Billing Code: 4410-11

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Martin Marietta Materials, Inc. 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. Martin Marietta Materials, Inc. et al., Civil Action No. 1:18-cv-00973. On April 25, 2018, the United States filed a Complaint alleging that Martin Marietta Materials, Inc.'s proposed acquisition of Panadero Corp. and Panadero Aggregates Holdings, LLC, including subsidiary Bluegrass Materials Company, LLC, 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 Defendants divest the lease to Martin Marietta's Forsyth Quarry, located in Suwanee, Georgia, and Bluegrass's Beaver Creek quarry, located in Hagerstown, Maryland, 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 N.W., Suite 8700, Washington, D.C. 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, N.W., Suite 8700
Washington, D.C. 20530,

and

STATE OF MARYLAND
Attorney General's Office
200 St. Paul Place, 19th Floor
Baltimore, Maryland 21202,

Plaintiffs,

v.

MARTIN MARIETTA MATERIALS, INC.
2710 Wycliff Road
Raleigh, North Carolina 27607,

LG PANADERO, L.P.
630 Fifth Avenue, 30th Floor
New York, New York 10111,

PANADERO CORP.,
200 W. Forsyth Street, 12th Floor
Jacksonville, Florida 32202,

PANADERO AGGREGATES HOLDINGS, LLC,
200 W. Forsyth Street, 12th Floor
Jacksonville, Florida 32202,

and

BLUEGRASS MATERIALS COMPANY, LLC
200 W. Forsyth Street, 12th Floor
Jacksonville, Florida 32202,

Defendants.

Civil Action No.: 1:18-cv-00973
Judge: Randolph Moss

COMPLAINT

Plaintiffs, the United States of America ("United States"), acting under the direction of the Attorney General of the United States, and the State of Maryland, acting by and through the Attorney General of Maryland, bring this civil antitrust action against Defendants to enjoin Martin Marietta Materials, Inc.'s ("Martin Marietta") proposed acquisition of Bluegrass Materials Company, LLC ("Bluegrass"). Plaintiffs allege as follows:

I. INTRODUCTION

1. On June 26, 2017, Martin Marietta and Bluegrass announced a definitive agreement under which Martin Marietta would acquire Bluegrass for $1.625 billion. The merger would expand the reach of one of the largest aggregate producers in the United States and create a combined firm with annual total revenues of approximately $4 billion.

2. Aggregate is a key input in asphalt and ready mix concrete and is used to build roads, highways, bridges, and other construction projects. The proposed acquisition would eliminate head-to-head competition between Martin Marietta and Bluegrass in supplying aggregate to customers in and immediately around Forsyth and north Fulton County, Georgia, and in and immediately around Washington County, Maryland. For a significant number of customers in these areas, Martin Marietta and Bluegrass are two of only three competitive sources of aggregate qualified by the respective states' Departments of Transportation ("DOT"). Elimination of competition between Martin Marietta and Bluegrass in these areas likely would give Martin Marietta the ability to raise prices or decrease the quality of service provided to these customers.

3. As a result, Martin Marietta's proposed acquisition of Bluegrass likely would substantially lessen competition for DOT-qualified aggregate in and immediately

around Forsyth and north Fulton County, Georgia, and in and immediately around Washington County, Maryland, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

II. THE PARTIES AND THE PROPOSED TRANSACTION

4. Defendant Martin Marietta is a North Carolina corporation with its headquarters in Raleigh, North Carolina. Martin Marietta is a leading supplier of aggregate and heavy building materials in the United States, with operations in 26 states. In 2017, Martin Marietta had net sales of $3.9 billion.

5. Defendant Bluegrass is a Delaware limited liability company with its headquarters in Jacksonville, Florida. Bluegrass operates 17 rock quarries, one sand plant, and two concrete manufacturing plants across Kentucky, Tennessee, South Carolina, Georgia, Pennsylvania, and Maryland.

6. Defendant Panadero Aggregates Holdings, LLC ("Panadero Aggregates") is a Delaware limited liability company with its headquarters in Jacksonville, Florida. Panadero Aggregates was formed to acquire, develop, and operate aggregate and other construction materials businesses. Panadero Aggregates is the owner of Bluegrass.

7. Defendant Panadero Corp. ("Panadero") is a Delaware corporation with its headquarters in Jacksonville, Florida. Panadero is a wholly-owned subsidiary of LG Panadero and is the majority owner of Panadero Aggregates. Panadero, which reported consolidated net sales of $199.5 million in 2016, was formed to acquire, develop, and operate aggregate and other construction materials businesses.

8. Defendant LG Panadero, L.P. ("LG Panadero") is a Delaware limited partnership headquartered in New York, New York. LG Panadero is the owner of Panadero.

9. Pursuant to the Securities Purchase Agreement dated June 23, 2017, Martin Marietta would acquire Panadero and Panadero Aggregates, including Bluegrass, from LG Panadero for $1.625 billion.

III. JURISDICTION AND VENUE

10. The United States brings this action pursuant to Section 15 of the Clayton Act, 15 U.S.C. §§ 4 and 25, as amended, to prevent and restrain Defendants from violating Section 7 of the Clayton Act, 15 U.S.C. § 18.

11. The State of Maryland brings this action under Section 16 of the Clayton Act, 15 U.S.C. § 26, to prevent and restrain Defendants from violating Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. The State of Maryland, by and through the Attorney General of Maryland, brings this action as *parens patriae* on behalf of the citizens, general welfare, and the general economy of the State of Maryland.

12. Defendants produce and sell aggregate in the flow of interstate commerce. Defendants' activity in the production and sale of aggregate 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.

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

IV. TRADE AND COMMERCE

A. Aggregate Is an Essential Input for Many Road and Construction Projects

14. Aggregate is a category of material used for road and construction projects. Produced in quarries, mines, and gravel pits, aggregate is predominantly limestone, granite, or other dark-colored igneous rock. Different types and sizes of rock are needed to meet different specifications for use in asphalt concrete, ready mix concrete, industrial processes, and other products. Asphalt concrete consists of approximately 95 percent aggregate, and ready mix concrete is made of up of approximately 75 percent aggregate. Aggregate thus is an integral input for road and other construction projects.

