SUBMISSION TO EXTERNAL REVIEW PANEL ON DC ISSUE 2009/100901

HAS A RESTRUCTURING CREDIT EVENT OCCURRED WITH RESPECT TO CEMEX S.A.B. DE CV

BRIEF IN SUPPORT OF THE "YES" PRESENTED POSITION

Of counsel:

Simona Gory
Ben Harrington

QUINN EMANUEL URQUHART OLIVER &HEDGES, LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010-1601
(212) 849-7000

Daniel P. Cunningham

QUINN EMANUEL URQUHART OLIVER &HEDGES, LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010-1601
(212) 849-7000

Daniel P. Cunningham of Quinn Emanuel Urquhart Oliver & Hedges LLP and the Convened DC Members who support the "Yes" Presented Position submit this brief in support of the "Yes" Presented Position in answer to the question of whether a restructuring credit event occurred with respect to CEMEX, S.A.B. de C.V. ("CEMEX").

STATEMENT OF FACTS

I. CEMEX RESTRUCTURES ITS DEBT[1]

CEMEX is a Mexican holding company that operates through its subsidiaries to produce, distribute, market and sell cement, ready-mix concrete, aggregates and clinker. 20-F at 20. While CEMEX is a global company with production facilities and assets scattered across six continents, its largest centers of operation are the United States, Mexico, Spain, and the United Kingdom. *See id*. CEMEX operates through its operating subsidiaries, and has no significant assets other than its stock in its subsidiaries and its cash and marketable securities. *Id*. at 7.

CEMEX's holdings grew significantly in July of 2007 when it completed a $14.2 billion acquisition of the Australian company Rinker, an international leader in the manufacture and supply of construction materials and services. *Id*. at 21. The Rinker acquisition did not, however, go off according to plan. When the deal was struck, Rinker enjoyed a particularly strong presence in the United States, where it owned two cement plants and 172 ready-mix concrete facilities. *Id*. By assuming those operations, CEMEX's exposure to the United States economy "substantially increased." *Id*. at 6. But shortly after the acquisition was finalized, housing

[1] Most of this statement of facts is taken directly from CEMEX's most recent SEC filings, the first being its Form 20-F annual report for the period ended December 31, 2008, filed on June 30, 2009 ("20-F") (Ex. A) and the second being its Final Prospectus Supplement dated September 22, 2009 to the Prospectus dated September 8, 2009 (the "Prospectus") (Ex. B). The Prospectus concerned a CEMEX equity offering with proceeds of $1.625 billion that CEMEX conducted pursuant to the restructuring agreement finalized between CEMEX and its creditors on August 14, 2009. The 20-F and Prospectus are the most recent and authoritative documents concerning the CEMEX refinancing.

demand in the United States plummeted as the construction industry entered its "worst downturn in over 70 years." *Id*. at 35. CEMEX was not left unscathed. Accounting for the consolidation of Rinker's operations, CEMEX's cement and ready-mix concrete sales in the United States decreased by approximately 21% and 30% in 2008. *Id*. at 5. And in the first quarter of 2009, CEMEX suffered 33% and 41% reductions in the same sales categories. *Id*. CEMEX has described these losses as "the worst decline in sales volumes [it has] experienced in the United States in recent history." *Id*.

As the economic crisis in the United States spread across the globe, so too did CEMEX's losses. In Spain, for instance, CEMEX's cement and ready-mix sales fell by 30% and 26% respectively in 2008, and by 52% and 55% in the first quarter of 2009. *Id*. at 76, 6. In the United Kingdom the same sales measurements fell by 16% and 21% in 2008, and by 22% and 27% in 2009's first quarter. *Id*. A relative bright spot was Mexico, where CEMEX's cement and ready-mix sales fell only 4% and 6% in 2008 and, due to infrastructure spending, increased 3% and 4% in the first quarter of 2009. *Id*. at 5. But this modest uptick in sales in Mexico was offset by the severe depreciation of the Mexican Peso, which fell 26% against the Dollar in 2008. *Id*. Depreciation of the Peso is particularly problematic for CEMEX, because the company must "service [its] Dollar denominated obligations with revenues generated in Pesos or other currencies, as [it does] not generate sufficient revenue in Dollars from [its] operations to service all [of its] Dollar denominated obligations." *Id*. at 124.

To be sure, CEMEX was not the only cement and ready-mix concrete company to suffer from the global plummet in construction. But there are clear statistical indications that CEMEX took a disproportionate hit. In the United States, for example, demand for cement decreased by 15.8% across the market in 2008, and was projected to decline by 18% in 2009 (according to the

Portland Cement Association). *Id.* 35. Yet as the numbers above confirm, CEMEX fared even worse, with cement sales falling by 21% in 2008 and by 33% in the first quarter of 2009. *Id.* at 5. Similarly, while cement consumption in Spain decreased by 23.8% in 2008, *id*. at 39, CEMEX's domestic sales volumes in Spain fell by 30%, *Id*. at 76.

