



WEST VIRGINIA DEPARTMENT OF TRANSPORTATION

Division of Highways

Legal Division

**1900 Kanawha Boulevard East • Building Five • Room A-517
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**Jim Justice
Governor**

**Thomas J. Smith, P. E.
Secretary of Transportation/
Commissioner of Highways**

February 7, 2017

The Honorable Marty Gearheart
Co-Chairman
The Joint Legislative Oversight Commission on
Department of Transportation Accountability
West Virginia House of Delegates
Building 1, Room 200 E-A
Charleston, West Virginia 25305

RE: January 27, 2017, Letter To Thomas J. Smith, P.E., Secretary

Dear Delegate Gearheart:

Thank you for your letter to Commissioner Smith and for sharing the Joint Commission's concerns about the asphalt antitrust suits that have been filed by or at the direction of the West Virginia Department of Transportation, Division of Highways ("DOH"), against various asphalt companies. Secretary Smith asked me to respond to your letter.

As I indicated previously, DOH and I fully respect the Commission's oversight authority and we strive to be candid and transparent with your Commission to the extent permissible. As you may recall, at the Commission's December hearing, I shared substantial and meaningful information that reflects my general nature to be candid and upfront. Further, since I became Director of the Legal Division in 2015, I have launched a number of internal initiatives to enhance internal controls and redress waste, abuse, and misconduct.

As discussed below, I can assure you that there was no attempt to evade or circumvent the Commission's important oversight function or dodge the Commission's inquiries.

First, as I explained at the January 10, 2017, Commission hearing, I was constrained in what answers I could or would provide because there was a pending motion to dismiss the antitrust suit that had been filed, but not noticed for hearing, by the asphalt companies. At that point, the Kanawha County Circuit Court had entertained no argument on the issue, the matter had not been briefed in Court, and it was not in the best interests of the DOH, as stewards for

West Virginia's taxpayers, to substantively argue or address the issue before your Commission.¹ Now that the suit has been dismissed, I can provide substantive responses to your inquiries.

Second, prior to the January 10, 2017, Commission hearing, I specifically advised the Commission's counsel during two telephone conferences that he should contact Mr. Edward Wenger, the General Counsel for the West Virginia Attorney General, about the scope of the Commission's inquiry because the Attorney General was working with DOH on the antitrust suit. On January 5, 2017, at 1:14 p.m., Mr. Wenger informed me that he was "[w]aiting to hear about potentially talking to Gearheart." For unknown reasons, neither Mr. Wenger nor any Attorney General official was invited to testify at the hearing or, if invited to attend, their attendance was not compelled.

Third, on January 9, 2017, at 5:14 p.m., and prior to the January Commission hearing, Mr. Wenger specifically directed me as follows:

Tomorrow, AG would like for you to say at the hearing that there will be a filing this week and that you would defer questions to the AG's office for answering after the filing.

Given that Mr. Morrissey is the chief legal officer for the State of West Virginia and was DOH's attorney, I complied with the Attorney General's directive when I appeared at the hearing while attempting to balance my duty to DOH and my obligation to be transparent before your Commission.

Further, after my testimony was completed before the Commission at the January hearing but before I left the hearing room, I was quietly approached by a female attorney who advised that she was from the Attorney General's Office. To my shock, she asked me: "Do we represent DOH?" At that time, I had been working with the Attorney General's Office on many late evenings, weekends, and holidays in order to file an asphalt antitrust suit.

Fourth, on January 4, 2017, at 6:34 p.m., Mr. Wenger specifically inquired:

Mike, as a follow up to our earlier discussion, is there any way that we can push back the response to the committee's letter? And is my intuition correct that the letter will be publicly available?

¹ As an aside, years ago when I was in private practice, I was the lead attorney in intervening in *E.H. v. Matin*, 81-MISC-585 (Kanawha County Circuit Court), on behalf of three comprehensive behavioral health centers. One day before an evidentiary hearing in the suit that I had noticed, a senior DHHR official appeared before a committee of the West Virginia Legislature and testified about the litigation. The official conceded the seminal issue that we asserted in our intervention. In response, legislators openly rebuked the DHHR official for his committee testimony and his unwise decision to discuss the pending litigation, especially the seminal issue that was scheduled to be argued in Court the following day. At the evidentiary hearing, I used the official's legislative testimony to impeach him and his testimony was instrumental in promoting a meaningful resolution of the suit.

In response to Mr. Wenger's request, and in deference to the Attorney General's authority as West Virginia's chief legal officer and DOH's attorney, I contacted you and the Commission's counsel and respectfully requested that any Commission hearing be deferred until after January 11, 2017. At Mr. Wenger's request, I even offered to attempt to arrange a private meeting with you, Commission members, Mr. Wenger, and me so that the Attorney General's Office could address the matter. I complied with the Attorney General's request while attempting to balance my duty to DOH and my obligations to the Commission.

The letter that I eventually filed with the Commission on January 5, 2017, was specifically requested and approved by Mr. Wenger on January 5, 2017, at 1:14 p.m. Again, I followed the Attorney General's specific directive to me so the Commission's concerns about any lack of transparency, being rebuffed, or recalcitrance should be directed to the Attorney General's Office because the Attorney General's Office provided specific instructions and directives to me in his capacity as DOH's attorney.