15. For each construction project, a customer establishes specifications that must be met for each application for which aggregate is used. For example, state DOTs, including the Georgia and Maryland DOTs, set specifications for aggregate used to produce asphalt concrete, ready mix concrete, and road base for state DOT projects. State DOTs specify characteristics such as hardness, durability, size, polish value, and a variety of other characteristics. The specifications are intended to ensure the longevity and safety of the roads, bridges and other projects for which aggregate is used.

16. State DOTs qualify quarries according to the end uses of the aggregate, to ensure that the stone used in an application meets the necessary specifications. In addition, state DOTs test the aggregate at various points: at the quarry before it is shipped; when the aggregate is sent to the purchaser to produce an end product such as asphalt concrete; and after the end product has been produced. Many cities, counties,

commercial entities, and individuals in Georgia and Maryland have adopted their respective state DOT-qualified aggregate specifications when building roads, bridges, and other construction projects in order to optimize the longevity of their projects.

B. Transportation Is a Significant Component of the Cost of Aggregate

17. Aggregate is priced by the ton and is a relatively inexpensive product, with prices typically ranging from approximately five to twenty dollars per ton. A variety of approaches are used to price aggregate. For small volumes, aggregate often is sold according to a posted price. For large volumes, customers typically either negotiate prices for a particular job or negotiate yearly requirements contracts, seeking bids from multiple aggregate suppliers.

18. In areas where aggregate is locally available, it is transported from quarries to customers by truck. Truck transportation is expensive, and transportation costs can become a significant portion of the total cost of aggregate.

C. Relevant Markets

1. State DOT-Qualified Aggregate Is a Relevant Product Market

19. Within the broad category of aggregate, different types and sizes of stone are used for different purposes. For instance, aggregate qualified for use as road base may not be the same size and type of rock as aggregate qualified for use in asphalt concrete. Accordingly, aggregate types and sizes are not interchangeable with one another and demand for each is separate. Thus, each type and size of aggregate likely is a separate line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

20. State DOTs qualify aggregate for use in road construction and other projects in that particular state. DOT-qualified aggregate meets particular standards for size, physical composition, functional characteristics, end uses, and availability. A customer whose job specifies aggregate qualified by a particular state's DOT cannot substitute aggregate or other materials that have not been so qualified.

21. Although numerous narrower product markets exist, the competitive dynamic for most types of state DOT-qualified aggregate is nearly identical, as a quarry can typically produce all, or nearly all, types of DOT-qualified aggregate for a particular state. Therefore, most types of DOT-qualified aggregate for a particular state may be combined for analytical convenience into a single relevant product market for the purpose of evaluating the competitive impact of the acquisition.

22. A small but significant increase in the price of state DOT-qualified aggregate would not cause a sufficient number of customers to substitute to another type of aggregate or another material so as to make such a price increase unprofitable. Accordingly, the production and sale of Georgia DOT-Qualified Aggregate and Maryland DOT-Qualified Aggregate (hereinafter "DOT-Qualified Aggregate") are distinct lines of commerce and relevant product markets within the meaning of Section 7 of the Clayton Act.

2. The Relevant Geographic Markets Are Local

23. Aggregate is a relatively low-cost product that is bulky and heavy. As a result, the cost of transporting aggregate is high compared to the value of the product.

24. When customers seek price quotes or bids, the distance from the quarry to the project site or plant location will have a considerable impact on the selection of a

supplier, due to the high cost of transporting aggregate relative to the low value of the product. Suppliers know the importance of transportation costs to a potential customer's selection of an aggregate supplier; they know the locations of their competitors, and they often will factor the cost of transportation from other suppliers into the price or bid that they submit.

25. The primary factor that determines the area a supplier will serve is the location of competing quarries. When quoting prices or submitting bids, aggregate suppliers will account for the location of the project site or plant, the cost of transporting aggregate to the project site or plant, and the locations of the competitors that might bid on a job. Therefore, depending on the location of the project site or plant, suppliers are able to adjust their bids to account for the distance other competitors are from a job.

a. The Forsyth and North Fulton County Area Is a Relevant Geographic Market

26. Martin Marietta operates the Forsyth quarry in Suwanee, Georgia, and Bluegrass owns and operates the Cumming quarry in Cumming, Georgia. Customers in and immediately around Forsyth County and Fulton County north of the Chattahoochee River (hereinafter referred to as the "Forsyth and North Fulton County Area") are served by both the Forsyth and Cumming quarries. Customers with plants or jobs in the Forsyth and North Fulton County Area may, depending on the location of their plant or job sites, economically procure Georgia DOT-Qualified Aggregate from the Forsyth and Cumming quarries, or from quarries operated by a third firm located in Norcross, Buford, and Ball Ground, Georgia. Other more distant quarries cannot compete successfully on a regular basis for a significant number of customers with plants or jobs in the Forsyth and North Fulton County Area because they are too far away and transportation costs are too great.

27. Customers likely would be unable to switch to suppliers outside the Forsyth and North Fulton County Area to defeat a small but significant price increase. Accordingly, the Forsyth and North Fulton County Area is a relevant geographic market for the production and sale of Georgia DOT-Qualified Aggregate within the meaning of Section 7 of the Clayton Act.

b. The Washington County Area Is a Relevant Geographic Market

28. Martin Marietta owns and operates the Boonsboro quarry in Boonsboro, Maryland, and the Pinesburg quarry in Williamsport, Maryland, and Bluegrass owns and operates the Beaver Creek quarry in Hagerstown, Maryland. The Boonsboro, Pinesburg, and Beaver Creek quarries each serve customers in and immediately around Washington County, Maryland (hereinafter referred to as the "Washington County Area"). Customers with plants or jobs in the Washington County Area may, depending on the location of their plant or job site, economically procure Maryland DOT-Qualified Aggregate from the Boonsboro, Pinesburg, or Beaver Creek quarries, or from a quarry operated by a third firm located in nearby Chambersburg, Pennsylvania. Other more distant quarries cannot compete successfully on a regular basis for customers with plants or jobs in the Washington County Area because they are too far away and transportation costs are too great.

29. Customers likely would be unable to switch to more distant suppliers outside of the Washington County Area to defeat a small but significant price increase. Accordingly, the Washington County Area is a relevant geographic market for the production and sale of Maryland DOT-Qualified Aggregate within the meaning of Section 7 of the Clayton Act.

