

States Attorney, for the District of South Carolina, First Union Building, 1441 Main Street, Suite 500, Columbia, South Carolina 29201, at U.S. EPA Region IV, 61 Forsyth Street, Atlanta, Georgia 30303, and at the Consent Decree Library, 1120 G Street, NW, 3rd Floor, Washington, DC 20005, (202) 624-0892. A copy of the proposed Consent Decree may be obtained in person or by mail from the Consent Decree Library, 1120 G Street, NW., 3rd Floor, Washington, DC 20005. In requesting a copy, please enclose a check in the amount of \$4.75 (25 cents per page reproduction cost) payable to the Consent Decree Library.

Joel M. Gross,

Chief, Environmental Enforcement Section, Environment and Natural Resources Division.
[FR Doc. 99-15205 Filed 6-15-99; 8:45 am]

BILLING CODE 4410-15-M

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Florida Rock Industries, Inc., et al.; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)-(h), that a proposed Final Judgment, Stipulation and Order, and Competitive Impact Statement have been filed with the United States District Court in the Middle District of Florida, Jacksonville Division, Civil No. 99-516-CIV-J-20A.

On May 26, 1999, the United States filed a Complaint alleging that the proposed acquisition by Florida Rock of the stock of Harper Bros. and Commercial Testing, Inc. would violate section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment, filed the same time as the Complaint, requires Florida Rock to divest the Alico Road Quarry, Fort Myers, Florida, the Palmdale Sand Mine, Palmdale, Florida, and related assets that it will obtain in connection with the acquisition of Harper Bros. and Testing.

Public comment is invited within the statutory 60-day comment period. Such comments and responses thereto will be published in the **Federal Register** and filed with the Court. Comments should be directed to J. Robert Kramer, Chief, Litigation II Section, Antitrust Division, United States Department of Justice, 1401 H Street, NW., Suite 3000, Washington, DC 20530 (telephone: 202/307-0924).

Copies of the Complaint, Stipulation and Order, Proposed Final Judgment, and Competitive Impact Statement are

available for inspection in Room 215 of the U.S. Department of Justice, Antitrust Division, 325 7th Street, NW., Washington, DC 20530, (202) 514-2841. Copies of these materials may be obtained upon request and payment of a copying fee.

Constance K. Robinson,

Director of Operations & Merger Enforcement.

United States District Court, Middle District of Florida, Jacksonville Division

United States of America, Plaintiff, v. Florida Rock Industries, Inc.; Harper Bros., Inc.; Commercial Testing, Inc.; and Daniel R. Harper, Defendants [Civil No.: 99-516-CIV-J-20A].

Stipulation and Order

It is stipulated by and between the undersigned parties, by their respective attorneys, as follows:

1. The Court has jurisdiction over the subject matter of this action and over each of the parties hereto, and venue of this action is proper in the United States District Court for the Middle District of Florida.

2. The parties stipulate that a Final Judgment in the form hereto attached may be filed and entered by the Court, upon the motion of any party or upon the Court's own motion, at any time after compliance with the requirements of the Antitrust Procedures and Penalties Act (15 U.S.C. 16), and without further notice to any party or other proceedings, provided that the United States has not withdrawn its consent, which it may do at any time before the entry of the proposed Final Judgment by serving notice thereof on defendants and by filing that notice with the Court, on or before September 15, 1999.

3. Defendants shall abide by and comply with the provisions of the proposed Final Judgment pending entry of the Final Judgment or until expiration of time for all appeals of any court ruling declining entry of the proposed Final Judgment, and shall, from the date of the signing of this Stipulation by the parties, comply with all the terms and provisions of the proposed Final Judgment as though they were in full force and effect as an order of the Court.

4. Defendants shall not consummate the transaction sought to be enjoined by the Complaint herein before the Court has signed the Hold Separate Stipulation and Order.

5. This Stipulation shall apply with equal force and effect to any amended proposed Final Judgment agreed upon in writing by the parties and submitted to the Court.

6. In the event (a) the United States has withdrawn its consent, as provided in paragraph 2 above, or (b) the proposed Final Judgment is not entered pursuant to this Stipulation, the time has expired for all appeals of any Court ruling declining entry of the proposed Final Judgment, and the Court has not otherwise ordered continued compliance with the terms and provisions of the proposed Final Judgment, then the parties are released from all further obligations under this Stipulation, and the making of this Stipulation shall be without prejudice to any party in this or any other proceeding.

7. Defendants represent that the divestiture ordered in the proposed Final Judgment can and will be made, and that the defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained therein.

Dated: May 25, 1999.

For Plaintiff United States

Frederick H. Parmenter,

U.S. Department of Justice, Antitrust Division, Litigation II Section, Suite 3000, Washington, D.C. 20530, Telephone: (202) 307-0620, Facsimile: (202) 307-6283.

For Defendant Florida Rock Industries, Inc.

Eugene J. Meigher,

Arent Fox,

1050 Connecticut Avenue, N.W., Washington, D.C. 20036-5339, Telephone: (202) 857-6048, Facsimile: (202) 857-6395.

Lewis S. Lee,

LeBoeuf, Lamb, Greene & MacRae, 50 N. Laura Street, Jacksonville, Florida 32202-3650, Telephone: (904) 630-5322, Facsimile: (904) 353-1673.

For Defendants Harper Bros., Inc., Commercial Testing, Inc. and Daniel R. Harper

Neil Imus,

Vinson & Elkins L.L.P., The Willard Office Building, 1455 Pennsylvania Avenue, N.W., Washington, D.C. 20004-1008, Telephone: (202) 639-6675, Facsimile: (202) 639-6604.

Order

Approved for entry and ordered ¹ this 27th day of May, 1999, at Jacksonville, Florida.

Harvey E. Schlessinger,

United States District Judge.

United States of America, Plaintiff v. Florida Rock Industries, Inc.; Harper Bros., Inc.; Commercial Testing, Inc.; and Daniel R. Harper, Defendants. [Civil No.: 99-516-Civ-J-20A.]

Hold Separate Stipulation and Order

It is hereby stipulated and agreed by and between the undersigned parties,

¹ Final Judgment and Proposed Final Judgment mean the same thing.

subject to approval and entry by the Court, that:

I. Definitions

As used in this Hold Separate Stipulation and Order:

A. "Florida Rock" means defendant Florida Rock Industries, Inc., a Florida corporation headquartered in Jacksonville, Florida, and includes its successors and assigns, and its subsidiaries, divisions, groups, affiliates, directors, officers, managers, agents, and employees.

B. "Harper Bros." means defendant Harper Bros., Inc., a Florida corporation headquartered in Fort Myers, Florida, and includes its successors and assigns, and its subsidiaries, divisions, groups, affiliates, directors, officers, managers, agents, and employees.

C. "Testing" means defendant Commercial Testing, Inc., a Florida corporation headquartered in Fort Myers, Florida, and including its successors and assigns, and its subsidiaries, divisions, groups, affiliates, directors, officers, managers, agents, and employees.

D. "Daniel R. Harper" means defendant Daniel R. Harper, an individual who resides in Fort Myers, Florida and is the Chairman of the Board and majority stockholder of Harper Bros. and the majority stockholder of Testing.

E. "Aggregate" means crushed stone and gravel produced at quarries, mines, or gravel pits used to manufacture asphalt concrete and ready mix concrete. "Stone products" refer to any products produced at an aggregate quarry.

F. "Silica sand" means sand that is naturally occurring and not produced at an aggregate quarry (known as "manufactured sand"). Silica sand is used to produce specific types of ready mix concrete used in Florida Department of Transportation highway projects and commercial construction projects.

G. "Asphalt concrete" means a paving material produced by combining and heating asphalt cement (also referred to in the industry as "liquid asphalt" or asphalt oil") with aggregate.

H. "Ready mix concrete" means a building material used in the construction of building, highways, bridges, tunnels, and other projects that is produced by mixing a cementing material (commonly portland cement) and aggregate with sufficient water to cause the cement to set and bind. Silica sand is combined with aggregate to produce specific types of ready mix concrete required for certain construction projects.

I. "Southwest Florida" means Charlotte, Lee, and Collier Counties and Sarasota County south of State Route 780 in Florida. The city of Sarasota, Florida is located in Sarasota County, and the city of Fort Myers, Florida is located in Lee County.

J. "Alico Road Quarry" means Florida Rock's Alico Road, Lee County, Florida quarry located at 11840 Alico Road, Fort Myers, Florida that produces aggregate and stone products, encompassing the north and south operations, inclusive of:

1. All rights, titles, and interest, including all leasehold and renewal rights, in the Alico Road Quarry, and related maintenance facilities and administration buildings including, but not limited to, all real property and aggregate and stone products reserves, capital equipment, fixtures, inventories, trucks and other vehicles, licenses, stone crushing equipment, power supply equipment, scales, interests, permits, assets or improvements related to the production, distribution, and sale of aggregate and stone products at the Alico Road Quarry; and

(2) All intangible assets, including aggregate and stone products reserve testing information, technical information, leases, know-how, safety procedures, quality assurance and control procedures, customer lists and credit records, contracts to supply third parties aggregate and stone products, associated with the Alico Road Quarry.