Fifth, in reference to the Commission's December 2016 hearing, Mr. Wenger specifically directed me on December 5, 2016, at 2:42 p.m. to say at your hearing that "[i]f any questions come up during the [Commission] hearing that he [Mr. Morrissey] would like you to say something akin to 'Highways is in cooperative discussions with the Attorney General's office' and to give no further comment on the matter [antitrust suit]."

Once again, I complied with the Attorney General's directive as DOH's counsel while attempting to balance my duty to DOH and your Commission so your Commission's concerns about my inability to address the antitrust suit at your December 2016 hearing should be directed to the Attorney General's Office.

Sixth, a December 5, 2016, email to Mr. Morrissey's General Counsel that is attached hereto as Exhibit No. 1, memorializes the agreed terms of the Attorney General's representation of DOH. Recent events establish that DOH's engagement has been materially breached:

- Even though DOH provided significant data to the Attorney General's office on December 5, 2016, at approximately 2:24 p.m., that reveals (among other things) monopolistic conduct and collusion among various asphalt companies and the Attorney General agreed to file an antitrust suit within two weeks, the suit was not filed as initially agreed.² Suit was required to be filed "in approximately one or two weeks" or no later than December 19, 2016. Suit was not filed until January 11, 2017, although I did give the Attorney General an extension of time in which to file the suit in light of the complexity of the case;

² At the Commission's December 2016 hearing at which I agreed to share information about the manner in which DOH initiated the antitrust suit and engaged Bailey & Glasser, I did so in reliance on DOH's engagement that the Attorney General would file an antitrust suit within two weeks and with the expectation that the suit that Bailey & Glasser had filed would be dismissed simultaneously.

- The agreed count for breach of contract was excluded from the complaint. As the Commission may know, the antitrust statute has a statute of limitations of four years whereas breach of contract has a statute of limitations of 10 years. In my opinion, the exclusion of the agreed count for breach of contract has unwisely and imprudently diminished the potential recovery for DOH as stewards for West Virginia's taxpayers;
- Despite agreeing to work cooperatively with DOH to announce the filing of the antitrust suit, I was informed about Mr. Morrissey's January 11, 2017, press conference about 15 minutes before its start. At that time, I learned for the first time that DOH's counsel would publicly disparage his client and not work cooperatively with his client to announce the filing of the suit;
- The engagement required the Attorney General to list DOH as co-counsel on the antitrust complaint. I was informed after the January 10, 2017, Commission hearing that I would be excluded as co-counsel even though I had been working on the matter for over one year and I was the link to knowledgeable DOH personnel and DOH's antitrust expert; and
- An RFP to retain outside counsel to prosecute the antitrust suit was not timely issued. Further, in October 2016, one senior attorney in the Attorney General's Office specifically told me that the Attorney General's Office lacked "the capacity and expertise" to prosecute the antitrust suit and this conclusion was later affirmed by others in the Attorney General's Office. In fact, after Bailey & Glasser filed the suit but before the Commission's December 2016 hearing, the senior attorney specifically told me to continue working on the antitrust suit that Bailey & Glasser had filed because "we aren't doing a thing until after the election."

Seventh, in reference to the Attorney General's public statement on January 11, 2017, that DOH's filing was "flatly prohibited by law," I would invite you to consider these facts:

- As discussed below, Bailey & Glasser advised me that the firm had previously provided a draft antitrust asphalt complaint to Mr. Morrissey and members of his Office and had encouraged the Attorney General to file an antitrust suit on approximately three separate occasions over a nearly 1.5 year period. Bailey & Glasser told me that the Attorney General's Office repeatedly rebuffed the firm's invitation to file this historic and necessary suit and
- Even though the Attorney General claims that DOH's antitrust pleading is "flatly prohibited by law," the Attorney General rejected the opportunity to file such a necessary suit on three separate occasions; one of his senior attorneys advised me (and others subsequently affirmed) that the Attorney General's Office lacks "the capacity and expertise" to prosecute the antitrust suit; the senior attorney in the Attorney General's Office specifically told me to continue working on the antitrust suit after Bailey &

Glasser had filed DOH's antitrust complaint; and the Attorney General's failure to file such a necessary action when first presented with convincing evidence by Bailey & Glasser has compromised the antitrust claim by unnecessarily allowing the statute of limitations to expire on certain aspects of the claim.

Finally, the Commission's concern that DOH may have "jeopardized a significant legal action of the state" is untenable as reflected by the following:

- According to Bailey & Glasser, and as further confirmed in Bailey & Glasser's response to the RFP issued by the Attorney General, the West Virginia Attorney General's Office rejected the opportunity and ignored the need to file such an antitrust suit on approximately three separate occasions over a nearly 1.5 year period.³ As such, DOH commenced or caused to be commenced the very legal action that the Attorney General refused to file and
- Through its engagement of Bailey & Glasser and the filing of its antitrust suit, DOH gave life to "a significant legal action of the state" that the Attorney General refused to file. As such, only through DOH's actions was this significant legal action given an opportunity to recover monies from asphalt companies and reform West Virginia's asphalt market.

In reference to the Commission's specific inquiries, I direct your attention to the following:

1. When was the law firm Bailey & Glasser retained by the Department of Transportation and Division of Highways to represent them in the above-captioned West Virginia Paving lawsuit?

Bailey & Glasser agreed to represent DOH and file the antitrust complaint on October 13, 2016. I initiated discussions with Bailey & Glasser in consultation with my client as identified in response to Question No. 2. The Commissioner of DOH executed an engagement letter on October 14, 2016. Bailey & Glasser filed the suit on October 14, 2016.