D. Martin Marietta's Acquisition of Bluegrass Is Anticompetitive

30. Vigorous competition between Martin Marietta and Bluegrass on price and customer service in the production and sale of DOT-Qualified Aggregate has benefitted customers in the Forsyth and North Fulton County Area and in the Washington County Area.

31. In each of these areas, the competitors that constrain Martin Marietta and Bluegrass from raising prices on DOT-Qualified Aggregate are limited to those who are qualified by the Georgia and Maryland DOTs to supply aggregate and can economically transport the aggregate into these areas. As alleged above, for a significant number of customers in each area, there is only one other firm that produces DOT-Qualified Aggregate and can economically serve customers at their plants or job sites. The proposed acquisition will eliminate the competition between Martin Marietta and Bluegrass and reduce from three to two the number of suppliers of DOT-Qualified Aggregate for a significant number of customers in each area.

32. For a significant number of customers in each area, a combined Martin Marietta and Bluegrass will have the ability to increase prices for DOT-Qualified Aggregate and decrease service by limiting availability or delivery options. DOT-Qualified Aggregate producers know the distance from their own quarries and their competitors' quarries to a customer's job site. Generally, because of transportation costs, the farther a supplier's closest competitor is from a job site, the higher the price and margin that supplier can expect for that project. Post-acquisition, in instances where Martin Marietta and Bluegrass quarries are the closest locations to a customer's project,

the combined firm, using the knowledge of its competitors' locations, will be able to charge such customers higher prices or decrease the level of customer service.

33. The response of other suppliers of DOT-Qualified Aggregate will not be sufficient to constrain a unilateral exercise of market power by Martin Marietta after the acquisition.

34. The proposed acquisition will therefore substantially lessen competition in the market for DOT-Qualified Aggregate in the Forsyth and North Fulton County Area and in the Washington County Area and will likely lead to higher prices and reduced customer service for consumers of such products, in violation of Section 7 of the Clayton Act.

E. Difficulty of Entry

35. Timely, likely, and sufficient entry in the production and sale of DOT-Qualified Aggregate in the Forsyth and North Fulton County Area and in the Washington County Area is unlikely, given the substantial time and cost required to open a quarry.

36. Quarries are particularly difficult to locate and permit. First, securing the proper site for a quarry is challenging and time-consuming. 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 site must be close to customer plants and likely job sites given the high cost of transporting aggregate.

37. Second, once a suitable 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 altogether or make the process of opening it much more time-consuming and costly.

38. Third, even after a site is acquired and permitted, the owner must spend significant time and resources to prepare the land for quarry operations and purchase and install the necessary equipment.

39. Because of the cost and difficulty of establishing a quarry, entry will not be timely, likely or sufficient to mitigate the anticompetitive effects of Martin Marietta's proposed acquisition of Bluegrass.

V. VIOLATION ALLEGED

40. Martin Marietta's proposed acquisition of Bluegrass likely will substantially lessen competition in the production and sale of DOT-Qualified Aggregate in the Forsyth and North Fulton County Area and in the Washington County Area, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

41. Unless enjoined, the proposed acquisition likely will have the following anticompetitive effects, among others:

(a) actual and potential competition between Martin Marietta and Bluegrass in the production and sale of DOT-Qualified Aggregate in the Forsyth and North Fulton County Area and in the Washington County Area will be eliminated; and

(b) prices for DOT-Qualified Aggregate in the Forsyth and North Fulton County Area and in the Washington County Area likely will increase and customer service likely will decrease.

VI. REQUESTED RELIEF

42. Plaintiffs request that this Court:

(a) adjudge and decree that Martin Marietta's acquisition of Bluegrass would be unlawful and violate Section 7 of the Clayton Act, 15 U.S.C. § 18;

(b) preliminarily and permanently enjoin and restrain the Defendants and all persons acting on their behalf from consummating the proposed acquisition of Bluegrass by Martin Marietta, or from entering into or carrying out any other contract, agreement, plan, or understanding, the effect of which would be to combine Martin Marietta with Bluegrass;

(c) award Plaintiffs their costs for this action; and

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

Dated: April 25, 2018

FOR PLAINTIFF UNITED STATES OF AMERICA:

MAKAN DELRAHIM (D.C. Bar #457795)
Assistant Attorney General

MARIBETH PETRIZZI (D.C. Bar #435204)
Chief
Defense, Industrials, and Aerospace Section

ANDREW C. FINCH (D.C. Bar #494992)
Principal Deputy Assistant Attorney General

STEPHANIE A. FLEMING
Assistant Chief
Defense, Industrials, and Aerospace Section

BERNARD A. NIGRO, JR.
(D.C. Bar #412357)
Deputy Assistant Attorney General

DAVID E. ALTSCHULER (D.C. Bar #983023)
Assistant Chief
Defense, Industrials, and Aerospace Section

PATRICIA A. BRINK
Director of Civil Enforcement

KERRIE J. FREEBORN* (D.C. Bar #503143)
JAMES K. FOSTER
STEPHEN A. HARRIS
JOHN M. LYNCH (D.C. Bar #418313)
JAY D. OWEN
ANGELA Y. TING (D.C. Bar #449576)

Attorneys
United States Department of Justice
Antitrust Division
Defense, Industrials, and Aerospace Section
450 Fifth Street, N.W., Suite 8700
Washington, D.C. 20530
Tel.: (202) 598-2300
Fax: (202) 514-9033
Email: kerrie.freeborn@usdoj.gov
*Attorney of Record

FOR PLAINTIFF STATE OF MARYLAND:

BRIAN E. FROSH
MARYLAND ATTORNEY GENERAL

_____

JOHN R. TENNIS
Assistant Attorney General
Chief, Antitrust Division

_____

GARY HONICK
Senior Assistant Attorney General
200 St. Paul Place, 19th Floor
Baltimore, MD 21202
Tel: (410) 576-6470
Fax: (410) 576-7830
Email: jtennis@oag.state.md.us
Email: ghonick@oag.state.md.us

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA and STATE OF MARYLAND, *Plaintiffs,* v. MARTIN MARIETTA MATERIALS, INC., LG PANADERO, L.P., PANADERO CORP., PANADERO AGGREGATES HOLDINGS, LLC, and BLUEGRASS MATERIALS COMPANY, LLC, *Defendants.*	Civil Action No.: 1:18-cv-00973 Judge: Randolph Moss

PROPOSED FINAL JUDGMENT

WHEREAS, Plaintiffs, United States of America and the State of Maryland, filed their Complaint on April 25, 2018, Plaintiffs and Defendants, Martin Marietta Materials, Inc., LG Panadero, L.P., Panadero Corp, Panadero Aggregates Holdings, LLC, and Bluegrass Materials Company, LLC, 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, Plaintiffs require Defendants to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, Defendants have represented to Plaintiffs 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, as amended (15 U.S.C. § 18).

