

Complaint

IN THE MATTER OF

HOLCIM LTD. AND LAFARGE S.A.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 No. C-4519; File No. 141 0129
Complaint, May 4, 2015 – Decision, June 11, 2015

This consent order addresses the \$24.95 Billion acquisition by Holcim Ltd. (“Holcim”) of Lafarge S.A. (“Lafarge”). Holcim is a Swiss-based, vertically integrated global building materials company. and Lafarge is a vertically integrated global building materials company incorporated in France. In the United States, Holcim currently operates nine portland cement and three slag-grinding plants, as well as a large network of distribution assets. Lafarge currently operates six portland cement and three slag cement-grinding plants as well as numerous distribution terminals. The complaint alleges that merger of Holcim and Lafarge would create the world’s largest cement manufacturer and likely harm competition for portland cement—an essential ingredient in making concrete—in 12 geographic markets in the United States. The consent order eliminates the competitive concerns raised by the acquisition, by requiring the parties to divest assets in each relevant market. Under the order, the two companies are required to divest cement plants, quarries, terminals and other assets in 12 states. The order further requires Holcim to find a Commission-approved buyer for the cement plants and cement terminals located in the U.S., at no minimum price, no later than 120 days from the date the parties consummate the acquisition.

Participants

For the *Commission*: *Jennifer Milici* and *James E. Southworth*.

For the *Respondents*: *George Cary* and *Mark W. Nelson, Cleary Gottlieb Steen & Hamilton*; and *Andrew M. Lacy* and *Matthew J. Reilly, Simpson Thacher & Bartlett LLP*.

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act (“FTC Act”), and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Holcim Ltd. (“Holcim”), a company subject to the jurisdiction of the Commission, has agreed to

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acquire Lafarge S.A. (“Lafarge”), a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, that such acquisition, if consummated, would violate 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, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Holcim is a public limited company registered in Switzerland, with its office and principal place of business located at Zürcherstrasse 156, Jona, 8645 Canton of St. Gallen, Switzerland. Holcim’s principal U.S. subsidiary, Holcim (US) Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its U.S. headquarters and principal place of business located at 24 Crosby Drive, Bedford, MA 01730.

2. Respondent Lafarge is a société anonyme organized, existing, and doing business under and by virtue of the laws of France, with its office and principal place of business located at 61 rue des Belles Feuilles, Paris, France. Lafarge’s principal U.S. subsidiary, Lafarge North America Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland, with its U.S. headquarters and principal place of business located at 8700 W. Bryn Mawr Avenue, Suite 300 S, Chicago, IL 60631.

3. Each 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 company whose business is in or affects commerce, as “commerce” is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THE PROPOSED ACQUISITION

4. Pursuant to a Business Combination Agreement dated July 7, 2014 (“Agreement”), Holcim proposes to make a public exchange offer in accordance with the provisions of French laws

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to acquire all of the issued and outstanding shares of Lafarge in exchange for Holcim shares valued, at the time of entering into the agreement, at approximately \$25 billion (the “Acquisition”). The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

III. THE RELEVANT MARKETS

5. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are the manufacture, import, and sale of:

- a. portland cement, including but not limited to, blended cement, masonry cement, mortar, and clinker; and
- b. ground granulated blast furnace slag (“slag cement”).

6. Portland cement is the essential binding ingredient in concrete. A fine, usually gray powder, portland cement is a chemical combination of calcium, silicon, aluminum, iron, and small amounts of other ingredients. Users mix portland cement with water and aggregates (crushed stone, sand, or gravel) to form concrete, a fundamental building material that is widely used in residential, non-residential, and public infrastructure construction projects.

7. Slag cement is manufactured by grinding granulated blast furnace slag to a suitable fineness. Slag cement is usually used to replace a portion of portland cement in a concrete mixture. Blending or inter-grinding slag cement with portland cement within specified limits can improve the characteristics of the concrete for use in certain environments or construction applications.

8. For the purposes of this Complaint, the relevant geographic areas in which to analyze the effects of the Acquisition on the portland cement market are:

- a. Minneapolis-St. Paul, MN and surrounding areas;
- b. Duluth, MN and surrounding areas;

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- c. Western Wisconsin;
- d. Eastern Iowa;
- e. Memphis, TN and surrounding areas;
- f. Baton Rouge, LA and surrounding areas;
- g. New Orleans, LA and surrounding areas;
- h. Detroit, MI and surrounding areas;
- i. Grand Rapids, MI and surrounding areas;
- j. Northern Michigan;
- k. Western Montana; and
- l. Boston, MA/Providence, RI and surrounding areas.

9. For the purposes of this Complaint, the relevant geographic areas in which to analyze the effects of the Acquisition on the slag cement market are:

- a. the Mid-Atlantic Region, which consists of the states of Maryland, Delaware, New Jersey, Massachusetts, Connecticut, and Rhode Island, as well as the District of Columbia, Eastern New York, Eastern and Central Pennsylvania, and Northern Virginia; and
- b. the Western Great Lakes Region, which consists of the states of Michigan, Indiana, Illinois, Iowa, Wisconsin, and Minnesota.

IV. THE STRUCTURE OF THE MARKETS

10. Respondents Holcim and Lafarge are significant participants in each of the relevant markets, and each relevant market is already highly concentrated. The Acquisition would further increase concentration levels, resulting in the merged company becoming the largest supplier of portland cement and slag cement in each relevant market. Holcim and Lafarge are

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either the only two significant suppliers or two of, at most, four significant suppliers in each of the relevant markets.

V. ENTRY CONDITIONS

11. New entry into the relevant markets would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. Building a new plant or distribution terminal of sufficient scale requires significant sunk costs and is challenging because of the extensive permitting that is required. Because of the various obstacles that must be overcome, it would take over two years for an entrant to accomplish the steps required for entry and achieve a significant market impact.

VI. EFFECTS OF THE ACQUISITION

12. The effects of the Acquisition, if consummated, may be to substantially lessen competition or 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, by eliminating actual, direct, and substantial competition between Respondents Holcim and Lafarge and reducing the number of significant competitors in each relevant market; thereby increasing the likelihood that:

- a. the merged company would unilaterally exercise market power in the relevant markets;
- b. the remaining firms in the relevant markets would engage in collusion or coordinated interaction between or among each other; and
- c. consumers would be forced to pay higher prices or accept reduced service.

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VII. VIOLATIONS CHARGED

13. The Agreement described in Paragraph 4 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

14. The Acquisition described in Paragraph 4, 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 FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fourth day of May, 2015, issues its Complaint against said Respondents.

By the Commission, Commissioner Wright dissenting.

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The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Respondent Holcim Ltd. (“Holcim”) of Respondent Lafarge S.A. (“Lafarge”) (collectively, “Respondents”), and Respondents 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 Respondents 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

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Respondents 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

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an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts 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 has reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and Order to Hold Separate and Maintain Assets ("Hold Separate Order"), 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 Holcim is a public limited company registered in Switzerland, with its office and principal place of business located at Zürcherstrasse 156, Jona, 8645 Canton of St. Gallen, Switzerland. Holcim's principal U.S. subsidiary, Holcim (US) Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its U.S. headquarters and principal place of business located at 24 Crosby Drive, Bedford, MA 01730.
2. Respondent Lafarge is a société anonyme organized, existing, and doing business under and by virtue of the laws of France, with its office and principal place of business located at 61 rue des Belles Feuilles, Paris, France. Lafarge's principal U.S. subsidiary, Lafarge North America Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland, with its U.S. headquarters and principal place of business located at 8700 W. Bryn Mawr Avenue, Suite 300 S, Chicago, IL 60631.

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3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondents, and this proceeding is in the public interest.

ORDER**I.**

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

- A. “Holcim” means Holcim Ltd., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Holcim Ltd., including Holcim (US) Inc. and Holcim (Canada) Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Lafarge” means Lafarge S.A., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Lafarge S.A., including Lafarge North America, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Respondent” or “Respondents” means Lafarge and Holcim, individually and collectively.
- D. “Acquirer” means a person or entity approved by the Commission to acquire any of the Assets To Be Divested pursuant to this Order.
- E. “Acquisition” means the proposed merger of Holcim and Lafarge, as described and contemplated by the Business Combination Agreement dated July 7, 2014 between Holcim and Lafarge, as amended on March 20, 2015.

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- F. “Acquisition Date” means the date the Acquisition is consummated.
- G. “Assets To Be Divested” means the businesses and facilities, or portions thereof, listed below, but excluding in each case the Excluded Assets:
1. The Camden Slag Plant;
 2. The Canada/Great Lakes Assets;
 3. The Elmira Terminal;
 4. The Everett Terminal;
 5. The Grandville Terminal;
 6. The Mississippi River Assets;
 7. The Rock Island Terminal;
 8. The Skyway Slag Plant; and
 9. The Trident Assets;

Provided, however, that the Assets To Be Divested need not include those assets consisting of or pertaining to any of the Respondents’ trademarks, trade dress, service marks, or trade names, except with respect to any purchased inventory or as may be provided in any Remedial Agreement(s).

Provided, further, that in cases in which books and records included in the Assets To Be Divested contain information (a) that relates both to the Assets To Be Divested and to other retained businesses of Respondents or (b) such that Respondents have a legal obligation to retain the original copies, then Respondents shall be required to divest only copies or relevant excerpts of the materials containing such information. In instances where such copies are divested to an Acquirer, the Respondents shall provide to such Acquirer access to original materials under

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circumstances where copies of materials are insufficient for regulatory or evidentiary purposes.

- H. “Bettendorf Terminal” means the Terminal Assets relating to Summit’s Bettendorf Terminal located at 2871 Depot Street, Bettendorf, Iowa, that stores, distributes and sells Cement and related products.
- I. “Buzzi” means River Cement Sales Company d/b/a Buzzi Unicem USA, a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 100 Brodhead Road, Bethlehem, PA 18017-8989.
- J. “Buzzi Divestiture Agreement” means the two Divestiture Agreements dated as of April 15, 2015 by and between Respondent Holcim and Buzzi, attached as non-public Appendix I, for the divestiture of the Elmira Terminal, the Grandville Terminal, and the Rock Island Terminal.
- K. “Camden Slag Plant” means the Plant Assets relating to Holcim’s Slag plant located at 2500 Broadway, Camden, New Jersey, that produces, stores, distributes and sells Slag and related products.
- L. “Canada/Great Lakes Assets” means:
 - 1. The Plant Assets relating to Holcim’s Mississauga Cement plant located at 2391 Lakeshore Road, Mississauga, Ontario, Canada, that produces, stores, distributes and sells Cement and related products;
 - 2. The Terminal Assets relating to Holcim’s Buffalo terminal located at 1751 Fuhrmann Boulevard, Buffalo, New York, that stores, distributes and sells Cement and related products;
 - 3. The Terminal Assets relating to Holcim’s Cleveland terminal located at 6925 Granger,

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Independence, Ohio that stores, distributes and sells Cement and related products;

4. The Terminal Assets relating to Holcim's Detroit terminal located at 101 N. Forman, Detroit, Michigan that stores, distributes and sells Cement and related products;
 5. The Terminal Assets relating to Holcim's Duluth terminal located at 1100 Port Terminal Drive, Duluth, Minnesota that stores, distributes and sells Cement and related products; and
 6. The Terminal Assets relating to Holcim's Dundee terminal located at 15125 Day Road, Dundee, Michigan that stores, distributes and sells Cement and related products;
- M. "Canada Competition Bureau" or "CCB" means the Competition Bureau of Canada, the Commissioner of Competition under Canada's Competition Act, the Competition Tribunal established by Canada's Competition Tribunal Act, or any other Canadian governmental, judicial or regulatory entity with responsibility for granting clearances or approvals relating to competition or antitrust matters.
- N. "Cement" means the product that is the result of the combination of calcium (normally from limestone), silicon, aluminum, iron and other raw materials, and that is produced by quarrying, crushing and grinding the raw materials, burning them in kilns at high temperatures, and then finely grinding the resulting pellets ("clinker") with gypsum into an extremely fine powder. The term "Cement" includes, but is not limited to, Portland cement, masonry and mortar cement, and the clinker that is ground to produce Cement.
- O. "Commission" means the Federal Trade Commission.
- P. "Direct Costs" means cost not to exceed the cost of labor, material, travel, and other expenditures to the

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extent the costs are directly incurred to provide services under this Order or the Hold Separate Order. “Direct Cost” to an Acquirer for its use of any of Respondents’ employees’ labor shall not exceed the then-current average wage rate for such employee, including benefits.

- Q. “Divestiture Agreement” means any agreement between Respondents and an Acquirer (or a Divestiture Trustee appointed pursuant to Paragraph V. of this Order and an Acquirer) and all amendments, exhibits, attachments, agreements, and schedules thereto, related to any of the Assets To Be Divested that has been approved by the Commission to accomplish the requirements of this Order. The term “Divestiture Agreement” includes, as appropriate, the Buzzi Divestiture Agreement, the Eagle Divestiture Agreement, the Essroc Divestiture Agreement, and the Summit Divestiture Agreement.
- R. “Divestiture Date” means the date any of the respective divestitures required by this Order are consummated.
- S. “Divestiture Trustee” means any person or entity appointed by the Commission pursuant to Paragraph V. of this Order to act as a trustee in this matter.
- T. “Eagle” means Eagle Materials Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its offices and principal place of business located at 3811 Turtle Creek, Suite 1100, Dallas, Texas 75219-4487.
- U. “Eagle Divestiture Agreement” means the Divestiture Agreement dated as of March 3, 2015 by and between Respondent Holcim and Eagle, attached as non-public Appendix II, for the divestiture of the Skyway Slag Plant.
- V. “Elmira Terminal” means the Terminal Assets relating to Holcim’s Elmira terminal located at 8649 Parmater

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Road and 8715 Parmater Road, Elmira, Michigan that stores, distributes and sells Cement and related products.

- W. “Essroc” means Essroc Cement Corp., a corporation organized, existing, and doing business under and by virtue of the laws of the state of Pennsylvania, with its offices and principal place of business located at 3251 Bath Pike, Nazareth, Pennsylvania 18064.
- X. “Essroc Divestiture Agreement” means the two Divestiture Agreements dated as of April 14, 2015 by and between Respondent Holcim and Essroc, attached as non-public Appendix III, for the divestiture of the Camden Slag Plant and the Everett Terminal.
- Y. “Everett Terminal” means the Terminal Assets relating to Holcim’s Everett terminal located at 202 Rover Street, Everett, Massachusetts that stores, distributes and sells Cement and related products.
- Z. “Excluded Assets” means the “Excluded Assets” as defined in each Divestiture Agreement approved by the Commission.
- AA. “Grandville Terminal Assets” means the Terminal Assets relating to Holcim’s Grandville terminal located at 3443 Viaduct Street SW, Grandville, Michigan that stores, distributes and sells Cement and related products.
- BB. “Hold Separate Monitor” means the Person approved by the Commission to serve as a Hold Separate Monitor pursuant to the Hold Separate Order issued by the Commission.
- CC. “Hold Separate Order” means the Order to Hold Separate and Maintain Assets issued by the Commission in this matter.
- DD. “Know-How” means know-how, trade secrets, techniques, data, inventions, practices, methods, and

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other confidential or proprietary technical, business, research, development and other similar information.