2. Please identify the individual(s) who formally approved the retention of Bailey & Glasser in the above-captioned West Virginia Paving lawsuit to represent the Department of Transportation and the Division of Highways.

On October 13, 2016, the date that I first communicated with Bailey & Glasser, I was Director of DOH's Legal Division. As Director, I reported directly to the DOH Assistant

³ Given the responses to the Attorney General's RFP, I recommended that the Attorney General's Office immediately engage Bailey & Glasser because Bailey & Glasser's bid is the most cost-effective for the State and Bailey & Glasser is the most qualified bidder to handle this complex litigation. To date, the Attorney General has not engaged counsel even though answers to the complaint are due on or about February 17, 2017.

Commissioner, the DOH Commissioner, and the Governor's General Counsel. All such people were consulted, approved the retention of Bailey & Glasser, and authorized the filing of the antitrust suit. Then DOH Commissioner Mattox executed the engagement letter between DOH and Bailey & Glasser on October 14, 2016.

3. Was a written agreement entered into with Bailey & Glasser? If so, please provide a copy of the agreement and fee arrangement.

Yes. Please see the attached agreement attached hereto as Exhibit 2. Bailey & Glasser orally offered to reduce their agreed fee after I commenced discussions with the West Virginia Attorney General's Office about the Attorney General representing DOH that resulted in the filing of the recent antitrust complaint. Further, you will notice that one of the specific terms in DOH's engagement of the Attorney General that I requested was for the Attorney General to "use its best efforts to negotiate a contingent fee agreement with outside counsel that is less than the permitted statutory amount in order to enhance DOH's net recovery."

4. Please state with specificity the process utilized by the Department of Transportation and Division of Highways to select Bailey & Glasser as legal counsel in the above-captioned West Virginia Paving lawsuit. In answering this question, please include all steps of the process, including the following:

- a. **Who contacted whom first (e.g. did employees/officials with the Department of Transportation/Division of Highways contact Bailey & Glasser first about this retention matter or did Bailey & Glasser contact DOT/DOH first about this matter);**
- b. **The date of such initial interaction/contact, the parties involved, and manner of contact;**
- c. **Whether other private counsel was contacted by the Department of Transportation/Division of Highways to represent it in the WV Paving matter;**
- d. **Summary and Timeline of subsequent meetings/communications after the initial interaction until the date of ultimate retention of Bailey & Glasser as legal counsel;**
- e. **Whether a bid process or proposal for legal services was used; and**
- f. **How the fee arrangement for legal services was determined.**

Please see my response to Questions 1, 2, 3, 5, and 6.

5. Does the Department of Transportation and Division of Highways maintain it has the ability to retain private counsel without Attorney General approval? If so, please provide a copy of the legal authority (statutory or otherwise) that the Department and Division maintain grants them the ability to retain private counsel.

Yes, depending upon the nature of the anticipated legal work. However, DOH expressly recognizes and respects the role of the Attorney General as West Virginia's chief legal officer and DOH further acknowledges that it does not – and should not – have unbridled authority to hire outside counsel. Aside from the asphalt antitrust suit, the Attorney General's Office is currently handling litigation for DOH and DOH has previously utilized the Attorney General's Office for some legal services.

As for the legal authority for DOH to retain outside legal counsel generally, please see W.Va. Code §§ 17-2A-7 and 17-2A-8. As discussed below, the Commissioner's express statutory powers contained in W.Va. Code § 17-2A-8 inform the scope of the Commissioner's permissible authority to engage counsel pursuant to W.Va. Code § 17-2A-7.

In reference to DOH's express authority to engage Bailey & Glasser to file the asphalt antitrust suit, Bailey & Glasser affirmatively opined to me prior to DOH engaging their firm that based on their research DOH had the express statutory authority to engage the firm to file the antitrust suit. Further, by email dated October 13, 2016, Mr. Bailey forwarded a draft complaint and advised as follows:

This is drafted as being brought by DOH on behalf of itself and as *parens patriae* for the citizens of West Virginia, **which we think is consistent with your [DOH's] statutory authority** (emphasis added).

Thereafter, Bailey & Glasser provided a written opinion in the form of a draft letter about DOH's authority to engage Bailey & Glasser that the firm requested that I send to the Attorney General. After consulting with my client, I did not submit the requested letter and instead sent the attached letter. See Exhibit No. 3.

Having practiced law in West Virginia for over 23 years, I recognize that reasonable attorneys can have reasonable differences about the interpretation and application of statutory provisions. Such differences should not promote recriminations and ethical challenges to which I was subjected at the Commission's January hearing but should foster calm and professional dialogue to better understand the nature of the differences and provide a means for constructive resolution to protect West Virginia's taxpayers. In that regard, while DOH expressly recognizes that the West Virginia Attorney General should be the primary prosecutor of antitrust suits on DOH's behalf, DOH acted prudently and professionally under the circumstances to initiate or cause to be initiated such an historic antitrust suit to attempt to reform West Virginia's asphalt market.

