UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Department of Justice Antitrust Division 1401 H Street, N.W. Suite 3000 Washington, D.C. 20530, Plaintiff, v. CEMEX, S.A.B. de C.V., Av. Ricardo Margàin Zozaya #325, Colonia del Valle Campestre, Garza García, Nuevo León, Mexico 66265 and RINKER GROUP LIMITED Level 8, Tower B, 799 Pacific Highway Chatsworth, NSW 2067, Australia, Defendants.	CASE NO.: 1:07-cv-00640 JUDGE: Hon. Royce C. Lamberth DECK TYPE: Antitrust DATE STAMP:

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

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA" or "Tunney Act"), the United States moves for entry of the proposed Final Judgment filed in this civil antitrust case. Defendants Cemex, S.A.B. de C.V. ("Cemex") and Rinker Group Limited ("Rinker") have stipulated to the entry of the proposed Final Judgment upon compliance with the APPA and do not object to entry of this proposed Final Judgment without a hearing. The Competitive Impact Statement ("CIS"), filed May 23, 2007, explains why entry of the proposed Final Judgment is in the public interest. The United States is filing with

this motion a Certificate of Compliance setting forth the steps taken by the parties to comply with all applicable provisions of the APPA and certifying that the statutory waiting periods have expired. Thus, the proposed Final Judgment may be entered at this time without further hearing if the Court determines that entry is in the public interest. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.[1]

MEMORANDUM

I. Background

A. Pre-Complaint Investigation

On October 27, 2006, Cemex Australia Pty Ltd, an entity controlled by Cemex, initiated a hostile cash tender offer to acquire all of the outstanding shares of Rinker. The total enterprise value of the transaction offer at the time, including Rinker's debt, was approximately $12 billion. The United States Department of Justice ("Department") initiated its investigation in November 2006, and over a four-month period conducted an extensive investigation into the competitive effects of the transaction. As part of the investigation, the Department obtained considerable

[1]This transaction involved a cash tender offer. On June 18, 2007, Cemex obtained control of the Rinker board of directors. In keeping with the United States's standard practice, neither the proposed Final Judgment nor the Amended Hold Separate Stipulation and Order ("AHSSO") prohibited Cemex from obtaining control of the board of directors. *See* ABA Section of Antitrust Law, *Antitrust Law Developments* 387 (5th ed. 2002) (noting that "[t]he Federal Trade Commission (as well as the Department of Justice) will permit the underlying transaction to close during the notice and comment period"). Such a prohibition could interfere with many time-sensitive deals and prevent or delay the realization of substantial efficiencies. In consent decrees requiring divestitures, it is also standard practice to include a "preservation of assets" clause in the decree and to file a stipulation to ensure that the assets to be divested remain competitively viable. That practice has been followed here. Proposed Final Judgment ¶ VIII. In addition, the AHHSO has been filed and entered by the Court in this case.

information and materials from Cemex and Rinker and issued eleven Civil Investigative Demands to third parties. More than 250 interviews were conducted of customers, competitors, federal and state agency officials, and other individuals with knowledge of the industries impacted by the transaction. The investigative staff carefully analyzed the information that was gathered and thoroughly considered all of the issues presented. The Department considered the potential competitive effects of the transaction with respect to a variety of construction materials produced by Cemex and Rinker and concluded that the combination of Cemex and Rinker likely would lessen competition in: (1) the "large project" ready mix concrete markets in the metropolitan areas of Fort Walton Beach/Panama City/Pensacola, Jacksonville, Orlando, Tampa/St. Petersburg, and Fort Myers/Naples, Florida, and the metropolitan areas of Flagstaff and Tucson, Arizona; (2) the concrete block markets in the metropolitan areas of Tampa/St. Petersburg and Fort Myers/Naples, Florida; and (3) the market for aggregate that meets state department of transportation or American Society of Testing Materials specifications for use in asphalt concrete and ready mix concrete in Tucson, Arizona.

