

IN THE MATTER OF
AMERICAN HOECHST CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF
THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3215. Complaint, July 2, 1987—Decision, July 2, 1987

This consent order permits, among other things, American Hoechst Corp. to divest certain polyester fiber businesses. The respondent must make the divestiture to a Commission-approved acquirer within one year and must obtain the Commission's prior approval for certain acquisitions for the next ten years.

Appearances

For the Commission: *Rhett Krulla, Ronald B. Rowe, and Jeffrey I. Zuckerman.*

For the respondents: *William R. Norfolk, Sullivan & Cromwell, Washington, D.C. and William Pelster, Skadden, Arps, Slate, Meagher, & Flom, New York City.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondents, American Hoechst Corporation, Hoechst Aktiengesellschaft, referred to herein collectively as "Hoechst," and Celanese Corporation, corporations subject to the jurisdiction of the Commission, have entered into an agreement, described in paragraph 15 herein, that, if consummated, would violate the provisions 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; that said agreement and the actions of respondents to implement that agreement constitute violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, the Commission hereby issues its Complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows: [2]

I. DEFINITIONS

1. For purposes of this complaint, the following definitions shall apply:

a. "*Hoechst*" means American Hoechst Corporation, its parent, Hoechst Aktiengesellschaft, its predecessors, subsidiaries (including, but not limited to, Hostachem Acquisition Incorporated), divisions, groups, affiliate entities (including, but not limited to, Wacker and related entities), and each of their past or present directors, officers, employees, agents, and representatives; and each partnership, joint venture, joint stock company, or concession in which Hoechst is a participant. The words "subsidiary," "affiliate," and "joint venture" refer to any partial (10 percent or more), as well as total, ownership or control.

b. "*Celanese*" means Celanese Corporation, its predecessors, subsidiaries, divisions, groups, affiliate entities, and each of their past or present directors, officers, employees, agents, and representatives; and each partnership, joint venture, joint stock company, or concession in which Celanese is a participant. The words "subsidiary," "affiliate," and "joint venture" refer to any partial (10 percent or more), as well as total, ownership or control.

c. The "*acquisition*" means the transaction described, in whole or in part, in paragraph 15 of this complaint.

d. "*Polyester fibers*" or "*polyester*" means manufactured fibers in which the fiber-forming substance is any long-chain synthetic polymer composed of polyethylene terephthalate, a chemical polymer derived from the polycondensation of ethylene glycol with either dimethyl terephthalate or [3] terephthalic acid. "Polyester fibers" include polyester staple and polyester filament.

e. "*Textile polyester fibers*" means any polyester fibers used in the production of textiles, which includes fabrics and yarns used primarily in apparel, carpeting, home furnishings, and automotive applications.

f. "*Textile polyester filament*" means continuous threads, or "filaments," of polyester produced for textile applications. "Textile polyester filament" does not include polyester staple.

g. "*Polyester staple*" means any short fiber of polyester that is cut from spun polyester. "Polyester staple" includes fiberfill and tow.

II. AMERICAN HOECHST CORPORATION

2. Respondent American Hoechst Corporation ("American Hoechst") is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located at 1041 Route 202-206 North, Somerville, New Jersey. American Hoechst is a wholly-owned subsidiary of the West German corporation, Hoechst Aktiengesellschaft.

3. American Hoechst is one of the largest producers of textile polyester fibers, including both polyester staple and textile polyester

filament, in the United States. Overall operations of American Hoechst in the United States include the production and sale of various petrochemicals, plastics, and pharmaceuticals. [4]

4. Respondent American Hoechst had sales of approximately \$1.6 billion in 1985 on overall operations of the company in the United States.

5. American Hoechst's indirect wholly-owned subsidiary, Hostachem Acquisition Incorporated, a corporation organized and existing under the laws of the State of Delaware, is a holding company that has been formed to purchase the capital stock of Celanese.