In conjunction with flagging sales, CEMEX suffered goodwill impairment losses in 2008 of $4.7 billion which could be largely traced to its acquisition of Rinker. *Id*. at 10. Because a substantial portion of CEMEX's total assets corresponded to goodwill (34% of CEMEX's total assets are intangible assets, and 77% of those intangibles are attributable to goodwill), these losses materially eroded CEMEX's asset base. *Id*. at 9. CEMEX's asset base was further eroded by divestitures aimed at freeing up funds. In 2008, CEMEX entered agreements to sell the entirety of its operations in Italy, Austria, Hungary, and the Canary Islands (netting approximately $870 million total). *Id*. at 7. And CEMEX lost all of its Venezuelan assets – which accounted for 2.1% of the company's total assets – without compensation on August 18, 2008, when the Venezuelan government seized control of its Venezuelan facilities. *Id.* at 48, 117-18. CEMEX has initiated legal proceedings to obtain compensation for the seized assets. *Id*.

At the close of 2008 CEMEX found itself in significant peril. As of December 31, 2008, the company's consolidated liabilities exceeded its assets by approximately $6.2 billion. *Id*. at F-61. More critically, CEMEX's consolidated total debt had swollen to approximately $18.8 billion, and a large portion of that debt was slated to mature in the near future. *See id*. at 3. Specifically, $6.9 billion would mature in 2009, *id*. at F-61, followed by $3.9 billion in 2010 and $ 7.8 billion in 2011, *id*. at 3. As CEMEX's later filings with the SEC made plain, it could not meet these short-term obligations without restructuring. The company explained that it needed "access to funds to meet [these] obligations" and noted that "there are no assurances that [it would] be able to successfully complete the bank debt refinancing process." *Id*. at 10. CEMEX's independent auditors, confirmed the grim prognosis: "[T]he ability of CEMEX to continue operating as a going concern is dependent on its ability to complete the bank refinancing … or otherwise obtain additional debt or equity financial resources to pay CEMEX's obligations as they become due." *Id*. at F-61.

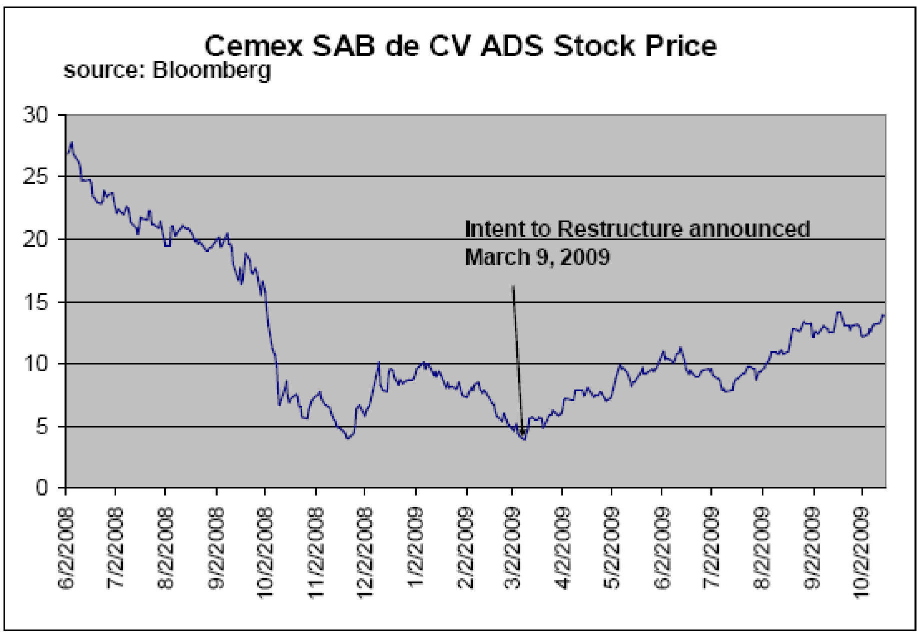
Accordingly, in December of 2008, CEMEX took action to extend the maturity on some of the short term debt of CEMEX and its subsidiaries. CEMEX's creditors extended a lifeline in January of 2009 by pushing back the maturity date on approximately $3 billion in debt that would have otherwise become due in 2009. *Id*. at F-63. This was only a partial fix and CEMEX continued its decline. In early March 2009, CEMEX was forced to indefinitely postpone its planned $500 million bond offering after investors demanded excessively high yields. *See* CEMEX Press Release (March 9, 2009) ("March Press Release") (Ex. C); Lester Pimentel and Thomas Black, *Cemex Said to Delay $500 Million Bond Sale After Drop*, Bloomberg, March 6, 2009 ("Bloomberg Article") (Ex. D).