II. DEFINITIONS

As used in this Final Judgment:

A. "Acquirer" or "Acquirers" means the entity or entities to whom Defendants divest the Divestiture Assets.

B. "Acquirer of the Georgia Divestiture Assets" means Midsouth Paving, Inc., or another entity to which Defendants divest the Georgia Divestiture Assets.

C. "Acquirer of the Maryland Divestiture Assets" means the entity to which Defendants divest the Maryland Divestiture Assets.

D. "Closing" means the consummation of the divestiture of all the Divestiture Assets pursuant to either Section IV or Section V of this Final Judgment.

E. "Completion of the Transaction" means the closing of Martin Marietta's acquisition of Panadero Corp. and Panadero Aggregates Holdings, LLC, including Bluegrass Materials Company, LLC.

F. "Martin Marietta" means Defendant Martin Marietta Materials, Inc., a North Carolina corporation with its headquarters in Raleigh, North Carolina, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

G. "LG Panadero" means Defendant LG Panadero, L.P., a Delaware limited partnership with its headquarters in New York, New York, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

H. "Panadero" means Defendant Panadero Corp., a Delaware corporation with its headquarters in Jacksonville, Florida, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

I. "Panadero Aggregates" means Defendant Panadero Aggregates Holdings, LLC, a Delaware limited liability company with its headquarters in Jacksonville, Florida,

its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

J. "Bluegrass" means Defendant Bluegrass Materials Company, LLC, a Delaware limited liability company with its headquarters in Jacksonville, Florida, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

K. "Bluegrass Entities" means LG Panadero, Panadero, Panadero Aggregates, and Bluegrass.

L. "Midsouth" means Midsouth Paving, Inc., a Delaware corporation with its headquarters in Birmingham, Alabama, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees. Midsouth is a subsidiary of CRH plc and CRH Americas Materials, Inc.

M. "Forsyth Quarry" means Martin Marietta's quarry located at 3561 Peachtree Pkwy., Suwanee, Georgia 30024.

N. "Beaver Creek Quarry" means Bluegrass's quarry located at 10101 Mapleville Rd., Hagerstown, Maryland 21740.

O. "Georgia Divestiture Assets" means:

1. Martin Marietta's lease to the Forsyth Quarry;

2. all tangible assets used at the Forsyth Quarry, including, but not limited to, all manufacturing equipment, tooling, and fixed assets, mining equipment, aggregate reserves, personal property, inventory, office furniture, materials, supplies, on- or off-site warehouses or storage facilities, and all other tangible property and assets used

in connection with the Forsyth Quarry; all licenses, permits, and authorizations issued by any governmental organization relating to the Forsyth Quarry; all contracts, agreements, teaming arrangements, leases (including renewal rights), commitments, certifications and understandings, including sales agreements and supply agreements relating to the Forsyth Quarry, except for regional or national service agreements; all customer lists, contracts, accounts, and credit records relating to the Forsyth Quarry; all repair and performance records and all other records relating to the Forsyth Quarry; and

3. all intangible assets used in the production and sale of aggregate at the Forsyth Quarry, including but not limited to, all contractual rights, patents, licenses and sublicenses, intellectual property, copyrights, trademarks, trade names, service marks, service names (provided, however, that such marks and names shall not include the term "Martin Marietta"), technical information, computer software (including dispatch software and management information systems) and related documentation (provided, however, that the Acquirer may elect to acquire extracted data relating to the Forsyth Quarry without the accompanying software), know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, quality assurance and control procedures, design tools and simulation capability, all manuals and technical information Martin Marietta provides to its own employees, customers, suppliers, agents, or licensees, and all data (including aggregate reserve testing information) concerning the Forsyth Quarry.

P. "Maryland Divestiture Assets" means:

1. the Beaver Creek Quarry;

2. all tangible assets used at the Beaver Creek Quarry, including, but not limited to, all manufacturing equipment, tooling, and fixed assets, mining equipment, aggregate reserves, personal property, inventory, office furniture, materials, supplies, on- or off-site warehouses or storage facilities, and all other tangible property and assets used in connection with the Beaver Creek Quarry; all licenses, permits, and authorizations issued by any governmental organization relating to the Beaver Creek Quarry; all contracts, agreements, teaming arrangements, leases (including renewal rights), commitments, certifications and understandings, including sales agreements and supply agreements, except for regional or national service agreements; all customer lists, contracts, accounts, and credit records relating to the Beaver Creek Quarry; all repair and performance records and all other records relating to the Beaver Creek Quarry; and

3. all intangible assets used in the production and sale of aggregate at the Beaver Creek Quarry, including but not limited to, all contractual rights, patents, licenses and sublicenses, intellectual property, copyrights, trademarks, trade names, service marks, service names (provided, however, that such marks and names shall not include the word “Bluegrass”), technical information, computer software (including dispatch software and management information systems) and related documentation (provided, however, that the Acquirer may elect to acquire extracted data relating to the Beaver Creek Quarry without the accompanying software), know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, quality assurance and control procedures, design tools and simulation capability, all manuals and technical information Bluegrass provides to its own

employees, customers, suppliers, agents, or licensees, and all data (including aggregate reserve testing information) concerning the Beaver Creek Quarry.

Q. "Divestiture Assets" means the Georgia Divestiture Assets and the Maryland Divestiture Assets.

III. APPLICABILITY

A. This Final Judgment applies to Martin Marietta and the Bluegrass Entities, 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 Section 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 Acquirers of the assets divested pursuant to this Final Judgment.

IV. DIVESTITURES

A. Defendants are ordered and directed, within twenty-one (21) calendar days after the Court's signing of the Hold Separate Stipulation and Order in this matter, to divest the Georgia Divestiture Assets in a manner consistent with this Final Judgment to Midsouth or another Acquirer of the Georgia Divestiture Assets 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 Georgia Divestiture Assets as expeditiously as possible.