EE. “Material Confidential Information” means any material non-public information relating to the Assets To Be Divested either prior to or after the applicable Divestiture Date, including, but not limited to, business and strategic plans, customer or supplier lists, customer or supplier contract terms, information about sales to customers or purchases from suppliers, manufacturing volumes or costs, price lists, marketing methods, or Know-How, and:

1. Obtained by Respondents prior to the Divestiture Date; or,
2. Obtained by Respondents after the Divestiture Date, in the course of performing Respondents’ obligations under any Remedial Agreement(s) or the Hold Separate Order;

Provided, however, that Material Confidential Information shall not include:

- x. Information that is in the public domain when received by Respondents;
- y. Information that is not in the public domain when received by Respondents and thereafter becomes public through no act or failure to act by Respondents;
- z. Information that Respondents develop or obtain independently, without violating any applicable law or this Order, and without breaching any confidentiality obligation with respect to the information; and,
- aa. Information that becomes known to Respondents from a third party not in breach of applicable law or a confidentiality obligation with respect to the information.

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FF. “Mississippi River Assets” means:

1. The Plant Assets relating to Lafarge’s Davenport Cement plant located at 301 East Front Street, Buffalo, Iowa that produces, stores, distributes and sells Cement and related products;
2. The Terminal Assets relating to Lafarge’s Red Rock terminal located at 1363 Red Rock Road, St. Paul, Minnesota that stores, distributes and sells Cement and related products;
3. The Terminal Assets relating to Lafarge’s Minneapolis terminal located at 33 26th Ave North Minneapolis, Minnesota that stores, distributes and sells Cement and related products;
4. The Terminal Assets relating to Lafarge’s Des Moines terminal located at 275 South 11th Street, West Des Moines, Iowa that stores, distributes and sells Cement and related products;
5. The Terminal Assets relating to Lafarge’s La Crosse terminal located at 816 Bain Bridge St., La Crosse, Wisconsin that stores, distributes and sells Cement and related products;
6. The Terminal Assets relating to Lafarge’s Memphis terminal located at 48 Henry Avenue, Memphis, Tennessee that stores, distributes and sells Cement and related products;
7. The Terminal Assets relating to Lafarge’s Union terminal located at 10650 Hwy 44, Convent, Louisiana that stores, distributes and sells Cement and related products; and
8. The Terminal Assets relating to Lafarge’s France Road terminal located at 2315 France Street, New Orleans, Louisiana that stores, distributes and sells Cement and related products.

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GG. “Monitor” means any person or entity appointed by the Commission pursuant to Paragraph IV. of this Order to act as a monitor in this matter.

HH. “Plant Assets” means all of Respondents’ rights, title, and interest in and to all assets, tangible and intangible, relating to, used in, or reserved for use in, its Cement and Slag plant operations, including but not limited to, all: real property, whether owned or leased, and including any quarries, pits, or other natural resource rights (together, in each case, with all easements, rights of way, buildings, improvements, and appurtenances); personal property; equipment, machinery and tools; furniture and fixtures; vehicles, railcars, barges or other transportation vessels; storage facilities; inventory and supplies; raw materials; books and records; contracts; customer and vendor lists; licenses, government approvals, registrations, permits, and applications (to the extent transferable); telephone and fax numbers; and goodwill;

Provided, that, Plant Assets need not include terminals that receive, store, distribute, or sell Cement, Slag or related products produced or distributed by the plant, unless otherwise required by this Order.

II. “Proposed Acquirer” means any proposed acquirer of any of the Assets To Be Divested submitted to the Commission for its approval under this Order; “Proposed Acquirer” includes, as appropriate, Buzzi, Eagle, Essroc, and Summit.

JJ. “Remedial Agreement(s)” means:

1. Any Divestiture Agreement; and
2. Any other agreement between a Respondent and a Commission-approved Acquirer (or between a Divestiture Trustee and a Commission-approved Acquirer), including but not limited to any Transition Services Agreement and any Cement or Slag supply, throughput, storage or transportation

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agreement, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Assets To Be Divested, that have been approved by the Commission to accomplish the requirements of this Order.

- KK. “Rock Island Terminal” means the Terminal Assets relating to Holcim’s Rock Island terminal located at 625 First Avenue, Rock Island, Illinois, that stores, distributes and sells Cement and related products.
- LL. “Slag” means ground granulated blast furnace slag (or “GGBFS”), which is a cementitious material produced by grinding granulated blast furnace slag to a suitable fineness for use as a hydraulic binder in the production of concrete and mortar.
- MM. “Skyway Slag Plant” means the Plant Assets relating to Holcim’s Slag plant located at 3020 East 103rd Street, Chicago, Illinois that produces, stores, distributes and sells Slag and related products.
- NN. “Summit” means Summit Materials, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its offices and principal place of business located at 1550 Wynkoop Street, 3rd Floor, Denver, Colorado. “Summit” includes its wholly-owned subsidiary Continental Cement Company, LLC.
- OO. “Summit Divestiture Agreement” means the Divestiture Agreement dated as of April 16, 2015 by and between Respondent Lafarge and Summit, attached as non-public Appendix IV, for (a) the divestiture of the Mississippi River Assets to Summit and (b) the purchase by Respondents of the Bettendorf Terminal from Summit.
- PP. “Terminal Assets” means all of Respondents’ rights, title, and interest in and to all assets, tangible and intangible, relating to, used in, and/or reserved for use in, its Cement terminal operations, including but not

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limited to, all: real property, whether owned or leased (together, in each case, with all easements, rights of way, buildings, improvements, and appurtenances); personal property; equipment, machinery and tools; furniture and fixtures; vehicles, railcars, barges or other transportation vessels; storage facilities; inventory and supplies; raw materials; books and records; contracts; customer and vendor lists; licenses, government approvals, registrations, permits, and applications (to the extent transferable); telephone and fax numbers; and goodwill;

Provided, that, Terminal Assets need not include any of the Cement or Slag production plants that supply Cement, Slag or related products to the terminal, unless otherwise required by this Order.

QQ. “Trident Assets” means:

1. The Plant Assets relating to Holcim’s Trident Cement plant located at 4070 Trident Road, Three Forks, Montana that produces, stores, distributes and sells Cement and related products;
2. The Terminal Assets relating to Holcim’s Edmonton terminal located at 10122 17th Street NW, Edmonton, Alberta, Canada, that stores, distributes and sells Cement and related products; and
3. The Terminal Assets relating to Holcim’s Lethbridge terminal located at 5114 1st Street, Coalhurst, Alberta, Canada, that stores, distributes and sells Cement and related products.

RR. “Transition Services Agreement” means an agreement that receives the prior approval of the Commission between one or both Respondents and an Acquirer of any of the assets divested under this Order to provide, at the option of the Acquirer and at no more than the Direct Costs of the Respondents, any services (or training for the Acquirer to provide services for itself)

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reasonably necessary to transfer the divested assets to the Acquirer in a manner consistent with the purposes of this Order, and may include, but are not limited to, payroll, employee benefits, accounting, IT systems, supply, distribution, warehousing, terminal or throughput services, access to Know-How, use of trademarks or trade names, or other logistical and administrative support.

II.**IT IS FURTHER ORDERED** that:

- A. Respondents shall divest the Assets To Be Divested, absolutely and in good faith, as follows:
1. Within 10 days of the Acquisition Date, the Camden Slag Plant and the Everett Terminal shall be divested to Essroc pursuant to and in accordance with the Essroc Divestiture Agreement;
 2. Within 10 days of the Acquisition Date, the Mississippi River Assets shall be divested to Summit pursuant to and in accordance with Summit Divestiture Agreement;
 3. Within 10 days of the Acquisition Date, the Elmira Terminal, the Grandville Terminal, and the Rock Island Terminal shall be divested to Buzzi pursuant to and in accordance with the Buzzi Divestiture Agreement;
 4. Within 10 days of the Acquisition Date, the Skyway Slag Plant shall be divested to Eagle pursuant to and in accordance with the Eagle Divestiture Agreement; and
 5. Within 120 days of the Acquisition Date, the Canada/Great Lakes Assets and the Trident Assets shall be divested, at no minimum price, to one or more Acquirers that receives the prior approval of the Commission, and in a manner that receives the prior approval of the Commission.

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Provided, however, that such Acquirer(s) shall have received all necessary approvals from the Canada Competition Bureau to acquire the Canada/Great Lakes Assets and the Trident Assets prior to the applicable Divestiture Date(s);

- B. *Provided, that,* if prior to the date this Order becomes final, Respondents have divested the Assets To Be Divested pursuant to Paragraph II.A.1.-4. and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that:
1. Any Proposed Acquirer identified in Paragraph II.A.1.-4. is not an acceptable Acquirer, then Respondents shall, within five days of notification by the Commission, rescind such transaction with that Proposed Acquirer, and shall divest such assets, absolutely and in good faith, at no minimum price, to an Acquirer and in a manner that receives the prior approval of the Commission, within 90 days of the date the Commission notifies Respondents that such Proposed Acquirer is not an acceptable Acquirer; or
 2. The manner in which any divestiture identified in Paragraph II.A.1.-4. was accomplished is not acceptable, the Commission may direct the Respondents, or appoint a Divestiture Trustee pursuant to Paragraph V. of this Order, to effect such modifications to the manner of divesting those assets to such Acquirer (including, but not limited to, entering into additional agreements or arrangements, or modifying the relevant Divestiture Agreement) as may be necessary to satisfy the requirements of this Order.
- C. All Remedial Agreement(s) approved by the Commission:
1. Shall be deemed incorporated by reference into this Order, and any failure by Respondents to comply

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with the terms of any such Remedial Agreement(s) shall constitute a violation of this Order; and

2. Shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of any Acquirer or to reduce any obligation of Respondents under such agreement. If any term of any Remedial Agreement(s) varies from the terms of this Order (“Order Term”), then to the extent that Respondents cannot fully comply with both terms, the Order Term shall determine Respondents’ obligations under this Order.

D. At the option of each Acquirer, and subject to the prior approval of the Commission, Respondents shall enter into a Transition Services Agreement for a term extending up to two years following the relevant Divestiture Date, which agreement may be terminated at any time by the Acquirer without penalty upon commercially reasonable notice to Respondents.

E. Prior to each applicable Divestiture Date:

1. Respondents shall secure, at their sole expense, consents from any third parties that are necessary to effect the complete transfer of the Assets To Be Divested to each Acquirer, and for each Acquirer to operate the Assets To Be Divested in a manner consistent with the purposes of this Order;

Provided, however, that for consents not required to be secured by the Divestiture Date pursuant to the applicable Divestiture Agreement, Respondents shall use commercially reasonable efforts to secure such consents promptly following the Divestiture Date;

Provided, further, that Respondents shall not be required to secure the consent of any governmental agency relating to any permit, license, or right that

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Respondents have no legal right to divest or transfer to the Acquirer; and

2. Respondents shall use best efforts to assist each Acquirer to obtain from any governmental agency the transfer from Respondents or issuance to the Acquirer of any permit, license, or right that Respondents have no legal right to divest or transfer to the Acquirer.

F. Pending divestiture of any of the Assets To Be Divested, Respondents shall:

1. Take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Assets To Be Divested, to minimize any risk of loss of competitive potential for the Assets To Be Divested, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Assets To Be Divested, except for ordinary wear and tear; and
2. Not sell, transfer, encumber, or otherwise impair the Assets To Be Divested (other than in the manner prescribed in this Decision and Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the Assets To Be Divested.

G. With respect to each Divestiture Agreement:

1. Respondents shall provide reasonable opportunity in advance of the Divestiture Date for the Proposed Acquirer to:
 - a. Meet personally, and outside of the presence or hearing of any employee or agent of Respondents, with any or all of the employees of the Assets To Be Divested pursuant to the applicable Divestiture Agreement; and
 - b. Make offers of employment to any or all of the employees of the Assets To Be Divested

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pursuant to the applicable Divestiture Agreement;

2. Respondents shall: (i) not directly or indirectly interfere with the hiring by the Acquirer of employees of the Assets To Be Divested; (ii) not directly or indirectly attempt to persuade any one or more of the employees of any Assets To Be Divested to decline any offer of employment from any Acquirer, or offer any incentive to any employee to decline employment with any Acquirer; (iii) remove any impediments within the control of Respondents that may deter those employees from accepting employment with such Acquirer (including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondents that would affect the ability or incentive of those individuals to be employed by such Acquirer); (iv) not make any counteroffer to any employee who has an outstanding offer of employment, or who has accepted an offer of employment, from an Acquirer; and (v) continue to extend to any employee of the Assets To Be Divested, prior to the applicable Divestiture Date, all employee benefits offered in the ordinary course of business, including regularly scheduled or merit raises and bonuses, and regularly scheduled vesting of all pension benefits;
3. Respondents shall not, directly or indirectly, for a period of two (2) years from the applicable Divestiture Date, solicit, negotiate, hire, or enter into any arrangement for the services of any employee of the Assets To Be Divested who has accepted an offer of employment with, or who is employed by, an Acquirer.

Provided, however, a violation of this provision will not occur if:

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- a. The employee's employment has been terminated by the Acquirer;
 - b. Respondents advertise for employees in newspapers, trade publications, or other media not targeted specifically at any one or more of the employees of the Acquirer(s); or,
 - c. Respondents hire an employee who has applied for employment with Respondents, provided that such application was not, directly or indirectly, solicited or induced by Respondents in violation of this Order.
- H. The purpose of the divestitures is to ensure the continuation of the Assets To Be Divested as ongoing, viable facilities engaged in the Cement and/or Slag businesses 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. Respondents shall not:
1. Provide, disclose, or otherwise make available any Material Confidential Information to any person except as required or permitted by this Order, the Hold Separate Order, or any Remedial Agreement(s); or
 2. Use any Material Confidential Information for any reason or purpose other than as required or permitted by this Order, the Hold Separate Order, or any of the Remedial Agreement(s), and shall limit access to Material Confidential Information to only those employees necessary for Respondents to fulfill their obligations under the Order, the Hold Separate Order, or the Remedial Agreement(s).

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- B. Respondents shall devise and implement measures to protect against the storage, distribution, and use of Material Confidential Information that is not permitted by this Order, the Hold Separate Order, or the Remedial Agreement(s). These measures shall include, but not be limited to, restrictions placed on access by persons to information available or stored on any of Respondents' computers or computer networks.
- C. Notwithstanding anything else in paragraph III of this Order and subject to the Hold Separate Order, Respondents may use and disclose Material Confidential Information:
 - 1. In the ordinary course of business in the operation of Respondents' retained businesses and assets if:
 - a. The Material Confidential Information relates both to the Assets To Be Divested and to Respondents' retained businesses or assets;
 - b. The Divestiture Agreement permits Respondents to retain Material Confidential Information that also relates to Respondents' retained businesses or assets; and
 - c. Respondents protect against the disclosure or use of such Material Confidential Information in the same way Respondents protect against the disclosure or use of Respondents' other confidential information;
 - 2. For the purpose of performing Respondents' obligations under this Order, the Hold Separate Order, or the Remedial Agreement(s);
 - 3. To ensure compliance with legal and regulatory requirements including, but not limited to:
 - a. Retaining a copy of Material Confidential Information for the sole purpose of complying with any applicable law, regulations, and other legal obligations; and,

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- b. Requirements of the rules and regulations of the Securities and Exchange Commission and of any stock, the performance of necessary audits and the maintenance of effective internal controls and procedures for required disclosures of financial information;
- 4. To provide accounting, information technology, and credit-underwriting services;
- 5. To provide legal services associated with actual or potential litigation and transactions;
- 6. To monitor and ensure compliance with financial, tax reporting, governmental environmental, health, and safety requirements; or
- 7. As otherwise provided by this Order and the Hold Separate Order.