On March 9, 2009, CEMEX entered global discussions with its primary lenders to renegotiate the repayment schedule on the bulk of its outstanding debt, or approximately $14.5 billion.[2] See 20-F at F-62. The lenders agreed to a Conditional Waiver and Extension Agreement ("CWEA") under which loan repayment obligations of CEMEX Espana due from March 24, 2009 to July 31, 2009 would be extended to July 31, 2009, at which point the parties expected to complete a global restructuring of the debt of CEMEX and its subsidiaries. *Id*. The debt of CEMEX itself includes cross-default provisions to the debt of CEMEX Espana. Credit Agreement dated May 31, 2005, § 10.01(e) (Ex. E). The parties stipulated that if global

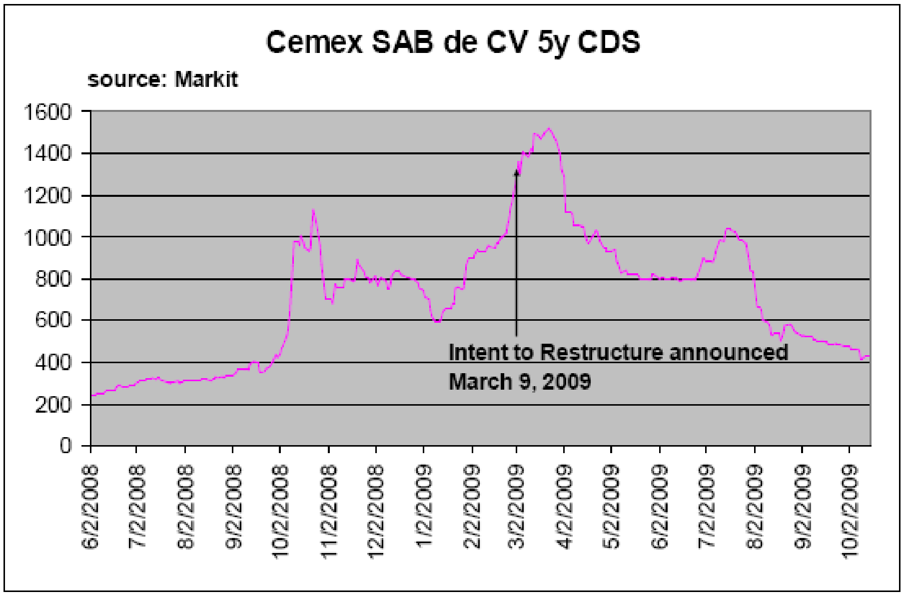
[2] This total of $14.5 billion represents debt of CEMEX, a holding company, and its operating subsidiaries.

restructuring was not in place prior to the expiration of the CWEA, the extended amounts would become due and the lenders could elect to accelerate the principal amount due under various other facilities (which totaled $12.9 billion as of June 26, 2009). *See id*.

As would be expected, the market responded favorably to news that CEMEX had entered discussions to extend maturities on its debt. On March 9, 2009, the day on which negotiations were announced, CEMEX's stock was trading at an absolute low. Since that time, and as restructuring discussions progressed, the stock price has climbed steadily. The graph below, based on Bloomberg, illustrates CEMEX's stock price through the relevant period:



CEMEX's CDS trades display a similar profile. The 5-year CDS spread widened substantially in the period preceding the restructuring announcement and for two weeks thereafter (peaking on March 23, 2009 at 1515 bps). As the following graph, based on Markit, demonstrates, the CDS spread tightened steadily as progress was made in restructuring discussions:



The market's favorable reaction to CEMEX's restructuring negotiations had little impact on the underlying financial condition of the company. In fact, shortly after restructuring negotiations had commenced, CEMEX's credit ratings were further downgraded by Standard & Poor's (from BB+ to B-) and by Fitch (from BB+ to B). See Prospectus, at S-65. The downgrading, in CEMEX's words, "negatively impact[ed] the availability of financing and the terms on which [it] could refinance [its] debt." 20-F at 4. As restructuring discussions continued, CEMEX sought to improve its financial profile by further divesting assets. *Id*. at 26. On June 15, 2009, CEMEX sold the entirety of its Australian operations (for $1.62 billion consideration) and its interest in four quarries in the United States (for $65 million consideration). *Id*. CEMEX also continued to pursue cost-saving measures, including efforts to reduce its global workforce. *Id*.. By June 30, 2009, CEMEX had decreased its global headcount by 21% from December 31, 2007 levels. Prospectus at S-6.

A global restructuring agreement was ultimately completed on August 14, 2009 between CEMEX and its major lenders (the "August Restructuring Agreement"). Prospectus at S-3. The agreement freed CEMEX from its overwhelming short-term loan obligations by amending

CEMEX's existing facilities to extend the maturity date on approximately $15 billion of its total consolidated debt. *See id*. Critically, CEMEX (on a consolidated basis) is now obliged to make only $476 million in loan payments in 2009, $2.4 billion in 2010, and $2.1 billion in 2011, *id*. S-84, as compared to its previous commitments as at May 31, 2009 of $4.2 billion in 2009, 20-F at F-61, $3.9 billion in 2010 and $ 7.8 billion in 2011, *id*. at 3. Over $14 billion of CEMEX's $15.1 billion existing bank debt was included in the Restructuring Agreement. *See* CEMEX Investor Presentation: Improving our Business Model and Strengthening Our Balance Sheet (August 17, 2009) (Ex. F) at slide 21. CEMEX reported that this agreement was accepted by 100% of its creditors, including over 50 individual banks. *Id*., at slide 3, 21.

