Department of Justice
Antitrust Division

United States, et al. V. Martin Marietta Materials, Inc., and Texas Industries, Inc.

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, et al. v. Martin Marietta Materials, Inc., and Texas Industries, Inc., Civil Action No. 1:14-cv-01079. On June 26, 2014, the United States and the State of Texas filed a Complaint alleging that the proposed acquisition by Martin Marietta Materials of the aggregate business assets of Texas Industries, Inc. would violate Section 7 of the Clayton Act, 15 U.S.C. §18. The proposed Final Judgment, filed the same time as the Complaint, requires the defendants to divest the North Troy quarry in Mill Creek, Oklahoma; one rail yard in Dallas, Texas; and one rail yard in Frisco, Texas. All of these assets serve parts of the Dallas, Texas area.

Copies of the Complaint, proposed Final Judgment and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 450 Fifth Street, NW, Suite 1010, Washington, DC 20530 (telephone: 202-514-2481), on the Department of Justice's website at http://www.usdoj.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 U.S.

Department of Justice, Antitrust Division's internet website, filed with the Court and, under certain circumstances, published in the Federal Register. Comments should be directed to Maribeth Petrizzi, Chief, Litigation II Section, Antitrust Division, Department of Justice, 450 Fifth Street, NW, Suite 8700, Washington, DC 20530 (telephone: 202-307-0924).

Patricia A. Brink,
Director of Civil Enforcement.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA United States Department of Justice Antitrust Division 450 Fifth Street, N.W., Suite 8700 Washington, D.C. 20530 and STATE OF TEXAS Office of the Attorney General Consumer Protection Division Antitrust Section 300 W. 15th Street, 7th Floor Austin, TX 78701 Plaintiffs, v. MARTIN MARIETTA MATERIALS, INC. 2710 Wycliff Road Raleigh, North Carolina 27607 and TEXAS INDUSTRIES, INC. 1503 LBJ Freeway, Suite 400 Dallas, Texas 75234 Defendants.	) Case No.: 1:14-cv-01079) Judge: Hon. John Bates) Filed: 06/26/2014

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 Texas, acting by and through the Attorney General of Texas, bring this civil antitrust action against Defendants Martin Marietta

Materials, Inc. ("Martin Marietta") to enjoin Martin Marietta's proposed acquisition of Texas Industries, Inc. ("Texas Industries"). Plaintiffs complain and allege as follows:

I. INTRODUCTION

1. On January 28, 2014, Martin Marietta and Texas Industries announced a definitive merger agreement valued at approximately $2.7 billion. The merger would create the largest aggregate producer in the United States, with annual net sales of nearly $3 billion.

2. The proposed acquisition would eliminate real and potential head-to-head competition between Martin Marietta and Texas Industries on price and service in supplying aggregate in the Dallas, Texas area. For a significant number of customers in the Dallas area, Martin Marietta and Texas Industries are two of the three best sources of Texas DOT-qualified aggregate. Elimination of competition between Martin Marietta and Texas Industries likely would give Martin Marietta the ability to raise prices or decrease the quality of service provided to these customers. As a result, the proposed acquisition likely would substantially lessen competition in the production and sale of aggregate in the Dallas area, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

II. THE PARTIES TO THE PROPOSED TRANSACTION

3. Defendant Martin Marietta is incorporated in North Carolina with its headquarters in Raleigh, North Carolina. Martin Marietta produces, distributes, and/or markets aggregate for the construction industry in 29 states. Martin Marietta also produces aggregate in Nova Scotia, Canada, and the Bahamas, which it distributes and sells at numerous terminals and yards along the East Coast of the United States. In 2013, Martin Marietta had net sales of $2.1 billion.

4. Defendant Texas Industries is incorporated in Delaware with its headquarters in Texas. Texas Industries produces, distributes, and/or markets aggregate in five states; Texas,

Oklahoma, Louisiana, Arkansas and California. Texas Industries also produces asphalt concrete, ready mix concrete, and has significant cement production capabilities in California and Texas. In 2013, Texas Industries had net sales of $800 million.

III. JURISDICTION AND VENUE

5. 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.

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

7. 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.

