

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION AND DIVISION OF
HIGHWAYS,

Plaintiff,

v.

CIVIL ACTION NO.

WEST VIRGINIA PAVING, INC.,
SOUTHERN WEST VIRGINIA PAVING, INC.,
SOUTHERN WEST VIRGINIA ASPHALT, INC.,
KELLY PAVING, INC., CAMDEN
MATERIALS, LLC, AMERICAN
ASPHALT & AGGREGATE, INC.,
AMERICAN ASPHALT OF WEST
VIRGINIA, LLC, BLACKTOP
INDUSTRIES AND EQUIPMENT COMPANY,
AND JOHN AND JANE DOES 1-25,

Defendants.

COMPLAINT

1. The West Virginia Department of Transportation and Division of Highways ("DOH"), as authorized under provisions W. Va. Code §§ 47-18-8, -9 and § 17-2A-8, brings the action on behalf of itself and in its capacity as *parens patriae* for all West Virginia entities and individuals that purchased hot-mix asphalt and/or hot-mix asphalt paving services directly or indirectly from the Defendants.

2. Defendants are a collection of once vigorous competitors in asphalt production, paving and contracting services, now illegally combined into actual or *de facto* monopolies in at least thirty West Virginia counties. Defendants have established and abused their market power illegally and have done so through a common scheme that has harmed competition in each of the geographic areas identified in this Complaint. Through this action DOH seeks to recover illegal overcharges caused by Defendants' monopolization and agreements in restraint of trade in the

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markets for the production and sale of asphalt throughout West Virginia in violation of W.Va. Code §§ 47-18-3, -4, -9. DOH also seeks all equitable relief necessary to restore competition in the sale of asphalt in West Virginia.

STATEMENT OF THE CASE

3. This case is about Defendants' brazen statewide monopolization scheme in West Virginia, which has illegally inflated the cost of asphalt, the primary commodity used in building and repairing roads, parking lots, driveways, recreation courts, and airport runways (collectively "roads") and other miscellaneous products such as roofing. Defendants' scheme unlawfully forced the State Division of Highways to pay at least 40% more for asphalt than it should have, inflated Defendants' market share to over 80% in many counties, and illegally extracted millions of dollars in DOH overpayments.

4. West Virginia's roads are its central nervous system: fundamental to its economy, transportation system and the health and welfare of its citizens.

5. Understanding this, West Virginians, through their state and local governments, spend copious sums—upon information and belief, in the tens of millions of dollars—indirectly on asphalt each year when they purchase asphalt paving and other asphalt contractor services ("paving") containing the Defendants' asphalt from the Defendants and third parties. State and local governments, in particular, devote a disproportionate share of their annual budgets to paving and frequently have to delay, reject, or restrict the scope of critical road repair and construction projects due to the unlawfully excessive cost of the asphalt used in paving jobs in the areas dominated by the Defendants.

6. Given the inherent importance of roads, and therefore asphalt, in West Virginia, robust competition in the industry is essential; nothing has a greater influence on the affordability

of road construction and other asphalt projects. Roads cannot be built or maintained to the extent required when Defendants can dictate the price of asphalt and impose unlawfully high rates. The importance of minimizing asphalt costs is why DOH and West Virginians need a competitive process in which high quality and low cost is the norm. Asphalt monopolies are anathema to that outcome.

7. Regrettably, competition in West Virginia's asphalt industry is virtually non-existent. In the past years, millions of West Virginia dollars have been wasted on overpayment for paving due to inflated asphalt costs—dollars that by intent and design landed in the Defendants' pockets.

8. Defendants have engaged in an ongoing series of illegal and covert anticompetitive combinations, acquisitions, agreements, and practices. Defendants have thereby acquired, maintained, and enhanced market power in the market for the sale and production of asphalt in numerous counties that cover almost the entire State. Defendants have the ability to control asphalt prices and exclude their few competitors throughout West Virginia.

9. Defendants have grasped control of the assets of at least 15 asphalt plants that at one time directly competed with each other in West Virginia and therefore kept asphalt prices at lower, more competitive levels. Many of these plants were acquired by Defendants only after those plants offered competitive prices and began taking asphalt sales away from Defendants. Defendants also inexplicably shuttered asphalt plants after expending huge sums to acquire them. Together, and employing other illegal tactics, Defendants extinguished emerging competition for asphalt sales and have kept prices unreasonably high.

10. Defendants have amplified the negative effects of their asphalt plant acquisitions by acquiring or combining with numerous key asphalt paving companies. Controlling both the

supply of asphalt and owning paving contractors that apply the asphalt has foreclosed potential rival paving companies from bidding against Defendants. As with the asphalt plants, many of those paving companies were acquired as soon as they began successfully bidding against Defendants for asphalt paving contracts. And as with the asphalt plants, paving companies were inexplicably shuttered despite huge sums Defendants paid to acquire them. Defendants were thus also able to extinguish emerging competition for paving jobs and kept prices unreasonably high.

11. To gain a further stranglehold in the asphalt market in West Virginia, Defendants are now in the process of acquiring control of the sources of aggregate material—which represent 95% of the material needed to produce asphalt—in this State. If Defendants are allowed to continue their aggregate acquisition spree, competition in the asphalt production industry in West Virginia will be irreparably foreclosed.