6. American Hoechst is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

III. HOECHST AKTIENGESELLSCHAFT

7. Respondent Hoechst Aktiengesellschaft ("Hoechst AG") is a foreign corporation organized and existing under the laws of the Federal Republic of Germany, with its principal place of business located at D-6230 (Main) 80, Frankfurt, Federal Republic of Germany. Hoechst AG is the corporate parent of American Hoechst.

8. The Hoechst group of companies produces a diverse range of products, including polyester and polyester raw materials. Respondent Hoechst AG is one of the largest producers of polyester fibers in the world.

9. Net income for respondent Hoechst AG overall in 1985 was approximately \$499 million on sales of \$14.5 billion. The fibers and fiber raw materials business [5] segment of the company accounted for 10 percent of total corporate sales.

10. Hoechst AG is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

IV. CELANESE CORPORATION

11. Respondent Celanese Corporation ("Celanese") is a corporation organized and existing under the laws of the State of Delaware, with its principal executive offices and place of business located at 1211 Avenue of the Americas, New York, New York.

12. Celanese produces polyester fibers at manufacturing facilities

in the United States, Canada, and Mexico. Celanese is the second largest producer of textile polyester fibers, including both polyester staple and textile polyester filament, in the United States, and is the only producer of textile polyester fibers in Canada.

13. Respondent Celanese's overall net income was \$178 million in 1985 on sales of approximately \$3 billion.

14. Celanese is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44. [6]

V. THE ACQUISITION

15. On or about November 3, 1986, Hoechst commenced a cash tender offer for up to 100 percent of the issued and outstanding shares of Celanese common stock and preferred stock, with the intent of effecting a merger of Hostachem Acquisition Incorporated, a Delaware corporation wholly-owned by Hoechst, into Celanese, all as contemplated in the Agreement of Merger entered into among Hoechst, its subsidiary, and Celanese, on November 2, 1986. Pursuant to that Agreement, Celanese's Board of Directors has approved Hoechst's tender offer, has recommended its acceptance by Celanese stockholders, and has agreed to approve the merger of Hostachem Acquisition Incorporated into Celanese following the tender offer. If the acquisition is consummated as presently contemplated, the total value of the transaction will be approximately \$2.7 billion. Through this proposed stock acquisition, Hoechst will effectively acquire the polyester business of Celanese.

VI. TRADE AND COMMERCE

16. For purposes of this complaint, relevant lines of commerce in which to evaluate the effects of the acquisition are:

- a. the manufacture, distribution, and sale of polyester staple; and
- b. the manufacture, distribution, and sale of textile polyester filament. [7]

17. For purposes of this complaint, the relevant section of the country in which to evaluate the effects of the acquisition with respect to each of the relevant lines of commerce is the United States as a whole.

VII. MARKET STRUCTURE

18. In 1986, approximately 2.1 billion pounds of polyester staple was produced in the United States. The polyester staple market is highly

concentrated, whether measured by the Herfindahl-Hirschmann Index ("HHI") or by four-firm and eight-firm concentration ratios.

19. In 1986, approximately 844 million pounds of textile polyester filament was produced in the United States. The textile polyester filament market is highly concentrated, whether measured by the HHI or by four-firm and eight-firm concentration ratios.

VIII. ENTRY CONDITIONS

20. It is difficult to enter into the manufacture, distribution, and sale of polyester staple or of textile polyester filament.

XI. ACTUAL COMPETITION

21. Hoechst and Celanese are actual competitors in the manufacture, distribution, and sale of polyester staple and of textile polyester filament. [8]

X. EFFECTS

22. The aforesaid acquisition, if consummated, will significantly increase the levels of concentration in the relevant markets.

23. The effect of the aforesaid acquisition, if consummated, may be substantially to lessen competition in each of the relevant markets in violation 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, in the following ways, among others:

- a. it will eliminate actual competition between Hoechst and Celanese and between Celanese and others in the relevant markets; and
- b. it will significantly enhance the possibility of collusion or interdependent coordination among the remaining firms in the relevant markets.

