

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

**COMMISSIONERS: Edith Ramirez, Chairwoman
Maureen K. Ohlhausen
Terrell McSweeney**

_____)		
In the Matter of)	
)	
)	
HEIDELBERGCEMENT AG,)	
 a corporation;)	
)	Docket No. C-
 and)	
)	
ITALCEMENTI S.p.A,)	
 a corporation.)	
)	
_____)		

**DECISION AND ORDER
[Public Record Version]**

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Respondent HeidelbergCement AG (“Heidelberg”) of Respondent Italcementi S.p.A. (“Italcementi”) (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 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 Maintain Assets (“Asset Maintenance 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 Heidelberg is a corporation organized, existing, and doing business under and by virtue the laws of Germany, having its registered seat in Heidelberg, registered with the commercial register of the local court of Mannheim under no. HRB 330082, with its registered business address at Berliner Straße 6, 69120 Heidelberg, Germany. Heidelberg’s principal U.S. subsidiary, Lehigh Hanson, 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 300 East John Carpenter Freeway, Irving, TX 75062.
2. Respondent Italcementi is a corporation organized, existing, and doing business under and by virtue of the laws of Italy, having its seat in Bergamo, registered with Bergamo Chamber of Commerce under no. 00637110164, with its registered business address at Via Camozzi 124, 24121 Bergamo, Italy. Italcementi’s principal U.S. subsidiary, Essroc Cement Corp., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Pennsylvania, with its U.S. headquarters and principal place of business located at 3251 Bath Pike, Nazareth, PA 18064.
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:

DEFINITIONS OF PERSONS

- A. “Acquirer” means, as the context requires, either or both of the Martinsburg Acquirer and the Indianapolis Acquirer.
- B. “Cemex” means Kosmos Cement Company, a general partnership, organized, existing, and doing business under and by virtue of the laws of the State of Kentucky, with its offices and principal place of business located at 1501 Belvedere Road, West Palm Beach, FL 33406.

- C. “Commission” means the Federal Trade Commission.
- D. “Governmental Entity” means any federal, provincial, state, county, local, or other political subdivision of the United States or any other country, or any department or agency thereof, or any state or federal court.
- E. “Heidelberg” means HeidelbergCement AG, its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by HeidelbergCement AG (including, but not limited to, Lehigh Hanson, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- F. “Indianapolis Acquirer” means either Cemex or another Person approved by the Commission to purchase the Indianapolis Terminal Assets.
- G. “Italcementi” means Italcementi S.p.A., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Italcementi S.p.A., (including, but not limited to, Essroc Cement Corp), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- H. “Martinsburg Acquirer” means a Person approved by the Commission to acquire the Martinsburg Cement Business Assets.
- I. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or Governmental Entity, and any subsidiaries, divisions, groups, or affiliates thereof.
- J. “Respondent” or “Respondents” means Heidelberg and Italcementi, individually and collectively.

GENERAL DEFINITIONS

- K. “Acquisition” means the proposed acquisition of approximately 45 percent of the outstanding voting securities of Italcementi by Heidelberg as described and contemplated by the Share Purchase Agreement dated July 28, 2015, as amended.
- L. “Acquisition Date” means the date the Acquisition is consummated.
- M. “Ashland Terminal” means the Terminal Assets relating to Italcementi’s Ashland Terminal located at 9680 Old Ridge Road, Ashland, VA, that stores, distributes and sells Cement and related products.
- N. “Asset Maintenance Monitor” means the Person approved by the Commission to serve as an Asset Maintenance Monitor pursuant to the Asset Maintenance Order issued by the Commission.
- O. “Asset Maintenance Order” means the Order to Maintain Assets issued by the Commission in this matter.