1. Ready Mix Concrete

Ready mix concrete is a building material made of a combination of cement, fine and coarse aggregate, small amounts of chemical additives, and water. It is made at production facilities called batch plants and transported in heavy-duty trucks with rotating drums. Ready mix concrete is unique because it is pliable when freshly mixed, can be molded into a variety of forms, and it is strong and permanent when hardened. For many building applications, customers will not substitute other building materials, such as steel, wood, or asphalt, for ready mix concrete.

Not all suppliers of ready mix concrete can service every kind of project. For example, servicing certain types of large projects, such as large state department of transportation highway and bridge building projects and high-rise building projects, requires ready mix concrete suppliers to have: (a) multiple ready mix concrete plants in a geographic area; (b) the ability to produce large amounts of concrete with multiple specifications; (c) backup plants; (d) a large number of concrete trucks; (e) a sizeable and well-trained workforce; (f) the demonstrated ability to service such a large project; and (g) considerable financial backing to remedy any problems relating to defective concrete. A small but significant post-acquisition increase in the price of ready mix concrete that meets the bid specifications would not cause the purchasers of ready mix concrete for large projects to substitute another building material in sufficient quantities, or to utilize a supplier of ready mix concrete without the characteristics described above with sufficient frequency so as to make such a price increase unprofitable.

The cost of transporting ready mix concrete is high compared to the value of the product. In addition, because concrete begins to set while being driven to the job site, it is highly perishable. Because of its perishability and the cost of hauling concrete, depending on the size of the city and the associated traffic, the distance concrete can reasonably be transported for large projects is limited to a metropolitan area and, in many cases, to only portions of that area.

The acquisition of Rinker by Cemex would reduce the number of suppliers of ready mix concrete that might bid on certain types of large projects from three to two in metropolitan Tampa/St. Petersburg and Fort Walton Beach/Panama City/Pensacola, Florida, and in metropolitan Tucson, Arizona; from four to three generally, and in some areas or for some projects from three to two, in metropolitan Orlando, metropolitan Fort Myers/Naples, and

metropolitan Jacksonville, Florida; and from two to one in metropolitan Flagstaff, Arizona. As a result, the transaction would lessen competition for ready mix concrete in the affected areas and likely would lead to higher prices.

2. Concrete Block

Concrete block is a construction material used to build exterior and interior walls in residential and commercial structures. In Florida, from Orlando south, the walls of residential structures are built almost exclusively with concrete block. For nearly all residential construction applications in this geographic area, an increase in the price of concrete block would not cause the purchasers of concrete block to substitute another product.

The cost of transporting concrete block is high compared to the value of the product. Manufacturers or third-party haulers deliver concrete block to customer job sites by truck. As delivery distance increases, the ratio of transportation costs to the price of concrete block increases. In urban areas, this most often confines the transport of concrete block to the metropolitan area. Consequently, an increase in the price of block would not cause customers to purchase block from outside the metropolitan area where they are located.

The acquisition, as originally proposed, would have given Cemex control of approximately 60 percent of the concrete block capacity in metropolitan Tampa/St. Petersburg and approximately 69 percent of the concrete block capacity in metropolitan Fort Myers/Naples. As a result, the transaction would lessen competition for concrete block in the affected areas and likely would lead to higher prices.

3. Aggregate

Aggregate is rock mined from either quarries or pits that is used to make ready mix

concrete and asphalt concrete. It must meet state departments of transportation or American Society of Testing Materials specifications for the specific type of asphalt or ready mix concrete being produced. There are no substitutes for aggregate because aggregate differs from other types of stone products in its physical composition, functional characteristics, customary uses, and pricing. A small but significant post-acquisition increase in the price of aggregate that meets state departments of transportation and American Society of Testing Materials specifications for use in ready mix concrete and asphalt projects would not cause the purchasers of such aggregate to substitute another product.