XI. VIOLATIONS CHARGED

24. The proposed acquisition of the capital stock of Celanese by Hoechst would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

25. The Agreement of Merger described in paragraph 15 constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

26. The proposed acquisition of the capital stock of Celanese by Hoechst would, if consummated, violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. [9]

Chairman Oliver was recorded as voting in the negative.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the acquisition of all of the issued and outstanding common and other voting stock of Celanese Corporation ("Celanese") by Hostachem Acquisition Incorporated, an indirect wholly-owned subsidiary of American Hoechst Corporation ("American Hoechst") which is a subsidiary of Hoechst Aktiengesellschaft (collectively "Hoechst") and the subsequent mergers of Celanese with Hostachem Acquisition Incorporated and Hostachem with American Hoechst, and Hoechst and Celanese, having been furnished with a copy of a draft complaint that the Bureau of Competition has presented to the Commission for its consideration, and which, if issued by the Commission would charge Hoechst and Celanese with violations of the Clayton Act and Federal Trade Commission Act; and [2]

Respondents Hoechst and Celanese, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said 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, 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 had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Hoechst Aktiengesellschaft is an alien corporation organized and existing under the laws of the Federal Republic of Germany, with its executive offices located at 6230 Frankfurt (Main) 80, Federal Republic of Germany. [3]

2. American Hoechst Corporation, a wholly-owned subsidiary of Hoechst Aktiengesellschaft, is a corporation organized and existing under the laws of the State of Delaware, with its executive offices located at 1041 Route 202-206 North, Somerville, New Jersey.

3. Celanese Corporation is a corporation organized and existing

under the laws of the State of Delaware, with its executive offices located at 1211 Avenue of the Americas, New York, New York.

4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Hoechst and Celanese, and the proceeding is in the public interest.

ORDER

I.

It is hereby ordered, That as used in this order, the following definitions shall apply:

(a) "*Acquisition*" means Hoechst's acquisition of shares of the common and other voting stock of Celanese, a merger of Celanese with Hostachem Acquisition Incorporated and a merger of Hostachem with American Hoechst. [4]

(b) "*Polyester staple and textile filament fibers*" means synthetic fiber composed of polyethylene terephthalate, including both cut fiber and continuous filaments, used in apparel, carpeting, upholstery, home furnishing, or other textile applications, but not including monofilament, spunbond, sewing thread, and high-tenacity industrial filament (which includes industrial filament produced or sold by Celanese's Industrial Fiber business unit).

(c) "*Polyester textile fiber assets and businesses*" means assets and operations in the United States relating to the manufacture, distribution, sale, research and development of polyester staple or textile filament fibers, including goodwill, customer files, patents, know how, and the "Fortrel" trademark for Celanese's and the "Trevira" trademark for American Hoechst's polyester textile fiber business, respectively, as well as assets and operations related to the manufacture, distribution, sale, research and development of polyethylene terephthalate for use in the manufacture of polyester staple and textile filament fibers.

(d) "*Celanese*" means Celanese Corporation, as it was constituted prior to the acquisition, including its parents, predecessors, subsidiaries, divisions, groups and affiliates controlled by Celanese and their respective successors and assigns. [5]

(e) "*Hoechst*" means Hoechst Aktiengesellschaft, American Hoechst Corporation, Hostachem Acquisition Incorporated, their predecessors, subsidiaries, divisions, groups and affiliates controlled by Hoechst and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

II.

