

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Civil No.: 99-516-CIV-J-20A
)	
v.)	
)	
FLORIDA ROCK INDUSTRIES, INC.;)	Filed: May 26, 1999
HARPER BROS., INC.;)	
COMMERCIAL TESTING, INC.; and)	Judge Schlessinger
DANIEL R. HARPER,)	
)	
Defendants.)	

COMPLAINT FOR INJUNCTIVE RELIEF

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil antitrust action to obtain equitable relief against the defendants and alleges as follows:

1. The United States seeks to prevent the proposed acquisition by defendant Florida Rock Industries, Inc. ("Florida Rock") of defendant Harper Bros., Inc. ("Harper Bros.") and defendant Commercial Testing, Inc. ("Testing") pursuant to a letter of intent entered into by defendants on May 5, 1999. Florida Rock and Harpers Bros. are two of only three significant producers of aggregate used for asphalt concrete and ready mix concrete in Southwest Florida, and two of the three producers of silica sand used for ready mix concrete in Southwest Florida. If the acquisition is permitted, Florida Rock would control about 68 percent of the aggregate sold

for asphalt concrete and ready mix concrete and 60 percent of the silica sand sold for ready mix concrete in Southwest Florida.

2. Florida Rock's acquisition of Harper Bros. will terminate the direct price competition between Florida Rock and Harper Bros. in the Southwest Florida market. The acquisition substantially increases the opportunity for coordination that would raise prices to the detriment of consumers. Since there would be virtually no significant competitors remaining capable of increasing output, higher prices are likely to result unilaterally from the elimination of a significant competitor in the aggregate and silica sand markets even without coordination.

I. JURISDICTION AND VENUE

3. This action is filed under Section 15 of the Clayton Act, 15 U.S.C. § 25, to prevent and restrain the violation by the defendants, as hereinafter alleged, of Section 7 of the Clayton Act, 15 U.S.C. § 18.

4. The defendants transact business in this District. Venue is proper in this District under 15 U.S.C. § 22 and 28 U.S.C. § 1391(c).

5. The defendants are engaged in interstate commerce and in activities substantially affecting interstate commerce. The Court has jurisdiction over this action and over the parties pursuant to 15 U.S.C. § 22 and 28 U.S.C. §§ 1331 and 1337.

II. DEFINITIONS

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

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

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

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

10. "Hot-mix plant" means a plant that produces asphalt concrete.

11. "Concrete plant" means a plant that produces ready mix concrete.

12. "Southwest Florida" means Charlotte, Lee, and Collier Counties and Sarasota County south of State Route 780 in Florida.

III. DEFENDANTS

13. Florida Rock is a Florida corporation with headquarters in Jacksonville, Florida. Florida Rock operates in Florida, Georgia, Virginia, Maryland, Washington, D.C., and North Carolina. Extracting, processing, and selling aggregate and silica sand is one of its principal businesses. Florida Rock produces aggregates at its Alico Road Quarry in Lee County, Florida,

and silica sand at its Witherspoon Sand Mine in Glades County, Florida. In 1997, Florida Rock reported total sales of approximately \$456 million.

14. Harper Bros. is a Florida corporation with headquarters in Ft. Myers, Florida. One of Harper Bros. principal businesses is extracting and processing aggregates and silica sand. Harper Bros. produces aggregates at the Alico Road Mine in Lee County, Florida, and silica sand at the Palmdale Sand Mine in Glades County, Florida. In 1997, Harper Bros. reported total sales of approximately \$44 million.

15. Testing is a Florida corporation with headquarters in Ft. Myers, Georgia. Testing conducts quality testing of construction materials. In 1997, Testing reported total sales of \$267,893.

16. Daniel R. Harper is made a defendant herein. Daniel R. Harper is an individual who resides in Fort Myers, Florida, and is the Chairman of the Board and majority stockholder of Harper Bros. and the majority stockholder of Testing.

