

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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KANAWHA COUNTY CIRCUIT COURT

**CITY OF CHARLESTON,
and all others similarly situated,**

Plaintiff,

v.

**Civil Action No.: 16-C-1552
Hon. Tod J. Kaufman**

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

Defendants.

**ANSWER AND AFFIRMATIVE DEFENSES OF
DEFENDANT WEST VIRGINIA PAVING, INC.**

COME NOW Defendant West Virginia Paving, Inc. ("WVP"); and responds to the Plaintiff's Complaint as follows. For the convenience of the Court, the paragraphs from Plaintiff's Complaint have been reproduced herein. WVP's responses immediately follow each respective paragraph.

WVP emphasizes that the Complaint is fatally defective because it fails to allege a relevant geographic market. The failure to allege a relevant geographic market makes it impossible to determine whether competition has been impaired by the Defendants or the cause of any such impairment. Moreover, without alleging a relevant geographic market, the parties and the Court are unable to determine whether discovery requests are relevant or unnecessary and unduly costly. In addition, it is impossible to determine whether class action treatment is appropriate without

awareness of whether there are one or many relevant geographic markets. WVP will nevertheless answer in order to move the case to its ultimate dismissal.

1. Plaintiff the City of Charleston, by and through undersigned counsel, brings this action on behalf of a class of all West Virginia citizens that purchased hot-mix asphalt (“asphalt”) indirectly from Defendants, from January 1, 2006 through the present (the “Class Period”), for violations of the West Virginia Antitrust Act (the “Class”). Plaintiff and the Class acquired this asphalt indirectly when they purchased asphalt paving and other asphalt contracting services from Defendants’ owned or affiliated entities, or purchased, from third parties, paving and other services or products utilizing or containing Defendants’ asphalt.

WVP is without sufficient knowledge or information to form a belief as to the truth of the allegations related to when, where, or how the purported class members purchased asphalt and therefore demands strict proof thereof. WVP denies the remaining allegations in paragraph 1. Specifically, and without limitation, WVP denies that this case is maintainable as a class action and denies that WVP violated the West Virginia Antitrust Act or any other applicable law in any way.

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

monopolization and agreements in restraint of trade in the markets for the production and sale of asphalt throughout West Virginia in violation of W.Va. Code §§ 47-18-3, -4, -9. Plaintiff also seeks on behalf of itself and the Class all equitable relief necessary to restore competition in the sale of asphalt in West Virginia.

WVP denies the allegations in paragraph 2 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 3 and demands strict proof thereof. Further, WVP states that at all times it has conducted its business in accordance with the antitrust laws and with the goal of providing quality services to its customers at a competitive price. Plaintiff's allegations are founded upon comparisons to undefined markets in other states without considering the significant differences in bidding requirements and contract specifications.

4. The Class spends copious sums—upon information and belief, in the tens of millions of dollars—indirectly on asphalt each year when they purchase asphalt paving and other

asphalt contractor services (“paving”) containing the Defendants’ asphalt from the Defendants and third parties. Municipal and local governments, in particular, devote a disproportionate share of their annual budgets to paving and frequently have to delay, reject, or restrict the scope of critical road repair and construction projects due to the unlawfully excessive cost of the asphalt used in paving jobs in the areas dominated by the Defendants.

WVP denies the allegations in paragraph 4 and demands strict proof thereof.

5. Given the inherent importance of roads, and therefore asphalt, in West Virginia, robust competition in the industry is essential; nothing has a greater influence on the affordability of road construction and other asphalt projects. Roads cannot be built or maintained to the extent required when Defendants can dictate the price of asphalt and impose unlawfully high rates. The importance of minimizing asphalt costs is why the Class needs a competitive process in which high quality and low cost is the norm. Asphalt monopolies are anathema to that outcome.

WVP denies the allegations in paragraph 5 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 6 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 7 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 8 and demands strict proof thereof.

9. Defendants have amplified the negative effects of their asphalt plant acquisitions by acquiring or combining with numerous key asphalt paving companies. Controlling both the supply of asphalt and owning paving contractors that apply the asphalt has foreclosed potential rival paving companies from bidding against Defendants. As with the asphalt plants, many of those paving companies were acquired as soon as they began successfully bidding against Defendants for asphalt paving contracts. And as with the asphalt plants, paving companies were inexplicably shuttered despite huge sums Defendants paid to acquire them. Defendants were thus also able to extinguish emerging competition for paving jobs and kept prices unreasonably high.

WVP denies the allegations in paragraph 9 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 10 and demands strict proof thereof.

11. Defendants have not stopped at combining with and acquiring competitors. After becoming virtual monopolists, Defendants purposefully took actions to maintain and enhance their market dominance through a host of predatory actions and bullying. Defendants have: (a)

induced boycotts against their competitors; (b) expressly threatened to put new competitors out of business; (c) routinely broken state and federal laws related to truckload weights to gain a substantial competitive advantage; (d) made aggressive overtures to buy out the few remaining competitors in the market; (e) mandated statewide covenants not to compete, for as many as ten years, from their vanquished business rivals; and (f) lying, flagrantly and under penalty of perjury, to municipalities about their secret ownership of ostensibly competing companies.

WVP denies the allegations in paragraph 11 and its subparts and demands strict proof thereof.