B. Defendants are ordered and directed, within ninety (90) calendar days after the filing of the Complaint in this matter, or five (5) calendar days after notice of the entry of this Final Judgment by the Court, whichever is later, to divest the Maryland Divestiture Assets in a manner consistent with this Final Judgment to an Acquirer of the Maryland Divestiture Assets acceptable to the United States, in its sole discretion, after consultation with the State of Maryland. 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 Maryland Divestiture Assets as expeditiously as possible.

C. In the event Defendants are attempting to divest the Georgia Divestiture Assets to an Acquirer other than Midsouth, and in accomplishing the divestiture of the Maryland Divestiture Assets ordered by this Final Judgment, Defendants promptly shall make known, by usual and customary means, the availability of the Divestiture Assets. Defendants shall inform any person making an inquiry regarding a possible purchase of the Divestiture Assets that they are being divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Defendants shall offer to furnish to all prospective Acquirers, 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.

D. Defendants shall provide the Acquirer(s) and the United States information relating to the personnel involved in the operation of the Divestiture Assets to enable the Acquirer(s) to make offers of employment. Defendants will not interfere with any negotiations by the Acquirer(s) to employ any Defendant employee whose primary responsibility is the operation of the Divestiture Assets.

E. Defendants shall permit prospective Acquirers of the Divestiture Assets to have reasonable access to personnel and to make inspections of the physical facilities of Divestiture Assets; access to any and all environmental, zoning, and other permit documents and information; and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

F. Defendants shall warrant to the Acquirer(s) that each Divestiture Asset will be operational on the date of sale.

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 warrant to the Acquirer(s) that (1) there are no material defects in the environmental, zoning, or other permits pertaining to the operation of each Divestiture Asset, and (2) following the sale of the Divestiture Assets, Defendants will 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 divestitures pursuant to Section IV, or by Divestiture Trustee appointed pursuant to Section 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, after consultation with the

State of Maryland with respect to the Maryland Divestiture Assets, that the Divestiture Assets can and will be used by the Acquirer(s) as part of a viable, ongoing business in the production and sale of Georgia and Maryland Department of Transportation-qualified aggregate ("State DOT-Qualified Aggregate"). The divestitures, whether pursuant to Section IV or Section V of this Final Judgment,

(1) shall be made to an Acquirer that, in the United States' sole judgment, after consultation with the State of Maryland with respect to the Maryland Divestiture Assets, has the intent and capability (including the necessary managerial, operational, technical, and financial capability) of competing effectively in the business of producing and selling State DOT-Qualified Aggregate; and

(2) shall be accomplished so as to satisfy the United States, in its sole discretion, after consultation with the State of Maryland with respect to the Maryland Divestiture Assets, that none of the terms of any agreement between an Acquirer and Defendants give Defendants the ability unreasonably to raise the Acquirer's or Acquirers' costs, to lower the Acquirer's or Acquirers' efficiency, or otherwise to interfere in the ability of the Acquirer to compete effectively.

V. APPOINTMENT OF DIVESTITURE TRUSTEE

A. If Defendants have not divested all of the Divestiture Assets within the time periods specified in Paragraphs IV(A) and IV(B), Defendants shall notify the United States, and the State of Maryland with respect to the Maryland Divestiture Assets, 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 remaining Divestiture Assets.

B. After the appointment of a Divestiture Trustee becomes effective, only the Divestiture Trustee shall have the right to sell the remaining Divestiture Assets. The Divestiture Trustee shall have the power and authority to accomplish the divestitures to

an Acquirer acceptable to the United States, after consultation with the State of Maryland with respect to the Maryland Divestiture Assets, 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 Defendants 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 divestitures. 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 Defendants 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 Defendants 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 divestitures and the speed with which it is accomplished, but timeliness is paramount. If the Divestiture Trustee and Defendants 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 Defendants and the United States.

E. Defendants shall use their best efforts to assist the Divestiture Trustee in accomplishing the required divestitures. 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 divestitures.

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 divestitures 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 divestitures 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 divestitures, (2) the reasons, in the Divestiture Trustee's judgment, why the required divestitures have 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, Defendants or the Divestiture Trustee, whichever is then responsible for effecting the divestitures required herein, shall notify the United States, and the State of Maryland with respect to the Maryland Divestiture Assets, of any proposed divestitures required by Section IV or Section 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 divestitures 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, after consultation with the State of Maryland with respect to the Maryland Divestiture Assets, may request from Defendants, the proposed Acquirer(s), any other third party, or the Divestiture Trustee, if applicable, additional information concerning the proposed divestitures, the proposed Acquirer(s), 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(s), any third party, and the Divestiture Trustee, whichever is later, the United States shall provide written notice to Defendants and the Divestiture Trustee, if there is one, stating whether or not it objects to the proposed divestitures. If the United States provides written notice that it does not object, the divestitures 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(s) or upon objection by the United States, the divestitures proposed under Section IV or Section V shall not be consummated. Upon objection by Defendants under Paragraph V(C), the divestitures 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 Section V of this Final Judgment.

VIII. HOLD SEPARATE

Until the divestitures required by this Final Judgment have been accomplished, the Bluegrass Entities shall until the Completion of the Transaction, and Martin Marietta shall until Closing, 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 divestitures 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 divestitures have been completed under Section IV or Section V, the Bluegrass Entities shall until the Completion of the Transaction, and Martin Marietta shall until Closing, deliver to the United States an affidavit, which shall describe the fact and manner of Defendants' compliance with Section IV or Section V of this Final Judgment. Affidavits provided by Martin Marietta must be signed by its Chief Financial Officer and General Counsel; each affidavit provided by the Bluegrass Entities must be signed by the highest ranking officer of each Defendant included in the Bluegrass Entities; and affidavits provided by Bluegrass Materials Co., LLC must also be signed by its CFO. 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 the Bluegrass Entities shall until the Completion of the Transaction, and Martin Marietta shall until Closing, 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 divestitures have 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, 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, or the Maryland Attorney General's Office, 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. NO REACQUISITION

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

XII. 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.

XIII. 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. In any enforcement proceeding in which the Court finds that the 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.

XIV. EXPIRATION OF FINAL JUDGMENT

Unless this Court grants an extension, this Final Judgment shall expire ten (10) 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 the Defendants that the divestitures have been completed and that the continuation of the Final Judgment no longer is necessary or in the public interest.