12. Defendants have not stopped at combining with and acquiring competitors. After becoming virtual monopolists, Defendants purposefully took actions to maintain and enhance their market dominance through a host of predatory actions and bullying. Defendants have: (a) induced boycotts against their competitors; (b) expressly threatened to put new competitors out of business; (c) routinely broken state and federal laws related to truckload weights to gain a substantial competitive advantage; (d) made aggressive overtures to buy out the few remaining competitors in the market; (e) mandated statewide covenants not to compete, for as many as ten years, from their vanquished business rivals; and (f) lying, flagrantly and under penalty of perjury, to governments about their secret ownership of ostensibly competing companies.

13. Defendants have erected substantial barriers to those who might consider entering the asphalt industry. They have choked off the supply of aggregate and asphalt to competing asphalt plants and paving companies; threatened new entrants in these markets with reprisals

unless they ceased operations or sold to Defendants; and engaged in other predatory conduct that make it economically irrational for anyone to consider launching or expanding asphalt production or paving businesses in large swaths of this State.

14. Defendants' comprehensive scheme has been made all the more pernicious, long lasting, and effective by the purposeful concealment of their transactions and the extent of their control in this State. Defendants have used complex ownership structures to obscure the relationship between their numerous subsidiaries and affiliates which has allowed them to misrepresent their ownership of former competitors. Defendants have thus been able to lure DOH and West Virginians into believing that they are receiving multiple bids from independent competitors when in fact Defendants have an undisclosed interest in "competing" bidders. In other words, Defendants surreptitiously bid against themselves to cloak their common ownership. Thus, Defendants have created a scenario that regardless of which entity is awarded a contract, it is Defendants who actually win the bid.

15. Indeed, on at least one occasion, entities affiliated with Defendants submitted "bids" against each other giving the appearance of competition and even signing documents under penalty of perjury certifying that the bids were made without connection to any other entities submitting bids.

16. The Antitrust Division of the United States Department of Justice ("DOJ") has noted the ability of actors, such as Defendants, to fly under the regulatory radar while creating an illegal monopoly. According to the DOJ, "[i]n various states across the country, large aggregate, asphalt concrete, and concrete suppliers and highway construction companies are making numerous small acquisitions in local and regional markets. Some of these acquisitions can eliminate competition and provide the acquiring firm with the ability to raise prices. Because these

acquisitions often do not trigger the statutory requirement to report a proposed acquisition to the federal antitrust agencies, the Division does not receive notice that these transactions have occurred.” United States Department of Justice Guidelines and Reports, *A Merger Screening System to Monitor Acquisitions Occurring in the Aggregate, Asphalt Concrete, and Concrete Industries*. The Defendants have been only too happy to fly under that radar in West Virginia.

17. The economic effects of Defendants’ anticompetitive scheme have been marked. By unlawfully escalating the cost of asphalt, DOH and West Virginians, through their state and local governments, paid as much as 40% more per ton of asphalt in certain areas than in competitive areas in neighboring states when they have purchased paving from the Defendants and third parties. Further, badly needed road construction and repairs have been delayed or unaddressed by the unnecessarily high costs of asphalt, causing immeasurable consequential economic damage and unconscionable public safety risks.

18. Defendants’ practices have been continuous and ongoing, and show no signs of subsiding. Through this action DOH seeks to disgorge Defendants of their illegal financial gains and seeks equitable relief to abate ongoing and future economic and other harms resulting from the Defendants’ conduct.

JURISDICTION AND VENUE

19. General and specific personal jurisdiction exists over the parties because they have had systematic and continuous contacts in this jurisdiction and a substantial part of the acts and omissions giving rise to the causes of action arose in this jurisdiction.

20. The Circuit Court of Kanawha County, West Virginia has jurisdiction over this action pursuant to W.Va. Code § 51-2-2 because the amount in controversy, excluding interest, exceeds \$2,500, and because this action seeks equitable relief.

21. Venue is proper in this Court pursuant to W.Va. Code § 47-18-15 because acts on which this action is based occurred in Kanawha County, and several of the Defendants transact business within this county.

THE PARTIES

22. The West Virginia Department of Transportation and Division of Highways (“DOH”), as authorized under provisions W. Va. Code §§ 47-18-8, -9 and § 17-2A-8, brings this action against Defendants on behalf of itself and as *parens patriae*.

23. Defendant West Virginia Paving, Inc. (“WV Paving”) is a West Virginia corporation duly authorized to conduct business in the State of West Virginia, with its principal place of business located in Dunbar, West Virginia. WV Paving engages in the business of manufacturing, selling, and/or applying asphalt and asphalt related products in West Virginia markets. WV Paving previously competed but no longer competes with some or all of the other Defendants after combining with them.

24. Defendant Southern West Virginia Paving, Inc. (“Southern WV Paving”) is a West Virginia corporation duly authorized to conduct business in the State of West Virginia, with its principal place of business located in Sprague, West Virginia. Southern WV Paving engages in the business of manufacturing, selling, and/or applying asphalt and asphalt related products in West Virginia markets. Southern WV Paving previously competed but no longer competes with some or all of the other Defendants after combining with them.

25. Defendant Southern West Virginia Asphalt, Inc. (“Southern WV Asphalt”) is a West Virginia corporation duly authorized to conduct business in the State of West Virginia, with its principal place of business located in Sprague, West Virginia. Southern WV Asphalt engages in the business of manufacturing, selling, and/or applying asphalt and asphalt related products in

West Virginia markets. Southern WV Asphalt previously competed but no longer competes with some or all of the other Defendants after combining with them.

26. Defendant Kelly Paving, Inc. (“Kelly Paving”) is a West Virginia corporation duly authorized to conduct business in the State of West Virginia. Kelly Paving engages in the business of manufacturing, selling, and/or applying asphalt and asphalt related products in West Virginia markets. Kelly Paving is a joint venture partner with Defendant WV Paving in Defendant Camden Materials. As a result of this joint venture, competition between Kelly Paving and WV Paving has been unreasonably restrained.

