

relevant claims of the '668 patent are unpatentable.

On April 12, 2018, Cisco and Arista filed responses to each other's comments.

On April 16, 2017, Cisco filed a response to Arista's stay motion.

Having examined the record of this modification proceeding, including the MRD, the comments to the MRD, and the responses thereto, the Commission has determined to find that Cisco has failed to show by a preponderance of the evidence that Arista's redesigned products infringe claims 1, 7, 9, 10, and 15 of the '577 patent or that Arista has indirectly infringed those claim by contributing to or inducing infringement by its customers. Accordingly, the Commission has determined to modify the remedial orders to exempt Arista's redesigned products that were the subject of this modification proceeding. The modification proceeding is terminated with respect to the '577 patent.

The Commission has also determined to suspend the modification proceeding with respect to the '668 patent and to deny Arista's motion to stay the modification proceeding as to the '668 patent as moot in light of the Commission's prior suspension of the remedial orders with respect to the '668 patent.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: June 26, 2018.

**Lisa Barton,**

*Secretary to the Commission.*

[FR Doc. 2018-14130 Filed 6-29-18; 8:45 am]

**BILLING CODE 7020-02-P**

## DEPARTMENT OF JUSTICE

### Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140-0079]

#### Agency Information Collection Activities; Proposed eCollection eComments Requested; Extension Without Change of a Currently Approved Collection; Transactions Among Licensee/Permittees and Transactions Among Licensees and Holders of User Permits

**AGENCY:** Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice.

**ACTION:** 60-Day notice.

**SUMMARY:** The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will submit the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

**DATES:** Comments are encouraged and will be accepted for 60 days until August 31, 2018.

**FOR FURTHER INFORMATION CONTACT:** If you have additional comments, particularly with respect to the estimated public burden or associated response time, have suggestions, need a copy of the proposed information collection instrument with instructions, or desire any additional information, please contact Anita Scheddel, Program Analyst, Explosives Industry Programs Branch, either by mail 99 New York Ave. NE, Washington, DC 20226, or by email at [eipb-informationcollection@atf.gov](mailto:eipb-informationcollection@atf.gov), or by telephone at 202-648-7158.

**SUPPLEMENTARY INFORMATION:** Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

#### Overview of This Information Collection

1. *Type of Information Collection (check justification or form 83):* Extension, without change, of a currently approved collection.

2. *The Title of the Form/Collection:* Transactions Among Licensee/

Permittees and Transactions Among Licensees and Holders of User Permits.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:*

*Form number (if applicable):* None.

*Component:* Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:*

*Primary:* Business or other for-profit.

*Other (if applicable):* Individuals or households, and farms.

*Abstract:* This information collection requires specific transactions for licensee/permittees and holders of user permits. These requirements are outlined in 27 CFR part 555.103 in order to comply with the Safe Explosives Act.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* An estimated 50,000 respondents will respond once to this collection, and it will take each respondent approximately 30 minutes to complete each response.

6. *An estimate of the total public burden (in hours) associated with the collection:* The estimated annual public burden associated with this collection is 25,000 hours, which is equal to 50,000 (total respondents) \* 1 (# of response per respondent) \* .5 (30 minutes).

*If additional information is required contact:* Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405A, Washington, DC 20530.

Dated: June 27, 2018.

**Melody Braswell,**

*Department Clearance Officer for PRA, U.S. Department of Justice.*

[FR Doc. 2018-14167 Filed 6-29-18; 8:45 am]

**BILLING CODE 4410-FY-P**

## DEPARTMENT OF JUSTICE

### Antitrust Division

#### United States v. CRH plc, et al.: Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)-(h), that a proposed Final Judgment, Stipulation, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States of America v. CRH plc, et al.*, Civil Action No. 1:18-

cv-1473. On June 22, 2018, the United States filed a Complaint alleging that the proposed acquisition of the assets of Pounding Mill Quarry Corporation (“Pounding Mill”) by CRH plc and CRH Americas Materials, Inc. (collectively, “CRH”) would violate Section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment, filed at the same time as the Complaint, requires that CRH divest the Pounding Mill quarry located in Rocky Gap, Virginia and related assets.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement 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.

Public comment is invited within 60 days of the date of this notice. Such comments, including the name of the submitter, and responses thereto, will be posted on the Antitrust Division’s website, filed with the Court, and, under certain circumstances, published in the **Federal Register**. Comments should be directed to Maribeth Petrizzi, Chief, Defense, Industrials, and Aerospace Section, Antitrust Division, Department of Justice, 450 Fifth Street NW, Suite 8700, Washington, DC 20530 (telephone: (202) 307-0924).

**Patricia A. Brink,**

*Director of Civil Enforcement.*

**United States District Court for the District of Columbia**

*United States of America, United States Department of Justice, Antitrust Division, 450 Fifth Street NW, Suite 8700, Washington, D.C. 20530, Plaintiff, v. CRH PLC, Belgard Castle, Dublin, Ireland 22, CRH Americas Materials, Inc., 900 Ashwood Parkway, Suite 600, Atlanta, Georgia 30338, and Pounding Mill Quarry Corporation, 171 Saint Clair Crossing, Bluefield, Virginia 24605, Defendants.*

No. 18-cv-1473

Judge Dabney L. Friedrich

**COMPLAINT**

The United States of America (“United States”), acting under the direction of the Attorney General of the United States, brings this civil antitrust action against defendants CRH plc (“CRH”), CRH Americas Materials, Inc. (“CRH Americas”), and Pounding Mill Quarry Corporation (“Pounding Mill”) to enjoin CRH Americas’ proposed acquisition of Pounding Mill’s assets. If defendants are permitted to

consummate this acquisition, it would substantially lessen competition for the supply of aggregate and asphalt concrete in southern West Virginia. The United States alleges as follows:

**I. INTRODUCTION**

1. CRH Americas’ acquisition of Pounding Mill’s aggregate quarries would secure CRH Americas’ control over the supply of materials necessary to build and maintain roads and bridges in southern West Virginia. Aggregate and asphalt concrete are the primary materials used to build, pave, and repair roads. Aggregate is an essential input in asphalt concrete, which is used to pave roads, and is also needed for other parts of road construction, such as the base layer of rock that provides a foundation for paved roads. CRH Americas currently supplies both aggregate and asphalt concrete in southern West Virginia and already holds significant shares in each market.

2. The proposed acquisition would result in CRH Americas owning nearly all of the aggregate quarries that supply southern West Virginia. CRH Americas and Pounding Mill are the primary suppliers of aggregate for West Virginia Department of Transportation (“WVDOT”) projects in that area, together supplying well over 80 percent of the aggregate purchased directly by WVDOT or purchased by contractors for use in WVDOT projects. The proposed acquisition would eliminate the head-to-head competition between CRH Americas and Pounding Mill. As a result, prices for aggregate used for road construction would likely increase significantly if the acquisition is consummated.

3. CRH Americas’ acquisition of Pounding Mill’s quarries also would strengthen the virtual monopoly CRH Americas currently holds over the supply of asphalt concrete in southern West Virginia. In that market, CRH Americas competes with only one small new entrant, which has a small market share, but is poised to grow. That firm currently procures aggregate from Pounding Mill which, unlike CRH Americas, has no presence in the asphalt-concrete market. There are no alternative aggregate suppliers to which that asphalt-concrete competitor can economically turn. The merger would give CRH Americas the means and incentive to disadvantage or exclude its asphalt-concrete competitor by denying it access to aggregate, reliable delivery, and competitive prices. Without access to a reliable source of aggregate, any future asphalt-concrete suppliers would be barred from entering the southern West Virginia market.

4. The state of West Virginia spends hundreds of millions of dollars on new construction and road maintenance projects each year. With approximately 36,000 miles of state-maintained roads, West Virginia boasts the sixth largest state-maintained road system in the United States. Without competing suppliers for the necessary inputs for road construction and other infrastructure projects, the state of West Virginia and federal and state taxpayers would pay the price for CRH Americas’ control over these important markets. In light of these market conditions, CRH Americas’ acquisition of Pounding Mill’s quarries would cause significant anticompetitive effects in the markets for aggregate and asphalt concrete used for WVDOT road projects in southern West Virginia. Therefore, the proposed acquisition violates Section 7 of the Clayton Act, 15 U.S.C. § 18, and should be enjoined.

**II. DEFENDANTS AND THE PROPOSED TRANSACTION**

5. Defendant CRH, a corporation headquartered in Ireland, is a global supplier of building materials. In the United States, CRH, through its vast network of subsidiaries, is a leader in the supply of aggregate, asphalt concrete, and ready mix concrete, among numerous other things, conducting business in 44 states, and employing 18,500 people at close to 1,200 operating locations across the country. In 2015, CRH had global sales of approximately \$26 billion, with sales in the United States of approximately \$14 billion.

6. Defendant CRH Americas is incorporated in Delaware. CRH Americas’ principal place of business is in Atlanta, Georgia, and the headquarters of its Mid-Atlantic Division is in Dunbar, West Virginia. CRH Americas is a subsidiary (through its parent CRH Americas, Inc.) of CRH plc. CRH Americas is one of the largest suppliers of aggregate, asphalt concrete, ready mix concrete, and construction and paving services in the United States. CRH Americas has a large network of subsidiaries in the United States that operate in different localities. For example, West Virginia Paving, Inc. is a subsidiary of CRH Americas. West Virginia Paving, Inc. is a highway grading and paving contractor throughout West Virginia.

7. Defendant Pounding Mill is a Delaware corporation headquartered in Bluefield, Virginia. Pounding Mill owns and operates four quarries—three in Virginia and one in West Virginia—from which it supplies aggregate. In 2015,

Pounding Mill had sales of approximately \$44 million.

8. In June of 2014, CRH Americas and Pounding Mill signed a letter of intent pursuant to which CRH Americas agreed to purchase Pounding Mill. The primary assets to be acquired are Pounding Mill's four quarries, including the real property associated with those quarries, and the equipment used to operate the quarries. The parties entered into a purchase agreement in March 2018.

### III. JURISDICTION AND VENUE

9. The United States brings this action pursuant to Section 15 of the Clayton Act, 15 U.S.C. § 25, to prevent and restrain defendants from violating Section 7 of the Clayton Act, 15 U.S.C. § 18.

10. Defendants produce and sell aggregate, asphalt concrete, paving services, and other products in the flow of interstate commerce. Defendants' activity in the sale of aggregate and other products substantially affects interstate commerce. The Court has subject matter jurisdiction over this action pursuant to Section 15 of the Clayton Act, 15 U.S.C. § 25, and 28 U.S.C. §§ 1331, 1337(a), and 1345.

11. Defendants have consented to personal jurisdiction and venue in the District of Columbia. Venue, therefore, is proper under Section 12 of the Clayton Act, 15 U.S.C. § 22 and 28 U.S.C. § 1391(c).

### IV. RELEVANT MARKETS

#### A. Relevant Product Markets

##### 1. WVDOT Aggregate

12. Aggregate is particulate material that primarily includes crushed stone, sand, and gravel. It is produced at mines, quarries, and gravel pits and is used for a variety of construction projects. Aggregate generally can be categorized based on size into fine aggregate and coarse aggregate. Within the categories of fine and coarse aggregate, aggregate is further identified based on the size of the aggregate and the type of rock that it is. Aggregate can also differ based on hardness, durability, and polish value, among other characteristics.

