

## **SECOND AMENDMENT TO LEASE AGREEMENT**

THIS SECOND AMENDMENT TO LEASE AGREEMENT ("Amendment 2") is made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2020, by and between the City of Pensacola ("City" or "Lessor"), and CEMEX Southeast, LLC ("CEMEX" or "Lessee").

### **RECITALS**

WHEREAS, City and Reynolds Ready Mix, LLC ("Reynolds"), entered into a Lease Agreement on October 25, 2002 ("Original Agreement," and as amended, modified or supplemented from time to time, the "Lease"), for leased premises in and around Warehouse #6, located at the City of Pensacola, Port of Pensacola ("Port"), and for the purposes described therein; and

WHEREAS, the Original Agreement was amended by the First Amendment to Lease Agreement, dated January 22, 2003, between the City and Reynolds ("Amendment 1," and together with the Original Agreement, the "Amended Agreement"); and

WHEREAS, the Amended Agreement was assigned and assumed by CEMEX under an Assignment and Assumption Agreement, dated March 28, 2005, between Reynolds and CEMEX, and approved by the City; and

WHEREAS, Lessee has fulfilled all of its obligations under the Lease; and

WHEREAS, the City and CEMEX desire to continue their mutually beneficial relationship beyond the term of the Amended Agreement.

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained, the City and CEMEX agree that the Amended Agreement shall be further amended as follows:

**1.** The Recitals above are true and correct, and are hereby incorporated as a material part of this Amendment 2. Unless otherwise defined herein, capitalized terms defined in the Amended Agreement and used in this Amendment 2 shall have the meanings given such terms in the Amended Agreement.

**2.** Paragraph 1.2 of the Lease is replaced in its entirety with the following language:

“1.2 Rail Sidings. Lessee shall have exclusive use of all rail trackage located to the north of Warehouse #6, within the covered rail area between Warehouse #6 and Warehouse #8. In exchange for such exclusive use, Lessee shall be responsible for all maintenance and repair of said trackage at Lessee’s sole cost and expense. With the exception of this trackage, all other rail track, spurs and sidings located on the Port, along with all shared internal roadways and shared parking areas, constitute common area infrastructure of the Port and is available for use in support of the operations of all Port lessees and users. Lessee will coordinate movement of Lessee’s railcars with the Port Cargo Operations Superintendent to ensure that all Port users’ operational needs are met with minimum conflict. Lessee may only move Lessee’s own railcars and is not authorized to move railcars on behalf of any other Port lessee or user, unless authorized by the Port Cargo Operations Superintendent on a case-by-case basis.

3. The City and CEMEX agree that the current Amended Agreement expires December 31, 2022, at the end of the Second Subsequent Renewal Term. A new Paragraph 3.5 is added to the Lease as follows, with the remaining subparagraphs of Paragraph 3 of the existing Lease remaining in full force and effect:

“3.5 Additional Renewal Terms. Upon the conclusion of the Second Subsequent Renewal Term, Lessee shall have the option to renew this Lease for up to two (2) additional five- (5-) year terms (‘Additional Renewal Terms’), which shall occur unless Lessee provides Lessor a minimum of 120 days’ advance written notice of non-renewal. For all Additional Renewal Terms, the wharfage charges for all commodities previously specified in the table in Paragraph 19, ‘TARIFF AND WHARFAGE,’ under ‘Wharfage per ton,’ shall be fixed at \$1.51 per short ton (‘Wharfage Rate’). Stevedoring, handling and security fees shall all be assessed at the rates published in the Port Tariff, as amended from time-to-time. Further, effective upon commencement of the first Additional Renewal Term, Lessee shall make an annual lump sum maintenance fee payment for Port common area infrastructure of \$24,000 (‘Common Area Infrastructure Maintenance Fee’), due no later than April 1<sup>st</sup> of each year for the duration of the Lease and all renewals thereof.”