27. Defendant Camden Materials, LLC (“Camden Materials”) is a West Virginia limited liability company duly authorized to conduct business in the State of West Virginia, with its principal place of business located in Dunbar, West Virginia. Camden Materials is a joint venture between Defendants WV Paving and Kelly Paving. Camden Materials engages in the business of manufacturing and selling asphalt. As a result of this joint venture, competition between Kelly Paving and WV Paving has been unreasonably restrained.

28. Defendant American Asphalt & Aggregate, Inc. (“American Asphalt & Aggregate”) is a West Virginia corporation duly authorized to conduct business in the State of West Virginia, with its principal place of business located in Kenova, West Virginia. American Asphalt & Aggregate engages in the business of manufacturing, selling, and/or applying asphalt and asphalt related products. American Asphalt & Aggregate previously competed but no longer competes with some or all of the other Defendants after combining with them.

29. Defendant American Asphalt of West Virginia, LLC (“American Asphalt”) is a Delaware limited liability company duly authorized to conduct business in the State of West Virginia, with its principal place of business located in Kenova, West Virginia. American

Asphalt's members are Defendants Southern WV Asphalt and American Asphalt & Aggregate, and thus American Asphalt is a citizen of West Virginia. American Asphalt engages in the business of manufacturing, selling, and/or applying asphalt and asphalt related products. American Asphalt previously competed but no longer competes with some or all of the other Defendants after combining with them.

30. Defendant Blacktop Industries and Equipment Company ("Blacktop Industries") is a West Virginia corporation duly authorized to conduct business in the State of West Virginia, with its principal place of business located in Kenova, West Virginia. Blacktop Industries engages in the business of manufacturing, selling, and/or applying asphalt and asphalt related products. Blacktop Industries previously competed but no longer competes with some or all of the other Defendants after combining with them.

CO-CONSPIRATORS

31. Various other individuals and entities, known and unknown, and not named as defendants in this Complaint, have participated as co-conspirators in the violations alleged herein and have performed acts and made statements in furtherance thereof. Such individuals or entities include persons or entities that stand to benefit from the elimination of competition in the production and sale of asphalt, in the sale of asphalt contracting services, and in the production and sale of aggregate materials. Such individuals or entities acted as co-conspirators and aided, abetted, or participated with the Defendants in the commission of the wrongful acts alleged in this Complaint.

PRODUCT AND GEOGRAPHIC MARKETS

32. There are at least three product markets impacted by the Defendants' unlawful conduct:

- a. The market for the production and sale of asphalt;
- b. The market for the indirect sale of asphalt (*e.g.*, sale and purchase of paving by and from persons or entities using Defendants' asphalt);
- c. The market for the acquisition of aggregate materials for use in the manufacture of asphalt. The State does not bring a claim here that the Defendants have monopolized or attempted to monopolize the market for aggregate, but reserves the right to do so in the future, including upon discovery.

33. According to the National Asphalt Pavement Association, the United States has more than 2.6 million miles of paved roads and highways, and 93 percent of those are surfaced with asphalt.

34. Asphalt is the preferred material for these roads because asphalt roads: can be constructed and repaired quickly which helps improve road safety; provide a smooth and continuous surface; reduce tire-pavement noise; handle hazardous road conditions; require less road salt for deicing treatments; require less energy to produce than other paving materials; and can be reused or recycled.

35. Other materials such as concrete are not adequate substitutes for asphalt because, among other reasons, concrete is more prone to cracking and breaking (especially if the surface underneath is not perfectly smooth); removal and replacement of concrete is more difficult compared to asphalt; asphalt paving projects can be finished and opened to traffic much faster than concrete; and maintenance and repair of asphalt is faster and less costly than concrete.

36. Paving roads with asphalt requires specialized equipment, permitting, access to asphalt, and know how. DOH and West Virginians, through their state and local governments,

cannot perform asphalt paving on their own and therefore contract with private companies to pave roads.

37. Contractors who do not specialize in asphalt paving cannot quickly and cost effectively develop the expertise or acquire the inputs and equipment in order to bid for the types of asphalt paving jobs required by DOH and West Virginians, through their state and local governments. DOH and West Virginians, through their state and local governments, cannot utilize non-asphalt contractors for paving.

38. An indispensable ingredient in asphalt is aggregate. Aggregate is a compilation of hard, inert materials including sand, gravel, crushed stone, slag or rock dust and typically make up about 95 percent of asphalt by weight and 75-85 percent by volume. Aggregate is primarily responsible for the amount of weight finished pavement can withstand.

39. Selection of an aggregate material for use in asphalt depends on several factors including availability, cost, and quality of material. Commonly measured physical aggregate properties include gradation and size; toughness and resistance; durability and soundness; particle shape and surface texture; specific gravity; cleanliness and deleterious materials; and moisture content.

40. Defendants are rapidly attempting to consolidate ownership of aggregate materials, and upon information and belief, Defendants currently control the grade of aggregate approved by the DOH.

41. There is potentially more than one geographic market within which to analyze the impact and legality of the Defendants' conduct. However, each of these markets share the following:

a. Each has experienced substantial economic damage from Defendants' collective and intertwined unlawful conduct; and

b. This same statewide scheme by Defendants to monopolize the product and geographic markets is the cause of economic injury in these markets.

c. As such, the geographic markets within which to analyze the Defendants may be statewide or narrower such by each county. Sub-markets within these broader markets may also exist, and the precise contours of the geographic market(s) will be determined through discovery and economic analysis of discovery materials.

THE DEFENDANTS HAVE MARKET POWER

42. Combined, Defendants are an industry colossus. Whether measured in market share or demonstrated control over prices and the exclusion of competitors, Defendants have market power in the market for asphalt production. Defendants also are in the process of establishing market power in the production and sale of aggregate materials—95% of the inputs in asphalt production.

43. Defendants' average an 82% monetary market share—an amount that frequently rises to 95%—in at least the following 30 West Virginia counties: Boone, Cabell, Calhoun, Clay, Fayette, Grant, Greenbrier, Hardy, Jackson, Kanawha, Lincoln, Logan, Mason, McDowell, Mercer, Monroe, Nicholas, Pendleton, Pocahontas, Putnam, Raleigh, Ritchie, Roane, Summers, Tucker, Tyler, Wayne, Wirt, Wood, and Wyoming.

44. Defendants use their market power to indirectly harm DOH and West Virginians when their or other paving companies bid using Defendants' asphalt. When Defendants' paving companies and affiliates sell paving, their inflated asphalt prices are passed on to DOH and West

Virginians. In the rare instances other companies succeed at auction, they too simply pass on the Defendants' overcharges to DOH and West Virginians, through their state and local governments.

**ANTICOMPETITIVE CONDUCT: COMBINATIONS WITH
ACTUAL AND POTENTIAL COMPETITORS**

45. Defendants have engaged in a series of clandestine combinations and consolidations with competing asphalt plants and asphalt paving contractors that serve West Virginia markets. Many of these combinations and acquisitions occurred soon after the targets began competing successfully against Defendants.

46. Through their scheme of asphalt plant and asphalt paving contractor combinations and acquisitions, the following entities which used to compete are now under the control of Defendants and have illegally overcharged DOH and West Virginians, through their state and local governments, for asphalt and asphalt paving services.

47. The consolidations and combinations with WV Paving, Southern WV Asphalt, and Southern WV Paving were amongst the first steps in Defendants' West Virginia monopolization scheme. Defendants' combination with Mountain Enterprises turned them into a behemoth. Mountain Enterprises dominated WV Paving in large swaths of West Virginia for years. Rather than compete on price against Mountain Enterprises, Defendants simply combined with them to destroy competition. As part of that combination, Defendants also wrapped W-L Construction & Paving, Inc. and Bizzack, Inc. into its growing collective.

48. Appalachian Paving and Aggregate, LLC, an asphalt and paving business located in Lenore, West Virginia, won a \$3.6 million contract to pave an airport in Mingo County. Shortly thereafter, Defendants consumed the company.

49. Those daring to compete with Defendants have been forced to confront Defendants' financial heft. American Asphalt & Aggregate, Inc. ("American Asphalt") was one such maverick

competitor. American Asphalt, through its subsidiary Blacktop Industries, began bidding, and winning, against Defendants on asphalt paving projects in West Virginia by simply offering lower prices.

50. WV Paving then approached Mr. Daron Dean, owner of American Asphalt and acquired American Asphalt. Rather than compete on price, Defendants bought off American Asphalt and its subsidiary Blacktop Industries. As a part of the deal, American Asphalt shuttered two of its asphalt plants that had previously competed against Defendants and also agreed not to compete, through Blacktop Industries.

51. The post-transaction loss of competition between American Asphalt and Defendants was significant. Upon information and belief, after winning six competitive bids in one month competing against WV Paving, Blacktop Industries never bid against WV Paving again. That loss of competition can be seen in bids submitted to the City of Charleston. Before American Asphalt was acquired, Blacktop Industries bid \$510,028 less than WV Paving to resurface numerous streets in the City of Charleston. The City of Charleston thus saved over one half million dollars through actual competition. The Defendants have completely extinguished that competition.

52. Defendants later consumed the assets of Yellowstar Materials, Inc. in West Virginia. Yellowstar, which owned two asphalt plants, was formed by a former Vice President of WV Paving. Yellowstar had the potential to compete with Defendants within West Virginia. Unfortunately, WV Paving recognized the incipient competition and threatened Yellowstar by, among other things, claiming it would put an asphalt plant directly next to Yellowstar. Defendants continued to threaten Yellowstar until Yellowstar was forced to sell to Defendants, at which point Yellowstar's asphalt plants were torn down.

53. Upon information and belief, Defendants also combined with Appalachian Paving & Aggregate after Appalachian obtained a sizeable paving contract and thus dared to challenge Defendants' monopoly.

54. Defendants' acquisition of MAC Construction & Excavating in 2014 tells a similar story. MAC Construction ambitiously entered the West Virginia market and competed head-to-head with Defendants. MAC Construction showed early success in outbidding WV Paving. In July 2014, on two massive projects, MAC Construction's bids defeated WV Paving with substantially lower prices.

55. Almost immediately after MAC Construction's successes, Defendants acquired the company and MAC Construction requested revocation of a permit to operate an asphalt plant in St. Albans. With this acquisition, Defendants quickly and decisively shut down MAC Construction's emerging beneficial competitive influence.

56. Outright acquisition is not the only means by which Defendants have throttled competition in this State. They also frequently employ sham "joint ventures" that have no legitimate economic basis but do allow Defendants to continue operating unrestrained by market forces.

57. In one example, Kelly Paving, Inc. competed aggressively against WV Paving for years in several West Virginia counties. When Kelly Paving began to win this war, Defendants proposed and finalized a sham "joint venture" with Kelly Paving that became Camden Materials, LLC.

58. Camden Materials opened an asphalt plant in Parkersburg. Although both parties to the Camden Materials "joint venture" have massive balance sheets replete with cash, and thus could have easily opened competitive plants, the companies agreed to collude and end their price

war. Since the creation of the “joint venture” the two companies have stopped bidding against one another and prices they charged increased. In Jackson County, for example, although both entities “bid,” WV Paving won almost all of the bids after 2006 and Kelly Paving simply stopped bidding on projects in Mason County.

59. Unfortunately for those purchasing asphalt paving services in this State, the Camden Materials sham “joint venture” is growing. According to Kelly Paving’s parent, there may be a new asphalt plant on the way at Camden Materials. Such an expansion would further reduce competition between WV Paving and Kelly Paving and thus increase Defendants’ scope and dominance.

60. Defendants’ dominance over asphalt production has spilled into the asphalt paving industry and forced those prices unnecessarily high. Defendants sell their asphalt at monopoly prices. As result, when Defendants prevail at an auction for asphalt paving jobs, DOH and West Virginians, through their state and local governments, indirectly pay Defendants’ illegal asphalt overcharge.

61. Even in the rare cases where an asphalt paving company that is not controlled by a Defendant prevails in the bidding process, DOH and West Virginians still pay the Defendants’ overcharge. That occurs because almost all of those independent paving companies must buy asphalt from the Defendants at their monopoly price and just pass those illegal overcharges onto DOH and West Virginians.

62. DOH and West Virginians have been injured and are threatened with continuing injury by Defendants’ pattern of acquisitions, combinations, and other anticompetitive conduct referred to above, which has eliminated actual competition between Defendants and the acquired or combined companies, eliminated competition in the asphalt and asphalt related services markets

generally, raised prices for asphalt and asphalt related services, substantially increased concentration in the markets for asphalt and asphalt related services, facilitated the possibility of collusion among the remaining competitors, and increased barriers to entry and barriers to effective competition.

63. Defendants' conduct is particularly egregious given the state of West Virginia's roads. Many of West Virginia's roads are in a state of disrepair, with repeated calls from the public for cash-strapped governments to "fix the roads." And, according to a recent study, West Virginia had the highest fatality rate per distance driven in 2012.¹ Because the state, municipalities and other political subdivisions have been overcharged for road paving services, they are unable to remedy this dire situation.

**ANTICOMPETITIVE CONDUCT: ILLEGAL MAINTENANCE AND
ENHANCEMENT OF MARKET DOMINANCE**

64. Defendants have also taken continuous, ongoing, and outrageous actions to maintain and enhance their market power.

65. In but one example, Defendants have gone to great lengths to destroy a small but potential rival. AAA Paving is a small paving company that recently competed for asphalt paving jobs against Defendants.

66. When AAA Paving began operating, it purchased its asphalt from Southern WV Paving. However, to reduce dependency on Southern WV Paving, AAA Paving bought two asphalt plants with the intention of moving them to Princeton, West Virginia.

67. AAA Paving purchased an industrial park in Princeton and informed Southern WV Paving that it planned to move its two plants to that site. Doing so may have introduced meaningful

¹ Road Safety in the Individual U.S. States: Current Status and Recent Changes, Michael Sivak, July 2014, University of Michigan Transportation Research Institute.

competition to Southern WV Paving. Predictably, in exchange for abandoning these plans, management for Southern WV Paving immediately offered to cut the price of asphalt to AAA Paving or, in the alternative, threatened to cut off supply of aggregate and liquid asphalt to AAA Paving. When AAA Paving continued with its plans to install asphalt plants in Princeton, Defendants refused to sell any more asphalt to AAA Paving.

68. Defendants' acquisition of Yellowstar Materials followed a similar script, although Defendants succeeded in forcing Yellowstar out of business. When Yellowstar threatened to introduce an element of competition in West Virginia, Defendants threatened to locate a plant next to Yellowstar's plant. Further bolstering their threats, Defendants told a trucking company that previously served Yellowstar that if the trucking company provided any further services to Yellowstar, it would never be hired by Defendants. After Defendants succeeded in forcing Yellowstar out of business, they tore down Yellowstar's plants and forced Yellowstar's owner to sign a 10 year non-compete agreement.

69. Defendants' actions toward Yellowstar and AAA Paving have not been rare occurrences.

70. Asphalt paving companies that bid against Defendants are confronted with Defendants' control of the asphalt supply. Defendants may refuse to supply asphalt to those independent paving companies, only agree to sell to them at unreasonable prices, and/or provide them with inferior or unusable product. Those unreasonable prices make it difficult for the paving company to make competitive or qualifying bids against Defendants.

71. Defendants also have concealed the actual ownership structures of the entities it owns and controls when its companies submit bids for asphalt paving contracts. The entities

receiving the bids are thus induced to believe they are receiving competitive bids when in fact the bidders are related. Defendants even sign affidavits, falsely, that no such relationships exist.

72. Defendants likely have also violated West Virginia law governing the weight of trucks transporting asphalt. Upon information and belief, Defendants routinely overweight their trucks, giving them a substantial advantage against would be competitors for jobs requiring large amounts of asphalt.

EXPANDING TO AGGREGATES

73. Defendants have not stopped at illegally monopolizing the asphalt market. In their attempts to gain absolute control over all stages of the asphalt production process, Defendants have made recent maneuvers to monopolize the aggregates industry in West Virginia.