K. "Palmdale Sand Mine" means Harper Bros.' Palmdale, Glades County, Florida sand mine located at 5200 U.S. 27, Northwest, Palmdale, Florida that produces silica sand, inclusive of:

(1) All rights, titles, and interests, including all leasehold and renewal rights, in the Palmdale Sand Mine, and related maintenance facilities and administration buildings including, but not limited to, all real property and silica sand reserves, capital equipment, fixtures, inventories, trucks and other vehicles, licenses, sand washing equipment, power supply equipment, scales, interests, permits, assets or improvements related to the production, distribution, and sale of silica sand at the Alico Road Quarry; and

(2) All intangible assets, including silica and sand reserve testing information, technical information, know-how, leases, safety procedures, quality assurance and control procedures, customer lists and credit records, and contracts to supply third parties silica sand associated with the Palmdale Sand Mine.

II. Objectives

The Proposed Judgment filed in this case is meant to ensure Florida Rock's

prompt divestitures of the Alico Road Quarry and the Palmdale Sand Mine for the purpose of maintaining viable competitors in the sale of aggregate and silica sand in Southwest Florida to remedy the effects that the United States alleges would otherwise result from Florida Rock's proposed acquisition of Harper Bros. This Hold Separate Stipulation and Order ensures, prior to such divestiture, that the Alico Road Quarry and the Palmdale Sand Mine that are being divested be maintained as an independent, economically viable, ongoing business concern, and that competition is maintained during the pendency of the divestiture.

III. Jurisdiction and Venue

The Court has jurisdiction over the subject matter of this action and over each of the parties hereto, and venue of this action is proper in the United States District Court for the Middle District of Florida.

IV. Hold Separate Provisions

Until the divestiture required by the Final Judgment has been accomplished:

A. Florida Rock shall preserve, maintain, and operate the Alico Road Quarry and the Palmdale Sand Mine assets as an independent competitor with management, sales and operations held entirely separate, distinct and apart from those of Florida Rock. Florida Rock shall not coordinate its production, marketing or sale of silica sand and aggregate or stone products with that produced by the Alico Road Quarry and the Palmdale Sand Mine assets. Within thirty (30) days of the entering of this Order, Florida Rock will inform the United States of the steps taken to comply with this provision.

B. Florida Rock shall take all steps necessary to ensure that: (1) The Alico Road Quarry and Palmdale Sand Mine assets will be maintained and operated as an independent, ongoing, economically viable and active competitor in the production and sale of silica sand and aggregate and stone products in Southwest Florida; (2) management of the Alico Road Quarry and the Palmdale Sand Mine assets will not be influenced by Florida Rock; and (3) the books, records, competitively sensitive sales, marketing and pricing information, and decision-making associated with the Alico Road Quarry and the Palmdale Sand Mine assets will be kept separate and apart from the aggregate and stone products business of Florida Rock. Florida Rock's influence over the Alico Road Quarry and the Palmdale Sand Mine assets shall be limited to that necessary to carry out Florida Rock's obligations under this

Hold Separate Stipulation and Order and the Final Judgment.

C. Florida Rock shall use all reasonable efforts to maintain and increase sales of silica sand and aggregate and stone products by the Alico Road Quarry and the Palmdale Sand Mine assets, and shall maintain at 1998 or previously approved levels, whichever are higher, promotional, advertising, sales, technical assistance, marketing and merchandising support for silica sand and aggregate and stone products produced or sold by the Alico Road Quarry and the Palmdale Sand Mine assets.

D. Florida Rock shall provide sufficient working capital to maintain the Alico Road Quarry and the Palmdale Sand Mine assets as economically viable, competitive, and ongoing businesses.

E. Florida Rock shall take all steps necessary to ensure that the Alico Road Quarry and the Palmdale Sand Mine assets are fully maintained in operable condition at no lower than their current rated capacity configurations, and shall maintain and adhere to normal repair and maintenance schedules for the Alico Road Quarry and the Palmdale Sand Mine assets.

F. Florida Rock shall not, except as part of a divestiture approved by the United States in accordance with the terms of the proposed Final Judgment, remove, sell, lease, assign, transfer, pledge or otherwise dispose of any of the Alico Road Quarry and Palmdale Sand Mine assets.

G. Florida Rock shall maintain, in accordance with sound accounting principles, separate, accurate and complete financial ledgers, books and records that report on a periodic basis, such as every four weeks or every month, consistent with past practices, the assets, liabilities, expenses, revenues and income of the Alico Road Quarry and Palmdale Sand Mine assets.

H. Except in the ordinary course of business or as is otherwise consistent with this Hold Separate Stipulation and Order, defendants shall not hire, transfer or terminate, or alter any current employment or salary agreements for any Florida Rock or Harper Bros. employees who (i) on the date of the signing of this Agreement, work at the Alico Road Quarry and Palmdale Sand Mine or (ii) are members of the management committee referenced in Section IV(I) of this Order.

I. Until such time as the Alico Road Quarry and the Palmdale Sand Mine assets are divested, the assets shall be managed by Fred Buckner. Mr. Buckner shall have complete managerial responsibility for the Alico Road Quarry

and the Palmdale Sand Mine, subject to the provisions of this Order and the Final Judgment. In the event that Mr. Buckner is unable to perform his duties, Florida Rock shall appoint, subject to the United States' approval, a replacement within ten (10) working days. Should Florida Rock fail to appoint a replacement acceptable to the United States within ten (10) working days, the United States shall appoint a replacement.

J. Florida Rock shall take no action that would interfere with the ability of any trustee appointed pursuant to the Final Judgment to complete the divestiture pursuant to the Final Judgment to a suitable purchaser.

K. This Hold Separate Stipulation and Order shall remain in effect until consummation of the divestiture contemplated by the Final Judgment or until further Order of the Court.

Dated: May 25, 1999.

For Plaintiff United States:

Frederick H. Parmenter,

U.S. Department of Justice, Antitrust Division, Litigation II Section, Suite 3000, Washington, D.C. 20530, Telephone: (202) 307-0620, Facsimile: (202) 307-6283.

For Defendant Florida Rock Industries, Inc.

Eugene J. Meigher, Arent Fox,

1050 Connecticut Avenue, N.W., Washington, D.C. 20036-5339, Telephone: (202) 857-6048, Facsimile: (202) 857-6395.

Lewis S. Lee,

LeBoeuf, Lamb, Greene & MacRae, 50 N. Laura Street, Jacksonville, Florida 32202-3650, Telephone: (904) 630-5322, Facsimile: (904) 353-1673.

For Defendants Harper Bros., Inc., Commercial Testing, Inc. and Daniel R. Harper

Neil Imus,

Vinson & Elkins L.L.P., The Willard Office Building, 1455 Pennsylvania Avenue, N.W., Washington, D.C. 20004-1008, Telephone: (202) 639-6675, Facsimile: (202) 639-6604.

Order

Approved for entry and ordered ¹ this 27th day of May, 1999, at Jacksonville, Florida.

Harvey E. Schlessinger,

United States District Judge.

United States of America, Plaintiff, v. Florida Rock Industries, Inc., Harper Bros., Inc., Commercial Testing, Inc., and Daniel R. Harper, Defendants. Civil No.: 99-516-CIV-J-2CA.

Proposed Final Judgment

Whereas, plaintiff, the United States of America, and defendants, Florida Rock Industries, Inc. ("Florida Rock"),

Harper Bros., Inc. ("Harper Bros."), Commercial Testing, Inc. ("Testing"), and Daniel R. Harper, by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting any evidence against or an admission by any party with respect to any issue of law or fact herein and that this Final Judgment shall settle all claims made by the United States in its Complaint filed on May 26, 1999;

And whereas, defendants have agreed to be bound by the provisions of this Final Judgment pending its approval by the Court;

And whereas, the essence of this Final Judgment is prompt and certain divestiture of the identified assets to assure that competition is not substantially lessened;

And whereas, the United States requires defendants to make certain divestitures for the purpose of establishing a viable competitor in the production and sale of aggregate and silica sand in Charlotte, Lee, and Collier Counties and Sarasota County south of State Route 480 in Florida;

And whereas, defendants have represented to the United States that the divestitures ordered herein can and will be made and that defendants will later raise no claims of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

And whereas, the United States currently believes that entry of this Final Judgment is in the public interest;

Now, therefore, before the taking of any testimony, and without trial or adjudication of any issue of fact or law herein, and upon consent of the parties hereto, it is hereby ordered, adjudged, and decreed as follows.

I. Jurisdiction

This Court has jurisdiction over each of the parties hereto and the subject matter of this action. The Complaint states a claim upon which relief may be granted against defendants, as hereinafter defined, under section 7 of the Clayton Act, as amended (15 U.S.C. 18).