To secure these favorable terms CEMEX has pledged "the capital stock of the subsidiaries that represent substantially all of [its] business as collateral." Prospectus at S-4. In addition, the Restructuring Agreement requires that CEMEX place or sell at least $1.0 billion in equity or equity-linked securities (which was effected pursuant to the Prospectus); achieve certain economic-performance benchmarks (including specific EBITDA-to-total-debt and EBITDA-to-interest-expense ratios); and adhere to various restrictive covenants limiting its business operations (including restrictions on CEMEX's capacity to make capital expenditures, incur debt, and engage in joint ventures). *Id*.

In a conference call announcing the restructuring arrangement, CEMEX's Executive Vice President of Finance and Legal, Héctor Medina, acknowledged these imposing terms, but stressed the necessity of the deal. *See* Transcript of Cemex Business Update Call (August 17, 2009) ("Call Transcript") (Ex. G) at 4. He explained: "Prior to our refinancing agreement, we were facing unsustainable amortization requirements during 2009 to 2011." *Id*. The extended maturity dates kept CEMEX from defaulting on those requirements and, Mr. Medina hoped, would grant CEMEX the "time and flexibility to deleverage [its] balance sheet as [its] markets, … performance and the financial environment recover." *Id*. In the same call, Mr. Medina also acknowledged that Cemex's existing bank debt had not been paid down under the Restructuring Agreement. In response to a query whether "[t]he old agreements [had been] repaid," Mr. Medina answered: "No." *Id*. at 5. He went on to explain that Cemex had paid its creditors a "200 basis point consent fee," presumably referring to the cost of securing the lenders' consent to amending the existing loan facilities. *Id*. at 8.

II. THE ISSUE OF CEMEX'S RESTRUCTURING IS PRESENTED TO THE DETERMINATIONS COMMITTEE

On October 9, 2009, a General Interest Question was submitted to the ISDA Credit Derivatives Determinations Committee of the Americas (the "Committee") as follows: "Has a Restructuring Credit Event occurred with respect to Cemex S.A.B. de C.V?" (the "Question Presented").

On November 6, 2009, after extensive deliberations, the Committee voted on the Question Presented but failed to achieve the 80% supermajority needed to resolve the issue. *See* Credit Derivatives Determinations Committee Rule 4.1. In particular, nine Committee members voted "No,"[3] indicating that they believed a restructuring event had not occurred, while six Committee members voted "Yes,"[4] indicating that they believed that it had.

III. THE RESTRUCTURING CREDIT EVENT

Section 4.7 of the 2003 ISDA Credit Derivatives Definitions (the "2003 Definitions"), defined the "Restructuring" credit event in relevant part as follows:

[3] The nine no votes comprised Bank of America/Merrill Lynch, Barclays, Citibank, Credit Suisse, Goldman Sachs, PIMCO, Primus Asset Management, RBS and UBS.

[4] The six yes votes comprised Deutsche Bank, JP Morgan, Morgan Stanley, Rabobank, Elliott Management Corporation and Legal & General Investment Management.

> (a) "Restructuring" means that, with respect to one or more Obligations and in relation to an aggregate amount not less than the Default Requirement, any one or more of the following events occur in a form that binds all holders of such Obligation … :
>
> > (iii) a postponement or other deferral of a date or dates for either (A) the payment or accrual of interest or (B) the payment of principal or premium …
>
> (b) Notwithstanding the provisions of Section 4.7(a), none of the following shall constitute a Restructuring: …
>
> > (iii) the occurrence of, agreement to or announcement of any of the events described in Section 4.7(a)(i) to (v) in circumstances where such event does not directly or indirectly result from a deterioration in the creditworthiness or financial condition of the Reference Entity.

A comparison of the portions of Section 4.7 of the 2003 Definitions quoted above to the corresponding parts of Section 4.7 ("Restructuring") in the 1999 ISDA Credit Derivatives Definitions (the "1999 Definitions") reveals that the relevant parts of the two provisions are substantively identical.[5] In fact, there were no changes at all in subclauses (a)(iii) or (b)(iii), which are the operative provisions for this analysis. The only changes were in the introductory language in clause (a) quoted above, but those changes were not of any substance. Consequently, the history of the development of Section 4.7 of the 1999 Definitions is directly relevant to the interpretation of Section 4.7 of the 2003 Definitions.

