

ZUCKERT SCOUTT & RASENBERGER, L.L.P.

ATTORNEYS AT LAW

888 Seventeenth Street, NW, Washington, DC 20006-3309
Telephone [202] 298-8660 Fax [202] 342-0683

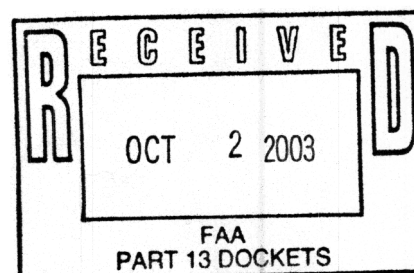
FRANK J. COSTELLO

DIRECT DIAL (202) 973-7907
fjcostello@zsrllaw.com

October 2, 2003

BY PERSONAL DELIVERY AND FACSIMILE

Office of the Chief Counsel
Attention: FAA Part 16 Airport Proceedings Docket
AGC-610
Federal Aviation Administration
800 Independence Ave. S.W.
Washington, D.C. 20591



**Re: Part 16 Complaint; *National Business Aviation Association, Inc.,
Bombardier Aerospace Corp. and Dassault Falcon Jet Corp. v. City of
Santa Monica, California***

Dear Sir or Madam:

Pursuant to 14 C.F.R. Part 16.23, the National Business Aviation Association, Inc. ("NBAA"), Bombardier Aerospace Corp. ("BAC") and Dassault Falcon Jet Corp. ("DFJ") (together, "Complainants") file this complaint against the City of Santa Monica, California, as the owner, operator and sponsor of Santa Monica Municipal Airport (SMO). The complaint centers on discriminatory landing fees at SMO that went into effect on August 1, 2003.¹ Those fees are intended to deny, and will have the effect of denying, access to SMO by larger business jet aircraft. All communications with respect to this complaint should be addressed to: Frank J. Costello, Zuckert, Scoutt & Rasenberger, L.L.P., 888 17th Street, N.W., Washington, D.C. 20006; (202) 298-8660; (202) 342-0683 (fax); fjcostello@zsrllaw.com.

Complainants

1. NBAA is a not-for-profit corporation incorporated under the laws of the District of Columbia and headquartered at 1200 Eighteenth Street, N.W., Washington, D.C. NBAA represents over 7,300 member companies which own and operate over 9,300 general aviation aircraft to facilitate the conduct of their businesses or which are otherwise involved with business

¹ While Complainants understand that the City may have "withheld billings" of the new landing fees for some period of time after the effective date of August 1, 2003, it appears that the City is now billing for the new fees.

Office of the Chief Counsel

October 2, 2003

Page 2

aviation. NBAA members comprise a substantial segment of the general aviation community. NBAA acts as a spokesperson for business aviation before government agencies and the U.S. Congress and, in selected cases of importance, such as this one, represents its members' interests by initiating or participating in court actions and/or proceedings before regulatory agencies such as the FAA.²

2. At least eleven NBAA members have SMO as their home base. A number of those members operate larger business jet aircraft that would be directly and substantially affected by the new landing fees. Additionally, NBAA members throughout the nation operate business jet aircraft to and from SMO and similarly would be directly and substantially affected by the new landing fees.

3. BAC, a member of NBAA, is a corporation incorporated under the laws of the state of Delaware, with headquarters in Canada. BAC's business is the management and operation of fractionally-owned aircraft. BAC's clients include the U.S. government, employees of Fortune 400 companies, and others. In its business, BAC operates into and out of SMO various aircraft that are subject to the new SMO landing fees, including the Challenger 604, Lear 31a, Lear 45 and Lear 60. For the 12-month period from September 2002 through August 2003, business jet aircraft operated by BAC averaged approximately 81 landings per month at SMO. As the operator of aircraft subject to the challenged landing fees, BAC is directly and substantially affected by those fees.

4. DFJ is a privately-held for-profit corporation organized under the laws of the state of Delaware, and is a member of NBAA. DFJ's primary business is the sale, completion, and

² The FAA rejected NBAA's initial complaint on the grounds that Part 16 does not recognize associational standing. Although NBAA has added individual complainants, it respectfully disagrees with the FAA on this important issue.

Associational standing, the doctrine that an organization may seek to redress its members' injuries even without a showing of injury to the organization itself, long has been regarded as a fundamental due process right. See, e.g., *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544 (1996).

Ironically, the origin of Part 16, at least in part, was in a proceeding in which NBAA was the principal complainant. In the *Investigation Into Massport's Landing Fees*, FAA Docket 13-88-2 (1988), NBAA took the lead in challenging a fee schedule at Boston's Logan Airport. That case, and subsequent disputes, highlighted the need for a formal procedural structure for such cases. Part 16 was the result. The Preamble to Part 16 indicates that associational standing would continue: "An association will have to meet the same 'directly and substantially affected' standing requirement individually, but will be able to file a part 16 complaint as a representative of its members who are 'directly and substantially affected' by an act or omission of respondent." 61 Fed. Reg. 53998 (1996). NBAA's initial complaint properly alleged that its members would be directly and substantially affected by the new fees.