II. Definitions

As used in this Final Judgment:

A. "Florida Rock" means defendant Florida Rock Industries, Inc., a Florida corporation headquartered in Jacksonville, Florida, and includes its successors and assigns, and its subsidiaries, divisions, groups, affiliates, directors, officers, managers, agents, and employees.

¹ Proposed final Judgment and Final Judgment referred to herein are interchangeable.

B. "Harper Bros." means defendant Harper Bros., Inc., a Florida corporation headquartered in Fort Myers, Florida, and includes its successors and assigns, and its subsidiaries, divisions, groups, affiliates, directors, officers, managers, agents, and employees.

C. "Testing" means defendant Commercial Testing, Inc., a Florida corporation headquartered in Fort Myers, Florida, and includes its successors and assigns, and its subsidiaries, divisions, groups, affiliates, directors, officers, managers, agents, and employees.

D. "Daniel R. Harper" means defendant Daniel R. Harper, an individual who resides in Fort Myers, Florida, and is the Chairman of the Board and majority stockholder of Harper Bros. and the majority stockholder of Testing.

E. "Aggregate" means crushed stone and gravel produced at quarries, mines, or gravel pits used to manufacture asphalt concrete and ready mix concrete. "Stone products" refer to any products produced at an aggregate quarry.

F. "Silica sand" means sand that is naturally occurring and not produced at an aggregate quarry (Known as "manufactured sand"). Silica sand is used to produce specific types of ready mix concrete used in Florida Department of Transportation highway projects and commercial construction projects.

G. "Asphalt concrete" means a paving material produced by combining and heating asphalt cement (also referred to in the industry as "liquid asphalt" or "asphalt oil") with aggregate.

H. "Ready mix concrete" means a building material used in the construction of buildings, highways, bridges, tunnels, and other projects that is produced by mixing a cementing material (commonly portland cement) and aggregate with sufficient water to cause the cement to set and bind. Silica sand is combined with aggregate to produce specific types of ready mix concrete required for certain construction projects.

I. "Southwest Florida" means Charlotte, Lee, and Collier Counties and Sarasota County south of State Route 780 in Florida. The City of Sarasota, Florida is located in Sarasota County, and the City of Fort Myers, Florida is located in Lee County.

J. "Alico Road Quarry" means Florida Rock's Alico Road, Lee County, Florida quarry located at 11840 Alico Road, Fort Myers, Florida that produces aggregate and stone products, encompassing the north and south operations, inclusive of:

(1) All rights, titles, and interests, including all leasehold and renewal rights, in the Alico Road Quarry, and related maintenance facilities and administration buildings including, but not limited to, all real property and aggregate and stone products reserves, capital equipment, fixtures, inventories, trucks and other vehicles, licenses, stone crushing equipment, power supply equipment, scales, interests, permits, assets or improvements related to the production, distribution, and sale of aggregate and stone products at the Alico Road Quarry; and

(2) All intangible assets, including aggregate and stone products reserve testing information, technical information, leases, know-how, safety procedures, quality assurance and control procedures, customer lists and credit reports, contracts to supply third parties aggregate and stone products, associated with the Alico Road Quarry.

K. "Palmdale Sand Mine" means Harper Bros.' Palmdale, Glades County, Florida sand mine located at 5200 U.S. 27, Northwest, Palmdale, Florida that produces silica sand inclusive of:

(1) All rights, titles, and interests, including all leasehold and renewal rights, in the Palmdale Sand Mine, and related maintenance facilities and administration buildings including, but not limited to, all real property and silica sand reserves, capital equipment, fixtures, inventories, trucks and other vehicles, licenses, sand washing equipment, power supply equipment, scales, interests, permits, assets or improvements related to the production, distribution, and sale of silica sand at the Palmdale Sand Mine; and

(2) All intangible assets, including silica sand reserve testing information, technical information, leases, know-how, safety procedures, quality assurance and control procedures, customer lists and credit reports, contracts to supply third parties silica sand associated with the Palmdale Sand Mine.

L. "Reserve Assets" means the aggregate reserves leased by Florida Rock located in Lee County Florida, identified as Florida Rock Properties, Inc's properties in the following locations in Lee County, Florida:

(1) West Mining Parcel: The east 1/2 of Section 33 and the south 1500 feet of the southeast 1/4 of Section 28, Township 45 South, Range 26 East, Lee County, Florida (see Area 1 of attached map);

(2) North Mining Parcel: The south 1500 feet of Section 27, Township 45 South, Range 26 East and the northwest 1/4 of Section 34, Township 45 South,

Range 26 East, Lee County, Florida (see Area 2 of attached map); and

(3) an easement through the north 956,405 feet of Section 4, Township 46 South, Range 26 East, Lee County, Florida.

III. Applicability

A. The provisions of this Final Judgment apply to the defendants, their successors and assigns, subsidiaries, directors, officers, managers, agents, and employees, and all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise.

B. Defendants shall require, as a condition of the sale or other disposition of the Alico Road Quarry and the Palmdale Sand Mine, that the purchaser or purchasers agree to be bound by the provisions of this Final Judgment.

IV. Divestitures

A. Florida Rock is hereby ordered and directed in accordance with the terms of this Final Judgment, within one hundred and eighty (180) calendar days after the filing of the proposed Final Judgment, or five (5) days after notice of the entry of the Final Judgment by the Court, whichever is later, to divest the Alico Road Quarry and the Palmdale Sand Mine to a purchaser or purchasers acceptable to the United States, in its sole discretion.

B. Florida Rock shall use its best efforts to accomplish the divestiture as expeditiously and timely as possible.

C. In accomplishing the divestitures ordered by this Final Judgment, Florida Rock promptly shall make known, by usual and customary means, the availability of the Alico Road Quarry and the Palmdale Sand Mine. Florida Rock shall inform any person an inquiry regarding a possible purchase that the sale is being made pursuant to this Final Judgment and provide such person with a copy of this Final Judgment. Florida Rock shall also offer to furnish to all prospective purchasers, subject to customary confidentiality assurances, all information regarding these assets customarily provided in a due diligence process except such information subject to attorney-client privilege or attorney work-product privilege. Florida Rock shall make available such information to the United States at the same time that such information is made available to any other person.

D. Florida Rock shall not interfere with any negotiations by any purchaser to employ any Florida Rock or Harper Bros. employee who works at, or whose principal responsibility concerns any

silica sand or aggregate and stone products business that is part of the Palmdale Sand Mine or the Alico Road Quarry assets.

E. As customarily provided as part of a due diligence process, Florida Rock shall permit prospective purchasers of the Alico Road Quarry and the Palmdale Sand Mine to have access to personnel and to make such inspection of these assets; access to any and all environmental, zoning, and other permit documents and information; and access to any and all financial, operational, or other documents and information.

F. Florida Rock shall warrant to the purchaser or purchasers of the Alico Road Quarry and the Palmdale Sand Mine that each asset will be operational on the date of sale.

G. Florida Rock shall not take any action, direct or indirect, that will impede in any way the operation of the Alico Road Quarry or the Palmdale Sand Mine.

H. Florida Rock shall warrant to the purchaser or purchasers of the Alico Road Quarry and the Palmdale Sand Mine that there are no known material defects in the environmental, zoning, or other permits pertaining to the operation of these assets, and that Florida Rock with respect to the Alico Road Quarry and the Palmdale Sand Mine will not undertake, directly or indirectly, following the divestiture of these assets, any challenges to the environmental, zoning, or other permits pertaining to the operation of the assets.

I. Unless the United States otherwise consents in writing, the divestiture pursuant to Section IV, whether by Florida Rock or by trustee appointed pursuant to Section V of this Final Judgment, shall include the Alico Road Quarry and the Palmdale Sand Mine and be accomplished by selling or otherwise conveying each asset, or such other assets included by the Trustee under Section V, to a purchaser or purchasers in such a way as to satisfy the United States, in its sole discretion, that the assets can and will be used by the purchaser or purchasers as part of a viable, ongoing business or businesses engaged in the manufacture and sale of aggregate and stone products and silica sand. The divestitures, whether pursuant to Section IV or Section V of this Final Judgment, shall be made to a purchaser or purchasers for whom it is demonstrated to the United States' sole satisfaction that the purchaser: (1) Has the capability and intent of competing effectively in the production and sale of aggregate and stone products and silica sand in Southwest Florida; (2) has or soon will have the managerial, operational, and financial capability to

compete effectively in the production and sale of aggregate and stone products and silica sand in Southwest Florida; and (3) is not hindered by the terms of any agreement between the purchaser and Florida Rock which gives Florida Rock the ability unreasonably to raise the purchaser's cost, lower the purchaser's efficiency, or otherwise to interfere in the ability of the purchaser to effectively compete in Southwest Florida.