Further, a reasonable interpretation of West Virginia law establishes that DOH had the statutory authority to engage Bailey & Glasser to file the asphalt antitrust suit. W. Va. Code § 17-2A-8(23) expressly provides that “the commissioner may . . . [i]nvoke any appropriate legal or equitable remedies to enforce his or her orders, to compel compliance with requirements of law and to protect and preserve the state road and highway system or any part of the system.” Given that the Commissioner may invoke “any appropriate legal or equitable remedies . . . to compel compliance with requirements of law” and given that the Antitrust Act constitutes a “requirement of law” and permits the recovery of legal relief and the enforcement of equitable remedies, a reasonable interpretation of existing law establishes that the Commissioner had the authority to engage Bailey & Glasser to file the asphalt antitrust suit against West Virginia Paving, Inc., et al, especially under the circumstances.

Moreover, as I explained at the Commission’s January hearing, the Commissioner’s powers must be read *in para materia* with the Commissioner’s authority to employ legal services to carry them out and fulfill the Commissioner’s express statutory duties. W. Va. Code § 17-2A-7 provides that the Commissioner “[s]hall select and employ a competent legal staff adequate for the ordinary legal services required by him.” Id. § 17-2A-7(1). It also states that the Commissioner “[m]ay call upon the attorney general and the prosecuting attorneys of the several counties, within their respective jurisdictions, for legal assistance and services as provided by law.” Id. § 17-2A-7(2). Finally, subsection (3) states that the Commissioner “[m]ay employ such additional legal counsel as he deems necessary upon a reasonable fee basis to perform legal services in acquiring, by right of eminent domain or otherwise, property, or an estate, right or interest therein.” Id. § 17-2A-7(3).

Under § 17-2A-7, the Commissioner has the mandatory duty, by use of the word “shall,” to “select and employ . . . competent” legal counsel to handle “ordinary legal services” that he requires. Given that the Commissioner has the express statutory authority to “[i]nvoke any appropriate legal or equitable remedies . . . to compel compliance with requirements of law”, the bringing of a legal action that seeks damages and/or equitable relief constitutes “ordinary legal services” because the Commissioner’s ordinary statutory powers give the Commissioner such ordinary authority. Further, because the Commissioner may employ additional legal counsel to acquire “property” by eminent domain or “otherwise” and monetary damages constitute property, the construction of the statute lends itself to the conclusion that the Commissioner could engage counsel to recover monetary damages, e.g., property, in an asphalt antitrust suit. Indeed, property can be either real property, e.g., real estate, or personal property, e.g., money. The statutory provision at issue makes no distinction between real or personal property.

It is important to note that § 17-2A-7(2) specifically states that the Commissioner “[m]ay call upon the attorney general.” As we know, the verb “may” is discretionary. Further, the use of the verb “may” must be read together with the opening clause of § 17-2A-7 that expressly states: “Notwithstanding any law to the contrary....” Given the clear language of this provision, a reasonable construction of the statute is that the Commissioner’s powers in § 17-2A-7 are not limited or affected by any other law, including the competitive bidding procedures. This reading is confirmed by subsection (o) of the new law that addresses competitive bidding for private

attorneys. It reads: “Nothing in this section . . . shall [] be deemed to change any existing law that authorizes a state agency or state agent to employ its own counsel or enter into contracts for legal services.” W. V. Code § 5-3-3a(o).

Finally, DOH does not assert that it has unrestrained authority to engage outside counsel and DOH does not seek such unchecked power. However, under the peculiar circumstances of this matter, DOH identified a troubling trend, initiated a detailed internal analysis, and launched a necessary antitrust suit to protect West Virginia’s taxpayers and curb known and recognized abuses in West Virginia’s asphalt market. Going forward, DOH welcomes your assistance and the assistance of your Commission as we seek to eliminate similar abuses and to promote competition that will inevitably reduce costs and enhance quality.

6. Did the Department of Transportation and Division of Highways first seek counsel/representation from the Attorney General’s office prior to retaining Bailey & Glasser? If so, please provide copies of any and all documents, communications, correspondence, etc. between the Attorney General’s office and the Department of Transportation and Division of Highways relating to the same.

In consultation with the United States Department of Justice Antitrust Division (“DOJ”), the Attorney General’s Office was invited to assist the DOH in a preexisting antitrust matter that directly impacts the asphalt antitrust litigation and provides a foundation for understanding DOH’s decision to engage Bailey & Glasser.

Oldcastle Materials, Inc. (“Oldcastle”), owns West Virginia Paving, Inc. (“WVP”). Oldcastle has been attempting to acquire the Pounding Mill Quarry Corporation that, if successful, will further strangle competition in West Virginia’s asphalt market, increase prices for asphalt and aggregate, and result in inferior asphalt in West Virginia’s southern market.

Despite the obvious anti-competitive impact of the proposed acquisition, and without consulting DOH’s Legal Division, by email dated April 29, 2015, a senior official from Oldcastle and WVP contacted Commissioner Mattox and tendered two proposed letters to Mr. Mattox that WVP, on behalf of Oldcastle, wanted Commissioner Mattox to execute. See Exhibit No. 4. While the letters are self-explanatory, the letters affirm that Oldcastle and WVP wanted Mr. Mattox to provide an opinion to DOJ that contradicts established facts and the known anti-competitive impact of the proposed acquisition. Wisely, Mr. Mattox consulted me before endorsing the letters and Mr. Mattox never endorsed the letters.

On July 7, 2015, DOH officials and I met with officials from DOJ to discuss Oldcastle’s attempt to acquire the Pounding Mill Quarry Corporation and its anti-competitive impact on West Virginia’s aggregate and asphalt markets. A representative from the West Virginia Attorney General’s Office was invited and attended. At the meeting, the evidentiary basis and potential legal strategy for the pending antitrust matter was discussed with the expectation that the meeting would remain confidential.