13. The various sizes and types of aggregate are distinct and often used for different purposes. For example, the aggregate that is used as a road base may be different than the aggregate that is mixed into asphalt concrete.

14. Aggregate is an essential component of road construction projects, such as building or repairing roads. Aggregate is used in road projects as a base that is laid and compacted

under the asphalt concrete. Aggregate also is an essential ingredient in asphalt concrete, which is used for paving roads and other areas. There are no substitutes for aggregate in these types of road construction projects because no other material can be used for the same purpose.

15. To evaluate the proposed acquisition's effects on the market for aggregate, it is appropriate to include all sizes and kinds of aggregate because, with limited exceptions, each size and type of aggregate is offered under similar competitive conditions in the relevant geographic market. Thus, the grouping of the various sizes and types of aggregate makes evaluating competitive effects more efficient without undermining the reliability of the analysis. One exception to this aggregation is "friction- course" aggregate, which is a specialized variety used exclusively to create the anti-skid surface layer of roads. Pounding Mill does not have the ability to manufacture friction- coarse aggregate and the competitive conditions for that product are not similar to the remaining aggregate market.

16. Because different types, sizes, and qualities of aggregate are needed depending on the intended use, the end-use customer establishes the exact specifications that the aggregate must meet for each application. These specifications are designed by the project engineers to ensure the safety and longevity of road construction projects.

17. WVDOT purchases significant quantities of aggregate for its road construction projects, which include building, repairing, and maintaining roads and bridges in West Virginia. For these projects, aggregate is needed as an input into the asphalt concrete that is used to pave the roads. Aggregate is also necessary for other parts of the road or bridge, such as road base. WVDOT also purchases significant quantities of aggregate for its maintenance yards. These maintenance yards are used to store the aggregate purchased directly by WVDOT for use on the projects WVDOT completes itself, instead of through a contractor, such as fixing a pothole or repaving a small area of a road.

18. For each road project, WVDOT provides the precise specifications for the aggregate used for asphalt concrete and road base, among other things. For example, particular types of aggregate are used to strengthen the asphalt and ensure that the road remains stable. WVDOT specifications are designed to ensure that the roads and bridges are built safely and withstand heavy usage

over time. WVDOT tests the aggregate used in its projects to ensure that it meets specifications. The use of aggregate that does not meet WVDOT specifications could compromise the safety of roads or bridges, or cause the need for repairs sooner than would otherwise be required. Therefore, aggregate that does not meet WVDOT specifications cannot be used.

19. A small but significant increase in the price of aggregate that meets WVDOT specifications (hereinafter "WVDOT aggregate") would not cause WVDOT to substitute other types of materials in sufficient quantities, or to utilize aggregate that does not meet its specifications, with sufficient frequency so as to make such a price increase unprofitable. Accordingly, WVDOT aggregate is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

##### 2. WVDOT Asphalt Concrete

20. Asphalt concrete is a composite material that is used to surface roads, parking lots, and airport tarmacs, among other things. Asphalt concrete consists of aggregate combined with liquid asphalt and other materials. After it is mixed, the asphalt concrete is laid in several layers and compacted. Asphalt concrete has unique performance characteristics compared to other building materials, such as ready mix concrete. For example, asphalt concrete is the desired material used to build roadways because it has optimal surface durability and friction, resulting in low tire wear, high breaking efficiency, and low roadway noise. Other products generally cannot be used as economically to build and maintain roadways and therefore are not adequate substitutes. Ready mix concrete in particular is significantly more expensive for paving roadways than asphalt concrete and takes significantly longer to set, delaying the use of the road. Only in limited circumstances can ready mix concrete be used to build new roads. In addition, ready mix concrete cannot be used for repairing asphalt-concrete roads.

21. WVDOT purchases significant quantities of asphalt concrete for road construction and maintenance projects within the State of West Virginia. For each road project, WVDOT provides the precise specifications for the asphalt concrete. WVDOT specifications are designed to ensure that the roads are built safely and withstand heavy usage over time. WVDOT tests the asphalt concrete used in its projects to ensure that it meets WVDOT specifications. Using asphalt concrete that does not meet WVDOT specifications could

compromise the safety of the road or cause the need for repairs sooner than would otherwise be required. Therefore, asphalt concrete that does not meet WVDOT specifications cannot be used.

22. A small but significant increase in the price of asphalt concrete that meets WVDOT specifications (hereinafter "WVDOT asphalt concrete") would not cause WVDOT to substitute other materials in sufficient quantities, or to utilize asphalt concrete that does not meet its specifications, with sufficient frequency so as to make such a price increase unprofitable. Accordingly, WVDOT asphalt concrete is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

## B. Geographic Markets

### 1. WVDOT Aggregate

23. Aggregate is a relatively low-cost product that is bulky and heavy, with

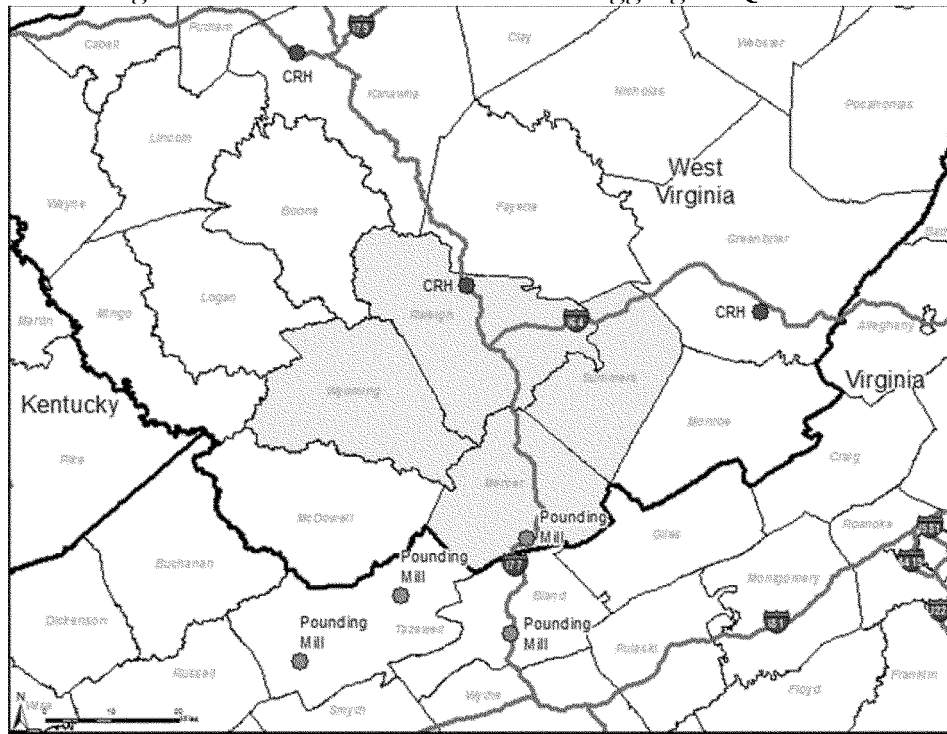
high transportation costs. The geographic area an aggregate supplier can profitably serve is primarily determined by: (1) the distance from the quarry to the job site where the aggregate is used; and (2) the relative distance between the supplier's competitor's quarry and the job site compared to its own. Suppliers know the importance of transportation costs to a customer's selection of an aggregate supplier and also know the locations of all their competitors. An aggregate supplier can often charge a lower/more competitive price than its competitor if its quarry is closer to the customer's location than its competitor's quarry.

24. CRH Americas owns and operates aggregate quarries located in Beckley and Lewisburg, West Virginia. Those quarries sell WVDOT aggregate to customers with plant locations or job sites in the following four counties in West Virginia: Wyoming, Raleigh,

Mercer, and Summers (these four counties are hereinafter referred to as "Southern West Virginia"). Customers with plant locations or job sites within Southern West Virginia may also economically procure WVDOT aggregate from Pounding Mill's quarries located in Princeton, West Virginia and Rocky Gap, Virginia, and from another smaller third-party quarry located in Lewisburg, West Virginia. For many customer locations in Southern West Virginia, quarries owned by CRH Americas and Pounding Mill are the two closest options and can quote different prices based on the location of a customer in relation to each supplier's quarries.

25. Figure 1 below shows the locations of CRH Americas' and Pounding Mill's aggregate quarries in and near Southern West Virginia.

**Figure 1: Locations of Defendants' Aggregate Quarries**



26. A small but significant post-acquisition increase in the price of WVDOT aggregate to customers with plants or job sites in Southern West Virginia would not cause those customers to substitute another product or procure aggregate from suppliers other than CRH Americas, Pounding Mill, and the third competitor in sufficient quantities so as to make such a price increase unprofitable. Accordingly, Southern West Virginia is

a relevant geographic market for WVDOT aggregate within the meaning of Section 7 of the Clayton Act.

### 2. WVDOT Asphalt Concrete

27. As with aggregate, the geographic area an asphalt-concrete plant can profitably serve is primarily determined by the location of its plant in relation to the job site and the relative location of competing suppliers. Asphalt-concrete

suppliers typically deliver asphalt concrete to a job site.

28. Distance from the plant to the job site is important for two reasons—temperature and transportation costs. First, asphalt concrete must be maintained at a certain temperature range before it is poured. If the temperature drops below that required by the asphalt-concrete specifications, it cannot be used. The temperature of asphalt concrete drops as it travels from

the plant and drops faster in colder weather than in warmer weather. As a result, the distance between an asphalt-concrete plant and the project site determines whether a plant can service a particular geographic area. Second, asphalt concrete is heavy and as a result transporting it is expensive. Therefore, the distance between the site where the asphalt concrete is poured and the asphalt-concrete plant drives the transportation costs and has a considerable impact on the area a supplier can profitably serve.

29. A further factor that determines the area a supplier can profitably serve is the location of its plant in relation to the location of competing plants. Suppliers know the importance of

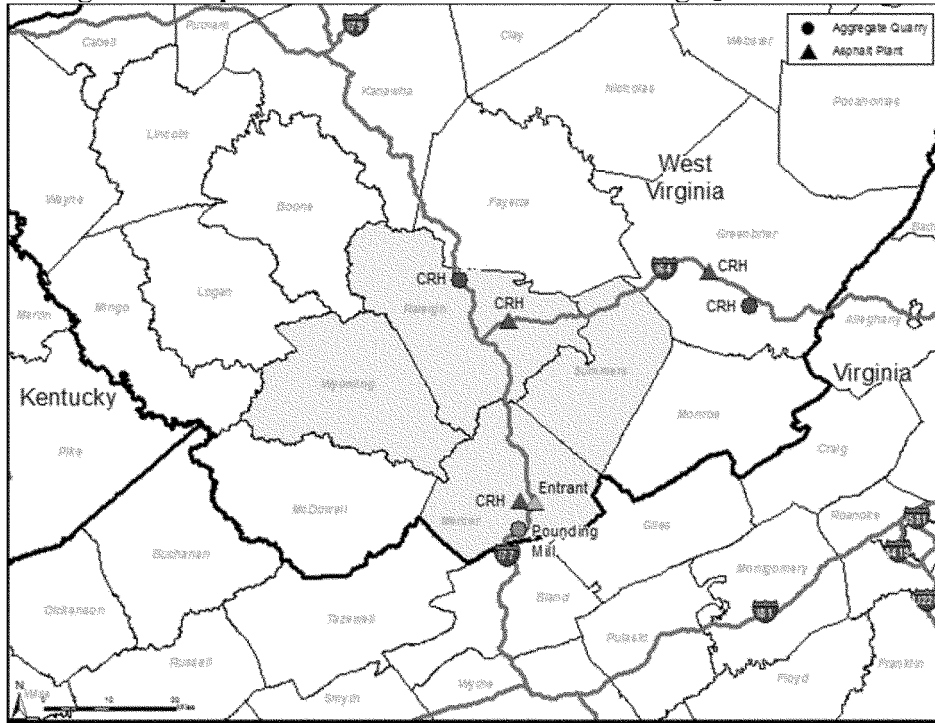
transportation costs to a customer's selection of a supplier and also generally know how far each competing supplier can deliver asphalt concrete. An asphalt-concrete supplier often can charge a lower/more competitive price than its competitor if its plant is closer to the customer's location than its competitor's plant.