XV. 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 responses to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: _____

Court approval subject to procedures of 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 and STATE OF MARYLAND, *Plaintiffs,* v. MARTIN MARIETTA MATERIALS, INC., LG PANADERO, L.P., PANADERO CORP., PANADERO AGGREGATES HOLDINGS, LLC, and BLUEGRASS MATERIALS COMPANY, LLC, *Defendants.*	Civil Action No.: 1:18-cv-00973 Judge: Randolph Moss

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

On June 26, 2017, Martin Marietta Materials, Inc. ("Martin Marietta") and

Bluegrass Materials Company, LLC ("Bluegrass") announced a definitive agreement under which Martin Marietta would acquire Bluegrass for approximately $1.625 billion. The United States and the State of Maryland ("Plaintiffs") filed a civil antitrust Complaint on April 25, 2018, seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of the proposed acquisition would be to substantially lessen competition in the production and sale of Department of Transportation ("DOT")-qualified aggregate in and immediately around Forsyth and north Fulton County, Georgia and in and immediately around Washington County, Maryland, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. This loss of competition likely would result in increased prices and decreased customer service for customers in those areas.

At the same time the Complaint was filed, Plaintiffs also filed a Hold Separate Stipulation and Order ("Hold Separate") and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, Defendants are required to divest the lease to Martin Marietta's Forsyth quarry and all of the quarry's assets to Midsouth Paving, Inc., a subsidiary of CRH, plc and CRH Americas Materials, Inc., and to divest Bluegrass's Beaver Creek quarry and all of the quarry's assets to a yet-to-be determined purchaser that must be approved by the United States (collectively, the "Divestiture Assets"). Under the terms of the Hold Separate, Defendants will take certain steps to ensure that prior to their divestiture the Divestiture Assets are operated as competitively independent, economically viable and ongoing business concerns, that they will remain independent and uninfluenced by the consummation of the acquisition, and that competition is maintained during the pendency of the ordered divestitures.

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

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants and the Proposed Transaction

Defendant Martin Marietta is a North Carolina corporation with its headquarters in Raleigh, North Carolina. Martin Marietta is a leading supplier of aggregates and heavy building operations, with operations in 26 states. In 2017, Martin Marietta had net sales of $3.9 billion.

Defendant Bluegrass is a Delaware limited liability company with its headquarters in Jacksonville, Florida. Bluegrass operates 17 rock quarries, one sand plant, and two concrete manufacturing plants across Kentucky, Tennessee, South Carolina, Georgia, Pennsylvania, and Maryland.

Defendant Panadero Aggregates Holdings, LLC ("Panadero Aggregates") is a Delaware limited liability company with its headquarters in Jacksonville, Florida. Panadero Aggregates was formed to acquire, develop, and operate aggregate and other construction materials businesses, and is the owner of Bluegrass.

Defendant Panadero Corp. ("Panadero") is a Delaware corporation with its headquarters in Jacksonville, Florida. Panadero is a wholly-owned subsidiary of LG Panadero and is the majority owner of Panadero Aggregates. Panadero, which reported consolidated net sales of $199.5 million in 2016, was formed to acquire, develop, and

operate aggregate and other construction materials businesses.

Defendant LG Panadero, L.P. ("LG Panadero") is a Delaware limited partnership headquartered in New York, New York. LG Panadero is the owner of Panadero.

Pursuant to a Securities Purchase Agreement dated June 23, 2017, Martin Marietta would acquire Panadero and Panadero Aggregates, including Bluegrass, from LG Panadero for $1.625 billion. The proposed transaction, as initially agreed to by Defendants on June 23, 2017, would lessen competition substantially in the production and sale of DOT-qualified aggregate in and immediately around Forsyth and north Fulton County, Georgia and in and immediately around the Washington County, Maryland Area. This acquisition is the subject of the Complaint and proposed Final Judgment that Plaintiffs filed today.

B. Industry Overview

Aggregate is a category of material used for road and construction projects. Produced in quarries, mines, and gravel pits, aggregate is predominantly limestone, granite, or other dark-colored igneous rock. Different types and sizes of rock are needed to meet different specifications for use in asphalt concrete, ready mix concrete, industrial processes, and other products. Asphalt concrete consists of approximately 95 percent aggregate, and ready mix concrete is made of up of approximately 75 percent aggregate. Aggregate thus is an integral input for road and other construction projects.

For each construction project, a customer establishes specifications that must be met for each application for which aggregate is used. For example, state DOTs, including the Georgia and Maryland DOTs, set specifications for aggregate used to produce asphalt concrete, ready mix concrete, and road base for state DOT projects.

State DOTs specify characteristics such as hardness, durability, size, polish value, and a variety of other characteristics. The specifications are intended to ensure the longevity and safety of the roads, bridges and other projects for which aggregate is used.

State DOTs qualify quarries according to the end uses of the aggregate, to ensure that the stone used in an application meets the necessary specifications. In addition, state DOTs test the aggregate at various points: at the quarry before it is shipped; when the aggregate is sent to the purchaser to produce an end product such as asphalt concrete; and after the end product has been produced. Many cities, counties, commercial entities, and individuals in Georgia and Maryland have adopted their respective state DOT-qualified aggregate specifications when building roads, bridges, and other construction projects in order to help ensure the longevity of their projects.

Aggregate is priced by the ton and is a relatively inexpensive product, with prices typically ranging from approximately five to twenty dollars per ton. A variety of approaches are used to price aggregate. For small volumes, aggregate often is sold according to a posted price. For large volumes, customers typically either negotiate prices for a particular job or negotiate yearly requirements contracts, seeking bids from multiple aggregate suppliers.

In areas where aggregate is locally available, it is transported from quarries to customers by truck. Truck transportation is expensive relative to the cost of the product itself, and transportation costs can become a significant portion of the total cost of aggregate.

C. Relevant Markets

1. State DOT-Qualified Aggregate Is a Relevant Product Market

According to the Complaint, within the broad category of aggregate, different types and sizes of stone are used for different purposes. For instance, aggregate qualified for use as road base may not be the same size and type of rock as aggregate qualified for use in asphalt concrete. Accordingly, aggregate types and sizes are not interchangeable for one another and demand for each is separate. Thus, the Complaint alleges that each type and size of aggregate likely is a separate line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

State DOTs qualify aggregate for use in road construction and other projects in that particular state. DOT-qualified aggregate meets particular standards for size, physical composition, functional characteristics, end uses, and availability. A customer whose job specifies aggregate qualified by a particular state's DOT cannot substitute aggregate or other materials that have not been so qualified.