4. Paragraph 4.1 is amended in its entirety to read:

“4.1 Unless otherwise specified herein, during the term of this Lease, Lessee shall pay on or before the last day on which payment may be made without penalty or interest, all lawful taxes, assessments and other user fees, however named, which may

be charged, assessed, imposed, or levied upon the Leased Premises by the Department of Revenue, State of Florida, Escambia County, the City of Pensacola, or any district or other governmental body, regardless of whether Lessee or the City is billed. The City shall provide Lessee promptly with any bill that it receives for any such taxes, assessments or fees, and, in any event, at least five (5) business days prior to the date on which any such taxes, assessments or fees are due.”

5. Paragraphs 4.2 and 4.3 are deleted in their entirety.

6. Paragraph 5.1 is amended to remove the last sentence thereof, which required that at least 51% of Lessee’s cargo tonnage entering the Leased Premises be transported via ship or barge.

7. A new Paragraph 5.3 is added as follows:

“5.3 When market conditions, product sourcing, and facility structural soundness permit, as determined by Lessee in its sole, reasonable discretion, Lessee will endeavor to deliver cargo tonnage entering the Leased Premises by ship or barge. To facilitate waterborne cargo movement, Lessee will install vessel loading/unloading system(s) appropriate to Lessee’s operations, as determined by Lessee in its sole, reasonable discretion. Such system(s) must preserve compliance with the provisions of Paragraph 5.2, must be portable, and may not be permanently affixed to the dock, berth or berth apron.”

8. Paragraph 7, “RENT,” is revised to add the following language at the end of the first paragraph:

“Effective January 1, 2023, if the first Additional Renewal Term is exercised in accordance with Paragraph 3.5, Lessee’s base rent will increase to \$324,000 annually (\$3.60 per sq. ft., per year), payable in twelve (12) equal monthly installments of \$27,000 due on the first (1<sup>st</sup>) of each month. Such base rent shall be adjusted annually on the first day of each calendar year by the average annual change in the Consumer Price Index for the previous five (5) years, with the revised base rental rate being effective each January 1<sup>st</sup> for the ensuing calendar year.”

9. Paragraph 7.1, “Wharfage Guarantee,” is revised to add the following at the end of the paragraph:

“Beginning January 1, 2023, if the first Additional Renewal Term is exercised in accordance with Paragraph 3.5, Lessee guarantees that the minimum tonnage of cargo received into the Leased Premises in a calendar year will be no less than 80,000 short tons, increasing by 5,000 short tons annually until the minimum tonnage received into the Leased Premises is no less than 100,000 short tons per calendar year. Lessee agrees to pay the Wharfage Rate as expressed in Paragraph 3.5 herein on 100% of the guaranteed tonnage, whether or not that tonnage is actually received into the Leased Premises. Such Wharfage Guarantee payment or balance thereof, if any is owed, is to be made no later than April 1 of each year for the prior calendar year’s activity.”

**10.** The following language is added to the end of Paragraph 11, “RIGHT TO INSPECTION”:

“While on the Leased Premises, Lessor and its authorized agents and employees shall comply with Lessee’s site safety rules and procedures.”

**11.** Paragraph 16, “INSURANCE,” is deleted in its entirety and replaced with the following:

“16. **INSURANCE**. Lessee shall procure and maintain insurance of the types and to the limits specified herein at all times during the term of this Lease and any renewals thereof.

As used in this Article, the ‘City’ is defined to mean the City of Pensacola itself, any of its subsidiaries or affiliates, elected and appointed officials, or employees, representatives and authorized agents.

Lessee and City understand and agree that the minimum limits of insurance herein required may become inadequate during the term of this Lease. Lessee agrees that it will increase such minimum limits to the levels required by the City from time to time, modified no more than one (1) time in each Additional Renewal Term, within one hundred eighty (180) days following Lessee’s receipt of written notice from the Port Director specifying such adjustments.

Insurance shall be procured from an insurer qualified to do business in Florida whose business reputation, financial stability, and claims payment reputation are satisfactory

to the City in its sole reasonable discretion. The amounts, forms, and types of insurance required to be provided and maintained by Lessee shall conform to the minimum requirements specified in the attached Schedule 1 – Insurance Requirements.”

**12.** Each of the parties agrees that compliance with all applicable laws as specified in Paragraph 18, “COMPLIANCE WITH GOVERNMENTAL REGULATIONS,” including those relating to anti-bribery and anti-corruption, by each party is a material term of the Lease.