As explained in the Practice Notes accompanying the 1999 Definitions, the Restructuring credit event was drafted to address the perceived weakness in the earlier version of the definition (contained in ISDA's long form confirmation for a credit swap transaction), which had relied on the subjective concept of materiality and thus created uncertainty in its application. In order to "promote greater certainty" Section 4.7(a) of the 1999 Definitions was drafted to identify specific, objective events that the drafters considered to be "typical elements of a restructuring of

[5] As a technical matter, the 2003 Definitions modified and revised certain parts of the 1999 Definitions without replacing those definitions wholesale.

indebtedness." Practice Notes at viii. Significantly, however, the drafters also recognized that a definition that relied only on the occurrence of listed objective events "ran the risk" of triggering a restructuring event where those specified events occurred "with respect to a Reference Entity whose credit quality had improved or remained the same" — a result that was contrary to the very purpose of credit default transactions. *Id*. Consequently, Section 4.7(b)(iii) of the 1999 Definitions was drafted to provide a "limited exception" in order "to minimize the prospect of the events described in Section 4.7(a) triggering a Restructuring in those circumstances". *Id*.

The purpose of the carve-out in Section 4.7(a)(iii) is therefore clear. As the Practice Notes explained:

> The provision should be read with its purpose in mind, namely to protect against triggering a Restructuring where a Reference Entity's credit quality has improved and it negotiates new terms with its lenders or where its credit quality has stayed the same but improving market conditions permit the negotiation of more favorable terms.

Id. at viii- ix. Whether or not the carve-out applies "will, of course depend upon the facts and circumstances at the time of the relevant event, and the analysis in any particular case should focus on the totality of those facts and circumstances." *Id*. at ix The Practice Notes then explained that:

> There may be circumstances, however, where the financial prospects of a Reference Entity and its indebtedness have improved over short periods of time, but where a fuller review of the facts and circumstances indicate that a Restructuring has occurred. Thus, for example, the agreement to new terms on a distressed borrowing, even after a long period of negotiations, would constitute a Restructuring under a credit derivative transaction in effect when such negotiations began despite any improvement in the creditworthiness of the Reference Entity while the new terms were being negotiated. . . . *Id*.

The force of this language from 1999 has been confirmed by subsequent events. Following several controversial "restructurings" in the early 2000's, certain market participants urged ISDA to remove Restructuring from the list of Credit Events or, as an alternative, further tighten its provisions so that a narrower class of events would qualify as Credit Events. But

ISDA took neither approach based on market consensus. Instead, it left the 1999 triggers for a Restructuring in place – making only nonsubstantive changes to the definitional provisions set out above – and narrowed the set of obligations that become deliverable when a Restructuring occurs.[6] When it did not amend the 1999 Restructuring triggers (and the related carve-outs), ISDA confirmed the continued validity of the interpretive guidance set out in the 1999 Practice Notes.

ARGUMENT

In brief, CEMEX's restructuring announced on August 14, 2009 triggered a Restructuring credit event. First, the terms for extending the maturity of the subject obligations fall squarely within Section 4.7(a)(iii). Second, the carve-out in Section 4.7(b)(iii) clearly does not apply given the role of CEMEX's credit problems in driving what occurred.

I. THE AUGUST RESTRUCTURING TRIGGERED A RESTRUCTURING EVENT UNDER SECTION 4.7(a)(iii)

A. The August Restructuring Satisfied Each of the Requirements in Section 4.7(a)(iii)

As CEMEX itself explained: "On August 14, 2009, we entered into a financing agreement with our major creditors, which we refer to as the financing agreement. The financing agreement extends the maturities of approximately U.S. $15 billion in syndicated and bilateral bank obligations …."[7] Prospectus at S-3. Thus, the August Restructuring Agreement, which "extended the maturities" of CEMEX's debt obligations, falls squarely within the ambit of

[6] This was done through the introduction of Modified Restructuring and then later Modified Modified Restructuring to alter the Deliverable Obligation criteria for physical settlement. The 2001 Restructuring Supplement, later incorporated into the 2003 Definitions also introduced the Multiple Holder Obligation provision as part of Restructuring.

[7] Cemex had various outstanding debt obligations that qualify as "Obligations" for the purpose of determining whether a Restructuring has occurred including, among others, the $1.2 billion Credit Agreement dated May 31, 2005.

Section 4.7(a)(iii), which provides that a restructuring will occur upon the "postponement or deferral of a date or dates for … the payment or accrual of interest or… the payment of principal or premium." In fact, the amounts involved were very large. Maturities of $6.9 billion in 2009, $3.9 billion in 2010 and $7.8 billion in 2011 became $476 million in 2009, $2.4 billion in 2010 and $2.1 billion 2011. 20-F at F-61, 3; Prospectus at S-84. The deferral of principal payments at the level of CEMEX itself satisfies any applicable Default Requirement (the fallback level is $10 million), and the postponement of principal payments was consented to by 100% of the holders effected. In return those holders received a consent fee of 200 basis points. It is hard to imagine a better example of a transaction that satisfies Section 4.7(a)(iii).

While CEMEX described its plans for what occurred on August 14, 2009 in various ways as negotiations progressed in the months prior to that date the most reliable and definitive descriptions are found in what CEMEX said on August 14 and 17, 2009 and in its Prospectus dated September 22, 2009. The information released on August 14, 2009 and statements made by senior officers of CEMEX on August 17, 2009 reflected the terms as agreed on August 14. The Prospectus was vetted by leading law firms from Mexico and New York, and it was written to satisfy the disclosure requirements of the United States securities laws. Those sources are thus more reliable than statements made before the restructuring transaction was finalized that were not subject to a strenuous due diligence process.