V. Appointment of Trustee

A. In the event that Florida Rock has not divested the Alico Road Quarry or the Palmdale Sand Mine within the time specified in Section IV.A of this Final Judgment, the Court shall appoint, on application of the United States, a trustee selected by the United States and approved by the Court to effect the divestiture of each such asset not sold. If the Alico Road Quarry has not been sold, the trustee shall have the right, in its sole discretion, to include the Reserve Assets in the sale of the Alico Road Quarry.

B. After the appointment of a trustee becomes effective, only the trustee shall have the right to divest any assets. The trustee shall have the power and authority to accomplish any and all divestitures of assets at the best price then obtainable upon a reasonable effort by the trustee, subject to the provisions of Sections IV and VIII of this Final Judgment, and shall have such other powers as the Court shall deem appropriate. Subject to Sections V(C) and VIII of this Final Judgment, the trustee shall have the power and authority to hire at the cost and expense of Florida Rock any investment bankers, attorneys, or other agents reasonably necessary in the judgment of the trustee to assist in the divestitures, and such professionals and agents shall be accountable solely to the trustee. The trustee shall have the power and authority to accomplish the divestitures at the earliest possible time to a purchaser acceptable to the United States, and shall have such other powers as this Court shall deem appropriate. Florida Rock shall not object to a sale by the trustee on any grounds other than the trustee's malfeasance. Any such objections by Florida Rock must be conveyed in writing to the United States and the trustee within ten (10) calendar days after the trustee has provided the notice required under Section VI of this Final Judgment.

C. The trustee shall serve at the cost and expense of Florida Rock, on such terms and conditions as the Court may prescribe, and shall account for all monies derived from the sale of the

assets sold by the trustee and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services and those of any professionals and agents retained by the trustee, all remaining money shall be paid to Florida Rock and the trust shall then be terminated. The compensation of such trustee and of any professionals and agents retained by the trustee shall be reasonable in light of the value of the assets to be divested and based on a fee arrangement providing the trustee with an incentive based on the price and terms of price and terms of the divestiture and the speed with which it is accomplished.

D. Florida Rock shall use its best efforts to assist the trustee in accomplishing the required divestiture, including best effort to effect all necessary regulatory approvals. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee shall have full and complete access to the personnel, books, records, and facilities of the businesses to be divested, and Florida Rock shall develop financial or other information relevant to the businesses to be divested customarily provided in a due diligence process as the trustee may reasonably request, subject to customary confidential assurances. Florida Rock shall permit prospective acquirers of the assets to have reasonable access to personnel and to make such inspection of physical facilities and any and all financial, operational or other documents and other information as may be relevant to the divestiture required by this Final Judgment.

E. After its appointment, the trustee shall file monthly reports with the parties and the Court setting forth the trustee's efforts to accomplish the divestiture ordered under this Final Judgment; provided, however, that to the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the court. Such reports shall include the name, address and telephone number of each person who, during the preceding month, made an offer to acquire, expresses an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in any of the businesses to be divested, and shall describe in detail each contact with any such person during that period. The trustee shall maintain full records of all efforts made to sell the assets to be divested.

F. If the trustee has not accomplished such divestiture within six (6) months after its appointment, the trustee thereupon shall file promptly with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestiture, (2) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished, and (3) the trustee's recommendations; provided, however, that to the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such report to the parties, who shall each have the right to be heard and to make additional recommendations consistent with the purpose of the trust. The Court shall enter thereafter such orders as it shall deem appropriate in order to carry out the purpose of the trust, which may, if necessary, include extending the trust and the term of the trustee's appointment by a period requested by the United States.

G. The conduct or actions shall be subject to review by the Court upon the application of any party here to.

Notification

Within two (2) business days following execution of a definitive agreement, contingent upon compliance with the terms of this Final Judgment, to effect, in whole or in part, any proposed divestiture pursuant to Sections IV or V of this Final Judgment. Florida Rock or the trustee, whichever is then responsible for effecting the divestiture, shall notify the United States of the proposed divestiture. If the trustee is responsible, it shall similarly notify the United States of the proposed divestiture. If the trustee is responsible, it shall similarly notify Florida Rock. The notice shall set forth the details of the proposed transaction and list the name, address, and telephone number of each person not previously identified who offered to, or expressed an interest in or a desire to, acquire any ownership interest in the businesses to be divested that are the subject of the binding contract, together with full details of same. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States, in its sole discretion, may request from Florida Rock, the proposed purchaser, or any other third party additional information concerning the proposed divestiture and the proposed purchaser. Florida Rock and the trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree. Within thirty (30)

calendar days after receipt of the notice or within twenty (2) calendar days after the United States has been provided the additional information requested from Florida Rock, the proposed purchaser, and any third party, whichever is later, the United States shall provide written notice to Florida Rock and the trustee, if there is one, stating whether or not it objects to the proposed divestiture if the United States provides written notice to Florida Rock and the trustee that it does not object, then the divestiture may be consummated, subject only to Florida Rock's limited right to object to the sale under Section V(B) of this Final Judgment. Upon objection by the United States, a divestiture proposed under Section IV or Section V may not be consummated. Upon objection by Florida Rock under the provision in Section V(B), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

VII. Affidavits

A. Within twenty (20) calendar days of the filing of this Final Judgment and every thirty (30) calendar days thereafter until the divestitures have been completed whether pursuant to Section IV or Section V of this Final Judgment, Florida Rock shall deliver to the United States an affidavit as to the fact and manner of compliance with sections IV or V of this Final Judgment. Each such affidavit shall include, *inter alia*, the name, address, and telephone number of each person who, at any time after the period covered by the last such report, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in any of the assets to be divested, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts that Florida Rock has taken to solicit a buyer for any of the assets to be divested and to provide required information to prospective purchasers, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States to information provided by Florida Rock, including limitations on information, shall be made within (14) days of receipt of such affidavit.

B. Within twenty (20) calendar days of the filing of this Final Judgment, Florida Rock shall deliver to the United States an affidavit which describes in detail all actions Florida Rock has taken and all steps Florida Rock has implemented on an on-going basis to

preserve the Alico Road Quarry and the Palmdale Sand Mine pursuant to Section VIII of this Final Judgment and the Hold Separate Stipulation and Order entered by the Court. The affidavit also shall describe, but not be limited to, Florida Rock's efforts to maintain and operate the Alico Road Quarry and the Palmdale Sand Mine as active competitors, maintain the management, sales, marketing and pricing of each asset, and maintain each asset in operable condition at current capacity configurations. Florida Rock shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in Florida Rock's earlier affidavit(s) filed pursuant to this Section within fifteen (15) calendar days after the change is implemented.

C. Until one year after such divestiture has been completed, Florida Rock shall preserve all records of all efforts made to preserve the Alico Road Quarry and the Palmdale Sand Mine and to effect the ordered divestitures.

VIII. Hold Separate Order

Until the divestitures required by the Final Judgment have been accomplished, defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the divestiture of the Alico Road Quarry and the Palmdale Sand Mine.

IX. Financing

Florida Rock is ordered and directed not to finance all or any part of any purchase by an acquirer made pursuant to Sections IV or V of this Final Judgment.

X. Compliance Inspection

For the purposes of determining or securing compliance with the Final Judgment and subject to any legally recognized privilege, from time to time:

A. Duly authorized representatives of the United States Department of Justice, upon written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Florida Rock made to its principal offices, shall be permitted:

(1) Access during office hours of Florida Rock to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Florida Rock, who may have counsel present, relating to the matters contained in this Final Judgment and the Hold Separate Stipulation and Order; and

(2) Subject to the reasonable convenience of Florida Rock and without restraint or interference from it, to interview, either informally or on the record, its officers, employees, and agents, who may have counsel present, regarding any such matters.

B. Upon the written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, made to Florida Rock's principal offices, Florida Rock shall submit such written reports, under oath if requested, with respect to any matter contained in the Final Judgment and the Hold Separate Stipulation and Order.

C. No information or documents obtained by the means provided in Section VII or X of this Final Judgment shall be divulged by a representative of the United States to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by Florida Rock to the United States, Florida Rock represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and Florida Rock marks each pertinent page of such material. "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then ten (10) calendar days notice shall be given by the United States to Florida Rock prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which Florida Rock is not a party.

XI. Retention of Jurisdiction

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violations hereof.

XII. Termination

Unless this Court grants an extension, this Final Judgment will expire on the tenth anniversary of the date of its entry.

XIII. Public Interest

Entry of this Final Judgment is in the public interest.

Done and ordered this _____ day of _____, 1999, Jacksonville, Florida.

United States District Judge.

United States of America, Plaintiff, v. Florida Rock Industries, Inc.; Harper Bros., Inc.; Commercial Testing, Inc.; and Daniel R. Harper, Defendants. [Civil No. 99-516-CIV-J-20A].