IV.**IT IS FURTHER ORDERED** that:

- A. The Commission appoints ING Financial Markets LLC as Monitor, and approves the agreement between the Monitor and Respondents, attached as Appendix V (“Monitor Agreement”) and Non-Public Appendix V-1 (“Monitor Compensation”). The Monitor is appointed to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order and the Remedial Agreement(s).
- B. The Monitor’s duties and responsibilities shall include the following, among other responsibilities that may be required:
 - 1. The Monitor shall act in a fiduciary capacity for the benefit of the Commission;

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2. The Monitor shall serve until such time as Respondents have complied fully with all of their obligations under the Remedial Agreement(s);
3. The Monitor shall have the power and authority to Monitor Respondents' compliance with this Order and the Remedial Agreement(s);
4. The Monitor shall have power and authority to review and audit, at the Respondents' sole cost and expense, the books and records of Respondents to determine whether Respondents have complied fully with their obligations under the Order and the Remedial Agreement(s);
5. The Monitor shall exercise such power and authority and carry out his or her duties and responsibilities in a manner consistent with the purposes of this Order and in consultation with the Commission and its staff;
6. The Monitor shall review all reports submitted to the Commission by Respondents under this Order and, within thirty (30) days from the date the Monitor receives a report, the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Order and the Remedial Agreement(s); and,
7. The Monitor shall provide written reports to the Commission every 60 days, or upon a schedule determined by Commission staff, that provides the Commission with timely information to determine if Respondents have complied and are complying with their obligations under this Order and the Remedial Agreement(s). In addition, the Monitor shall provide such additional written reports as Commission staff may request that reasonably are related to determining if Respondents have complied and are complying with their obligations under this Order and the Remedial Agreement(s).

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The Monitor shall not provide to Respondents, and Respondents shall not be entitled to receive, copies of these reports.

- C. Respondents shall grant and transfer to the Monitor, and such Monitor shall have, all rights, powers, and authority necessary to carry out the Monitor's duties and responsibilities, including, but not limited to, the following:
1. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with this Order and the Remedial Agreement(s);
 2. Subject to any demonstrated legally recognized privilege, Respondents shall provide the Monitor full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondents' compliance with its obligations under this Order and the Remedial Agreement(s);
 3. Within one (1) calendar day of submitting a report required by this Order, Respondents shall deliver a copy of such report to the Monitor;
 4. Except as otherwise set forth in this Order, the Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions to which the Monitor and Respondents agree and that the Commission approves;
 5. The Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

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6. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations 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 gross negligence, willful or wanton acts, or bad faith by the Monitor; and,
7. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement.

Provided, however, that such agreement shall not restrict the Monitor from providing any information to the Commission or its staff, or require the Monitor to report to Respondents the substance of communications to or from the Commission, its staff, or an Acquirer.

- D. Respondents shall comply with all terms of the Monitor Agreement, and any breach by Respondents of any term of the Monitor Agreement shall constitute a violation of this Order. Notwithstanding any paragraph, section, or other provision of the Monitor Agreement, any modification of the Monitor Agreement, without the prior approval of the Commission, shall constitute a failure to comply with this Order.
- E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.

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- F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor. The Commission shall select the substitute Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed substitute Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed substitute Monitor, Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor. Not later than ten (10) days after the appointment of the Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondents' compliance with the relevant requirements of this Order and the Remedial Agreement(s) in a manner consistent with the purpose of this Order. If a substitute Monitor is appointed, Respondents shall consent to the terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor as set forth in this Paragraph.
- G. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.
- H. A Monitor appointed pursuant to this Order may be, but need not be, the same person appointed as the Divestiture Trustee pursuant to Paragraph V. of this Order and as Hold Separate Monitor appointed pursuant to the Hold Separate Order.

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V.**IT IS FURTHER ORDERED** that:

- A. If Respondents have not divested all of the Assets To Be Divested in the time and manner required by Paragraph II of this Order, the Commission may appoint a Divestiture Trustee to divest the remaining Assets To Be Divested, and to enter into Transition Services Agreements and other Remedial Agreement(s), and perform Respondents' other obligations, in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the required assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including one or more court-appointed Divestiture Trustees, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.
- B. The Commission may select a Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, and stated in writing their reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

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1. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement for any divestitures required by Paragraph II. of this Order 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 effectuate the divestitures required by, and satisfy the additional obligations imposed by, this Order. Any failure by Respondents to comply with a trust agreement approved by the Commission shall be a violation of this Order.
2. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
 - a. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to effectuate the divestitures required by, and satisfy the additional obligations imposed by, this Order.
 - b. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture required by this Order, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan to satisfy the divestiture obligations of this Order, or believes that such obligation can be achieved within a reasonable time, the period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; *provided, however*, that the Commission may extend the period only two (2) times.

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- c. Subject to any demonstrated legally recognized privilege, any Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be divested by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as any Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede any Divestiture Trustee's accomplishment of the divestiture. Any delays caused by Respondents shall extend the time under this Paragraph for a time period equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.
- d. Any Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner that receives the prior approval of the Commission and to an Acquirer that receives the prior approval of the Commission as required by this Order; *provided, however*, if any Divestiture Trustee receives bona fide offers for any asset to be divested 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 Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such entity within five (5) days after receiving notification of the Commission's approval.

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- e. Any Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. Any Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, 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. Any Divestiture Trustee shall account for all monies derived from the divestitures 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 Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of any Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.
- f. Respondents shall indemnify any 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 gross negligence, malfeasance, willful or wanton acts, or bad faith by the Divestiture Trustee.

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- g. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
 - h. The Divestiture Trustee shall report in writing to Respondents and to the Commission every thirty (30) days concerning the Divestiture Trustee's efforts to accomplish the divestitures.
 - i. Respondents 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.
- C. If the Commission determines that the 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.
- D. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of any Divestiture Trustee, issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures required by this Order.
- E. The Divestiture Trustee appointed pursuant to this Paragraph may be, but need not be, the same person as the Monitor appointed under this Order and as Hold Separate Monitor appointed pursuant to the Hold Separate Order.

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VI.**IT IS FURTHER ORDERED** that:

- A. Within thirty (30) days after the date this Order is issued, and every thirty (30) days thereafter until the completion of the last divestiture required by this Order, Respondents shall submit to the Commission (and a complete copy to the Monitor appointed under this Order, and the Hold Separate Monitor appointed under the Hold Separate Order) a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order. For the period covered by this report, the report shall include, but not be limited to, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraph II. of this Order, including a description of all substantive contacts or negotiations for the divestitures and the identity and contact information of all parties contacted. Respondents shall include in the reports copies of all material written communications to and from such parties, all internal memoranda reviewing or evaluating possible acquirers or divestiture proposals, and all reports and recommendations concerning completing the obligations.
- B. On the first anniversary of the date this Order is issued, and thereafter on each subsequent anniversary until Respondents have satisfied in full all of their obligations under Paragraph II. of this Order and all of the Remedial Agreement(s), Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order. For the period covered by each such report, Respondents shall state the name and contact information for each Person that maintains or claims (regardless of whether Respondents agree or disagree with such Person, and regardless whether a judicial or arbitration action has been threatened or commenced)

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that one or more Respondents have failed to comply fully with the Order (including any Remedial Agreement(s) made a part thereof), briefly describe the Person's claim, and provide copies of any written communications between Respondents and the Person concerning the claim.

VII.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to:

- A. Any proposed dissolution of Respondents;
- B. Any proposed acquisition, merger or consolidation of Respondents; or
- C. Any other change in the Respondents, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

VIII.

IT IS FURTHER ORDERED that for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to Respondents made to either Respondent's principal United States offices, registered office of its United States subsidiary, or its headquarters address, Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of Respondents 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 Respondents related to compliance with this Order, which copying services shall be provided by Respondents at the request of the authorized representative(s) of the Commission and at the expense of the Respondents; and

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- B. To interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

IX.

IT IS FURTHER ORDERED that this Order shall terminate on June 11, 2025.

By the Commission, Commissioner Wright dissenting.

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APPENDIX I

Buzzi Divestiture Agreement

**[Redacted From the Public Record, But Incorporated By
Reference]**

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APPENDIX II

Eagle Divestiture Agreement

**[Redacted From the Public Record, But Incorporated By
Reference]**

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APPENDIX III

Essroc Divestiture Agreement

**[Redacted From the Public Record, But Incorporated By
Reference]**

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APPENDIX IV

Summit Divestiture Agreement

**[Redacted From the Public Record, But Incorporated By
Reference]**

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APPENDIX V**Monitor Agreement**

Appendix V

REDACTED PUBLIC VERSION

MONITOR AGREEMENT

This Monitor Agreement (this "Agreement") entered into this 16th day of April, 2015 by and among ING Financial Markets LLC ("ING" or the "Monitor"), Lafarge S.A. ("Lafarge"), and Holcim Ltd. ("Holcim," collectively with Lafarge, "Respondents") (ING, Lafarge and Holcim together, the "Parties") provides as follows:

WHEREAS, the United States Federal Trade Commission (the "Commission") has accepted or will shortly accept for public comment an Agreement Containing Consent Order, including a proposed Decision and Order and a proposed Order to Hold Separate and Maintain Assets ("Hold Separate Order" and collectively, the "Orders"), which, among other things, requires the divestiture of certain plant and terminal assets, as defined in the Orders, and contemplates the appointment of a Monitor to monitor Respondents' compliance with their obligations under the Orders;

WHEREAS, the Commission has appointed ING as Monitor pursuant to the Orders, and ING has consented to such appointment;

WHEREAS, the Orders further provide that Respondents shall execute an agreement, subject to the prior approval of the Commission, that confers all the rights and powers necessary to permit the Monitor to monitor Respondents' compliance with the terms of the Orders; and

WHEREAS, the parties to this Agreement intend to be legally bound, subject only to the Commission's approval of this Agreement.

NOW, THEREFORE, the Parties agree as follows:

All capitalized terms used in this Agreement and not specifically defined herein shall have the respective definitions given to them in the Orders.

ARTICLE I

1.1 Monitor's Responsibilities. The Monitor shall be responsible for monitoring Respondents' compliance with their obligations as set forth in the Orders and the Divestiture Agreements, as defined in the Orders ("Monitor's Responsibilities").

1.2 Access to Relevant Information and Facilities. The Monitor shall have full and complete access to the personnel, facilities, books, and records of Respondents related to Respondents' obligations under the Orders and the Divestiture Agreements, as the Monitor may reasonably request. Respondents shall cooperate with any reasonable request of the Monitor. The Monitor shall give Respondents reasonable notice of any request for such access or such information and shall attempt to schedule any access or requests for information in such a manner as will not unreasonably interfere with Respondents' operations. At the request of the Monitor, Respondents shall promptly arrange meetings and discussions, including tours of relevant facilities, at reasonable times and locations between the Monitor and employees of Respondents who have knowledge relevant to the proper discharge of the Monitor's responsibilities under the Orders.

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APPENDIX V

Appendix V

1.3 Compliance Reports. Respondents shall provide the Monitor with copies of all compliance reports filed with the Commission in a timely manner, but in any event no later than five (5) business days after the date on which Respondents file such a report with the Commission;

1.4 Monitor's Obligations. The Monitor shall:

- a. carry out the Monitor's Responsibilities, including submission of periodic reports, and such additional written reports as may be requested by the Commission staff, to the Commission staff regarding Respondents' compliance with the Orders;
- b. maintain the confidentiality of all confidential information, including Confidential Business Information, and any other non-public confidential information provided to the Monitor by Respondents, the Acquirers of the Divested Businesses, any supplier or customer of Respondents, or the Commission, and shall use such confidential information only for the purpose of discharging the his obligations pursuant to this Agreement and not for any other purpose, including, without limitation, any other business, scientific, technological, or personal purpose. The Monitor may disclose confidential information only to:
 - i. persons employed by ING Groep N.V. or an affiliate of ING Groep N.V. or who are working with the Monitor under this Agreement;
 - ii. persons working with the Monitor under this Agreement (and only to the extent such persons have executed a confidentiality agreement consistent with the provisions of this Agreement); and
 - iii. persons employed at the Commission or Canadian Competition Bureau working on this matter.
 - iv. The Monitor shall maintain a record and inform the Commission of all persons (other than the persons referenced in 1.4 (b)(i) and 1.4 (b)(ii) above) to whom confidential information related to this Monitor Agreement has been disclosed.
- c. require any consultants, accountants, attorneys, and any other representatives or assistants retained by the Monitor to assist in carrying out the Monitor's Responsibilities to execute a confidentiality agreement that requires such third parties to treat confidential information with the same standards of care and obligations of confidentiality to which the Monitor must adhere under this Agreement;
- d. maintain the confidentiality, for a period of ten (10) years after the termination of this Agreement, of all other aspects of the performance of the Monitor's Responsibilities and not disclose any confidential information, including Confidential Business Information, relating thereto; and

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APPENDIX V

Appendix V

- e. upon termination of the Monitor's duties under this Agreement, the Monitor shall consult with the Commission's staff regarding disposition of any written and electronic materials (including materials that Respondents provided to the Monitor) in the possession or control of the Monitor that relate to the Monitor's duties, and the Monitor shall dispose of such materials, which may include sending such materials to the Commission's staff, as directed by the staff. In response to a request by Respondents to return or destroy materials that Respondents provided to the Monitor, the Monitor shall inform the Commission's staff of such request and, if the Commission's staff do not object, shall comply with the Respondents' request. Notwithstanding the foregoing, the Monitor shall not be required to return or destroy confidential information contained in an archived computer back-up system for its disaster recovery and/or security purposes, and it may retain a copy of confidential information, subject to the terms of this Agreement, in accordance with its internal record retention procedures for legal or regulatory purposes. Nothing herein shall abrogate the Monitor's duty of confidentiality, which includes an obligation not to disclose any non-public information obtained while acting as a Monitor for ten (10) years after termination of this Agreement.

For the purpose of this Agreement, information shall not be considered confidential or proprietary to the extent that it is or becomes part of the public domain (other than as the result of any action by the Monitor or by any employee, agent, affiliate or consultant of the Monitor), or to the extent that the recipient of such information can demonstrate that such information was already known to the recipient at the time of receipt from a source other than the Monitor, the Respondents, or any director, officer, employee, agent, consultant or affiliate of the Monitor or the Respondents, when such source was not known to recipient after due inquiry to be restricted from making such disclosure to such recipient.

In the event that confidential information must be disclosed by the Monitor or any person referenced in 1.4(b)(i) or 1.4(b)(iii) herein under applicable law or pursuant to legal process, such party shall, to the extent not otherwise prohibited, give written notice to the Respondents that such disclosure is required so that the Respondents may, at their sole expense, seek an appropriate protective order or waive compliance with the terms hereof or both. If absent the entry of a protective order or the receipt of a waiver of this Monitor Agreement, the Monitor or any person referenced in 1.4(b)(i) or 1.4(b)(iii) herein is compelled by law or legal process to disclose any confidential information, such party (x) may disclose such information solely to the extent required by law, (y) shall not disclose such information until such time as it is required by law, and (z) shall exercise commercially reasonable efforts to obtain reliable assurances that confidential treatment will be accorded to any confidential information so disclosed. Notwithstanding the foregoing, the Monitor or any person referenced in 1.4(b)(i) or 1.4(b)(iii) herein may disclose confidential information to any regulatory or self-regulatory agency having jurisdiction over such party in the course of routine

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APPENDIX V**Appendix V**

reviews or audits when such disclosure is required by law, which confidential information may be disclosed without notice or restriction.