On July 13, 2015, I received a call from the chief financial officer of West Virginia Paving, Inc., with whom I had served in my work in pastoral ministry, inquiring about DOH's confidential meeting with DOJ. As a result of the apparent disclosure of confidential information at our meeting with DOJ, I had a cooperative discussion with DOJ officials and it was mutually agreed to exclude the West Virginia Attorney General's Office from any future participation in the matter.

Further, when I discussed with Bailey & Glasser the possibility of engaging their firm to represent DOH in the antitrust suit on October 13, 2016, I was informed by Mr. Ben Bailey that Mr. Morrissey, and people working on his behalf, had rebuffed Bailey & Glasser's request to file an antitrust suit against various asphalt companies. Mr. Bailey and another Bailey & Glasser attorney further advised that a few days before the antitrust suits were filed on behalf of various West Virginia municipalities that Mr. Morrissey was contacted again (a third time) and he was invited to file an antitrust suit and engage Bailey & Glasser. Mr. Bailey advised that Mr. Morrissey again refused to file such a suit or engage his firm.

Given that West Virginia Paving's CFO learned about issues discussed between DOH and DOJ regarding a significant confidential antitrust matter, my ongoing cooperative work with DOJ, and the information provided to me by Mr. Ben Bailey about the Attorney General's initial refusal to file an antitrust suit against the asphalt paving companies, I consulted the persons to whom I report and it was collectively agreed to retain Bailey & Glasser and immediately have the firm file an antitrust suit on behalf of DOH.

In reference to the inquiry about whether other private counsel were contacted about the possibility of representing DOH in an asphalt antitrust suit, the answer is in the affirmative. Shortly after I was appointed Director of the Legal Division on January 1, 2015, and I started to identify various disconcerting issues, I made a concerted effort to work cooperatively with the DOJ and I was instrumental in getting a DOJ official invited to an inter-agency meeting among DOH's sister agencies in neighboring states about which I had testified at the Commission's December 2016, meeting. During my time as Director, and informed by my more than two decades in private legal practice, I have reviewed various West Virginia law firms, law firms from other states, antitrust experts, antitrust filings in other jurisdictions, conferred with an antitrust attorney in the Ohio Attorney General's Office who has successfully litigated highway antitrust suits, conferred with sophisticated data analysts, etc., to identify potential law firms that could possibly represent DOH. Other than Bailey & Glasser, DOH did not formally engage any such law firms to assist in the antitrust matter.

My vetting of various law firms, coupled with the peculiar nature of asphalt antitrust litigation and upon learning of Bailey & Glasser's ongoing investigation of West Virginia's asphalt market, revealed that Bailey & Glasser was and remains peculiarly qualified to represent DOH in the pending asphalt antitrust suit. Further, in light of W.Va. Code § 5-3-3a, I was unwilling to recommend to my client that any fee agreement exceed 25 percent.

7. Please describe and provide documentation reflecting your compliance, if any, with W.Va. Code § 5-3-3a in the retention of Bailey & Glasser in the above-captioned matter.

Please see my response to Questions No. 5 and 6. Also, please see the engagement letter between DOH and Bailey & Glasser attached hereto as Exhibit No. 2. Further, prior to DOH formally engaging the Attorney General but after Bailey & Glasser filed the antitrust suit on DOH's behalf, Bailey & Glasser offered to reduce its fee to represent DOH. Further, you will also note that I insisted that DOH's engagement must require the Attorney General to use his best efforts to negotiate a contract with any outside counsel that may be retained through an RFP for a contingent fee less than the statutory amount. See Exhibit No. 1.

8. As a result of the filing and voluntary dismissal of the above-captioned lawsuit, is the Department and Division liable to the Bailey & Glasser firm for worked performed and/or percentage of recovery? If so, please provide a summary and estimate of such liabilities that may be owed to the Bailey & Glasser law firm.

No. As discussed in response to Question No. 6, Bailey & Glasser advised that it had researched applicable law and that DOH had the express statutory authority to engage the firm to file the antitrust suit. Bailey & Glasser further advised that the complaint "is drafted as being brought by DOH on behalf of itself and as *parens patriae* for the citizens of West Virginia, which we think is consistent with your statutory authority." (emphasis added)

Accordingly, DOH engaged Bailey & Glasser in reliance on the firm's express opinion that DOH had the authority to engage the firm and, if DOH's engagement was improper, Bailey & Glasser likely lacks standing to recover fees for *ultra vires* work, if any, that it had otherwise represented to DOH was permissible. Further, Bailey & Glasser did not participate in any way in DOH's data analysis which is the basis for the antitrust suit that was filed by the West Virginia Attorney General on DOH's behalf.

Finally, as Bailey & Glasser revealed in its January 27, 2017, response to RFP # 58 that was issued by the West Virginia Attorney General, Bailey & Glasser launched its own independent investigation of West Virginia's asphalt market and subsequently shopped itself to one or more potential clients. As such, while Bailey & Glasser certainly hoped to be engaged by the West Virginia Attorney General to file an antitrust asphalt suit, Bailey & Glasser did its underlying work and investigation without any formal engagement by DOH or the Attorney General. Further, in its response to the RFP, Bailey & Glasser specifically acknowledged that it was unaware of DOH's parallel asphalt antitrust investigation which serves as the basis for DOH's antitrust suit. Given the foregoing, I can foresee no reasonable way in which DOH would be liable to Bailey & Glasser for any fees or expenses.