30. CRH Americas has an advantage with respect to transportation costs because it owns several asphalt-concrete plants in Southern West Virginia. CRH Americas owns and operates three of the four asphalt-concrete plants that supply WVDOT asphalt concrete and serve customers in Southern West Virginia. Customers with job sites in Southern West Virginia may also economically

procure WVDOT asphalt concrete from CRH Americas' sole asphalt-concrete competitor, which operates one asphalt-concrete plant in Mercer County. Pounding Mill does not own any asphalt-concrete plants, though it is currently supplying CRH Americas' competitor in the production of asphalt concrete with the aggregate it needs to compete. Thus, the four asphalt-concrete plants that serve Southern West Virginia procure aggregate from CRH Americas and Pounding Mill.

31. Figure 2 below shows the locations of the four asphalt-concrete plants in Southern West Virginia and the location of the aggregate quarries that supply those plants.

**Figure 2: Asphalt-Concrete Plants and Serving Quarries**



32. A small but significant post-acquisition increase in the price of WVDOT asphalt concrete to customers with job sites in Southern West Virginia would not cause those customers to substitute another product or procure WVDOT asphalt concrete from suppliers other than CRH Americas or its rival in sufficient quantities so as to make such a price increase unprofitable. Accordingly, Southern West Virginia constitutes a relevant geographic market for WVDOT asphalt concrete within the meaning of Section 7 of the Clayton Act.

**V. ANTICOMPETITIVE EFFECTS OF CRH AMERICAS' ACQUISITION OF POUNDING MILL**

**A. Anticompetitive Effects in the Market for WVDOT Aggregate**

33. If CRH Americas acquired Pounding Mill, competition would be substantially lessened for the supply of WVDOT aggregate in Southern West Virginia. This market is already highly concentrated and would become significantly more concentrated as a result of CRH Americas' acquisition of Pounding Mill's quarries.

34. For all WVDOT aggregate supplied in Southern West Virginia, including aggregate supplied to WVDOT through

contractors for road projects and aggregate purchased directly by WVDOT for its maintenance yards, CRH Americas and Pounding Mill's combined market share is well over 80 percent. Moreover, the companies' combined share is even higher—over 90 percent—for the aggregate supplied by contractors for use in road projects.

35. Acquisitions that reduce the number of competitors in already concentrated markets are more likely to substantially lessen competition. Concentration can be measured in various ways, including by market shares and by the widely-used Herfindahl-Hirschman Index ("HHI").

Under the *Horizontal Merger Guidelines*, post-acquisition HHIs above 2,500 and changes in HHI above 200 trigger a presumption that a proposed acquisition is likely to enhance market power and substantially lessen competition in a defined market.

36. Premerger, the HHI for aggregate supplied for WVDOT road projects is approximately 4,350. The post-acquisition HHI is approximately 8,500, with an increase of over 4,000. For WVDOT aggregate purchased by WVDOT for its maintenance yards, the premerger HHI is approximately 3,800. Post-acquisition, the HHI is approximately 6,700, with an increase of nearly 3,000. Given the extraordinarily high pre- and post-acquisition concentration levels in the relevant markets described above, CRH Americas' proposed acquisition of Pounding Mill presumptively violates Section 7 of the Clayton Act.

37. CRH Americas and Pounding Mill compete vigorously in the market for WVDOT aggregate in Southern West Virginia. For many customers and job sites in that area, they are the first- and second-best sources of supply for aggregate in terms of price, quality, and reliability of delivery.

38. Only one other company, located in Lewisberg, West Virginia, is able to supply WVDOT aggregate in Southern West Virginia in any meaningful quantity. But while this competitor supplies WVDOT aggregate to maintenance yards, it has not bid on many road projects, leaving only CRH Americas and Pounding Mill to compete for many of those large projects.

39. While a few other small suppliers provide limited quantities of WVDOT aggregate for maintenance yards in Southern West Virginia, they are unable to provide the large quantity of aggregate needed on road projects and do not supply the types or quality of aggregate needed for the asphalt concrete and road base. For example, the quarries located to the south and west of Pounding Mill's quarries are too far from Southern West Virginia to effectively compete in the relevant market and, as a result, have a small share in that market and almost no influence on price.

40. The proposed acquisition would substantially increase the likelihood that CRH Americas would unilaterally increase the price of WVDOT aggregate to customers in Southern West Virginia. Without the constraint of competition between CRH Americas and Pounding Mill, the combined firm would have a greater ability to exercise market power by raising prices to customers for whom CRH Americas and Pounding Mill were

the two best sources of WVDOT aggregate.

41. Therefore, the proposed acquisition would substantially lessen competition in the market for WVDOT aggregate in Southern West Virginia. This is likely to lead to higher prices for the ultimate consumers of such aggregate, in violation of Section 7 of the Clayton Act.

#### **B. Anticompetitive Effects in the Market for WVDOT Asphalt Concrete**

42. CRH Americas' acquisition of Pounding Mill would substantially lessen competition in the market for WVDOT asphalt concrete in Southern West Virginia. CRH Americas has historically dominated this market. Pounding Mill does not compete directly with CRH Americas in the asphalt-concrete market, but it is a supplier of aggregate to CRH Americas' only competitor. That competitor, a recent entrant, has begun making inroads in the WVDOT asphalt-concrete market, and eroding CRH Americas' dominant position. By building its asphalt-concrete plant close to Pounding Mill's quarry in Mercer County, this entrant attempted to ensure that it would have a reliable, nearby source of aggregate, which allowed it to charge competitive prices. Pounding Mill is uniquely positioned to provide asphalt-concrete producers such as this entrant with competitively-priced aggregate, because it is not itself vertically integrated, and so has no incentive to raise the costs or otherwise disadvantage other asphalt-concrete producers.

43. If the proposed acquisition were consummated, this entrant could no longer be assured an economical source of WVDOT aggregate. Post-merger, CRH Americas would have the ability and incentive to use its ownership of Pounding Mill's quarries to disadvantage its rival by either withholding WVDOT aggregate or supplying it at less favorable terms than Pounding Mill currently provides.

44. Any post-merger conduct by CRH Americas that cuts off the supply of WVDOT aggregate or raises the cost of that input, would weaken its asphalt-concrete rival's ability to compete on price. If CRH Americas' rival cannot win WVDOT contracts, it may find it impossible to stay in business, thereby ensuring CRH Americas' control over the entire market for WVDOT asphalt concrete in Southern West Virginia.

45. Post-acquisition, CRH Americas would have the incentive and ability to raise the price or sacrifice sales of WVDOT aggregate in order to maintain its dominance in the asphalt-concrete

market. Such a strategy would be attractive in part because the sale of asphalt concrete is significantly more profitable than the sale of aggregate. Therefore, if CRH Americas were able to gain additional asphalt-concrete sales by raising the price of aggregate to its rival, foreclosing supply, or delaying deliveries, the additional asphalt-concrete sales would be considerably more profitable to CRH Americas than any lost aggregate sales.

46. By raising the costs of its sole competitor in the provision of WVDOT asphalt concrete, CRH Americas likely would gain the ability to unilaterally raise the price of WVDOT asphalt concrete in Southern West Virginia.

47. Therefore, the acquisition of Pounding Mill's quarries would give CRH Americas the incentive and ability to either eliminate or raise the costs of its sole asphalt-concrete competitor. As a result, the acquisition would substantially lessen competition in the market for WVDOT asphalt concrete in Southern West Virginia in violation of Section 7 of the Clayton Act.

#### **VI. ENTRY WILL NOT CONSTRAIN CRH AMERICAS' MARKET POWER IN THE RELEVANT MARKETS**

48. Entry into the market for WVDOT aggregate in Southern West Virginia is unlikely to be timely, likely, and sufficient to constrain CRH Americas' market power post-merger given the substantial time and cost required to open a quarry. Entry is likely to take two years or more. First, securing the proper site for a quarry is difficult and time-consuming. There are few sites on which to locate coarse aggregate operations in or near Southern West Virginia. Finding land with the correct rock composition requires extensive investigation and testing of candidate sites, as well as the negotiation of necessary land transfers, leases, and/or easements. Further, the location of a quarry close to likely job sites is extremely important due to the high cost of transporting aggregate. Once a location is chosen, obtaining the necessary permits is difficult and time-consuming. Attempts to open a new quarry often face fierce public opposition, which can prevent a quarry from opening or make opening it much more time-consuming and costly. Finally, even after a site is acquired and permitted, the owner must spend significant time and resources to prepare the land and purchase and install the necessary equipment.

49. Moreover, once a quarry is operating, a supplier must demonstrate that its aggregate meets WVDOT specifications. WVDOT qualification

requires testing. Until the aggregate can meet these specifications, it cannot be used to supply WVDOT road construction projects.

50. Entry into the market for WVDOT asphalt concrete in Southern West Virginia also is unlikely to be timely, likely, and sufficient to constrain CRH Americas' post-merger market power. Potential entrants in WVDOT asphalt concrete must have access to WVDOT aggregate. Only CRH Americas and one other competitor would be available to supply WVDOT aggregate in Southern West Virginia and, for many locations in Southern West Virginia, the remaining competitor would not be an economical alternative.

51. Post-acquisition, CRH Americas would have the incentive and opportunity to foreclose its competitors' access to WVDOT aggregate or disadvantage its rivals by either withholding WVDOT aggregate or supplying it on less favorable terms. Lack of access to a reliable, independent supply of aggregate would deter or prevent timely or sufficient entry into the asphalt-concrete market in Southern West Virginia.

52. In addition, an entrant into the asphalt-concrete market would have to purchase appropriate land close to an aggregate quarry, build a plant, procure the necessary land-use and environmental permits, and obtain WVDOT approval of each asphalt-concrete mix made, among other things. These actions involve significant costs and often lengthy time periods.

## VII. THE ACQUISITION VIOLATES SECTION 7 OF THE CLAYTON ACT

53. If allowed to proceed, CRH Americas' proposed acquisition of Pounding Mill is likely to substantially lessen competition in the markets for WVDOT aggregate in Southern West Virginia and WVDOT asphalt concrete in Southern West Virginia in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

54. Unless enjoined, the proposed acquisition likely would have the following anticompetitive effects, among others:

(a) actual and potential competition between CRH Americas and Pounding Mill in the market for WVDOT aggregate in Southern West Virginia would be eliminated;

(b) the sole remaining competitor for WVDOT asphalt concrete would lose its aggregate supplier or be forced to pay significantly higher prices for aggregate, substantially reducing price competition in the market for WVDOT asphalt concrete;

(c) prices for WVDOT aggregate in Southern West Virginia likely would increase and customer service likely would decrease; and

(d) prices for WVDOT asphalt concrete in Southern West Virginia likely would increase and customer service likely would decrease.