8. Defendants have consented to venue and personal jurisdiction in this judicial district.

IV. TRADE AND COMMERCE

A. Aggregate is an Essential Input for Many Construction Projects

9. Aggregate is stone, produced at mines, quarries, and gravel pits, that is used for construction projects and in various industrial processes. The aggregate produced in quarries and mines is predominantly limestone, granite, or trap 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.

10. The customer on each construction project establishes specifications that the aggregate must meet for each application for which it is used. State Departments of Transportation ("state DOTs"), including the Texas DOT, 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 and durability, size, polish value, and a variety of other characteristics. The specifications are intended to ensure the longevity and safety of the projects that use aggregate.

11. For Texas DOT projects, the Texas DOT tests the aggregate to ensure that the stone for an application meets proper specifications 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 often after the end product has been produced. In addition, the Texas DOT pre-qualifies quarries according to the end uses for the aggregate. Many city, county, and commercial entities in Texas use the Texas DOT aggregate specifications when building roads, bridges, and parking lots to optimize project longevity.

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

12. Aggregate is priced by the ton and is a relatively inexpensive product. Prices range 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

larger volumes, customers either negotiate prices for a particular job or seek bids from multiple aggregate suppliers.

13. In areas where aggregate is locally available, it is transported from quarries to customers by truck. On a per-mile basis, trucking is the most expensive option for transporting aggregate over longer distances.

14. Aggregate is also shipped by rail from quarries to yards. It is then transported by truck from the yards to customers in the area. The rail yards, which typically are supplied by quarries that are 100 to 200 miles away, frequently are large operations that can handle 75- to 100-car unit trains and are served by large quarries located on rail lines that have automated aggregate rail-loading operations. Over longer distances, the cost of transporting aggregate by rail is significantly cheaper, on a per-mile basis, than by truck.

C. Relevant Markets

1. Texas DOT-Qualified Aggregate is a Relevant Product Market

15. Within the broad category of aggregate, different types of stone are used for different purposes. For instance, aggregate used as road base is not the same as aggregate used in asphalt concrete. Accordingly, they are not interchangeable or substitutable for one another and demand for each is separate. Thus, each type of aggregate likely is a separate line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

16. Texas DOT-qualified aggregate is aggregate qualified by Texas DOT for use in road construction. Aggregate that meets the standards for Texas DOT qualification differs from other aggregate in its size, physical composition, functional characteristics, customary uses, consistent availability, and pricing. A customer whose job specifies Texas DOT-qualified aggregate cannot substitute non-Texas DOT-qualified aggregate or other materials.

17. Although numerous narrower product markets exist, the competitive dynamic for each type of Texas DOT-qualified aggregate is nearly identical. Therefore, they all may be combined for analytical convenience into a single relevant product market for the purpose of evaluating the competitive impact of the acquisition.

18. A small but significant increase in the price of Texas 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 Texas DOT-qualified aggregate is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

2. Dallas, Texas is a Relevant Geographic Market

19. 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.

20. When customers seek price quotes or bids, the distance from 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 cost 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.

21. The primary factor that determines the area a supplier can serve is the location of competing quarries and rail yards. 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.

22. The size of a geographic market also can depend on whether aggregate is being transported in an urban or rural setting and on specific characteristics of the road network. Where there are multiple quarries in a region, urban traffic congestion may greatly reduce the distance aggregate can be economically transported. In such cases, geographic markets can be very small. The closest quarry or rail yard to a customer also may have higher delivery costs than a more distant quarry because of local traffic patterns that increase fuel costs. Consequently, in large cities, local markets can be small and multiple geographic markets may exist.

23. Martin Marietta owns and operates two rail yards that serve Dallas County and portions of surrounding counties (hereinafter referred to as the "Dallas area"). Customers with plants or jobs in the Dallas area may, depending on the location of their plant or job sites, also economically procure Texas DOT-qualified aggregate from two rail yards operated by Texas Industries and from one competitor's quarry located in Bridgeport, Texas. Other quarries cannot compete successfully on a regular basis for customers with plants or jobs in the Dallas area because they are too far away and transportation costs are too great.

24. Customers likely would be unable to switch to suppliers outside the Dallas area to defeat a small but significant price increase. Accordingly, the Dallas area is a relevant geographic market for the production and sale of Texas DOT-qualified aggregate within the meaning of Section 7 of the Clayton Act.