IV. TRADE AND COMMERCE

A. The Relevant Product Markets

Aggregate

17. Aggregate is a stone product used to manufacture asphalt concrete and ready mix concrete. Aggregate is mined in quarries, crushed, separated by stone size, and transported to an asphalt or ready mix concrete plant.

18. Aggregate differs from other types of stone products in its physical composition, functional characteristics, customary uses, and pricing. It must meet the Florida Department of Transportation or American Society of Testing Material's specifications for the specific type of

asphalt concrete or ready mix concrete being produced. In response to a small but significant increase in the price of aggregate, asphalt concrete and ready mix concrete manufacturers in Southwest Florida would not substitute to another product.

19. The production and sale of aggregate used to manufacture asphalt concrete and ready mix concrete is a line of commerce and a relevant product market within the meaning of the Clayton Act.

Silica Sand

20. Silica sand is a naturally occurring sand product used to manufacture specific types of ready mix concrete required on Florida Department of Transportation highway projects and commercial construction projects.

21. Silica sand differs from sand that is manufactured from stone products (manufactured sand) in its physical composition, functional characteristics, and customary uses. The Florida Department of Transportation requires that silica sand be used in ready mix concrete whenever the ready mix concrete is used as a surface for vehicular traffic. Because of its superior pumping or finishing qualities, commercial contractors use silica sand in place of, or in some instances in combination with, manufactured sand to produce ready mix concrete. In response to a small but significant increase in the price of silica sand, ready mix concrete manufacturers in Southwest Florida would not substitute to another product.

22. The production and sale of silica sand used to manufacture specific types of ready mix concrete is a line of commerce and a relevant product market within the meaning of the Clayton Act.

B. The Relevant Geographic Market

Aggregate

23. Aggregate is a low-priced commodity product. Because of its weight and bulk, transportation costs comprise a substantial portion of the price per ton of aggregate. Aggregate cannot be economically shipped long distances. For these reasons, the geographic location of aggregate quarries, mines and gravel pits and associated transportation costs create regional markets for the sale of aggregate generally no larger than an urban area or a small region of a state.

24. Producers of aggregate located in Southwest Florida sell and compete with each other for sales of aggregate within Southwest Florida. Florida Rock sells aggregate in Southwest Florida from its quarry known as the Alico Road Quarry located in Lee County, Florida. Harper Bros. sells aggregate in Southwest Florida from its quarry known as the Alico Road Mine located in Lee County, Florida. The Florida Rock Alico Road Quarry and the Harper Bros. Alico Road Mine are located off Alico Road in close proximity to each other.

25. Asphalt concrete and ready mix concrete producers located in Southwest Florida rely upon aggregate quarries in Southwest Florida for their supply of aggregate. In response to a small but significant increase in the price of aggregate in Southwest Florida, aggregate producers not serving Southwest Florida are unlikely to expand sales substantially into Southwest Florida.

26. Southwest Florida is a relevant geographic market within the meaning of Section 7 of the Clayton Act. Asphalt concrete and ready mix concrete customers located in Southwest Florida are likely to pay higher prices for aggregate as a result of this acquisition and they would

not be able to substitute products sold by producers not serving Southwest Florida in the face of a small but significant price increase by producers in Southwest Florida.

Silica Sand

27. Silica sand is also a low-priced commodity product. Because of its weight and bulk, transportation costs comprise a substantial portion of the price per ton of silica sand. Silica sand cannot be shipped economically long distances. For these reasons, the geographic location of the sand mines and associated transportation costs create regional markets for the sale of silica sand generally no larger than an urban area or a small region of a state.

28. Producers of silica sand located in or near Southwest Florida sell and compete with each other for sales of silica sand within Southwest Florida. Florida Rock sells silica sand in Southwest Florida from its Witherspoon Sand Mine located in Glades County, Florida. Harper Bros. sells silica sand in Southwest Florida from its Palmdale Sand Mine located in Glades County, Florida.

