

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF INDIANA

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARTIN MARIETTA MATERIALS, INC.;  
CSR LIMITED; CSR AMERICA, INC.;  
and AMERICAN AGGREGATES  
CORPORATION,

Defendants.

Civil No. IP97-854C-T/G

Filed: May 27, 1997

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 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 May 27, 1997, the United States filed a civil antitrust complaint, which alleges that the proposed acquisition by Martin Marietta Materials, Inc. ("Martin") of American Aggregates Corporation ("American Aggregates") from CSR America, Inc. ("CSR America") which is a subsidiary of CSR Limited ("CSR") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The

Complaint alleges that a combination of the two most significant competitors in the aggregate market in Marion County, Indiana would lessen competition in the production and sale of aggregate in Marion County. The prayer for relief in the Complaint seeks: (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act; and (2) a permanent injunction preventing Martin from acquiring control of American Aggregates' aggregate business, or otherwise combining such business with Martin's own business in the United States.

When the Complaint was filed, the United States, also filed a proposed settlement that would permit Martin to complete its acquisition of American Aggregates' aggregate business, but require a certain divestiture that will preserve competition in Marion County. This settlement consists of a Stipulation and Order, a proposed Final Judgment and a Hold Separate Stipulation and Order.

The proposed Final Judgment orders Martin to divest certain Marion County assets -- American Aggregates' Harding Street, Indianapolis, Indiana quarry and certain related tangible and intangible assets. Martin must complete the divestiture of this quarry and related assets within one hundred and eighty (180) calendar days after the date on which the proposed Final Judgment was filed (i.e., May 27, 1997) in accordance with the procedure specified therein.

The Stipulation and Order, proposed Final Judgment and Hold Separate Stipulation and Order require Martin to ensure that,

until the divestiture mandated by the proposed Final Judgment has been accomplished, the Harding Street Quarry and related assets to be divested will be maintained and operated as an independent, ongoing, economically viable and active competitor. Martin must preserve and maintain the quarry to be divested as a saleable and economically viable, ongoing concern, with competitively sensitive business information and decision-making divorced from that of Martin's aggregate business. Martin will appoint a person to monitor and ensure its compliance with these requirements of the proposed Final Judgment.

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

## II.

### DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

#### A. *Martin, American Aggregates and the Proposed Transaction*

Martin is engaged in the business of producing and selling aggregate in Marion County. In Marion County, Martin operates the Kentucky Avenue Quarry which produces aggregate. In 1995, Martin had sales of \$660 million.

Through its wholly owned subsidiary, American Aggregates, CSR is engaged in the business of producing and selling aggregate

in Marion County. CSR operates two aggregate quarries in or near Marion County that produce aggregate which is used to manufacture asphalt concrete and ready-mix concrete. In 1996, American Aggregates had sales of \$120 million.

On February 21, 1997, Martin agreed to acquire all of the outstanding voting securities of American Aggregates, excluding its Michigan operations, from CSR America which is wholly owned by CSR. The purchase price is approximately \$234.5 million. This transaction, which would take place in the highly concentrated Marion County aggregate industry, precipitated the government's suit.

*B. The Transaction's Effects in Marion County*

The Complaint alleges that, the production and sale of aggregate constitutes a line of commerce, or relevant product market, for antitrust purposes, and that Marion County constitutes a section of the country, or relevant geographic market. The complaint alleges that the effect of Martin's acquisition may be to lessen competition substantially in the production and sale of aggregate in Marion County.

Aggregate is material that is used to manufacture asphalt concrete and ready-mix concrete. A considerable amount of the asphalt concrete and ready-mix concrete manufactured for use in Marion County is used on highways and roads built for the Indiana Department of Transportation and local jurisdictions located within Marion County. No good economic functional substitutes exist for aggregate. Manufacturers and buyers of aggregate

recognize aggregate as a distinct product.

Producers of aggregate located in or near Marion County sell and compete with each other for sales of aggregate in Marion County. Due to high transportation costs and long delivery time, producers of aggregate not located in Marion County or in close proximity to Marion County do not sell a significant amount of aggregate for use within Marion County.

The Complaint alleges that Martin's acquisition of American Aggregates would substantially lessen competition for the production and sale of aggregate in Marion County. Actual and potential competition between Martin and American Aggregates for the production and sale of aggregate in Marion County will be eliminated.

Martin and American Aggregates are the only producers of aggregate in Marion County and are two of only three significant producers in close proximity to Marion County. American Aggregates and Martin sell the vast majority of all the aggregate used to manufacture asphalt concrete and ready mix concrete for road and highway construction projects in Marion County contracted for by the Indiana Department of Transportation and local jurisdictions within Marion County. The Indiana Department of Transportation, through its contracts for highway construction, is indirectly the largest purchaser of aggregate in Marion County.