D. Martin Marietta's Acquisition of Texas Industries is Anticompetitive

25. Vigorous competition between Martin Marietta and Texas Industries on price and customer service in the production and sale of Texas DOT-qualified aggregate has benefitted customers in the Dallas area.

26. The competitors that could constrain Martin Marietta and Texas Industries from raising prices on Texas DOT-qualified aggregate in the Dallas area are limited to those who are qualified by the Texas DOT to supply aggregate and can economically rail or truck the aggregate into the Dallas area. Currently only one other supplier of Texas DOT-qualified aggregate consistently can sell aggregate into the Dallas area on a cost-competitive basis with Martin Marietta or Texas Industries.

27. The proposed acquisition will eliminate the competition between Martin Marietta and Texas Industries and reduce from three to two the number of suppliers of Texas DOT-qualified aggregate in the Dallas area. Further, the proposed acquisition will substantially increase the likelihood that Martin Marietta will unilaterally increase the price of Texas DOT-qualified aggregate to a significant number of customers in the Dallas area.

28. The response of other suppliers of Texas DOT-qualified aggregate will not be sufficient to constrain a unilateral exercise of market power by Martin Marietta after the acquisition.

29. For certain customers, a combined Martin Marietta and Texas Industries will have the ability to increase prices for Texas DOT-qualified aggregate. The combined firm could also decrease service for these same customers by limiting availability or delivery options. Texas DOT-qualified aggregate producers know the distance from their own quarries or yards and their competitors' yards or 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 Texas Industries quarries or yards 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.

30. Further, Martin Marietta's elimination of Texas Industries as an independent competitor in the production and sale of Texas DOT-qualified aggregate in the Dallas area likely will facilitate anticompetitive coordination among the remaining suppliers. Texas DOT-qualified aggregate that meets a specific standard is relatively standard and homogenous, and producers often estimate competitors' output, capacity, reserves, and costs. Given these market conditions, eliminating one of the few Texas DOT-qualified aggregate suppliers is likely to further increase the ability of the remaining competitors to coordinate successfully.

31. The transaction will substantially lessen competition in the market for Texas DOT-qualified aggregate in the Dallas area, which is likely to 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

32. Timely, likely, and sufficient entry in the production and sale of Texas DOT-qualified aggregate in the Dallas area is unlikely, given the substantial time and cost required to open a quarry or rail yard.

33. Quarries are particularly difficult to locate and permit. Locating a quarry may take as long as four years, particularly when seeking suitable sites with rail access. Once a location is chosen, obtaining a permit to open a new quarry in Texas is difficult and time-

consuming. Aggregate producers have spent over two years successfully obtaining permits and also have failed to obtain quarry permits on multiple occasions.

34. Location is also essential for a rail-served quarry, so that the aggregate can be directly loaded on the trains for transportation to the rail yard. If the quarry is not located on a rail line, the aggregate must be transported by truck, which can eliminate the transportation cost advantage of using rail. Additionally, if the haul from the quarry to the rail yard is not a "single line" haul, with only one railroad carrier, the cost of the multi-line haul can diminish some of the cost advantage associated with moving aggregate by rail.

35. Establishing a rail yard is difficult and may take several years in addition to the time necessary to locate, permit and open a quarry. To achieve the economies necessary to be competitive in the Dallas area, rail yards must be large and able to handle large amounts of aggregate. Obtaining the large parcels of land and permits necessary to locate a rail yard in the Dallas area is difficult, and the cost of obtaining the land and building the rail yard would be considerable. The combined cost of permitting and opening both a new rail-served quarry and a new rail yard in the Dallas area could exceed $50 million.

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

V. VIOLATION ALLEGED

37. Martin Marietta's proposed acquisition of Texas Industries likely will substantially lessen competition in the production and sale of Texas DOT-qualified aggregate in the Dallas area, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

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

(a) actual and potential competition between Martin Marietta and Texas Industries in the market for the production and sale of Texas DOT-qualified aggregate in the Dallas area will be eliminated;

(b) prices for Texas DOT-qualified aggregate likely will increase and customer service likely would decrease;

(c) the potential for unlawful anticompetitive coordination between remaining competitors in the Dallas area likely will be increased.