## VIII. REQUESTED RELIEF

55. The United States requests that this Court:

(a) adjudge and decree that CRH Americas' acquisition of Pounding Mill's assets would be unlawful and violate Section 7 of the Clayton Act, 15 U.S.C. § 18;

(b) preliminarily and permanently enjoin and restrain defendants and all persons acting on their behalf from consummating the proposed acquisition of Pounding Mill or its assets by CRH Americas, or from entering into or carrying out any other contract, agreement, plan, or understanding, the effect of which would be to combine CRH Americas with Pounding Mill;

(c) award the United States its costs for this action; and

(d) award the United States such other and further relief as the Court deems just and proper.

Dated: June 22, 2018

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA:

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## UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

*United States of America*, Plaintiff, v. *CRH PLC, CRH Americas Materials, Inc., and Pounding Mill Quarry Corporation*, Defendants.

No. 18-cv-1473

Judge Dabney L. Friedrich

## PROPOSED FINAL JUDGMENT

WHEREAS, Plaintiff, United States of America, filed its Complaint on June 22, 2018, the United States and defendants, CRH plc, CRH Americas Materials, Inc., and Pounding Mill Quarry Corporation, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

AND WHEREAS, defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, the essence of this Final Judgment is the prompt and certain divestiture of certain rights or assets by defendants to assure that competition is not substantially lessened;

AND WHEREAS, the United States requires defendants to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, defendants have represented to the United States that the divestitures required below can and will be made and that defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is ORDERED, ADJUDGED AND DECREED:

## I. JURISDICTION

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against defendants under Section 7 of the Clayton Act, 15 U.S.C. § 18, as amended.

## II. DEFINITIONS

As used in this Final Judgment:

A. "Acquirer" means Salem Stone or another entity to which defendants divest the Divestiture Assets.



B. "CRH" means defendant CRH plc, an Irish public limited company with its headquarters in Dublin, Ireland, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

C. "CRH Americas" means defendant CRH Americas Materials, Inc., a Delaware corporation with its principal place of business in Atlanta, Georgia, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

D. "Pounding Mill" means defendant Pounding Mill Quarry Corporation, a Virginia corporation with its headquarters in Bluefield, Virginia, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

E. "Salem Stone" means Salem Stone Corporation, a Virginia corporation with its headquarters in Dublin, Virginia, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

F. "Closing" means the closing of the transaction between CRH Americas and Pounding Mill pursuant to which CRH Americas acquires the assets of Pounding Mill.

G. "Divestiture Assets" means all assets associated with or utilized by Pounding Mill's Rocky Gap quarry, including, but not limited to:

1. All real property, including:

(a) All real property that is subject to the deed of record dated December 14, 1991, and registered in Bland County, Virginia in Deed Book 134, Page 138, less and except the right of way of the Norfolk and Western Railway as described in the deed recorded in Deed Book 20, Page 586; and those properties described in deeds recorded in Deed Book 21, Page 77; Deed Book 31, Page 478; Deed Book 32, Page 388; and Deed Book 53, Page 220;

(b) All real property that is subject to the deed of record dated July 8, 1989, and registered in Bland County, Virginia in Deed Book 99, Page 626, except the property described in the deed recorded in Deed Book 34, Page 295; and

(c) All real property that is subject to the deed of record dated February 8, 2017, and registered in Bland County, Virginia under Instrument Number 170000077, except those properties described in deeds recorded in Deed Book 53, Page 334; Deed Book 53, Page

360; Deed Book 57, Page 138; Deed Book 59, Page 96; Deed Book 59, Page 98; Deed Book 61, Page 397; Deed Book 62, Page 171; Deed Book 60, Page 653; and Deed Book 62, Page 168.

2. All tangible assets that have been primarily used at or in connection with the Rocky Gap quarry at any time since July 31, 2016, including, but not limited to: all equipment, vehicles, and buildings; tooling and fixed assets, personal property, inventory, office furniture, materials, and supplies; geologic maps, core drillings, and core samples; aggregate reserve testing information, results, and analyses; research and development activities; licenses, permits, and authorizations issued by any governmental organization; all contracts, teaming arrangements, agreements, leases, commitments, certifications, and understandings, including, but not limited to, all contracts that have been fulfilled in part or in whole with aggregate produced at the Rocky Gap quarry; customer lists, accounts, and credit records; repair and performance records, records relating to testing or approvals by the West Virginia Department of Transportation or Virginia Department of Transportation, and all other records;

3. All intangible assets that have been primarily used at or in connection with the Rocky Gap quarry at any time since July 31, 2016, including, but not limited to, all patents, licenses, sublicenses, intellectual property, copyrights, trademarks, trade names, service marks, service names, technical information, computer software and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures, research data concerning historic and current research and development, quality assurance and control procedures, design tools and simulation capability, and manuals and technical information defendants provide to their own employees, customers, suppliers, agents, or licensees.

### III. APPLICABILITY

A. This Final Judgment applies to CRH, CRH Americas, and Pounding Mill, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

B. If, prior to complying with Section IV and V of this Final Judgment, defendants sell or otherwise dispose of all or substantially all of their assets or

of lesser business units that include the Divestiture Assets, they shall require the purchaser to be bound by the provisions of this Final Judgment. Defendants need not obtain such an agreement from the Acquirer of the assets divested pursuant to this Final Judgment.

### IV. DIVESTITURE

A. CRH and CRH Americas are ordered and directed, within ten (10) business days after the Court signs the Hold Separate Stipulation and Order in this matter to divest the Divestiture Assets in a manner consistent with this Final Judgment to an Acquirer acceptable to the United States, in its sole discretion. The United States, in its sole discretion, may agree to one or more extensions of this time period not to exceed sixty (60) calendar days in total, and shall notify the Court in such circumstances. Defendants agree to use their best efforts to divest the Divestiture Assets as expeditiously as possible.

B. In accomplishing the divestiture ordered by this Final Judgment, defendants shall offer to furnish to the Acquirer, subject to customary confidentiality assurances, all information and documents relating to the Divestiture Assets customarily provided in a due diligence process except such information or documents subject to the attorney-client privilege or work-product doctrine. Defendants shall make available such information to the United States at the same time that such information is made available to any other person.

C. At the option of the Acquirer, defendants shall provide the Acquirer and the United States information relating to the personnel involved in the production and sale of aggregate and asphalt concrete at defendants' locations in: (1) the following counties in West Virginia: Boone, Clay, Fayette, Greenbrier, Logan, McDowell, Mercer, Mingo, Monroe, Nicholas, Raleigh, Summers, and Wyoming; and (2) the following counties in Virginia: Bland, Buchanan, Giles, Russell, and Tazewell, to enable the Acquirer to make offers of employment. Defendants shall not interfere with any negotiations by the Acquirer to employ any employee of CRH, CRH Americas, or Pounding Mill at any of the defendants' operations located in the counties listed in this paragraph. Defendants shall waive all non-compete agreements for any employee who elects employment with the Acquirer.

D. Prior to Closing Pounding Mill shall, and after Closing CRH and CRH Americas shall, permit prospective Acquirers of the Divestiture Assets to



have reasonable access to personnel and to make inspections of the physical facilities of the Rocky Gap quarry; access to any and all environmental, zoning, and other permit documents and information; access to any aggregate reserve estimates and geological studies; and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

E. Pounding Mill shall ensure that each asset is operational on the date of Closing and that there are no material defects in the environmental, zoning, or other permits pertaining to the operation of each asset as of the date of Closing.

F. CRH and CRH Americas shall warrant to the Acquirer that each asset will be operational on the date of sale of the Divestiture Assets and that there are no material defects in the environmental, zoning, or other permits pertaining to the operation of each asset on the date of sale of the Divestiture Assets.

G. Defendants shall not take any action that will impede in any way the permitting, operation, or divestiture of the Divestiture Assets.

H. Defendants shall not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of the Divestiture Assets.

I. Unless the United States otherwise consents in writing, the divestiture, whether pursuant to Section IV or V of this Final Judgment, shall include the entire Divestiture Assets, and shall be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Assets can and will be used by the Acquirer as part of a viable, ongoing business involved in the production and sale of aggregate. The divestiture, whether pursuant to Section IV or V of this Final Judgment,

(1) shall be made to an Acquirer that, in the United States' sole judgment, has the intent and capability (including the necessary managerial, operational, technical and financial capability) of competing effectively in the production and sale of aggregate; and

(2) shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between the Acquirer and CRH give CRH the ability unreasonably to raise the Acquirer's costs, to lower the Acquirer's efficiency, or otherwise to interfere in the ability of the Acquirer to compete effectively.

J. Within ten (10) calendar days of the date of sale of the Divestiture Assets to the Acquirer, CRH shall provide a notification of the divestiture to all customers that purchased: (1) 500 tons

or more of aggregate per project from CRH Americas' Alta quarry, CRH Americas' Beckley quarry, or any Pounding Mill quarry since January 1, 2016; or (2) 2,000 tons of aggregate or more per project from CRH Americas' Alta quarry, CRH Americas' Beckley quarry, or any Pounding Mill quarry since January 1, 2014. The notification must be in a form approved by the United States, in its sole discretion, and shall state that the Divestiture Assets are now owned by the Acquirer, are not affiliated with CRH, CRH Americas, or Pounding Mill, and shall include with such notice a copy of this proposed Final Judgment. CRH shall provide the United States with a copy of its draft notice no fewer than five (5) calendar days before it is sent to customers.

#### **V. APPOINTMENT OF DIVESTITURE TRUSTEE**

A. If CRH and CRH Americas have not divested the Divestiture Assets within the time period specified in Paragraph IV(A), they shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a Divestiture Trustee selected by the United States and approved by the Court to effect the divestiture of the Divestiture Assets.

B. After the appointment of a Divestiture Trustee becomes effective, only the Divestiture Trustee shall have the right to sell the Divestiture Assets. The Divestiture Trustee shall have the power and authority to accomplish the divestiture to an Acquirer acceptable to the United States at such price and on such terms as are then obtainable upon reasonable effort by the Divestiture Trustee, subject to the provisions of Sections IV, V, and VI of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to Paragraph V(D) of this Final Judgment, the Divestiture Trustee may hire at the cost and expense of CRH and CRH Americas any investment bankers, attorneys, or other agents, who shall be solely accountable to the Divestiture Trustee, reasonably necessary in the Divestiture Trustee's judgment to assist in the divestiture. Any such investment bankers, attorneys, or other agents shall serve on such terms and conditions as the United States approves including confidentiality requirements and conflict of interest certifications.

C. Defendants shall not object to a sale by the Divestiture Trustee on any ground other than the Divestiture Trustee's malfeasance. Any such objections by defendants must be conveyed in writing to the United States and the Divestiture Trustee within ten (10) calendar days after the Divestiture

Trustee has provided the notice required under Section VI.