1.5 Monitor Payment. Respondents will pay the Monitor the hourly fee specified in the attached confidential fee schedule ("Hourly Fee") for all reasonable time spent in performance of the Monitor's duties under this Agreement. In addition, Respondents will pay: (a) out-of-pocket expenses reasonably incurred by the Monitor in the performance of the Monitor's duties; and (b) fees and disbursements reasonably incurred by such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities hereunder, however, all such out-of-pocket expenses and fees and disbursements shall be pre-approved by Respondents, which shall not withhold approval unreasonably. The Monitor shall invoice Respondents on a monthly basis, within seven (7) days of the conclusion of the month, including details and an explanation of all matters for which the Monitor submits an invoice to Respondents. Respondents shall pay such invoices within thirty (30) days of receipt. Any consultants, accountants, attorneys, and other representatives and assistants retained by the Monitor shall invoice their services to the Monitor who will review and approve such invoices and submit to Respondents for payment. At their own expense, Respondents may retain an independent auditor to verify such invoices. The Monitor and Respondents shall submit any disputes about invoices to the Commission for assistance in resolving such disputes.

1.6 Monitor's Indemnification. Respondents indemnify the Monitor, ING Groep N.V. and all affiliates of ING Groep N.V. and their directors and employees (the "Indemnified Parties") and Respondents shall hold the Indemnified Parties harmless (regardless of any action, whether in contract, statutory law, tort or otherwise) against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties and obligations hereunder, 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 gross negligence, willful misconduct, or bad faith by the Indemnified Parties. The Monitor's maximum liability to the Respondents relating to services rendered pursuant to this Monitor Agreement (regardless of the form of the action, whether in contract, statutory law, tort, or otherwise) shall be limited to the total sum of the fees paid to the Monitor by Respondents, except to the extent resulting from the gross negligence, willful misconduct or bad faith by the Indemnified Parties, in which case the liability is not so limited.

1.7 Disputes. In the event of a disagreement or dispute between Respondents and the Monitor concerning Respondents' obligations under one or both of the Orders, and, in the event that such disagreement or dispute cannot be resolved by the Parties, any Party may seek the assistance of the individual in charge of the Commission's Compliance Division.

1.9 Conflicts of Interest. If the Monitor becomes aware during the term of this Agreement that it has or may have a conflict of interest that may affect or could have the appearance of affecting performance by the Monitor of any of the Monitor's Responsibilities, the Monitor shall immediately inform Respondents and the Commission of any such conflict.

Decision and Order

APPENDIX V

Appendix V

ARTICLE II

2.1 Termination. This Agreement shall terminate upon the earlier of (a) the expiration or termination of the Orders; (b) the expiration or termination of the last to expire of the Divestiture Agreements; (c) Respondents' receipt of written notice from the Commission that the Commission has determined that ING has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve as Monitor; and (d) with at least thirty (30) days advance notice to be provided by the Monitor to Respondents and to the Commission, upon resignation of the Monitor. If this Agreement is terminated for any reason, the confidentiality obligations set forth in Section 1.3 above will remain in force.

2.2 Governing Law. This Agreement and the rights and obligations of the parties hereunder shall in all respects be governed by the substantive laws of the state of New York, including all matters of construction, validity and performance. The Orders shall govern this Agreement and any provisions herein which conflict or are inconsistent with them may be declared null and void by the Commission and any provision not in conflict shall survive and remain a part of this Agreement.

2.3 Disclosure of Information. Nothing in this Agreement shall require Respondents to disclose any material information that is subject to a legally recognized privilege or that Respondents are prohibited from disclosing by reason of law or an agreement with a third party.

2.4 Assignment. This Agreement may not be assigned or otherwise transferred by Respondents or the Monitor without the consent of Respondents and the Monitor and the approval of the Commission. Any such assignment or transfer shall be consistent with the terms of the Orders.

2.5 Modification. No amendment, modification, termination, or waiver of any provision of this Agreement shall be effective unless made in writing, signed by all parties, and approved by the Commission. Any such amendment, modification, termination, or waiver shall be consistent with the terms of the Orders.

2.6 Approval by the Commission. This Agreement shall have no force or effect with respect to the Orders until approved by the Commission.

2.7 Entire Agreement. This Agreement, and those portions of the Orders incorporated herein by reference, constitute the entire agreement of the parties and supersede any and all prior agreements and understandings between the Monitor and Respondents, written or oral, with respect to the subject matter hereof.

2.8 Duplicate Originals. This Agreement may be executed in several counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same document.

2.9 Section Headings. Any heading of a section is for convenience only and is to be assigned no significance whatsoever as to its interpretation and intent.

Decision and Order

APPENDIX V**Appendix V****ARTICLE III**

3.1 In the performance of his functions and duties under this Agreement, the Monitor shall exercise the standard of care and diligence that would be expected of a reasonable person in the conduct of its own business affairs.

3.2 It is understood that the Monitor will be serving under this Agreement as an independent contractor and that the relationship of employer and employee shall not exist between the Monitor and Respondents.

3.3 This Agreement is for the sole benefit of the Parties hereto and their permitted assigns and the Commission, and nothing herein express or implied shall give, or be construed to give, any other person any legal or equitable rights hereunder.

3.4 In the event that ING wishes to terminate this Agreement, ING shall provide written notice to the Respondents and the Commission. Respondents and ING shall work in good faith with the Commission to identify and propose to the Commission a successor Monitor. ING shall continue to serve as Monitor under the terms of this Agreement until such time as the Commission approves a successor Monitor, and ING's termination of this Agreement shall be effective only upon the approval by the Commission of a successor Monitor.

ARTICLE IV

4.1 The Monitor should have all of the powers and responsibilities and protections conferred upon the Monitor by the Hold Separate Order, including but not limited to:

- a. monitoring the organization and operations of the Hold Separate Business;
- b. supervising the management of the Hold Separate Business through the Managers;
- c. maintaining the independence of the Hold Separate Business;
- d. monitoring Respondents' compliance with their obligations as required by the Orders; and
- e. reviewing Replacement Contracts and Allocated Shared Contracts and determining, in consultation with Commission staff, whether these contracts comply with the Hold Separate Order.

4.2 By the date of the Hold Separate Order, Respondents shall transfer to and confer upon the Monitor all rights, powers and authority necessary to permit the Monitor to perform its duties and responsibilities pursuant to and consistent with the purposes of the Hold Separate Order.

4.3 Subject to applicable laws and regulations, the Monitor shall have full and complete access to the personnel, books, records, documents, and facilities of the Hold Separate Business, and to any other relevant information as the Monitor may reasonably request.

Decision and Order

APPENDIX V**Appendix V**

including but not limited to all documents kept by the Respondents in the ordinary course of business that relate to the Hold Separate Business. Respondents shall develop such financial and other information as the Monitor may reasonably request and shall cooperate with the Monitor. The Monitor shall give Respondents reasonable notice of any request for such access or information. The Monitor shall attempt to schedule any access or requests for information in such a manner as will not unreasonably interfere with Respondents' operations.

[The rest of the page has been intentionally left blank.]

Decision and Order

APPENDIX V

Appendix v

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written.

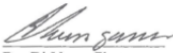
MONITOR

ING Financial Markets LLC

Phillip Comerford, Jr.
Managing Director

RESPONDENTS

Lafarge S.A.


By: Bi Yong Chungunco
Title: Senior Vice President –
Group General Counsel &
Corporate Secretary

Holcim Ltd.

By:
Title:

Decision and Order

APPENDIX V

Appendix V

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written.

MONITOR

ING Financial Markets LLC



Phillip Comerford, Jr.
Managing Director

RESPONDENTS

Lafarge S.A.

By:
Title:

Holcim Ltd.

By:
Title:

Decision and Order

APPENDIX V

Appendix V

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written.

MONITOR

ING Financial Markets LLC

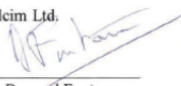
Phillip Comerford, Jr.
Managing Director

RESPONDENTS

Lafarge S.A.

By:
Title:

Holcim Ltd.

 16/04/2015

By: Bernard Fontana
Title: CEO, Holcim Ltd

 16/04/2015

By: Xavier Dedullen
Title: Chief Legal & Compliance Officer,
Holcim Ltd

Decision and Order

APPENDIX V-1

Monitor Compensation

**[Redacted From the Public Record, But Incorporated by
Reference]**

Order to Maintain Assets

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Holcim Ltd. (“Holcim”) of Respondent Lafarge S.A. (“Lafarge”) (collectively, “Respondents”), and Respondents 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 Respondents 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

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”) containing an admission by Respondents 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 Respondents 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 has reason to believe that Respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the Consent Agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure described in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters this Order to Hold Separate and Maintain Assets (“Hold Separate Order”):

1. Respondent Holcim is a public limited company registered in Switzerland, with its office and principal place of business located at Zürcherstrasse 156, Jona, 8645 Canton of St. Gallen, Switzerland. Holcim’s principal U.S. subsidiary, Holcim (US) Inc., is a corporation organized, existing, and doing business

Order to Maintain Assets

under and by virtue of the laws of the State of Delaware, with its U.S. headquarters and principal place of business located at 24 Crosby Drive, Bedford, MA 01730.

2. Respondent Lafarge is a société anonyme organized, existing, and doing business under and by virtue of the laws of France, with its office and principal place of business located at 61 rue des Belles Feuilles, Paris, France. Lafarge's principal U.S. subsidiary, Lafarge North America Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland, with its U.S. headquarters and principal place of business located at 8700 W. Bryn Mawr Avenue, Suite 300 S, Chicago, IL 60631.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Hold Separate Order, the following definitions, and all other definitions used in the Consent Agreement and the Decision and Order, shall apply:

- A. "Allocated Shared Contracts" means contracts between Respondents and Summit that allocate the contract rights and obligations of the Shared Contracts to promote the competitive and viable operation of the Bettendorf Terminal and the Davenport Plant after the Divestiture Date in a manner that achieves the purposes of the Decision & Order.
- B. "CCB Consent Agreement" means the agreement between Respondents and the Canada Competition Bureau dated as of __, which requires that: (a) Respondents divest Holcim's "Alberta Business" and

Order to Maintain Assets

“Canada Business,” as those terms are defined in the agreement, including among other assets the Canada/Great Lakes Assets and the Trident Assets; and (b) Respondents keep the “Alberta Business” and the “Canada Business” separate from the rest of Respondents’ operations following the Acquisition Date.

- C. “Decision and Order” means:
1. the Proposed Decision and Order contained in the Consent Agreement in this matter until issuance and service of a Final Decision and Order by the Commission; and
 2. the Final Decision and Order issued and served by the Commission.
- D. “Hold Separate Business” means the Canada/Great Lakes Assets and the Trident Assets.
- E. “Hold Separate Business Employee” means any employee or agent of the Hold Separate Businesses (other than a Support Services Employee).
- F. “Hold Separate Business Manager” means the Chief Executive Officer of Holcim (Canada) Inc., or such alternative manager as selected by the Hold Separate Monitor, in consultation with Commission staff.
- G. “Hold Separate Period” means the period from the Acquisition Date until the Divestiture Date of the Hold Separate Business.
- H. “Orders” means the Decision and Order and this Hold Separate Order.
- I. “Replacement Contracts” means contracts relating to the same subject matter of the Shared Contracts that provide the Respondents and Summit each with contract rights and obligations that are substantially equivalent in the aggregate to those contract rights and

Order to Maintain Assets

obligations in the Shared Contracts, and that promote the competitive and viable operation of the Bettendorf Terminal and the Davenport Plant after the Divestiture Date in a manner that achieves the purposes of the Decision & Order.

- J. “Required Inputs” means raw materials, Cement, Slag or any other input products used by the Hold Separate Business in the ordinary course of business and in accordance with past practice.
- K. “Shared Contracts” means the contracts relating both to divested businesses and retained businesses that are defined as “Shared Contracts” in the Summit Divestiture Agreement.
- L. “Support Services” means assistance with respect to the operation of the Hold Separate Business, including, but not limited to: (i) human resources and administrative services such as payroll processing and employee benefits; (ii) preparation of tax returns, environmental health and safety services; (iii) financial accounting and reporting services; (iv) legal, licensing, and audit services; (v) licensing and regulatory compliance in any jurisdiction in which it does business; (vi) maintenance and oversight of information technology systems and other computerized or electronic systems and databases; (vii) processing of accounts payable and accounts receivable; (viii) supply, procurement, and related services, including supply of Required Inputs; (ix) public relations and public affairs services; (x) construction and development services; (xi) safety and security services; and (xii) procurement and renewal of insurance and related services. Support Services includes any assistance provided to the Hold Separate Business at any time within twenty four (24) months prior to the commencement of the Hold Separate Period, and in addition, any other assistance or support reasonably required during the Hold Separate Period to achieve the purposes of this Hold Separate Order and the Decision and Order.

Order to Maintain Assets

- M. “Support Services Employee” means any of Respondents employees or agents tasked with providing Support Services under this Hold Separate Order.

II.**IT IS FURTHER ORDERED** that:

- A. Respondents shall operate, or cause to be operated, the Assets To Be Divested in the ordinary course of business and in accordance with past practice. Respondents shall take such actions as are necessary to maintain the full viability, marketability, and competitiveness of the Assets To Be Divested, minimize any risk of loss of competitive potential for the Assets To Be Divested, and prevent the destruction, removal, wasting, deterioration, or impairment of the Assets To Be Divested, except for ordinary wear and tear. Included in these obligations, Respondents shall, without limitation:
1. Maintain and operate the Assets To Be Divested in the ordinary course of business and consistent with past practice (including regular repair and maintenance efforts);
 2. Not sell, transfer, encumber, or otherwise impair the Assets To Be Divested (other than in the manner prescribed in the Decision and Order), nor take any action (or fail to take any action) that lessens the full economic viability, marketability, or competitiveness of the Assets To Be Divested, or that would cause the Assets To Be Divested to be operated in a manner inconsistent with applicable laws or regulations;
 3. Use best efforts to preserve the existing relationships and good will with suppliers, customers, employees, and others having business relationships with the Assets To Be Divested;

Order to Maintain Assets

4. Maintain staffing levels and a work force of equivalent size, training and expertise associated with each of the Assets To Be Divested in the ordinary course of business;
5. Maintain the books and records of the Assets To Be Maintained;
6. Make any payment required to be paid under any contract or lease when due, and otherwise pay all liabilities and satisfy all obligations associated with the Assets To Be Divested in the ordinary course of business and in accordance with past practice;
7. Provide the Assets To Be Divested with sufficient financial and other resources to:
 - a. Operate and staff the Assets To Be Divested in the ordinary course of business and in accordance with past practices;
 - b. Perform all maintenance to, and repair of, the Assets To Be Divested in the ordinary course of business and in accordance with past practice;
 - c. Carry on capital projects, physical plant improvements, and business plans as are already underway or planned, including but not limited to any existing or planned renovation, remodeling, or expansion projects;
 - d. Maintain the viability, competitiveness, and marketability of Assets To Be Divested; and
 - e. Perform any other obligations as required by the Decision and Order and this Hold Separate Order.

