

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

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

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In the Matter of)	
)	
CEMEX, S.A. de C.V.,)	Docket No. C-4131
a corporation.)	
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)	

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

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

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

The Commission, having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Consent Agreement and to place such Consent Agreement containing the Decision and Order on the

- G. "Aggregate(s)" means crushed stone and gravel produced at quarries, mines, or gravel pits used to manufacture Ready Mix Concrete and Asphalt Concrete.
- H. "Asphalt Concrete" means a paving material produced by combining and heating asphalt

- Q. "Person" means any individual, partnership, association, firm, company, corporation, or other business entity.
- R. "Ready Mix Concrete" means a building material used in the construction of buildings,

venture partners;

7. all governmental approvals, consents, licenses, permits, waivers, or other authorizations held by RMC and used to operate the RMC Ready Mix Concrete Businesses;
8. all rights of RMC relating to the RMC Ready Mix Concrete Businesses under any warranty and guarantee, express or implied;
9. all books, records, and files held by RMC relating to the RMC Ready Mix Concrete Businesses;
10. all rights in and to inventories of products, raw materials, supplies and parts, including work-in-process and finished goods held by RMC and used in the RMC Ready Mix Concrete Businesses;
11. all customer and vendor lists, catalogs, sales promotion literature, and advertising materials held by RMC and used in the RMC Ready Mix Concrete Businesses; and
12. all items of prepaid expense held by RMC and used in the RMC Ready Mix Concrete Businesses;

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

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

II.

IT IS FURTHER ORDERED that:

- A. During the Hold Separate Period, Respondent shall hold the Held Separate Business separate, apart, and independent as required by this Hold Separate and shall vest the Held Separate Business with all rights, powers, and authority necessary to conduct its business; Respondent shall not exercise direction or control over, or influence directly or indirectly, the Held Separate Business or any of its operations, or the Hold Separate Monitor, except to the extent that Respondent must exercise direction and control over the Held Separate Business as is necessary to assure compliance with this Hold Separate, the Consent Agreement, the Decision and Order, and all applicable laws.

B. Until the Effective Date of Divestiture, Respondent shall take such actions as are necessary to maintain the viability and marketability of the Held Separate Business and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets, except for ordinary wear and tear.

C. The purpose of this Hold Separate is to: (1) preserve the Held Separate Business as a viable, competitive, and ongoing business independent of Respondent until the divestiture required by the Decision and Order is achieved; (2) assure that no Material Confidential Information is exchanged between Respondent and the Held Separate Business, except in accordance with the provisions of this Hold Separate; and (3) prevent interim harm to competition pending the relevant divestiture and other relief.

D. Respondent shall hold the Held Separate Business separate, apart, and independent on the following terms and conditions:

1. Mr. Stephen J. Roebuck shall serve as Hold Separate Monitor, pursuant to the agreement executed by the Hold Separate Monitor and Respondent and attached as Confidential Appendix B (“Monitor Agreement”).

a. Respondent shall, no later than one (1) day after the Acquisition Date, transfer to the Hold Separate Monitor all rights, powers, and authorities necessary to permit the Hold Separate Monitor to perform his duties and responsibilities, pursuant to this Hold Separate and consistent with the purposes of the Decision and Order, and shall include in the Monitor Agreement all provisions necessary to effectuate this requirement.

b. The Hold Separate Monitor shall have the responsibility, consistent with the terms of this Hold Separate and the Decision and Order, for monitoring the organization of the Held Separate Business; for managing the Held Separate Business through the Manager; for maintaining the independence of the Held Separate Business; and for monitoring Respondent’s compliance with its obligations pursuant to this Hold Separate and the Decision and Order.

c. Subject to all applicable laws and regulations, the Hold Separate Monitor shall have

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consistent with the terms of this Hold Separate.

- d. The Hold Separate Monitor shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Hold Separate Monitor's duties and responsibilities.
 - e. The Commission may require the Hold Separate Monitor to sign an appropriate confidentiality agreement relating to materials and information received from the Commission in connection with performance of the Hold Separate Monitor's duties.
 - f. Respondent may require the Hold Separate Monitor to sign an appropriate confidentiality agreement prohibiting the disclosure of any Material Confidential Information gained as a result of his role as Hold Separate Monitor to anyone other than the Commission.
 - g. Thirty (30) days after the Hold Separate becomes final, and every thirty (30) days thereafter until the Hold Separate terminates, the Hold Separate Monitor shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Hold Separate. Included within that report shall be the Hold Separate Monitor's assessment of the extent to which the businesses comprising the Held Separate Business are meeting (or exceeding) their projected goals as are reflected in operating plans, budgets, projections or any other regularly prepared financial statements.
 - h. If the Hold Separate Monitor ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate, the Commission may appoint a substitute Hold Separate Monitor consistent with the terms of this paragraph, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of the substitute Hold Separate Monitor within five (5) days after notice by the staff of the Commission to Respondent of the identity of any substitute Hold Separate Monitor, Respondent shall be deemed to have consented to the selection of the proposed substitute Hold Separate Monitor. Respondent and the substitute Hold Separate Monitor shall execute a Monitor Agreement, subject to the approval of the Commission, consistent with this paragraph.
2. No later than one (1) day after the Acquisition Date, Respondent shall enter into a management agreement with, and transfer all rights, powers, and authorities necessary to manage and maintain the Held Separate Business to, Mr. Michael Smith, the current

accepts the position of Manager and, subsequently, ceases to act as Manager, then Respondent shall select a substitute Manager, subject to the approval of the Commission, and transfer to the substitute Manager all rights, powers and authorities necessary to permit the substitute Manager to perform his/her duties and responsibilities, pursuant to this Hold Separate.