VI. REQUESTED RELIEF

39. Plaintiffs request that this Court:

(a) adjudge and decree that Martin Marietta's acquisition of Texas Industries 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 Texas Industries 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 Texas Industries;

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

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

FOR PLAINTIFF UNITED STATES OF AMERICA:

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Dated: June 26, 2014

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Dated: June 26, 2014

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)
	)
and	)
	)
STATE OF TEXAS	)
	) Case No.: 1:14-cv-01079
Plaintiffs,	)
	) Judge: Hon. John Bates
v.	)
	) Filed: 06/26/2014
MARTIN MARIETTA MATERIALS, INC.	)
	)
and	)
	)
TEXAS INDUSTRIES, INC.	)
	)
Defendants.	)

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 January 28, 2014, Martin Marietta Materials, Inc. ("Martin Marietta") and Texas Industries, Inc. ("Texas Industries") announced a definitive merger agreement valued at approximately $2.7 billion. After investigating the competitive impact of that acquisition, the Plaintiffs filed a civil antitrust Complaint on June 26, 2014. The Complaint alleges that the

acquisition likely will substantially lessen competition in the production and sale of aggregate qualified by the Texas Department of Transportation ("Texas DOT") to customers in the Dallas, Texas area, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. As a result of the acquisition, prices for Texas DOT-qualified aggregate likely will increase and customer service likely will be reduced.

At the same time the Complaint was filed, Plaintiffs also filed a Hold Separate Stipulation and Order ("Hold Separate") and a proposed Final Judgment. These filings are designed to eliminate the anticompetitive effects of Martin Marietta's acquisition of Texas Industries. The proposed Final Judgment, which is explained more fully below, requires Defendants, among other things, to divest Martin Marietta's rail yards located in Frisco, Texas and Dallas, Texas, and the quarry located in Mill Creek, Oklahoma. The terms of the Hold Separate ensure that the Divestiture Assets will be operated as a competitively independent, economically viable and ongoing business concern that will remain independent and uninfluenced by the consummation of the acquisition, and that competition is maintained during the pendency of the ordered divestiture.

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 Transaction

Defendant Martin Marietta is incorporated in North Carolina with its headquarters in Raleigh, North Carolina. Martin Marietta produces, distributes, and/or markets aggregate for the

construction industry in 29 states. Martin Marietta also produces aggregate in Nova Scotia, Canada, and the Bahamas, for distribution and sale at numerous terminals and yards along the East Coast of the United States. In 2013, Martin Marietta had net sales of $2.1 billion.

Defendant Texas Industries is incorporated in Delaware with its headquarters in Dallas, Texas. Texas Industries produces, distributes, and/or markets aggregate in; Texas, Oklahoma, Louisiana, Arkansas and California. Texas Industries also produces asphalt concrete, ready mix concrete, and cement. In 2013, Texas Industries had net sales of $800 million.

The merger would create the largest aggregate producer in the United States, with annual net sales of nearly $3 billion. The proposed transaction, as initially agreed by Defendants likely will lessen competition substantially. This acquisition is the subject of the Complaint and proposed Final Judgment filed by the United States on June 26, 2014.

B. Industry Background

Aggregate is stone, produced at mines, quarries, and gravel pits, that is used for construction projects and in various industrial processes. The aggregate produced in quarries and mines is predominantly limestone, granite, or trap 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.

The customer on each construction project establishes specifications that the aggregate must meet for each application for which it is used. State Departments of Transportation ("state DOTs"), including the Texas DOT, 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 and durability, size, polish value, and a variety of other characteristics. The specifications are intended to ensure the longevity and safety of the projects that use aggregate.

For Texas DOT projects, the Texas DOT tests the aggregate to ensure that the stone for an application meets proper specifications 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 often after the end product has been produced. In addition, the Texas DOT pre-qualifies quarries according to the end uses for the aggregate. Many city, county, and commercial entities in Texas use the Texas DOT aggregate specifications when building roads, bridges, and parking lots to optimize project longevity.

Aggregate is priced by the ton and is a relatively inexpensive product. Prices range 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 larger volumes, customers either negotiate prices for a particular job or seek bids from multiple aggregate suppliers.