Order to Maintain Assets

8. Prior to the Divestiture Date, for each of the Shared Contracts, and in each case subject to the approval of the Hold Separate Monitor (in consultation with Commission staff), negotiate Replacement Contracts or Allocated Shared Contracts in place of each of the Shared Contracts
- B. During the Hold Separate Period, Respondents shall:
1. Keep the Hold Separate Business separate, apart, and independent of Respondents' other businesses and assets as required by this Hold Separate Order, and shall vest the Hold Separate Business with all rights, powers, and authority necessary to conduct its business; and
 2. Not exercise direction or control over, or influence directly or indirectly, the Hold Separate Business or any of its operations, or the Hold Separate Monitor, except to the extent that Respondents must exercise direction and control over the Hold Separate Business as is necessary to assure compliance with this Hold Separate Order, the Consent Agreement, the Decision and Order, the CCB Consent Agreement, and applicable laws.
- C. The purpose of this Hold Separate Order is to: (i) maintain and preserve the Assets To Be Divested as viable, competitive, and ongoing businesses until the divestitures required by the Decision and Order are achieved; (ii) maintain and preserve the Hold Separate Business as a viable, competitive, and ongoing business independent of Respondents during the Hold Separate Period; (iii) assure that no Material Confidential Information is exchanged between Respondents and the Hold Separate Business, except in accordance with the provisions of this Hold Separate Order; (iv) prevent interim harm to competition pending the relevant divestitures; and (v) help remedy any anticompetitive effects of the proposed Acquisition as alleged in the Commission's Complaint.

Order to Maintain Assets

III.

IT IS FURTHER ORDERED that:the Commission appoints ING Financial Markets LLC as Hold Separate Monitor to monitor and supervise the management of the Hold Separate Business and ensure that Respondents comply with their obligations under this Hold Separate Order and the Decision and Order.

- A. Respondents shall enter into the agreement with the Hold Separate Monitor, attached to the Decision and Order as Appendix V, that shall become effective no later than one (1) day after the date this Hold Separate Order is issued, and that transfers to and confers upon the Hold Separate Monitor all rights, powers, and authority necessary to permit the Hold Separate Monitor to perform his or her duties and responsibilities pursuant to this Hold Separate Order in a manner consistent with the purposes of this Hold Separate Order and the Decision and Order and in consultation with Commission staff; and shall require that the Hold Separate Monitor act in a fiduciary capacity for the benefit of the Commission:
 - 1. The Hold Separate Monitor shall have the responsibility for:
 - a. monitoring the organization of the Hold Separate Business; supervising the management of the Hold Separate Business by the Hold Separate Business Manager; maintaining the independence of the Hold Separate Business; and monitoring Respondents' compliance with their obligations pursuant to this Hold Separate Order and the Decision and Order; and,
 - b. Reviewing Replacement Contracts and Allocated Shared Contracts and determining, in consultation with Commission staff, whether these contracts comply with this Hold Separate Order;

Order to Maintain Assets

2. The Hold Separate Monitor shall act in a fiduciary capacity for the benefit of the Commission. 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 Hold Separate Business, and to any other relevant information as the Hold Separate Monitor may reasonably request including, but not limited to, all documents and records kept by Respondents in the ordinary course of business that relate to the Hold Separate Business. Respondents shall develop such financial or other information as the Hold Separate Monitor may reasonably request;
3. The Hold Separate Monitor shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Hold Separate Monitor's duties and responsibilities;
4. The Commission may require the Hold Separate Monitor and each of the Hold Separate Monitor's consultants, accountants, attorneys, and other representatives and assistants 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;
5. Respondents may require the Hold Separate Monitor and each of the Hold Separate Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement; *provided, however*, that such agreement shall not restrict the Hold Separate Monitor from providing any information to the Commission;

Order to Maintain Assets

6. The Hold Separate Monitor shall serve, without bond or other security, at the cost and expense of Respondents, on reasonable and customary terms commensurate with the person's experience and responsibilities;
 7. Respondents shall indemnify the Hold Separate Monitor and hold it harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Hold Separate Monitor'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 the Hold Separate Monitor's malfeasance, gross negligence, willful or wanton acts, or bad faith.
 8. Thirty (30) days after the date the Acquisition is completed, and every thirty (30) days thereafter until the Hold Separate Order terminates, the Hold Separate Monitor shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Hold Separate Order and Respondents' compliance with their obligations under the Hold Separate Order and the Decision and Order.
- B. If the Hold Separate Monitor ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate Order, the Commission may appoint a substitute Hold Separate Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld, as follows:
1. If Respondents have not opposed in writing, including the reasons for opposing, the selection of the proposed substitute Hold Separate Monitor within five (5) business days after notice by the staff of the Commission to Respondents of the

Order to Maintain Assets

identity of the proposed substitute Hold Separate Monitor, then Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor.

2. Respondents shall, no later than five (5) days after the Commission appoints a substitute Hold Separate Monitor, enter into an agreement with the substitute Hold Separate Monitor that, subject to the approval of the Commission, confers on the substitute Hold Separate Monitor all the rights, powers, and authority necessary to permit the substitute Hold Separate Monitor to perform, its, his, or her duties and responsibilities on the same terms and conditions as provided in Paragraph III. of this Hold Separate Order;

Provided, that, if the CCB removes, or fails to appoint, ING Financial Markets LLC as the monitor under the CCB Consent Agreement, the Commission may remove the Hold Separate Monitor and appoint, in consultation with the CCB, a substitute Hold Separate Monitor under this Paragraph.

- C. The Hold Separate Monitor shall serve through the Hold Separate Period; *provided, however*, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.
- D. The Commission may on its own initiative or at the request of the Hold Separate Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Hold Separate Order.
- E. A Monitor appointed pursuant to this Hold Separate Order may be, but need not be, the same Person appointed as the Monitor and/or Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

Order to Maintain Assets

IV.**IT IS FURTHER ORDERED** that:

- A. Respondents shall cooperate with, and take no action to interfere with or impede the ability of: (i) the Hold Separate Monitor, (ii) any Hold Separate Business Employee, or (iii) any Support Services Employee, to perform his or her duties and responsibilities consistent with the terms of this Hold Separate Order and the Decision and Order;
- B. Respondents shall continue to provide, or offer to provide, Support Services and Required Inputs to the Hold Separate Business as were being provided to the Hold Separate Business by Respondents prior to the Acquisition Date;
 - 1. For Support Services and Required Inputs that Respondents provided to the Hold Separate Business prior to the Acquisition Date, Respondents may charge no more than the same price, if any, charged by Respondents for such Support Services and Required Inputs in the ordinary course of business and in accordance with past practice;
 - 2. For any other Support Services and Required Inputs that Respondents may provide to the Hold Separate Business, Respondents may charge no more than Respondents' Direct Cost for the same or similar Support Services or Required Inputs; and
 - 3. Notwithstanding the above, the Hold Separate Business shall have, in consultation with the Hold Separate Monitor, the ability to acquire Support Services or Required Inputs from persons other than Respondents.
- C. Respondents shall not permit:

Order to Maintain Assets

1. Any of its employees, officers, agents, or directors, other than (i) any Hold Separate Employees, and (ii) any Support Services Employees, to be involved in the operations of the Hold Separate Business, except to the extent otherwise provided in this Hold Separate Order.
 2. Any Hold Separate Employee to be involved, in any way, in the operations of Respondents' businesses other than the Hold Separate Business.
- D. Respondents shall provide the Hold Separate Business with sufficient financial and other resources as may be required to fulfill Respondents' obligations and responsibilities under the Orders, and as may reasonably be requested by the Hold Separate Monitor, to:
1. Operate the Hold Separate Business as it was prior to the Acquisition Date (including efforts to generate new business) consistent with the ordinary course practices of the Hold Separate Business in place prior to the Acquisition Date;
 2. Perform all maintenance to, and replacements or remodeling of, the assets of the Hold Separate Business in the ordinary course of business and in accordance with past practice and with current plans;
 3. Carry on such capital projects, physical plant improvements, and business plans as are already under way or planned for which all necessary regulatory and legal approvals have been obtained, including, but not limited to, existing or planned renovation, remodeling, and expansion projects; and
 4. Maintain the viability, competitiveness, and marketability of the Hold Separate Business.

Order to Maintain Assets

Such financial resources to be provided to the Hold 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 Hold Separate Monitor may, in consultation with Commission staff, direct the Hold Separate Business Employees to reduce in scale or pace any capital or research and development project of the Hold Separate Business, or substitute any capital or research and development project of the Hold Separate Business for another of the same cost.

- E. Respondents shall provide each Hold Separate Business Employee with reasonable financial incentives to continue in his or her position consistent with past practices and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Hold Separate Business pending divestiture. Such incentives shall include a continuation of all employee benefits (or employee benefits of substantially equivalent value), including funding of regularly scheduled raises and bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to assure the continuation, and prevent any diminution, of the viability, marketability, and competitiveness of the Hold Separate Business until the Divestiture Date, and as may otherwise be necessary to achieve the purposes of this Hold Separate Order.
- F. No later than ten (10) days after the date the Acquisition Date, Respondents shall establish and implement procedures, subject to the approval of the Hold Separate Monitor, covering the management, maintenance, and independence of the Hold Separate Business consistent with the provisions of this Hold Separate Order.
- G. No later than ten (10) days after the date the Acquisition Date, Respondents shall circulate to Hold

Order to Maintain Assets

Separate Business Employees, Support Services Employees, and to persons who are employed in Respondents' businesses that compete with the Hold Separate Business, a notice of the requirements of this Hold Separate Order, the Decision and Order, and the Consent Agreement, in a form approved by the Hold Separate Monitor in consultation with Commission staff, including copies of the Hold Separate Order and the Decision and Order.

V.**IT IS FURTHER ORDERED** that:

- A. After the Acquisition Date, Respondents' employees, other than employees of the Hold Separate Business and Support Services Employees, shall not receive, or have access to, or use or continue to use any Material Confidential Information of the Hold Separate Business except in the course of:
1. Performing their obligations or as permitted under this Hold Separate Order or the Decision and Order;
 2. Performing their obligations under the Divestiture Agreements;
 3. Negotiating agreements to divest assets pursuant to the Decision and Order and engaging in related due diligence; and
 4. Complying with financial reporting requirements, obtaining legal advice, defending legal claims, conducting investigations, or enforcing actions threatened or brought against the Hold Separate Business, or as required by law. Notwithstanding the above, Respondents may receive aggregate financial and operational information relating to the Hold Separate Business only to the extent necessary to allow Respondents to comply with the requirements and obligations of the laws and

Order to Maintain Assets

regulations of the United States and other countries, to prepare consolidated financial reports, tax returns, reports required by securities laws, and personnel reports, and to comply with this Hold Separate Order or in complying with or as permitted by the Decision and Order. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this Hold Separate Order.

For purposes of this Paragraph V.A., Respondents' employees that provide Support Services or that staff the Hold Separate Business shall be deemed to be performing obligations under this Hold Separate Order.

- B. If access to or disclosure of Material Confidential Information of the Hold Separate Business to Respondents' employees is necessary and permitted under Paragraph V.A. of this Hold Separate Order, Respondents shall:
1. Implement and maintain a process and procedures, as approved by the Hold Separate Monitor, such approval not to be unreasonably withheld, pursuant to which Material Confidential Information of the Hold Separate Business may be disclosed or used only:
 - a. to or by those employees who require such information;
 - b. to the extent such Material Confidential Information is required; and
 - c. after such employees have signed an appropriate agreement in writing to maintain the confidentiality of such information.
 2. Enforce the terms of this Paragraph V. as to any of Respondents' employees and take such action as is

Order to Maintain Assets

necessary to cause each such employee to comply with the terms of this Paragraph V., including training Respondents' employees and taking all other actions that Respondents would take to protect their own trade secrets and proprietary information.

- C. Respondents shall implement, and 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 Hold Separate Business, including, but not limited to, the opportunity by the Hold Separate Monitor, on terms and conditions agreed to with Respondents, to audit Respondents' networks and systems to verify compliance with this Hold Separate Order.
- D. No Hold Separate Business Employee shall receive or have access to, or use or continue to use, any non-public, confidential information relating to Respondents' businesses (not subject to the Hold Separate Order), except such information as is necessary to maintain and operate the Hold Separate Business.

VI.

IT IS FURTHER ORDERED that within thirty (30) days after this Hold Separate Order is issued, and every thirty (30) days thereafter until this Hold Separate Order terminates, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with all provisions of this Hold Separate Order. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with this Hold Separate Order.

Order to Maintain Assets

VII.

IT IS FURTHER ORDERED that each Respondent shall notify the Commission at least thirty (30) days prior to any proposed:

- A. Dissolution of such Respondent;
- B. Acquisition, merger or consolidation of such Respondent; or
- C. Any other change in such Respondent, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Hold Separate Order.

VIII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Hold Separate Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to Respondents, Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of the Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Respondents related to compliance with this Hold Separate Order, which copying services shall be provided by Respondents at its expense; and
- B. To interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

Order to Maintain Assets

IX.

IT IS FURTHER ORDERED that this Hold Separate Order 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. With respect to each of the Assets To Be Divested, the day after Respondents' (or a Divestiture Trustee's) completion of the divestiture as described in and required by the Decision and Order.

Provided, however, that if the Commission, pursuant to Paragraph II.B. of the Decision and Order, requires the Respondents to rescind any of the divestitures contemplated by any Divestiture Agreement, then, upon rescission, the requirements of this Hold Separate Order shall again be in effect with respect to the relevant Assets To Be Divested until the day after Respondents' (or a Divestiture Trustee's) completion of the divestiture(s) of the relevant Assets To Be Divested.

By the Commission, Commissioner Wright dissenting.

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) designed to remedy the anticompetitive effects resulting from the proposed acquisition of Lafarge S.A (“Lafarge”) by Holcim Ltd. (“Holcim”). Under the terms of the proposed Consent Agreement, Lafarge is required to divest to Continental Cement Company (“Continental”) its Davenport cement plant and quarry located in Buffalo, Iowa along with cement terminals and associated distribution assets in Minneapolis and St. Paul, Minnesota; La Crosse, Wisconsin; Memphis, Tennessee; and Convent and New Orleans, Louisiana. The Consent Agreement also requires Holcim to divest its Skyway slag cement plant located in Chicago, Illinois to Eagle Materials Inc. (“Eagle”), its slag cement plant located in Camden, New Jersey and its terminal near Boston, Massachusetts to Essroc Cement Corporation (“Essroc”), and its cement terminals in Grandville and Elmira, Michigan and Rock Island, Illinois to Buzzi Unicem USA (“Buzzi”). Finally, the Consent Agreement requires Holcim to divest to a buyer or buyers approved by the Commission (1) Holcim’s Trident, Montana cement plant and two related terminals in Alberta, Canada, and (2) Holcim’s Mississauga cement plant located in Ontario, Canada and related cement terminals in Duluth, Minnesota; Detroit and Dundee, Michigan; Cleveland, Ohio; and Buffalo, New York.

The Consent Agreement has been placed on the public record for 30 days to solicit comments from 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 decide whether it should withdraw from the Consent Agreement, modify it, or make final the Decision and Order (“Order”).

