UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. CEMEX, S.A.B. de C.V. and RINKER GROUP LIMITED, Defendants.	CASE NO.: 1:07-cv-00640 JUDGE: Hon. Royce C. Lamberth DECK TYPE: Antitrust DATE STAMPED:

MOTION AND MEMORANDUM OF THE UNITED STATES
IN SUPPORT OF ENTRY OF THE SECOND MODIFIED FINAL JUDGMENT

Plaintiff, United States of America, moves for entry of the proposed Second Modified Final Judgment filed in this civil antitrust case. On January 7, 2009, pursuant to Federal Rule of Civil Procedure 60(b)(5) and Section XI of the Modified Final Judgment ("MFJ") entered in this matter on November 28, 2007, the United States and defendant Cemex, S.A.B. de C.V. ("Cemex"), filed a Joint Motion to Establish Notice and Comment Procedures and to Modify the Modified Final Judgment ("Joint Motion") to allow Cemex to reacquire Rinker Group Limited's ("Rinker") Kennedy Plant, located at 1406 Atlanta Avenue, Orlando, Florida 32806, which was divested to CRH plc ("CRH") pursuant to the MFJ. On January 8, 2009, the Court entered an Order to Establish Notice and Comment Procedures for the Modification of the Modified Final Judgment ("Order"), in which the Court stated that it would not rule on entry of the proposed Second Modified Final Judgment until the United States had notified the Court that the parties had complied with the Order. As set forth below, the United States and Cemex have satisfied the

requirements of the Order, and the proposed Second Modified Final Judgment may be entered at this time without further proceedings if the Court determines that entry is in the public interest.

MEMORANDUM

I. Background

On October 27, 2006, Cemex initiated a hostile cash tender offer to acquire all of the outstanding shares of Rinker for $13.00 a share. Cemex and Rinker were competitors in the ready mix concrete, concrete block, aggregate, and Portland cement markets in various states across the United States. In several cities in Florida and Arizona, the United States found that both companies had substantial operations in either the ready mix concrete, concrete block, or aggregate markets. On April 4, 2007, the United States filed with the Court a Complaint to prevent Cemex's acquisition of Rinker. Because the transaction involved Cemex's hostile cash tender offer for Rinker, Rinker was not named as a defendant in the Complaint. At the same time the Complaint was filed, the United States filed a Hold Separate Stipulation and Order, which incorporated the terms of a proposed Final Judgment to remedy the harm to competition that otherwise would have arisen from the acquisition. The Court signed the Hold Separate Stipulation and Order on April 10, 2007, and entered it on April 11, 2007.

On April 9, 2007, Cemex announced that it had withdrawn its hostile cash tender offer and entered into a Bid Agreement with Rinker, pursuant to which Cemex agreed to increase its offer to $15.85 a share. As a result of Cemex and Rinker entering into the Bid Agreement, the United States amended its Complaint on April 30, 2007 to include Rinker as a defendant, and Rinker signed and became a party to an Amended Hold Separate Stipulation and Order, which was accompanied by an amended Final Judgment that included Rinker as a party. The Court

signed and entered the Amended Hold Separate Stipulation and Order on May 2, 2007. On August 31, 2007, the Court entered the Final Judgment that had been filed on April 30, 2007. Subsequently, on November 27, 2007, the United States, Cemex, and Rinker filed a joint motion to modify the Final Judgment to account for unforeseen difficulties concerning Cemex's ability to divest a fee simple interest in the Valencia ready mix plant site in Tucson, Arizona. On November 28, 2007, the Court entered the MFJ, which permitted Cemex to replace the fee simple interest with a long-term lease.

According to the Complaint, Cemex's acquisition of Rinker would have substantially lessened competition in the production and distribution of ready mix concrete in the metropolitan areas of Fort Walton Beach/Panama City/Pensacola, Jacksonville, Orlando, Tampa/St. Petersburg, Fort Myers/Naples, Florida, and the metropolitan areas of Flagstaff and Tucson, Arizona. In addition, the acquisition would have substantially lessened competition in the production and distribution of concrete block in metropolitan Tampa/St. Petersburg and Fort Myers/Naples, Florida. Finally, the acquisition would have substantially lessened competition in the production and distribution of aggregate in metropolitan Tucson, Arizona.

The Final Judgment required Cemex to divest 39 ready mix concrete, concrete block, and aggregate plants that served metropolitan areas in Florida and Arizona (the "Divestiture Assets"), including the Kennedy Plant in Orlando. In the majority of the geographic markets in which the Final Judgement obligated Cemex to divest assets, Cemex divested assets it was acquiring from Rinker. However, in Orlando, Cemex wished to keep its Division Avenue Plant and an adjoining Rinker plant, because of raw materials supply efficiencies that could be obtained by operating adjoining plants. In lieu of divesting its own Division Avenue plant, Cemex offered to divest

Rinker's Kennedy Plant. On September 12, 2007, the United States approved CRH as the proposed purchaser of the Divestiture Assets, and on November 28, 2007, Cemex divested the Divestiture Assets to CRH.

