

## SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is made and entered into by and between defendants, Blacktop Industries and Equipment Company, American Asphalt of West Virginia, LLC (“AAWV”), American Asphalt & Aggregate, Inc. (collectively “American Defendants”) and the State of West Virginia ex rel. Patrick Morrissey, Attorney General, Byrd E. White, in his official capacity as Secretary of Transportation and Commissioner of Highways, West Virginia Department of Transportation and the Cities of Charleston, Beckley, Bluefield, Huntington, Parkersburg, and the Kanawha County Commission (together, the “Settling Plaintiffs”).

WHEREAS, the Settling Plaintiffs in these actions allege that the American Defendants engaged in restraints of trade in violation of W. Va. Code § 47-18-3; and

WHEREAS, the Settling Plaintiffs have conducted an investigation into the facts and law regarding these actions and have concluded that their claims are valid, but nevertheless believe that resolving their claims against the American Defendants according to the terms set forth below is in their best interests;

WHEREAS, the American Defendants, despite their belief that they are not liable for the claims asserted and have good defenses thereto, have nevertheless agreed to enter into this Agreement to avoid further expense, inconvenience, and the distraction of burdensome and protracted litigation, and to obtain the releases, orders, and judgment contemplated by this Agreement, and to put to rest with finality all claims that were or could have been asserted against them based on the allegations of these actions, as more particularly set out below; and

WHEREAS, the American Defendants understand that the Settling Plaintiffs’ claims will proceed against CRH, plc, Oldcastle, Inc., Oldcastle Materials, Inc., West Virginia Paving, Inc., Southern West Virginia Asphalt, Inc., Southern West Virginia Paving, Inc., and Camden Materials, LLC (the “Non-Settling Defendants”);

NOW, THEREFORE, in consideration of the covenants, agreements, and releases set forth herein and for other good and valuable consideration, it is agreed by and among the undersigned that the claims against the American Defendants be settled, compromised, and dismissed on the merits with prejudice as to the American Defendants, on the following terms and conditions, and incorporating all of the preceding clauses:

1. **DEFINITIONS.**

- a. Settlement Funds – means \$600,000.00 in immediately available currency or funds.
- b. The Southwestern Market – means the geographical area encompassed by Putnam, Cabell, Kanawha, Wayne, Lincoln, Boone, Logan, and Mingo Counties, West Virginia.
- c. Asphalt – 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.
- d. Asphalt Paving Services – means actions or activities involved in applying Asphalt to roadways, whether newly constructed or resurfacing.

2. **INJUNCTIVE RELIEF AND STRUCTURAL CHANGES.** The American Defendants agree to the entry of an injunction, without the necessity of a bond, prohibiting the conduct set forth in paragraphs 2.a through 2.b, below. In addition, subject to obtaining the same through either judgment or settlement with the Non-Settling Defendants (or as many of them may be necessary to secure the relief contemplated), the American Defendants will not oppose the structural changes – or structural changes substantially similar thereto – set forth in paragraphs 2.c through 2.q, below, which are sought in order to improve competition in the Southwestern market:

- a. The American Defendants shall refrain from entering into any contract, combination or conspiracy to restrain trade in West Virginia in violation of the WVAA, W.Va. Code § 47-18-3, and shall not monopolize or attempt to monopolize Asphalt manufacturing or Asphalt Paving Services in West Virginia, by unlawful means, in violation of the WVAA. W.Va. Code § 47-18-4.