9. Related to the above question, has any compensation been paid to the Bailey & Glasser law firm relating to the above-captioned lawsuit? If so, please provide the amount and detail for such compensation. Similarly, has reimbursement of expenses been

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February 7, 2017
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sought by the Bailey & Glasser law firm relating to the above-captioned lawsuit? If so, please provide a copy of such request or invoice.

DOH has paid no compensation to Bailey & Glasser. DOH has provided no reimbursement to Bailey & Glasser. Bailey & Glasser has sought no compensation or reimbursement from DOH.

Please contact me if you have any questions about this matter.

Very truly yours,



Michael J. Folio
Director

cc: The Honorable Roman Prezioso

Exhibit 1

Folio, Michael J

From: Folio, Michael J
Sent: Monday, December 05, 2016 5:47 PM
To: Edward M. Wenger
Cc: Edens, Brandi L
Subject: DOH Antitrust

Ed:

Based on our meeting with the Attorney General today, it is my understanding that:

1. DOH and your Office will work cooperatively for your Office to draft and file an antitrust and breach of contract complaint that will be filed in the Kanawha County Circuit Court. DOH will cause the pending antitrust suit to be dismissed when your Office files such complaint. It is anticipated that the complaint will be filed in approximately one or two weeks;
2. Your Office and DOH will appear as counsel on the complaint that you are drafting and that will be filed;
3. Upon the filing of the complaint, your Office and DOH will work cooperatively to announce the filing of the complaint. Such announcement may include a press release and/or joint press conference;
4. Your office will issue an RFP to engage competent outside counsel under WV Code 5-3-3 to prosecute the suit that your Office will file. Your Office will use its best efforts to negotiate a contingent fee agreement with outside counsel that is less than the permitted statutory amount in order to enhance DOH's net recovery. While the Attorney General has the sole discretion to select such counsel, the Attorney General will consult with me prior to the selection of such counsel but the Attorney General is not obligated to accept my recommendation in selecting outside counsel;
5. DOH will make its antitrust expert available to your Office for consultation.

Thank you.

Mike

Exhibit 2

October 13, 2016

REPRESENTATION AGREEMENT

Hon. Paul A. Maddox, Jr., P.E.
Cabinet Secretary
c/o Mike Folio
West Virginia Department of Transportation
State Capitol, Bldg. 5
1900 Kanawha Blvd. E.
Charleston, WV 25305

**Re: Pursuit of Asphalt Antitrust Claims by the West Virginia Department
of Transportation and Division of Highways ("DOH")**

Dear Secretary Maddox,

I appreciate your interest in retaining us to pursue this matter. This letter agreement sets forth the proposed terms of Bailey & Glasser LLP's representation of DOH in pursuing legal claims regarding the sale of asphalt, asphalt paving services, and asphalt contracting services, by Oldcastle, Inc., West Virginia Paving, Southern West Virginia Asphalt and Paving, Kelly Paving, and related affiliates (together, "the Defendants"), particularly (1) West Virginia's prohibition on combinations and contracts that unreasonably restrain trade, and (2) West Virginia's ban on actual and attempted monopolization. The DOH agrees that pursuing any other lawsuits or legal issues will require a separate agreement.

1. **Attorney Fees and Costs.** We agree to represent DOH on a contingent basis. The DOH will not have to pay any fee unless a recovery is obtained for the DOH by verdict, settlement or otherwise. In the event that a recovery is obtained DOH agrees to the following with respect to attorney fees and costs:
 - a. **Attorney Fees.** We shall be entitled to compensation equal to 25% of the gross amount recovered by verdict, settlement or otherwise. In addition, the claims we bring on behalf of DOH may include fee-shifting provisions requiring the Defendants to pay part or all of DOH's legal fees and/or expenses. Any award of fees or costs or both belongs to us. In the event that fee-shifting applies, we will offset any fees actually recovered from the Defendants against the 25% contingent fee. DOH agrees to cooperate with us in any action to recover fees or costs.
 - b. **Costs.** We agree to advance all costs required to pursue this litigation, and DOH agrees that we will be entitled to take those costs out of any recovery due to DOH

after the contingency fee is calculated. These costs include copying costs, travel expenses, fees for expert witnesses and public relations consultants, travel costs, filing fees and all other out-of-pocket expenses reasonably incurred in connection with this case.

2. **Settlement.** DOH agrees not to make any settlement of any claim unless we or our representatives are present and receive payment in accordance with this agreement.
3. **Conflicts.** We know of no actual conflicts at this time. If any conflicts arise, we will promptly inform you and address them immediately. If, in our judgment, any irreconcilable conflicts arise, we reserve the right to withdraw from the matter. Additionally, if irreconcilable conflicts arise, DOH also reserves the right to withdraw.
4. **Potential Conflicts – Multiple Clients with Similar Claims.** The Firm already represents four municipalities with potential claims similar to DOH's. We have been asked to represent other potential plaintiffs with similar claims as well. This could present a conflict of interest and there are certain risks associated with this kind of arrangement of which DOH should be aware. While we will try to avoid such issues if it is practical to do so, they might still occur, and DOH should not take them lightly. Moreover, if any conflict of interest affecting DOH does arise, we will inform DOH promptly and work with DOH on how best to proceed in accordance with the West Virginia Rules of Professional Conduct. Potential conflicts of interest include:
 - a) We discover that there is a limited pool of assets from which recovery is reasonably likely (for example, an insurance policy) and those assets are insufficient to pay all of our clients full value for their claims;
 - b) The Defendants offer an aggregate or "lump sum" settlement to all of our clients that does not specify the amount each client will receive;
 - c) The Defendants offer to settle, but only if a certain percentage, or even all, of our clients to accept the proposed deal; and
 - d) We may be required by the applicable Rules of Professional Conduct to share material information about DOH's claims and negotiating position with our other clients.