**13.** The address for notices to Lessee contained in Paragraph 30, “NOTICES,” is amended to read, “CEMEX Southeast, LLC, 1501 Belvedere Road, West Palm Beach, Florida 33406, Attn: Vice President Logistics, with a copy to: CEMEX, 1501 Belvedere Road, West Palm Beach, Florida 33406, Attn: General Counsel.”

**14.** Subsections (a) and (b) of Paragraph 39, “SECURITY DEPOSIT,” are deleted in their entirety and replaced with the following:

“39. **SECURITY DEPOSIT.** (a)(i) On or before the Delivery Date, Lessee shall deliver to Lessor Two Hundred Eighty-eight Thousand and No/100 Dollars (\$288,000.00), in United States currency or by cashier’s check or wire transfer which, together with any additional amounts delivered to Lessor pursuant to this paragraph and any interest earned thereon, shall hereinafter be referred to as the ‘Security Deposit.’ The Security Deposit shall be maintained by Lessor in a segregated, interest-bearing account and may be withdrawn by Lessor only in amounts necessary to cure any defaults by Lessee of Lessee’s obligations under this Lease which have not been timely cured pursuant to Paragraph 28. Upon the expiration or termination of this Lease, Lessor shall return to Lessee so much of the Security Deposit as remains after all obligations of Lessee have been fulfilled or cured. Withdrawal in whole or in part of the Security Deposit by Lessor shall not be a waiver of any claims or remedies of Lessor.

(ii) On or before January 1, 2021, Lessee may replace the Security Deposit with a payment bond, in form and substance, and issued by an insurance company, reasonably satisfactory to Lessor (the ‘Bond’), in an amount equal to six (6) months’ rent (Paragraph 7) plus six (6) months’ Wharfage Guarantee (Paragraph 7.1) for the ensuing year of the term of this Lease (the ‘Minimum Bond Amount’). Within sixty (60) business days of the delivery of the Bond to Lessor, Lessor shall return the Security Deposit to Lessee by check or wire transfer to such account as Lessee shall direct. Lessee

shall pay the premium for and maintain the Bond in the Minimum Bond Amount throughout the remaining term of this Lease.

(b) Lessor shall not withdraw any part of the Security Deposit or make any claim on the Bond until an arbitrator selected in the manner described herein makes a final determination that Lessee is in default of one or more of its obligations under this Lease, that Lessee has failed to timely cure such default, that such default may be cured in whole or in part by Lessor's recovery of money damages, and that Lessor is entitled to withdraw such part of the Security Deposit or make a claim on the Bond as Lessor determines is necessary for relief from Lessee's default. The arbitrator shall have no power or authority to determine the amount of such money damages. The arbitrator shall be without power or authority to make any decisions contrary or inconsistent with, adding to, subtracting from, or modifying, altering or ignoring in any way, the terms of this Lease, or of any applicable law or rules or regulations having the force and effect of law. A determination by the arbitrator shall be final and binding solely with respect to the right of Lessor to withdraw all or any part of the Security Deposit or make any claim on the Bond without necessity for confirmation of the determination or award for judgment or decree by a court. A determination by the arbitrator may be vacated by a court upon application of Lessee only on the grounds specified in Section 682.13, Florida Statutes."

**15.** Subsections (f) and (g) of Paragraph 39, "SECURITY DEPOSIT," are deleted in their entirety and replaced with the following:

"(f) Nothing in this Paragraph 39 shall prohibit either party from seeking relief in law or in equity except as limited hereby. Although the determination by the arbitrator shall be final and binding with respect to the right of Lessor to withdraw all or any part of the Security Deposit or make any claim on the Bond prior to a judgment by a court of competent jurisdiction, the arbitrator's decision shall not be final and binding with respect to the existence of a default or the amount of damages for any default. Either party may seek appropriate judicial remedies on such issues or any other issues except as expressly limited hereby; provided, however, that neither party may seek judicial process to avoid or delay arbitration of the issues provided for in this Paragraph 39 or to prohibit Lessor from withdrawing all or any part of the Security Deposit or making any claim on the Bond in accordance with the arbitrator's determination.