12. Defendants have erected substantial barriers to those who might consider entering the asphalt industry. They have choked off the supply of aggregate and asphalt to competing asphalt plants and paving companies; threatened new entrants in these markets with reprisals unless they ceased operations or sold to Defendants; and engaged in other predatory conduct that make it economically irrational for anyone to consider launching or expanding asphalt production or paving businesses in large swaths of this state.

WVP denies the allegations in paragraph 12 and demands strict proof thereof.

13. Defendants' comprehensive scheme has been made all the more pernicious, long lasting, and effective by the purposeful concealment of their transactions and the extent of their control in this state. Defendants have used complex ownership structures to obscure the relationship between their numerous subsidiaries and affiliates which has allowed them to

misrepresent their ownership of former competitors. Defendants have thus been able to lure the Class into believing that they are receiving multiple bids from independent competitors when in fact Defendants have an undisclosed interest in “competing” bidders. In other words, Defendants surreptitiously bid against themselves to cloak their common ownership. Thus, Defendants have created a scenario that regardless of which entity is awarded a contract, it is Defendants who actually win the bid.

WVP denies the allegations in paragraph 13 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 14 and demands strict proof thereof.

15. The Antitrust Division of the United States Department of Justice (“DOJ”) has noted the ability of actors, such as Defendants, to fly under the regulatory radar while creating an illegal monopoly. According to the DOJ, “[i]n various states across the country, large aggregate, asphalt concrete, and concrete suppliers and highway construction companies are making numerous small acquisitions in local and regional markets. Some of these acquisitions can eliminate competition and provide the acquiring firm with the ability to raise prices. Because these acquisitions often do not trigger the statutory requirement to

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

In response to the allegations contained in paragraph 15, WVP refers to the document cited therein for a full and complete statement of its terms. WVP denies the remainder of the allegations in paragraph 15 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 16 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 17 and demands strict proof thereof.

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

Without regard to any other proceeding pending against it, WVP admits that this Court has subject matter jurisdiction for at least some of the allegations asserted by Plaintiff.

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

Without regard to any other proceeding pending against it, WVP admits that this Court has jurisdiction over at least some of the claims asserted by Plaintiff.

20. Venue is proper in this Court pursuant to W.Va. Code § 47-18-15 because acts on which this action is based occurred in Kanawha County, Plaintiff City of Charleston's principal place of business is in Kanawha County, and several of the Defendants transact business within Kanawha County.

Without regard to any other proceeding pending against it, WVP admits that this Court is the proper venue for at least some of the claims asserted by the Plaintiff.

21. All of the members of the proposed Class are citizens of West Virginia.

Paragraph 21 contains legal conclusions to which no response is required. To the extent to which a response is deemed necessary, WVP denies the allegations in paragraph 21 and demands strict proof thereof. Particularly, and without limitation, WVP denies that this case is maintainable as a class action and that the class is properly and lawfully defined.

22. All Defendants are defendants: (i) from whom significant relief is sought by the Class; (ii) whose conduct forms a significant basis for the claims asserted by the proposed Class; and (iii) who are citizens of West Virginia.

Without regard to any other proceeding pending against it, WVP admits that this Court has jurisdiction over at least some of the claims asserted by the Plaintiff. WVP denies that this case is maintainable as a class action and that the class is properly and lawfully defined.

23. The principal (and indeed all) injuries resulting from Defendants' conduct were incurred by the Class in West Virginia.

Paragraph 23 contains legal conclusions to which no response is necessary. To the extent to which a response is deemed necessary, WVP denies the allegations in paragraph 23 and demands strict

proof thereof. Particularly, and without limitation, WVP denies that this case is maintainable as a class action and that the class is properly and lawfully defined.

24. Plaintiff the City of Charleston (“Charleston”), is a West Virginia municipal corporation established pursuant to W.Va. Code § 8-1-1, et seq. Charleston purchased asphalt indirectly from the Defendants at unlawfully high prices when it purchased paving from Defendants and/or third parties during the Class Period.

Upon information and belief, WVP admits that Plaintiff is a West Virginia municipal corporation. WVP denies the remainder of the allegations in paragraph 24 and demands strict proof thereof.

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

WVP admits that WVP is a West Virginia corporation duly authorized to conduct business in the State of West Virginia and has its principal place of business in Dunbar, West Virginia. WVP also admits that WVP manufactures, sells, and applies asphalt and asphalt related products in one or more markets in West Virginia. WVP denies the remainder of the allegations in paragraph 25 and demands strict proof thereof.

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

WVP admits that Southern West Virginia Paving, Inc. (“SWVP”) is a West Virginia corporation duly authorized to conduct business in the State of West Virginia and has its principal place of business in Sprague, West Virginia. WVP also admits that SWVP applies asphalt and asphalt related products in one or more markets in West Virginia. WVP denies the remainder of the allegations in paragraph 26 and demands strict proof thereof.

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

WVP admits that Southern West Virginia Asphalt, Inc. (“SWVA”) is a West Virginia corporation duly authorized to conduct business in the State of West Virginia and has its principal place of business in Sprague, West Virginia. WVP also admits that SWVA manufactures asphalt and asphalt related products in one or more markets in West Virginia. WVP denies the remainder of the allegations in paragraph 27 and demands strict proof thereof.