In addition, we represent many other entities and individuals. It is possible that during the time that we are providing legal services under this agreement, some of our present or future clients will have disputes, litigation, or transactions with or against DOH. Such matters could pose a variety of risks, direct or indirect, to your business, legal, financial or other interests. Notwithstanding such risks, both known or unknown, you agree that we may continue to represent or may undertake in the future to represent existing or new clients in such matters, including the prosecution or legal defense of litigation, even though such matters are directly or indirectly adverse in any respect to DOH or any

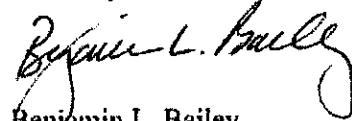
persons or entities related to DOH, as long as the matters are not substantially related to the present matter.

5. **Association with Other Counsel.** DOH agrees that we may associate with other counsel in this case as we see fit. If we associate with other counsel, we will be responsible for paying the associated counsel and DOH's fees will not be greater than those set forth above.
6. **Files.** At the conclusion of the matter, we will maintain only electronic copies of files and we will maintain those electronic files for ten years.
7. **Discharge and Withdrawal.** DOH may discharge us at any time, in which case it agrees to reimburse us for all expenses incurred and to reasonably compensate us for professional services performed on its behalf prior to our discharge. Payment of outstanding costs and expenses shall be made on the effective date of our discharge from the case. Additionally, we may withdraw for good cause. "Good cause" includes your breach of this Agreement, refusal to cooperate with us or failure to follow our advice on a material matter, or any fact or circumstance that would render our continuing representation either unlawful or unethical.
8. **Disclaimer of Guarantee.** Nothing in this agreement and nothing in our reports or statements should be construed as a promise or guarantee about the outcome of any matter. We make no such promises or guarantees. Our comments about the expected outcome of this matter are expressions of our opinion only based on the presently known facts and circumstances.
9. **Additional Disclaimer.** Nothing in this agreement shall supersede any state or federal statute, state or federal regulation or policy, and/or the West Virginia Rules of Professional Conduct. Should any fees be found by a court of last resort to be inconsistent with any such statute, including W. Va. Code § 5-3-3a(h), regulation, policy or rule, all parties to this agreement agree that the attorneys' fees due under this agreement shall not be waived, but shall be restructured so that they are consistent with such statute, regulation, policy or rule.
10. **Designated Representative.** Mike Folio will serve as the designated representative of DOH for purposes of discussing litigation strategy, making initial settlement decisions (possibly subject to approval by the Secretary of Transportation and Commissioner of Highways), and receiving status updates regarding the case.
11. **Effective Date.** The effective date of this agreement will be retroactive to the date we first performed services. The date at the beginning of this agreement is for reference only.

Hon. Paul A. Maddox, Jr., P.E.
Page 4

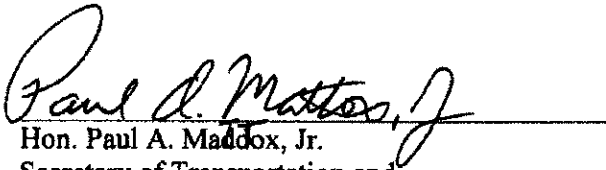
If the arrangements set forth herein are acceptable to you, kindly indicate your approval in the appropriate space below and return one original of this letter to me. This letter may be executed in counterparts and a facsimile or pdf copy of a signature shall have the same effect as an original. We look forward to working with you. If you have any questions about this letter or our representation, please call or write me.

Sincerely,



Benjamin L. Bailey
Its: Partner

Agreed to and Accepted by:



Hon. Paul A. Maddox, Jr.
Secretary of Transportation and
Commissioner of Highways

10/14/16
Date

Exhibit 3



WEST VIRGINIA DEPARTMENT OF TRANSPORTATION

Division of Highways

Legal Division

1900 Kanawha Boulevard East • Building Five • Room A-517
Charleston, West Virginia 25305-0430 • (304) 558-2823

Earl Ray Tomblin
Governor

Paul A. Mattox, Jr., P. E.
Secretary of Transportation/
Commissioner of Highways

December 5, 2016

The Honorable Patrick Morrissey
Office of the Attorney General
State Capitol Complex
Charleston, WV 25305

Re: *West Virginia Paving, et al. – Antitrust Lawsuits*

Dear Attorney General Morrissey:

I look forward to meeting with you and Mr. Ed Wenger this afternoon to discuss your concerns regarding the antitrust suit that was filed by the West Virginia Department of Transportation, Division of Highways ("DOH"), and that is pending before Judge Bloom in the Kanawha County Circuit Court.