It is further ordered, That:

(A) Hoechst shall divest, absolutely and in good faith, within twelve months from the date this order becomes final, either:

1. the following portion of the polyester textile fiber assets and businesses in the United States of the Celanese Textile Fibers Business Group, which group is included in the descriptions on pages 5-6 of the Celanese Corporation 1985 Annual Report on Form 10-K filed with the Securities and Exchange Commission and on pages 12-13 of the 1985 Celanese Annual Report:

(a) all assets at Celanese's Florence ("Palmetto"), South Carolina and Fayetteville, North Carolina manufacturing facilities; [6]

(b) All polyester staple production capacity, and all polyester terephthalate production capacity currently used in the production of polyester staple, at Celanese's Salisbury, North Carolina manufacturing facility and such additional assets as are currently used at that facility in the production of polyester staple fiber and are requested by the prospective acquirer provided, however, that Hoechst (i) is not required to divest the assets at the facility that relate to the supply, utilities and service arrangements and agreements that Hoechst is required to supply in accordance with the provisions of paragraph II (B) 3; (ii) is only required to permit the acquirer to use on a nonexclusive basis (under a suitable license, lease, contract or similar arrangement), and is not required to divest, current technology or know-how at the Salisbury facility that is also used or usable in the businesses of Celanese or Hoechst that are not being divested; and (iii) will not be required to divest any portion of the Salisbury manufacturing facility, or any assets at that facility, if the Commission in its discretion determines that such divestiture is not required; [7]

(c) such assets at Celanese's Dreyfus Research Park in Charlotte, North Carolina as the prospective acquirer requests and will continue to use in conjunction with the operations of Celanese's polyester textile fiber manufacturing facilities that are divested to that acquirer;

(d) two of the type 30 POY spinning machines and associated winding equipment currently located and operating at Celanese's plant located in Greenville, South Carolina that the acquirer intends to use to produce POY textile filament in the United States;

(e) such other Celanese polyester textile fiber assets and business in the United States as are currently used by the Celanese Textile Fibers Business Group and are requested by the prospective acquirer for continued use in the administration, manufacture, distribution, sale,

research and development, or technical support of polyester staple and textile filament fibers, except such of those assets specified in the following provision to this paragraph II (A) 1. [8]

Provided, however, that Hoechst shall not be required to divest:

(i) Celanese's facilities at Shelby, North Carolina and (except as provided in II (A) 1 (d), above) Greenville, South Carolina,

(ii) the "Fortrel" trademark unless the II A 1 properties are divested and the prospective acquirer requests the right to use that trademark and then Hoechst is only required to provide suitable licenses or similar arrangement for use of that trademark in the United States for polyester staple and textile filament fibers; or

(iii) Celanese's polyester textile fiber assets and businesses that satisfy the following conditions: 1) either such assets are administrative facilities that are not located at the facilities or locations specified in paragraph II (A) 1 (a), (b) and (c) or such assets consist of technology or know-how, 2) such assets have been used or continue to be used in conjunction with other assets of Celanese not required to be divested, and 3) Hoechst provides the acquirer in lieu of [9] divestiture of such assets suitable leases, licenses or similar arrangements on a nonexclusive basis.

(The foregoing assets and businesses are hereinafter referred to as the "II A 1 properties.") or

2. All of the polyester textile fiber assets and businesses of American Hoechst, including:

(a) all of the polyester textile fiber assets and businesses of Hoechst Fiber Industries ("HFI"), a division of American Hoechst; provided, however, Hoechst is entitled to negotiate suitable arrangements with the acquirer necessary to operate the retained assets and businesses relating to the manufacture and sale of monofilament, spunbond and solid-state resins;

(b) all polyester staple and textile filament production capacity at American Hoechst's, Spartanburg, South Carolina manufacturing facility and such additional assets as are currently used at that facility in the production of polyester staple and textile filament fiber and are requested by the [10] prospective acquirer; provided, however, that Hoechst (i) is not required to divest the assets at that facility that relate to the supply, utilities and service arrangements and agreements that Hoechst is required to supply in accordance with the provisions of paragraph II (B) (3); and (ii) is only required to permit the acquirer to use on a nonexclusive basis (under a suitable license, lease contract or similar arrangement), and is not required to divest, current technology or know-how at the Spartanburg facility that is

also used or useable in the businesses of Celanese or Hoechst that are not being divested.