The acquisition of American Aggregates by Martin would create a dominant aggregate company in Marion County. It would

reduce the number of significant competitors operating aggregate facilities in Marion County or in close proximity to Marion County from three to two, and significantly reduce the number of competitors located in Marion County supplying aggregate used to manufacture asphalt concrete and ready mix concrete manufactured for highways in Marion County.

As a result of the acquisition, Martin would have significant control over the aggregate market in Marion County, giving it market power to increase the price of aggregate in Marion County. Prices for aggregate are likely therefore to increase. In response to such a price increase, purchasers could not switch to another producer of aggregate.

New entry in Marion County is unlikely to restore the competition lost through Martin's removal of American Aggregates from the marketplace. De novo entry into the production and sale of aggregate requires a significant capital investment and likely would take over two years before any new aggregate production facility could begin production. State and local zoning provisions make it very difficult to open an aggregate production facility in or near Marion County.

*C. Harm to Competition as a Consequence of the Acquisition*

The Complaint alleges that the transaction would have the following effects, among others: competition for the production and sale of aggregate in Marion County will be substantially lessened; actual and potential competition between Martin and American Aggregates in the production and sale of aggregate in

Marion County will be eliminated; and prices for aggregate in Marion County are likely to increase above competitive levels.

### III.

#### EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment would preserve competition in the production and sale of aggregate in Marion County by placing in independent hands American Aggregates' Harding Street, Indianapolis, Indiana aggregate quarry used by American Aggregates to serve Marion County, thus maintaining the existing level of suppliers in the market place. In response to a price increase from Martin, purchasers would be able to turn to another producer with significant capacity to produce aggregate in Marion County.

Within one hundred and eighty (180) calendar days after filing the proposed Final Judgment, Martin must divest American Aggregates' Harding Street aggregate quarry and related assets which are located in Marion County. The Harding Street quarry and related assets will be sold to a purchaser who demonstrates to the sole satisfaction of the United States that they will be an economically viable and effective competitor, capable of competing effectively in the production and sale of aggregate in Marion County.

Until the ordered divestiture takes place, Martin must take all reasonable steps necessary to accomplish the divestiture and cooperate with any prospective purchaser. If Martin does not

accomplish the ordered divestiture within the specified one hundred and eighty (180) calendar days which may be extended by up to sixty (60) calendar days by the United States in its sole discretion, the proposed Final Judgment provides for procedures by which the Court shall appoint a trustee to complete the divestiture. Martin must cooperate fully with the trustee.

If a trustee is appointed, the proposed Final Judgment provides that Martin will pay all costs and expenses of the trustee. The trustee's compensation will be structured so as to provide an incentive for the trustee to obtain the highest price then available for the assets to be divested, and to accomplish the divestiture as quickly as possible. After the effective date of his or her appointment, the trustee shall serve under such other conditions as the Court may prescribe. After his or her appointment becomes effective, the trustee will file monthly reports with the parties and the Court, setting forth the trustee's efforts to accomplish the divestiture. At the end of six (6) months, if the mandated divestiture has not been accomplished, the trustee shall file promptly with the Court a report that sets forth the trustee's efforts to accomplish the divestiture, explain why the divestiture has not been accomplished, and make any recommendations. The trustee's report will be furnished to the parties and shall be filed in the public docket, except to the extent the report contains information the trustee deems confidential. The parties each will have the right to make additional recommendations to the Court. The Court shall



enter such orders as it deems appropriate to carry out the purpose of the trust.

#### 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 attorney's fees. Entry of the proposed Final Judgment neither will 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 Martin, CSR, CSR America or American Aggregates.

#### V.

##### PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and the 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 should comment within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

J. Robert Kramer  
Chief, Litigation II Section  
Antitrust Division  
United States Department of Justice  
1401 H Street, N.W., Suite 3000  
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

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits of its Complaint against the defendants. The United States is satisfied, however, that the divestiture of the assets and other

relief contained in the proposed Final Judgment will preserve viable competition in the production and sale of aggregate in Marion County that otherwise would be affected adversely by the acquisition. Thus, the proposed Final Judgment would achieve the relief the government would have obtained through litigation, but avoids the time, expense and uncertainty of a full trial on the merits of the government's Complaint.

## VII.

### STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60) day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination, the court may consider--

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment 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) (emphasis added). As the Court of Appeals for the District of Columbia Circuit recently held, the APPA permits a court to consider, 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 United States v. Microsoft, 56 F.3d 1448 (D.C. Cir. 1995).

In conducting this inquiry, "the 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. 24598 (1973). Rather,

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.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, 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. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981); see also Microsoft, 56 F.3d 1448 (D.C. Cir. 1995). Precedent requires that:

the 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.

United States v. Bechtel, 648 F.2d 660,666 (9th Cir. 1981)

(emphasis added).

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[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.'" (citations omitted). United States v. American Tel. and Tel. Co., 552 F. Supp. 131, 150 (D.D.C. 1982), aff'd sub nom., Maryland v. United States, 460 U.S. 1001 (1983).

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.

Respectfully submitted,

Executed on: May , 1997

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