING ON THE PROPOSED FINAL JUDGMENT

The United States and defendant 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. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

Roger W. Fones, Chief
Transportation, Energy &
Agriculture Section
Antitrust Division
325 Seventh Street, N.W., Suite 500
Washington, D.C. 20530

VI.

<u>ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT</u>

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits of its Complaint against Signature. The United States is satisfied, however, that the divestiture of the assets and other relief contained in the proposed Final Judgment will preserve viable competition in the provision of FBO services to general aviation customers at PBI that otherwise would be affected adversely by the acquisition. Thus, the compliance with the proposed Final Judgment and the completion of the sale required by the Judgment would achieve the relief the government would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the government's Complaint.

VII.

<u>STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT</u>

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60) day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination, the court <u>may</u> consider --

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

> (2) the impact of entry of such judgment 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). As the United States Court of Appeals for the D.C. Circuit has held, this statute permits a court to consider, 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 United States v. Microsoft, 56 F.3d 1448, 1461-62 (D.C. Cir. 1995).

In conducting this inquiry, "the 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."[2] Rather,

> 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.

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[2] 119 Cong. Rec. 24598 (1973). See United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. Rep. 93-1463, 93rd Cong. 2d Sess. 8-9, reprinted in (1974) U.S. Code Cong. & Ad. News 6535, 6538.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, 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.), cert. denied, 454 U.S. 1083 (1981); see also Microsoft, 56 F.3d at 1460-62. Precedent requires that

> the 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.[3]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree

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[3] United States v. Bechtel, 648 F.2d at 666 (citations omitted)(emphasis added); see United States v. BNS, Inc., 858 F.2d at 463; United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); United States v. Gillette Co., 406 F. Supp. at 716; see also Microsoft, 56 F.3d at 1461 (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.'") (citations omitted).

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.' (citations omitted)."[4]

VIII.

DETERMINATIVE MATERIALS AND DOCUMENTS

There are no materials or documents that the United States considered to be determinative in formulating this proposed Final Judgment. Accordingly, none are being filed with this Competitive Impact Statement.

Dated: February 5, 1997

Respectfully submitted,

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[4] United States v. American Tel. and Tel. Co., 552 F. Supp. 131, 150 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983), quoting United States v. Gillette Co., supra, 406 F. Supp. at 716; United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).