UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

and

STATE OF MARYLAND,

Plaintiffs,

v.

MARTIN MARIETTA MATERIALS, INC.,

LG PANADERO, L.P.,

PANADERO CORP.,

PANADERO AGGREGATES HOLDINGS, LLC,

and

BLUEGRASS MATERIALS COMPANY, LLC,

Defendants.

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On June 26, 2017, Martin Marietta Materials, Inc. ("Martin Marietta") and Bluegrass Materials Company, LLC ("Bluegrass") announced a definitive agreement under which Martin

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

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

Plaintiffs and Defendants have stipulated that the proposed Final Judgment may be

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

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

A. The Defendants and the Proposed Transaction

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

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

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

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

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

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

B. Industry Overview

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

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

are intended to ensure the longevity and safety of the roads, bridges and other projects for which aggregate is used.

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

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

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

C. Relevant Markets

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

According to the Complaint, within the broad category of aggregate, different types and sizes of stone are used for different purposes. For instance, aggregate qualified for use as road base may not be the same size and type of rock as aggregate qualified for use in asphalt concrete.

Accordingly, aggregate types and sizes are not interchangeable for one another and demand for each is separate. Thus, the Complaint alleges that each type and size of aggregate likely is a separate line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

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

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

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

2. The Relevant Geographic Markets Are Local

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

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

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

According to the Complaint, customers likely would be unable to switch to suppliers outside the Forsyth and North Fulton County Area to defeat a small but significant price

increase. The Complaint therefore alleges that the Forsyth and North Fulton County Area is a relevant geographic market for the production and sale of Georgia DOT-Qualified Aggregate within the meaning of Section 7 of the Clayton Act.

b. The Washington County Area Is a Relevant Geographic Market

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

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

D. Martin Marietta's Acquisition of Bluegrass Is Anticompetitive

According to the Complaint, vigorous competition between Martin Marietta and

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

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

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

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

E. Barriers to Entry

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

According to the Complaint, quarries are particularly difficult to locate and permit. First, securing the proper site for a quarry is challenging and time-consuming. Finding land with the correct rock composition requires extensive investigation and testing of candidate sites, as well as the negotiation of necessary land transfers, leases, and/or easements. Further, the site must be close to customer plants and likely job sites given the high cost of transporting aggregate. Second, once a suitable location is chosen, obtaining the necessary permits is difficult and time-consuming. Attempts to open a new quarry often face fierce public opposition, which can prevent a quarry from opening altogether or make the process of opening it much more time-consuming and costly. Finally, even after a site is acquired and permitted, the owner must spend

significant time and resources to prepare the land for quarry operations and purchase and install the necessary equipment.

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

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

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

A. Divestiture

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

In the Washington County Area, Paragraph IV(B) of the proposed Final Judgment

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

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

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

In the event that Defendants do not accomplish the divestitures within the periods

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

B. Compliance Affidavits

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

C. Enforcement and Expiration of the Final Judgment

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

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

Finally, Section XIV of the proposed Final Judgment provides that the Final Judgment shall expire ten (10) years from the date of its entry, except that after five (5) years from the date of its entry, the Final Judgment may be terminated upon notice by the United States to the Court and Defendants that the divestitures have been completed and that the continuation of the Final Judgment is no longer necessary or in the public interest.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

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

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

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

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in

the *Federal Register*, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the *Federal Register*.

Written comments should be submitted to:

Maribeth Petrizzi
Chief, Defense, Industrials, and Aerospace Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW, Suite 8700
Washington, D.C. 20530

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

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

Plaintiffs considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. Plaintiffs could have continued the litigation and sought preliminary and permanent injunctions against Martin Marietta's acquisition of Bluegrass. Plaintiffs are satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the production and sale of DOT-Qualified Aggregate in the Forsyth and North Fulton County and Washington County Areas. Thus, the proposed Final Judgment would achieve all or substantially all of the relief Plaintiffs would have obtained through litigation, but

avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v, U.S. Airways Group, Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the "court's inquiry is limited" in Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at *3, (D.D.C. Aug. 11,

2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable.").[1]

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

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

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that a court should not reject the proposed remedies because it believes others are preferable); *Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also U.S. Airways*, 38 F. Supp. 3d at 74 (noting that room must be made for the government to grant concessions in the negotiation process for

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

settlements (citing *Microsoft*, 56 F.3d at 1461); *United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 38 F. Supp. 3d at 74 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459-60. As this Court confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits

of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2); *see also U.S. Airways*, 38 F. Supp. 3d at 75 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[3] A court can make its public interest determination based on the competitive impact statement and response to public comments alone. *U.S. Airways*, 38 F. Supp. 3d at 75.

[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.*, No. 73-CV-681-W-1, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980, *22 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93-298, at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

VIII. DETERMINATIVE DOCUMENTS

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

Dated: April 25, 2018

Respectfully submitted,

FOR PLAINTIFF
UNITED STATES OF AMERICA

/s/

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CERTIFICATE OF SERVICE

I, Kerrie Freeborn, hereby certify that on April 25, 2018, I caused a copy of the foregoing Competitive Impact Statement to be served on Defendants Martin Marietta Materials, Inc., LG Panadero, L.P., Panadero Corp., Panadero Aggregates Holdings, LLC, and Bluegrass Materials Company, LLC by mailing the documents electronically to their duly authorized legal representatives as follows:

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