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

To the extent to which the allegations in paragraph 28 do not relate to WVP, no response is necessary. To the extent to which any allegation does relate to WVP or to which a response is otherwise deemed required, WVP admits that WVP lawfully owns a 50% interest in Camden Materials, LLC (“Camden”). WVP is without sufficient information knowledge or information to form a belief as to Kelly Paving, Inc.’s (“Kelly’s”) corporate form or the exact nature of its business and therefore denies those allegations and demands strict proof thereof. WVP denies the remainder of the allegations in paragraph 28 and demands strict proof thereof.

29. Defendant Camden Materials, LLC (“Camden Materials”) is a West Virginia limited liability company duly authorized to conduct business in the State of West Virginia, with

its principal place of business located in Dunbar, West Virginia. Camden Materials is a joint venture between Defendants WV Paving and Kelly Paving. Camden Materials engages in the business of manufacturing and selling asphalt. As a result of this joint venture, competition between Kelly Paving and WV Paving has been unreasonably restrained.

WVP admits that Camden is a West Virginia limited liability company duly authorized to conduct business in the State of West Virginia and has its principal place of business in Dunbar, West Virginia. WVP also admits that WVP lawfully owns a 50% interest in Camden. WVP also admits that Camden manufactures asphalt. WVP denies the remainder of the allegations in paragraph 29 and demands strict proof thereof.

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

To the extent to which the allegations in paragraph 30 do not relate to WVP, no response is necessary. To the extent to which any allegation does relate to WVP or to which a response is otherwise deemed required, WVP responds as follows: WVP is without sufficient knowledge or

information to form a belief as to American Asphalt & Aggregate, Inc.'s ("AA&A's") corporate form or the exact nature of its business and therefore denies those allegations and demands strict proof thereof. WVP denies the remainder of the allegations in paragraph 30 and demands strict proof thereof.

31. Defendant American Asphalt of West Virginia, LLC ("American Asphalt") is a Delaware limited liability company duly authorized to conduct business in the State of West Virginia, with its principal place of business located in Kenova, West Virginia. American Asphalt's members are Defendants Southern WV Asphalt and American Asphalt & Aggregate, and thus American Asphalt is a citizen of West Virginia. American Asphalt engages in the business of manufacturing, selling, and/or applying asphalt and asphalt related products. American Asphalt previously competed but no longer competes with some or all of the other Defendants after combining with them.

To the extent to which the allegations in paragraph 31 do not relate to WVP, no response is required. To the extent to which any allegation does relate to WVP or a response is otherwise deemed required, WVP responds as follows: WVP admits that SWVA lawfully owns a 50% interest in American Asphalt of West Virginia, LLC ("AAWV"). WVP also admits that AAWV is a Delaware limited liability company duly authorized to conduct business in the State of West Virginia and it has its principal place of business in Kenova, West Virginia. WVP also admits that AAWV manufactures asphalt. WVP denies the remainder of the allegations in paragraph 31 and demands strict proof thereof.

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

To the extent to which the allegations in paragraph 32 do not relate to WVP, no response is necessary. To the extent to which any allegation does relate to WVP or to which a response is otherwise deemed required, WVP responds as follows: WVP is without sufficient knowledge or information to form a belief as to Blacktop Industries and Equipment’s (“Blacktop’s”) corporate form or the exact nature of its business and therefore denies these allegations and demands strict proof thereof. WVP denies the remainder of the allegations in paragraph 32 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 33 and demands strict proof thereof.

34. This action is brought pursuant to Rule 23 of the West Virginia Rules of Civil Procedure on behalf of Plaintiff and consisting of the following proposed Class:

- i. All West Virginia citizens at the time of the filing of this action, including individuals, municipal corporations, and businesses, who purchased products or services containing or utilizing asphalt manufactured or sold by the Defendants from January 1, 2006 to the present. Explicitly excluded from the Class are individuals who are directors or officers of Defendants or their affiliates.

Paragraph 34 contains legal conclusions to which no response is required. To the extent to which a response is deemed required, WVP denies the allegations and demands strict proof thereof. Particularly, and without limitation, WVP denies that this case is maintainable as a class action and that the class is properly and lawfully defined.

35. The Class Period runs from at least as early as January 1, 2006 to the date of the filing of this lawsuit because the nature of Defendants' actions concealed the unlawful actions, with the exact date to be determined during discovery in this action.

Paragraph 35 contains legal conclusions to which no response is required. To the extent to which a response is deemed required, WVP denies the allegations and demands strict proof thereof.

Particularly, and without limitation, WVP denies that this case is maintainable as a class action and that the putative class period is a proper and lawful timeframe, particularly with regard to, among other things, the applicable statutes of limitations and the doctrines of laches, waiver, and estoppel.

36. The proposed Class is so numerous and geographically dispersed throughout the State of West Virginia that joinder of all members is impracticable except by means of a class action.

Paragraph 36 contains legal conclusions to which no response is required. To the extent to which a response is deemed required, WVP denies the allegations and demands strict proof thereof.