B. <u>CEMEX's Existing Facilities Were Amended, Not Discharged and Reissued</u>

According to CEMEX, the August Restructuring Agreement took the form of an amendment to existing bank facilities pursuant to which the original obligations continued in full force and effect. For instance, the Prospectus explained that "We and certain of our subsidiaries were obligors as borrowers or guarantors under our various credit facilities and other indebtedness prior to the effectiveness of the financing agreement. <u>These obligations continue to</u>

be in full force and effect under the financing agreement." Prospectus at S-85 (emphasis added). Similarly, the description of the terms of the transactions made clear that the old facilities had not been discharged, but rather remained in place subject to the amendments agreed to as part of the restructuring. Thus, summarizing the applicable interest rates, CEMEX stated: "In general, our existing bank facilities that are included in the bank financing agreement bear interest at either a base rate plus an applicable margin, a LIBOR rate plus an applicable margin or a Euribor rate plus an applicable margin. The base rates, LIBOR rates and Euribor rates applicable to our existing bank facilities remain in place." Prospectus at S-16 (emphasis added). Similarly, in explaining the applicable cross-default provisions, the Prospectus explained: "Each existing facility that is part of the financing agreement contains a cross-default provision which provides that upon acceleration … creditors under that existing facility may also accelerate amounts due under that existing facility." Prospectus at S-89 to 90.

In addition, CEMEX's August 14, 2009 Press Release (Ex. J) announcing the restructuring plan refers to a "revised maturity schedule" and specifies that the "Refinancing Plan extends the maturities of approximately US$15 billion," confirming that the restructuring was effected via an amendment to existing facilities, rather than a repayment of old debt and an issuance of new debt. Similarly, Hector Medina, Executive Vice President of Finance and Legal, made clear that none of CEMEX's outstanding debt had been repaid. At the Company's August 17, 2009 conference call with analysts discussing the terms of the restructuring, one caller asked whether "[t]he old agreements [had been] repaid?" Call Transcript at 5. Mr. Medina's response was a definitive "No." *Id*. In addition, when Mr. Medina was asked about the cost of the restructuring, he replied that the cost included "a 2%-200 basis points consent fee." *Id*. at 8. It is much more likely that this sort of consent fee was paid in connection with amendments to existing obligations as opposed to the repayment of outstanding obligations and issuance of new obligations.

If any further evidence is required, the Bloomberg description of one of CEMEX's restructured bank facilities also demonstrates that the relevant facilities were amended. Thus, the "maturity change" effected by the August restructuring is listed as one of five amendments in the "Amendment History" section of the screen. *See* Bloomberg screen (Ex. K).

In contrast, the passing references to a "new facility" made in certain of CEMEX's press releases and earnings calls all occurred prior to August 14, 2009 and thus predate the conclusion of the August Restructuring Agreement and are contradicted by the company's later, more detailed descriptions of what actually occurred. *See e.g.,* Press Releases dated June 30, 2009 and January 28, 2009 (Exs. L, M). The later statements contained in the Prospectus provide more definitive evidence of the true nature of the August Restructuring Agreement than do earlier informal statements in press releases and the like. Therefore, the CEMEX restructuring of August 14, 2009, pursuant to which CEMEX and its creditors agreed to extend the maturity dates on CEMEX's debt, satisfied section 4.7(a)(iii) of the 2003 Definitions.

II. THE RESTRUCTURING RESULTED DIRECTLY OR INDIRECTLY FROM A DETERIORATION IN THE CREDITWORTHINESS OF CEMEX

It is overwhelmingly clear that the agreement announced on August 14, 2009 resulted directly from a deterioration in the creditworthiness and financial condition of CEMEX. Consequently, the carve-out in Section 4.7(b)(iii) does not apply and a Restructuring credit event was in fact triggered.

A. The Publically Available Information Makes Clear That the CEMEX Restructuring Resulted From CEMEX's Highly Distressed Financial Condition

As a result of its highly distressed financial condition, CEMEX faced the prospect of default on its substantial debt obligations, forcing it to enter into a series of restructuring negotiations with its creditors, culminating in the August Restructuring Agreement. In other words, the August Restructuring Agreement was not executed due to CEMEX's improved credit worthiness or improving market conditions. To the contrary, the viability of CEMEX as a going concern was dependent on the successful completion of its restructuring. The evidence to this effect is indisputable and includes the conclusions of CEMEX's independent auditors, numerous statements by CEMEX itself, analysis by rating agencies and market opinion.