(c) all the capacity to manufacture polyethylene terephthalate necessary to ensure a self sufficiency of supply for the divested assets at the capacity levels that they currently operate; and

(d) such research and development assets at Spartanburg, South Carolina as the prospective acquirer requests and will continue to use in conjunction with the operations of American Hoechst's polyester textile fiber [11] manufacturing facilities that are divested to that acquirer.

Provided, however, that Hoechst shall not be required to divest the "Trevira" trademark unless the II A 2 properties are divested and the prospective acquirer requests the right to use that trademark and then Hoechst is only required to provide suitable licenses or similar arrangement for use of that trademark in the United States for polyester staple and textile filament fibers.

(The foregoing assets and businesses are hereinafter referred to as the "II A 2 properties".)

(B) In conjunction with the divestiture, Hoechst and Celanese shall:

1. assign to the acquirer of the II A 1 properties the Service Agreement dated March 13, 1981 (and certain related agreements) between Celanese and Monsanto Company;

2. provide any easements and rights of way that are requested by the prospective acquirer and that facilitate the operation of the II A assets; [12]

3. if the polyester staple operations of Celanese's Salisbury facility or the II A 2 properties are divested, provide the acquirer, at fair market price, supply arrangements and utilities and service agreements (such as nitrogen, inert air, process and drinking water, steam, and waste treatment) that are requested by the prospective acquirer for use in conjunction with the assets and businesses sold to the acquirer; and

4. if the II A 2 properties are divested, provide the acquirer, at fair market prices, supply arrangements for terephthalic acid and dimethyl-terephthalate that are requested by the prospective acquirer for use in conjunction with the assets and businesses divested to the acquirer.

(Hereinafter referred to as "II B agreements".)

(C) Hoechst and Celanese shall:

1. retain all liabilities arising from the operation of any of the II A

properties that are divested through and including, but not following, the date of closing of the sale of such properties; [13]

2. ensure that all persons who accept employment with any acquirer of the II A 1 properties shall become fully vested in their account balances under Celanese's Stock Bonus and Investment Plan Trust;

3. transfer from Celanese's pension plan if the II A 1 properties are divested, or from Hoechst's pension plan if the II A 2 properties are divested, to a pension fund(s) to be established by an acquirer or acquirers of those properties assets equal to the actuarially accrued liability as of the closing date, or otherwise secure the accrued pension benefits, with respect to Celanese, or, as the case may be, Hoechst, employees who accept employment with an acquirer or acquirers of any II A property; and

4. encourage its employees who are employed at any divested II A property to accept employment with any acquirer(s) of any II A property.

(D) Hoechst and Celanese shall maintain the viability and marketability of the assets required to be divested and shall not cause or permit the destruction, removal or impairment of any assets or businesses to be divested except in the ordinary course of business and except for ordinary wear and tear. [14]

(E) II A 1 or II A 2 properties shall be divested to and II B agreements and agreements provided for in paragraph II (A) made with, an acquirer or acquirers, and only in a manner, that receives the prior approval of the Commission. The purpose of the divestiture and agreements is to ensure the continuation of the assets as ongoing, viable enterprises engaged in the manufacture, distribution, sale, research and development of polyester staple and textile filament fibers in the United States and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

(F) If Hoechst has not divested the II A 1 or II A 2 properties within the twelve-month period specified in II (A), Hoechst shall consent to the appointment of a trustee by the Commission to divest the II A 1 properties. In the event that the Commission brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, Hoechst shall consent to the appointment of a trustee in such action. The appointment of a trustee shall not preclude the Commission from seeking civil penalties and other relief available to it for any failure by Hoechst to comply with paragraphs II (C) through VI of this order.

(G) If a trustee is appointed by the Commission or a court pursuant to paragraph II (F) of this order, Hoechst shall [15] consent to the following terms and conditions regarding the trustee's duties and responsibilities:

1. The Commission shall select the trustee, subject to Hoechst's consent, which shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures.