The Complaint alleges that although numerous narrower product markets exist, the competitive dynamic for most types of state DOT-qualified aggregate is nearly identical, as a quarry can typically produce all, or nearly all, types of DOT-qualified aggregate for a particular state. Therefore, most types of DOT-qualified aggregate for a particular state may be combined for analytical convenience into a single relevant product market for the purpose of evaluating the competitive impact of the acquisition.

According to the Complaint, a small but significant increase in the price of state DOT-qualified aggregate would not cause a sufficient number of customers to substitute to another type of aggregate or another material so as to make such a price increase unprofitable. Accordingly, the Complaint alleges that the production and sale of Georgia DOT-Qualified Aggregate and Maryland DOT-Qualified Aggregate (hereinafter "DOT-

Qualified Aggregate") are distinct lines of commerce and relevant product markets within the meaning of Section 7 of the Clayton Act.

2. The Relevant Geographic Markets Are Local

When customers seek price quotes or bids for aggregate, the distance from the quarry to the project site or plant location will have a considerable impact on the selection of a supplier, due to the high cost of transporting aggregate relative to the low value of the product. Suppliers know the importance of transportation costs to a potential customer's selection of an aggregate supplier; they know the locations of their competitors, and they often will factor the cost of transportation from other suppliers into the price or bid that they submit. For these reasons, the primary factor that determines the area a supplier will serve is the location of competing quarries.

a. The Forsyth and North Fulton County Area Is a Relevant Geographic Market

According to the Complaint, Martin Marietta operates the Forsyth quarry in Suwanee, Georgia, and Bluegrass owns and operates the Cumming quarry in Cumming, Georgia. Customers in and immediately around Forsyth County and Fulton County north of the Chattahoochee River (hereinafter referred to as the "Forsyth and North Fulton County Area") are served by both the Forsyth and Cumming quarries. Customers with plants or jobs in the Forsyth and North Fulton County Area may, depending on the location of their plant or job sites, economically procure Georgia DOT-Qualified Aggregate from the Forsyth and Cumming quarries, or from quarries operated by a third firm located in Norcross, Buford, and Ball Ground, Georgia. Other more distant quarries cannot compete successfully on a regular basis for a significant number of customers with plants or jobs in the Forsyth and North Fulton County Area because they are too far

away and transportation costs are too great.

According to the Complaint, customers likely would be unable to switch to suppliers outside the Forsyth and North Fulton County Area to defeat a small but significant price increase. The Complaint therefore alleges that the Forsyth and North Fulton County Area is a relevant geographic market for the production and sale of Georgia DOT-Qualified Aggregate within the meaning of Section 7 of the Clayton Act.

b. The Washington County Area Is a Relevant Geographic Market

According to the Complaint, Martin Marietta owns and operates the Boonsboro quarry in Boonsboro, Maryland, and the Pinesburg quarry in Williamsport, Maryland, and Bluegrass owns and operates the Beaver Creek quarry in Hagerstown, Maryland. The Boonsboro, Pinesburg, and Beaver Creek quarries each serve customers in and immediately around Washington County, Maryland (hereinafter referred to as the "Washington County Area"). Customers with plants or jobs in the Washington County Area may, depending on the location of their plant or job site, economically procure Maryland DOT-Qualified Aggregate from the Boonsboro, Pinesburg, or Beaver Creek quarries, or from a quarry operated by a third firm located in nearby Chambersburg, Pennsylvania. Other more distant quarries cannot compete successfully on a regular basis for customers with plants or jobs in the Washington County Area because they are too far away and transportation costs are too great.

According to the Complaint, customers likely would be unable to switch to more distant suppliers outside of the Washington County Area to defeat a small but significant price increase. The Complaint therefore alleges that the Washington County Area is a relevant geographic market for the production and sale of Maryland DOT-Qualified

Aggregate within the meaning of Section 7 of the Clayton Act.

D. Martin Marietta's Acquisition of Bluegrass Is Anticompetitive

According to the Complaint, vigorous competition between Martin Marietta and Bluegrass on price and customer service in the production and sale of DOT-Qualified Aggregate has benefitted customers in the Forsyth and North Fulton County Area and in the Washington County Area.

The Complaint alleges that in each of these areas, the competitors that constrain Martin Marietta and Bluegrass from raising prices on DOT-Qualified Aggregate are limited to those who are qualified by the Georgia and Maryland DOTs to supply aggregate and can economically transport the aggregate into these areas. According to the Complaint, for a significant number of customers in each area, there is only one other firm that produces DOT-Qualified Aggregate and can economically serve customers at their plants or job sites. The proposed acquisition will eliminate the competition between Martin Marietta and Bluegrass and reduce from three to two the number of suppliers of DOT-Qualified Aggregate for a significant number of customers in each area.

According to the Complaint, for a significant number of customers in each area, a combined Martin Marietta and Bluegrass will have the ability to increase prices for DOT-Qualified Aggregate and decrease service by limiting availability or delivery options. DOT-Qualified Aggregate producers know the distance from their own quarries and their competitors' quarries to a customer's job site. Generally, because of transportation costs, the farther a supplier's closest competitor is from a job site, the higher the price and margin that supplier can expect for that project. Post-acquisition, in instances where Martin Marietta and Bluegrass quarries are the closest locations to a customer's project,

the combined firm, using the knowledge of its competitors' locations, will be able to charge such customers higher prices or decrease the level of customer service.

The Complaint alleges that the response of other suppliers of DOT-Qualified Aggregate will not be sufficient to constrain a unilateral exercise of market power by Martin Marietta after the acquisition. For all of these reasons, the Complaint alleges that the proposed acquisition will therefore substantially lessen competition in the market for DOT-Qualified Aggregate in the Forsyth and North Fulton County Area and in the Washington County Area and likely lead to higher prices and reduced customer service for consumers of such products, in violation of Section 7 of the Clayton Act.

E. Barriers to Entry

The Complaint alleges that entry in the production and sale of DOT-Qualified Aggregate in the Forsyth and North Fulton County Area and in the Washington County Area is unlikely to be timely or sufficient to offset the anticompetitive effects of the acquisition, given the substantial time and cost required to open a quarry.