(g) If Lessor withdraws all or any part of the Security Deposit or makes any claim on the Bond pursuant to this Paragraph 39 upon determination of the arbitrator of Lessee's uncured default as provided in Paragraph 39(b), and Lessor does not terminate

this Lease, Lessee shall deliver to Lessor within fifteen (15) days of such withdrawal or claim, (i) sufficient monies, in United States currency or by cashier's check or wire transfer, or (ii) such replacement or confirming Bond, for Lessor to maintain the Minimum Security Deposit or Minimum Bond Amount, as applicable, provided in Paragraph 39(a)."

**16.** Paragraph 46, "ENTIRE AGREEMENT," is deleted in its entirety and replaced with the following:

"46. **ENTIRE AGREEMENT.** This Lease, as the same may be amended, modified or supplemented by the parties hereto from time to time, together with its exhibits and schedules, contains the entire agreement between Lessor and Lessee regarding the subject matter hereof, and supersedes all prior negotiations, representations or agreements, either written or oral."

**17.** Except as amended herein, all other terms and conditions of the Lease shall remain unchanged and in full force and effect, and are ratified and confirmed by the parties in all respects.

**18.** This Amendment 2 may be executed in two or more counterparts, and by facsimile signatures or portable document format (.pdf or similar format), each of which need not contain the signatures of more than one party, but all of which, when taken together, shall constitute one and the same instrument.

[THIS SPACE INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, the parties hereto have executed this Amendment 2 by their respective duly authorized representatives as of the date first above written.

**CITY OF PENSACOLA, FLORIDA**

\_\_\_\_\_  
Mayor Grover C. Robinson IV

Attest:

\_\_\_\_\_  
City Clerk, Ericka L. Burnett

**CEMEX SOUTHEAST, LLC**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Legal in form and valid as drawn:

Approved As To Substance:

\_\_\_\_\_  
City Attorney

\_\_\_\_\_  
Department Director/Division Head

### Schedule 1

<b><u>Insurance Requirements</u></b>		
	<b><u>Type</u></b>	<b><u>Amount</u></b>
(1)	Worker's Compensation and Employer's Liability	Statutory \$1,000,000/\$1,000,000/\$1,000,000 (including USL&H and Jones Act, if applicable)
(2)	Broad Form Commercial General Liability Policy to include coverage for the following (must include liability for marine vessels):	Combined Single Limit for Bodily Injury and Property Damage of \$5,000,000 per occurrence or its equivalent with an aggregate of not less than \$5,000,000. Coverage shall include sudden and non-sudden pollution conditions resulting from the escape or release of smoke, vapors, fumes, acids, alkalis, toxic chemicals, liquids or gasses, waste materials, or other irritants, contaminants or pollutants.
	(A) Premises Operations	
	(B) Independent Contractors	
	(C) Products/Completed Operations	
	(D) Personal Injury	
	(E) Contractual Liability	
	(F) Damage to Leased Premises	
(3)	Property Insurance including flood insurance for physical damage to the property of the Company, including improvements and betterments to the Leased Premises	Coverage for replacement value of property
(4)	Property Insurance for physical damage to the Facilities, including improvements and betterments to the Leased Premises, resulting from fire, theft, vandalism, windstorm, flood (if and to the extent any of the Facilities are located in a federally-designated special flood hazard area), and other risks commonly insured against for similar port improvements	Coverage for replacement value of Facilities
(5)	Automobile Liability (any automobile)	Combined Single Limit for Bodily Injury and Property Damage of \$1,000,000 per occurrence or its equivalent in excess of umbrella coverage, \$5,000,000 per occurrence or its equivalent in excess of umbrella coverage for vehicle(s) with access to the Air Operations Area.
(6)	Above Ground and/or Underground Storage Tank Liability (but only if such tanks exist at the Leased Premises)	\$10,000,000 per claim
(7)	Port Liability including coverage for premises, operations, products and completed operations and independent contractors.	\$10,000,000 per occurrence, combined single limit, written on an occurrence form