On October 21, 2008, Cemex informed the United States that Cemex and CRH wanted to exchange two ready concrete plants located in Orlando, Florida. This exchange of plants would result in Cemex reacquiring the Kennedy Plant that had been divested to CRH pursuant to the MFJ at the same time that CRH acquires from Cemex the Division Avenue Plant retained by Cemex in 2007. Section XI of the Final Judgment and the MFJ proscribe the reacquisition of assets divested pursuant to the Final Judgment and the MFJ. Cemex seeks this modification because it leases the land used by the Division Avenue Plant under a lease that expires on April 29, 2009. Through an acquisition of Cemex's landlord, Conrad Yelvington, Inc. ("Yelvington"), CRH acquired the land encompassing Cemex's Division Avenue Plant and decided that it wished to relocate its own ready-mix operations to the Division Avenue site, thus displacing Cemex's operations. Cemex wants to relocate its Division Avenue operations to the Kennedy Plant site that Cemex previously divested to CRH, as CRH will vacate this site when it relocates to Division Avenue. The proposed modification to the Modified Final Judgment allows for Cemex's reacquisition of the Kennedy Plant to preserve Cemex's existing production capacity in downtown Orlando following CRH's move to Division Avenue.

II. The Order Establishing Compliance Procedures and the Parties' Compliance with those Procedures

The Order provided that the United States and Cemex must notify potentially interested persons about the pendency of the Joint Motion to permit Cemex to reacquire the Kennedy Plant

and provide such persons with the opportunity to comment on the proposed reacquisition. The Order required: (1) the United States to publish in the *Federal Register* a notice announcing the Joint Motion, the United States's tentative consent to the proposed reacquisition, and inviting the submission of comments within 30 days of publication; (2) Cemex to publish notice of the motion to modify the MFJ in *The Washington Post* and *The Orlando Sentinel* and the opportunity for public comment; and (3) after the conclusion of the 30-day comment period, the United States to file with the Court any comments it received and its responses to those comments. The Order further provided that the Court would not rule upon the entry of the proposed Second Modified Final Judgment until the United States moved the Court to enter it.

Pursuant to the Order, on January 21, 2009, the United States published in the *Federal Register* notice of the Joint Motion and invited the submission of comments during a 30-day period after publication. On January 15 and 16, 2009, Cemex published in two consecutive issues of *The Washington Post* and *The Orlando Sentinel* notice of the Joint Motion and the opportunity for comments. The 30-day comment period prescribed by the Order for the receipt of written comments, during which the proposed Second Modified Final Judgment would not be entered, ended on February 20, 2009. During the 30-day comment period, the United States received no comments on the proposed modification to the MFJ.

III. The Proposed Modification is in the Public Interest

This Court has jurisdiction to modify or terminate the MFJ pursuant to Section XII of the Judgment, Fed. R. Civ. P. 60(b)(5), and "principles inherent in the jurisdiction of the chancery." *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932); *see also In re Grand Jury Proceedings*, 827 F.2d 868, 873 (2d Cir. 1987).

Where, as here, the parties have consented to a proposed modification of an antitrust judgment, the issue before the Court is whether modification is in the public interest. *See United States v. Western Elec. Co.*, 900 F.2d 283, 307 (D.C. Cir. 1990) ("*Western Elec. I*") (noting that court should "approve an uncontested modification so long as the resulting array of rights and obligations is within the *zone of settlements* consonant with the public interest *today*"); *see also United States v. Western Elec. Co.*, 993 F.2d 1572, 1576 (D.C. Cir. 1993) ("*Western Elec. II*") (quoting *Western Elec. I*); *United States v. SBC Commc'ns, Inc.*, 339 F. Supp. 2d. 116, 117 (D.D.C. 2004) ("*SBC I*") (same). The Court of Appeals for this Circuit has stated that "the district court may reject an uncontested modification only if it has exceptional confidence that adverse antitrust consequences will result – perhaps akin to the confidence that would justify a court in overturning the predictive judgments of an administrative agency." *Western Elec. II*, 993 F.2d at 1577.

The public interest standard to be applied by the district court is the same one used in reviewing an initial proposed consent judgment in a government antitrust case. *See Western Elec. I*, 900 F.2d at 295; *United States v. American Telephone & Telegraph Co.*, 552 F. Supp. 131, 147 n.67 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 406 U.S. 1001 (1983). It has long been recognized that the United States has broad discretion in settling antitrust litigation on terms that will best serve the public interest in competition. *See United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995) (stating that government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest"). *See generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 11 (D.D.C. 2007) ("*SBC II*") (explicating the public interest standard under the Tunney Act).