D. The Divestiture Trustee shall serve at the cost and expense of CRH and CRH Americas pursuant to a written agreement, on such terms and conditions as the United States approves including confidentiality requirements and conflict of interest certifications. The Divestiture Trustee shall account for all monies derived from the sale of the assets sold by the Divestiture Trustee and all costs and expenses so incurred. After approval by the Court of the Divestiture Trustee's accounting, including fees for its services yet unpaid and those of any professionals and agents retained by the Divestiture Trustee, all remaining money shall be paid to CRH and CRH Americas and the trust shall then be terminated. The compensation of the Divestiture Trustee and any professionals and agents retained by the Divestiture Trustee shall be reasonable in light of the value of the Divestiture Assets and based on a fee arrangement providing the Divestiture Trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished, but timeliness is paramount. If the Divestiture Trustee and CRH and CRH Americas are unable to reach agreement on the Divestiture Trustee's or any agents' or consultants' compensation or other terms and conditions of engagement within fourteen (14) calendar days of appointment of the Divestiture Trustee, the United States may, in its sole discretion, take appropriate action, including making a recommendation to the Court. The Divestiture Trustee shall, within three (3) business days of hiring any other professionals or agents, provide written notice of such hiring and the rate of compensation to CRH, CRH Americas, and the United States.

E. Defendants shall use their best efforts to assist the Divestiture Trustee in accomplishing the required divestiture. The Divestiture Trustee and any consultants, accountants, attorneys, and other agents retained by the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities of the business to be divested, and defendants shall develop financial and other information relevant to such business as the Divestiture Trustee may reasonably request, subject to reasonable protection for trade secret or other confidential research, development, or commercial information or any applicable privileges. Defendants shall take no action to interfere with or to impede the

Divestiture Trustee's accomplishment of the divestiture.

F. After its appointment, the Divestiture Trustee shall file monthly reports with the United States and, as appropriate, the Court setting forth the Divestiture Trustee's efforts to accomplish the divestiture ordered under this Final Judgment. To the extent such reports contain information that the Divestiture Trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person. The Divestiture Trustee shall maintain full records of all efforts made to divest the Divestiture Assets.

G. If the Divestiture Trustee has not accomplished the divestiture ordered under this Final Judgment within six months after its appointment, the Divestiture Trustee shall promptly file with the Court a report setting forth: (1) the Divestiture Trustee's efforts to accomplish the required divestiture; (2) the reasons, in the Divestiture Trustee's judgment, why the required divestiture has not been accomplished, and (3) the Divestiture Trustee's recommendations. To the extent such report contains information that the Divestiture Trustee deems confidential, such report shall not be filed in the public docket of the Court. The Divestiture Trustee shall at the same time furnish such report to the United States which shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the Divestiture Trustee's appointment by a period requested by the United States.

H. If the United States determines that the Divestiture Trustee has ceased to act or failed to act diligently or in a reasonably cost-effective manner, it may recommend the Court appoint a substitute Divestiture Trustee.

## **VI. NOTICE OF PROPOSED DIVESTITURE**

A. Within two (2) business days following execution of a definitive divestiture agreement, CRH and CRH Americas or the Divestiture Trustee, whichever is then responsible for

effecting the divestiture required herein, shall notify the United States of any proposed divestiture required by Section IV or V of this Final Judgment. If the Divestiture Trustee is responsible, it shall similarly notify defendants. The notice shall set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Assets, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States may request from defendants, the proposed Acquirer, any other third party, or the Divestiture Trustee, if applicable, additional information concerning the proposed divestiture, the proposed Acquirer, and any other potential Acquirer. Defendants and the Divestiture Trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from defendants, the proposed Acquirer, any third party, and the Divestiture Trustee, whichever is later, the United States shall provide written notice to CRH and CRH Americas and the Divestiture Trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to defendants' limited right to object to the sale under Paragraph V(C) of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer or upon objection by the United States, a divestiture proposed under Section IV or V shall not be consummated. Upon objection by defendants under Paragraph V(C), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

## **VII. FINANCING**

Defendants shall not finance all or any part of any purchase made pursuant to Section IV or V of this Final Judgment.

## **VIII. HOLD SEPARATE**

Until the divestiture required by this Final Judgment has been accomplished, CRH and CRH Americas shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered

by this Court. Prior to the Closing, Pounding Mill shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the divestiture ordered by this Court.

## **IX. AFFIDAVITS**

A. Within twenty (20) calendar days of the filing of the Complaint in this matter, and every thirty (30) calendar days thereafter until the divestiture has been completed under Section IV or V, defendants shall deliver to the United States an affidavit signed by each defendant's Chief Financial Officer and General Counsel, which shall describe the fact and manner of defendants' compliance with Section IV or V of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty (30) calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts defendants have taken to solicit buyers for the Divestiture Assets, and to provide required information to prospective Acquirers, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States to information provided by defendants, including limitation on information, shall be made within fourteen (14) calendar days of receipt of such affidavit.

B. Within twenty (20) calendar days of the filing of the Complaint in this matter, defendants shall deliver to the United States an affidavit that describes in reasonable detail all actions defendants have taken and all steps defendants have implemented on an ongoing basis to comply with Section VIII of this Final Judgment. Defendants shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in defendants' earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

C. Defendants shall keep all records of all efforts made to preserve and divest the Divestiture Assets until one year after such divestiture has been completed.

## **X. COMPLIANCE INSPECTION**

A. For the purposes of determining or securing compliance with this Final Judgment, or of any related orders such as any Hold Separate Stipulation and Order, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the United States Department of Justice, Antitrust Division, including consultants and other persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendants, be permitted:

(1) access during defendants' office hours to inspect and copy, or at the option of the United States, to require defendants to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of defendants, relating to any matters contained in this Final Judgment; and

(2) to interview, either informally or on the record, defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, defendants shall submit written reports or response to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by defendants to the United States, defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and defendants mark each pertinent page of such material,

"Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," then the United States shall give defendants ten (10) calendar days' notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

## **XI. NOTIFICATION**

Unless such transaction is otherwise subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a (the "HSR Act"), CRH and CRH Americas, without providing advance notification to the United States Department of Justice, Antitrust Division, shall not directly or indirectly acquire any assets of or any interest, including any financial, security, loan, equity or management interest, in any businesses involved in the production and/or sale of aggregate and/or asphalt concrete in the counties listed in Paragraph IV(C) during the term of this Final Judgment.

Such notification shall be provided to the United States Department of Justice, Antitrust Division in the same format as, and per the instructions relating to the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, except that the information requested in Items 5 through 8 of the instructions must be provided only for aggregate and/or asphalt concrete. Notification shall be provided at least thirty (30) calendar days prior to acquiring any such interest, and shall include, beyond what may be required by the applicable instructions, the names of the principal representatives of the parties to the agreement who negotiated the agreement, and any management or strategic plans discussing the proposed transaction. If within the 30-day period after notification, representatives of the United States Department of Justice, Antitrust Division make a written request for additional information, defendants shall not consummate the proposed transaction or agreement until thirty calendar days after submitting all such additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the HSR Act and rules promulgated thereunder. This Section shall be broadly construed and any ambiguity or uncertainty regarding the filing of notice under this Section shall be resolved in favor of filing notice.

## **XII. NO REACQUISITION**

Defendants may not reacquire any part of the Divestiture Assets during the term of this Final Judgment.

## **XIII. RETENTION OF JURISDICTION**

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

## **XIV. ENFORCEMENT OF FINAL JUDGMENT**

A. The United States retains and reserves all rights to enforce the provisions of this Final Judgment, including its right to seek an order of contempt from this Court. Defendants agree that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of this Final Judgment, the United States may establish a violation of the decree and the appropriateness of any remedy therefor by a preponderance of the evidence, and they waive any argument that a different standard of proof should apply.

B. The Final Judgment should be interpreted to give full effect to the procompetitive purposes of the antitrust laws and to restore all competition harmed by the challenged conduct. Defendants agree that they may be held in contempt of, and that the Court may enforce, any provision of this Final Judgment that, as interpreted by the Court in light of these procompetitive principles and applying ordinary tools of interpretation, is stated specifically and in reasonable detail, whether or not it is clear and unambiguous on its face. In any such interpretation, the terms of this Final Judgment should not be construed against either party as the drafter.

C. In any enforcement proceeding in which the Court finds that defendants have violated this Final Judgment, the United States may apply to the Court for a one-time extension of this Final Judgment, together with such other relief as may be appropriate. In connection with any successful effort by the United States to enforce this Final Judgment against a defendant, whether litigated or resolved prior to litigation, that defendant agrees to reimburse the United States for any attorneys' fees, experts' fees, and costs incurred in connection with that enforcement effort,

including the investigation of the potential violation.

### **XV. EXPIRATION OF FINAL JUDGMENT**

Unless this Court grants an extension, this Final Judgment shall expire ten years from the date of its entry, except that after five (5) years from the date of its entry, this Final Judgment may be terminated upon notice by the United States to the Court and defendants that the divestiture has been completed and that the continuation of the Final Judgment no longer is necessary or in the public interest.

### **XVI. PUBLIC INTEREST DETERMINATION**

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: \_\_\_\_\_

Court approval is subject to procedures of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16.

United States District Judge

### **United States District Court for the District of Columbia**

*United States of America, Plaintiff, v. CRH PLC, CRH Americas Material, Inc., and Pounding Mill Quarry Corporation, Defendants.*

No. 18-cv-01473

Judge Dabney L. Friedrich

### **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**

Defendants CRH plc ("CRH"), CRH Americas Materials, Inc. ("CRH Americas"), and Pounding Mill Quarry Corporation ("Pounding Mill") entered into a purchase agreement, dated March

26, 2018, pursuant to which CRH Americas would acquire the assets of Pounding Mill, including four of Pounding Mill's aggregate quarries located in West Virginia and Virginia. The United States filed a civil antitrust Complaint on June 22, 2018, seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of this acquisition would be to lessen competition substantially in the markets for aggregate and asphalt concrete that are used in West Virginia Department of Transportation ("WVDOT") road projects in southern West Virginia. This loss of competition likely would result in increased prices and decreased service in these markets. Therefore, the Complaint alleges that the proposed acquisition violates Section 7 of the Clayton Act, 15 U.S.C. § 18, and should be enjoined.

CRH Americas' acquisition of Pounding Mill's aggregate quarries would secure CRH Americas' control over the materials necessary to build and maintain roads and bridges in southern West Virginia. CRH Americas supplies aggregate and asphalt concrete in this area and holds significant shares in each market. The proposed acquisition would result in CRH Americas owning nearly all of the aggregate quarries that supply southern West Virginia and would eliminate the head to head competition between CRH Americas and Pounding Mill for the supply of aggregate. As a result, prices for aggregate likely would increase significantly if the acquisition was consummated. The acquisition also would strengthen the virtual monopoly CRH Americas holds over the supply of asphalt concrete in southern West Virginia. In that market, CRH Americas competes with only one small new entrant that procures aggregate from Pounding Mill. There are no alternative aggregate suppliers to which that competitor can economically turn. The merger would give CRH Americas the means and incentive to disadvantage or exclude its competitor by denying it access to aggregate, reliable delivery, and competitive prices.

Along with the Complaint, the United States 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, explained more fully below, CRH Americas is required to divest Pounding Mill's Rocky Gap quarry located in Rocky Gap, Virginia (hereinafter, "Rocky Gap" or the "Rocky Gap Quarry") and related assets to Salem Stone Corporation ("Salem").