- b. The American Defendants shall refrain from assisting or helping any other party to obtain or maintain a monopoly in the Asphalt manufacturing or Asphalt Paving Services in West Virginia.
- c. The American Defendants shall not sell or attempt to sell their interests in American Asphalt of West Virginia, LLC to the Non-Settling Defendants or any third party affiliated with the Non-Settling Defendants.
- d. American Asphalt & Aggregate, Inc or its designee will acquire at no cost an additional 1% of the AAWV joint venture to achieve 51% ownership of the AAWV Joint Venture;
- e. The Non-Settling Defendants shall remove all non-compete agreements and restrictive covenants imposed by them on the American Defendants and their affiliates, including Daron Dean;
- f. The Non-Settling Defendants shall not attempt to enforce buyout provisions contained in the AAWV joint venture agreement. Instead, American Asphalt & Aggregate, Inc. or its designee shall be entitled to exercise a buyout of the Non-Settling Defendants on the terms set forth in the AAWV joint venture agreement;
- g. American Asphalt & Aggregate, Inc. or its designee shall have right of first refusal to acquire the Non-Settling Defendants' 49% interest in the AAWV Joint Venture at 4 times EBITDA;
- h. To increase changes capacity, AAWV may install an additional silo and transfer chute at the Kenova and St. Albans plants, which will be financed by the JV and guaranteed by the Non-Settling Defendants;
- i. The JV may install a bath tower (4-5 ton), hot elevator, and dryer at Kenova to be financed by the JV and guaranteed by the Non-Settling Defendants;
- j. The Non-Settling Defendants shall enter in a long-term aggregate supply agreement with the American Defendants, including recycled asphalt pavement ("RAP");
- k. WVP will surrender accounting oversight for the AAWV joint venture to the American Defendants;
- l. Daron Dean's daughter plans to enter the asphalt laydown business as a certified Minority- or Woman-owned Business Entity. Sales from the AAWV joint venture to Dean's daughter's business shall be made at arms' length;
- m. WVP shall sell liquid asphalt to American Defendants at the same price it receives from its sister company or companies;

- n. The AAWV joint venture shall supply spot asphalt on non-discriminatory price and supply terms to all customers;
- o. The American Defendants and the Non-Settling Defendants shall take all steps reasonable and necessary in order to eliminate the Non-Settling Defendants' take or pay tonnage obligation from the AAWV joint venture;
- p. All other terms of the AAWV joint venture shall stay the same.

3. **AGREEMENT OF SOUTHERN WEST VIRGINA ASPHALT, INC. ("SWVA") TO STRUCTURAL CHANGES.** SWVA, by an authorized signature below, agrees and authorizes the structural changes set forth in Paragraphs 2.c-p. and will cooperate with the American Defendants to implement said changes.

4. **NO OBLIGATION OF SETTling PLAINTIFFS.** American Defendants agree the Settling Plaintiffs have no obligation or liability to American Defendants or Non-Settling Defendants if the structural changes in 2.c-p. are not consummated, even if previously agreed to by Non-Settling Defendants.

5. **SETTLEMENT PAYMENT.** The American Defendants or their designee shall deliver to counsel for the Settling Plaintiffs the amount of \$600,000.00 by wire transfer of immediately available funds to the Client Trust account of Bailey & Glasser LLP no later than Friday, September 25, 2020.

6. **NO CIVIL PENALTY.** No portion of the Settlement Payment shall be considered a civil penalty or subject to the provisions of W. Va. Code § 47-18-18.

7. **COOPERATION.** The American Defendants agree to give full, continuing and complete cooperation to Settling Plaintiffs by: (a) giving full and truthful assistance in discovery and/or trial preparation relating to the Settling Plaintiffs' claims against the Non-Settling Defendants; (b) meeting and conferring on making available appropriate officers, agents, and employees for trial, as well as providing an in-person proffer (with counsel present) of said witnesses testimony upon request; (c) producing at trial and, if necessary, at multiple trials, in

person representatives to provide truthful and complete testimony, at the Settling Plaintiffs' expense; (d) making officers, agents, and employees reasonably available for interviews (with counsel present) by Settling Plaintiffs' counsel; (e) providing reasonable access to all economic analyses applicable to determining the impact of the antitrust violations alleged by the Settling Plaintiffs; (f) making expert witnesses reasonably available for debriefing and interviewing regarding any economic analyses performed which are disclosed pursuant to this Agreement; (g) making expert witnesses reasonably available for interviews (with counsel present) by Settling Plaintiffs' counsel, at Settling Plaintiffs' expense; (h) making expert witnesses available at trial and, if necessary, multiple trials, to provide truthful and complete testimony, at Settling Plaintiffs' expense.

8. **DISMISSAL OF APPEAL NO. 18-0129.** The American Defendants and the Cities of Charleston, Beckley, Bluefield, Huntington, Parkersburg, and the Kanawha County Commission shall prepare and file a stipulation of dismissal of Appeal No. 18-0129 which is currently pending and stayed by the West Virginia Supreme Court of Appeals.