- P. “Assets To Be Divested” means:
1. The Martinsburg Cement Business and, at the option of the Acquirer and subject to the prior approval of the Commission, the Columbus Terminal and the Middlebranch Terminal; and,
 2. The Indianapolis Terminal.
- Q. “Baltimore Terminal” means the Terminal Assets relating to Italcementi’s Baltimore Terminal located at 5700 Chemical Road, Baltimore, MD, that stores, distributes and sells Cement and related products.
- R. “Bessemer Terminal” means:
1. The Terminal Assets relating to Italcementi’s Bessemer terminal located at Second Street, PO Box 779, Bessemer, PA, that stores, distributes and sells Cement and related products; and,
 2. An agreement approved by the Commission between Respondents and the Martinsburg Acquirer requiring Respondents to use or maintain any real property adjacent to the real property upon which the Bessemer terminal is located and any rights or easements retained by Respondents in or relating to the real property upon which the Bessemer terminal is located in a reasonable manner that does not interfere materially with the operation of the Bessemer Terminal by the Martinsburg Acquirer.
- S. “Books and Records” means any and all original, copies, drafts, and final versions of all books, records, files, customer files, customer lists, customer purchasing histories, vendor files, vendor lists, advertising and marketing materials, sales materials, technical information, architectural drawings and blueprints of any kind, databases, financial information, reports, regulatory materials, or documents, information, and files of any kind, regardless of whether the document, information, or files are stored or maintained in traditional paper format, by means of electronic, optical, or magnetic media or devices, photographic or video images, or any other format or media
- T. “Chesapeake Terminal” means the Terminal Assets relating to Italcementi’s Chesapeake terminal located at 100 Pratt Street, Chesapeake, VA, that stores, distributes and sells Cement and related products.
- U. “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.
- V. “Cemex Agreement” means the agreement between Essroc Cement Corp. and Kosmos Cement Company dated May 5, 2016 attached as Confidential Appendix I to this Order.

- W. “Columbus Terminal” means the Terminal Assets relating to Italcementi’s Columbus terminal located at 1550 Williams Road, Columbus, OH, that stores, distributes and sells Cement and related products.
- X. “Direct Costs” means cost not to exceed the cost of labor, material, travel, and other expenditures to the extent the costs are directly incurred to provide services under this Order or the Asset Maintenance 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.
- Y. “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 Indianapolis Terminal Divestiture Agreement and the Martinsburg Business Divestiture Agreement.
- Z. “Divestiture Date” means the date any of the respective divestitures required by this Order are consummated.
- AA. “Divestiture Employees” means:
1. All employees of Respondents who perform duties at the locations of any one or more of the Assets to be Divested (including, but not limited to, the Solvay Terminal Assets) ; and,
 2. All employees of Respondents wherever located who perform duties at any location that are reasonably necessary for the operation in a manner that achieves the purposes of this Order of the Assets to be Divested (including, but not limited to, the Solvay Terminal Assets).
- BB. “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.
- CC. “Essroc/EPA Consent Decree” means the consent decree in United States of America, et al, v. Essroc Cement Corp., Civil Action No. 11-1650, filed in the United States District Court for the Western District of Pennsylvania.
- DD. “Frederick Terminal” means the Terminal Assets relating to Italcementi’s terminal located at 4120 Buckeystown Pike, Frederick, MD that stores, distributes and sells Cement and related products.
- EE. “Grinding” means the process of grinding clinker or granulated blast furnace slag into the powder that is or is an ingredient used in making cement.
- FF. “Indianapolis Terminal” means the Terminal Assets relating to Italcementi’s terminal located at 1051 South Emerson Avenue, Indianapolis, IN, that stores, distributes and sells Cement and related products.

- GG. “Indianapolis Terminal Divestiture Agreement” means:
1. The Cemex Agreement; or,
 2. Any other contracts and agreements that receive the approval of the Commission to divest the Indianapolis Terminal to an Acquirer approved by the Commission as required by this Order.
- HH. “Intellectual Property” means all intellectual property owned or licensed (as licensor or licensee) by Respondents in which Respondents have a proprietary interest, and all associated rights thereto, including all of the following in any jurisdiction throughout the world: (i) all Patents; (ii) all trade secrets, Know-How, and confidential or proprietary information (including ideas, research and development, formulas, compositions, manufacturing and production processes and techniques, technical data and information, blue prints, designs, drawings, specifications, protocols, quality control information, customer and supplier lists, pricing and cost information, business and marketing plans and proposals, and all other data, technology, and plans); (iii) all computer software (including source code, executable code, data, databases and related documentation); and (iv) all rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation, or breach of any of the foregoing.
- II. “Know-How” means know-how, trade secrets, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, development, and other similar information.
- JJ. “Leetsdale Terminal” means the Terminal Assets relating to Italcementi’s Leetsdale terminal located at 500 W. Park Road, Leetsdale, PA, that stores, distributes and sells Cement and related products.
- KK. “Martinsburg Business Divestiture Agreement” means any contracts and agreements that receive the approval of the Commission to divest the Martinsburg Cement Business to an Acquirer approved by the Commission as required by this Order.
- LL. “Martinsburg Cement Business” means the
1. Martinsburg Cement Plant;
 2. Ashland Terminal;
 3. Baltimore Terminal;
 4. Bessemer Terminal;
 5. Chesapeake Terminal;
 6. Frederick Terminal;
 7. Leetsdale Terminal;
 8. Newport News Terminal, and,
 9. Solvay Terminal.