Proposed Final Judgment

Whereas, plaintiff, the United States of America, and defendants, Florida Rock Industries, Inc. ("Florida Rock"), Harper Bros., Inc. ("Harper Bros."), Commercial Testing, Inc. ("Testing"), and Daniel R. Harper, by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting any evidence against or an admission by any party with respect to any issue of law or fact herein and that this Final Judgment shall settle all claims made by the United States in its Complaint filed on May 26, 1999;

And whereas, defendants have agreed to be bound by the provisions of this Final Judgment pending its approval by the Court;

And whereas, the essence of this Final Judgment is prompt and certain divestiture of the identified assets to assure that competition is not substantially lessened;

And whereas, the United States requires defendants to make certain divestitures for the purpose of establishing a viable competitor in the production and sale of aggregate and silica sand in Charlotte, Lee, and Collier Counties and Sarasota County south of State Route 480 in Florida;

And whereas, defendants have represented to the United States that the divestitures ordered herein can and will be made and that defendants will later raise no claims of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

And whereas, the United States currently believes that entry of this Final Judgment is in the public interest;

Now, therefore, before the taking of any testimony, and without trial or adjudication of any issue of fact or law herein, and upon consent of the parties hereto, it is hereby ordered, adjudged, and decreed as follows:

I. Jurisdiction

This Court has jurisdiction over each of the parties hereto and the subject matter of this action. The Complaint states a claim upon which relief may be granted against defendants, as hereinafter defined, under Section 7 of the Clayton Act, as amended (15 U.S.C. 18).

II. Definitions

As used in this Final Judgment:

A. "Florida Rock" means defendant Florida Rock Industries, Inc., a Florida corporation headquartered in Jacksonville, Florida, and includes its successors and assigns, and its subsidiaries, divisions, groups, affiliates, directors, officers, managers, agents, and employees.

B. "Harper Bros." means defendant Harper Bros., Inc., a Florida corporation headquartered in Fort Myers, Florida, and includes its successors and assigns, and its subsidiaries, divisions, groups, affiliates, directors, officers, managers, agents, and employees.

C. "Testing" means defendant Commercial Testing, Inc., a Florida corporation headquartered in Fort Myers, Florida, and includes its successors and assigns, and its subsidiaries, divisions, groups, affiliates, directors, officers, managers, agents, and employees.

D. "Daniel R. Harper" means defendant Daniel R. Harper, an individual who resides in Fort Myers, Florida, and is the Chairman of the Board and majority stockholder of Harper Bros. and the majority stockholder of Testing.

E. "Aggregate" means crushed stone and gravel produced at quarries, mines, or gravel pits used to manufacture asphalt concrete and ready mix concrete. "Stone products" refer to any products produced at an aggregate quarry.

F. "Silica sand" means sand that is naturally occurring and not produced at an aggregate quarry (known as "manufactured sand"). Silica sand is used to produce specific types of ready mix concrete used in Florida Department of Transportation highway projects and commercial construction projects.

G. "Asphalt concrete" means a paving material produced by combining and heating asphalt cement (also referred to in the industry as "liquid asphalt" or "asphalt oil") with aggregate.

H. "Ready mix concrete" means a building material used in the construction of buildings, highways, bridges, tunnels, and other projects that is produced by mixing a cementing

material (commonly portland cement) and aggregate with sufficient water to cause the cement to set and bind. Silica sand is combine with aggregate to produced specific types of ready mix concrete required for certain construction projects.

I. "Southwest Florida" means Charlotte, Lee, and Collier Counties and Sarasota County south of State Route 780 in Florida. The City of Sarasota, Florida is located in Sarasota County, and the City of Fort Myers, Florida is located in Lee County.

J. "Alico Road Quarry" means Florida Rock's Alico Road, Lee County, Florida quarry located at 11840 Alico Road, Fort Myers, Florida that produces aggregate and stone products, encompassing the north and south operations, inclusive of:

(1) All rights, titles, and interests, including all leasehold and renewal rights, in the Alico Road Quarry, and related maintenance facilities and administration buildings including, but not limited to, all real property and aggregate and stone products reserves, capital equipment, fixtures, inventories, trucks and other vehicles, licenses, stone crushing equipment, power supply equipment, scales, interests, permits, assets or improvements related to the production, distribution, and sale of aggregate and stone products at the Alico Road Quarry; and

(2) All intangible assets, including aggregate and stone products reserve testing information, technical information, leases, know-how, safety procedures, quality assurance and control procedures, customer lists and credit reports, contracts to supply third parties aggregate and stone products, associated with the Alico Road Quarry.

K. "Palmdale Sand Mine" means Harper Bros. Palmdale, Glades County, Florida sand mine located at 5200 U.S. 27, Northwest, Palmdale, Florida that produces silica sand inclusive of:

(1) All rights, titles, and interests, including all leasehold and renewal rights, in the Palmdale Sand Mine, and related maintenance facilities and administration buildings, including, but not limited to, all real property and silica sand reserves, capital equipment, fixtures, inventories, trucks and other vehicles, licenses, and sand washing equipment, power supply equipment, scales, interests, permits assets or improvements related to the production, distribution, and sale of silica sand at the Palmdale Sand Mine; and

(2) All intangible assets, including silica sand reserve testing information, technical information, leases, know-how, safety procedures, quality assurance and control procedures, customer lists and credit reports,

contracts to supply third parties silica sand associated with the Palmdale Sand Mine.

L. "Reserve Assets" means the aggregate reserves leased by Florida Rock located in Lee County, Florida, identified as Florida Rock Properties, Inc.'s properties in the following locations in Lee County, Florida:

(1) West Mining Parcel: The east $\frac{1}{2}$ of Section 33 and the south 1500 feet of the southeast $\frac{1}{4}$ of Section 28, Township 45 South, Range 26 East, Lee County, Florida (see Area 1 of attached map);

(2) North Mining Parcel: The south 1500 feet of Section 27, Township 45 South, Range 26 East and the northwest $\frac{1}{4}$ of Section 34, Township 45 South, Range 26 East, Lee County, Florida (see Area 2 of attached map); and

(3) An easement through the north 959.405 feet of Section 4, Township 46 South, Range 26 East, Lee County, Florida.

III. Applicability

A. The provision of this Final Judgment apply to the defendants, their successors and assigns, subsidiaries, directors, officers, managers, agents, and employees, and all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise.

B. Defendants shall require, as a condition of the sale or other disposition of the Alico Road Quarry and the Palmdale Sand Mine, that the purchaser or purchasers agree to be bound by the provisions of this Final Judgment.

IV. Divestitures

A. Florida Rock is hereby ordered and directed in accordance with the terms of this Final Judgment, within one hundred and eighty (180) calendar days after the filing of the proposed Final Judgment, or five (5) days after notice of the entry of this Final Judgment by the Court, whichever is later, to divest the Alico Road Quarry and the Palmdale Sand Mine to a purchaser or purchasers acceptable to the United States, in its sole discretion.

B. Florida Rock shall use its best efforts to accomplish the divestiture as expeditiously and timely as possible.

C. In accomplishing the divestitures ordered by this Final Judgment, Florida Rock promptly shall make known, by usual and customary means, the availability of the Alico Road Quarry and the Palmdale Sand Mine. Florida Rock shall inform any person making an inquiry regarding a possible purchase that the sale is being made pursuant to

this Final Judgment and provide such person with a copy of this Final Judgment. Florida Rock shall also offer to furnish to all prospective purchasers, subject to customary confidentiality assurances, all information regarding these assets customarily provided in a due diligence process except such information subject to attorney-client privilege or attorney work-product privilege. Florida Rock shall make available such information to the United States at the same time that such information is made available to any other person.

D. Florida Rock shall not interfere with any negotiations by any purchaser to employ any Florida Rock or Harper Bros. employee who works at, or whose principal responsibility concerns any silica sand or aggregate and stone products business that is part of the Palmdale Sand Mine or the Alico Road Quarry assets.

E. As customarily provided as part of a due diligence process, Florida Rock shall permit prospective purchasers of the Alico Road Quarry and the Palmdale Sand Mine to have access to personnel and to make such inspection of these assets; access to any and all environmental, zoning, and other permit documents and information; and access to any and all financial, operational, or other documents and information.

F. Florida Rock shall warrant to the purchaser or purchasers of the Alico Road Quarry and the Palmdale Sand Mine that each asset will be operational on the date of sale.

G. Florida Rock shall not take any action, direct or indirect, that will impede in any way the operation of the Alico Road Quarry or the Palmdale Sand Mine.

H. Florida Rock shall warrant to the purchaser or purchasers of the Alico Road Quarry and the Palmdale Sand Mine that there are no known material defects in the environmental, zoning, or other permits pertaining to the operation of these assets, and that Florida Rock with respect to the Alico Road Quarry and the Palmdale Sand Mine will not undertake, directly or indirectly, following the divestiture of these assets, any challenges to the environmental, zoning, or other permits pertaining to the operation of the assets.