In areas where aggregate is locally available, it is transported from quarries to customers by truck. On a per-mile basis, trucking is the most expensive option for transporting aggregate over longer distances. Aggregate is also shipped by rail from quarries to yards. It is then transported by truck from the yards to customers in the area. The rail yards, which typically are supplied by quarries that are 100 to 200 miles away, frequently are large operations that can handle 75- to 100-car unit trains and are served by large quarries located on rail lines that have automated aggregate rail-loading operations. Over longer distances, the cost of transporting aggregate by rail is significantly cheaper, on a per-mile basis, than by truck.

C. Texas DOT-Qualified Aggregate is a Relevant Product Market

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

Texas DOT-qualified aggregate is aggregate qualified by Texas DOT for use in road construction. Aggregate that meets the standards for Texas DOT qualification differs from other aggregate in its size, physical composition, functional characteristics, customary uses, consistent availability, and pricing. A customer whose job specifies Texas DOT-qualified aggregate cannot substitute non-Texas DOT-qualified aggregate or other materials.

Although numerous narrower product markets exist, the competitive dynamic for each type of Texas DOT-qualified aggregate is nearly identical. Therefore, they all may be combined for analytical convenience into a single relevant product market for the purpose of evaluating the competitive impact of the acquisition.

A small but significant increase in the price of Texas 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 Texas DOT-qualified aggregate is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

D. Dallas, Texas is a Relevant Geographic Market

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.

When customers seek price quotes or bids, the distance from 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 cost 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.

The primary factor that determines the area a supplier can serve is the location of competing quarries and rail yards. 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.

The size of a geographic market also can depend on whether aggregate is being transported in an urban or rural setting and on specific characteristics of the road network. Where there are multiple quarries in a region, urban traffic congestion may greatly reduce the distance aggregate can be economically transported. In such cases, geographic markets can be very small. The closest quarry or rail yard to a customer also may have higher delivery costs than a more distant quarry because of local traffic patterns that increase fuel costs. Consequently, in large cities, local markets can be small and multiple geographic markets may exist.

Martin Marietta owns and operates two rail yards that serve Dallas County and portions of surrounding counties (hereinafter referred to as the "Dallas area"). Customers with plants or jobs in the Dallas area may, depending on the location of their plant or job sites, also

economically procure Texas DOT-qualified aggregate from two rail yards operated by Texas Industries and from one competitor's quarry located in Bridgeport, Texas. Other quarries cannot compete successfully on a regular basis for customers with plants or jobs in the Dallas area because they are too far away and transportation costs are too great.

Customers likely would be unable to switch to suppliers outside the Dallas area to defeat a small but significant price increase. Accordingly, the Dallas area is a relevant geographic market for the production and sale of Texas DOT-qualified aggregate within the meaning of Section 7 of the Clayton Act.

E. The Competitive Effects of Martin Marietta's Acquisition of Texas Industries

Customers in the Dallas area have benefited from vigorous competition between Martin Marietta and Texas Industries on price and customer service in the production and sale of Texas DOT-qualified aggregate.

The competitors that could constrain Martin Marietta and Texas Industries from raising prices on Texas DOT-qualified aggregate in the Dallas area are limited to those who are qualified by the Texas DOT to supply aggregate and can economically rail or truck the aggregate into the Dallas area. Currently only one other supplier of Texas DOT-qualified aggregate consistently can sell aggregate into the Dallas area on a cost-competitive basis with Martin Marietta or Texas Industries.

The proposed acquisition will eliminate the competition between Martin Marietta and Texas Industries and reduce from three to two the number of suppliers of Texas DOT-qualified aggregate in the Dallas area. Further, the proposed acquisition will substantially increase the likelihood that Martin Marietta will unilaterally increase the price of Texas DOT-qualified

aggregate to a significant number of customers in the Dallas area. The response of other suppliers of Texas DOT-qualified aggregate will not be sufficient to constrain a unilateral exercise of market power by Martin Marietta after the acquisition.

For certain customers, a combined Martin Marietta and Texas Industries will have the ability to increase prices for Texas DOT-qualified aggregate. The combined firm could also decrease service for these same customers by limiting availability or delivery options. Texas DOT-qualified aggregate producers know the distance from their own quarries or yards and their competitors' yards or 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 Texas Industries quarries or yards 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.