Provided, however, the Martinsburg Cement Business does not include:

1. Books and Records that contain only information that relates solely to assets properly retained by Respondents under this Order;
 2. Books and Records:
 - a. That contain information that relates both to Assets To Be Divested and to assets properly retained by Respondents under this Order; and,
 - b. From which Respondents, using best efforts, have redacted information about the dates, products, quantity of products, prices, credit terms, and other commercial information about transactions with customers at any of the Assets To Be Divested;
 3. A copy of those portions of Primary Books and Records and a copy of Redacted Books and Records divested to an Acquirer that:
 - a. Respondents are required to keep or maintain for legal, regulatory, tax, or bona fide document retention purposes; and,
 - b. Respondents keep or maintain at a location and under conditions of access that allow only Respondents' agents and employees who perform legal or accounting services for Respondents to access;
 4. Contracts with common carriers to use any vehicles, railcars, barges, or other transportation vessels, other than contracts for such vehicles, railcars, barges, or other transportation vessels in number, type, quantity, and quality as are reasonably necessary for an Acquirer to operate the Assets To Be Divested in a manner to achieve the purposes of this Order; and,
 5. Other Cement plants, or other sources of Cement or related products, in addition to the Martinsburg Cement Plant; and,
 6. Other Cement terminals in addition to the Terminals To Be Divested and the Optional Terminals.
- MM. "Martinsburg Cement Plant" means Italcementi's Plant Assets relating to Italcementi's Cement plant located at 1826 S. Queen Street, Martinsburg, WV, that produces, stores, distributes and sells Cement and related products.
- NN. "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 Asset Maintenance Order;

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

1. Information that is in the public domain when received by Respondents;
2. 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;
3. 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,
4. 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.

OO. "Middlebranch Terminal" means the Terminal Assets relating to Italcementi's Middlebranch terminal located at 8282 Middlebranch Ave. NE, Middlebranch, OH, that stores, distributes and sells Cement and related products. The Middlebranch Terminal includes all assets located at the Middlebranch terminal relating to Grinding that takes place at the Middlebranch terminal, including, but not limited to:

1. Real property, whether owned or leased, and including any storage areas, quarries, pits, or other natural resource rights (together, in each case, with all easements, rights of way, buildings, improvements, and appurtenances);
2. All personal property, equipment, machinery and tools, furniture and fixtures;
3. Such vehicles, railcars, barges, or other transportation vessels in number, type, quantity, and quality (wherever located) as are reasonably necessary for an Acquirer to operate the Assets To Be Divested in a manner to achieve the purposes of this Order;
4. Storage facilities at the Middlebranch terminal for any products produced by Grinding or sold at the plant, or shipped to any terminal, in bagged, bulk, or other form;
5. Assets related to or used for receiving raw materials used in or related to Grinding or shipping products produced by Grinding;
6. Inventory, supplies, and raw materials;
7. Primary Books and Records and Redacted Books and Records, in each case wherever located;
8. Contracts;
9. Customer and vendor lists; and,
10. Licenses, government approvals, registrations, permits, and applications (to the extent transferable);

Provided, that, the Middlebranch Terminal does not include Terminal Assets relating to Grinding at other than the Terminals To Be Divested and the Columbus Terminal.

Provided, further, that, Contracts do not include contracts for granulated blast furnace slag not exclusively used by the Middlebranch Terminal Assets.

- PP. “Monitor” means any Person appointed by the Commission pursuant to Paragraph IV. of this Order to act as a monitor in this matter.
- QQ. “Newport News Terminal” means the Terminal Assets relating to Italcementi’s terminal located at 1900 Harbor Access Road, Newport News, VA that stores, distributes and sells Cement and related products.
- RR. “Optional Terminals” means the Columbus Terminal and the Middlebranch Terminal.
- SS. “Plant Assets” means all of Respondents’ rights, title, and interest in and to all assets, tangible and intangible, located or used at the Martinsburg Cement Plant relating to, used in, or reserved for use in, its Cement plant operations, including but not limited to, all:
1. 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);
 2. Personal property, equipment, machinery and tools, furniture and fixtures;
 3. Such vehicles, railcars, barges, or other transportation vessels in number, type, quantity, and quality (wherever located) as are reasonably necessary for an Acquirer to operate the Assets To Be Divested in a manner to achieve the purposes of this Order;
 4. Storage facilities for any Cement produced or sold at the plant, or shipped to any terminal, in bagged, bulk, or other form;
 5. Terminal Assets located at the Cement plant used to ship from the plant, or sell or deliver at the plant, any Cement (whether produced at the plant or some other location);
 6. Inventory, supplies, and raw materials;
 7. Primary Books and Records and Redacted Books and Records, in each case wherever located;
 8. Contracts;
 9. Customer and vendor lists;
 10. Intellectual Property used in or necessary for the operation of any Cement plant required to be divested by this Order;
 11. Licenses, government approvals, registrations, permits, and applications (to the extent transferable);
 12. Telephone and fax numbers; and,