Under the terms of the Hold Separate, CRH Americas will take certain steps to ensure that Rocky Gap is 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. Defendants and the Proposed Transaction**

Defendant CRH is headquartered in Ireland and is a global supplier of building materials. In the United States, CRH is a leader in the supply of aggregate, asphalt concrete, and ready mix concrete, among many other things. In 2015, CRH had global sales of approximately \$26 billion and sales in the United States of approximately \$14 billion. Defendant CRH Americas (through its parent CRH Americas, Inc.) is a subsidiary of CRH plc. CRH Americas is incorporated in Delaware and has a principal place of business in Atlanta, Georgia. CRH Americas is one of the largest suppliers of aggregate, asphalt concrete, ready mix concrete, and construction and paving services in the United States.

Defendant Pounding Mill is incorporated in Delaware and has its headquarters in Virginia. Pounding Mill owns and operates four aggregate quarries—three in Virginia and one in West Virginia. In 2015, Pounding Mill had sales of approximately \$44 million.

On March 26, 2018, CRH Americas and Pounding Mill entered into an Asset Purchase Agreement. Pursuant to this agreement, CRH Americas will acquire all the assets of Pounding Mill, including four quarries located in West Virginia and Virginia and the equipment and other property used to operate such quarries and run the Pounding Mill business. The proposed transaction, as initially agreed to by Defendants, would lessen competition substantially as a result of CRH Americas' acquisition of Pounding Mill's assets. This acquisition is the subject of the Complaint and

proposed Final Judgment filed by the United States on June 22, 2018.

## **B. The Competitive Effects of the Transaction for Aggregate and Asphalt Concrete Used for WVDOT Projects**

### **1. Relevant Markets Affected by the Proposed Acquisition**

#### **a. Product Markets**

##### **i. WVDOT Aggregate**

Aggregate is particulate material that primarily includes crushed stone, sand, and gravel. It is produced at mines, quarries, and gravel pits and is used for a variety of construction projects. Aggregate generally can be categorized based on size into fine aggregate and coarse aggregate. Within the categories of fine and coarse aggregate, aggregate is further identified based on the size of the aggregate and the type of rock. Aggregate also can differ based on hardness, durability, and polish value, among other characteristics. Further, various sizes and types of aggregate are distinct and often used for different purposes.

Aggregate is an essential component of road construction, such as building or repairing roads. Aggregate is used in road projects as a base that is laid and compacted under the asphalt concrete. Aggregate also is an essential ingredient in asphalt concrete, which is used for paving roads and other areas. There are no substitutes for aggregate in these types of road construction projects because no other materials can be used for the same purpose.

To evaluate the proposed acquisition's effects on the market for aggregate, it is appropriate to include all sizes and kinds of aggregate because, with limited exceptions, each size and type of aggregate is offered under similar competitive conditions in the relevant geographic market. Thus, the grouping of the various sizes and types of aggregate makes evaluating competitive effects more efficient without undermining the reliability of the analysis.<sup>1</sup>

Because different types, sizes, and qualities of aggregate are needed depending on the intended use, the end-use customer establishes the exact specifications that the aggregate must meet for each application. These specifications are designed by the project engineers to ensure the safety and longevity of road construction

projects. WVDOT purchases significant quantities of aggregate for its road construction projects, which include building, repairing and maintaining roads and bridges in West Virginia. WVDOT also purchases significant quantities of aggregate for its maintenance yards. These maintenance yards are used to store the aggregate purchased directly by WVDOT for use on the projects WVDOT completes itself, instead of through a contractor, such as fixing a pothole or repaving a small area of a road.

For each road project, WVDOT provides the precise specifications for the aggregate used for asphalt concrete and road base, among other things. WVDOT specifications are designed to ensure that the roads and bridges are built safely and withstand heavy usage over time. The use of aggregate that does not meet WVDOT specifications could compromise the safety of the road or bridge, or cause the need for repairs sooner than would otherwise be required. Therefore, aggregate that does not meet WVDOT specifications cannot be used.

A small but significant increase in the price of aggregate that meets WVDOT specifications (hereinafter "WVDOT aggregate") would not cause WVDOT to substitute other types of materials in sufficient quantities, or to utilize aggregate that does not meet its specifications, with sufficient frequency so as to make such a price increase unprofitable. Accordingly, WVDOT aggregate is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

##### **ii. WVDOT Asphalt Concrete**

Asphalt concrete is a composite material that is used to surface roads, parking lots, and airport tarmacs, among other things. Asphalt concrete consists of aggregate combined with liquid asphalt and other materials. Asphalt concrete has unique performance characteristics compared to other building materials, such as ready mix concrete. For example, asphalt concrete is the desired material used to build roadways because it has optimal surface durability and friction, resulting in low tire wear, high breaking efficiency, and low roadway noise. Other products generally cannot be used as economically to build and maintain roadways and therefore are not adequate substitutes.

WVDOT purchases significant quantities of asphalt concrete for road construction and maintenance projects in West Virginia. For each road project, WVDOT provides the precise specifications for the asphalt concrete.

WVDOT specifications are designed to ensure that the roads are built safely and withstand heavy usage over time. Using asphalt concrete that does not meet WVDOT specifications could compromise the safety of the road or cause the need for repairs sooner than would otherwise be required. Therefore, asphalt concrete that does not meet WVDOT specifications cannot be used.

A small but significant increase in the price of asphalt concrete that meets WVDOT specifications (hereinafter "WVDOT asphalt concrete") would not cause WVDOT to substitute other materials in sufficient quantities, or to utilize asphalt concrete that does not meet its specifications, with sufficient frequency so as to make such a price increase unprofitable. Accordingly, WVDOT asphalt concrete is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

#### **b. Geographic Markets**

The relevant geographic markets for both WVDOT aggregate and WVDOT asphalt concrete are the following four counties in West Virginia: Wyoming, Raleigh, Mercer, and Summers (these four counties are hereinafter referred to as "Southern West Virginia").

##### **i. WVDOT Aggregate**

Aggregate is a relatively low-cost product that is bulky and heavy, with high transportation costs. The geographic area an aggregate supplier can profitably serve is primarily determined by: (1) the distance from the quarry to the job site where the aggregate is used; and (2) the relative distance between the supplier's competitor's quarry and the job site compared to its own. Suppliers know the importance of transportation costs to a customer's selection of an aggregate supplier and also know the locations of all their competitors. An aggregate supplier can often charge a lower/more competitive price than its competitor if its quarry is closer to the customer's location than its competitor's quarry.

CRH Americas owns and operates aggregate quarries located in Beckley and Lewisburg, West Virginia and those quarries sell WVDOT aggregate to customers with plant locations or job sites in Southern West Virginia. Customers with plant locations or job sites in Southern West Virginia may also economically procure WVDOT aggregate from Pounding Mill's quarries located in Princeton, West Virginia and Rocky Gap, Virginia, and from another smaller third-party quarry located in Lewisburg, West Virginia. For many customer locations in Southern West Virginia,

<sup>1</sup> However, the market for aggregate does not include friction-coarse aggregate that is used to create the anti-skid surface layer of roads. Pounding Mill does not have the ability to manufacture friction-coarse aggregate and the competitive conditions for that product are not similar to the remaining aggregate market.

quarries owned by CRH Americas and Pounding Mill are the two closest options and can quote different prices based on the location of a customer in relation to each supplier's quarries.

A small but significant post-acquisition increase in the price of WVDOT aggregate to customers with plants or job sites in Southern West Virginia would not cause those customers to substitute another product or procure aggregate from suppliers other than CRH Americas, Pounding Mill, and the third competitor in sufficient quantities so as to make such a price increase unprofitable. Accordingly, Southern West Virginia is a relevant geographic market for WVDOT aggregate within the meaning of Section 7 of the Clayton Act.

## ii. WVDOT Asphalt Concrete

As with aggregate, the geographic area an asphalt-concrete plant can profitably serve is primarily determined by the location of its plant in relation to the job site and the relative location of competing suppliers. Asphalt-concrete suppliers typically deliver asphalt concrete to a job site. Distance from the plant to the job site is important for two reasons—temperature and transportation costs. First, asphalt concrete must be maintained at a certain temperature range before it is poured. If the temperature drops below that required by the asphalt-concrete specifications, it cannot be used. The temperature of asphalt concrete drops as it travels from the plant and drops faster in colder weather than in warmer weather. As a result, the distance between an asphalt-concrete plant and the project site determines whether a plant can service a particular geographic area. Second, asphalt concrete is heavy and transporting it is expensive. Therefore, the distance between the site where the asphalt concrete is poured and the asphalt-concrete plant drives transportation costs and has a considerable impact on the area a supplier can profitably serve.

A further factor that determines the area a supplier can profitably serve is the location of its plant in relation to competing plants. Suppliers know the importance of transportation costs to a customer's selection of a supplier and also generally know how far each competing supplier can deliver asphalt concrete. An asphalt-concrete supplier often will charge a lower/more competitive price than its competitor if its plant is closer to the customer's location than its competitor's plant.

CRH Americas has an advantage with respect to transportation costs because it owns and operates three of the four

asphalt-concrete plants that supply WVDOT asphalt concrete and serve customers in Southern West Virginia. Customers with job sites in Southern West Virginia may also economically procure WVDOT asphalt concrete from CRH's sole asphalt-concrete competitor, which operates one asphalt-concrete plant in Mercer County, West Virginia. Pounding Mill does not own any asphalt-concrete plants, though it is currently supplying CRH Americas' competitor in the asphalt concrete market with the aggregate it needs to compete. Thus, the four asphalt-concrete plants that serve Southern West Virginia procure aggregate from CRH Americas and Pounding Mill.

A small but significant post-acquisition increase in the price of WVDOT asphalt concrete to customers with job sites in Southern West Virginia would not cause those customers to substitute another product or procure WVDOT asphalt concrete from suppliers other than CRH Americas or its rival in sufficient quantities so as to make such a price increase unprofitable. Accordingly, Southern West Virginia constitutes a relevant geographic market for WVDOT asphalt concrete within the meaning of Section 7 of the Clayton Act.

## 2. Anticompetitive Effects in the Market for WVDOT Aggregate

If CRH Americas acquired Pounding Mill, competition would be substantially lessened for the supply of WVDOT aggregate in Southern West Virginia. This market is already highly concentrated and would become significantly more concentrated as a result of the acquisition. For all WVDOT aggregate supplied in Southern West Virginia, including aggregate supplied to WVDOT through contractors for road projects and aggregate purchased directly by WVDOT for its maintenance yards, CRH Americas and Pounding Mill's combined market share is well over 80 percent. Moreover, the companies' combined share is even higher—over 90 percent—for the aggregate supplied by contractors for use in road projects.

Acquisitions that reduce the number of competitors in already concentrated markets are more likely to substantially lessen competition. Concentration can be measured in various ways, including by market shares and by the widely-used Herfindahl-Hirschman Index ("HHI"). Under the *Horizontal Merger Guidelines*, post-acquisition HHIs above 2,500 and changes in HHI above 200 trigger a presumption that a proposed acquisition is likely to enhance market power and substantially lessen competition in a defined market.

Premerger, the HHI for aggregate supplied for WVDOT road projects is approximately 4,350. The post-acquisition HHI is approximately 8,500, with an increase of over 4,000. For WVDOT aggregate purchased by WVDOT for its maintenance yards, the premerger HHI is approximately 3,800. Post-acquisition, the HHI is approximately 6,700, with an increase of nearly 3,000.