37. Common questions of law and fact exist and such common questions predominate over any question of law or fact which may affect only individual class members. Such common questions include:

- i. Whether Defendants possess market power in the Class Areas;
- ii. Whether Defendants combined in a manner which restrained trade and commerce in the manufacturing, selling and/or applying of asphalt within West Virginia;
- iii. Whether Defendants suppress and eliminate competition in the manufacture and sale of asphalt within West Virginia;
- iv. Whether Defendants establish and maintain unreasonably high, excessive, monopolistic, and non-competitive prices for asphalt within West Virginia;

- v. To what extent Defendants acquired and combined with competitors in the asphalt and asphalt paving industries within West Virginia;
- vi. To what extent Defendants acquired asphalt plants within West Virginia;
- vii. To what extent Defendants entered “joint ventures” with competitors in the asphalt and asphalt paving industries in West Virginia;
- viii. Whether Defendants’ threatened potential competitors and entrants into the market for asphalt and asphalt paving services in West Virginia;
- ix. Whether Defendants obscured or misrepresented the true nature of the entity or entities bidding on asphalt paving jobs;
- x. Whether Defendants took an action(s) to conceal their illegal actions.

Paragraph 37 and its subparts contain legal conclusions to which no response is required. To the extent to which a response is deemed required, WVP denies the allegations and demands strict proof thereof.

38. The named Plaintiff asserts claims that are typical of the claims of the entire Class. The named Plaintiff, like all members of the Class, was injured by Defendants’ charging of supracompetitive prices resulting from their restraint of trade and monopolization when they acquired asphalt indirectly from the Defendants.

Paragraph 38 contains legal conclusions to which no response is required. To the extent to which a response is deemed required, WVP denies the allegations and demands strict proof thereof.

39. The named Plaintiff will fairly and adequately represent and protect the interests of the Class. The named Plaintiff has no interests antagonistic to those of the Class. The named Plaintiff has retained counsel who are competent and experienced in complex civil litigation and class actions.

Paragraph 39 contains legal conclusions to which no response is required. To the extent to which a response is deemed required, WVP denies the allegations and demands strict proof thereof.

40. The named Plaintiff anticipates that there will be no difficulty in the management of this litigation. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

Paragraph 40 contains legal conclusions to which no response is required. To the extent to which a response is deemed required, WVP denies the allegations and demands strict proof thereof.

41. The named Plaintiff has suffered, and will continue to suffer, antitrust injury and damages as a result of Defendants' charging of supracompetitive prices resulting from their restraint of trade and monopolization.

WVP denies the allegations in paragraph 41 and demands strict proof thereof.

42. The named Plaintiff reserves the right to adjust the class definition and class period in response to discovery and ongoing investigation.

Paragraph 42 merely reserves Plaintiff's right to adjust the class definition and class period in response to discovery and ongoing investigation. Likewise, WVP similarly reserves its rights to adjust its objections and responses to the same. Particularly, and without limitation, WVP denies that this case is maintainable as a class action.

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

Paragraph 43 contains legal conclusions to which no response is required. To the extent to which a response is deemed required, WVP denies the allegations and demands strict proof thereof. Particularly, and without limitation, WVP denies that this case is maintainable as a class action and that these are properly and lawfully defined or cognizable markets.

44. The Class consists of individuals and entities that have purchased asphalt paving and other contracting services containing Defendants' asphalt either from Defendants or third parties. No product other than asphalt can be used to provide these services.

Paragraph 44 contains legal conclusions to which no response is required. To the extent to which a response is deemed required, WVP is without sufficient knowledge or information to admit or deny the allegations of paragraph 44 and therefore denies the same and demands strict proof thereof.

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

WVP is without sufficient knowledge or information to admit or deny the allegations of paragraph 45 and therefore denies the same and demands strict proof thereof.

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

WVP admits that paragraph 46 contains some general descriptions of asphalt, but denies that asphalt is the preferred or only material for roads in all circumstances.

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

WVP admits that paragraph 47 contains some general descriptions of concrete and asphalt, but denies that concrete or other materials are never adequate substitutes for asphalt.

48. Paving roads with asphalt requires specialized equipment, permitting, access to asphalt, and know how. The Class cannot perform asphalt paving on their own and therefore contract with private companies to pave roads.

WVP admits that production and application of asphalt requires some degree of specialization in various areas. Paragraph 48 further contains legal conclusions to which no response is required. To the extent to which a response is deemed required, WVP is without sufficient knowledge or information to admit or deny the allegations of paragraph 48 and therefore denies the same and demands strict proof thereof.

49. Contractors who do not specialize in asphalt paving cannot quickly and cost effectively develop the expertise or acquire the inputs and equipment in order to bid for the types of

asphalt paving jobs required by the Class. The Class cannot utilize non-asphalt contractors for paving.

WVP denies the allegations in paragraph 49 and demands strict proof thereof.

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

WVP admits that paragraph 50 lists some general descriptions of asphalt and aggregate.

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

WVP admits that paragraph 51 lists some general descriptions of asphalt and aggregate.

52. Defendants are rapidly attempting to consolidate ownership of aggregate materials, and upon information and belief, Defendants currently control the only grade of aggregate approved by the West Virginia Divisions of Highways (“DOH”).

WVP denies the allegations in paragraph 52 and demands strict proof thereof.