The Court's role in determining whether the initial entry of a consent decree is in the public interest is not to determine what decree would best serve society, but only to determine whether entering the proposed decree would be in the public interest. It should so determine and enter the proposed decree unless it cannot find that the government's explanation of why the proposed decree would be in the public interest is reasonable, or finds that the government has abused its discretion or failed to discharge its duty to the public. *See Microsoft*, 56 F.3d at 1460-62; *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981); *see also SBC II*, 489 F. Supp. 2d at 15-16 ("[T]he relevant inquiry is whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable."). The Court's role is to "insur[e] that the government has not breached its duty to the public in consenting to the decree." *Bechtel*, 648 F.2d at 666; *see also Microsoft*, 56 F.3d at 1461 (examining whether "the remedies [obtained in the Final Judgment] were not so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States's prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case). As the public interest standard for reviewing a modification to a consent decree is the same as for deciding whether initially to enter the decree, the Court should conclude that modifying the decree is in the public interest if the United States has offered a reasonable explanation of why the modification vindicates the public interest in competitive markets, and there is no showing of abuse of discretion affecting the United States's recommendation.

IV. Modification of the Modified Final Judgment is Appropriate Given the Changing Conditions in the Orlando Market

The United States agrees with Cemex that the MFJ should be modified to allow Cemex to reacquire the Kennedy plant subject to the provisions of the proposed Second Modified Final Judgment. On October 21, 2008, Cemex represented to the United States on behalf of Cemex and CRH that the two companies wanted to exchange Cemex's Division Avenue facility and CRH's Kennedy Plant, which was divested by Cemex to CRH pursuant to the MFJ. These two facilities are located one-half mile apart from each other in Orlando, and the production capacities of the two plants are similar.

Modification to the MFJ will allow Cemex to continue operating at its present capacity in the downtown Orlando ready mix concrete market. As a result of CRH's purchase of Yelvington, CRH now owns the land that encompasses Cemex's Division Avenue Plant. Furthermore, Cemex's Division Avenue Plant site lease will expire on April 30, 2009. When the lease expires, CRH plans to displace Cemex from the Division Avenue site and move its Kennedy Plant operations to the Division Avenue site to take advantage of economies resulting from consolidation of its aggregate and concrete plant operations.

In order to continue operating at its present capacity in the downtown Orlando market, Cemex must acquire another ready mix concrete plant to replace the Division Avenue Plant. The most efficient place for Cemex to relocate its operations would be the Kennedy Plant site that Cemex previously divested to CRH, and which CRH will vacate when it relocates to Division Avenue.

The proposed modification of the MFJ will provide for Cemex's reacquisition of the Kennedy plant to preserve Cemex's operations – and its continued competition with CRH in Orlando – following CRH's move to Division Avenue. Further, Cemex no longer will be leasing land from a competitor and operating a plant inside a competitor's facilities. Therefore, the MFJ should be modified to permit Cemex to reacquire the Kennedy Plant.

Attached to this Motion and Memorandum is a proposed Second Modified Final Judgment that includes a modified Section XI, which now reads:

> Cemex may not reacquire any part of the Divestiture Assets during the term of this Second Modified Final Judgment, except that Cemex may reacquire Rinker's Kennedy plant, located at 1406 Atlanta Avenue, Orlando, Florida 32806, provided that it simultaneously divests and does not subsequently reacquire its Division Avenue plant located at 2201 Division Avenue, Orlando, Florida.

In addition, Section XIII has been modified to provide that the MFJ will terminate ten years from November 28, 2007, the date that the MFJ was entered.

V. Conclusion

Because the parties have satisfied all the requirements of the Order to Establish Notice and Comment Procedures for the Modification of the Modified Final Judgment, and because entry of the Second Modified Final Judgment is in the public interest, the United States

respectfully requests that the Court enter the attached Second Modified Final Judgment as soon as possible.

Dated: March 4, 2009

Respectfully submitted,

Frederick H. Parmenter
VA Bar No. 18184
Attorney
United States Department of Justice
Antitrust Division
Litigation II Section
1401 H Street N.W., Suite 3000
Washington, D.C. 20530
(202) 307-0620

CERTIFICATE OF SERVICE

I, Frederick H. Parmenter, hereby certify that on March 4, 2009, I caused a copy of the foregoing Motion and Memorandum of the United States in Support of Entry of the Second Modified Final Judgment to be served on defendant CEMEX, S.A.B. de C.V. by mailing the document electronically to the duly authorized legal representative of the defendant.

Frederick H. Parmenter

Counsel for CEMEX, S.A.B. de C.V.:

Clifford H. Aronson, Esquire
Skadden, Arps, Slate Meagher & Flom LLP
Four Times Square
New York, New York 10036-6522
(212) 735-2644
caronson@skadden.com