First and perhaps most critically, CEMEX's independent auditors expressed substantial doubt about CEMEX's ability to continue as a going concern without the successful completion of the restructuring. In KPMG's audit report, dated June 29, 2009, on the December 31, 2008 CEMEX financial statements, KPMG stated that:

> The accompanying consolidated financial statements have been prepared assuming that the Company will continue operating as a going concern. As discussed in notes 22 and 23 to the consolidated financial statements, the Company's ability to fulfill its short and long-term debt obligations that mature in 2009 is dependent on successfully completing their refinancing. This raises substantial doubt about the Company's ability to continue as a going concern. Management's plans in regard to these matters are also described in note 22 to the consolidated financial statements. The consolidated financial statements do not include any adjustments that might result from the outcome of this uncertainty.
> 20-F at F-2.

In other words, KPMG said in its June 29, 2009 audit report, a very important document, that unless CEMEX successfully amended the maturities of its debt obligations, there was substantial doubt about CEMEX's ability to continue as a going concern. This should be fully dispositive of any issue under Section 4.7(b)(iii) of the 2003 Definitions.

Second, CEMEX acknowledged the gravity of its problems. CEMEX explained in its Form 20-F: "Our access to funds to meet our obligations is, in part, dependant on the ultimate outcome of the bank debt refinancing process. In connection with this uncertainty … the independent auditors' report accompanying our consolidated financial statements … contains a paragraph expressing substantial doubt as to our ability to continue as a going concern." 20-F at 10. Similarly, in its Prospectus, CEMEX explained: "The audit report covering the December 31, 2008 consolidated financial statement contains an explanatory paragraph that states that the Company's ability to fulfill its short and long term debt obligations that mature in 2009 is dependent on successfully completing its refinancing, which raises substantial doubts about the Company's ability to continue as a going concern." Prospectus at S-111.

CEMEX's dependence on restructuring for its continued viability was confirmed during the August 17, 2009 conference call with analysts, when the company again admitted that it would have been unable to pay its maturing debt in the absence of the August Restructuring Agreement, stating that "Prior to our refinancing agreement, we were facing unsustainable amortization requirements during 2009 to 2011." Call Transcript at 4.

CEMEX's highly distressed financial condition was the product of historic losses, swelling debt and all time sales lows. As detailed above, CEMEX's financial problems began with its ill-timed 2007 acquisition of Rinker, which increased the company's exposure to the United States just before an unprecedented downturn in the United States construction industry. 20-F at 6, 35. The company suffered its "worst decline" in United States sales volumes following the acquisition, and, as the United States economic crisis became a global crisis, similar sales decreases worldwide. *Id*. at 5, 6, 76. Moreover, there are statistical indications that CEMEX was disproportionally affected by the global downturn in construction. Most significantly, the decrease in CEMEX's 2008 and 2009 volume sales in the United States and Spain (two of its major markets) was greater than the market-wide decrease in consumption in those countries. *Id*. at 5, 35, 39, 76.

By the end of 2008, CEMEX's liabilities exceeded its assets by $6.2 billion (on a consolidated basis), and its debt had expanded to approximately $18.8 billion. *Id*. at F-61, 3. Fortunately, CEMEX was able to negotiate several short-term arrangements to protect the company and its subsidiaries from defaulting on imminent debt obligations – namely, CEMEX secured a January 2009 extension on $3 billion in maturing debt and the CEWA, which extended certain short-term repayment obligations to July 31, 2009. *Id*. at F-62. But these arrangements did not resolve the company's deeper financial problems. Statements in CEMEX's public filings make that much clear:

> Our revolving credit lines are fully drawn. If our operating results worsen significantly, or if we are unable to complete our planned divestitures and our cash flow or capital resources prove inadequate, we could face liquidity problems and may not be able to comply with our upcoming principal payment maturities on our indebtedness.
>
> We and our subsidiaries have sought and obtained waivers and amendments to several of our debt instruments relating to a number of financial ratios. We may need to seek waivers or amendments in the future. However, we cannot assure you that any future waivers, if requested, will be obtained. If we or our subsidiaries are unable to comply with the provisions of our debt instruments, and are unable to obtain a waiver or amendment, the indebtedness outstanding under such debt instruments could be accelerated. Acceleration of these debt instruments would have a material adverse effect on our financial condition. *Id*. at 4.

Moreover, the condition of CEMEX itself, a holding company with no significant assets was particularly precarious. CEMEX explained: "We are a holding company with no significant assets other than the stock of our subsidiaries and our holdings of cash and marketable securities. … If we are unable to receive cash from our subsidiaries, or results of operations and financial condition could be affected and we may not be able to service our debt." *Id*. at 7.

The company's own statements thus clearly demonstrate that CEMEX sought financing as a result of its deteriorating and distressed financial condition.