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

- a. Each has experienced substantial economic damage from Defendants' collective and intertwined unlawful conduct; and
- b. This same statewide scheme by Defendants to monopolize product and geographic markets is the cause of economic injury in these markets.
- c. As such, the geographic markets within which to analyze the Defendants may be statewide or narrower such by each county. Sub-markets within these broader markets may also exist, and the precise contours of the geographic market(s) will be determined through discovery and economic analysis of discovery materials.

Paragraph 53 contains legal conclusions to which no response is required. To the extent to which a response is deemed required, WVP denies the allegations in paragraph 53 and its subparts and demands strict proof thereof. Particularly, and without limitation, WVP denies that these are properly and lawfully defined markets. Further, and without limitation, WVP denies that there is but one relevant geographic market.

54. Combined, Defendants are an industry colossus. Whether measured in market share or demonstrated control over prices and the exclusion of competitors, Defendants have market

power in the market for asphalt production. Defendants also are in the process of establishing market power in the production and sale of aggregate materials-95% of the inputs in asphalt production.

WVP denies the allegations in paragraph 54 and demands strict proof thereof.

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

WVP is without sufficient knowledge or information to admit or deny the allegations of paragraph 55 and therefore denies the same and demands strict proof thereof.

56. Defendants use their market power to indirectly harm the Class when their or other paving companies bid using Defendants' asphalt. When Defendants' paving companies and affiliates sell paving, their inflated asphalt prices are passed on to the Class. In the rare instances other companies succeed at auction, they too simply pass on the Defendants' overcharges to the Class.

WVP denies the allegations in paragraph 56 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 57 and demands strict proof thereof.

58. Through their scheme of asphalt plant and asphalt paving contractor combinations and acquisitions, the following entities which used to compete are now under the control of Defendants and have illegally overcharged the Class for asphalt and asphalt paving services.

WVP denies the allegations in paragraph 58 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 59 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 60 and demands strict proof thereof.

61. Those daring to compete with Defendants have been forced to confront Defendants' financial heft. American Asphalt & Aggregate, Inc. ("American Asphalt") was one such maverick competitor. American Asphalt, through its subsidiary Blacktop Industries, began bidding, and winning, against Defendants on asphalt paving projects in West Virginia by simply offering lower prices.

WVP denies the allegations in paragraph 61 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 62 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 63 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 64 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 65 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 66 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 67 and demands strict proof thereof.

68. Outright acquisition is not the only means by which Defendants have throttled competition in this state. They also frequently employ sham "joint ventures" that have no legitimate

economic basis but do allow Defendants to continue operating unrestrained by market forces.

WVP denies the allegations in paragraph 68 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 69 and demands strict proof thereof.

70. Camden Materials opened an asphalt plant in Parkersburg. Although both parties to the Camden Materials “joint venture” have massive balance sheets replete with cash, and thus could have easily opened competitive plants, the companies agreed to collude and end their price war. Since the creation of the “joint venture” the two companies have stopped bidding against one another and prices they charged increased. In Jackson County, for example, although both entities “bid,” WV Paving won almost all of the bids after 2006 and Kelly Paving simply stopped bidding on projects in Mason County.

WVP denies the allegations in paragraph 70 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 71 and demands strict proof thereof.

72. Defendants’ dominance over asphalt production has spilled into the asphalt paving industry and forced those prices unnecessarily high. Defendants sell their asphalt at monopoly prices. As result, when Defendants prevail at an auction for asphalt paving jobs, the Class indirectly pay Defendants’ illegal asphalt overcharge.

WVP denies the allegations in paragraph 72 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 73 and demands strict proof thereof.

74. The Class has been injured and are threatened with continuing injury by Defendants' pattern of acquisitions, combinations, and other anticompetitive conduct referred to above, which has eliminated actual competition between Defendants and the acquired or combined companies, eliminated competition in the asphalt and asphalt related services markets generally, raised prices for asphalt and asphalt related services, substantially increased concentration in the markets for asphalt and asphalt related services, facilitated the possibility of collusion among the remaining competitors, and increased barriers to entry and barriers to effective competition.

WVP denies the allegations in paragraph 74 and demands strict proof thereof.

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

The document cited in paragraph 75 and its accompanying footnote can speak for itself. WVP denies the remainder of the allegations in paragraph 75 and demands strict proof thereof.

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

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

WVP denies the allegations in paragraph 76 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 77 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 78 and demands strict proof thereof.

79. AAA Paving purchased an industrial park in Princeton and informed Southern WV Paving that it planned to move its two plants to that site. Doing so may have introduced meaningful competition to Southern WV Paving. Predictably, in exchange for abandoning these plans, management for Southern WV Paving immediately offered to cut the price of asphalt to AAA Paving or, in the alternative, threatened to cut off supply of aggregate and liquid

asphalt to AAA Paving. When AAA Paving continued with its plans to install asphalt plants in Princeton, Defendants refused to sell any more asphalt to AAA Paving.

WVP denies the allegations in paragraph 79 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 80 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 81 and demands strict proof thereof.

82. Asphalt paving companies that bid against Defendants are confronted with Defendants' control of the asphalt supply. Defendants may refuse to supply asphalt to those independent paving companies, only agree to sell to them at unreasonable prices, and/or provide them

with inferior or unusable product. Those unreasonable prices make it difficult for the paving company to make competitive or qualifying bids against Defendants.

WVP denies the allegations in paragraph 82 and demands strict proof thereof.