1. Unless the United States otherwise consents in writing, the divestiture pursuant to Section IV, whether by Florida Rock or by trustees appointed pursuant to Section V of this Final Judgment, shall include the Alico Road Quarry and the Palmdale Sand Mine and be accomplished by selling or otherwise conveying each assets, or such other assets included by the

Trustee under Section V, to a purchaser or purchasers in such a way as to satisfy the United States, in its sole discretion, that the assets can and will be used by the purchaser or purchasers as part of a viable, ongoing business or businesses engaged in the manufacture and sale of aggregate and stone products and silica sand. The divestitures, whether pursuant to Section IV or Section V of this Final Judgment, shall be made to a purchaser or purchasers for whom it is demonstrated to the United States' sole satisfaction that the purchasers: (1) Has the capability and intent of competing effectively in the production and sale of aggregate and stone products and silica sand in Southwest Florida; (2) has or soon will have the managerial, operational, and financial capability to compete effectively in the production and sale of aggregate and stone products and silica sand in Southwest Florida; and (3) is not hindered by the terms of any agreement between the purchaser and Florida Rock which gives Florida Rock the ability unreasonably to raise the purchaser's costs, lower the purchaser's efficiency, or otherwise to interfere in the ability of the purchaser to effectively compete in Southwest Florida.

V. Appointment of Trustee

A. In the event that Florida Rock has not divested the Alico Road Quarry or the Palmdale Sand Mine within the time specified in Section IV. A of this Final Judgment, the Court shall appoint, on application of the United States, a trustee selected by the United States and approved by the Court to effect the divestiture of each such asset not sold. If the Alico Road Quarry has not been sold, the trustee shall have the right, in its sole discretion, to include the Reserve Assets in the sale of the Alico Road Quarry.

B. After the appointment of a trustee becomes effective, only the trustee shall have the right to divest any assets. The trustee shall have the power and authority to accomplish any and all divestitures of assets at the best price then obtainable upon a reasonable effort by the trustee, subject to the provisions of Sections IV and VIII of this Final Judgment, and shall have such other powers as the Court shall deem appropriate. Subject to Sections V(C) and VIII of this Final Judgment, the trustee shall have the power and authority to hire at the cost and expense of Florida Rock any investment bankers, attorneys, or other grants reasonably necessary in the judgment of the trustee to assist in the divestitures, and such professionals and agents shall be accountably solely to the trustee. The

trustee shall have the power and authority to accomplish the divestitures at the earliest possible time to a purchaser acceptable to the United States, and shall have such other powers as this Court shall deem appropriate. Florida Rock shall not object to a sale by the trustee on any grounds other than the trustee's malfeasance. Any such objections by Florida Rock must be conveyed in writing to the United States and the trustee within ten (10) calendar days after the trustee has provided the notice required under Section VI of this Final Judgment.

C. The trustee shall serve at the cost and expense of Florida Rock, on such terms and conditions as the Court may prescribe, and shall account for all monies derived from the sale of the assets sold by the trustee and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services and those of any professionals and agents retained by the trustee, all remaining money shall be paid to Florida Rock and the trust shall then be terminated. The compensation of such trustee and of any professionals and agents retained by the trustee shall be reasonable in light of the value of the assets to be divested and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished.

D. Florida Rock shall use its best efforts to assist the trustee in accomplishing the required divestiture, including best effort to effect all necessary regulatory approvals. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee shall have full and complete access to the personnel, books, records, and facilities of the businesses to be divested, and Florida Rock shall develop financial or other information relevant to the businesses to be divested customarily provided in a due diligence process as the trustee may reasonably request, subject to customary confidential assurances. Florida Rock shall permit prospective acquirers of the assets to have reasonable access to personnel and to make such inspection of physical facilities and any and all financial, operational or other documents and other information as may be relevant to the divestiture required by this Final Judgment.

E. After its appointment, the trustee shall file monthly reports with the parties and the Court setting forth the trustee's efforts to accomplish the divestiture ordered under this Final Judgment; provided, however, that to

the extent shall reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address and telephone number of each person who, during the preceding month, made an offer to acquire, expresses an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in any of the businesses to be divested, and shall describe in detail each contact with any such person during that period. The trustee shall maintain full records of all efforts made to sell the assets to be divested.

F. If the trustee has not accomplished such divestiture within six (6) months after its appointment, the trustee thereupon shall file promptly with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestiture, (2) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished, and (3) the trustee's recommendations; provided, however, that to the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such report to the parties, who shall each have the right to be heard and to make additional recommendations consistent with the purpose of the trust. The Court shall enter thereafter such orders as it shall deem appropriate in order to carry out the purpose of the trust, which may, if necessary, include extending the trust and the term of the trustee's appointment by a period requested by the United States, or

G. The conduct on actions of the trustee shall be subject to review by the Court upon the application of any party here to.

VI. Notification

Within two (2) business days following execution of a definitive agreement, contingent upon compliance with the terms of this Final Judgment, to effect, in whole or in part, any proposed divestiture pursuant to Sections IV or V of this Final Judgment, Florida Rock or the trustee, whichever is then responsible for effecting the divestiture, shall notify the United States of the proposed divestiture. If the trustee is responsible, it shall similarly notify Florida Rock. The notice shall set forth the details of the proposed transaction and list the name, address, and telephone number of each person not previously identified who offered to, or expressed an interest in or a desire to,

acquire any ownership interest in the businesses to be divested that are the subject of the binding contract, together with full details of same. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States, in its sole discretion, may request from Florida Rock, the proposed purchaser, or any other third party additional information concerning the proposed divestiture and the proposed purchaser. Florida Rock and the trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from Florida Rock, the proposed purchaser, and any third party, whichever is later, the United States shall provide written notice to Florida Rock and the trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice to Florida Rock and the trustee that it does not object, then the divestiture may be consummated, subject only to Florida Rock's limited right to object to the sale under Section V(B) of this Final Judgment. Upon objection by the United States, a divestiture proposed under Section IV or Section V may not be consummated. Upon objection by Florida Rock under the provision in Section V(B), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

VII. Affidavits

A. Within twenty (20) calendar days of the filing of this Final Judgment and every thirty (30) calendar days thereafter until the divestitures have been completed whether pursuant to Section IV or Section V of this Final Judgment, Florida Rock shall deliver to the United States an affidavit as to the fact and manner of compliance with Sections IV or V of this Final Judgment. Each such affidavit shall include, *inter alia*, the name, address, and telephone number of each person who, at any time after the period covered by the last such report, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in any of the assets to be divested, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts that Florida Rock has taken to solicit a buyer for any of the assets

to be divested and to provide required information to prospective purchasers, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States to information provided by Florida Rock, including limitations on information, shall be made within (14) days of receipt of such affidavit.

B. Within twenty (20) calendar days of the filing of this Final Judgment, Florida Rock shall deliver to the United States an affidavit which describes in detail all actions Florida Rock has taken and all steps Florida Rock has implemented on an on-going basis to preserve the Alico Road Quarry and the Palmdale Sand Mine pursuant to Section VIII of this Final Judgment and the Hold Separate Stipulation and Order entered by the Court. The affidavit also shall describe, but not be limited to, Florida Rock's effort to maintain and operate the Alico Road Quarry and the Palmdale Sand Mine as active competitors, maintain the management, sales, marketing and pricing of each asset, and maintain each asset in operable condition at current capacity configurations. Florida Rock shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in Florida Rock's earlier affidavit(s) filed pursuant to this Section within fifteen (15) calendar days after the change is implemented.

C. Until one year after such divestiture has been completed, Florida Rock shall preserve all records of all efforts made to preserve the Alico Road Quarry and the Palmdale Sand Mine and to effect the ordered divestitures.

VIII. Hold Separate Order

Until the divestitures required by the Final Judgment have been accomplished, defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the divestiture of the Alico Road Quarry and the Palmdale Sand Mine.

IX. Financing

Florida Rock is ordered and directed not to finance all or any part of any purchase by an acquirer made pursuant to Sections IV or V of this Final Judgment.

X. Compliance Inspection

For the purposes of determining or securing compliance with the Final Judgment and subject to any legally recognized privilege, from time to time:

A. Duly authorized representatives of the United States Department of Justice,

upon written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Florida Rock made to its principal offices, shall be permitted:

(1) Access during office hours of Florida Rock to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Florida Rock, who may have counsel present, relating to the matters contained in this Final Judgment and the Hold Separate Stipulation and Order; and

(2) Subject to the reasonable convenience of Florida Rock and without restraint or interference from it, to interview, either informally or on the record, its officers, employees, and agents, who may have counsel present, regarding any such matters.

B. Upon the written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, made to Florida Rock's principal offices, Florida Rock shall submit such written reports, under oath if requested, with respect to any matter contained in the Final Judgment and the Hold Separate Stipulation and Order.

C. No information or documents obtained by the means provided in Section VII or X of this Final Judgment shall be divulged by a representative of the United States to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by Florida Rock to the United States, Florida Rock represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and Florida Rock marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then ten (10) calendar days notice shall be given by the United States to Florida Rock prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which Florida Rock is not a party.

XI. Retention of Jurisdiction

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violations hereof.