DOH appreciates your opinion and certainly respects your Office. In that regard, DOH believes that the continued prosecution of the pending suit is absolutely necessary to protect West Virginia's taxpayers. While DOH believes that it has the statutory authority to engage Bailey & Glasser, LLP, to prosecute the pending antitrust suit, DOH is sensitive to your concerns and the wisdom of the West Virginia Legislature in enacting W.Va. Code § 5-3-3a. As such, DOH respectfully requests that your Office immediately appoint Bailey & Glasser as a special assistant attorney general pursuant to W.Va. Code § 5-3-3(b) to continue handling the pending antitrust suit.

We fear that the removal or threatened removal of Bailey & Glasser as counsel will stymie necessary efforts to redress anti-competitive behavior and monopolistic conduct in West Virginia's asphalt market that has strangled competition, compromised quality, and resulted in millions of dollars of impermissible charges by certain asphalt contractors.

Further, we believe that an immediate appointment outside a formal request for bids is appropriate in this case and consistent with the factors under W. Va. Code § 5-3-3a(c). First, DOH has dedicated significant resources and personnel to this matter over the last year and Bailey & Glasser has been conducting a lengthy and detailed analysis of West Virginia's asphalt market. DOH and Bailey & Glasser have acquired a level of institutional expertise that is necessary to prosecute the pending suit. As such, DOH "requires time-sensitive legal services that cannot be adequately provided by the Office of Attorney General and for which insufficient time exists to complete the customary competitive bidding process" *Id.* § 5-3-3a(c). Second, an immediate appointment is necessary "to avoid disruption" in the pending case by allowing

previously selected counsel "to continue providing legal representation." *Id.* § 5-3-3a(c). Their immediate special appointment to represent DOH in this case is necessary to protect the best interests of the agency, the state, and the taxpayers. Third, I am sure that your Office would agree that Bailey & Glasser more than satisfies the factors such as skills and expertise, staffing and support, and national recognition in subsection (e), justifying their special appointment.

Like you, DOH believes that any contingent fee structure must be reasonable and beneficial to West Virginia's taxpayers. As such, Bailey & Glasser has agreed to represent DOH in the pending antitrust suit based upon the fee structure contained in W.Va. Code § 5-3-3a(h).

DOH welcomes your support as it continues to prosecute the pending antitrust suit to redress misconduct that has imperiled West Virginia's infrastructure and improperly eroded West Virginia's resources.

Very truly yours,

A handwritten signature in dark ink, appearing to be "M. J. Folio", written in a cursive style.

Michael J. Folio
Director

Exhibit 4

Folio, Michael J

From: Mattox, Paul A
Sent: Thursday, March 17, 2016 8:10 AM
To: Folio, Michael J
Subject: Fwd:
Attachments: OCM -- Letter to F. Parmenter.docx; ATT00001.htm; OCM -- Letter to W. Crane (2).docx; ATT00002.htm

Fyi

Sent from my iPad

Begin forwarded message:

From: "Crane, Willie (Appalachian Materials Group)" <wcrane@wvpaving.com>
Date: April 29, 2015 at 11:10:27 AM EDT
To: "Paul Mattox (Paul.A.Mattox@wv.gov)" <Paul.A.Mattox@wv.gov>

Paul,

As discussed.

Thanks,

Willie

April 29, 2015

BY EMAIL

Frederick H. Parmenter
U.S. Department of Justice
Antitrust Division, Litigation II
450 5th Street, NW
Washington, DC 20001
frederick.parmenter@usdoj.gov

Re: *CRH plc's Acquisition of Pounding Mill Quarry Corporation*
DOJ No. 60-212319-0004

Dear Mr. Parmenter:

I am writing to confirm that the West Virginia Department of Transportation ("DOT") has no objection to Oldcastle's acquisition of the Pounding Mill quarries in West Virginia and Virginia. After checking with the relevant departments of the DOT, we do not regard the Boxley quarries at Beckley and Alta as competitors of the Pounding Mill quarries. We have concluded that the acquisition will not result in any increase in prices or deterioration in service. I also understand that Oldcastle is an owner of Boxley LLC and may acquire complete ownership and operation of Boxley LLC. We have taken this into consideration in arriving at our conclusion.

If requested to make our position known to the Deputy Assistant Attorney General in charge of Antitrust, I would be prepared to do so.

Sincerely,

Paul A. Mattox Jr., P.E.
Secretary of Transportation
West Virginia Department of Transportation

April 29, 2015

BY EMAIL

Mr. Willie Crane
Business Manager
Appalachian Materials Group, North
2950 Charles Avenue
Dunbar, WV 25064

Re: Oldcastle Acquisition of Pounding Mill Quarries

Dear Mr. Crane:

I am writing to confirm that the West Virginia Department of Transportation ("DOT") has no objection to Oldcastle's acquisition of the Pounding Mill quarries in West Virginia and Virginia. After checking with the relevant departments of the DOT, we do not regard the Boxley quarries at Beckley and Alta as competitors of the Pounding Mill quarries. We have concluded that the acquisition will not result in any increases of price in stone or hot mix asphalt, and we conclude that there will be no deterioration in service. I also understand that Oldcastle is an owner of Boxley LLC and may acquire complete ownership and operation of Boxley LLC. We have taken this into consideration in arriving at our conclusion.

I understand the Antitrust Division of the Justice Department has concerns regarding the acquisition. Please feel free to show this letter to the DOJ and let me know if I can be of any further assistance.

Sincerely,

Paul A. Mattox, Jr, P.E.
Secretary of Transportation
West Virginia Department of Transportation