29. Ready mix concrete producers located in Southwest Florida rely upon silica sand plants located in or near this area for their supply of silica sand. In response to a small but significant increase in the price of silica sand in Southwest Florida, silica sand producers not serving the Southwest Florida area are unlikely to expand sales substantially into the Southwest Florida.

30. Southwest Florida is a relevant geographic market within the meaning of Section 7 of the Clayton Act. Ready mix concrete customers located in Southwest Florida are likely to pay higher prices for silica sand as a result of this acquisition and they would not be able to

substitute products sold by producers not serving Southwest Florida in the face of a small but significant price increase by producers in or near Southwest Florida.

V.
ANTICOMPETITIVE EFFECT AND ENTRY

Aggregate

31. The proposed acquisition of Harper Bros. by Florida Rock will significantly reduce competition in the production and sale of aggregate in Southwest Florida. Florida Rock and Harper Bros. are the two largest producers of aggregate in Southwest Florida and have the largest reserves of aggregate. Florida Rock accounts for about 44 percent of the aggregate produced in Southwest Florida and Harper Bros accounts for approximately 24 percent. After the acquisition, the combined entity will control about 68 percent of the Southwest Florida aggregate market. They are two of only three significant producers in close proximity to Southwest Florida possessing sufficient aggregate reserves that would permit consumers to switch aggregate suppliers if prices were increased.

32. Using a measure of market concentration called the Herfindahl-Hirschman Index (“HHI”), defined and explained in Appendix A, combining Florida Rock’s and Harper Bros.’ business in Southwest Florida would substantially increase the already high concentration in the aggregate market. Based on 1998 production, the HHI for the Southwest Florida aggregate market is about 2666. After the proposed acquisition, the HHI would increase by about 2112 points, resulting in a post-merger HHI of about 4778.

33. The acquisition of Harper Bros. by Florida Rock would remove a significant competitor and create a dominant aggregate company in Southwest Florida with the ability unilaterally to increase prices for aggregate. In addition, the proposed acquisition will facilitate

coordinated pricing activity among remaining aggregate producers. Accordingly, the acquisition will increase the likelihood of anticompetitive price increases for consumers. Aggregate products are only slightly differentiated (if at all) and price is an important dimension of competition. The combination of Florida Rock's and Harper Bros.' Southwest Florida aggregate businesses would result in a substantial reduction in competition, increase the risk of coordinated action, and likely result in higher aggregate prices.

34. Establishing a new, successful aggregate production facility in Southwest Florida is difficult, time-consuming and costly. To be cost competitive in Southwest Florida, an aggregate production facility must be able to produce large amounts of consistent quality aggregate in close proximity to the hot-mix plants and concrete plants where the aggregate will be used. Environmental and zoning permits must be obtained to operate an aggregate production facility. Federal, state and local environmental provisions and state and local zoning provisions make it very difficult to open an aggregate production facility in Southwest Florida. It would likely take between two to five years (if permits can be obtained) to license and build an aggregate production plant in Southwest Florida. Timely and sufficient entry is unlikely to occur in the aggregate market in Southwest Florida to defeat a post-acquisition aggregate price increase.

Silica Sand

35. The proposed acquisition of Harper Bros. by Florida Rock would remove a significant competitor and significantly reduce competition in the production and sale of silica sand in Southwest Florida. Florida Rock and Harper Bros. are two of only three producers of silica sand in or near Southwest Florida.

36. The acquisition of Harper Bros. by Florida Rock would create a dominant silica sand producer serving Southwest Florida. It would reduce the number of competitors operating silica sand facilities in or near Southwest Florida from three to two, and significantly reduce the number of competitors supplying silica sand used to manufacture specific types of ready mix concrete in Southwest Florida. After the acquisition, Florida Rock would have the power unilaterally to increase prices for silica sand. In addition, the proposed acquisition will facilitate coordinated pricing activity among silica sand producers. Accordingly, the acquisition will increase the likelihood of anticompetitive price increases for consumers. Silica sand products are only slightly differentiated (if at all), and price is an important dimension of competition. The combination of Florida Rock's and Harper Bros.' Southwest Florida silica sand businesses would result in a substantial reduction in competition, increase the risk of coordinated action, and likely result in higher silica sand prices.