CRH Americas and Pounding Mill compete vigorously in the market for WVDOT aggregate in Southern West Virginia. For many customers and job sites in that area, they are the first- and second-best sources of supply for aggregate in terms of price, quality, and reliability of delivery. Only one other company, located in Lewisburg, West Virginia, is able to supply WVDOT aggregate in Southern West Virginia in any meaningful quantity. But while this competitor supplies WVDOT aggregate to maintenance yards, it has not bid on many road projects, leaving only CRH Americas and Pounding Mill to compete for most of those large projects. While a few other small suppliers provide limited quantities of WVDOT aggregate for maintenance yards in Southern West Virginia, they are unable to provide the large quantity of aggregate needed on road projects and do not supply the types or quality of aggregate needed for the asphalt concrete and road base.

The proposed acquisition would substantially increase the likelihood that CRH Americas would unilaterally increase the price of WVDOT aggregate to customers in Southern West Virginia. Without the constraint of competition between CRH Americas and Pounding Mill, the combined firm would have a greater ability to exercise market power by raising prices to customers for whom CRH Americas and Pounding Mill were the two best sources of WVDOT aggregate.

Therefore, the proposed acquisition would substantially lessen competition in the market for WVDOT aggregate in Southern West Virginia. This is likely to lead to higher prices for the ultimate consumers of such aggregate, in violation of Section 7 of the Clayton Act.

## 3. Anticompetitive Effects in the Market for WVDOT Asphalt Concrete

CRH Americas' acquisition of Pounding Mill would substantially lessen competition in the market for WVDOT asphalt concrete in Southern West Virginia. CRH Americas has historically dominated this market. Pounding Mill does not compete directly with CRH Americas in the asphalt-concrete market, but it is a

supplier of aggregate to CRH Americas' only competitor. That competitor, a recent entrant, has recently begun making inroads in the WVDOT asphalt-concrete market, and eroding CRH Americas' dominant position. By building its asphalt-concrete plant close to Pounding Mill's quarry in Mercer County, this entrant attempted to ensure that it would have a reliable, nearby source of aggregate, which allowed it to charge competitive prices. Pounding Mill is uniquely positioned to provide asphalt-concrete producers such as this entrant with competitively priced aggregate because it is not itself vertically integrated, and so has no incentive to raise the costs or otherwise disadvantage other asphalt-concrete producers.

If the proposed acquisition were consummated, this entrant could no longer be assured an economical source of WVDOT aggregate. Post-merger, CRH Americas would have the ability and incentive to use its ownership of Pounding Mill's quarries to disadvantage its rival by either withholding WVDOT aggregate or supplying it at less favorable terms than Pounding Mill currently provides.

Any post-merger conduct by CRH Americas that cuts off the supply of WVDOT aggregate or raises the cost of that input would weaken its asphalt-concrete rival's ability to compete on price. If CRH Americas' rival cannot win WVDOT contracts, it may find it impossible to stay in business, thereby ensuring CRH Americas' control over the entire market for WVDOT asphalt concrete in Southern West Virginia.

CRH Americas would have the incentive and ability to raise the price or sacrifice sales of WVDOT aggregate in order to maintain its dominance in the asphalt-concrete market. Such a strategy would be attractive in part because the sale of asphalt concrete is significantly more profitable than the sale of aggregate. Therefore, if CRH Americas were able to gain additional asphalt-concrete sales by raising the price of aggregate to its rival, foreclosing supply, or delaying deliveries, the additional asphalt-concrete sales would be considerably more profitable to CRH Americas than any lost aggregate sales. By raising the costs of its sole competitor in the provision of WVDOT asphalt concrete, CRH Americas likely would gain the ability to unilaterally raise the price of WVDOT asphalt concrete in Southern West Virginia.

Therefore, CRH Americas' acquisition of Pounding Mill's quarries would give CRH Americas both the incentive and ability to either eliminate or raise the costs of its sole asphalt-concrete

competitor. As a result, the acquisition would substantially lessen competition in the market for WVDOT asphalt concrete in Southern West Virginia.

#### **4. Entry Will Not Constrain CRH Americas' Market Power**

Entry into the market for WVDOT aggregate in Southern West Virginia is unlikely to be timely, likely, and sufficient to constrain CRH Americas' market power post-merger given the substantial time and cost required to open a quarry.

First, securing the proper site for an aggregate quarry is difficult and time-consuming. There are few sites on which to locate coarse aggregate operations in or near Southern West Virginia. Finding land with the correct rock composition requires extensive investigation and testing of candidate sites, as well as the negotiation of necessary land transfers, leases, and/or easements. Further, the location of a quarry close to likely job sites is extremely important due to the high cost of transporting aggregate.

Once a location is chosen, obtaining the necessary permits is also difficult and time-consuming. Attempts to open a new quarry often face fierce public opposition, which can prevent a quarry from opening or make opening it much more time-consuming and costly. Finally, even after a site is acquired and permitted, the owner must spend significant time and resources to prepare the land and purchase and install the necessary equipment. Moreover, once a quarry is operating, a supplier must demonstrate that its aggregate meets WVDOT specifications. WVDOT qualification requires testing. Until the aggregate can meet these specifications, it cannot be used to supply WVDOT road construction projects.

Entry into the market for WVDOT asphalt concrete in Southern West Virginia also is unlikely to be timely, likely, or sufficient to constrain CRH Americas' post-merger market power. Potential entrants in WVDOT asphalt concrete must have access to WVDOT aggregate. Only CRH Americas and one other competitor would be available to supply WVDOT aggregate in Southern West Virginia and, for many locations in Southern West Virginia, the remaining competitor will not be an economical alternative. Post-merger, CRH Americas would have the incentive and opportunity to foreclose its competitors' access to WVDOT aggregate or disadvantage its rivals by either withholding WVDOT aggregate or supplying it on less favorable terms. Lack of access to a reliable, independent

supply of aggregate will deter or prevent timely or sufficient entry into the asphalt-concrete market in Southern West Virginia.

In addition, an entrant into the asphalt-concrete market would have to purchase appropriate land close to an aggregate quarry, build a plant, procure the necessary permits, and obtain WVDOT approval of each asphalt-concrete mix made, among other things. These actions are required before production of asphalt concrete can begin and involve significant costs and often lengthy time periods.

### **III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT**

The divestiture required by the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in the markets for WVDOT aggregate and WVDOT asphalt concrete by establishing a new, independent, and economically viable WVDOT aggregate supplier in Southern West Virginia. The divestiture will preserve the current state of competition in both the markets for WVDOT aggregate and WVDOT asphalt concrete.

#### **A. The Divestiture Assets**

The proposed Final Judgment requires CRH and CRH Americas to divest all assets that are primarily used for or in connection with Pounding Mill's Rocky Gap quarry. CRH and CRH Americas must divest all real property identified in Paragraph II(G)(1) of the proposed Final Judgment upon which the Rocky Gap quarry currently operates, and the property adjacent to that quarry.

In addition, CRH and CRH Americas must divest all tangible assets listed in Paragraph II(G)(2) of the proposed Final Judgment that have been primarily used to operate the Rocky Gap quarry at any time since July 31, 2016. This includes all production equipment that has been used at the Rocky Gap quarry since that date. This provision ensures that, among other things, any mobile tangible assets, such as vehicles or production equipment, used at the Rocky Gap quarry since July 31, 2016, are divested. Further, CRH and CRH Americas must divest all ongoing customer contracts that have been fulfilled by aggregate produced at the Rocky Gap quarry, even if the contract does not require that the aggregate be produced at the Rocky Gap quarry. This provision will ensure that the acquirer of the Divestiture Assets receives all ongoing work of the Rocky Gap quarry and prevent CRH Americas from fulfilling such work from one of its other quarries post-acquisition, including the nearby quarry that it is acquiring from Pounding Mill.



Defendants also are required to divest all intangible assets that have been primarily used by the Rocky Gap quarry at any time since July 31, 2016. The proposed Final Judgment provides that Pounding Mill cannot interfere with the permitting, operation, or divestiture of the Divestiture Assets and shall not undertake any challenges to the permits relating to the Divestiture Assets.

### **B. The Acquirer of the Divestiture Assets**

Paragraph IV(I) of the proposed Final Judgment provides that final approval of the divestiture, including the identity of the acquirer, is left to the sole discretion of the United States to ensure the continued independence and viability of the Divestiture Assets in the relevant markets. In this matter, Salem has been identified as the expected purchaser of the Divestiture Assets. Due to the narrow local market at issue and the small number of companies with sufficient expertise that operate in or near Southern West Virginia, there are only a small number of potential purchasers that could quickly begin operating the Rocky Gap quarry. After a thorough examination of Salem, its plans for the Divestiture Assets, the proposed sale agreement, and consideration of feedback from customers, the United States approved Salem as the buyer. Salem is a large, regional producer of construction aggregates and owns 15 quarries in Virginia and North Carolina. Salem is a strong aggregate competitor in markets near Southern West Virginia, and WVDOT has qualified various types of the aggregate that Salem produces for use on its road projects. Salem's vast experience producing and selling aggregate, its familiarity with WVDOT's approval process, and its familiarity with nearby geographic markets should ensure that in its hands the Divestiture Assets will provide meaningful competition.

If the sale to Salem does not occur, CRH and CRH Americas may sell the divestiture assets to another acquirer, subject to the approval of the United States. If CRH Americas does not secure an acceptable acquirer and divest the assets during the time period allowed for the divestiture, an acquirer will be located by a trustee, subject to the approval of the United States.

### **C. Provisions of the Proposed Final Judgment**

Paragraph IV(A) of the proposed Final Judgment requires that the Divestiture Assets be sold to Salem or an approved acquirer within ten days after the Court signs the Hold Separate. The entry of

the Hold Separate was chosen as the date upon which the divestiture period begins to run because CRH and CRH Americas cannot consummate the acquisition of Pounding Mill's assets until the Court enters the Hold Separate, and that acquisition must be consummated before the Divestiture Assets are sold. If the Divestiture Assets are not sold within ten days of the Court's entry of the Hold Separate, a Divestiture Trustee is to be appointed to sell the Divestiture Assets to an entity acceptable to the United States.

Defendants also are required to provide various information regarding and access to the Divestiture Assets to potential acquirers of those assets. For example, Defendants are required to provide the Acquirer information relating to employees to enable the acquirer to make offers of employment. The proposed Final Judgment requires Defendants to provide information about employees at the Rocky Gap quarry, as well as the other three Pounding Mill quarries and several CRH Americas aggregate and asphalt-concrete facilities. The scope of this area includes the counties within and closest to the relevant geographic market alleged in the Complaint. This will ensure that the acquirer has a broad pool of potential candidates to choose from. In addition, Defendants must provide information regarding employees at CRH Americas' asphalt-concrete operations. Asphalt-concrete suppliers work closely with aggregate producers and are often knowledgeable about some aspects of the others' business. Therefore, asphalt-concrete suppliers may also be a source of qualified employees for an aggregate producer.

Further, Paragraph IV(J) of the proposed Final Judgment requires CRH and CRH Americas to notify all customers that have purchased aggregate from the CRH Americas quarries located in Southern West Virginia, and all four Pounding Mill quarries, that the Rocky Gap quarry has been sold and is not affiliated with CRH Americas or Pounding Mill. The proposed Final Judgment requires such notification be provided for customers that historically made aggregate purchases of a dollar value typical of WVDOT road construction projects. The more recent the customer, the smaller the dollar volume of purchases needed to meet the notification cut-off. This notification will ensure that customers are informed about the existence of the Rocky Gap quarry as an independent source of aggregate.

