

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Deborah Platt Majoras, Chairman**
 Orson Swindle
 Thomas B. Leary
 Pamela Jones Harbour
 Jon Leibowitz

In the Matter of)
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 CEMEX, S.A. de C.V.,) **Docket No. C -**
 a corporation.))
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DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Cemex, S.A. de C.V. (“Cemex”), hereinafter referred to as “Respondent,” of RMC Group PLC (“RMC”), and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission, having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Hold Separate and Maintain Assets (“Hold Separate”), attached at Appendix C, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34,

the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent Cemex is incorporated as a stock corporation with variable capital organized under the laws of the United Mexican States with its office and principal place of business located at Av. Ricardo Margáin Zozaya #325, Colonia del Valle Campestre, Garza García, Nuevo León, Mexico 66265. Respondent Cemex operates all of its business in the United States through its wholly owned subsidiary, Cemex Corp., which operates all of its business through its wholly owned subsidiary, Cemex Inc. Cemex Inc. has its principal place of business on 840 Gessner Road, Suite 1400, Houston, Texas 77024.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “Cemex” or “Respondent” means Cemex, S.A. de C.V., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Cemex (including, but not limited to, Cemex Corp. and Cemex Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “RMC” means RMC Group PLC, a public limited company organized under the laws of England and Wales with registered number 249776 whose registered principal office is located at RMC House, Coldharbour Lane, Thorpe, Egham, Surrey TW20 8TD, United Kingdom.
- C. “Commission” means the Federal Trade Commission.
- D. “Acquirer” means any Person that receives the prior approval of the Commission to acquire the Ready Mix Concrete Divestiture Assets pursuant to Paragraph II. or Paragraph III. of this Order.
- E. “Acquisition” means the proposed acquisition of RMC by Cemex pursuant to the September 27, 2004 Implementation Agreement between Cemex and RMC.
- F. “Acquisition Date” means the date the Acquisition is consummated.

- G. "Aggregate(s)" means crushed stone and gravel produced at quarries, mines, or gravel pits used to manufacture Ready Mix Concrete and Asphalt Concrete.
- H. "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.
- I. "Divestiture Agreement" means any agreement that receives the prior approval of the Commission between Respondent and an Acquirer (or between a Divestiture Trustee appointed pursuant to Paragraph III. of this Order and an Acquirer) related to the Ready Mix Concrete Divestiture Assets required to be divested pursuant to Paragraph II. (or Paragraph III.) of this Order.
- J. "Divestiture Trustee" means the Divestiture Trustee appointed pursuant to Paragraph III. of this Order.
- K. "Effective Date of Divestiture" means the date on which Respondent (or a Divestiture Trustee) divests to an Acquirer the Ready Mix Concrete Divestiture Assets completely and as required by Paragraph II. (or by Paragraph III.) of this Order.
- L. "Hold Separate" means the Order to Hold Separate and Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.
- M. "Hold Separate Monitor" means the Person appointed pursuant to Paragraph II. of the Hold Separate.
- N. "Material Confidential Information" means competitively sensitive, proprietary and all other information that is not in the public domain owned by or pertaining to a Person or a Person's business, and includes, but is not limited to, all customer lists, price lists, cost information, marketing methods, patents, technologies, processes, or other trade secrets. The Ready Mix Concrete Divestiture Assets shall be considered a Person separate from Respondent (as defined in this Order and the Hold Separate) and RMC for this purpose.
- O. "Person" means any individual, partnership, association, firm, company, corporation, or other business entity.
- P. "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, but not limited to, Portland cement) and Aggregate with sufficient water to cause the cement to set and bind.

- Q. “Ready Mix Concrete Divestiture Assets” means all of RMC’s rights, titles, and interests in and to all assets, properties, business and goodwill, tangible or intangible, and any improvements or additions thereto, used to operate the RMC Ready Mix Concrete Businesses in the ordinary course and in accordance with past practice, including, but not limited to:
- (i) the Ready Mix Concrete facilities, Aggregate facilities, Asphalt Concrete facilities, quarries, mines, gravel pits, aggregate reserves, plants, and other buildings located at the sites identified on Appendix A hereto;
 - (ii) all real property (together with appurtenances, licenses, and permits), including all leasehold and renewal rights, owned, leased, or otherwise held by RMC and used to operate the RMC Ready Mix Concrete Businesses located at the sites identified on Appendix A hereto;
 - (iii) all capital equipment, stone crushing equipment, power supply equipment, scales, machinery, fixtures, tools, trucks and other vehicles, transportation and storage facilities, furniture, and supplies held by RMC and used to operate the RMC Ready Mix Concrete Businesses;
 - (iv) all personal property owned, leased or otherwise held by RMC and used to operate the RMC Ready Mix Concrete Businesses;
 - (v) all intangible assets and all intellectual property owned by or licensed to RMC used in the RMC Ready Mix Concrete Businesses, including, but not limited to, aggregate reserve testing information, technical information, leases, know-how, safety procedures, quality assurance and control procedures, dispatch software, systems and equipment, trademarks, patents, mask works, copyrights, trade secrets, research materials, technical information, management information systems, software, inventions, test data, licenses, registrations, submissions, approvals, technology, specifications, designs, drawings, processes, recipes, mix designs, protocols, and formulas;
 - (vi) all rights of RMC relating to the RMC Ready Mix Concrete Businesses under any contract entered into with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees, and joint venture partners;
 - (vii) all governmental approvals, consents, licenses, permits, waivers, or other authorizations held by RMC and used to operate the RMC Ready Mix Concrete Businesses;