37. Establishing a new, successful silica sand production facility in or near Southwest Florida is difficult, time-consuming and costly. To be cost competitive in Southwest Florida, a silica sand production facility must be able to produce large amounts of consistent quality silica sand in close proximity to concrete plants where the silica sand will be used. Environmental and zoning permits must be obtained to operate a silica sand production facility. Federal, state and local environmental provisions and state and local zoning provisions make it very difficult to open a silica sand production facility in or near Southwest Florida. Timely and sufficient entry is unlikely to occur in the silica sand market in Southwest Florida to defeat a post-acquisition price increase in silica sand.

VI.
VIOLATION ALLEGED

38. On September 14, 1998, the defendants notified the United States that they had entered into a letter of intent providing for Florida Rock to acquire all of the outstanding capital stock of Harper Bros., Testing, and 320 acres of land. The letter of intent lapsed on January 2, 1999, and a subsequent letter of intent was entered into by the defendants on May 5, 1999, involving the same capital stock and assets. The purchase price is approximately \$87.5 million.

39. The effect of the proposed transaction may be substantially to lessen competition and tend to create a monopoly in interstate trade and commerce in violation of Section 7 of the Clayton Act.

40. The transaction will have the following effects, among others:

- a. competition generally in the Southwest Florida markets for aggregate and silica sand will be substantially lessened;

- b. actual and potential competition between Florida Rock and Harper Bros. in the Southwest Florida markets for aggregate and silica sand will be substantially lessened; and

- c. prices consumers pay for aggregate and silica sand in Southwest Florida are likely to increase.

VII.
REQUESTED RELIEF

The United States requests:

1. That the proposed acquisition of Harper Bros. and Testing by Florida Rock be adjudged to be in violation of Section 7 of the Clayton Act;
2. That Florida Rock be temporarily and preliminarily enjoined from acquiring Harper Bros., Testing, and 320 acres of land;
3. That the defendants be permanently enjoined from carrying out their letter of intent dated May 5, 1999, or from entering into or carrying out any agreement, understanding or plan, the effect of which would be to combine the businesses or assets of the defendants;
4. That the United States be awarded the costs of this action; and
5. That the United States have such other and further relief as the Court deems just and proper.

Dated: May 25, 1999

_____/s/_____
Joel I. Klein
Assistant Attorney General

_____/s/_____
Frederick H. Parmenter

_____/s/_____
Donna E. Patterson
Deputy Assistant Attorney General

_____/s/_____
P. Terry Lubeck

_____/s/_____
Constance K. Robinson
Director of Operations and
Merger Enforcement

_____/s/_____
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APPENDIX A
HERFINDAHL-HIRSCHMAN INDEX CALCULATIONS

"HHI" means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of thirty, thirty, twenty, and twenty percent, the HHI is 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). The HHI takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1000 and 1800 points are considered to be moderately concentrated, and those in which the HHI is in excess of 1800 points are considered to be concentrated. Transactions that increase the HHI by more than 100 points in concentrated markets presumptively raise antitrust concerns under the Horizontal Merger Guidelines issued by the U.S. Department of Justice and the Federal Trade Commission. See *Merger Guidelines* § 1.51.

CERTIFICATION OF SERVICE

I hereby certify that copies of the Complaint for Injunctive Relief, Competitive Impact Statement, Hold Separate Stipulation and Order, Stipulation and Order, Final Judgment, and Local Rule 3.01(e) Emergency Motion and Memorandum Requesting Rulings on the Proposed Hold Separate Stipulation and Order and Stipulation and Order have been served upon Florida Rock Industries, Inc., Harper Bros., Inc., Commercial Testing, Inc., and Daniel R. Harper, by placing copies of the foregoing documents in the U.S. Mail, directed to each of the above-named parties at the addresses given below, this 25th day of May, 1999.

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and
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