The Transaction

Pursuant to a Combination Agreement dated July 7, 2014, Holcim proposes to acquire 100 percent of the existing shares of Lafarge in a transaction valued at \$24.95 billion at that time. The Commission’s Complaint alleges that the proposed acquisition, if

Analysis to Aid Public Comment

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 certain regional markets in the United States for the manufacture and sale of portland cement and slag cement. The proposed Consent Agreement will remedy the alleged violations by preserving the competition that would otherwise be eliminated by the proposed acquisition.

The Parties

Holcim is a Swiss-based, vertically integrated global building materials company. The company's products include cement, clinker, concrete, lime, and aggregates. In the United States, Holcim currently operates nine portland cement and three slag grinding plants, as well as a large network of distribution assets.

Lafarge is a vertically-integrated global building materials company incorporated in France and headquartered in Paris. Lafarge primarily produces and sells cement, aggregates, and ready-mix concrete. In the United States, Lafarge currently operates six portland cement and three slag cement grinding plants as well as numerous distribution terminals.

The Relevant Products And Structure Of The Markets

In the United States, both parties manufacture and sell portland cement. Portland cement is an essential ingredient in making concrete, a cheap and versatile building material. Because portland cement has no close substitute and the cost of cement usually represents a relatively small percentage of a project's overall construction costs, few customers are likely to switch to other products in response to a small but significant increase in the price of portland cement.

Both parties also manufacture and sell ground, granulated blast furnace slag ("slag cement"), a specialty cement product with unique characteristics that can serve as a partial substitute for portland cement. Customers add slag cement to portland cement to enhance the physical properties of a concrete mixture. It is appropriate to treat slag cement as a separate relevant product because an insufficient number of purchasers would switch to

Analysis to Aid Public Comment

other products in response to a small but significant increase in the price of slag cement to render such a price increase unprofitable.

The primary purchasers of portland and slag cement are ready-mix concrete firms and producers of concrete products. These customers usually pick up portland and slag cement from a cement company's plant or terminal in trucks. Because portland and slag cement are heavy and relatively cheap commodities, transportation costs limit the distance customers can economically travel to pick up the products. The precise scope of the area that can be served by a particular plant or terminal depends on a number of factors, including the density of the specific region and local transportation costs.

Due to transportation costs, cement markets are local or regional in nature. The relevant geographic markets in which to analyze the effects of the proposed acquisition on portland cement competition are (1) the Minneapolis-St. Paul, Minnesota area; (2) the Duluth, Minnesota area; (3) western Wisconsin; (4) eastern Iowa; (5) the Memphis, Tennessee area; (6) the Baton Rouge, Louisiana area; (7) the New Orleans, Louisiana area; (8) the Detroit, Michigan area; (9) northern Michigan; (10) the Grand Rapids, Michigan area; (11) western Montana; and (12) the Boston, Massachusetts/Providence, Rhode Island area. The proper geographic markets in which to analyze the effects of the proposed transaction on slag cement are (1) the Mid-Atlantic region and (2) the western Great Lakes region.

The relevant markets for portland cement and slag cement are already highly concentrated. For each of the relevant markets, the parties are either the only suppliers in the market, two of only three suppliers, or two of only four suppliers.

Entry

Entry into the relevant portland cement and slag cement markets would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the proposed transaction. The cost to construct a new portland cement plant of sufficient size to be competitive would likely cost over \$300 million and take more than five years to

Analysis to Aid Public Comment

permit, design, and construct while the expansion of an existing facility would likely cost hundreds of millions of dollars and take four or more years to complete. Building competitive cement distribution terminals is also difficult and time consuming. It can take more than two years to obtain the necessary permits and complete construction of a competitive terminal in the relevant markets. New entrants into slag cement markets face the additional hurdle of having to obtain a cost-effective source for the raw material. There are few domestic sources for granulated blast furnace slag because there are a limited number of active blast furnaces in the United States. Given the difficulties of entry, it is unlikely that any new entry could be accomplished in a timely manner in the relevant markets to defeat a likely price increase caused by the proposed acquisition.

Effects Of The Acquisition

Unless remedied, the proposed merger would likely result in competitive harm in each of the relevant portland and slag cement markets. The merger would eliminate substantial head-to-head competition between the parties in each of these markets and significantly increase market concentration. For many customers in these markets, the merger would combine the two closest competitors for their business, leaving the merged entity with the power to increase prices to these customers unilaterally. Further, because the merger would reduce the number of significant competitors to, at most, two or three in the relevant markets, it would enhance the likelihood of collusion or coordinated action between the remaining competitors by reducing impediments to reaching common terms of coordination and making it easier to monitor and retaliate against potential deviation from a coordinated scheme.

The Consent Agreement

The proposed Consent Agreement eliminates the competitive concerns raised by Holcim's proposed acquisition of Lafarge by requiring the parties to divest assets in each relevant market. Lafarge is required to divest a cement plant in Buffalo, Iowa and a network of distribution terminals along the Mississippi River in Louisiana, Tennessee, Wisconsin, and Minnesota to Continental. Continental, in turn, will sell its cement terminal located in

Analysis to Aid Public Comment

Bettendorf, Iowa to Lafarge in order to eliminate the competitive overlap that would otherwise be created by its acquisition of Lafarge's Davenport cement plant. Because Lafarge will be able to supply the Bettendorf terminal at a comparable or lower cost than Continental, the transactions contemplated in the Consent Agreement will maintain the competitive status quo in the eastern Iowa market. Holcim is required to divest distribution terminals in Illinois and Michigan to Buzzi. Holcim is further required to divest a terminal in Massachusetts and a slag plant in New Jersey to Essroc and a slag plant in Illinois to Eagle. Each of the identified buyers possesses the experience and capability to become significant competitors in the relevant markets. The parties must accomplish the divestitures to these buyers within ten days after the proposed acquisition is accomplished.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the proposed acquisition. If the Commission determines that any of the identified buyers is not an acceptable acquirer, the proposed Order requires the parties to divest the assets to a Commission-approved acquirer within 90 days of the Commission notifying the parties that the proposed acquirer is not acceptable. If the Commission determines that the manner in which any divestiture was accomplished is not acceptable, the Commission may direct the parties, or appoint a divestiture trustee, to effect such modifications as may be necessary to satisfy the requirements of the Order.

Finally, the proposed Consent Agreement requires Holcim to divest to a buyer or buyers approved by the Commission (1) a cement plant in Trident, Montana and two distribution terminals in Alberta, Canada (the "Trident Assets"), and (2) a cement plant in Mississauga, Ontario and cement terminals in Minnesota, Michigan, Ohio, and New York (the "Great Lakes Assets"). The divestiture of the Trident plant would eliminate the proposed merger's potential anticompetitive impact on purchasers of portland cement located in western Montana. The two Alberta terminals distribute cement produced at the Trident plant and are included in the Consent Agreement in order to preserve the viability and marketability of the Trident Assets. Holcim's Mississauga plant supplies portland cement into the United States both directly and via terminals located in Duluth; Detroit;

Analysis to Aid Public Comment

Dundee, Michigan; Cleveland, Ohio; and Buffalo, New York. The divestiture of the Great Lakes Assets would remedy the proposed merger's anticompetitive effects in the Duluth and Detroit areas. The Cleveland and Buffalo terminals are included in the Consent Agreement in order to preserve the viability and marketability of the Great Lakes Assets. The Trident Assets and Great Lakes Assets are also part of a larger group of Holcim assets located in Canada that the Respondents have agreed to divest in order to resolve competitive concerns raised by the Canadian Competition Bureau ("CCB"). Commission staff worked cooperatively with staff from the CCB to ensure that our respective proposed remedies would be consistent and effective.

The proposed Order provides that Holcim must find a buyer (or buyers) for the Trident Assets and the Great Lakes Assets, at no minimum price, that is acceptable to the Commission, no later than 120 days from the date on which the parties consummate the proposed acquisition. The Consent Agreement also contains an Order to Hold Separate and Maintain Assets, which will serve to ensure that these assets are held separate and operated independently from the merged company and protect the viability, marketability, and competitiveness of the divestiture asset packages until the assets are divested to a buyer or buyers approved by the Commission.

To ensure compliance with the proposed Order, the Commission has agreed to appoint an Interim Monitor to ensure that Holcim and Lafarge comply with all of their obligations pursuant to the Consent Agreement and to keep the Commission informed about the status of the transfer of the rights and assets to appropriate purchasers.

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 proposed Decision and Order or to modify its terms in any way.

Statement of the Commission

STATEMENT OF THE COMMISSION

The Federal Trade Commission has voted to accept a settlement to resolve the likely anticompetitive effects of Holcim Ltd.'s ("Holcim") proposed \$25 billion acquisition of Lafarge S.A. ("Lafarge"). We have reason to believe that, absent a remedy, the proposed acquisition is likely to substantially reduce competition in the manufacture and sale of portland cement and slag cement. As we explain below, we believe the proposed remedy, tailored to counteract the likely anticompetitive effects of the proposed acquisition without eliminating any efficiencies that might arise from the combination of the two companies, is in the public interest.¹

Holcim is a Switzerland-based, vertically integrated global building materials company, with products that include cement, clinker, concrete, lime, and aggregates. Lafarge is a France-based, vertically integrated global building materials company that primarily produces and sells cement, aggregates, and ready-mix concrete.

The merged company will be the world's largest cement manufacturer, with combined 2014 revenues of approximately \$35 billion and operations in more than 90 countries. Our competitive concerns pertain to specific geographic markets in the United States where Holcim and Lafarge each make significant cement sales. The proposed merger would likely harm competition for the distribution and sale of portland cement, an essential ingredient in making concrete, in 12 local or regional markets. It would also threaten to lessen competition for the distribution and sale of slag cement, a specialty cement product used in certain applications, in two other regional markets.

The merger would create a merger to monopoly in some of the challenged relevant markets, while in others at most three competitors would remain post-merger. Absent a remedy, the Herfindahl-Hirschman Index ("HHI") in each of these markets would exceed 3,400, making every market highly concentrated

¹ Chairwoman Ramirez, Commissioner Brill, Commissioner Ohlhausen, and Commissioner McSweeney join in this statement.

Statement of the Commission

according to the 2010 Horizontal Merger Guidelines.² The increase in HHI in each market would exceed 900, well above the 200-point change necessary to trigger the Guidelines' presumption that the merger is "likely to enhance market power."³ There is no evidence rebutting this presumption. If anything, the evidence suggests that the estimates of market concentration understate our concerns.

In each of the relevant markets at issue, there is evidence that unilateral anticompetitive effects are likely. Substantial evidence demonstrates that, for many customers in the relevant areas, the merging firms are their preferred suppliers and that customers have benefitted from substantial head-to-head competition between the parties in negotiating prices for portland and slag cement. Customers in every single one of the affected markets expressed concern that their inability to play the merging parties off each other would diminish their ability to obtain better prices or other favorable terms. As the Guidelines note, a combination of two competing sellers "can significantly enhance the ability and incentive of the merged entity to obtain a result more favorable to it, and less favorable to the buyer, than the merging firms would have offered separately absent the merger."⁴ In addition, the evidence demonstrates that not all of the remaining suppliers in the relevant markets provide customers with practical alternatives to the merging parties for a variety of reasons, including capacity constraints, lack of distribution assets to supply new customers, and downstream vertical integration.⁵

The evidence also suggests that the proposed acquisition would increase the ability and incentives of the combined firm and other market participants to engage in coordinated behavior that would result in harm to consumers. The relevant markets have characteristics that make them susceptible to coordination.

² See 2010 HORIZONTAL MERGER GUIDELINES § 5.3. The threshold at which a market is considered "highly concentrated" under the Guidelines is 2,500.

³ *Id.*

⁴ *Id.* § 6.2.

⁵ For instance, ready-mix concrete producers are often unwilling to purchase cement from their rivals.

Statement of the Commission

They are highly concentrated; the products are homogeneous; overall market elasticity is low; customer switching costs are low; and sales are relatively small, frequent, and usually not made pursuant to long-term contracts. There is also a high degree of transparency in these markets. Competitors are aware of each other's production capacities, costs, sales volumes, prices, and customers. Our concern about the potential for coordinated effects in these markets is heightened by evidence that cement suppliers, including the same global firms that compete in these markets, have expressly colluded in other geographic markets with similar characteristics.⁶ By reducing the number of significant competitors to only two or three, the proposed merger would make it easier for the remaining firms to coordinate, monitor compliance with, and retaliate against potential deviation from, a coordinated scheme. We therefore have reason to believe that the merger may enhance the vulnerability to coordinated effects that already exists in the relevant markets.⁷

In his dissent, Commissioner Wright takes issue with our decision to seek a remedy in six markets, going to great lengths to argue that we are improperly relying solely on the increase in market concentration to justify our action, that we are creating new presumptions of harm, that we lack a "credible basis" on

⁶ See, e.g., Press Release, European Commission, The Court of Justice Upholds in Substance the Judgment Delivered by the Court of First Instance in 2000 Concerning the Cement Cartel, Jan. 7, 2004, *available at* http://europa.eu/rapid/press-release_CJE-04-2_en.htm (announcing fines of EUR 100 million on cement suppliers for collusion); Press Release, German Federal Cartel Office, Highest fine in Bundeskartellamt History is Final, April 10, 2013, *available at* http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/10_04_2013_BGH-Zement.html (announcing fines of EUR 380 million on Lafarge, Holcim, and others for collusion); Philip Blenkinsop, *Belgian Competition Regulator Fines Cement Groups*, Aug. 31, 2013, *available at* <http://www.reuters.com/article/2013/08/31/belgium-cement-idUSL6N0GW05U20130831> (reporting EUR 14.7 million in fines levied by the Belgian Competition Council on Holcim and others for collusion); Press Release, Polish Office of Competition and Consumer Protection, UOKiK Breaks Cement Cartel, Dec. 12, 2013, *available at* https://uokik.gov.pl/news.php?news_id=10754&news_page=1 (announcing decision of Poland's Court of Competition and Consumer Protection to impose fines of PLN 339 million (~\$93 million) on cement suppliers for collusion involving Lafarge and others); see generally MERGER GUIDELINES § 7.2.

⁷ See MERGER GUIDELINES § 7.1.

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which to conclude that the merger may enhance the vulnerability of the relevant markets to coordination, and that our action is otherwise inconsistent with the Guidelines. We respectfully disagree with Commissioner Wright's various characterizations of the Commission's statement in this matter. The Guidelines make clear that a substantial increase in concentration caused by a merger continues to be a significant factor in merger analysis because highly concentrated markets with only two or three large firms are more likely to lead to anticompetitive outcomes.⁸ Economic theory and empirical research bear this out.⁹ As a result, we view the evidence in a merger that reduces the number of firms in a relevant market to two or three differently from a merger that only reduces the number of firms to six or seven. Where, as here, a proposed merger significantly increases

⁸ *Id.* § 2.1.3 ("Mergers that cause a significant increase in concentration and result in highly concentrated markets are presumed to be likely to enhance market power, but this presumption can be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power."). See also Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 701, 708 (2010) (explaining that the Guidelines' flexible approach "certainly does not mean that they reject the use of market concentration to predict competitive effects, as can be seen in Sections 2.1.3 and 5," that the Guidelines "recognize that levels and changes in market concentration are more probative in some cases than others," and that "the Agencies place considerable weight on HHI measures in cases involving coordinated effects") (emphasis in original).