Section XI of the proposed Final Judgment requires CRH and CRH

Americas to notify the Antitrust Division of certain proposed acquisitions not otherwise subject to filing under the Hart-Scott Rodino Act, 15 U.S.C. 18a (the "HSR Act"). The requirement applies to acquisitions of entities engaged in the production of asphalt concrete and/or aggregate in and around the alleged relevant market, as defined in Paragraph IV(C) of the proposed Final Judgment.

The proposed Final Judgment also contains provisions designed to promote compliance and make the enforcement of Division consent decrees as effective as possible. Paragraph XIV(A) provides that the United States retains and reserves all rights to enforce the provisions of the proposed Final Judgment, including its rights to seek an order of contempt from the Court. Under the terms of this paragraph, Defendants have agreed that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of the Final Judgment, the United States may establish the violation and the appropriateness of any remedy by a preponderance of the evidence and that Defendants have waived any argument that a different standard of proof should apply. This provision aligns the standard for compliance obligations with the standard of proof that applies to the underlying offense that the compliance commitments address.

Paragraph XIV(B) provides additional clarification regarding the interpretation of the provisions of the proposed Final Judgment. The proposed Final Judgment was drafted to restore all competition that would otherwise be harmed by the merger. Defendants agree that they will abide by the proposed Final Judgment, and that they may be held in contempt of this Court for failing to comply with any provision of the proposed Final Judgment that is stated specifically and in reasonable detail, as interpreted in light of this procompetitive purpose.

Paragraph XIV(C) of the proposed Final Judgment further provides that should the Court find in an enforcement proceeding that Defendants have violated the Final Judgment, the United States may apply to the Court for a one-time extension of the Final Judgment, together with such other relief as may be appropriate. In addition, in order to compensate American taxpayers for any costs associated with the investigation and enforcement of violations of the proposed Final Judgment, Paragraph XIV(C) provides that in any successful effort by the United States to enforce the Final Judgment against a Defendant, whether litigated or resolved prior to litigation, that Defendant agrees to

reimburse the United States for attorneys' fees, experts' fees, or costs incurred in connection with any enforcement effort, including the investigation of the potential violation.

Finally, Section XV of the proposed Final Judgment provides that the Final Judgment shall expire ten years from the date of its entry, except that after five years from the date of its entry, the Final Judgment may be terminated upon notice by the United States to the Court and Defendants that the divestitures have been completed and that the continuation of the Final Judgment is no longer necessary or in the public interest.

The divestiture will remedy the likely anticompetitive effects of the acquisition in the markets for WVDOT aggregate and WVDOT asphalt concrete by preserving the current state of competition in both markets.

#### 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 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 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 United States Department of Justice, Antitrust Division's website and, under certain circumstances, published in the **Federal Register**.

Written comments should be submitted to:

Maribeth Petrizzi  
Chief, Defense, Industrials, and  
Aerospace Section Antitrust Division  
United States Department of Justice  
450 Fifth Street, N.W., Suite 8700  
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 CRH Americas' acquisition of Pounding Mill's quarries. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition in the markets for WVDOT asphalt concrete and WVDOT aggregate in Southern West Virginia. 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. U.S. Airways Group, Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the "court's inquiry is limited" in Tunney Act settlements); *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").<sup>2</sup>

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

<sup>2</sup>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).

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.

*Bechtel*, 648 F.2d at 666 (emphasis added) (citations omitted).<sup>3</sup> 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 *U.S. Airways*, 38 F. Supp. 3d at 75 (noting that a court should not reject the proposed remedies because it believes others are preferable); *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 *U.S. Airways*, 38 F. Supp. 3d at 74 (noting that room must be made for the government to grant concessions in the negotiation process for settlements (citing *Microsoft*, 56 F.3d at 1461); *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 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 *U.S. Airways*, 38 F. Supp. 3d at 74 (noting that the court must simply determine whether there is a factual foundation for the government’s decisions such that its conclusions regarding the proposed settlements are reasonable; *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); see also *U.S. Airways*, 38 F. Supp. 3d at 75 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). 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. 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.<sup>4</sup> A court can make its public interest determination based on the competitive impact statement and response to public comments alone. *U.S. Airways*, 38 F. Supp. 3d at 75.

#### VIII. DETERMINATIVE DOCUMENT

In formulating the proposed Final Judgment, the United States considered a report on the geology of the Rocky Gap Quarry site entitled “Rocky Gap Quarry, Rocky Gap, Virginia” dated March 13, 2017, authored by John Chermak, PhD, PG, to be a determinative document within the meaning of the APPA.

Dated: June 22, 2018

Respectfully submitted,  
FOR PLAINTIFF  
UNITED STATES OF AMERICA

/s/

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<sup>4</sup> 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, \*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.”).

<sup>3</sup> 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’”).

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## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

#### Ljudmil Kljusev, M.D.; Decision and Order

On September 15, 2017, the Acting Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause to Ljudmil Kljusev, M.D. (hereinafter, Respondent), of Milford, Connecticut. Order to Show Cause (hereinafter, OSC), at 1. The Show Cause Order proposed the revocation of Respondent's Certificate of Registration on the ground that he does "not have authority to handle controlled substances in the State of Connecticut, the [S]tate in which . . . [he is] registered with the DEA." *Id.* at 1 (citing 21 U.S.C. 823(f) and 824(a)(3)).

As to the Agency's jurisdiction, the Show Cause Order alleged that Respondent holds DEA Certificate of Registration No. BK7295834, which authorizes him to dispense controlled substances in schedules II through V as a practitioner, at the registered address of 227 Naugatuck Avenue, Milford, Connecticut 06460. OSC, at 1. The Show Cause Order alleged that this registration expires on December 31, 2018. *Id.*

As the substantive ground for the proceeding, the Show Cause Order alleged that Respondent is "currently without authority to practice medicine or handle controlled substances in the State of Connecticut, the [S]tate in which . . . [he is] registered with the DEA." *Id.* at 2. More specifically, it alleged that, on November 30, 2016, Respondent's "license to practice medicine in the State of Connecticut (No. 039302) lapsed; on February 28, 2015 and December 6, 2016, respectively, Respondent's Connecticut Controlled Substances Registrations, Nos. CSP.0030952 and CSP.0059205, expired; and on February 21, 2017, Respondent "entered into an agreement with the Connecticut Department of Health in which . . . [he] agreed not to renew or reinstate . . . [his] license to practice medicine in Connecticut." *Id.* at 1.

The Show Cause Order notified Respondent of his right to request a hearing on the allegations or to submit a written statement while waiving his right to a hearing, the procedures for

electing each option, and the consequences for failing to elect either option. *Id.* at 2 (citing 21 CFR 1301.43). The Show Cause Order also notified Respondent of the opportunity to submit a Corrective Action Plan. OSC, at 2-3 (citing 21 U.S.C. 824(c)(2)(C)).

By letter dated October 2, 2017, Respondent requested "a hearing in the matter of Order to . . . [Show] Cause in timely manner, for why my DEA license should not be revoked or surrendered." Hearing Request, at 1. According to the Hearing Request, Respondent "did not commit the alleged crimes of distribution of narcotics and money laundering," although he admitted that, "[he pled] guilty and served 26 months in federal prison." *Id.* at 2. In the Hearing Request, Respondent admitted that he "voluntarily surrendered . . . [his] medical license" and also stated that he did not surrender his DEA license because his research "found that [it] is almost impossible to get it back" and because he "must say that . . . [he is] disheartened to surrender what has been . . . [his] livelihood." *Id.* at 6.<sup>1</sup>

The Office of Administrative Law Judges put the matter on the docket and assigned it to Administrative Law Judge Mark M. Dowd (hereinafter, ALJ). I adopt the following statement of procedural history from the ALJ's Order Granting the Government's Motion for Summary Disposition and Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision of the Administrative Law Judge dated November 15, 2017 (hereinafter, R.D.).

Th[e ALJ], on October 11, 2017, ordered the Government to file evidence to support the allegations that the Respondent lacked state authority to handle controlled substances by October 23, 2017.<sup>2</sup> Moreover,

<sup>1</sup> By letter dated October 6, 2017, Respondent submitted a "Correction [sic] Action Plan" stating that, "Now that I understand the law of proceedings, if I had a chance to continue to practice I will secure the prescriptions and never issue any refill without personally having seen those patients and will be having a licensed medical practitioner on site." Corrective Action Plan, at 3. Respondent's Corrective Action Plan also stated that, "[S]hould I continue to be able to prescribe, I will assure that I implement all the safe modes of practices, bill only for the visits that I conduct face to face, not over the Skype and will never prescribe controlled substances again if necessary." *Id.*

By letter dated December 5, 2017, the Acting Assistance Administrator, Diversion Control Division, responded to Respondent's Corrective Action Plan. "After careful review," she stated, "I deny the request to discontinue or defer administrative proceedings." Corrective Action Plan Denial, at 1. She added that, "I have determined there is no potential modification of your [Proposed Corrective Action Plan] that could or would alter my decision in this regard." *Id.*

<sup>2</sup> The October 11, 2017 document that the R.D. references is the ALJ's Order Directing the Filing of Government Evidence of Lack of State Authority Allegation and Briefing Schedule, at 1.

the Respondent was given until November 9, 2017, to file a response to any allegations made by the Government.<sup>3</sup>

On October 19, 2017, the Government filed a Motion for Summary Disposition (Government's Motion), seeking a recommended decision granting the Government's Motion and recommending revocation. Gov't Mot. at 5. The Government provided evidence that the Respondent voluntarily surrendered his license to practice as a physician and surgeon through the Declaration of . . . [a DEA Diversion Group Supervisor], the Respondent's "Voluntary Agreement Not To Renew Or Reinstate License," a notarized letter from the Practitioner License and Investigations Section of the Connecticut Department of Public Health, and the State of Connecticut License Lookup website report. Gov't Mot. at Attch. 1; Gov't Mot. at Ex. 1; Gov't Mot. at Ex. 2; Gov't Mot. at Ex. 3. As to the Respondent's State of Connecticut Controlled Substance Registrations, the Government . . . searched the State of Connecticut License Lookup website, where the Government produced evidence that the Respondent's Controlled Substances Registrations no. CSP.0030952 and CSP.0059205 remain 'inactive' and expired on February 28, 2015, and December 6, 2016, respectively. Gov't Mot. at Ex. 4, 5.

To date, the Respondent failed to file any response to the Government's Motion or evidence produced.

R.D., at 2-3.

In his R.D., the ALJ granted the Government's Motion for Summary Disposition, and recommended that Respondent's registration be revoked and that any pending applications for its renewal be denied.

At this juncture, no dispute exists over the fact that the Respondent currently lacks state authority to handle controlled substances in Connecticut due to his voluntary surrender of his license to practice as a physician and surgeon on February 21, 2017 . . . . Because the Respondent lacks state authority at the present time, Agency precedent dictates that he is not entitled to maintain his DEA registration. Simply put, there is no contested factual matter that could be introduced at a hearing that would, in the Agency's view, provide authority to allow the Respondent to continue to hold his . . . [DEA registration].

*Id.* at 5. By letter dated December 15, 2017, the ALJ certified and transmitted the record to me for final agency action. In that letter, the ALJ stated that neither party filed exceptions and that the time period to do so had expired.

I issue this Decision and Order based on the entire record before me. 21 CFR 1301.43(e). I make the following findings of fact.

<sup>3</sup> The document the R.D. references is the document described in footnote 2, at 2.