2. The trustee shall have the power and authority to divest any II A 1 properties or enter into any II B agreements and other agreements provided for in paragraph II (A) that have not been divested or entered into by Hoechst within the time period for divestiture in paragraph II(A). The trustee shall have 18 months from the date of appointment to accomplish the divestiture, which shall be subject to the prior approval of the Commission and, if the trustee is appointed by a court, subject also to the prior approval of the court. If, however, at the end of the eighteen-month period the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission or by the court for a court-appointed trustee. Provided, however, the Commission or the court for a court-appointed [16] trustee may only extend the divestiture period two times.

3. The trustee shall have full and complete access to the personnel, books, records and facilities of any business that the trustee has the duty to divest, and Hoechst shall develop such financial or other information relevant to the assets to be divested as such trustee may reasonably request. Hoechst shall cooperate with the trustee, and shall take no action to interfere with or impede the trustee's accomplishment of the divestiture.

4. The power and authority of the trustee to divest shall be at the most favorable price and terms available consistent with the order's absolute and unconditional obligation to divest and the purposes of the divestiture as stated in paragraph II(E).

5. The trustee shall serve at the cost and expense of Hoechst on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the Commission or the court of the account of the trustee, including fees for his or her services, all remaining monies shall be paid to [17] Hoechst and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee divesting the trust property.

6. Promptly upon appointment of the trustee and subject to the approval of the Commission, Hoechst shall, subject to the Commission's prior approval, and consistent with provisions of this order, execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to cause divestiture and sign agreements.

7. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed.

8. The trustee shall report in writing to the Commission and Hoechst every sixty days concerning the trustee's efforts to accomplish divestiture.

(H) The Agreement to Hold Separate, attached hereto and made a part hereof as Appendix I, shall continue in effect until such time as (1) all the II A 1 properties, except Type 30 POY spinning machines at Greenville, have been divested by Hoechst or [18] a trustee pursuant to this order, or (2) all of the II A 2 properties have been divested by Hoechst pursuant to the order.

III.

It is further ordered, That, within sixty days after the date of service of this order, and every sixty days thereafter until Hoechst and Celanese have fully complied with the provisions of paragraph II of this order, Hoechst and Celanese 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 with, or have complied with that provision and those reports shall be accorded such confidential treatment as is available pursuant to Section 6(f) and 21 of the Federal Trade Commission Act, as amended. Hoechst and Celanese shall include in compliance reports, among other things that are required from time to time, a full description of contacts or negotiations for the divestiture of the paragraph II A properties, including the identity of all parties contacted. Hoechst and Celanese also shall include in compliance reports copies of all written communications to and from such parties, and all internal memoranda, reports and recommendations concerning divestiture. [19]

IV.

It is further ordered, That for a period commencing on the date of service of this order and continuing for ten years from and after the date of service of this order, Hoechst shall cease and desist from acquiring, without the prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries or otherwise, assets used or previously used in (and still suitable for use in), or any interest in, or the whole or any part of the stock or share capital of, any company engaged in, the manufacture, distribution, or sale of polyester staple and textile filament fibers in the United States. Provided, however, that these prohibitions shall not relate (i) to the construction of new facilities, (ii) to the acquisition of assets outside of the United

States, (iii) to the acquisition of any interest in, or the whole or part of the stock or share capital of any company engaged in the manufacture, distribution or sale of polyester staple and textile filament fibers outside of the United States if such company has annual sales in the United States of less than one percent of the then current respective total United States annual sales of polyester staple fibers or polyester textile filament fibers or (iv) to the acquisition of used assets that Hoechst intends to relocate to existing or new facilities for use in production of polyester staple and textile filament fibers if such used assets have production capacity of less than one percent of the United States' then current respective capacity for the production of polyester staple fibers [20] or polyester textile filament fibers.

One year from the date of service of this order and annually thereafter, Hoechst shall file with the Commission a verified written report of its compliance with this paragraph.

V.

