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 No: 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"), files the single public comment received concerning the Proposed Final Judgment in this case and the United States's response to the comment. After consideration of the submitted comment, the United States continues to believe that the Proposed Final Judgment 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 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, likely would 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 likely would 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, a Proposed Final Judgment, and a Competitive Impact Statement that explains how the Proposed Final Judgment is designed to remedy the likely anticompetitive effects of the proposed acquisition. As required by the Tunney Act, the United States published the Proposed Final Judgment and Competitive Impact Statement in the *Federal Register* on February 10, 2016. *See* 81 Fed. Reg. 7144 (Feb. 10, 2016). In addition, the United States ensured that a summary of the terms of the Proposed Final Judgment and Competitive Impact Statement, together with directions for the submission of 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, dated April 20, 2016, 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
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> (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 RESPONSE OF THE UNITED STATES

After the Tunney Act deadline for comments had passed, the United States received one public comment from the City of Dallas ("Dallas"). Although Dallas submitted the comment late, the United States nevertheless responds herein. In its comment, Dallas expressed concern about the possible anticompetitive effects of Signature's acquisition of Landmark at Love Field Airport (DAL or "Love Field"), which Dallas owns and operates. Combined, Signature and Landmark have 54 percent of the FBO market (14 percent by Landmark and 40 percent by Signature) and lease nearly 70 percent of the FBO facilities at Love Field. In addition to Signature and Landmark, Love Field has three other providers of FBO services. Signature's acquisition of Landmark reduces the number of competitors at Love Field from five to four. Dallas submitted the comment to provide additional information about the situation at Love Field and highlight what Dallas believes to be competitive concerns that the proposed settlement does not address. In particular, Dallas is concerned that the Proposed Final Judgment would not provide any constraints on Signature-Landmark operations at Love Field and would not require Signature to report future FBO acquisitions at Love Field to the United States. Dallas advocates for the United States to include more specific protections for Love Field and other airports that are not included in the Complaint.

The United States appreciates Dallas's advocacy efforts on behalf of competition at Love Field. Over the course of its five-month investigation, the United States carefully considered the effects of the acquisition at Love Field and chose not to take enforcement action based on its conclusion that the merger did not result in a substantial lessening of competition in the market for FBO services at Love Field. As a result of its investigation, the United States alleged only that Signature's proposed acquisition of Landmark was likely to lessen competition substantially in the market for full-service FBO services at IAD (Virginia), SDL (Arizona), FAT (California), TRM (California), HPN (New York), and ANC (Alaska) in violation of Section 7 of the Clayton Act. At these airports, the acquisition reduces the number of FBOs from three to two or two to one. At Love Field, however, three robust competitors would remain post-merger. One of the remaining FBO competitors, Business Jet Center, currently has 28 percent of the FBO market at Love Field—double Landmark's market share. Additionally, the nearly 70 percent post-acquisition share of FBO leases at Love Field is mostly attributable to leases Signature already holds. Landmark's FBO at Dallas is on a sublease, and Landmark has a small shared ramp space and no hangar space. Accordingly, the United States did not allege that the acquisition would violate the Clayton Act in the FBO market at Love Field.

As noted above, pursuant to the Tunney Act, the Court is limited to deciding whether the decree is in the public interest by considering the relationship between the remedy secured and the specific allegations set forth in the Complaint. *See Microsoft*, 56 F.3d at 1459-60 (courts reviewing Tunney Act settlement decrees are limited to considering issues "formulated in the complaint" and are "only authorized to review the decree itself," but where a "claim is not made, a remedy directed to that claim is hardly appropriate.") The United States did not allege in its

Complaint that the merger would result in harm at Love Field. Dallas's comment, therefore, does not address the Tunney Act question before the Court—which is whether the proposed remedy will cure the alleged violations—but instead seeks a remedy for a violation that the United States in its discretion elected not to include in its Complaint. Review of the prosecutorial discretion of the United States is far outside the purview of the Tunney Act, which authorizes courts to only review the decree itself. *See Microsoft,* 56 F.3d at 1459 (agreeing with the government that in a Tunney Act proceeding, a district court may not "reach beyond the complaint to evaluate claims that the government did *not* make and to inquire as to why they were not made.") Because the decree provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint, the Proposed Final Judgment is in the public interest.

IV. CONCLUSION

After reviewing the public comment, the United States continues to believe that the Proposed Final Judgment, 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 Final Judgment 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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