Further, Martin Marietta's elimination of Texas Industries as an independent competitor in the production and sale of Texas DOT-qualified aggregate in the Dallas area likely will facilitate anticompetitive coordination among the remaining suppliers. Texas DOT-qualified aggregate that meets a specific standard is relatively standard and homogenous, and producers often estimate competitors' output, capacity, reserves, and costs. Given these market conditions, eliminating one of the few Texas DOT-qualified aggregate suppliers is likely to further increase the ability of the remaining competitors to coordinate successfully.

The transaction will substantially lessen competition in the market for Texas DOT-qualified aggregate in the Dallas area, which is likely to lead to higher prices and reduced customer service for consumers of such products, in violation of Section 7 of the Clayton Act.

The likely anticompetitive effects of the transaction in the Dallas area will not be mitigated by entry, given the substantial time and cost required to open a quarry or rail yard. Quarries are particularly difficult to locate and permit. Locating a quarry may take as long as four years, particularly when seeking suitable sites with rail access. Once a location is chosen, obtaining a permit to open a new quarry in Texas is difficult and time-consuming. Aggregate producers have spent over two years successfully obtaining permits and also have failed to obtain quarry permits on multiple occasions.

Location is also essential for a rail-served quarry, so that the aggregate can be directly loaded on the trains for transportation to the rail yard. If the quarry is not located on a rail line, the aggregate must be transported by truck, which can eliminate the transportation cost advantage of using rail. Additionally, if the haul from the quarry to the rail yard is not a "single line" haul, with only one railroad carrier, the cost of the multi-line haul can diminish some of the cost advantage associated with moving aggregate by rail.

Establishing a rail yard is difficult and may take several years in addition to the time necessary to locate, permit and open a quarry. To achieve the economies necessary to be competitive in the Dallas area, rail yards must be large and able to handle large amounts of aggregate. Obtaining the large parcels of land and permits necessary to locate a rail yard in the Dallas area is difficult, and the cost of obtaining the land and building the rail yard would be considerable. The combined cost of permitting and opening both a new rail-served quarry and a new rail yard in the Dallas area could exceed $50 million.

Because of the cost and difficulty of establishing a quarry and a rail yard, entry will not be timely, likely or sufficient to counteract the anticompetitive effects of Martin Marietta's proposed acquisition of Texas Industries.

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 Dallas, Texas area by establishing a new, independent, and economically viable competitor. The proposed Final Judgment requires Defendants, within 90 days after the filing of the Complaint, or five days after notice of the entry of the Final Judgment by the Court, whichever is later, to divest Martin Marietta's rail yards located in Dallas, Texas and Frisco, Texas as well as its North Troy Quarry located in Mill Creek, Oklahoma (the "Divestiture Assets"). The Dallas yard primarily serves downtown Dallas, while the Frisco yard serves northern Dallas County and portions of the surrounding counties. The North Troy quarry serves as a source for aggregate that is distributed through the two rail yards. These assets constitute all of the assets that Martin Marietta currently uses to supply aggregate to the Dallas area, so the acquirer of these assets will be able to compete with Defendants.

While Defendants must make all of the Divestiture Assets available for purchase, Paragraph IV(B) of the proposed Final Judgment allows the acquirer to exclude from the Divestiture Assets any portion that the acquirer elects not to acquire, subject to the written approval of the United States, in its sole discretion, after consultation with the State of Texas. In this case, the rail yards are the source of direct competition between Defendants in the Dallas area; however, the rail yards cannot operate as an aggregate distribution facility without a source of aggregate, which the acquirer of the Divestiture Assets may not currently own. Paragraph IV(B) allows the acquirer of the Divestiture Assets not to purchase the North Troy quarry if it already owns or operates an aggregate source that could ship aggregate to the divested rail yards. The assets must be divested in such a way as to satisfy the United States in its sole discretion,

after consultation with Texas, that the operations can and will be operated by the purchaser as a viable, ongoing business that can compete effectively in the relevant market. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective purchasers.

The terms of the proposed Final Judgment require Defendants to divest the Divestiture Assets within 90 days. If Defendants are unable to accomplish the divestiture within this period the United States, in its sole discretion, may grant Defendants one or more extensions of this time period not to exceed 90 days in total. The 90-day potential extension will permit the proposed acquirer to complete any testing and drilling that it may choose to conduct as part of its due diligence process. In the event that Defendants do not accomplish the divestiture within the periods prescribed in the proposed Final Judgment, the Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture. 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. 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. 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.