For the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to American Hoechst Corporation or Celanese made to their principal offices, Hoechst and Celanese shall permit any duly authorized representatives of the Commission:

1. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Hoechst or Celanese relating to any matters contained in this order; and

2. Upon five days' notice to American Hoechst Corporation or Celanese and without restraint or interference from them, to interview officers or employees of Hoechst or Celanese, who may have counsel present, regarding such matters. [21]

VI.

It is further ordered, That Hoechst and Celanese shall notify the Commission at least thirty days prior to any change in the corporation such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change that may affect compliance obligations arising out of this order.

Chairman Oliver was recorded as voting in the negative.

DISSENTING STATEMENT OF CHAIRMAN DANIEL OLIVER

Two separate concerns lead me to dissent from final Commission acceptance of the consent order in this matter. First, I do not believe that Hoechst's acquisition of Celanese is likely to lessen competition substantially in the production, distribution or sale of either polyester staple or textile polyester filament, the two relevant product markets alleged in the complaint. The theory of the complaint is that the acquisition—if not modified pursuant to the consent order—may have this effect in the United States. However, strong competition from foreign producers is likely to make it impossible for domestic producers—including the combined Hoechst-Celanese operation—to exercise any significant degree of market power, whether to raise prices above competitive levels or to injure competition in any other respect. There is therefore no reason to believe that the acquisition violates section 7 of the Clayton Act, and the consent order is unnecessary.

Second, the consent order will require the respondent—for ten years—to secure Commission approval prior to acquiring virtually any assets located in the United States that are used to manufacture, distribute, or sell polyester staple or textile filament fibers. If, as I have concluded, there is no reason to believe that the current acquisition would violate section 7, then there is no reason to require prior approval of future equally innocuous acquisitions. The Commission has recently determined that the appropriateness of prior approval provisions depends on "industry market structure and market conditions."¹ The record in this case does not establish that "market conditions and market structure in [the covered markets] are such that all such acquisitions . . . necessarily [would be] anticompetitive."²

For both reasons, I therefore respectfully dissent from final approval of the consent order in this matter.

¹ *American Medical International*, 104 FTC 1, 224 (1984); accord, *Hospital Corp. of America*, 106 FTC 361, 514 (1985), *aff'd*, 807 F.2d 1381 (7th Cir. 1986), *cert. denied*, ___ U.S. ___, No. 86-1492 (May 3, 1987).

² See *American Medical International*, 104 FTC at 225; see also *Hospital Corp. of America*, 106 FTC at 513-17.

IN THE MATTER OF

L'AIR LIQUIDE SOCIETE ANONYME, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF
THE CLAYTON ACT & SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3216. Complaint, July 15, 1987—Decision, July 15, 1987

This consent order requires, among other things, L'Air Liquide to divest some assets to resolve any antitrust concerns in the production and sale of liquid gases and to obtain prior Commission's approval for similar acquisitions.

Appearances

For the Commission: *Ernest A. Nagata.*

For the respondents: *Robert A. Lipstein, Coudeot Brothers, Wash-
ington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that L'Air Liquide Societe Anonyme pour L'Etude et L'Exploitation des Procédes Georges Claude has undertaken an acquisition of the voting securities of Big Three Industries, and a proposed merger of Big Three Industries with a subsidiary of L'Air Liquide Societe Anonyme pour L'Etude et L'Exploitation des Procédes Georges Claude, either of which, if consummated, would result in a violation 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 that a proceeding in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 11 of the Clayton Act, as amended, 15 U.S.C. 21 and Section 5(b) of the Federal Trade Commission Act, as amended 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINITIONS

1. For the purposes of this complaint, the following definitions shall apply:

(a) "*L'Air Liquide*" means L'Air Liquide Societe Anonyme pour L'Etude et L'Exploitation des Procédes Georges Claude, its officers, directors, agents, representatives, employees, successors and assigns together with all subsidiaries it controls.

(b) "*BTI*" means Big Three Industries, its officers, directors, agents,