XII. Termination

Unless this Court grants an extension, this Final Judgment will expire on the tenth anniversary of the date of its entry.

XIII. Public Interest

Entry of this Final Judgment is in the public interest.

DONE and ORDERED this _____ day of _____ 1999, Jacksonville, Florida.

United States District Judge.

A copy of the tract map can be obtained from the U.S. Department of Justice, Antitrust Division, 202-514-2481.

United States of America, Plaintiff, v. Florida Rock Industries, Inc.; Harper Bros., Inc.; Commercial Testing, Inc.; and Daniel R. Harper, Defendants. [Civil No.: 99-516-CIV-J-20A; Filed: 5/26/99.]

Competitive Impact Statement

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

I. Nature and Purpose of The Proceeding

The United States filed a civil antitrust Complaint under section 15 of the Clayton Act, 15 U.S.C. 25, on May 26, 1999, alleging that the proposed acquisition by Florida Rock Industries, Inc. ("Florida Rock") of Harper Bros., Inc. ("Harper Bros.") and Commercial Testing, Inc. ("Testing") pursuant to a letter of intent entered into on May 5, 1999, would violate Section 7 of the Clayton Act, 15 U.S.C. 18.

The Complaint alleges that a combination of two of only three significant competitors in the aggregate and silica sand markets in Charlotte, Lee, and Collier Counties and Sarasota County south of State Route 780 in Florida ("Southwest Florida") would lessen competition in the production and sale of aggregate and silica sand in Southwest Florida. The prayer for relief

in the Complaint seeks: (1) A judgment that the proposed acquisition would violate Section 7 of the Clayton Act; (2) a permanent injunction preventing Florida Rock from acquiring control of Harper Bros., Testing, and 320 acres of land, or otherwise combining with the businesses of Harper Bros. and Testing; (3) the United States be awarded costs; and (4) other relief as the Court deems just and proper.

When the Complaint was filed, the United States also filed a proposed settlement that would permit Florida Rock to complete its acquisition of Harper Bros., Testing, and 320 acres of land, but require a certain divestiture that will preserve in the Southwest Florida aggregate and silica sand markets. This settlement consists of a Stipulation and Order, a proposed Final Judgment and a Hold Separate Stipulation and Order.

The proposed Final Judgment orders Florida Rock to divest the Florida Rock Alico Road Quarry located in Lee County, Florida, the Harper Bros. Palmdale Sand Mine located in Glades County, Florida, and certain related tangible and intangible assets associated with the facilities. Florida Rock must complete the divestiture of this quarry and related assets within one hundred and eighty (180) calendar days after the date on which the proposed Final Judgment was filed (i.e., May 26, 1999) or within 5 days after notice of the entry of the Final Judgment by the Court, whichever is later, in accordance with the procedure specified therein. If Florida Rock does not do so within the time frame in the proposed Final Judgment, a trustee appointed by the Court would be empowered for an additional six months to sell the assets. If a trustee must undertake to divest the Alico Road Quarry, the trustee has the option of adding certain Florida Rock aggregate reserve parcels that are contiguous to the Alico Road Quarry to the divestiture package.

The Stipulation and Order, proposed Final Judgment and Hold Separate Stipulation and Order require Florida Rock to ensure that the Alico Road Quarry, the Palmdale Sand Mine, and related assets to be divested will be maintained and operated as an independent, ongoing, economically viable and active competitor until the divestitures mandated by the proposed Final Judgment have been accomplished. Final Rock must preserve and maintain the quarry and sand mine to be divested as saleable and economically viable, ongoing concerns, with competitively sensitive business information and decision-making divorced from that of Florida Rock's

other aggregate and silica sand businesses. Florida Rock will appoint a person to monitor and ensure its compliance with these requirements of the proposed Final Judgment.

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

II. Description of the Events Giving Rise to The Alleged Violation

A. Florida Rock, Harper Bros., Testing, and the Proposed Transaction

Florida Rock is a Florida corporation with headquarters in Jacksonville, Florida. Florida Rock operates in Florida, Georgia, Virginia, Maryland, Washington, DC, and North Carolina. One of its principal businesses is extracting and selling aggregate and silica sand. Florida Rock is engaged in the business of selling aggregate and silica sand in Southwest Florida. In Lee County, Florida Rock operates the Alico Road Quarry that produces aggregate, and in Glades County, it operates the Witherspoon Sand Mine which produces silica sand. In 1997, Florida Rock had sales of approximately \$456 million.

Harper Bros. is a Florida corporation with headquarters in Fort Myers, Florida. One of Harper Bros.' principal business is extracting and processing aggregates and silica sand. Harper Bros. is engaged in the business of selling aggregate and silica sand in Southwest Florida. In Lee County, Harper Bros. operates the Alico Road Mine that produces aggregate, and in Glades County, it operates the Palmdale Sand Mine which produces silica sand. In 1997, Harper Bros. had sales of approximately \$44 million.

On July 21, 1998, through a letter of intent that was supplemented on August 26, 1998, Florida Rock agreed to acquire all of the outstanding capital stock of Harper Bros., Testing and 320 acres of land. The letter of intent lapsed on January 2, 1999, and a subsequent letter of intent was entered into by the defendants on May 5, 1999. The purchase price is approximately \$87.5 million. This transaction, which would take place in the highly concentrated Southwest Florida aggregate and silica sand industries, precipitated the government's suit.

B. The Transaction's Effects in Southwest Florida

The Complaint alleges that, the production and sale of aggregate and silica sand constitute two distinct lines of commerce, or relevant product markets, for antitrust purposes, and that Southwest Florida constitutes a section of the country, or relevant geographic market. The complaint alleges that the effect of Florida Rock's acquisition may be to lessen competition substantially in the production and sale of aggregate and silica sand in Southwest Florida.

Aggregate is a stone product used to manufacture asphalt concrete and ready mix concrete. Aggregate differs from all other types of stone products in its physical composition, functional characteristics, customary uses, and pricing. It must meet Florida Department of Transportation or American Society of Testing Material's specifications for the specific type of asphalt concrete or ready mix concrete being produced. Manufacturers of asphalt concrete and ready mix concrete in Southwest Florida do not view other types of stone products as good substitutes. The production and sale of aggregate used to manufacture asphalt concrete and ready mix concrete constitutes a line of commerce and a relevant market for antitrust purposes.

Silica sand differs from sand that is manufactured from stone products (manufactured sand is the alternative to silica sand) in its physical composition, functional characteristics, and customary uses. The Florida Department of Transportation requires silica sand to be used in ready mix concrete whenever the ready mix concrete is used as a surface for vehicular traffic. Commercial contractors use silica sand in place of, or in combination with, manufactured sand to manufacture ready mix concrete when superior pumping or finishing qualities are required. Manufacturers of ready mix concrete recognizes silica sand as a distinct product. The production and sale of silica sand used to manufacture specific types of ready mix concrete constitutes a line of commerce and a relevant market for antitrust purposes.

Producers of aggregate and/or silica sand located in or near Southwest Florida sell and compete with each other for sales of aggregate and silica sand in Southwest Florida. Due to high transportation costs and long delivery time, producers of aggregate and/or silica sand not located in or near Southwest Florida do not sell a significant amount of aggregate and/or silica sand for use within Southwest Florida.

The Complaint alleges that Florida Rock's acquisition of Harper Bros. would substantially lessen competition for the production and sale of aggregate and silica sand in Southwest Florida. Actual and potential competition between Florida Rock and Harper Bros. for the production and sale of aggregate and silica sand in Southwest Florida will be eliminated. Florida Rock and Harper Bros. are the largest producers of aggregate in Southwest Florida and have the largest reserves of aggregate in Southwest Florida. Florida Rock accounts for about 44 percent of the aggregate produced in Southwest Florida and Harper Bros. accounts for approximately 24 percent. After the acquisition, the combined entity will control about 68 percent of the Southwest Florida aggregate market. They are two of only three significant producers in Southwest Florida possessing sufficient aggregate reserves that would permit consumers to switch aggregate suppliers if prices increased.

For silica sand, Florida Rock and Harper Bros. are two of only three producers capable of selling silica sand in Southwest Florida. After the acquisition, the combined entity will control approximately 60 percent of the Southwest Florida silica sand market.

The acquisition of Harper Bros. by Florida Rock would create a dominant aggregate and silica sand company in Southwest Florida. In the aggregate market, it would reduce from three to two the number of significant competitors which possess sufficient aggregate reserves that would permit consumers to switch aggregate suppliers if prices were increased. In the silica sand market, the number of competitors would decline from three to two. Florida Rock would have the market power to increase prices for aggregate and silica sand. In addition, the proposed acquisition will facilitate coordinated pricing activity among aggregate and silica sand producers and increase the likelihood of anticompetitive price increases for consumers. Aggregate and silica sand products are only slightly differentiated (if at all), and price is an important dimension of competition. The combination of Florida Rock's and Harper Bros.' Southwest Florida aggregate and silica sand businesses would result in a substantial reduction in competition, increase the risk of coordinated action, and likely result in higher aggregate and silica sand prices.