83. Defendants also have concealed the actual ownership structures of the entities it owns and controls when its companies submit bids for asphalt paving contracts. The entities receiving the bids are thus induced to believe they are receiving competitive bids when in fact the bidders are related. Defendants even sign affidavits, falsely, that no such relationships exist.

WVP denies the allegations in paragraph 83 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 84 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 85 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 86 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 87 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 88 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 89 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 90 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 91 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 92 and demands strict proof thereof.

93. Defendants not only have market power but have used it to cause the Class enormous damage.

WVP denies the allegations in paragraph 93 and demands strict proof thereof.

94. There are almost two dozen counties in Kentucky where companies aggressively bid against each other for paving contracts. These competitive areas are reasonable

benchmarks against which to measure Defendants' pricing in the West Virginia. This is even more the case given that these competitive areas have higher costs of living than West Virginia, and that operating costs for asphalt plants and pavers—including real estate, taxes, labor, and transportation—there are at least the same if not higher than in this state.

WVP denies the allegations in paragraph 94 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 95 and demands strict proof thereof.

96. The unnecessarily high prices for asphalt and asphalt paving services in West Virginia has secondary, and perhaps more detrimental, impacts. Governmental bodies may be forced to either delay road construction repairs or not pursue them at all, causing immeasurable consequential economic damage and unconscionable public safety risks. West Virginia is in dire straits when it comes to road finance. As our Blue Ribbon Commission on Highways observed last May: "To compensate for stagnant state and federal revenues, the *WVDOH* has increased the overall paving cycle to nearly 30 years when a 12-year paving cycle is

desired. This means that on average a road paved today will not be repaved for 30 years. However, because WVDOH, rightly, considers those roads with the most use to be the highest priority, *many lower volume local service roads may never get repaved and might have to become unpaved gravel roads.*” West Virginia Blue Ribbon Commission on Highways, *Investing in West Virginia’s Future, Phase I* (emphasis added).

The allegations in paragraph 96 consist of conclusory statements with a limited quotation from a report. To the extent any response is required, WVP denies the allegation that WVP has engaged in any unlawful conduct and denies that its conduct caused or contributed to any detrimental impact to governmental bodies or other persons, and WVP refers to the quoted report for a full and complete statement of its terms.

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

WVP denies the allegations in paragraph 97 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 98 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 99 and demands strict proof thereof.

100. Defendants have entered joint ventures and change in control transactions that conceal their true ownership of the asphalt, asphalt paving, and aggregate companies. These "joint ventures" include Bizzack Construction; American Asphalt of West Virginia; asphalt plants owned by Blacktop; Appalachian Paving and Aggregate; and Boxley Materials.

WVP denies the allegations in paragraph 100 and demands strict proof thereof.

101. For example, once the curtain is lifted, every payment made by Charleston for asphalt paving services, from 2006 to the present, was made to companies owned or controlled by Defendants, though operating under different names: (i) American Asphalt

and Aggregate, Inc.; (ii) American Asphalt of West Virginia, LLC; (iii) Blacktop Industries and Equipment, Inc.; and (iv) West Virginia Paving, Inc.

WVP denies the allegations in paragraph 101 and its subparts and demands strict proof thereof.

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

WVP denies the allegations in paragraph 102 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 103 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 104 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 105 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 106 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 107 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 108 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 109 and demands strict proof thereof.

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

Given the conclusory nature of the allegations in paragraph 110, WVP is not in a position to admit or deny at this time.

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

WVP denies the allegations in paragraph 111 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 112 and demands strict proof thereof.

113. Defendants own and control companies that both produce asphalt and provide the paving services. Defendants will not sell asphalt to potential competitors in the asphalt paving market at a price that will allow that potential competitor to compete on bids for

paving services. Potential competitors recognize that reality and therefore cannot enter the asphalt paving services market.

WVP denies the allegations in paragraph 113 and demands strict proof thereof.

114. Because private paving companies cannot obtain asphalt at a competitive cost in the relevant market, no private paving companies can sufficiently enter the market. Due to cost and budgetary concerns, government entities are likewise unable to enter the market for paving services. If a government entity planned to lay the asphalt themselves, they would need to acquire special equipment including at least one paver, a specialized tractor-trailer to haul the paver, dump trucks to haul the asphalt to the job site, at least two rollers, trucks and trailers to haul the rollers, and transportation for the paving crew and foreman. Given the sporadic and limited use for that equipment, such a large capital outlay is unlikely to be justified.

WVP denies the allegations in paragraph 114 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 115 and demands strict proof thereof.

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

Paragraph 116 merely incorporates by reference and thereby re-alleges the preceding paragraphs as if fully set forth therein. Likewise, WVP similarly incorporates by reference and thereby re-asserts its preceding responses to the respective allegations as if fully set forth herein.

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

WVP denies the allegations in paragraph 117 and demands strict proof thereof.

118. It was a part of the combination, conspiracy and/or understanding, and the object and purposes thereof to accomplish the following:
- a. To arbitrarily, unlawfully, unreasonably and knowingly control and affect the price of asphalt and asphalt related products and services within West Virginia;
 - b. To arbitrarily, unlawfully, unreasonably and knowingly prevent, suppress and eliminate competition from competitors and prospective competitors of Defendants other than those in combination, conspiracy and/or agreement with Defendants;

- c. To arbitrarily, unlawfully, unreasonably and knowingly prevent, suppress and eliminate competition from any source, other than those in combination, conspiracy and/or agreement with Defendants, in the sale of asphalt within West Virginia; and
- d. To establish and maintain unreasonably high, excessive, monopolistic and non-competitive prices for asphalt within West Virginia.