⁹ See, e.g., Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach* 11 (Georgetown Law Faculty Publications and Other Works, Working Paper No. 1304, 2014), available at <http://scholarship.law.georgetown.edu/facpub/1304> ("[V]arious theories of oligopoly conduct—both static and dynamic models of firm interaction—are consistent with the view that competition with fewer significant firms on average is associated with higher prices.... Accordingly, a horizontal merger reducing the number of rivals from four to three, or three to two, would be more likely to raise competitive concerns than one reducing the number from ten to nine, *ceteris paribus*"); Steffen Huck, et al., *Two Are Few and Four Are Many: Number Effects from Experimental Oligopolies*, 53 J. ECON. BEHAVIOR & ORG. 435, 443 (2004) (testing the frequency of collusive outcomes in Cournot oligopolies and finding "clear evidence that there is a qualitative difference between two and four or more firms"); Timothy F. Bresnahan & Peter C. Reiss, *Entry and Competition in Concentrated Markets*, 99 J. POL. ECON. 977, 1006 (1991) (finding, in a study of tire prices, that "[m]arkets with three or more dealers have lower prices than monopolists or duopolists," and noting that, "while prices level off between three and five dealers, they are higher than unconcentrated market prices").

Statement of the Commission

concentration in an already highly concentrated market, a presumption of competitive harm is justified under both the Guidelines and well-established case law.¹⁰

Moreover, despite Commissioner Wright's assertion to the contrary, our investigation went beyond consideration of market concentration and application of the Guidelines presumption of competitive harm and, as noted above, produced additional evidence supporting our belief that the effect of the proposed acquisition would be to substantially lessen competition and harm cement customers in the relevant markets. On coordinated effects, we found numerous characteristics of the market making it vulnerable to collusion. It is particularly troubling that existing cement suppliers have expressly colluded in other geographic markets with similar characteristics. We also examined whether other market factors, such as the possibility of entry or expansion, might alleviate our competitive concerns. The evidence demonstrates the presence of high barriers to entry for both portland cement and slag cement, including significant capital costs and regulatory requirements. Entry sufficient to deter or counteract the likely harm from the proposed transaction would thus be neither timely nor likely.

In the face of our competitive concerns, based on what we had learned about the nature and conditions of the relevant markets, the parties proposed divestitures to remedy our concerns in each of those markets. The parties did not comply with our Second Requests. While continued investigation may have produced more evidentiary support for our complaint, including those markets for which Commissioner Wright dissents, we do not think such a course would have been justified. We have ample evidence to support our allegations of anticompetitive harm and

¹⁰ See MERGER GUIDELINES § 2.1.3; *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008) ("Typically, the Government establishes a *prima facie* case by showing that the transaction in question will significantly increase market concentration, thereby creating a presumption that the transaction is likely to substantially lessen competition."); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001) (merger to duopoly creates a rebuttable presumption of anticompetitive harm through direct or tacit coordination).

Dissenting Statement

had no reason to burden the parties with the expense and delay of further inquiry for the sole purpose of obtaining additional, cumulative evidence. Nor would further inquiry have been a good use of Commission resources.

Merger analysis is necessarily predictive. The evidence in this case provides us with sufficient reason to believe that the proposed acquisition is likely to substantially reduce competition, and there is no evidence of countervailing efficiencies that weigh against the remedy. We believe that the public interest is best served by remedying the competitive concerns as set forth in our proposed consent order.

**DISSENTING STATEMENT OF COMMISSIONER
JOSHUA D. WRIGHT**

The Commission has voted to issue a Complaint and a Decision & Order against Holcim Ltd. (“Holcim”) and Lafarge S.A. (“Lafarge”) to remedy the allegedly anticompetitive effects of the proposed merger of the two companies. I dissent in part from and concur in part with the Commission’s decision because the evidence is insufficient to provide a reason to believe the proposed transaction is likely to substantially lessen competition, in violation of Section 7 of the Clayton Act, in several of the portland cement markets identified in the Complaint.¹

The Commission articulates coordinated effects and unilateral effects theories of harm arising from the proposed transaction in all of the fourteen relevant geographic markets defined in the Complaint (the “Relevant Markets”).² Additionally, and

¹ As I explain below, I concur with the Commission as to the Twin Cities, Duluth, western Wisconsin, New Orleans, western Montana, Boston/Providence, the Mid-Atlantic region, and the western Great Lakes region; I dissent with the Commission as to eastern Iowa, Memphis, Baton Rouge, Detroit, northern Michigan, and Grand Rapids.

² See Analysis of Agreement Containing Consent Orders to Aid Public Comment 3, Holcim Ltd., FTC File No. 141-0129 (May 4, 2015) (“For many

Dissenting Statement

untethered to these two theories of harm articulated in the 2010 *Horizontal Merger Guidelines* (“*Merger Guidelines*”), the Commission asserts that mergers, such as the proposed transaction, that reduce the number of competitors to three or fewer are likely to harm competition. The Commission’s structural presumption is economically unfounded and inappropriate in the vast majority of Relevant Markets. Furthermore, there is insufficient evidence to support a coordinated effects theory in any Relevant Market and insufficient evidence to support a unilateral effects theory in several of the Relevant Markets.

In those markets in which I conclude the record evidence supports neither a coordinated nor a unilateral effects theory, the Commission relies upon little more than the change in market structure to support each of its allegations. Without particularized evidence substantiating a unilateral effects or coordinated effects theory of harm arising from the proposed transaction, a structural theory alone cannot provide a sufficient basis to establish reason to believe a transaction violates the Clayton Act. It follows, in my view, that the Commission should refrain from imposing a remedy in the markets for which the evidence is insufficient to support either a coordinated effects theory or a unilateral effects theory.

I. The Commission’s Structural Theory And Presumption Are Unsupported By Economic Evidence

The Commission argues mergers that reduce the number of competitors in a relevant market to three or two are unique in the sense that they warrant a presumption of competitive harm and illegality,³ but it cannot defend its structural presumption upon the basis of economic evidence or accumulated empirical knowledge.

customers in these markets, the merger would . . . leav[e] the merged entity with the power to increase prices . . . unilaterally. Further, . . . it would enhance the likelihood of collusion or coordinated action between the remaining competitors.”).

³ *Id.* at 3.

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The Commission cites in support of its structural theory and presumption three academic articles written by economists.⁴ Only two offer economic evidence, and the proffered substantiation fails to support the claim. The first is an important early entrant into the static entry literature examining the relationship between market size and the number of entrants in a market, focusing upon isolated rural markets.⁵ It strains credulity to argue that Bresnahan and Reiss's important analysis of the impact of entry in markets involving doctors, dentists, druggists, plumbers, and tire dealers in local and isolated areas, where they find the competitive benefits of a second competitor are especially important, apply with generality sufficient to support a widely applicable presumption of harm based upon the number of firms. Indeed, the authors warn against precisely this interpretation of their work.⁶

The second article is a laboratory experiment and does not involve the behavior of actual firms and certainly cannot provide sufficient economic evidence to support a presumption that four-to-three and three-to-two mergers in real-world markets will result

⁴ *Id.* at 3 n.9.

⁵ Timothy F. Bresnahan & Peter C. Reiss, *Entry and Competition in Concentrated Markets*, 99 J. POL. ECON. 977 (1991). While Bresnahan and Reiss is an important early contribution to the static entry literature, it cannot possibly bear the burden the Commission wishes to place upon it. Abstracting from the complexities of market definition was necessary for the researchers to isolate entry decisions. This is possible when studying the effects of entry by a second dentist in a town with a population of less than 1,000, but not in most real-world antitrust applications. The authors of the study make this point themselves, noting that "whether this pattern appears in other industries remains an open question." *Id.* at 1007.

⁶ In earlier research using similar empirical techniques and data – namely, small rural markets – Bresnahan and Reiss plainly reject the notion that the findings should inform views of market structure and competition generally: "We do not believe that these markets 'stand in' for highly concentrated industries in the sectors of the economy where competition is national or global." Timothy F. Bresnahan & Peter C. Reiss, *Do Entry Conditions Vary Across Markets*, 3 BROOKINGS PAPERS ECON. ACTIVITY 833, 868 (1987).

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in anticompetitive coordination.⁷ Once again, the authors warn against such an interpretation.⁸

Finally, the Commission cites a draft article, authored by Steve Salop, in support of its view that economic evidence supports a presumption that four-to-three and three-to-two mergers are competitively suspect.⁹ The article does not purport to study or provide new economic evidence on the relationship between market structure and competition. Thus, it cannot support the Commission's proposition.¹⁰

There is simply no empirical economic evidence sufficient to warrant a *presumption* that anticompetitive coordination is likely to result from four-to-three or three-to-two mergers. Indeed, such a presumption would be inconsistent with modern economic theory and the analysis endorsed by the *Merger Guidelines*, which deemphasize inferences of competitive harm arising from market

⁷ Steffen Huck et al., *Two Are Few and Four Are Many: Number Effects from Experimental Oligopolies*, 53 J. ECON. BEHAVIOR & ORG. 435 (2004).

⁸ *Id.* at 436 (“The number of firms is not the only factor affecting competition in experimental markets. This implies that there exists no unique number of firms that determines a definite borderline between non-cooperative and collusive markets irrespective of all institutional and structural details of the experimental markets.”).

⁹ Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach* (Georgetown Law Faculty Publications and Other Works, Working Paper No. 1304, 2014), available at <http://scholarship.law.georgetown.edu/facpub/1304/>.

¹⁰ Nevertheless, to the extent Salop argues in favor of legal presumptions in merger analysis, he clarifies that they “obviously should be based on valid economic analysis, that is, proper economic presumptions,” which should be updated “based on new or additional economic factors besides market shares and concentration.” *Id.* at 37, 48. I agree. Additionally, Salop explains that “[c]ontemporary economic learning suggests that concentration be considered when undertaking competitive effects analysis – in conjunction with other factors suggested by the competitive effects theory – but not treated as the sole determinant of post-merger pricing.” *Id.* at 13-14. Notably, Salop does not endorse a distinction between four-to-three mergers or three-to-two mergers and mergers in less concentrated markets that justifies a presumption that the former are anticompetitive; rather, he merely observes that empirical evidence and economic theory do not warrant “*ignoring* market shares and concentration in merger analysis.” *Id.* at 12 (emphasis in original).

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structure in favor of greater reliance upon particularized evidence of changes in post-merger incentives to compete.¹¹

To the contrary, this approach is inconsistent with Agency practice and the letter and spirit of the more economically sophisticated approach adopted in the *Merger Guidelines*.¹² Section 2.1.3 of the *Merger Guidelines* does, as the Commission observes, state that “mergers that cause a significant increase in concentration and result in highly concentrated markets are presumed to be likely to enhance market power.”¹³ The *Merger Guidelines* insure against reverting to naked structural analysis by making clear that the role of market shares and market concentration is “not an end in itself,” but rather “one useful indicator of likely anticompetitive effects,” and that market concentration is not to be used to “provide a rigid screen to

¹¹ See Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 701, 707-08 (2010) (acknowledging the role of market concentration in the analysis endorsed in the *Merger Guidelines* and observing that they place less weight upon market concentration and market shares, instead emphasizing the importance of direct evidence of changes in post-merger incentives to compete and competitive effects). To the extent the Commission relies upon Shapiro’s caveat that “changes in market concentration are more probative in some cases than others,” Statement of the Federal Trade Commission 3 n.8, Holcim Ltd., FTC File No. 141-0129 (May 8, 2015), they fail to explain why, nor have I been provided any evidence attempting to establish that, markets for portland or slag concrete fit within the subset of cases for which it has been established that there is a reliable a relationship between market structure and competition. I do not quarrel with the notion that such markets exist. We identify them over time using economic analysis, empirical evidence, and accumulated learning. For example, substantial research has identified empirical regularities in the relationship between structure and price in generic pharmaceutical markets. See David Reiffen & Michael R. Ward, *Generic Drug Industry Dynamics*, 87 REV. ECON. & STAT. 37 (2005).

¹² Comments of the ABA Section of Antitrust Law on the Horizontal Merger Guidelines Revision Project (June 4, 2010), available at https://www.ftc.gov/sites/default/files/documents/public_comments/horizontal-merger-guidelines-review-project-proposed-new-horizontal-merger-guidelines-548050-00026/548050-00026.pdf (urging the agencies to “remove the presumption of illegality keyed to the level and increase in the HHI” because “[t]he presumption does not reflect how the Agencies conduct investigations [and] is not theoretically warranted”).

¹³ U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 7.1 (2010) [hereinafter MERGER GUIDELINES].

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separate competitively benign mergers from anticompetitive ones,” but rather to provide one way to distinguish competitively benign mergers from *those that warrant closer scrutiny*.¹⁴ To the extent these passages evince an ambiguity in the *Merger Guidelines* with respect to the minimum evidentiary burden that must be satisfied to support a merger challenge, the Commission should embrace the interpretation more consistent with a modern economic approach rather than with the obsolete and discredited structural analysis of a prior era.

Rather than relying upon economic evidence to defend the Commission’s structural presumption, the Commission highlights case law supporting a presumption of illegality for mergers to duopoly or that substantially increase concentration.¹⁵ As a preliminary matter, case law that endorses a wholly structural approach to merger analysis – an approach clearly rejected by the *Merger Guidelines* – does not constitute relevant economic evidence. Judicial opinions adopting this approach are orthogonal to the proposition in need of *economic substantiation*: that mergers resulting in three- or two-firm markets are likely to result in coordination. Indeed, one can find a variety of economically dubious propositions adopted in antitrust case law blessed by no less a legal authority than the Supreme Court.¹⁶ But courts’ observations about the relationship between market structure and competition are not relevant to the Commission’s adoption of a structural presumption in this case.

I therefore find any reliance upon structural changes alone to be economically untenable and insufficient to give me reason to

¹⁴ *Id.* §§ 4, 5.3.

¹⁵ Statement of the Federal Trade Commission, *supra* note 11, at 3 (citing *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008) and *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001)).

¹⁶ For example, well-established case law endorses the economic proposition that mergers that result in post-merger shares of greater than 30% are likely to harm competition, *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 364-65 (1963), and that mergers resulting in post-merger shares of less than 10% harm competition when coupled with a trend toward concentration, *United States v. Von’s Grocery Co.*, 384 U.S. 270 (1966); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966).

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believe the proposed transaction will violate Section 7 in the vast majority of Relevant Markets.

II. Coordinated Effects Are Unlikely In Any Relevant Market

The *Merger Guidelines* describe the conditions under which the antitrust agencies will challenge a proposed merger on the basis that it is likely to result in anticompetitive coordination. Specifically, the *Merger Guidelines* articulate three necessary conditions that must *each* be satisfied to support a coordinated effects theory: (1) a significant increase in concentration, leading to a moderately or highly concentrated market, (2) a market vulnerable to coordinated conduct, and (3) a credible basis for concluding the transaction will enhance that vulnerability.¹⁷ Thus, the *Merger Guidelines* establish clearly that a highly concentrated market that is already vulnerable to coordinated conduct is necessary but not sufficient to support a coordinated effects theory. Critically, the Commission must also have evidence sufficient to provide a credible basis to conclude the transaction will *enhance* the market's vulnerability to coordinated conduct. Such evidence must evince a change in the post-merger competitive market dynamics and, in particular, post-merger incentives to engage in coordinated pricing. The *Merger Guidelines* provide the elimination of a maverick firm as an illustrative example of the type of evidence that would satisfy the third condition and warrant a presumption of adverse coordinated effects.¹⁸ Importantly, the *Merger Guidelines* explain evidence that a merger will eliminate a maverick is given weight precisely because it changes post-merger incentives to coordinate.¹⁹

The first and second elements of the *Merger Guidelines*' coordinated effects analysis are not at issue in this case. The Commission's investigation revealed evidence supporting a conclusion that the Relevant Markets are already highly concentrated and the proposed transaction will increase

¹⁷ MERGER GUIDELINES, *supra* note 13, § 7.1; *see also* Dissenting Statement of Commissioner Joshua D. Wright 3, Fidelity National Financial, Inc., FTC File No. 131-0159 (Dec. 23, 2013) [hereinafter Wright, *Fidelity Dissent*].