Third, rating agency opinion confirms that CEMEX's creditworthiness had deteriorated significantly when on March 9, 2009 it announced its intention to seek extensions of maturities from its creditors. Thus on October 31, 2008 and January 21, 2009, Fitch and S&P respectively downgraded CEMEX's credit rating from BBB- to a below investment grade rating of BB+. Prospectus at S-65. In March 2009, following the restructuring announcement, both agencies further downgraded CEMEX's rating; S&P to B- and Fitch to B. *Id*. The more detailed rating agency analysis also demonstrates that CEMEX was experiencing significant creditworthiness difficulties. For instance, the Fitch report accompanying CEMEX's downgrade to a below investment grade ratings explained that "the company [is] facing significant maturities during 2009 amid a difficult credit market, resulting in increased refinancing risk … CEMEX's liquidity position is tight, as the company faces maturities of U.S.$5.7 billion during 2009." Fitch Report (Oct. 31, 2008) (Ex. N).

Fourth, the market was clearly of the view that CEMEX was deteriorating. Just prior to announcing its plans to enter into restructuring talks with its creditors, it was forced to indefinitely postpone a $500 million bond offering after investors demanded excessively high yields. *See* March Press Release; Bloomberg Article

B. Finding That a Restructuring Credit Event Occurred is Consistent with the Intent and Purpose of Section 4.7(b)(iii)

It would distort the clear purpose of the Restructuring carve-out in section 4.7(b)(iii) if it were applied in this case to prevent the CEMEX restructuring from triggering a Restructuring credit event. As the plain language of Section 4.7, the Practice Notes and the history of changes to "Restructuring" make clear, the carve-out was intended to exclude an event that would otherwise be a Restructuring where a "Reference Entity's credit quality has improved and it negotiates new terms with its lenders or where its credit quality stays the same but improved market conditions permit the negotiation of more favorable terms." Neither of these situations exist here. On no view of the facts was CEMEX's restructuring caused by an improvement in CEMEX's credit quality or an improvement in market conditions. To the contrary, as demonstrated above, CEMEX's financial condition was - based upon any measure -- distressed prior to the announcement of its intention to enter into global restructuring discussions, and that distressed condition continued through August 14, 2009.

The operation of Section 4.7(b)(iii) can best be understood by reference to the following spectrum.

Financial Condition of a Reference Entity

Good	Some Problems	Serious Problems	Brink of Insolvency	Bankrupt

Section 4.7(b)(iii) clearly carves out an entity in the "Good" category that negotiates new terms with its lenders. At the same time Section 4.7(b)(iii) does not address the "Bankrupt" category, which is addressed separately by the Bankruptcy credit event. Neither an entity that is in the "Brink of Insolvency" category nor an entity that falls under "Serious Problems" falls within Section 4.7(b)(iii)'s carve-out. It would be far too restrictive to conclude that Section 4.7(b)(iii) carves out an entity that has serious financial problems that play a direct or indirect role in causing the entity to negotiate new terms with its lenders of the types covered by Section 4.7(a). Section 4.7 clearly was intended to cover just that sort of situation. That leaves a category of entities that have some financial problems that renegotiate their debt. There is no need, however, to address that sort of situation here because the CEMEX case obviously does not fall in that category.

Before turning to the CEMEX facts, it is important to recall that the Practice Notes explained how to address complex restructuring situations as follows:

> Thus … the agreement to new terms on a distressed borrowing, ***even after a long period of negotiations***, would constitute a Restructuring under a credit derivative transaction in effect when such negotiations began despite any improvements in the creditworthiness of the Reference Entity while the new terms were being negotiated or as a result of the new, presumably more favorable terms. In this case, the eventual agreement to new terms is best viewed as an indirect result of the original distressed situation and not as the negotiation of more favorable terms by a Reference Entity whose credit quality has improved. Practice Notes at ix (emphasis added).

The CEMEX situation was complex, but the main thrust behind the negotiations that led to the August Restructuring Agreement was clear and consistent throughout: CEMEX had severe financial problems and could not afford to repay its debts as they would have fallen due. In December 2008 CEMEX announced that it would pursue an arrangement to extend its debt maturities. CEMEX also set out to sell certain subsidiaries, cut various costs, and reduce its workforce. The announcement by CEMEX on March 9, 2009 that it had initiated global discussions with its core banks to renegotiate the majority of its outstanding debt, in combination with the other actions CEMEX was taking, was viewed positively by the markets. But on June 29, 2009 it received a report from KPMG that expressed serious doubts about its ability to continue as a going concern, and on August 17, 2009, the Executive Vice President of Finance and Legal of CEMEX acknowledged that "Prior to our [August 14] refinancing agreement, we were facing unsustainable amortization requirements during 2009 to 2011." Call Transcript at 4. So, as accurately foreshadowed by the Practice Notes, after a long period of negotiations with a distressed borrower, the agreement to amend maturities with that borrower constitutes a Restructuring despite any improvements in the creditworthiness of that borrower during the lengthy negotiations of those amended terms. Thus, the better answer to whether there was a Restructuring credit event with respect to CEMEX is "Yes".

DATED: New York, New York
November 25, 2009

QUINN EMANUEL URQUHART OLIVER &
HEDGES, LLP

By: ____________________

Daniel P. Cunningham

51 Madison Avenue, 22nd Floor
New York, New York 10010-1601
(212) 849-7000
danielcunningham@quinnemanuel.com