WVP denies the allegations in paragraph 118 and its subparts and demands strict proof thereof.

119. As part of the unlawful combination and conspiracy, in pursuance thereof and in furtherance thereof and to effectuate its object and purpose, Defendants did:
- a. Acquire or combine with competitors in the asphalt industry;
 - b. Acquire or combine with competitors in the asphalt paving industry;
 - c. Acquire asphalt plants;
 - d. Enter into joint ventures with competitors in the asphalt industry;
 - e. Enter into joint ventures with competitors in the asphalt paving industry;
 - f. Threaten potential competitors and entrants into the market for asphalt and asphalt paving services; and
 - g. Obscure the true nature of the entity or entities bidding on asphalt paving jobs.

WVP denies the allegations in paragraph 119 and its subparts and demands strict proof thereof.

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

overpriced asphalt.

WVP denies the allegations in paragraph 120 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 121 and demands strict proof thereof.

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

Paragraph 122 merely incorporates by reference and thereby re-alleges the preceding paragraphs as if fully set forth therein. Likewise, WVP similarly incorporates by reference and thereby re-asserts its preceding responses to the respective allegations as if fully set forth herein.

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

WVP denies the allegations in paragraph 123 and demands strict proof thereof.

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

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

WVP denies the allegations in paragraph 124 and its subparts and demands strict proof thereof.

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

- a. Acquire or combine with competitors in the asphalt industry within West Virginia;
- b. Acquire asphalt plants within West Virginia;
- c. Acquire or combine with competitors in the asphalt paving industry within West Virginia;
- d. Enter into joint ventures with competitors in the asphalt industry in West Virginia;
- e. Enter into joint ventures with competitors in the asphalt paving industry in West Virginia;
- f. Threaten potential competitors and entrants into the market for asphalt and asphalt related products and services; and

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

WVP denies the allegations in paragraph 125 and its subparts and demands strict proof thereof.

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

WVP denies the allegations in paragraph 126 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 127 and demands strict proof thereof.

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

Paragraph 128 merely incorporates by reference and thereby re-alleges the preceding paragraphs as if fully set forth therein. Likewise, WVP similarly incorporates by reference and thereby re-asserts its preceding responses to the respective allegations as if fully set forth herein.

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

WVP denies the allegations in paragraph 129 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 130 and demands strict proof thereof.

131. Plaintiff and the Class conferred a benefit upon Defendants by paying supracompetitive prices for asphalt and asphalt related products and services.

WVP denies the allegations in paragraph 131 and demands strict proof thereof.

132. Defendants' conduct conferred a benefit upon themselves at the expense of the Class.

WVP denies the allegations in paragraph 132 and demands strict proof thereof.

133. Defendants were aware of the benefits conferred by Plaintiff and the Class, and those conferred by Defendants upon themselves. Those benefits came at the expense of Plaintiff and the Class. Defendants have retained the benefit without compensating

Plaintiff or the Class.

WVP denies the allegations in paragraph 133 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 134 and demands strict proof thereof.

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

Paragraph 135 merely incorporates by reference and thereby re-alleges the preceding paragraphs as if fully set forth therein. Likewise, WVP similarly incorporates by reference and thereby re-asserts its preceding responses to the respective allegations as if fully set forth herein.

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

WVP denies the allegations in paragraph 136 and demands strict proof thereof.

137. The purpose of the conspiracy was itself unlawful or was accomplished through

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

WVP denies the allegations in paragraph 137 and demands strict proof thereof.

138. Defendants combined together in this common purpose to acquire, maintain and enhance market power for the sale and production of asphalt and thereby control asphalt prices and exclude potential competitors. Defendants also combined together to control the supply of asphalt paving contractors to limit the potential for market entry and competition from rival paving companies. Defendants are also in the process of combining to acquire and control the sources of aggregate material which constitute 95% of the material needed to produce asphalt.

WVP denies the allegations in paragraph 138 and demands strict proof thereof.

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

WVP denies the allegations in paragraph 139 and demands strict proof thereof.

140. The acts of Defendants were done maliciously, willfully, wantonly, and with indifference to the civil obligations affecting the Plaintiff's rights and the rights of the Class.

WVP denies the allegations in paragraph 140 and demands strict proof thereof.

141. Plaintiff and the Class were victims of the common scheme and conspiracy referenced above. Plaintiff and the Class were injured, and continue to be injured because they paid and pay illegal overcharges for asphalt paving and other asphalt contracting services from Defendants' owned or affiliated entities, or purchased, from third parties, paving and other services or products utilizing or containing Defendants' asphalt.

WVP denies the allegations in paragraph 141 and demands strict proof thereof.

WVP denies all allegations not specifically admitted herein.

WVP denies that the named Plaintiff or any putative class member is entitled to any of the relief requested.

AFFIRMATIVE DEFENSES

1. The Complaint fails to state a claim upon which relief can be granted.
2. This case is not maintainable as a class action.
3. The putative class is not properly or lawfully defined.