Office of the Chief Counsel

October 2, 2003

Page 3

support of Falcon business jets manufactured by DFJ's parent company, Dassault Aviation, including the Falcon 50EX, Falcon 2000, Falcon 2000EX, Falcon 900C and Falcon 900EX. In the course of this business, DFJ performs demonstration flights for prospective buyers, including flights into and out of SMO that will be subject to the new landing fees. Over the past three years DFJ has averaged 5 operations per year into and out of SMO. As the operator of aircraft subject to the challenged landing fees, DFJ is directly and substantially affected by the new fees.

Subject of the Complaint

5. SMO is owned, operated and sponsored by the City of Santa Monica. The schedule of landing fees that is the subject of the Complaint is set forth in an ordinance adopted by the City Council on June 10, 2003.³ A copy of the Meeting Agenda for the June 10, 2003, City Council meeting at which the ordinance was adopted is attached as Exhibit NBAA-1. A copy of the June 20, 2003, notice of the new fee schedule from the Airport Manager to all tenants and aircraft operators is attached as Exhibit NBAA-2. The pertinent names and addresses for the responsible persons at the City of Santa Monica are: Susan E. McCarthy, City Manager, 1685 Main Street, Room 209, Santa Monica, CA 90401; Marsha Jones Moutrie, City Attorney, 1685 Main Street, Room 310, Santa Monica, CA 90401; Jeff Mathieu, Airport Director, Airport Administration Building, 3223 Donald Douglas Loop South, Santa Monica, CA 90405; and Robert Trimborn, Airport Manager, 3223 Donald Douglas Loop South, Santa Monica, CA 90405.

6. The new landing fees violate Grant Assurances 22 and 23 and the economic nondiscrimination and exclusive authority provisions of the 1984 Santa Monica Airport Agreement (1984 Agreement) to which the FAA is a party.⁴

Facts

7. SMO is a public-use reliever airport at which 447 aircraft are based and more than 217,600 operations are conducted each year, more than 70% of which are itinerant. SMO has

³ Unlike the Notice of Investigation pending in FAA Docket No. 16-02-08, the Santa Monica Airport Commission, an advisory body without direct operational responsibility, is not involved in this Complaint.

⁴ Additionally, the landing fees appear to violate the 1948 Instrument of Transfer by which the United States Government transferred its leasehold interest in Santa Monica Airport to the City of Santa Monica. That agreement includes a restriction running with the land requiring that the transferred land, buildings, equipment and structures "shall be used for public airport purposes for the use and benefit of the public, on reasonable terms and without unjust discrimination and without grant or exercise of any exclusive right for use of the airport" See Exhibit NBAA-4.

Office of the Chief Counsel

October 2, 2003

Page 4

received substantial federal funding, including \$9.7 million in federal airport development assistance between 1985 and 1994.

8. The City of Santa Monica has a long history of attempting to restrict jet aircraft operations at SMO. In the late 1970s, a series of such measures included a punitive landing fee schedule (\$5,000 for landing and \$10,000 for departure). A U.S. District Court struck it down:

I agree with the Plaintiffs that nothing is gained, nor is the validity of the exaction of these large sums of money saved, by the City's use of the word "fee." A fee for usage of the airport, to be a legitimate fee and not a sham, must bear a reasonable relationship to other fees charged for similar usage. If that reasonable relationship does not exist, the alleged fee is invalid.

The fees charged by Santa Monica for takeoff and landing and other uses of the airport by prop planes are far, far less. As I recall, for noncommercial use there is no fee at all; and for a commercial use it is a maximum of \$ 25.

Santa Monica Airport Ass'n v. Santa Monica, 481 F.Supp. 927, 945 (C.D. Cal. 1979), *aff'd*, 659 F.2d 100 (9th Cir. 1981).

9. In 1981, the City tried to close SMO. The ensuing litigation resulted in the 1984 Settlement Agreement which recognized the binding nature of the Grant Assurances and under which the City agreed to "operate and maintain the Airport as a viable functioning facility without derogation of its role as a general aviation reliever . . . until July 1, 2015." *Id.*, § 2.a.i. and § 8. The 1984 Agreement further recognized that SMO serves a "vital and critical role in its functions a general aviation reliever for the primary airports in the area . . . by diverting aircraft away from the air carrier airports and other heavily used airports located in the Greater Los Angeles Area." *Id.*, § 2.b.i.

10. Last year, the City tried again to restrict operations at SMO, this time with a proposal submitted by the Airport Commission to the City Council that, if adopted, would have barred any aircraft larger or faster than aircraft meeting than the FAA's Airport Reference Code B-II standard. The practical effect of the "Aircraft Conformance Program" would have been to ban at least 50% of the jet operations at SMO. On October 8, 2002, the FAA issued a Notice of Investigation in Docket No. 16-02-08. The Aircraft Conformance Program has not yet been implemented.