(viii) all rights of RMC relating to the RMC Ready Mix Concrete Businesses under any warranty and guarantee, express or implied;

(ix) all books, records, and files held by RMC relating to the RMC Ready Mix Concrete Businesses;

(x) all rights in and to inventories of products, raw materials, supplies, and parts, including work-in-process and finished goods held by RMC and used in the RMC Ready Mix Concrete Businesses;

(xi) all customer and vendor lists, catalogs, sales promotion literature, and advertising materials held by RMC and used in the RMC Ready Mix Concrete Businesses; and

(xii) all items of prepaid expense held by RMC and used in the RMC Ready Mix Concrete Businesses;

provided, however, that the Ready Mix Concrete Divestiture Assets do not include the Excluded Assets identified in Appendix B to this Order.

R. “RMC Ready Mix Concrete Businesses” means the research, development, manufacture, distribution, or sale of Ready Mix Concrete, and the related research, development, production, manufacture, distribution, or sale of Aggregates and/or Asphalt Concrete, at or by the facilities, quarries, mines, gravel pits, aggregate reserves, plants, and other buildings listed in Appendix A to this Order.

II.

IT IS FURTHER ORDERED that:

- A. Respondent shall divest the Ready Mix Concrete Divestiture Assets absolutely and in good faith, at no minimum price, to a single Acquirer, within six (6) months of the Acquisition Date.
- B. Respondent shall divest the Ready Mix Concrete Divestiture Assets only to an Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.
- C. Until the Effective Date of Divestiture, Respondent shall take such actions as are necessary to maintain the viability and marketability of the Ready Mix Concrete Divestiture Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of the Ready Mix Concrete Divestiture Assets, except for ordinary

wear and tear.

- D. Prior to the Effective Date of Divestiture, Respondent shall secure all consents and waivers from all government and private entities that are necessary for the divestiture of the Ready Mix Concrete Divestiture Assets to the Acquirer, and for the continued research, development, manufacture, sale or distribution of Ready Mix Concrete, Aggregate and Asphalt Concrete at or by the facilities listed in Appendix A to this Order by the Acquirer.
- E. The purpose of the divestiture of the Ready Mix Concrete Divestiture Assets is to ensure their continued operation in the same manner and engaged in the same businesses in which the RMC Ready Mix Concrete Businesses were engaged as of the time of the announcement of the Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

- A. If Respondent has not fully complied with the obligations to divest the Ready Mix Concrete Divestiture Assets as required by Paragraph II. of this Order, the Commission may appoint a Divestiture Trustee to divest the Ready Mix Concrete Divestiture Assets in a manner that satisfies the requirements of Paragraph II. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a Divestiture Trustee in such action to divest the Ready Mix Concrete Divestiture Assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph III. shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent to comply with this Order.
- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Divestiture Trustee, Respondent shall be deemed to have consented to

the selection of the proposed Divestiture Trustee.

- C. No later than ten (10) days after appointment of a Divestiture Trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondent shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the Ready Mix Concrete Divestiture Assets as required by this Order.
 2. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the Divestiture Trustee has submitted a divestiture plan or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period for no more than two (2) additional periods of twelve (12) months each.
 3. The Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the Ready Mix Concrete Divestiture Assets and to any other relevant information, as the Divestiture Trustee may request. Respondent shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Respondent shall cooperate with the efforts of the Divestiture Trustee to divest the Ready Mix Concrete Divestiture Assets. Any delays in divestiture caused by Respondent shall extend the time for divestiture under this Paragraph III. in an amount equal to the delay, as determined by the Commission.
 4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made only in a manner that receives the prior

approval of the Commission and only to an Acquirer that receives the prior approval of the Commission; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondent from among those approved by the Commission; *provided further, however*, that Respondent shall select such entity within five (5) days of receiving notification of the Commission's approval.