4. The alleged product and geographic markets are not properly or lawfully defined or cognizable.
5. The Plaintiff and the putative class lack both standing and antitrust standing.
6. The claims are barred, in whole or in part, by the applicable statutes of limitations.
7. The claims are barred, in whole or in part, by the doctrine of laches.
8. The claims are barred, in whole or in part, by the doctrine of waiver.
9. The claims are barred, in whole or in part, by the doctrine of unclean hands.
10. The claims are barred, in whole or in part, by the doctrine of estoppel.
11. The claims are bared, in whole or in part, by the Plaintiff's and/or the putative class members' failure to exercise reasonable care and diligence to mitigate their damages.
12. WVP did not actually or proximately cause any of the injuries, harms, or damages claimed—the existence of which WVP denies in the first instance.
13. None of the alleged injuries, harms, or damages—which WVP denies in the first instance—constitute cognizable antitrust injuries.
14. None of the alleged injuries, harms, or damages—which WVP denies in the first instance—were caused by WVP, but by other persons and/or entities such that those other persons' and/or entities' liability would offset any liability apportioned to WVP.
15. The equitable claims are barred, in whole or in part, because the Plaintiff and/or the putative class members have an adequate remedy at law—if any.
16. Any of the alleged damages—which WVP denies in the first instance—are too speculative and remote to be legally awardable and apportioned.
17. The claims are barred, in whole or in part, because the Plaintiff has not pleaded nor can it prove with particularity any alleged fraudulent concealment.
18. The claims are barred, in whole or in part, by any applicable arbitration or other limiting clauses in any of the contracts at issue.

19. Any alleged monopoly power that WVP may have—which it denies in the first instance—was lawfully obtained and/or thrust upon it.
20. The claims are barred, in whole or in part, because the Complaint has not sufficiently pleaded nor can the Plaintiff prove that WVP possessed or had a dangerous probability of possessing monopoly power in any relevant product or geographic market.
21. The claims are barred, in whole or in part, because WVP's alleged conduct did not lessen competition within any properly defined product or geographic market.
22. The claims are barred, in whole or in part, by the doctrine of laches and, specifically without limitation, the Plaintiff's undue delay in giving notice to WVP of the matters alleged in the Complaint and in commencing this litigation.
23. All of WVP's conduct at all times was reasonable and pro-competitive in light of the product markets, geographic markets, other competitors, and all other economic factors such that all conduct is lawful under the "rule of reason" test.
24. All of the joint ventures of which the Plaintiff and the putative class members complain were, at all times, reasonable in light of the circumstances and economic realities such that all conduct is lawful under the "rule of reason" test.
25. Third-party paving companies failed to pass on to their customers and to Plaintiff or the putative class members any increase in the price of asphalt by Defendants allegedly caused by the alleged structure of the market.
26. Any increase in the price of asphalt to Plaintiff or the putative class members was caused by the requirements and regulations and practices of the West Virginia Department of Transportation and Division of Highways.
27. Entry has been foreclosed by the regulations applied by and practices of the West Virginia Department of Transportation and Division of Highways.
28. Plaintiff's claims are barred in whole or in part by the National Cooperative Research and

Production Act.

29. Plaintiff's claims are barred, in whole or in part, by the *Noerr-Pennington* Doctrine.
30. All parties acted independently and not in concert.
31. Plaintiff's claims are barred, in whole or in part, by any amount owed to WVP as an offset.
32. Plaintiff has a duty to take reasonable action or minimize any damage, injury, or loss allegedly sustained as a result of the conduct alleged in the Complaint, and Plaintiff is barred, in whole or in part, from recovery for any damages that may have been reasonably avoided.
33. The claim for punitive damages is barred because treble damages are already available by statute.
34. The claim for punitive damages is barred, in whole or in part, by the applicable constitutional and statutory standards set forth in, inter alia, the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Article III of the West Virginia Constitution; and West Virginia Code § 55-7-29.
35. WVP acted in good faith and in compliance with all applicable laws, rules, regulations, and standards at all times.
36. WVP raises, so as to not waive, any applicable affirmative defense listed or contemplated by Rule 8 of the West Virginia Rules of Civil Procedure or provided under West Virginia's antitrust statutes.
37. WVP adopts and incorporates as if fully set forth herein any applicable affirmative defense asserted by any other party.
38. WVP reserves the right to assert additional affirmative defenses in light of future discovery and ongoing investigation.

Respectfully submitted,

WEST VIRGINIA PAVING, INC.

By Counsel

A handwritten signature in cursive script, appearing to read "R. Booth Goodwin II".

R. Booth Goodwin II (W. Va. Bar No. 7165)
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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

**CITY OF CHARLESTON,
and all others similarly situated,**

Plaintiff,

v.

**Civil Action No.: 16-C-1552
Hon. Tod J. Kaufman**

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

Defendants.

CERTIFICATE OF SERVICE

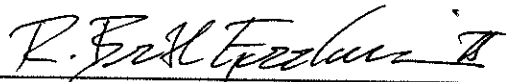
I hereby certify that I have served a true and correct copy of the foregoing **ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANT WEST VIRGINIA PAVING, INC.** on this 14th day of December, 2016, via the delivery methods noted below:

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