Aggregate is a bulky, heavy, and relatively low-cost product. The cost of transporting aggregate is high compared to the value of the product and limits the distance aggregate can be economically transported from an aggregate pit. Consequently, a small but significant post-acquisition increase in the price of aggregate in metropolitan Tucson would not cause customers of aggregate to procure aggregate in sufficient quantities from beyond metropolitan Tucson.

The acquisition, as originally proposed, would have reduced the number of significant suppliers of aggregate from five to four in the Tucson market generally and, depending on the location of the aggregate pit and the transportation costs, the number of suppliers could be reduced to as few as three or two. As a result, the transaction would lessen competition for ready mix concrete in the affected areas and likely would lead to higher prices.

B. The Proposed Final Judgment and Post-Complaint Investigation

On April 4, 2007, along with the complaint, the Department filed a Hold Separate Stipulation and Order ("HSSO") and a proposed Final Judgment. Because the transaction involved a hostile cash tender offer and Rinker had not agreed to be acquired, Rinker was not

named as a defendant in the Complaint. The proposed Final Judgment provided that, should Cemex and Rinker subsequently reach an agreement relating to Cemex's acquisition of any interest in Rinker, Cemex must require Rinker to sign and become a party to an amended HSSO. The Court signed the HSSO on April 10, 2007, and entered it on April 11, 2007.

On April 9, 2007, Cemex announced that it had entered into a Bid Agreement with Rinker. As a result of Cemex and Rinker entering into the Bid Agreement, the United States amended its Complaint to include Rinker as a defendant, and Rinker signed and became a party to the Amended Hold Separate Stipulation and Order ("AHSSO") and a party to the proposed Final Judgment. On May 2, 2007, the Court signed and entered the AHSSO. On May 23, 2007, the Department filed the CIS.

The proposed Final Judgment seeks to eliminate the anticompetitive effects of the acquisition by requiring Cemex to divest production and distribution facilities in: (1) the large project ready mix markets 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; (2) the concrete block markets in Tampa/St. Petersburg and Fort Myers/Naples, Florida; and (3) the aggregate market in Tucson, Arizona. In the ready mix concrete markets, it requires Cemex to divest eight ready mix concrete plants in metropolitan Fort Walton Beach/Panama City/Pensacola, two plants in metropolitan Jacksonville, four plants in metropolitan Orlando, six plants in metropolitan Tampa/St. Petersburg, six plants in metropolitan Fort Myers/Naples, four plants in Tucson, and one plant in metropolitan Flagstaff. In the concrete block markets, it requires Cemex to divest three concrete block plants in metropolitan Tampa/St. Petersburg and three in Fort Myers/Naples, Florida. In

the aggregate market in Tucson, Arizona, it requires Cemex to divest two aggregate facilities. The proposed Final Judgment also requires Cemex to divest assets such as trucks, manufacturing equipment, contracts, and supply agreements needed for the production and distribution of ready mix concrete, concrete block, and aggregate.

The Department is confident that the divestiture by Cemex of the assets set forth in the proposed Final Judgment will remedy the violation alleged in the Complaint. In each metropolitan area for ready mix concrete, the divestitures will establish a new, independent, and economically viable competitor that can bid on large projects, such as highways, bridges, and high-rise buildings. In metropolitan Tampa/St. Petersburg and Fort Myers/Naples, the divestitures will also establish new, independent, and economically viable competitors that can produce and distribute concrete block in each metropolitan area. Further, the divestitures will provide the new ready mix concrete competitor in Tucson, Arizona, with sufficient aggregate reserves to compete effectively in that market. As of this filing, Cemex is making substantial efforts to divest the assets in compliance with the proposed Final Judgment.

II. Compliance with the APPA

The APPA requires a sixty-day period for the submission of public comments on a proposed Final Judgment. *See* 15 U.S.C. § 16(b). In compliance with the APPA, the United States filed the CIS in this Court on May 23, 2007; published the CIS in the *Federal Register* on June 12, 2007, *see United States v. Cemex, S.A.B. de C.V.*, 72 Fed. Reg. 32314-31, 2007 WL 1668708; and published summaries of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, in *The Washington Post* for seven days beginning on June 16, 2007 and ending on

June 22, 2007.