The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in the production and sale of Texas DOT-qualified aggregate in the Dallas area.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The 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, Litigation II Section
Antitrust Division
United States Department of Justice
450 Fifth Street, N.W., Suite 8700
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The Plaintiffs considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The Plaintiffs could have continued the litigation and sought preliminary and permanent injunctions against Martin Marietta's acquisition of Texas Industries. The Plaintiffs are satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the production and sale Texas DOT-qualified aggregate in the Dallas area. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the 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. InBev N.V./S.A.*, 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, No. 08-1965 (JR), 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) (citing *United States v. Bechtel Corp*., 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2] In determining whether a

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[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).

[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)

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 Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom*. *Maryland v. United States*, 460 U.S. 1001 (1983); *see also 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.

(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'").

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 *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459-60. As this Court recently confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). 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 Senator 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]

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: June 26, 2014

Respectfully submitted,

/s/ Jay D. Owen
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[3] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (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, 93d Cong., 1st Sess., 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.").

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA and STATE OF TEXAS Plaintiffs, v. MARTIN MARIETTA MATERIALS, INC. and TEXAS INDUSTRIES, INC. Defendants.	)))))) Case No.: 1:14-cv-01079)) Judge: Hon. John Bates)) Date Filed: 06/26/2014)))))))

PROPOSED FINAL JUDGMENT

WHEREAS, Plaintiffs, the United States of America and the State of Texas, filed their Complaint on June 26, 2014, Plaintiffs and Defendants, Martin Marietta Materials, Inc. ("Martin Marietta") and Texas Industries, Inc. ("Texas Industries"), 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 mistake, hardship or difficulty of compliance as grounds for asking the Court to modify any of the 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" means the entity to whom Defendants divest the Divestiture Assets.

B. "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.

C. "Texas Industries" means Defendant Texas Industries, Inc., a Delaware corporation with its headquarters in Dallas, Texas, its successors and assigns, and its

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

D. "Divestiture Assets" means:

1. the aggregate quarry, including the portable plant, located at 12310 W. Holder Road, Mill Creek, Oklahoma 74856 (the "North Troy Quarry");

2. the rail yard located at 1760 Z Street Office, Dallas, Texas 75229 (the "Dallas Yard");

3. the rail yard located at 6601 Eubanks Street, Frisco, Texas 75034 (the "Frisco Yard");

4. all tangible assets used at or for the North Troy Quarry and the Dallas and Frisco Yards, including, but not limited to, all manufacturing equipment, tooling, and fixed assets, real property (leased or owned), mining equipment, aggregate reserves, personal property, inventory, office furniture, materials, supplies, and on- or off-site warehouses or storage facilities; all licenses, permits, and authorizations issued by any governmental organization; all contracts, agreements, leases (including renewal rights), commitments, and understandings, including sales agreements and supply agreements; all customer lists, contracts, accounts, and credit records; all other records; and, at the option of the Acquirer, a number of trucks, rail cars, and other vehicles usable at each of the North Troy Quarry and the Dallas and Frisco Yards, (limited, with respect to rail cars, to those that are used to serve the Dallas and Frisco Yards from the North Troy Quarry), equal to the average number of vehicles of each type used at the North Troy Quarry and the Dallas and Frisco Yards per month during the months of operation between January 1, 2013, and December 31, 2013 (calculated by averaging the number of each type of

vehicle that was used at the North Troy Quarry and the Dallas and Frisco Yards at any time during each month of operation); and

5. all intangible assets used in the production and sale of aggregate produced at the North Troy Quarry or related to the Dallas and Frisco Yards, including, but not limited to, all contractual rights, patents, licenses and sublicenses, intellectual property, technical information, computer software (including dispatch software and management information systems) and related documentation, 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 provided by Defendants to their own employees, customers, suppliers, agents, or licensees, and all data (including aggregate reserve testing information) concerning the North Troy Quarry and the Dallas and Frisco Yards; provided, however, that with respect to any intellectual property, software, and systems used primarily for assets other than the Dallas and Frisco Yards and the North Troy Quarry, the Divestiture Assets shall include instead a perpetual royalty-free, non-exclusive license to all such intellectual property, software, and systems.