5. In the event that the Divestiture Trustee determines that he or she is unable to divest the Ready Mix Concrete Divestiture Assets in a manner consistent with the Commission's purpose as described in Paragraph II. of this Order, the Divestiture Trustee may divest such additional assets of Respondent and effect such arrangements as are necessary to satisfy the requirements of this Order.
6. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondent, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of the Ready Mix Concrete Divestiture Assets as required by this Order.
7. Respondent shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
8. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Ready Mix Concrete Divestiture Assets.

9. The Divestiture Trustee shall act in a fiduciary capacity for the benefit of the Commission.
 10. The Divestiture Trustee shall report in writing to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
 11. Respondent may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- E. The Commission may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.
 - F. The Divestiture Trustee appointed pursuant to Paragraph III. of this Order may be the same Person appointed as Hold Separate Monitor pursuant to the relevant provisions of the Hold Separate in this matter.
 - G. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph III.

IV.

IT IS FURTHER ORDERED that for a period of one (1) year following the Effective Date of Divestiture, Respondent shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any former employees of the RMC Ready Mix Concrete Businesses who are employed by the Acquirer to terminate their employment relationship with the Acquirer if such employees have had access to Material Confidential Information of the Acquirer or of the Ready Mix Concrete Divestiture Assets; *provided, however*, a violation of this provision will not occur if: (1) the individual's employment has been terminated by the Acquirer; (2) Respondent advertises for employees in newspapers, trade publications, or other media not targeted specifically at the employees; or (3) Respondent hires employees who apply for employment with Respondent, so long as such employees were not solicited by Respondent in violation of this paragraph.

V.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order becomes final, and every sixty (60) days thereafter until Respondent has fully complied with

Paragraph II. and III. of this Order, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent shall include in its reports, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant Paragraphs of the Order, including a description of all substantive contacts or negotiations related to the divestiture of the relevant assets and the identity of all parties contacted. Respondent shall include in its reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning its obligations under this Order.

VI.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed (1) dissolution of Respondent, (2) acquisition, merger, or consolidation of Respondent, or (3) any other change in Respondent that may affect compliance obligations arising out of this Order, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in Respondent.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent, Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours of Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of Respondent related to compliance with this Order; and
- B. Upon five (5) days' notice to Respondent and without restraint or interference from Respondent, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

By the Commission.

Donald S. Clark
Secretary

SEAL
ISSUED:

Appendix A

RMC Ready Mix Concrete facilities to be divested pursuant to this Order:

- 10200 W. Tangerine Road, Marena, Arizona 85653
- 6601 N. Casa Grande Highway, Tucson, Arizona 85743
- 9301 S. Swan Road, Tucson, Arizona 85706
- 11800 E. Valencia Road, Tucson, Arizona 85747
- 409 Camino Ramanote, Rio Rico, Arizona 85648

RMC Aggregate facilities to be divested pursuant to this Order:

- 6601 N. Casa Grande Highway, Tucson, Arizona 85743
- 11800 E. Valencia Road, Tucson, Arizona 85747
- 409 Camino Ramanote, Rio Rico, Arizona 85648

RMC Asphalt Concrete facility to be divested pursuant to this Order:

- 6601 N. Casa Grande Highway, Tucson, Arizona 85743

Appendix B

The following are the Excluded Assets:

1. cash and cash equivalents;
2. any U.S. insurance policies that do not apply exclusively to the Ready Mix Concrete Divestiture Assets and prepaid expenses for any such U.S. insurance policies;
3. the following pension plans: The Savings and Retirement Plan for Employees of RMC USA, Inc. and Affiliated Companies; RMC USA, Inc. Amended and Restated Nonqualified Executive Savings Plan; and Savings & Retirement Plan for Employees of Tucson Ready-Mix, Inc.;
4. subject to item 5 below, intellectual property that is not used exclusively in the Ready Mix Concrete Divestiture Assets, provided, however, that, to the extent such intellectual property is used in the Ready Mix Concrete Divestiture Assets, Respondents shall grant the Acquirer a perpetual, nonexclusive, paid-up (royalty-free) license to use such intellectual property in the operation of the Ready Mix Concrete Divestiture Assets;
5. all rights, including the right to use, in or to any trade name and trademark whether or not registered in any country in the world which includes the term “RMC” or the “RMC” design; *provided, however*, that the Acquirer shall have rights to use the “RMC” trade name and trademark for a transition period of three months following the Effective Date of Divestiture;
6. any books and records that Respondent are required by law to retain, so long as RMC delivers at least one copy thereof to the Acquirer; and
7. all refunds, rebates, or similar payments of taxes to the extent such taxes were paid by or on behalf of RMC prior to the Effective Date of Divestiture.

Appendix C

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS