

Complaint

IN THE MATTER OF

CEMEX S.A. de C.V.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT*Docket C-4131; File No. 0510007**Complaint, February 11, 2005--Decision, March 25, 2005*

This consent order, among other things, requires the respondent to divest the ready-mix concrete business of RMC in Tucson, Arizona to a buyer approved by the Commission and at no minimum price. An accompanying Order to Hold Separate and Maintain Assets requires the respondent to hold separate and maintain the viability of the RMC Tucson business as a competitive operation until its transfer to the Commission-approved acquirer, and prohibits the exchange of certain material confidential information between the respondent and the RMC Tucson business.

Participants

For the Commission: *Randall A. Long, Andrew J. Forman, John D. Carroll, Richard A. Levy, Mary Thuell Sledd, Matthew J. Reilly, Michael R. Moiseyev, and Roger A. Boner.*

For the Respondent: *Clifford H. Aronson, Skadden, Arps, Slate, Meagher & Flom.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Cemex S.A. de C.V. (“Cemex”), a corporation subject to the jurisdiction of the Commission, has agreed to acquire RMC Group PLC (“RMC”), a corporation subject to the jurisdiction of the Commission, in violation 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 it appearing to the Commission that a proceeding in respect thereof would be in

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the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT

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. Respondent, among other things, is engaged in the manufacture and sale of ready-mix concrete and aggregates in Tucson, Arizona.

3. Respondent is, and at all times relevant herein has been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. §12, and is a corporation whose business is in or affects commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

II. THE ACQUIRED COMPANY

4. RMC is 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. RMC operates all of its business in the United States through its wholly owned subsidiary, RMC USA, Inc., which has its headquarters at One Glenlake Parkway, Suite 600, Atlanta, GA 30328.

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5. RMC, among other things, is engaged in the manufacture and sale of ready-mix concrete and aggregates in Tucson, Arizona.

6. RMC is, and at all times herein has been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. THE PROPOSED ACQUISITION

7. Pursuant to an Implementation Agreement dated September 27, 2004, Cemex proposed to acquire 100 percent of the existing shares of RMC for approximately \$5.8 billion (the “Acquisition”).

IV. THE RELEVANT MARKET

8. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the manufacture and sale of ready-mix concrete.

9. Ready-mix concrete is a construction material used to build various structures, including buildings, highways, bridges, tunnels, and numerous other projects. Ready-mix concrete is produced at local plants by mixing a cementitious material, typically Portland cement, and aggregates (crushed rocks) with water to form a slurry. In certain construction projects, silica sand is combined with aggregate to produce different types of ready-mix concrete. A chemical reaction induced by the combination of cement and water causes the mixture to harden and gain strength.

10. For the purposes of this Complaint, metropolitan Tucson, Arizona is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant line of commerce. Ready-mix concrete is a perishable product. If ready-mix concrete is not delivered to customers in a timely manner, typically less than one hour, it begins to harden and lose utility. Hence, ready-

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mix concrete is generally sold within 10 to 20 miles of the plant where it is mixed, although the precise distance may vary depending on traffic patterns and infrastructure. Transportation costs also can limit the distance ready-mix concrete can be shipped. In Tucson, Arizona each competitor has spaced plants within 20 miles of its other plants, creating a network capable of serving the entire Tucson metropolitan area.

V. THE STRUCTURE OF THE MARKET

11. The Tucson, Arizona market for ready-mix concrete is highly concentrated, whether measured by Herfindahl-Hirschman Index or two or four firm concentration ratios. Aside from Cemex and RMC, only one other company in Tucson, Arizona supplies ready-mix concrete. Accordingly, the Acquisition would significantly increase concentration in the Tucson, Arizona market for ready-mix concrete, leaving Cemex as the dominant supplier.

12. Cemex and RMC are actual competitors in the relevant market.

VI. ENTRY CONDITIONS

13. New entry into the relevant market is difficult due to a limited availability in the relevant area of the vital raw materials, aggregates and cement, necessary for ready-mix concrete production. In Tucson, Arizona, aggregates sufficient to supply a new ready-mix concrete operation are not available for purchase. A new entrant, therefore, would have to acquire its own local source of aggregates. In Tucson, Arizona, however, viable concrete aggregate reserves are scarce. Even if such reserves can be acquired, it would take in excess of two years to develop aggregate facilities of the scale necessary to serve the relevant market. Additionally, the supply of cement in Tucson, Arizona is constrained by a very limited number of cement suppliers.

14. New entry into the relevant market has not occurred in more than 10 years.

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15. New entry into the relevant market sufficient to deter or counteract the anticompetitive effects described in Paragraph 16 would not occur in a timely manner because it would take over two years to enter and achieve significant market impact.

VII. EFFECTS OF THE ACQUISITION

16. The effects of the Acquisition, if consummated, may be to substantially lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

- a. by eliminating actual, direct, and substantial competition between Cemex and RMC in the Tucson, Arizona market for ready-mix concrete;
- b. by increasing the likelihood that the remaining ready-mix suppliers in Tucson, Arizona would engage in coordinated interaction that harms consumers;
- c. by reducing incentives to improve service or product quality in the Tucson, Arizona market for ready-mix concrete; and
- d. by increasing the likelihood that customers would be forced to pay higher prices for ready-mix concrete in Tucson, Arizona.

VII. VIOLATIONS CHARGED

17. The Acquisition described in Paragraph 7 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

18. The Acquisition described in Paragraph 7, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the

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FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eleventh day of February, 2005, issues its Complaint against said Respondent.

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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, and having duly considered the comment received from an interested person pursuant to section 2.34 of its Rules, 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.

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- 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:

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(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,

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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

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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.

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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

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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.

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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.

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Appendix C

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

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 determined to accept the executed Consent Agreement and to place such Consent Agreement containing the Decision and Order 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 issues its Complaint, makes the following jurisdictional findings, and issues this Order to Hold Separate and Maintain Assets (“Hold Separate”):

Order to Hold Separate

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 Hold Separate, 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 the Decision and 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. “Decision and Order” means:
 - 1. until the issuance and service of a final Decision and Order by the Commission, the proposed Decision and Order contained in the Consent Agreement in this matter; and
 - 2. following the issuance and service of a final Decision and Order by the Commission, the final Decision and Order issued by the Commission.
- J. “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 the Decision and Order and an Acquirer) related to the Ready Mix Concrete Divestiture Assets required to be divested pursuant to Paragraph II. (or Paragraph III.) of the Decision and Order.

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- K. “Divestiture Trustee” means the Divestiture Trustee appointed pursuant to Paragraph III. of the Decision and Order.
- L. “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 the Decision and Order.
- M. “Held Separate Business” means the Ready Mix Concrete Divestiture Assets and all full-time, part-time, or contract employees of the RMC Ready Mix Concrete Businesses (“Held Separate Business employees”).
- N. “Hold Separate Monitor” means the Person appointed pursuant to Paragraph II. of this Hold Separate.
- O. “Hold Separate Period” means the time period during which the Hold Separate is in effect, which shall begin on the Acquisition Date and terminate pursuant to Paragraph V. hereof.
- P. “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 the Decision and Order and the Hold Separate) and RMC for this purpose.
- Q. “Person” means any individual, partnership, association, firm, company, corporation, or other business entity.

- R. "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.
- S. "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 Divestiture Businesses in the ordinary course and in accordance with past practice, including, but not limited to:
1. 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 to the Decision and Order (attached hereto);
 2. 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 to the Decision and Order (attached hereto);
 3. 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;
 4. all personal property owned, leased, or otherwise held by RMC and used to operate the RMC Ready Mix Concrete Businesses;

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5. 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;
6. 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;
7. all governmental approvals, consents, licenses, permits, waivers, or other authorizations held by RMC and used to operate the RMC Ready Mix Concrete Businesses;
8. all rights of RMC relating to the RMC Ready Mix Concrete Businesses under any warranty and guarantee, express or implied;
9. all books, records, and files held by RMC relating to the RMC Ready Mix Concrete Businesses;
10. 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;

11. 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
12. 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 the Decision and Order.

- T. “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 the Decision and Order.

IT IS FURTHER ORDERED that:

- U. During the Hold Separate Period, Respondent shall hold the Held Separate Business separate, apart, and independent as required by this Hold Separate and shall vest the Held Separate Business with all rights, powers, and authority necessary to conduct its business; Respondent shall not exercise direction or control over, or influence directly or indirectly, the Held Separate Business or any of its operations, or the Hold Separate Monitor, except to the extent that Respondent must exercise direction and control over the Held Separate Business as is necessary to assure compliance with this Hold Separate, the Consent Agreement, the Decision and Order, and all applicable laws.
- V. Until the Effective Date of Divestiture, Respondent shall take such actions as are necessary to maintain the viability and marketability of the Held Separate Business and to prevent the destruction, removal, wasting, deterioration, or

Order to Hold Separate

impairment of any of the assets, except for ordinary wear and tear.

- W. The purpose of this Hold Separate is to: (1) preserve the Held Separate Business as a viable, competitive, and ongoing business independent of Respondent until the divestiture required by the Decision and Order is achieved; (2) assure that no Material Confidential Information is exchanged between Respondent and the Held Separate Business, except in accordance with the provisions of this Hold Separate; and (3) prevent interim harm to competition pending the relevant divestiture and other relief.
- X. Respondent shall hold the Held Separate Business separate, apart, and independent on the following terms and conditions:
 - 1. Mr. Stephen J. Roebuck shall serve as Hold Separate Monitor, pursuant to the agreement executed by the Hold Separate Monitor and Respondent and attached as Confidential Appendix B (“Monitor Agreement”).
 - a. Respondent shall, no later than one (1) day after the Acquisition Date, transfer to the Hold Separate Monitor all rights, powers, and authorities necessary to permit the Hold Separate Monitor to perform his duties and responsibilities, pursuant to this Hold Separate and consistent with the purposes of the Decision and Order, and shall include in the Monitor Agreement all provisions necessary to effectuate this requirement.
 - b. The Hold Separate Monitor shall have the responsibility, consistent with the terms of this Hold Separate and the Decision and Order, for monitoring the organization of the Held Separate Business; for managing the Held Separate Business through the Manager; for maintaining the independence of the

Held Separate Business; and for monitoring Respondent's compliance with its obligations pursuant to this Hold Separate and the Decision and Order.

- c. Subject to all applicable laws and regulations, the Hold Separate Monitor shall have full and complete access to all personnel, books, records, documents, and facilities of the Held Separate Business or to any other relevant information as the Hold Separate Monitor may reasonably request including, but not limited to, all documents and records kept by Respondent in the ordinary course of business that relate to the Held Separate Business. Respondent shall develop such financial or other information as the Hold Separate Monitor may reasonably request and shall cooperate with the Hold Separate Monitor. Respondent shall take no action to interfere with or impede the Hold Separate Monitor's ability to monitor Respondent's compliance with this Hold Separate, the Consent Agreement, the Decision and Order, or otherwise to perform his duties and responsibilities consistent with the terms of this Hold Separate.
- d. The Hold Separate Monitor shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Hold Separate Monitor's duties and responsibilities.
- e. The Commission may require the Hold Separate Monitor to sign an appropriate confidentiality agreement relating to materials and information received from the Commission in connection with performance of the Hold Separate Monitor's duties.

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- f. Respondent may require the Hold Separate Monitor to sign an appropriate confidentiality agreement prohibiting the disclosure of any Material Confidential Information gained as a result of his role as Hold Separate Monitor to anyone other than the Commission.
- g. Thirty (30) days after the Hold Separate becomes final, and every thirty (30) days thereafter until the Hold Separate terminates, the Hold Separate Monitor shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Hold Separate. Included within that report shall be the Hold Separate Monitor's assessment of the extent to which the businesses comprising the Held Separate Business are meeting (or exceeding) their projected goals as are reflected in operating plans, budgets, projections or any other regularly prepared financial statements.
- h. If the Hold Separate Monitor ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate, the Commission may appoint a substitute Hold Separate Monitor consistent with the terms of this paragraph, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of the substitute Hold Separate Monitor within five (5) days after notice by the staff of the Commission to Respondent of the identity of any substitute Hold Separate Monitor, Respondent shall be deemed to have consented to the selection of the proposed substitute Hold Separate Monitor. Respondent and the substitute Hold Separate Monitor shall execute a Monitor Agreement, subject to the approval of the Commission, consistent with this paragraph.

2. No later than one (1) day after the Acquisition Date, Respondent shall enter into a management agreement with, and transfer all rights, powers, and authorities necessary to manage and maintain the Held Separate Business to, Mr. Michael Smith, the current Vice President of Operations and General Manager of Tucson Ready-Mix, Inc. (“Manager”).
 - a. In the event that Mr. Smith declines an offer to act as the Manager, or if Mr. Smith accepts the position of Manager and, subsequently, ceases to act as Manager, then Respondent shall select a substitute Manager, subject to the approval of the Commission, and transfer to the substitute Manager all rights, powers and authorities necessary to permit the substitute Manager to perform his/her duties and responsibilities, pursuant to this Hold Separate.
 - b. The Manager shall report directly and exclusively to the Hold Separate Monitor and shall manage the Held Separate Business independently of the management of Respondent. The Manager shall not be involved, in any way, in the operations of the other businesses of Respondent during the term of this Hold Separate.
 - c. The Manager shall have no financial interests affected by Respondent’s revenues, profits or profit margins, except that the Manager’s compensation for managing the Held Separate Business may include economic incentives dependent on the financial performance of the Held Separate Business if there are also sufficient incentives for the Manager to operate the Held Separate Business at no less than current rates of operation (including, but not limited to, current rates of production and sales) and to achieve the objectives of this Hold Separate.

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- d. The Manager shall make no material changes in the present operation of the Held Separate Business except with the approval of the Hold Separate Monitor, in consultation with the Commission staff.
 - e. The Manager shall have the authority, with the approval of the Hold Separate Monitor, to remove Held Separate Business employees and replace them with others of similar experience or skills. If any person ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate, the Manager, in consultation with the Hold Separate Monitor, may request Respondent to, and Respondent shall, appoint a substitute person, which person the Manager shall have the right to approve.
 - f. In addition to employees within the Held Separate Business, the Manager may employ such Persons as are reasonably necessary to assist the Manager in managing the Held Separate Business.
 - g. The Hold Separate Monitor shall be permitted, in consultation with the Commission staff, to remove the Manager for cause. Within fifteen (15) days after such removal of the Manager, Respondent shall appoint a replacement Manager, subject to the approval of the Commission, on the same terms and conditions as provided in Paragraph II.D.2 of this Hold Separate.
3. The Held Separate Business shall be staffed with sufficient employees to maintain the viability and competitiveness of the Held Separate Business. To the extent that such employees leave or have left the Held Separate Business prior to the Effective Date of Divestiture, the Manager, with the approval of the Hold Separate Monitor, may replace departing or departed employees with persons who have similar experience and

expertise or determine not to replace such departing or departed employees.

4. In connection with support services or products not included within the Held Separate Business, Respondent and RMC shall continue to provide, or offer to provide, the same support services to the Held Separate Business as are being provided to such business interests by Respondent and RMC as of the date the Consent Agreement is signed by Respondent. For any services or products that Respondent and RMC may provide to the Held Separate Business, Respondent may charge no more than the same price they charge others for the same services or products. Respondent's or RMC's personnel providing such services or products must retain and maintain all Material Confidential Information of the Held Separate Business on a confidential basis, and, except as is permitted by this Hold Separate, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any person whose employment involves any of Respondent's or RMC's businesses, other than the Held Separate Business. Such personnel shall also execute confidentiality agreements prohibiting the disclosure of any Material Confidential Information of the Held Separate Business.
 - a. Respondent and RMC shall offer to the Held Separate Business any services and products that Respondent or RMC provided to their other businesses directly or through third party contracts, or that they have provided directly or through third party contracts to the businesses constituting the Held Separate Business at any time since January 1, 2004. The Held Separate Business may, at the option of the Manager with the approval of the Hold Separate Monitor, obtain such services and products from Respondent or RMC. The services and products that

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Respondent or RMC shall offer the Held Separate Business shall include, but shall not be limited to, the following:

- (1) human resources and administrative services, including but not limited to payroll processing, labor relations support, pension administration, and procurement and administration of employee benefits, including health benefits;
 - (2) environmental health and safety services, which are used to develop corporate policies and insure compliance with federal and state regulations and corporate policies;
 - (3) financial accounting services;
 - (4) preparation of tax returns;
 - (5) audit services;
 - (6) information technology support services;
 - (7) processing of accounts payable and accounts receivable;
 - (8) technical support;
 - (9) procurement of supplies;
 - (10) procurement of goods and services utilized in the ordinary course of business by the Held Separate Business; and
 - (11) legal services.
- b. the Held Separate Business shall have, at the option of the Manager with the approval of the Hold

Separate Monitor, the ability to acquire services and products from third parties unaffiliated with Respondent or RMC.

5. Respondent shall cause the Hold Separate Monitor, the Manager, and each employee having access to Material Confidential Information to submit to the Commission a signed statement that the individual will maintain the confidentiality required by the terms and conditions of this Hold Separate. These individuals must retain and maintain all Material Confidential Information relating to the Held Separate Business on a confidential basis and, except as is permitted by this Hold Separate, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any of Respondent's businesses other than the Held Separate Business. These persons shall not be involved in any way in the management, production, distribution, sale, marketing, or financial operations of the competing businesses of Respondent.
6. No later than five (5) days after the Acquisition Date, Respondent shall establish written procedures, subject to the approval of the Hold Separate Monitor, covering the management, maintenance, and independence of the Held Separate Business consistent with the provisions of this Hold Separate.
7. No later than five (5) days after the date this Hold Separate becomes final, Respondent shall circulate to employees of the Held Separate Business, and to persons who are employed in Respondent's businesses that compete with the Held Separate Business, a notice of this Hold Separate and the Consent Agreement, in the form attached hereto as Appendix C.

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8. The Hold Separate Monitor and the Manager shall serve, without bond or other security, at the cost and expense of Respondent, on reasonable and customary terms commensurate with each person's experience and responsibilities.
9. Respondent shall indemnify the Hold Separate Monitor and Manager and hold each harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Hold Separate Monitor's or the Manager'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 liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Hold Separate Monitor or the Manager.
10. Respondent shall provide the Held Separate Business with sufficient financial resources:
 - a. as are appropriate in the judgment of the Hold Separate Monitor to operate the Held Separate Business as it is currently operated;
 - b. to perform all maintenance to, and replacements of, the assets of the Held Separate Business;
 - c. to carry on existing and planned capital projects and business plans; and
 - d. to maintain the viability, competitive vigor, and marketability of the Held Separate Business.

Such financial resources to be provided to the Held Separate Business shall include, but shall not be limited to, (i) general funds, (ii) capital, (iii) working capital, and (iv) reimbursement

for any operating losses, capital losses, or other losses; *provided, however*, that, consistent with the purposes of the Decision and Order, the Manager may reduce in scale or pace any capital or research and development project, or substitute any capital or research and development project for another of the same cost.

11. Respondent shall not, during the Hold Separate Period, directly or indirectly, solicit, induce, or attempt to solicit or induce any employee of the Held Separate Business for positions with Respondent. The Acquirer shall have the option of offering employment to any Held Separate Business employee. Respondent shall not interfere with the employment by the Acquirer of such employees; shall not offer any incentive to such employees to decline employment with the Acquirer or to accept other employment with the Respondent; and shall remove any impediments that may deter such employees from accepting employment with the Acquirer including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts that would affect the ability of such employees to be employed by the Acquirer, and the payment, or the transfer for the account of the employee, of all current and accrued bonuses, pensions and other current and accrued benefits to which such employees would otherwise have been entitled had they remained in the employment of the Respondent.
12. For a period of one (1) year commencing on the Effective Date of Divestiture, Respondent shall not, directly or indirectly, solicit, induce or attempt to solicit or induce any Held Separate Business employees 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 Held Separate Business; *provided, however*, a violation of this provision will not occur if:
(1) the individual's employment has been terminated by

Order to Hold Separate

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.

13. Except for the Manager, Held Separate Business employees, and support services employees involved in providing services to the Held Separate Business pursuant to Paragraph II.D.4., and except to the extent provided in Paragraph II.A., Respondent shall not permit any other of its employees, officers, or directors to be involved in the operations of the Held Separate Business.
14. Respondent shall assure that Held Separate Business employees receive, during the Hold Separate Period, their salaries, all current and accrued bonuses, pensions and other current and accrued benefits to which those employees otherwise would have been entitled.
15. Respondent's employees (excluding the Manager, Held Separate Business employees and employees involved in providing support services to the Held Separate Business pursuant to Paragraph II.D.4.) shall not receive, or have access to, or use or continue to use any Material Confidential Information of the Held Separate Business not in the public domain except:
 - a. as required by law; and
 - b. to the extent that necessary information is exchanged:
 - (1) in the course of consummating the Acquisition;
 - (2) in negotiating agreements to divest assets pursuant to the Consent Agreement and engaging in related due diligence;
 - (3) in complying with this Hold Separate or the Consent Agreement;

- (4) in overseeing compliance with policies and standards concerning the safety, health, and environmental aspects of the operations of the Held Separate Business and the integrity of the financial controls of the Held Separate Business;
- (5) in defending legal claims, investigations or enforcement actions threatened or brought against or related to the Held Separate Business; or
- (6) in obtaining legal advice.

Nor shall the Manager or Held Separate Business employees receive or have access to, or use or continue to use, any Material Confidential Information not in the public domain about Respondent and relating to Respondent's businesses, except such information as is necessary to maintain and operate the Held Separate Business. Respondent may receive aggregate financial and operational information relating to the Held Separate Business only to the extent necessary to allow Respondent to comply with the requirements and obligations of the laws of the United States and other countries, and to prepare consolidated financial reports, tax returns, reports required by securities laws, and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph.

16. Respondent and the Held Separate Business shall jointly implement, and at all times during the Hold Separate Period maintain in operation, a system, as approved by the Hold Separate Monitor, of access and data controls to prevent unauthorized access to or dissemination of Material Confidential Information of the Held Separate Business, including, but not limited to, the opportunity by the Hold Separate Monitor, on terms and conditions agreed to with Respondent, to audit Respondent's networks and systems to verify compliance with this Hold Separate.

Order to Hold Separate

III.

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 Hold Separate, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in Respondent.

IV.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Hold Separate, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent made to their principal United States offices, 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 relating to any matters contained in this Hold Separate; 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 any such matters.

V.

IT IS FURTHER ORDERED that this Hold Separate shall terminate at the earlier of:

- A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or

B. The day after the Effective Date of Divestiture (the date the divestiture required by the Decision and Order is completed).

By the Commission, Chairman Majoras recused.

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

Confidential Appendix B

HOLD SEPARATE MONITOR AGREEMENT

Order to Hold Separate

Appendix C**NOTICE OF DIVESTITURE AND REQUIREMENT FOR
CONFIDENTIALITY**

Cemex, S.A. de C.V. (“Cemex”), hereinafter referred to as “Respondent,” has entered into an Agreement Containing Consent Orders (“Consent Agreement”) with the Federal Trade Commission relating to the divestiture of certain assets and other relief.

As used herein, the term “Held Separate Business” means RMC’s ready mix concrete, aggregate and asphalt facilities located in Tucson, Arizona and Rio Rico, Arizona, and all full-time, part-time or contract employees whose duties relate primarily to the Held Separate Business. Under the terms of the Decision and Order contained in the Consent Agreement, Cemex must divest the Held Separate Business within six months after the Acquisition Date.

During the Hold Separate Period (which begins on the date that Cemex acquires RMC and ends after Cemex has completed the required divestiture of the Held Separate Business), the Held Separate Business shall be held separate, apart, and independent from Cemex’s other businesses. The Held Separate Business must be maintained as a separate, ongoing business, independent of all other businesses of Cemex, until Cemex has completed the required divestiture. All competitive information relating to the Held Separate Business must be retained and maintained by the persons involved in the operation of the Held Separate Business on a confidential basis, and such persons are prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person employed by Cemex or whose employment relates to any of Cemex’s businesses other than the Held Separate Business. These individuals shall not be involved in any way in the management, production, distribution, sales, marketing, or financial operations of the competing products or services of Cemex. Similarly, persons involved in similar activities in Respondent Cemex’s businesses are prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any similar information to or

with any other person whose employment involves the Held Separate Business, except as otherwise provided in the Hold Separate Order.

Until the Held Separate Business is divested, Respondent must take such actions as are necessary to maintain the viability, marketability, and competitiveness of the Held Separate Business, and to prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer, or impairment of the Held Separate Business or any assets related thereto, except for ordinary wear and tear.

Any violation of the Consent Agreement may subject Respondent to civil penalties and other relief as provided by law.

Analysis

**Analysis of Agreement Containing Consent Orders to Aid
Public Comment****I. Introduction**

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) from Cemex, S.A. de C.V. (“Cemex”). The purpose of the Consent Agreement is to remedy the anticompetitive effects resulting from Cemex’s proposed acquisition of RMC, PLC (“RMC”). The Consent Agreement requires Cemex to divest RMC’s Tucson, Arizona ready-mix concrete business within six months of the date Cemex signed the Consent Agreement. The Consent Agreement also includes an Order to Hold Separate and Maintain Assets that requires Cemex to preserve the RMC Tucson, Arizona ready-mix concrete business as a viable, competitive, and ongoing operation until the divestiture is achieved.

The Consent Agreement has been placed on the public record for 30 days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the Consent Agreement and the comments received, and will decide whether it should withdraw from the proposed Consent Agreement or make it final.

Pursuant to an Implementation Agreement dated September 27, 2004, Cemex agreed to acquire 100 percent of the existing shares of RMC for approximately \$5.8 billion (“Proposed Acquisition”). The Commission’s complaint alleges that the Proposed Acquisition, if consummated, would violate 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, by substantially lessening competition in the Tucson, Arizona market for the manufacture and sale of ready-mix concrete.

II. The Parties

Headquartered in Monterrey, Mexico, Cemex is the third largest cement company in the world, with significant downstream businesses in ready-mix concrete and related products. Cemex's operations in Tucson, Arizona consist of four ready-mix concrete plants, all of which are supplied internally with concrete aggregates.

RMC is a United Kingdom Holding Company headquartered in London, with nine subsidiaries doing business in the United States. RMC is the world's largest supplier of ready-mix concrete and a leading producer of cement and aggregates in Europe. RMC has five ready-mix concrete plants in the Tucson, Arizona area, all of which are supplied internally with locally-produced aggregates.

III. The Tucson, Arizona Ready-Mix Concrete Market

The relevant product market in which to assess the competitive effects of the Proposed Acquisition is ready-mix concrete. Ready-mix concrete is produced at local plants by combining cement, aggregates, and water in accordance with precise specifications. Once blended, ready-mix concrete is delivered to construction sites as a slurry in trucks with revolving drums. At construction sites, ready-mix concrete is poured and formed into its final shape. Among building products, ready-mix concrete is unique because it is pliable when freshly mixed and strong and permanent when hardened. Due to ready-mix concrete's exceptional characteristics as a building material, ready-mix concrete customers would not switch to other materials, such as steel, wood, or asphalt, in the event of a five to ten percent increase in the price of ready-mix concrete. Indeed, for some applications, such as certain building foundations, concrete's unique structural characteristics make it the only viable construction material.

The relevant geographic market in which to analyze the effects of the Proposed Acquisition is the Tucson, Arizona metropolitan area. The geographic scope of competition in ready-mix concrete

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is circumscribed by the perishable nature of the product. Once ready-mix concrete is blended at a plant and loaded into a truck, it will solidify if it is not poured in a timely manner (typically less than one hour), rendering it useless. Hence, ready-mix concrete generally is sold within a 10 to 20 mile radius of the plant where it is mixed, although the precise mileage may differ depending on traffic patterns and infrastructure. For instance, traffic congestion within a metropolitan area can significantly lengthen delivery times, whereas a plant located on the periphery of the market may be able to serve a larger area. Due to a low value-to-weight ratio, transportation costs also can effectively limit the distance that ready-mix concrete can be shipped. There are three ready-mix competitors in Tucson, each operating at least four ready-mix concrete plants: Cemex, RMC, and Rinker. Each competitor has spaced plants within 20 miles of its other plants, creating a network capable of supplying the entire area.

The three-firm Tucson, Arizona ready-mix concrete market is highly concentrated. If the Proposed Acquisition is consummated, the Tucson, Arizona ready-mix concrete market will become even more concentrated with only two independent suppliers. As a result, the Proposed Acquisition likely would facilitate coordinated behavior between Cemex and its lone remaining competitor. Coordination is particularly likely where the relevant product is homogenous, as is ready-mix concrete. In a two-firm market, each competitor would have an enhanced ability to monitor the other's conduct, and would know with certainty the source of any discounting. Likewise, the accuracy and effectiveness of any retaliation for deviations from the terms of collusion would greatly improve with only one remaining competitor. As a result, the Proposed Acquisition would increase the likelihood that ready-mix concrete purchasers in Tucson, Arizona would be forced to pay higher prices and would receive diminished service. Absent Commission action, Cemex's acquisition of RMC raises significant antitrust concerns in Tucson, Arizona.

Entry into the Tucson, Arizona ready-mix concrete market on a level sufficient to deter or counteract the likely anticompetitive effects of the Proposed Transaction is not likely to occur in a timely manner. Entry into this market is difficult due to a limited availability of the vital raw materials, *i.e.* aggregates and cement, necessary to sustain a new ready-mix concrete operation. In Tucson, Arizona, ready-mix concrete operations are closely intertwined with concrete aggregate operations. As a result, concrete aggregates are not currently available on the open market in Tucson on the scale necessary to sustain a new ready-mix concrete competitor. Thus, a new concrete entrant would need to enter the aggregate business itself, or enter the market contemporaneously with a new aggregate entrant. Neither alternative is likely to occur in a timely manner. Viable locations for concrete aggregates in Tucson are scarce, and even if a suitable site were found, an aggregates entrant would then need to undergo an extensive permitting process with federal, state, and local authorities. Entry into the Tucson, Arizona ready-mix concrete market also is made difficult by the scale required to compete. Entry with a single ready-mix plant would be insufficient, as customers typically require that a supplier have a network of plants. Presently, all three ready-mix companies have a network of at least four plants supplying the entire Tucson metropolitan area. Due to these entry barriers, new entry by a ready-mix concrete company has not occurred in Tucson in over ten years.

IV. The Consent Agreement

The Consent Agreement effectively remedies the Proposed Acquisition's anticompetitive effects in the Tucson, Arizona ready-mix concrete market by requiring Cemex to divest RMC's Tucson, Arizona ready-mix concrete business. Pursuant to the Consent Agreement, Cemex is required to divest the RMC Tucson, Arizona ready-mix concrete business to a buyer, at no minimum price, within six months of the date Cemex signed the Consent Agreement. The acquirer of the RMC Tucson business must receive the prior approval of the Commission. The

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Commission's goal in evaluating possible purchasers of divested assets is to ensure that the competitive environment that existed prior to the acquisition is maintained. A proposed acquirer of divested assets must not itself present competitive problems.

Should Cemex fail to accomplish the divestiture within the time and in the manner required by the Consent Agreement, the Commission may appoint a trustee to divest these assets. If approved, the trustee would have the exclusive power and authority to accomplish the divestiture within six months of being appointed, subject to any necessary extensions by the Commission. The Consent Agreement requires Cemex to provide the trustee with access to information related to the RMC Tucson business as necessary to fulfill his or her obligations.

The Order to Hold Separate and Maintain Assets that is included in the Consent Agreement requires that Cemex hold separate and maintain the viability of the RMC Tucson business as a competitive operation until the business is transferred to the Commission-approved acquirer. Furthermore, it contains measures designed to ensure that no material confidential information is exchanged between Cemex and the RMC Tucson business (except as otherwise provided in the Consent Agreement). The Order to Hold Separate and Maintain Assets is also designed to prevent interim harm to competition in the Tucson, Arizona ready-mix concrete market pending divestiture. Under the Order to Hold Separate and Maintain Assets, the Commission may appoint a Hold Separate Monitor to monitor Cemex's compliance with the Consent Agreement. Pursuant to that Order, the Commission has appointed Stephen J. Roebuck, President, Roebuck Consulting Group, as a Hold Separate Monitor to oversee the RMC Tucson business prior to its divestiture and to ensure that Cemex complies with its obligations under the Consent Agreement. Mr. Roebuck has more than 25 years of construction materials industry experience at all levels of management. Most recently, Mr. Roebuck served as Vice President of Sales and Marketing with Southdown, Inc.'s Concrete Products Division. He is also a former member of the

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Board and Executive Committee of the National Concrete Masonry Association; has authored over 20 industry-specific continuing education programs; and has served as a contributing author and editor for the National Ready Mixed Concrete Association's Certified Concrete Sales Professional program.

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and it is not intended to constitute an official interpretation of the Consent Agreement or proposed Order or to modify the terms of the Consent Agreement or proposed Order in any way.

Complaint

IN THE MATTER OF
CYTEC INDUSTRIES INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-4132; File No. 0410203
Complaint, February 28, 2005--Decision, April 7, 2005

This consent order, among other things, requires the respondent to divest the UCB Amino Resins Business and the Fechenheim Additives Business, including facilities that produce amino resins -- which are used to promote the adhesion of rubber to materials such as steel or fiber, in products such as automotive coatings, coil coatings, can coatings, appliance coatings, and tires -- associated patents and other intellectual property, and other assets, to a buyer approved by the Commission and at no minimum price. An accompanying Order to Hold Separate and Maintain Assets requires the respondent to hold separate and maintain the viability of the UCB Amino Resins Business as a competitive operation until its transfer to the Commission-approved acquirer, and prohibits the exchange of certain material confidential information between the respondent and the UCB Amino Resins Business.

Participants

For the Commission: *Robert S. Tovsky, Sebastian Lorigo, Marc I. Alvarez, Michael H. Knight, Geary A. Gessler, Nicholas Kreisle, and Jeffrey H. Fischer.*

For the Respondent: *Stuart Meiklejohn, Sullivan & Cromwell.*

COMPLAINT

Pursuant to the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that Cytec Industries Inc. ("Cytec"), a corporation subject to the jurisdiction of the Commission, has entered into an agreement to acquire the Surface Specialties division of UCB S.A. ("UCB"), a corporation subject to the jurisdiction of the Commission, and that the acquisition, if consummated, would