74. Defendants acquired 35 million tons of aggregate reserves by obtaining control of Kermit Burcher Contractors in Elkins, West Virginia.

75. Defendants obtained access to an addition 25 million tons of aggregate reserves by gaining control over R.H. Armstrong in Elkins, West Virginia.

76. Defendants also entered into a "joint venture" with the W.W. Boxley Company of southeast West Virginia, providing access to an additional 115 million tons of aggregates reserves.

77. Defendants acquired 273 million tons of reserves in Tucker County, West Virginia.

78. Defendants have also acquired 34 million tons of limestone reserves at a quarry close to the corridor linking Eastern Kentucky and West Virginia.

79. Upon information and belief, Defendants now control the vast majority of the only type of aggregate certified by the DOH for state road construction projects.

80. These acquisitions are potential devastating because Defendants can or shortly will be able to exclude asphalt plant competitors from the market merely by refusing to sell them aggregate at competitive prices, or simply boycotting them entirely.

ANTICOMPETITIVE EFFECTS AND DAMAGES

81. Defendants not only have market power but have used it to cause DOH and West Virginians enormous damage.

82. There are almost two dozen counties in Kentucky where companies aggressively bid against each other for paving contracts. These competitive areas are reasonable benchmarks against which to measure Defendants' pricing in the West Virginia. This is even more the case given that these competitive areas have higher costs of living than West Virginia, and that operating costs for asphalt plants and pavers—including real estate, taxes, labor, and transportation—there are at least the same if not higher than in this State.

83. These factors suggest that the per-ton price of asphalt in the neighboring state should be equal to or higher than that charged in the geographic markets. Alarming, asphalt prices are on average 40% higher in the geographic markets. DOH and West Virginians, through their state and local governments, have incurred massive economic injuries as this estimated 40% overcharge has been passed on to them when they have purchased paving and other contracting services containing Defendants' asphalt.

84. The unnecessarily high prices for asphalt and asphalt paving services in West Virginia has secondary, and perhaps more detrimental, impacts. Governmental bodies may be forced to either delay road construction repairs or not pursue them at all, causing immeasurable consequential economic damage and unconscionable public safety risks. West Virginia is in dire straits when it comes to road finance. As our Blue Ribbon Commission on Highways observed last

May: "To compensate for stagnant state and federal revenues, the *WVDOH has increased the overall paving cycle to nearly 30 years when a 12-year paving cycle is desired*. This means that on average a road paved today will not be repaved for 30 years. However, because WVDOH, rightly, considers those roads with the most use to be the highest priority, *many lower volume local service roads may never get repaved and might have to become unpaved gravel roads.*" West Virginia Blue Ribbon Commission on Highways, *Investing in West Virginia's Future, Phase I* (emphasis added).

PURPOSEFUL CONCEALMENT OF ANTICOMPETITIVE CONDUCT

85. Defendants have, through combinations and acquisitions, obtained control over numerous asphalt plants, companies that own and operate asphalt plants, and paving companies. None of those combinations and acquisitions, however, have triggered scrutiny under relevant antitrust laws.

86. Typically, Defendants continue to operate the asphalt plants and paving companies over which they gain control under the names used by the previous owners with no indication that these companies are now owned or controlled by Defendants.

87. Defendants negotiate employment or consulting contracts with some of the former owners or employees of the asphalt plant or paving companies to further contribute to the appearance of continuity. This practice leaves the public with the false impression that the acquired asphalt or paving company is still independent and that there is a measure of competition in the market when in fact the acquired companies are owned and controlled by Defendants.

88. Defendants have entered joint ventures and change in control transactions that conceal their true ownership of the asphalt, asphalt paving, and aggregate companies. These "joint

ventures” include Bizzack Construction; American Asphalt of West Virginia; asphalt plants owned by Blacktop Industries; Appalachian Paving and Aggregate; and Boxley Materials.

89. For example, once the curtain is lifted, every payment made by the City of Charleston for asphalt paving services, from 2006 to the present, was made to companies owned or controlled by Defendants, though operating under different names: (i) American Asphalt and Aggregate, Inc.; (ii) American Asphalt of West Virginia, LLC; (iii) Blacktop Industries and Equipment Company; and (iv) West Virginia Paving, Inc.

90. To further illustrate Defendants’ deception, American Asphalt bid against WV Paving for the sale of asphalt to the City of Charleston in 2012. In doing so American Asphalt and WV Paving signed affidavits stating that “I certify that this bid is made without prior understanding, agreement or *connection* with any corporation, firm, limited liability company, partnership or person or entity submitting a bid for the same materials, supplies, equipment or services and is in all respects fair and without collusion or fraud.” (emphasis added). American Asphalt listed its owners as Southern WV Asphalt and American Asphalt & Aggregates, Inc., while WV Paving listed its owners as Oldcastle Materials. In fact, Southern WV Asphalt, American Asphalt & Aggregates, Inc., and WV Paving are commonly owned and integrated entities. Obscuring these relationships was purposeful subterfuge aimed at tricking the City of Charleston into believing they were entertaining a competitive auction. In reality the City was dealing with one monopolist pretending to be two competing companies. And almost mockingly, the two bids were within one dollar of each other. Defendants were assured they would prevail and were able to set a non-competitive monopoly price.

INHERENT AND DEFENDANT-CREATED BARRIERS TO ENTRY

91. Establishing a new, successful asphalt plant is difficult, time-consuming, and costly.

92. As a threshold matter, environmental and zoning permits must be obtained and many communities object to asphalt plants on environmental and other grounds.