New entry in Southwest Florida is unlikely to restore the competition lost through Florida Rock's removal of Harper Bros. from the aggregate and silica sand markets. Establishing a new,

successful aggregate or silica sand production facility in or near Southwest Florida is difficult, time-consuming and costly. To be cost competitive in Southwest Florida, an aggregate or silica sand production facility must be able to produce large amounts of consistent quality aggregate or silica sand in close proximity to asphalt concrete and/or ready mix concrete plants.

Environmental and zoning permits must be obtained to operate an aggregate or silica sand production facility. Federal, state and local environmental provisions and state and local zoning provisions make it very difficult to open an aggregate or silica sand production facility in or near Southwest Florida. Timely and sufficient entry is unlikely to occur in the aggregate or silica sand markets in Southwest Florida to defeat any post-acquisition price increases.

C. Harm to Competition as a Consequence of the Acquisition

The Complaint alleges that the transaction would have the following effects, among others: Competition for the production and sale of aggregate and silica sand in Southwest Florida will be substantially lessened; actual and potential competition between Florida Rock and Harper Bros. in the production and sale of aggregate and silica sand in Southwest Florida will be eliminated; and prices for aggregate and silica sand in Southwest Florida are likely to increase above competitive levels.

III. Explanation of the Proposed Final Judgment

The proposed Final Judgment would preserve competition in the production and sale of aggregate and silica sand in Southwest Florida by placing in independent hands Florida Rock's Alico Rod Quarry which serves the Southwest Florida aggregate market and Harper Bros.' Palmdale Sand Mine which serves the Southwest Florida silica sand market. This would maintain the existing number of suppliers in the two markets. In response to a price increase from Florida Rock, purchasers would be able to turn to other producers of aggregate and silica sand with significant capacity to serve Southwest Florida.

Within one hundred and eighty (180) calendar days after filing the proposed Final Judgment of five (5) days after the entry of the Final Judgment, whichever is later, Florida Rock must divest its Alico Road aggregate quarry, Harper Bros.' Palmdale Sand Mine, and related assets. The Alico Road Quarry and the Palmdale Sand Mine will be sold to a purchaser or purchasers that demonstrates to the sole satisfaction of

the United States that they will be an economically viable and effective competitors, capable of competing effectively in the production and sale of aggregate and/or silica sand in Southwest Florida.

Until the ordered divestiture take place, Florida Rock must take all reasonable steps necessary to accomplish the divestiture and cooperate with any prospective purchaser. If Florida Rock does not accomplish the ordered divestiture within the specified one hundred and eighty (180) calendar days, which may be extended by up to sixty (60) calendar days by the United States in its sole discretion, the proposed Final Judgment provides for procedures by which the Court shall appoint a trustee to complete the divestiture. If a trustee must undertake to divest the Alico Road Quarry, the trustee has the option of adding certain Florida Rock aggregate reserve parcels that are contiguous to the Alico Road Quarry to the divestiture package. Florida Rock must cooperate fully with the trustee.

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

IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act (15 U.S.C. 15) provides that any person who

has been injured as a result of conduct prohibited by the antitrust laws may bring suit in Federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorney's fees. Entry of the proposed Final Judgment neither will impair nor assist the bringing of any private antitrust damage action. Under the provisions of section 5(a) of the Clayton Act (15 U.S.C. 16(a)), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against Florida Rock, Harber Bros., Testing, or Daniel Harper.

V. Procedures Available for Modification of the Proposed Final Judgment

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

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person should comment within sixty (60) days of the date of publication of this Competitive Impact Statement in the **Federal Register**. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its contest to the proposed Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with the Court and published in the **Federal Register**.

Written comments should be submitted to: J. Robert Kramer II, Chief, Litigation II Section, Antitrust Division, United States Department of Justice, 1401 H Street, NW, Suite 3000, Washington, DC 20530. The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. Alternatives to the Proposed Final Judgment

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

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

VII. Standard of Review Under the APPA for Proposed Final Judgment

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

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

(2) The impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e) (emphasis added). As the Court of Appeals for the District of Columbia Circuit recently held, the APPA permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States v. Microsoft*, 56 F.3d 1448 (D.C. Cir. 1995). The courts have recognized that the term "'public interest' take[s] meaning from the purposes of the regulatory legislation." *NAACP v. Federal Power Comm'n*, 425 U.S. 662, 669 (1976). Since the purpose of the antitrust laws is to preserve "free and unfettered competition as the rule of trade," *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958), the focus of the "public interest" inquiry under the APPA is whether the proposed Final Judgment would serve the public interest in free and unfettered competition. *United States v. American Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101

(1984); *United States v. Waste Management, Inc.*, 1985-2 Trade Cas. ¶ 66,651, at 63,046 (D.D.C. 1985). In conducting this inquiry, "the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."¹ Rather, [a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1997-1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a Court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United State v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) quoting *United States v. Bechtel Corp.*, 648 F.2d 660,666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981). See also, *Microsoft*, 56 F.3d 1448 (D.C. Cir. 1995). Precedent requires that:

The balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.²

A proposed consent decree is an agreement between the parties which is reached after exhaustive negotiations

and discussions. Parties do not hastily and thoughtlessly stipulate to a decree because, in doing so, they

waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and the elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.

United States v. Armour & Co., 402 U.S. 673, 681 (1971).

The proposed Final Judgment therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' (citations omitted)." ³

VIII. Determinative Documents

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

Executed on: May 25, 1999.

Respectfully submitted,

Frederick H. Parmenter,

Attorney, *United States Department of Justice, Antitrust Division, Litigation II Section, Suite 3000, 1401 H Street, NW, Washington, DC 20530, Telephone: (202) 307-0620, Facsimile: (202) 307-6283.*

[FR Doc. 99-14895 Filed 6-15-99; 8:45 am]

BILLING CODE 4410-11-M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 98-13]

Jimmy H. Conway, Jr., M.D.; Grant of Restricted Registration

On January 28, 1998, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to Jimmy Harold Conway, Jr., M.D. (Respondent) of

Oklahoma City, Oklahoma, notifying him of an opportunity to show cause as to why DEA should not deny his application for registration as a practitioner pursuant to 21 U.S.C. 823(f) and 824(a)(2) and (a)(4), for reason that he was convicted of a felony relating to controlled substances and that his registration would be inconsistent with the public interest.

By letter dated February 23, 1998, Respondent, through counsel, requested a hearing on the issues raised by the Order to Show Cause. Following prehearing procedures, a hearing was held in Oklahoma City, Oklahoma on July 14 and 15, 1998, before Administrative Law Judge Gail A. Randall. At the hearing, both parties called witnesses to testify and introduced documentary evidence. After the hearing, both parties submitted proposed findings of fact, conclusions of law and argument. On December 21, 1998, Judge Randall issued her Recommended Rulings, Findings of Fact, Conclusions of Law and Decision, recommending that Respondent's application for registration be granted without restrictions. Neither party filed exceptions to Judge Randall's opinion, and on January 26, 1999, Judge Randall transmitted the record of these proceedings to the Deputy Administrator.

The Deputy Administrator has considered the record in its entirety, and pursuant to 21 CFR 1316.67, hereby issues his final order based upon findings of fact and conclusions of law as hereinafter set forth. The Deputy Administrator adopts in full the recommended rulings, findings of fact and conclusions of law of the Administrative Law Judge, and adopts in part Judge Randall's recommended decision in this matter. His adoption is in no manner diminished by any recitation of facts, issues and conclusions herein, or of any failure to mention a matter of fact or law.

The Deputy Administrator finds that Respondent graduated from medical school in 1983, and has been in private practice since 1989. He is an orthopedic surgeon specializing primarily in the treatment of shoulder and knee injuries, general orthopedics, and sports medicine.

On February 27, 1996, an agent with the Oklahoma Bureau of Narcotics and Dangerous Drugs Control (OBN) received a complaint from a pharmacist concerning Respondent. The pharmacist had become suspicious of several prescriptions filled at the pharmacy for patient "Jim Conway" for Lorcet, a Schedule III control substance, and Soma, a non-controlled substance

¹ 119 Cong. Rec. 24598 (1973). See *United States v. Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975) A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See, H.R. 93-1463, 93rd Cong. 2d Sess. 8-9, reprinted in (1974) U.S. Code Cong. & Ad. News 6535, 6538.

² *United States v. Bechtel*, 648 F.2d at 666 (citations omitted) (emphasis added); see *United States v. BNS, Inc.*, 858 F.2d at 463; *United States v. National Broadcasting Co.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); *United States v. Gillette Co.*, 406 F. Supp. at 716. See also *United States v. American Cyanamid Co.* 719 F.2d at 565.

³ *United States v. American Tel. and Tel Co.*, 552 F. Supp. 131, 150 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) quoting *United States v. Gillette Co.*, *supra*, 406 F. Supp. at 716; *United States v. Aluminum, Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky 1985).