- b. The Manager shall report directly and exclusively to the Hold Separate Monitor and shall manage the Held Separate Business independently of the management of Respondent. The Manager shall not be involved, in any way, in the operations of the other businesses of Respondent during the term of this Hold Separate.
 - c. The Manager shall have no financial interests affected by Respondent's revenues, profits or profit margins, except that the Manager's compensation for managing the Held Separate Business may include economic incentives dependent on the financial performance of the Held Separate Business if there are also sufficient incentives for the Manager to operate the Held Separate Business at no less than current rates of operation (including, but not limited to, current rates of production and sales) and to achieve the objectives of this Hold Separate.
 - d. The Manager shall make no material changes in the present operation of the Held Separate Business except with the approval of the Hold Separate Monitor, in consultation with the Commission staff.
 - e. The Manager shall have the authority, with the approval of the Hold Separate Monitor, to remove Held Separate Business employees and replace them with others of similar experience or skills. If any person ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate, the Manager, in consultation with the Hold Separate Monitor, may request Respondent to, and Respondent shall, appoint a substitute person, which person the Manager shall have the right to approve.
 - f. In addition to employees within the Held Separate Business, the Manager may employ such Persons as are reasonably necessary to assist the Manager in managing the Held Separate Business.
 - g. The Hold Separate Monitor shall be permitted, in consultation with the Commission staff, to remove the Manager for cause. Within fifteen (15) days after such removal of the Manager, Respondent shall appoint a replacement Manager, subject to the approval of the Commission, on the same terms and conditions as provided in Paragraph II.D.2 of this Hold Separate.
3. The Held Separate Business shall be staffed with sufficient employees to maintain the viability and competitiveness of the Held Separate Business. To the extent that such employees leave or have left the Held Separate Business prior to the Effective Date of

Divestiture, the Manager, with the approval of the Hold Separate Monitor, may replace departing or departed employees with persons who have similar experience and expertise or determine not to replace such departing or departed employees.

4. In connection with support services or products not included within the Held Separate Business, Respondent and RMC shall continue to provide, or offer to provide, the same support services to the Held Separate Business as are being provided to such business interests by Respondent and RMC as of the date the Consent Agreement is signed by Respondent. For any services or products that Respondent and RMC may provide to the Held Separate Business, Respondent may charge no more than the same price they charge others for the same services or products. Respondent's or RMC's personnel providing such services or products must retain and maintain all Material Confidential Information of the Held Separate Business on a confidential basis, and, except as is permitted by this Hold Separate, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any person whose employment involves any of Respondent's or RMC's businesses, other than the Held Separate Business. Such personnel shall also execute confidentiality agreements prohibiting the disclosure of any Material Confidential Information of the Held Separate Business.
 - a. Respondent and RMC shall offer to the Held Separate Business any services and products that Respondent or RMC provided to their other businesses directly or through third party contracts, or that they have provided directly or through third party contracts to the businesses constituting the Held Separate Business at any time since January 1, 2004. The Held Separate Business may, at the option of the Manager with the approval of the Hold Separate Monitor, obtain such services and products from Respondent or RMC. The services and products that Respondent or RMC shall offer the Held Separate Business shall include, but shall not be limited to, the following:
 - (1) human resources and administrative services, including but not limited to payroll processing, labor relations support, pension administration, and procurement and administration of employee benefits, including health benefits;
 - (2) environmental health and safety services, which are used to develop corporate policies and insure compliance with federal and state regulations and corporate policies;
 - (3) financial accounting services;
 - (4) preparation of tax returns;
 - (5) audit services;

- (6) information technology support services;
- (7) processing of accounts payable and accounts receivable;
- (8) technical support;
- (9) procurement of supplies;
- (10) procurement of goods and services utilized in the ordinary course of business

Respondent shall not, directly or indirectly, solicit, induce or attempt to solicit or induce any Held Separate Business employees who are employed by the Acquirer to terminate their employment relationship with the Acquirer if such employees have had access to Material Confidential Information of the Acquirer or of the Held Separate Business; *provided, however*, a violation of this provision will not occur if: (1) the individual's employment has been terminated by the Acquirer; (2) Respondent advertises for employees in newspapers, trade publications, or other media not targeted specifically at the employees; or (3) Respondent hires employees who apply for employment with Respondent, so long as such employees were not solicited by Respondent in violation of this paragraph.

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

- (5) in defending legal claims, investigations or enforcement actions threatened or brought against or related to the Held Separate Business; or
- (6) in obtaining legal advice.

B. Upon five (5) days' notice to Respondent and without restraint or interference

Appendix A
to the Decision and Order

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

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

RMC Aggregate facilities to be divested pursuant to this Order:

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

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

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

Confidential Appendix B

HOLD SEPARATE MONITOR AGREEMENT

Appendix C

NOTICE OF DIVESTITURE AND REQUIREMENT FOR CONFIDENTIALITY

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

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

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

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

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