9. **RELEASES.** In consideration for the Settlement Payment and the other provisions and clauses of this Agreement, and for other valuable consideration, the American Defendants shall be completely released, acquitted, and forever discharged from any and all claims, demands, actions, suits, and causes of action that the Settling Plaintiffs, or any of them, ever had, now have, or hereafter may have on account of, or arising in any way out of, any and all known and unknown, foreseen and unforeseen, suspected or unsuspected injuries, damages, and the consequences thereof in any way arising out of or relating in any way to any act or omission of the American Defendants concerning the manufacture of asphalt or the provision of asphalt paving services to any of the Settling Plaintiffs and which were brought or could have been brought in the complaints filed in these actions including, without limitation, any claims arising under any federal or state antitrust, unjust enrichment, unfair competition, trade practice statutory or common law, and

consumer protection law (to the extent that a consumer protection claim would or could be based on allegations of an antitrust or unfair competition violation) (the “Released Claims”). The Settling Plaintiffs shall not, after the date of this Agreement, seek to establish liability against the American Defendants based, in whole or in part, upon any of the Released Claims, or conduct at issue in the Released Claims.

10. **EXCLUSION.** Because this action was not brought by the attorney general as a *parens patriae* action under W. Va. Code § 47-18-17, the Released Claims do not include claims which would be subject to the notice and opt-out provisions of that section.

11. **PARTIAL SETTLEMENT.** This Agreement does not settle or compromise any claim by Settling Plaintiffs against any of the Non-Settling Defendants, or any entity or defendant other than the American Defendants. All rights against such other entities and defendants are specifically reserved.

12. **ENFORCEMENT.** This Agreement shall be enforceable by the Settling Plaintiffs. Any failure by any party to this Agreement to insist upon the strict performance by any other party of any of the provisions of this Agreement shall not be deemed a waiver of any of the provisions of this Agreement.

13. **CONTINUING OBLIGATION.** This Agreement, which constitutes a continuing obligation, is binding upon the Settling Plaintiffs and the American Defendants and any of the American Defendants’ respective successors, assigns or other entities or persons otherwise bound by law. Each Party agrees to take all reasonable steps necessary to effectuate the terms of this Agreement

14. **WAIVER.** The Parties agree not to challenge the entry of the attached Agreed Order of Dismissal and waive all rights of appeal. Consent to this Agreement does not constitute an approval by the Settling Plaintiffs of the American Defendants’ business acts and practices,

and the American Defendants shall not represent this Agreement as such an approval.

15. **COMPLIANCE.** Nothing in this Agreement shall relieve the American Defendants of their obligation to comply with all U.S. federal, state, and local laws and regulations.

16. **CIRCUMVENTION.** The American Defendants shall not participate, directly or indirectly, in any activity or form a separate entity or corporation for the purpose of engaging in acts or practices in whole or in part in the State of West Virginia that are prohibited by this Agreement or for any other purpose that would otherwise circumvent any term of this Agreement.

17. **ONGOING JURISDICTION.** The Business Court Division of the Kanawha County Circuit Court shall retain jurisdiction over the implementation, enforcement, and performance of this Agreement and shall have exclusive jurisdiction over any suit, action, proceeding, or dispute arising out of or relating to this Agreement or the applicability of this Agreement that cannot be resolved by negotiation and agreement by the Settling Plaintiffs and the American Defendants.

18. **INTEGRATION CLAUSE.** This agreement constitutes the entire, complete, and integrated agreement among Settling Plaintiffs and the American Defendants pertaining to these actions and supersedes all prior and contemporaneous undertakings of Settling Plaintiffs and the American Defendants in connection herewith. This Agreement may not be modified or amended except in writing executed by Settling Plaintiffs and the American Defendants.

19. **EXECUTION IN COUNTERPARTS.** This Agreement may be executed in counterparts by Settling Plaintiffs and American Defendants, and a facsimile or scanned image of a signature shall be deemed an original signature for purposes of executing this Agreement.

20. **FUTURE INTERPRETATION.** Neither Settling Plaintiffs nor the American Defendants shall be considered to be the drafter of this Agreement or any of its provisions for the purpose of any statute, case law, or rule of interpretation or construction that would or might cause

any provision to be construed against the drafter of this Agreement.

21. **AUTHORITY.** Each of the undersigned represents that he or she is fully authorized to enter into the terms and conditions of, and to execute, this Agreement. The Parties warrant and represent that they have read this Agreement and understand all of its terms, and that they are knowingly and voluntarily entering into this Agreement without any duress or undue influence on the part of, or on behalf of, any of them, based on the advice of their own counsel and not upon any representations of any other Party or its counsel.