III. Applicability

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

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

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

IV. Divestitures

A. Defendants are ordered and directed, within 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 Divestiture Assets in a manner consistent with this Final Judgment to an Acquirer acceptable to the United States, in its sole discretion after consultation with the State of Texas. The United States, in its sole discretion, may agree to one or more extensions of this time period not to exceed 90 calendar days in total, and shall notify the Court in such circumstances. Defendants agree to use their best efforts to divest the Divestiture Assets as expeditiously as possible.

B. Notwithstanding the provisions of Paragraph IV(A), upon written request of Defendants, the United States, in its sole discretion, after consultation with the State of Texas, may agree, in writing, to exclude from the Divestiture Assets any portion thereof that the Acquirer, at its option, elects not to acquire.

C. In accomplishing the divestiture 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 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. Defendants shall make available such information to Plaintiffs at the same time that such information is made available to any other person.

D. Defendants shall provide the Acquirer and the United States with information relating to the personnel involved in the operation of the Divestiture Assets to enable the Acquirer to make offers of employment. Defendants will not interfere with any negotiations by the Acquirer 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 the 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 that each 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 that there are no material defects in the environmental, zoning or other permits pertaining to the operation of each asset, and that 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 divestiture pursuant to Section IV, or by 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 Texas, that the Divestiture Assets can and will be used by the Acquirer as part of a viable, ongoing business in the production and sale of 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's sole judgment, after consultation with the State of Texas, has the intent and capability (including the necessary managerial, operational, technical and financial capability) of competing effectively in the business of producing and selling aggregate; and

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

V. Appointment of Trustee

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

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

accomplish the divestiture to an Acquirer acceptable to the United States, after consultation with the State of Texas, at such price and on such terms as are then obtainable upon reasonable effort by the 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 trustee may hire at the cost and expense of Defendants any investment bankers, attorneys, or other agents, who shall be solely accountable to the trustee, reasonably necessary in the trustee's judgment to assist in the divestiture.

C. Defendants shall not object to a sale by the trustee on any ground other than the trustee's malfeasance. Any such objections by Defendants must be conveyed in writing to the United States and the trustee no later than ten (10) calendar days after the trustee has provided the notice required under Section VI.

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

United States may, in its sole discretion, take appropriate action, including making a recommendation to the Court.

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

F. After its appointment, the trustee shall file monthly reports with the United States and, as appropriate, the Court setting forth the trustee's efforts to accomplish the divestiture ordered under this Final Judgment. To the extent such reports contain information that the 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 trustee shall maintain full records of all efforts made to divest the Divestiture Assets.

G. If the trustee has not accomplished the divestiture ordered under this Final Judgment within six (6) months after the trustee's appointment, the trustee shall promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestiture, (2) the reasons, in the trustee's judgment, why the required divestiture has not been

accomplished, and (3) the trustee's recommendations. To the extent such report contains information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. The 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 trustee's appointment by a period requested by the United States.

H. If the United States determines that the 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 trustee.

VI. Notice of Proposed Divestiture

A. Within two (2) business days following execution of a definitive divestiture agreement, Defendants or the trustee, whichever is then responsible for effecting the divestiture required herein, shall notify the United States and the State of Texas of any proposed divestiture required by Section IV or V of this Final Judgment. If the trustee is responsible, it shall similarly notify Defendants. The notice shall set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Assets, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States, after consultation with the State of Texas, may request from Defendants, the proposed Acquirer, any other third party, or the trustee, if applicable, additional information

concerning the proposed divestiture, the proposed Acquirer, and any other potential Acquirer. Defendants and the trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

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

VII. Financing

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

VIII. Hold Separate

Until the divestiture required by this Final Judgment has been accomplished, Defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the divestiture ordered by this Court.

IX. Affidavits

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

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

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

X. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment, or of any related orders such as any Hold Separate 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 Texas 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)(7) 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)(7) 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. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire ten years from the date of its entry.

XIV. 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's responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: _____

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

_____

United States District Judge

[FR Doc. 2014-15959 Filed 07/08/2014 at 8:45 am; Publication Date: 07/09/2014]