¹⁸ MERGER GUIDELINES, *supra* note 13, § 7.1.

¹⁹ *Id.* § 2.1.5.

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concentration.²⁰ Furthermore, the evidence supports a conclusion that the markets are vulnerable to coordinated conduct.²¹ Nevertheless, the investigation failed to uncover any evidence to suggest the proposed transaction will increase post-merger incentives to coordinate – that is, there is no record evidence to provide a credible basis to conclude the merger alters the competitive dynamic in any Relevant Market in a manner that enhances its vulnerability to coordinated conduct.

The Commission asserts that the facts that the market is highly concentrated, that it is vulnerable to coordination, and that the merger reduces “the number of significant competitors to only two or three”²² jointly satisfy the third necessary element that “the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability.”²³ The Commission’s analysis can be read in one of two ways. Each is tantamount to the application of a structural presumption for coordinated effects claims involving markets with three or two firms, each is problematic because it adopts an outdated and obsolete structural approach to coordinated effects, and each is in significant tension with the economic approach to coordinated effects embodied in the *Merger Guidelines*.

The first interpretation is that the satisfaction of the first and second elements of the *Merger Guidelines* analysis – and particularly the demonstration that the merger significantly increases concentration in an already concentrated market – is sufficient to simultaneously satisfy the third element that the merger enhance post-merger incentives to coordinate. This interpretation renders the third element of Section 7.1 entirely superfluous. The more logical explanation of the third element is that a crucial, additional type of information is required to illuminate how the merger changes the merged firm’s incentives

²⁰ See Analysis of Agreement Containing Consent Orders to Aid Public Comment, *supra* note 2, at 2.

²¹ See Statement of the Federal Trade Commission, *supra* note 11, at 2 (describing the characteristics of the Relevant Markets that render them vulnerable to coordination).

²² *Id.* at 2.

²³ MERGER GUIDELINES, *supra* note 13, § 7.1

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to coordinate. The Commission's application completely overlooks the economic relevance of the third element.

The second plausible interpretation of the Commission's analysis is that the reduction in the number of competitors in a market is itself sufficient evidence to provide a credible basis that a merger will enhance a market's vulnerability to coordination and thus satisfy the third element of the *Merger Guidelines*' coordinated effects analysis. Under this reading, the Commission relies upon the fact that the proposed transaction reduces the number of competitors in each Relevant Market by one firm, either from four to three or from three to two.²⁴ For example, the Majority Statement asserts that the proposed transaction might enhance the likelihood of coordination by "mak[ing] it easier for the remaining firms to coordinate, monitor compliance with, and retaliate against potential deviation from, a coordinated scheme."²⁵ These are generic observations that are true of any merger that reduces the number of firms in a market; they are not particularized to the proposed transaction or to any Relevant Market nor do they establish a credible basis to conclude that post-merger incentives to coordinate will increase. The observation that a market with N firms will, after the merger, have N-1 firms is simply insufficient without more to establish the required credible basis. This is true even when a merger reduces the number of firms from four to three or from three to two. The Commission offers no explanation as to why the *Merger Guidelines* would go through the trouble of requiring a credible basis to believe a merger will change the market's competitive dynamics that *enhances* the market's vulnerability to coordinated conduct, *in addition to* an increase in market concentration, in order to substantiate a coordinated effects merger challenge if the latter were considered sufficient to satisfy both elements.

As I have stated previously, "there is no basis in modern economics to conclude with any modicum of reliability that increased concentration – without more – will increase post-

²⁴ See Statement of the Federal Trade Commission, *supra* note 11, at 2 (taking the view that a reduction of competitors to three or two firms in the relevant market justify a presumption of competitive harm).

²⁵ *Id.* at 2.

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merger incentives to coordinate.”²⁶ Janusz Ordover, in a leading treatment of the economics of coordinated effects, similarly explains that “[i]t is now well understood that it is not sufficient when gauging the likelihood of coordinated effects from a merger to simply observe that because the merger reduces the number of firms, it automatically lessens the coordination problem facing the firms and enhances their incentives to engage in tacit collusion; far from it.”²⁷ Without particularized evidence that the proposed transaction will enhance incentives to coordinate post-merger, I am unable to conclude there is reason to believe it is likely to substantially lessen competition in violation of Section 7.

III. Unilateral Effects Are Unlikely In Some Of The Relevant Markets

The Commission alleges the proposed transaction is likely to result in unilateral price effects in the Relevant Markets. Unilateral effects arise when the reduction in direct competition between merging firms is sufficient to create post-merger market power. The *Merger Guidelines* articulate a variety of potential unilateral effects theories, including merger to monopoly, merger of firms producing very close substitutes in a differentiated products market, merger of sellers competing in bargaining and auction markets, and mergers in homogeneous goods markets making post-merger output suppression strategies more profitable.²⁸ The unifying theme of the unilateral effects analysis contemplated by the *Merger Guidelines* is that a particularized showing that post-merger competitive constraints are weakened or eliminated by the merger is superior to relying solely upon inferences of competitive effects drawn from changes in market structure.²⁹

²⁶ Wright, *Fidelity Dissent*, *supra* note 17, at 3.

²⁷ Janusz A. Ordover, *Coordinated Effects*, in 2 ISSUES IN COMPETITION LAW AND POLICY 1359, 1367 (ABA Section of Antitrust Law 2008) (“It is quite clear . . . that a reduction in the number of firms and concomitant increases in concentration do not necessarily make collusion inevitable or even more likely, stable, or complete.”).

²⁸ MERGER GUIDELINES, *supra* note 13, § 6.

²⁹ See Shapiro, *supra* note 11, Part III (explaining the *Merger Guidelines*’ unilateral effects analysis, the types of evidence that support such analysis, and

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The potential unilateral effects theories in this case fall broadly within one of three categories. The first category involves straightforward merger-to-monopoly markets. In these markets, the theory of harm is that Holcim and Lafarge are the only two meaningful suppliers for all customers in the Relevant Market. The second category involves markets in which Holcim and Lafarge face some competition, but the proposed transaction will result in a merger to monopoly for a substantial subset of customers and will allow the merged entity to unilaterally increase market prices. The third category includes markets where the proposed transaction will reduce the number of competitors in the Relevant Market to three or two, and the remaining competitors will be unable or unwilling to compete for market share – for example, because of capacity constraints, leaving the merged entity with the ability to unilaterally raise prices. Each of these theories requires particularized evidence sufficient to establish reason to believe the proposed transaction violates Section 7 of the Clayton Act. I conclude the available evidence is sufficient to do so in some Relevant Markets and insufficient in others.

Unilateral price effects are “most apparent in a merger to monopoly in a relevant market.”³⁰ Basic economic theory provides a robust and reliable inference that a merger to monopoly or near monopoly is likely to result in anticompetitive effects. A rational firm with little or no competitive constraints will set prices or choose output to maximize its profits; it can be expected that a rational firm acquiring such monopoly power will adjust prices and output accordingly. No further economic evidence is required to substantiate an enforcement action based upon likely unilateral price effects and to establish reason to believe a merger to monopoly or near monopoly is likely to violate Section 7 of the Clayton Act. This analysis applies to at least one of the Relevant Markets.

The analysis is necessarily more nuanced for theories falling within the second category of theories of unilateral price effects. These theories involve Relevant Markets where the proposed transaction would reduce the number of competitors from four to

the relative analytical weakness of inferences of competitive harm drawn from changes in market structure).

³⁰ MERGER GUIDELINES, *supra* note 13, § 6.

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three or three to two, and the market share for the merged entity would not be large enough to infer it would have the power to raise market prices unilaterally. In these markets, particularized evidence is required to establish reason to believe the merged firm will gain unilateral pricing power. In many Relevant Markets, staff was successful in uncovering the required evidence. For example, in some Relevant Markets, there was evidence of a significant subset of customers for whom a sole market participant would be the only remaining acceptable supplier, due either to physical proximity or to some other preference rendering alternatives an unacceptable source of portland or slag cement. The Commission's example of ready-mix concrete producers,³¹ a relevant subset of customers, is an illustrative example here. In some Relevant Markets, the evidence supports a finding that such customers would continue to find their vertically integrated rivals to be an unacceptable source of portland cement, even if the sole remaining vertically unintegrated portland cement producer raised its prices after the merger. In the Relevant Markets for which credible evidence of this type is available, I find it sufficient to create reason to believe the merger is likely to result in competitive harm. Several other Relevant Markets fall into this category.

In other Relevant Markets, the allegation that there will remain only one acceptable supplier for a significant subset of customers after the proposed transaction lacks evidentiary support. Specifically, in these markets, the record evidence does not indicate that a material number of customers view Holcim and Lafarge as closest supply alternatives or that they view other potential suppliers as unacceptable supply sources and would continue to do so in the face of a post-merger unilateral price increase.³²

³¹ See Statement of the Federal Trade Commission, *supra* note 11, at 2 n.5.

³² The role of ready-mix customers in the competitive analysis is again illustrative. In some Relevant Markets the available evidence indicates there are some ready-mix customers that purchase from rivals and others that do not, but the totality of the evidence fails to establish the existence of a significant set of customers that view vertically integrated suppliers as unacceptable or would continue to do so in the face of a post-merger unilateral price increase.

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The final category of potential unilateral effects theories, like the second category, also involves Relevant Markets where the proposed transaction would reduce the number of competitors from four to three or three to two, but the post-merger market share would not be large enough to infer it would have the power to raise market prices unilaterally. However, unlike the second category, in these Relevant Markets, it is not customer preference that limits the number of available competitors to one. Rather, in these Relevant Markets, the proposed transaction is effectively a merger to monopoly or near monopoly because alternative suppliers would be unwilling or unable to compete with the merged entity in the face of a price increase. In some Relevant Markets, the investigation uncovered particularized evidence sufficient to establish a reason to believe such unilateral effects are likely, including evidence that other competitors are experiencing, or soon will experience, capacity constraints, rendering them unable or unwilling to compete for market share, or that other suppliers will not constrain the merged entity's prices. Several Relevant Markets fall into this third category.

Relevant Markets where the "reason to believe" standard is not satisfied lacked record evidence necessary to corroborate any of these three theories.³³ Indeed, with respect to the Relevant Markets for which I dissent from the Commission's decision, it is my view that the investigation failed to adduce particularized evidence to elevate the anticipated likelihood of competitive effects from "possible" to "likely" under any of these theories. Without this necessary evidence, the only remaining factual basis upon which the Commission rests its decision is the fact that the merger will reduce the number of competitors from four to three or three to two. This is simply not enough evidence to support a reason to believe the proposed transaction will violate the Clayton Act in these Relevant Markets.

³³ One other potentially plausible theory is that customers refuse to sole source their product, and therefore that two or more competitors are necessary to prevent post-merger unilateral effects. There is insufficient record evidence to indicate customers would be unwilling to switch from dual- to single-sourced supply in the event of a post-merger price increase.

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IV. Conclusion

Prior to entering into a consent agreement with the merging parties, the Commission must first find reason to believe that a merger likely will substantially lessen competition under Section 7 of the Clayton Act. A presumption that such reason to believe exists when a merger decreases in the number of competitors in a market to three or two is misguided. Additionally, when the Commission alleges coordinated or unilateral effects arising from a proposed transaction, this standard requires more than a mere counting of pre- and post-merger firms. In particular, reason to believe a proposed transaction is likely to result in coordinated effects requires evidence – absent from the record here – that the merger will *enhance* a market’s vulnerability to coordinated pricing, and not just that it takes place in a market that is already concentrated. In the absence of such a particularized showing, the Commission’s approach to coordinated effects here reduces to a strict structural presumption unsupported by modern economics and at odds with the *Merger Guidelines*.

Similarly, substantiating a unilateral effects theory requires particularized evidence – also absent from the record here in some Relevant Markets – that a merger will reduce or eliminate competitive constraints, permitting the merged entity to increase prices. Without such evidence, a unilateral effects theory reduces to little more than a complaint about market structure coupled with speculation about the circumstances under which unilateral effects might occur in a post-merger world. The *Merger Guidelines* contemplate a more rigorous analysis.

This is not to suggest the “reason to believe” standard requires access to every piece of relevant information and a full and complete economic analysis of a proposed transaction, regardless of whether the parties wish to propose divestitures before complying with a Second Request. Rather, the standard requires only evidence sufficient to establish that competitive harm is likely. Such evidence, although quite minimal – indeed, a handful of facts in most instances – is indeed available in some Relevant Markets in this matter, and it is in those markets that I concur with the Commission’s decision. While I appreciate the practical complications of requesting additional information during the course of a merger investigation, as well as the desire to conduct

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efficient investigations, these important pragmatic considerations do not trump the Commission's primary obligation to collect evidence sufficient to establish reason to believe the merger will harm competition before issuing a complaint and accepting a consent.

For the reasons I explain above, I find reason to believe the proposed transaction is likely to result in unilateral price effects, and thus violate the Clayton Act, in the Twin Cities, Duluth, western Wisconsin, New Orleans, western Montana, Boston/Providence, the Mid-Atlantic region, and the western Great Lakes region. I conclude there is no reason to believe the proposed transaction will violate Section 7 in eastern Iowa, Memphis, Baton Rouge, Detroit, northern Michigan, and Grand Rapids; it follows that I believe the Commission should refrain from imposing a remedy in these markets.

Complaint

IN THE MATTER OF

**ZF FRIEDRICHSHAFEN AG AND TRW
AUTOMOTIVE HOLDINGS CORP.****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 No. C-4520; File No. 141 0235
Complaint, May 5, 2015 – Decision, June 11, 2015*

This consent order resolves concerns regarding the \$12.4 billion acquisition by ZF Friedrichshafen AG (“ZF”) of TRW Automotive Holding Corp (“TRW”). ZF and TRW are two of the world’s largest auto parts suppliers, and two of only three North American suppliers of heavy vehicle tie rods. The complaint alleges that the merger would eliminate direct competition between ZF and TRW and that reducing the number of competitors from three to two would increase the likelihood of coordinated interaction between a combined ZF/TRW and its only other competitor for heavy vehicle tie rods in North America. The consent order eliminates the competitive concerns raised by ZF’s acquisition of TRW. Under the order, the combined company is required to divest TRW’s North American and European linkage and suspension business for heavy and light vehicles (which includes heavy vehicle tie rods). ZF and TRW are also required to preserve the assets until they are divested. A monitor will ensure that the merging parties comply with their obligations.

Participants

For the *Commission*: *Cem Akleman and Stephen Antonio.*

For the *Respondents*: *Peter Thomas, Simpson Thacher & Bartlett LLP; and Steven Holley, Sullivan & Cromwell LLP.*

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 ZF Friedrichshafen AG (“ZF”), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Respondent TRW Automotive Holdings Corp. (“TRW”), 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 (“FTC