According to the Complaint, quarries are particularly difficult to locate and permit. First, securing the proper site for a quarry is challenging and time-consuming. 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 site must be close to customer plants and likely job sites given the high cost of transporting aggregate. Second, once a suitable 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 altogether or make the process of 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 for quarry operations and purchase and install the necessary equipment.

For all of these reasons, the Complaint alleges that entry will not be timely, likely or sufficient to mitigate the anticompetitive effects of the acquisition.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture requirement of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in the production and sale of DOT-qualified aggregate in the Forsyth and North Fulton County Area and the Washington County Area by establishing a new, independent, and economically viable competitor in each area.

A. Divestiture

In the Forsyth and North Fulton County Area, Paragraph IV(A) of the proposed Final Judgment requires Defendants to divest the lease to Martin Marietta's Forsyth quarry and all tangible and intangible assets related to the quarry (the "Georgia Divestiture Assets") to Midsouth Paving, Inc. ("Midsouth"), or an alternative Acquirer acceptable to the United States, in its sole discretion, within twenty-one (21) days after the Court's signing of the Hold Separate. The United States required an upfront buyer for the divestiture of the Georgia Divestiture Assets because of the unique nature of the short-term lease being divested and the accompanying need to minimize the time before an Acquirer assumed control of the Forsyth quarry's operations. Midsouth, which is a subsidiary of CRH plc and CRH Americas Materials, Inc. (commonly known in the industry as "Oldcastle"), is an experienced operator of quarries in the region, with locations in Georgia, Alabama, and Tennessee.

In the Washington County Area, Paragraph IV(B) of the proposed Final Judgment requires the Defendants to divest Bluegrass's Beaver Creek quarry and all tangible and intangible assets related to the quarry (the "Maryland Divestiture Assets") to an Acquirer acceptable to the United States, in its sole discretion, after consultation with the State of Maryland. Defendants must complete the divestiture within ninety (90) days after the filing of the Complaint, or five (5) days after notice of entry of the Final Judgment by the Court, whichever is later.

With respect to the divestiture of both the Georgia and Maryland Divestiture Assets, Defendants must take all reasonable steps necessary to accomplish the divestitures quickly and shall cooperate with prospective purchasers. Paragraph IV(I) of the proposed Final Judgment further provides that Defendants must accomplish the divestitures in such a way as to satisfy the United States in its sole discretion, after consultation with the State of Maryland with respect to the Maryland Divestiture Assets, that the Divestiture Assets can and will be operated by the respective purchasers as viable, ongoing businesses that can compete effectively in the production and sale of State DOT-Qualified Aggregate.

The proposed Final Judgment also contains provisions intended to facilitate the respective purchasers' efforts to hire the employees involved in the operation of the Divestiture Assets. Paragraph IV(D) of the proposed Final Judgment requires Defendants to provide the Acquirers of the Divestiture Assets with information relating to the personnel involved in the operation of the Divestiture Assets to enable the Acquirers to make offers of employment, and provides that Defendants will not interfere with any negotiations by the Acquirers to hire these employees.

In the event that Defendants do not accomplish the divestitures within the periods prescribed in the proposed Final Judgment, Paragraph V(A) of the Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture of any remaining Divestiture Assets. If a trustee is appointed, the proposed Final Judgment provides that Defendants will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. Paragraph V(F) of the proposed Final Judgment requires that, after his or her appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture. Paragraph V(G) of the proposed Final Judgment requires that, at the end of six months, if the divestiture has not been accomplished, the trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate, in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

B. Compliance Affidavits

The proposed Final Judgment requires, in Paragraph IX(A), that the Defendants inform the United States of their compliance with the divestiture requirements of the proposed Final Judgment by delivering affidavits to the United States 20 days after the filing of the Complaint, and every 30 days thereafter until the divestitures have been completed. Martin Marietta's affidavits must be signed by its Chief Financial Officer and General Counsel. Defendants LG Panadero, Panadero, and Panadero Aggregates lack both a General Counsel and a Chief Financial Officer, so those entities must submit affidavits from each company's highest ranking officer. Bluegrass also is not represented

by a General Counsel, but will submit affidavits from both its highest ranking officer and Chief Financial Officer.

C. Enforcement and Expiration of the Final Judgment

The proposed Final Judgment contains provisions designed to promote compliance and make enforcement of Division consent decrees as effective as possible. Paragraph XIII(A) provides that the United States retains and reserves all rights to enforce the provisions of the proposed Final Judgment, including its right 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 the 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 XIII(B) of the proposed Final Judgment further provides that should the Court find in an enforcement proceeding that the 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 XIII(B) provides that in 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, or costs incurred in connection with any enforcement effort, including the investigation of the potential violation.

Finally, Section XIV of the proposed Final Judgment provides that the Final Judgment shall expire ten (10) years from the date of its entry, except that after five (5) 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.

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

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

Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the *Federal Register*, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the *Federal Register*.

Written comments should be submitted to:

Maribeth Petrizzi
Chief, Defense, Industrials, and Aerospace Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW, Suite 8700
Washington, D.C. 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

Plaintiffs considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. Plaintiffs could have continued the litigation and

sought preliminary and permanent injunctions against Martin Marietta's acquisition of Bluegrass. Plaintiffs are satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the production and sale of DOT-Qualified Aggregate in the Forsyth and North Fulton County and Washington County Areas. Thus, the proposed Final Judgment would achieve all or substantially all of the relief Plaintiffs 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.").[1]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc*., 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States v.*

[1] The 2004 amendments substituted "shall" for "may" in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

Bechtel 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).[2] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also 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

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

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 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.[3] A court can make its public interest determination based on the competitive

[3] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting

impact statement and response to public comments alone. *U.S. Airways*, 38 F. Supp. 3d at 75.

VIII. DETERMINATIVE DOCUMENTS

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

Dated: April 25, 2018

Respectfully submitted,

FOR PLAINTIFF
UNITED STATES OF AMERICA

Kerrie J. Freeborn* (D.C. Bar #503143)
United States Department of Justice
Antitrust Division
Defense, Industrials, and Aerospace Section
450 Fifth Street, N.W., Suite 8700
Washington, D.C. 20530
Tel: (202) 598-2300
Fax: (202) 514-9033
Email: kerrie.freeborn@usdoj.gov
*Attorney of Record

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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.").

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