ENTERED INTO AND AGREED TO BY:

Blacktop Industries and Equipment Company

By: 

Its: Pres. 9/15/20

American Asphalt of West Virginia, LLC

By: 

Its: Pres. 9/15/20

American Asphalt & Aggregate, Inc.

By: 

Its: Pres. 9/15/20



State of West Virginia ex rel. Patrick Morrisey, Attorney General

By: James P. Buffington II by permission DCD 9-17-2020

Its: Senior Deputy, Attorney General

West Virginia Department of Transportation, Division of Highways

By: \_\_\_\_\_

Its: \_\_\_\_\_

City of Charleston

By: \_\_\_\_\_

Its: \_\_\_\_\_

City of Parkersburg

By: \_\_\_\_\_

Its: \_\_\_\_\_

Kanawha County Commission

By: \_\_\_\_\_

Its: \_\_\_\_\_

State of West Virginia ex rel. Patrick Morrissey, Attorney General

By: \_\_\_\_\_

Its: \_\_\_\_\_

West Virginia Department of Transportation, Division of Highways

By: Bud E. Whitte

Its: Secretary & Commissioner

City of Charleston

By: \_\_\_\_\_

Its: \_\_\_\_\_

City of Parkersburg

By: \_\_\_\_\_

Its: \_\_\_\_\_

Kanawha County Commission

By: \_\_\_\_\_

Its: \_\_\_\_\_

State of West Virginia ex rel. Patrick Morrissey, Attorney General

By: \_\_\_\_\_


Its: \_\_\_\_\_

West Virginia Department of Transportation, Division of Highways

By: \_\_\_\_\_

Its: \_\_\_\_\_

City of Charleston

By:  \_\_\_\_\_

Its: *City Manager* \_\_\_\_\_

City of Parkersburg

By: \_\_\_\_\_

Its: \_\_\_\_\_

Kanawha County Commission

By: \_\_\_\_\_

Its: \_\_\_\_\_

State of West Virginia ex rel. Patrick Morrissey, Attorney General

By: \_\_\_\_\_

Its: \_\_\_\_\_

West Virginia Department of Transportation, Division of Highways

By: Bryce E. White

Its: Secretary & Commissioner

City of Charleston

By: \_\_\_\_\_

Its: \_\_\_\_\_

City of Parkersburg

By: Joseph T. Santer

Its: City Attorney

Kanawha County Commission

By: \_\_\_\_\_

Its: \_\_\_\_\_

State of West Virginia ex rel. Patrick Morrissey, Attorney General

By: \_\_\_\_\_

Its: \_\_\_\_\_

West Virginia Department of Transportation, Division of Highways

By: \_\_\_\_\_

Its: \_\_\_\_\_

City of Charleston

By: \_\_\_\_\_

Its: \_\_\_\_\_

City of Parkersburg

By: \_\_\_\_\_

Its: \_\_\_\_\_

Kanawha County Commission

By: W Kent Carper w/ permission Andrew Grance #11967

Its: President

City of Huntington

By: \_\_\_\_\_

Its: \_\_\_\_\_

City of Bluefield

By: \_\_\_\_\_

Its: \_\_\_\_\_

City of Beckley

By: \_\_\_\_\_

Its: \_\_\_\_\_

Southern West Virginia Asphalt, Inc.

By: \_\_\_\_\_

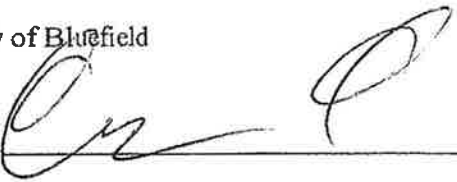
Its: \_\_\_\_\_

City of Huntington

By: \_\_\_\_\_

Its: \_\_\_\_\_

City of Bluefield

By:  \_\_\_\_\_

Its: SOLICITOR

City of Beckley

By: \_\_\_\_\_

Its: \_\_\_\_\_

Southern West Virginia Asphalt, Inc.

By: \_\_\_\_\_

Its: \_\_\_\_\_

City of Huntington

By: \_\_\_\_\_

Its: \_\_\_\_\_

City of Bluefield

By: \_\_\_\_\_

Its: \_\_\_\_\_

City of Beckley

By: William H. Fife, III

Its: City Solicitor

Southern West Virginia Asphalt, Inc.

By: \_\_\_\_\_

Its: \_\_\_\_\_