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:

MEMORANDUM OF PLAINTIFF UNITED STATES IN SUPPORT OF JOINT MOTION TO ESTABLISH NOTICE AND COMMENT PROCEDURES AND TO MODIFY THE MODIFIED FINAL JUDGMENT

Plaintiff, United States of America, and defendant, Cemex, S.A.B. de C.V. ("Cemex"), have jointly moved to modify the Modified Final Judgment entered by this Court on November 28, 2007 (the "MFJ") and establish procedures for the modification.[1] The MFJ required Cemex to divest certain ready mix concrete, concrete block, and aggregate plants in several geographic markets in order to remedy the competitive harm that otherwise would have resulted from the proposed acquisition as alleged in the Complaint. In the majority of the geographic markets in which the MFJ obligated Cemex to divest certain types of assets (i.e. ready mix plants), Cemex divested assets it was acquiring from Rinker. However, in Orlando, where Cemex was divesting assets that it owned, Cemex wished to keep both its ready mix concrete plant located at 2201 Division Avenue, Orlando, Florida ("Division Avenue Plant") and an adjoining Rinker plant, because of raw materials supply efficiencies that could be obtained by operating adjoining plants.

[1]Rinker Group Limited ("Rinker") is not included as a moving party because the company was acquired by Cemex.

In lieu of divesting its Division Avenue Plant, Cemex offered to divest the Kennedy ready mix concrete plant, located at 1406 Atlanta Avenue, Orlando, Florida 32806 ("Kennedy Plant"). Pursuant to the MFJ, all the assets were divested to CRH plc ("CRH") on November 30, 2008, including the Kennedy Plant in Orlando.

Cemex now seeks approval to modify the MFJ in order to reacquire the Kennedy Plant. Cemex currently leases the land on which its Division Avenue Plant sits under a lease that expires on April 30, 2009. As a result of an acquisition, CRH now owns the land that Cemex leases, and CRH wants to displace Cemex so that it can move its Kennedy Plant concrete operations to the Division Avenue site in order to take advantage of economies that can be realized by consolidating various aggregate and concrete operations there. The most efficient place for Cemex to relocate the operations it carries out at Division Avenue would be the Kennedy Plant site that Cemex will be vacating. Such a relocation is agreeable to CRH, which wishes to vacate and transfer its lease for the Kennedy Plant site to another party when it relocates to Division Avenue. However, Cemex is currently barred from reacquiring the Kennedy Plant site pursuant to Section XI of the MFJ. Because the proposed modification to Section XI of the MFJ will provide for Cemex's reacquisition of the Kennedy Plant in order to preserve Cemex's existing production capacity in downtown Orlando following CRH's move to Division Avenue, the United States tentatively consents to the modification of the MFJ to allow Cemex to reacquire the Kennedy Plant provided that it simultaneously divests its Division Avenue plant located at 2201 Division Avenue, Orlando, Florida, as specified in the proposed modification of the MFJ, and subject to public notice and an opportunity for public comment. Modification of the MFJ is in the public interest.

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 various 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 would otherwise 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, 2008, the Court entered the MFJ permitting 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 Cemex retained 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 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 tentatively 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.

III. MODIFICATION OF THE FINAL JUDGMENT IS APPROPRIATE GIVEN THE CHANGING CONDITIONS IN THE ORLANDO MARKET

The United States has tentatively agreed 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 Modified Final Judgment 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 to Section XI 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 Ave. Further, Cemex no longer will be leasing land from a competitor and operating a plant inside a competitor's facilities. Therefore, the United States believes that the MFJ should be modified to permit Cemex to reacquire the Kennedy Plant.

Attached to the Motion 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 10 years from November 28, 2007, the date that the MFJ was entered.

IV. PROPOSED PROCEDURES FOR GIVING PUBLIC NOTICE OF THE PENDING MOTION AND INVITING COMMENT THEREON

The opinion in *United States v. Swift & Co.* articulated a court's responsibility to implement procedures that will give non-parties notice of, and an opportunity to comment upon, antitrust judgment modifications proposed by consent of the parties:

> Cognizant . . . of the public interest in competitive economic activity, established chancery powers and duties, and the occasional fallibility of the Government, the court is, at the very least, obligated to ensure that the public, and all interested parties, have

received adequate notice of the proposed modification . . . . 1975-1 Trade Cas. (CCH) ¶ 60,201, at 65,703 (N.D. Ill. 1975) (footnote omitted).

It is the policy of the United States to consent to motions to modify judgments in antitrust actions only on condition that an appropriate effort be undertaken to notify potentially interested persons of the pendency of the motion. In this case, the United States has proposed, and defendant has agreed to the following:

1. The United States will publish in the Federal Register a notice announcing the Joint Motion to Modify the Modified Final Judgment and the United States's tentative consent to it, the reasons for modifying the MFJ, and inviting the submission of comments within 30 days of the publication.

2. Cemex will publish at its expense notice of the motion to modify the MFJ and the opportunity for public comment in two consecutive issues of The Washington Post and The Orlando Sentinel. These periodicals are likely to be read by persons interested in the market affected by the modification to the Final Judgment.

3. Within a reasonable period of time after the conclusion of the 30-day comment period following publication of the notices, the United States will file with the Court copies of any comments that it receives and its response to those comments.

4. The parties request that the Court not rule upon the motion until the United States has filed any comments and its responses to those comments or until the United States notifies the Court that no comments were received, and the United States moves the Court to enter the Proposed Second Modified Final Judgment. The

United States reserves the right to withdraw its consent to the motion at any time prior to entry of an order modifying the MFJ.

This procedure is designed to notify all potentially interested persons that a motion to modify the MFJ is pending and provide them adequate opportunity to comment thereon. Cemex has agreed to follow this procedure, including publication of the appropriate notices. The parties therefore submit herewith to the Court a separate order establishing this procedural approach and request that the Court enter this order promptly.

V. CONCLUSION

For the foregoing reasons, the plaintiff United States tentatively consents to the modification of the MFJ in this case, subject to completion of the procedures outlined herein, and the modification is in the public interest.

Dated: January 7, 2009

Respectfully submitted,

FOR PLAINTIFF
UNITED STATES OF AMERICA

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CERTIFICATE OF SERVICE

I, Frederick H. Parmenter, hereby certify that on January 7, 2009, I caused a copy of the foregoing Memorandum of Plaintiff United States in Support of Joint Motion and to Establish Notice and Comment Procedures to Modify the 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.



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