13. Goodwill.

Provided, however, that Plant Assets do 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, Plant Assets do not include any terminals other than the Terminals To Be Divested and the Optional Terminals.

- TT. "Primary Books and Records" means Books and Records containing information relating solely to the Plant Assets, Terminal Assets, or other assets divested under this Order.
- UU. "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 Cemex.
- VV. "Redacted Books and Records" means Books and Records:
1. That prior to a Divestiture Date contained information relating both to:
 - a. The Plant Assets, Terminal Assets, or other assets divested under this Order; and,
 - b. Assets retained by Respondents because the Order does not require their divestiture; and,
 2. From which Respondents have removed or redacted information relating solely to assets retained by Respondents before divesting the Books and Records to an Acquirer.
- WW. "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 supply, throughput, storage or transportation 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.
- XX. "Solvay Terminal" means the Terminal Assets relating to Heidelberg's terminal located at 1515 Willis Avenue, Solvay, NY, that stores, distributes and sells Cement and related products.
- YY. "Terminal Assets" means all of Respondents' rights, title, and interest in and to all assets, tangible and intangible, located at the Terminals To Be Divested relating to, used in, and/or reserved for use in, its Cement terminal operations, including but not limited to, all:

1. Real property, whether owned or leased (together, in each case, with all easements, rights of way, buildings, improvements, and appurtenances);
2. Personal property, equipment, machinery and tools, furniture and fixtures;
3. Such vehicles, railcars, barges, or other transportation vessels in number, type, quantity, and quality (wherever located) as are reasonably necessary for an Acquirer to operate the Assets To Be Divested in a manner to achieve the purposes of this Order;
4. Storage facilities for any Cement shipped to or sold at the terminal in bagged, bulk, or other form;
5. Inventory, supplies, and raw materials;
6. Books and Records (wherever located);
7. Contracts;
8. Customer and vendor lists;
9. Intellectual Property used in or necessary for the operation of any of the Terminals To Be Divested;
10. Licenses, government approvals, registrations, permits, and applications (to the extent transferable);
11. Telephone and fax numbers; and,
12. Goodwill.

Provided, however, that Terminal Assets do 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, Terminal Assets do not include:

1. Books and Records that contain only information that relates solely to assets properly retained by Respondents under this Order;
2. Books and Records:
 - a. That contain information that relates both to Assets To Be Divested and to assets properly retained by Respondents under this Order; and,
 - b. From which Respondents, using best efforts, have redacted information about the dates, products, quantity of products, prices, credit terms, and other commercial information about transactions with customers at any of the Assets To Be Divested;

3. A copy of those portions of Primary Books and Records and a copy of Redacted Books and Records divested to an Acquirer that:
 - a. Respondents are required to keep or maintain for legal, regulatory, tax, or bona fide document retention purposes; and,
 - b. Respondents keep or maintain at a location and under conditions of access that allow only Respondents' agents and employees who perform legal or accounting services for Respondents to access;
4. Contracts with common carriers to use any vehicles, railcars, barges, or other transportation vessels, other than contracts for such vehicles, railcars, barges, or other transportation vessels in number, type, quantity, and quality as are reasonably necessary for an Acquirer to operate the Assets To Be Divested in a manner to achieve the purposes of this Order; and,
5. Cement plants other than the Martinsburg Cement Plant and terminals other than the Terminals To Be Divested and the Optional Terminals.

ZZ. "Terminals To Be Divested" means the Ashland Terminal, Baltimore Terminal, Bessemer Terminal, Chesapeake Terminal, Frederick Terminal, Indianapolis Terminal, Leetsdale Terminal, Newport News Terminal, and Solvay Terminal.