The sixty-day period for public comments ended on August 21, 2007; the Division received no comments. As recited in the Certificate of Compliance filed simultaneously with this Motion, all the requirements of the APPA now have been satisfied. It is therefore appropriate for the Court to make the public interest determination required by 15 U.S.C. § 16(e) and to enter the Final Judgment.

III. Standard of Judicial Review Under the APPA for the Proposed Final Judgment

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the court, in accordance with amendments to the APPA in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
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> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B); *see generally United States v. SBC Commc'ns, Inc.*, Nos. 05-2102 and 05-2103, 2007 WL 1020746, at *9-16 (D.D.C. Mar. 29, 2007) (assessing public

interest standard under APPA and effect of 2004 amendments).[2] Courts in this circuit have held – both before and after the 2004 amendments – that the United States is entitled to deference in crafting its antitrust settlements, especially with respect to the scope of its complaint and the adequacy of its remedy, which are the "two most significant legal questions" relating to a public interest determination. *United States v. Microsoft Corp.*, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995);[3] *SBC Commc'ns*, 2007 WL 1020746, at *12-*16.

With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest* ." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

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[2] *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006) (substituting "shall" for "may" in directing relevant factors for court to consider and amending list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms). The 2004 amendments do not affect the substantial precedent in this and other circuits analyzing the scope and standard of review for APPA proceedings. *See SBC Commc'ns*, 2007 WL 1020746, at *9 ("[A] close reading of the law demonstrates that the 2004 amendments effected minimal changes . . . .").

[3] The *Microsoft* court explained that a court making a public interest determination under the APPA should consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *Microsoft*, 56 F.3d at 1458-62.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[4] In making its public interest determination, a district court must accord 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. *SBC Commc'ns*, 2007 WL 1020746, at *16 (United States entitled to "deference" as to "predictions about the efficacy of its remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003).

Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. AT&T Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *Gillette*, 406 F. Supp. at 716); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 2007 WL 1020746, at *16.

Moreover, the Court's role under the APPA is limited to reviewing the remedy in

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[4] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

relationship to the violations that the United States has alleged in its Complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Id.* at 1459-60. As this Court recently confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 2007 WL 1020746, at *14.

In its 2004 amendments to the Tunney Act, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). This language codified the intent of the original 1974 statute, expressed by Senator Tunney in the legislative history: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 2007 WL

1020746, at *9.[5]

IV. Conclusion

For the reasons set forth in this Motion and the CIS, the Court should find the proposed Final Judgment is in the public interest and should enter the attached proposed Final Judgment without further hearings. The United States respectfully requests that the attached Final Judgment be entered as soon as possible.

Dated: August 30, 2007

Respectfully submitted,

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[5] *United States v. Mid-Am. Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) 61,508, at 71,980 (W.D. Mo. 1977) ("[T]he Court, in making its public interest finding, should . . . carefully consider the explanations of the government in order to determine whether those explanations are reasonable under the circumstances.")

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CERTIFICATE OF SERVICE

I, Frederick H. Parmenter, hereby certify that on August 30, 2007, I caused a copy of the foregoing Certificate of Compliance with Provisions of the Antitrust Procedures and Penalties Act and the Motion and Memorandum of the United States in Support of Entry of Final Judgment with the attached proposed Final Judgment to be served on defendants CEMEX, S.A.B. de C.V. and RINKER GROUP LIMITED by mailing the documents electronically to the duly authorized legal representatives of each defendant, as follows:

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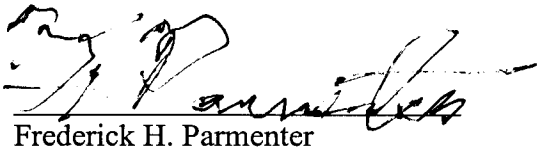

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