93. Even if potential competitors could obtain permits, it can take years—approximately 2-3 years for a company that does not own an aggregates quarry—from concept to completion of an asphalt plant.

94. Assuming a potential competitor is allowed to build an asphalt plant and then completes that plant, the competitor must still be able to obtain the ingredients necessary to manufacture the asphalt. Aggregates are one of the two main components in the manufacture of asphalt. To be cost competitive, an asphalt plant must own or have access to a supply of aggregates in close proximity to the plant.

95. As noted above, Defendants' scheme to monopolize all levels of the asphalt industry has extended into the market for the sale of aggregates. Defendants' increasing dominance in the supply of aggregates within and close to West Virginia makes construction of a new and competing asphalt plant a risky endeavor. With their control of the aggregates supply, Defendants can charge exorbitant prices to potential asphalt competitors. Because Defendants would not incur similarly high costs for aggregates, they have the ability to supply asphalt at lower cost. This threat prevents potential competitors from entering the market.

96. If a potential competitor was willing to confront, and could somehow overcome, the hurdles listed above, it would also have to be well capitalized and confident that it could sell its asphalt in significant volumes.

97. Estimated costs to build an asphalt plant range from \$1-2 million (and indeed can run beyond \$4 million). That figure does not even include costs to acquire the land for the plant, materials and heavy equipment (*e.g.*, loaders, a dozer, a tractor and dump trucks) that further increase the financial outlay.

98. A new entrant will also be confronted with extensive operating costs including labor; insurance; telecommunications; office supplies; parts and equipment; environmental permits and a lab for testing the asphalt; electricity to run the plant; and fuel and electricity for ancillary equipment.

99. For these reasons, very few if any asphalt plants have entered or will enter the relevant markets to combat the Defendants' unlawful pricing.

100. Defendants' monopolization of the asphalt market has also created a barrier to entry for potential competitors in the related market for asphalt paving services.

101. Defendants own and control companies that both produce asphalt and provide the paving services. Defendants will not sell asphalt to potential competitors in the asphalt paving market at a price that will allow that potential competitor to compete on bids for paving services. Potential competitors recognize that reality and therefore cannot enter the asphalt paving services market.

102. Because private paving companies cannot obtain asphalt at a competitive cost in the relevant market, no private paving companies can sufficiently enter the market. Due to cost and budgetary concerns, government entities are likewise unable to enter the market for paving services. If a government entity planned to lay the asphalt themselves, they would need to acquire special equipment including at least one paver, a specialized tractor-trailer to haul the paver, dump trucks to haul the asphalt to the job site, at least two rollers, trucks and trailers to haul the rollers,

and transportation for the paving crew and foreman. Given the sporadic and limited use for that equipment, such a large capital outlay is unlikely to be justified.

103. For all of the above reasons, very few if any asphalt plants or asphalt paving companies have entered or will enter the relevant markets to combat Defendants' illegal pricing behavior.

COUNT I – Restraints of trade in violation of W.Va. Code § 47-18-3
(Against all Defendants)

104. DOH incorporates by reference and thereby re-allege the preceding paragraphs as if fully set forth herein.

105. At all times relevant herein, Defendants did knowingly and unlawfully combine, conspire, agree and have a tacit understanding together with each other and others to restrain a part of the trade and commerce in the manufacturing and selling asphalt within West Virginia, and did, in fact, restrain trade and commerce in violation of W.Va. Code § 47-18-3.

106. It was a part of the combination, conspiracy and/or understanding, and the object and purposes thereof to accomplish the following:

- a. To arbitrarily, unlawfully, unreasonably and knowingly control and affect the price of asphalt and asphalt related products and services within West Virginia;
- b. To arbitrarily, unlawfully, unreasonably and knowingly prevent, suppress and eliminate competition from competitors and prospective competitors of Defendants other than those in combination, conspiracy and/or agreement with Defendants;
- c. To arbitrarily, unlawfully, unreasonably and knowingly prevent, suppress and eliminate competition from any source, other than those in combination, conspiracy and/or agreement with Defendants, in the sale of asphalt within West Virginia; and

d. To establish and maintain unreasonably high, excessive, monopolistic and non-competitive prices for asphalt within West Virginia.

107. As part of the unlawful combination and conspiracy, in pursuance thereof and in furtherance thereof and to effectuate its object and purpose, Defendants did:

- a. Acquire or combine with competitors in the asphalt industry;
- b. Acquire or combine with competitors in the asphalt paving industry;
- c. Acquire asphalt plants;
- d. Enter into joint ventures with competitors in the asphalt industry;
- e. Enter into joint ventures with competitors in the asphalt paving industry;
- f. Threaten potential competitors and entrants into the market for asphalt and asphalt paving services; and
- g. Obscure the true nature of the entity or entities bidding on asphalt paving jobs.

108. As a result of the foregoing, DOH and West Virginians have been damaged and will continue to be damaged because they are compelled to purchase asphalt paving and other services at non-competitive prices because they contain Defendants' unlawfully overpriced asphalt.

109. Defendants intend to continue engaging in their unfair competition and other unlawful practices for the purposes of restraining trade, destroying competition, and eliminating competitors. Until Defendants are permanently enjoined from continuing such acts and practices, DOH and West Virginians will suffer further losses and irreparable damages.

COUNT II – Monopolization in Violation of W.Va. Code § 47-18-4
(Against All Defendants)

110. DOH incorporates by reference and thereby re-allege the preceding paragraphs as if fully set forth herein.

111. At all times relevant herein, Defendants did knowingly and unlawfully monopolize or attempt to monopolize a part of the trade or commerce in the manufacture and sale of asphalt in West Virginia, in violation of W.Va. Code § 47-18-4.