11. Prior to August 1, 2003, no landing fees were imposed on general aviation operations at SMO. On June 10, 2003, the City Council adopted an ordinance that imposes, effective August 1, 2003, landing fees on all operations at SMO based on a sliding scale of charges per one thousand pounds of gross landing weight. It is a decidedly non-uniform fee, with the fee per thousand pounds dramatically increasing as the maximum certificated gross landing weight

Office of the Chief Counsel

October 2, 2003

Page 5

(MLW) of the aircraft increases. As a practical matter, it results in landing fees of the following magnitude:

Citation 500/525 (10,000 MLW)	\$ 2.90
Beechjet 4000 (14,000 MLW)	\$ 34.02
G-II/III (59,000 MLW)	\$342.79

12. The purported justification for this patently discriminatory fee schedule — that this is necessary to apportion pavement maintenance costs — simply is not credible. Everyone at the airport, including both aeronautical and non-aeronautical businesses, benefits from the runway. Taxing the largest aircraft with a disproportionate share of the costs is an arbitrary and capricious cost allocation that is inconsistent with the FAA's Policy Regarding Airport Rates and Charges.⁵ This type of gross discrimination violates Grant Assurances 22 and 23 and the economic nondiscrimination and exclusive authority provisions of the 1984 Agreement.

13. The purpose and effect of the new fee schedule is to force larger jet aircraft to use airports other than SMO, with weight as the latest proxy for unfounded noise concerns.⁶ It is last year's "Aircraft Conformance Program" in new clothing. A landing fee in excess of \$340 for larger jets should be compared to no landing fees for general aviation aircraft at Los Angeles International and Burbank. If the new fees become effective, they will turn SMO into a non-reliever airport, i.e., operations will be diverted to other airports.

Pre-Complaint Resolution

4. NBAA first learned of the proposed fee schedule shortly before the City Council meeting. On June 9, 2003, NBAA sent a letter to the City protesting the proposed action. *See*

⁵ Section 3 of the Policy provides as follows:

The airport proprietor must apply a consistent methodology in establishing fees for comparable aeronautical users of the airport. When the airport proprietor uses a cost-based methodology, aeronautical fees imposed on any aeronautical user or group of aeronautical users may not exceed the costs allocated to that user or user group under a cost allocation methodology adopted by the airport proprietor that is consistent with this guidance, unless aeronautical users otherwise agree.

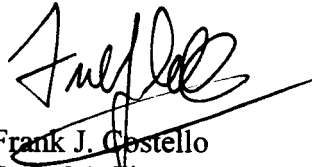
61 Fed. Reg. 31994 (1996).

⁶ In the recently issued Notice of Proposed Policy on Weight-Based Restrictions at Airports, the FAA stated that if "the limit on airport use appears motivated by interest in mitigating noise without going through processes that exist for such restrictions [i.e., Part 161], an attempt to limit aircraft by weight will be considered unreasonable." 68 Fed. Reg. 39176, 39177 (July 1, 2003).

Office of the Chief Counsel
October 2, 2003
Page 6

Exhibit NBAA-3. The ordinance was adopted the next day without reference to NBAA's objections (or the objections of other user groups). Pursuant to Part 16.21(b), the undersigned certifies that no other substantial and reasonable good faith efforts to resolve this matter could have been made and that there appears to be no reasonable prospect for timely resolution of the dispute. In its June 9, 2003 letter, NBAA asked the City Council to postpone its consideration of the fee schedule to permit interested parties the opportunity to review and comment on it. The City Council, instead, enacted the ordinance in spite of the concerns expressed by NBAA. To compel further informal resolution efforts would simply require Complainants to petition the same officials for relief that has already been rejected. Complainants respectfully suggest that the pre-complaint resolution requirement should not compel such a futile step. *Cf. Daedalus Enterprises, Inc. v. Baldrige*, 563 F. Supp. 1345, 1350 (D.D.C. 1983).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Frank J. Costello", written over a horizontal line.

Frank J. Costello
Scott M. Zimmerman
ZUCKERT, SCOUTT & RASENBERGER, L.L.P.
Counsel for Complainants

Office of the Chief Counsel
October 2, 2003
Page 7

Certificate of Service

I hereby certify that I have this day served the foregoing complaint on the following persons at the following addresses and facsimile numbers by first class mail, postage prepaid, and by facsimile transmission:

Susan E. McCarthy
City Manager
1685 Main Street
Room 209
Santa Monica, CA 90401

fax: (310) 917-6640

Marsha Jones Moutrie
City Attorney
1685 Main Street
Room 310
Santa Monica, CA 90401

fax: (310) 395-6727

Jeff Mathieu
Airport Director
Airport Administration Building
3223 Donald Douglas Loop South
Santa Monica, CA 90405.

fax: (310) 572-4495

Robert Trimborn
Airport Manager
3223 Donald Douglas Loop South
Santa Monica, CA 90405

fax: (310) 572-4495

ZUCKERT SCOUTT & RASENBERGER, L.L.P.

Office of the Chief Counsel

October 2, 2003

Page 8

Dated this 2nd day of October, 2003.

A handwritten signature in black ink, appearing to read "Frank J. Costello", is written over a light gray rectangular background.

Frank J. Costello
Counsel for Complainants