AAA. "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) 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 ten (10) days of the Acquisition Date, the Indianapolis Terminal shall be divested, absolutely and at no minimum price, to:
 - a. Cemex pursuant to and in accordance with the Indianapolis Terminal Divestiture Agreement; or,
 - b. A Person who receives the prior approval of the Commission and in accordance with an Indianapolis Terminal Divestiture Agreement that receives the prior approval of the Commission;

Provided further that, if prior to the date this Order becomes final, Respondents have divested the Indianapolis Terminal pursuant to Paragraph II.A.1. and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that:

1. Any Indianapolis Acquirer identified in Paragraph II.A.1. is not an acceptable Acquirer, then Respondents shall, within five days of notification by the Commission, rescind such transaction with that Indianapolis Acquirer, and shall divest such assets, absolutely and in good faith, at no minimum price, to another Acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission, within 90 days of the date the Commission notifies Respondents that such Indianapolis Acquirer is not an acceptable Acquirer; or,
2. The manner in which any divestiture identified in Paragraph II.A.1. was accomplished is not acceptable, the Commission may direct the Respondents, or appoint a Divestiture Trustee pursuant to Paragraph V.A. 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.

and,

2. Within one hundred and twenty (120) days of the Acquisition Date, the Martinsburg Cement Business shall be divested, absolutely and at no minimum price, to an Acquirer that receives the prior approval of the Commission, and in a manner that receives the prior approval of the Commission.

Provided that, at the option of the Acquirer and subject to the prior approval of the Commission, Respondents shall divest the Columbus Terminal and the Middlebranch Terminal to the Acquirer of the Martinsburg Cement Business.

B. 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 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.

- C. 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.
- D. Prior to each applicable Divestiture Date:
1. Respondents shall secure, at their sole expense, consents from any Person that are necessary to effect the complete transfer of the Assets To Be Divested to each Acquirer (including, but not limited to, any approvals of use or ownership of any of the Assets To Be Divested relating to the Essroc/EPA Consent Decree), and for each Acquirer to operate the Assets To Be Divested in a manner consistent with the purposes of this Order;
Provided, however, that Respondents shall not be required to secure the consent of any Governmental Entity relating to any permit, license, or right that 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 Entity 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.
- E. 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 and in the Asset Maintenance Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the Assets To Be Divested.
- F. With respect to each of the divestitures of Assets to be Divested required by this Order:
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 Divestiture Employees pursuant to the applicable Divestiture Agreement; and
 - b. Make offers of employment to any or all of the Divestiture Employees pursuant to the applicable Divestiture Agreement;

2. Respondents shall: (i) not directly or indirectly interfere with the hiring by the Acquirer of Divestiture Employees; (ii) not directly or indirectly attempt to persuade any one or more of the Divestiture Employees to decline any offer of employment from any Acquirer, or offer any incentive to any Divestiture Employee to decline employment with any Acquirer; (iii) remove any impediments within the control of Respondents that may deter those Divestiture 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 Divestiture 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 Divestiture Employee, prior to the applicable Divestiture Date, all Divestiture 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 Divestiture Employee 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:

- a. The Divestiture 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 Divestiture Employees of the Acquirer(s); or,
- c. Respondents hire a Divestiture 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.

- G. The purpose of the divestitures is to ensure the continuation of the Assets To Be Divested as ongoing, viable facilities engaged in the Cement business 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 Asset Maintenance 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 Asset Maintenance 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 Asset Maintenance Order, or the Remedial Agreement(s).
- 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 Asset Maintenance 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 Asset Maintenance 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 Asset Maintenance 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,
 - 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 Asset Maintenance Order.

IV.

IT IS FURTHER ORDERED that:

- A. The Commission appoints William Hill as Monitor, and approves the agreement between the Monitor and Respondents, attached as Appendix II (“Monitor Agreement”). 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;
 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 thirty (30) 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). 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;
 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.
- 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 Asset Maintenance Monitor appointed pursuant to the Asset Maintenance Order.

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.
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.

- 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.
- 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.
 - 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.
 - j. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee'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 Divestiture Trustee's duties.
- 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 Asset Maintenance Monitor appointed pursuant to the Asset Maintenance Order.

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 Asset Maintenance Monitor appointed under the Asset Maintenance 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) 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
- 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 ten (10) years after the date this Order is issued.

By the Commission.

Donald S. Clark
Secretary

SEAL:
ISSUED:

APPENDIX I

Indianapolis Terminal Divestiture Agreement

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

APPENDIX II

Monitor Agreement

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