112. It was a part of the unlawful monopoly and the purpose thereof to accomplish the following:

- a. To create and maintain a monopoly in the sale of asphalt in West Virginia;
- b. To control and affect the price of asphalt and asphalt related products and services in the West Virginia;
- c. To establish and maintain unreasonably high, excessive, monopolistic and non-competitive prices for asphalt and asphalt related products and services in West Virginia; and
- d. To prevent, suppress and eliminate competition in the manufacture, sale and/or application of asphalt in West Virginia.

113. As part of the unlawful monopoly and in furtherance thereof, Defendants did:

- a. Acquire or combine with competitors in the asphalt industry within West Virginia;
- b. Acquire asphalt plants within West Virginia;
- c. Acquire or combine with competitors in the asphalt paving industry within West Virginia;
- d. Enter into joint ventures with competitors in the asphalt industry in West Virginia;
- e. Enter into joint ventures with competitors in the asphalt paving industry in West Virginia;

f. Threaten potential competitors and entrants into the market for asphalt and asphalt related products and services; and

g. Obscure the true nature of the entity or entities bidding on asphalt paving jobs.

114. As a result of the foregoing, DOH and West Virginians have been damaged and will continue to be damaged because they are compelled to purchase asphalt paving and other services at non-competitive prices because they contain Defendants' unlawfully overpriced asphalt.

115. Defendants intend to continue engaging in their unfair competition and other unlawful practices for the purposes of restraining trade, destroying competition, and eliminating competitors. Until Defendants are permanently enjoined from continuing such acts and practices, DOH and West Virginians will suffer further losses and irreparable damages.

COUNT III – Unjust Enrichment
(Against All Defendants)

116. DOH incorporates by reference and thereby re-allege the preceding paragraphs as if fully set forth herein.

117. Defendants conduct was undertaken with the specific purpose of maintaining prices for asphalt and asphalt related products and services above competitive levels.

118. As a proximate result of Defendants' restraint of trade and monopolization they have been unjustly enriched by their willful and *per se* violations of West Virginia laws.

119. DOH and West Virginians conferred a benefit upon Defendants by paying supracompetitive prices for asphalt and asphalt related products and services.

120. Defendants' conduct conferred a benefit upon themselves at the expense of DOH and West Virginians.

121. Defendants were aware of the benefits conferred by DOH and West Virginians, through their state and local governments, and those conferred by Defendants upon themselves. Those benefits came at the expense of DOH and West Virginians. Defendants have retained this benefit without compensating DOH and West Virginians.

122. It would be inequitable to allow Defendants to retain those benefits considering Defendants' behavior in creating the environment that allowed them to obtain those benefits.

COUNT IV –Civil Conspiracy
(Against All Defendants)

123. DOH incorporates by reference and thereby re-alleges the preceding paragraphs as if fully set forth herein.

124. Defendants combined together through concerted action to accomplish an unlawful purpose—to create *de facto* monopolies throughout the state and thereby allow them to artificially raise the price of asphalt and asphalt contracting services.

125. The purpose of the conspiracy was itself unlawful or was accomplished through unlawful and tortious means, described above. Defendants shared the same conspiratorial objectives of engaging in an ongoing series of illegal and covert anticompetitive combinations, acquisitions and agreements to acquire, maintain and enhance market power for the sale and production of asphalt and asphalt contracting services and thereby control prices for asphalt and asphalt contracting services and exclude potential competitors from those markets.

126. Defendants combined together in this common purpose to acquire, maintain and enhance market power for the sale and production of asphalt and thereby control asphalt prices and exclude potential competitors. Defendants also combined together to control the supply of asphalt paving contractors to limit the potential for market entry and competition from rival paving

companies. Defendants are also in the process of combining to acquire and control the sources of aggregate material which constitute 95% of the material needed to produce asphalt.

127. Defendants' affirmative acts constitute unlawful civil conspiracy through the use of tortious conduct and a common scheme or plan in an attempt to acquire, maintain and enhance market power in the sale and production of asphalt and asphalt contracting services and thereby control asphalt prices and contracting services and exclude potential competitors.

128. The acts of Defendants were done maliciously, willfully, wantonly, and with indifference to the civil obligations affecting the rights of DOH and West Virginians, through their state and local governments.

129. DOH and West Virginians were victims of the common scheme and conspiracy referenced above. DOH and West Virginians, through their state and local governments, were injured, and continue to be injured because they paid and pay illegal overcharges for asphalt paving and other asphalt contracting services from Defendants' owned or affiliated entities, or purchased, from third parties, paving and other services or products utilizing or containing Defendants' asphalt

PRAYER FOR RELIEF

WHEREFORE, DOH requests:

- a. Damages;
- b. Punitive damages;
- c. That Defendants be enjoined from engaging in such unfair and unlawful acts and practices;
- d. That Defendants pay to DOH the costs of this action and reasonable attorneys' fees as well as pre-judgment and post-judgment interest to be allowed to DOH by this Court.

JURY DEMAND

DOH hereby demands a trial by jury.

**THE WEST VIRGINIA DEPARTMENT
OF TRANSPORTATION
AND DIVISION OF HIGHWAYS**

By Counsel


Benjamin L. Bailey (WVSB # 200)
Michael B. Hissam (WVSB # 11526)
Bailey & Glasser LLP
209 Capitol Street
Charleston, WV 25301
Telephone: 304-345-6555
Facsimile: 304-342-1110