

Complaint

IN THE MATTER OF

AMERICAN AIR LIQUIDE, INC.

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

Docket C-4109; File No. 0410020
Complaint, April 29, 2004--Decision, June 29, 2004

This consent order addresses the acquisition by Respondent L’Air Liquide, S. A., a world leader in industrial and medical gases and related equipment, of Messer Griesheim GmbH (“MGI”) – which produces and sells industrial gases in the United States – and the subsequent transfer of MGI to L’Air Liquide’s wholly-owned subsidiary, Respondent American Air Liquide, whose own United States subsidiary produces and supplies oxygen, nitrogen, argon, and many other industrial gases to customers for numerous applications in the petrochemical, manufacturing, and fabrication industries and the medical field. The order, among other things, requires Respondent American Air Liquide to divest the air separation units and related assets currently owned and operated by MGI in Vacaville, California; Irwindale, California; San Antonio, Texas; Westlake, Louisiana; DeLisle, Mississippi; and Waxahachie, Texas to an acquirer approved by the Commission. An accompanying Order to Hold Separate requires American Air Liquide to preserve the air separation units as viable, competitive and ongoing operations until the divestiture is achieved.

Participants

For the Commission: *Christina R. Perez, James E. Southworth, Tammy L. Imhoff, Richard A. Levy, Eli Barach, Joseph Eckhaus, Michael R. Moiseyev, Elizabeth A. Piotrowski, Charlotte Wojcik, Jeffrey H. Fischer and Mark W. Frankena.*

For the Respondent: *George Cary and Brian Byrne, Cleary, Gottlieb, Steen & Hamilton.*

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Pursuant to the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission (“Commission”), having reason to believe that the proposed acquisition by L’Air Liquide, Société

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Anonyme à Directoire et Conseil de Surveillance pour L'Etude et L'Exploitation des Procédés George Claude ("L'Air Liquide") of Messer Griesheim GmbH, a subsidiary of Messer Griesheim Group GmbH & Co. KGaA and subsequent transfer of Messer Griesheim Industries, Inc. ("MGI") to Respondent American Air Liquide, Inc., a corporation subject to the jurisdiction of the Commission, is 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 ("FTC 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, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent American Air Liquide, Inc. is a wholly-owned subsidiary of L'Air Liquide, and is a corporation existing under and by virtue of the laws of the United States, with its principal executive offices located at 46409 Landing Parkway, Fremont, California, 94538. American Air Liquide operates in the United States both directly and through its wholly-owned subsidiary, Air Liquide America L.P.

2. Respondent, through its subsidiary Air Liquide America L.P., is engaged in, among other things, the production and sale of industrial gases including, but not limited to, liquid oxygen, liquid nitrogen and liquid argon.

3. Respondent 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 affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

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II. ACQUIRED COMPANY

4. Messer Griesheim GmbH is a wholly-owned indirect subsidiary of Messer Griesheim Group GmbH & Co. KGaA (“Messer Griesheim Group”). Messer Griesheim Group is a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at Fuetingsweg 34, 47805 Krefeld, Germany. Messer Griesheim Group operates in the United States through MGI, a wholly-owned subsidiary existing under and by virtue of the laws of the United States and with its principal executive offices located at 3 Great Valley Parkway, Malvern, Pennsylvania, 19355.

5. Messer Griesheim Group and MGI are engaged in, among other things, the production and sale of industrial gases including, but not limited to, liquid oxygen, liquid nitrogen, and liquid argon.

6. MGI 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 FTC Act, as amended, 15 U.S.C. § 44.

III. THE ACQUISITION

7. Pursuant to a sale and purchase agreement dated January 19, 2004, L’Air Liquide agreed to acquire the entire share capital of Messer Griesheim GmbH for an aggregate purchase price of approximately \$3.5 billion and subsequently transfer MGI to Respondent American Air Liquide.

IV. THE RELEVANT MARKETS

8. For purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the acquisition are the manufacture and sale of:

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- a. liquid nitrogen;
- b. liquid oxygen; and
- c. liquid argon.

9. For purposes of this Complaint, the relevant geographic areas in which to analyze the effects of the acquisition on the liquid oxygen and liquid nitrogen markets are:

- a. Northern California;
- b. Southern California;
- c. Southern Texas;
- d. Western Louisiana; and
- e. the Central Gulf Coast.

10. For purposes of this Complaint, the relevant geographic area in which to analyze the effects of the acquisition on the liquid argon market is the United States, and narrower markets contained therein, including the Western United States.

V. THE STRUCTURE OF THE MARKETS

11. The relevant markets are highly concentrated whether measured by Herfindahl-Hirschman Indices (“HHI”) or two-firm and four-firm concentration ratios. In addition, the closest competing facilities, geographically, to MGI’s San Antonio, Texas plant are Respondent’s Ingleside and Victoria, Texas plants, and MGI’s Westlake plant is the closest competing facility, geographically, to Respondent’s Beaumont, Texas plant.

12. Respondent and MGI are actual competitors in the relevant markets.

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VI. BARRIERS TO ENTRY

13. New entry into the relevant markets would not occur in a timely manner sufficient to deter or counteract the adverse competitive effects of the acquisition because it would take over two years for an entrant to accomplish the steps required for entry and achieve a significant market impact. These steps include planning, designing and building a new air separation plant, as well as securing contracts with enough customers to justify the investment.

14. Entry into the relevant markets is costly, difficult and unlikely because of, among other things, the time and cost required to construct the air separation units that produce liquid oxygen, liquid nitrogen, and liquid argon. Constructing one air separation unit large enough to be viable in the market would cost at least \$30 to \$40 million, most of which is sunk. Moreover, it is not economically justifiable to build an air separation unit unless a sufficient amount of the plant's capacity has been pre-sold prior to construction, either to an on-site customer or to liquid customers with commitments under contract. Such pre-sale opportunities occur infrequently and unpredictably.

VII. EFFECTS OF THE ACQUISITION

15. The effects of the acquisition may be to substantially lessen competition and to tend to create a monopoly in the relevant markets as set forth above in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, in the following ways, among others:

- a. By eliminating direct actual competition between Respondent and MGI;

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- b. By enhancing the likelihood of collusion or coordinated action between or among the remaining firms in the Northern California, Southern California, and Central Gulf Coast liquid oxygen and liquid nitrogen markets;
- c. By enhancing the likelihood of collusion or coordinated action between or among the remaining firms in the liquid argon market;
- d. By eliminating competition between the two closest competitors, geographically, in the Southern Texas and Western Louisiana liquid oxygen and nitrogen markets;
- e. By increasing the likelihood that Respondent would unilaterally exercise market power in the Southern Texas and Western Louisiana liquid oxygen and nitrogen markets; and
- f. By increasing the likelihood that consumers would be forced to pay higher prices for liquid oxygen, liquid nitrogen and liquid argon in the relevant geographic areas.

VIII. VIOLATIONS CHARGED

16. The Acquisition agreement described in Paragraph 7 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

17. The Acquisition described in Paragraph 7, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-ninth day of April, 2004, issues its Complaint against said Respondents.

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The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by L’Air Liquide, Société Anonyme à Directoire et Conseil de Surveillance pour L’Etude et L’Exploitation des Procédés Georges Claude (“L’Air Liquide”) of Messer Griesheim GmbH, a subsidiary of Messer Griesheim Group GmbH & Co. KGaA, and the subsequent transfer of Messer Griesheim Industries, Inc. to Respondent American Air Liquide, Inc. and Respondent having been furnished thereafter with a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and its Order to Hold Separate and Maintain Assets (“Hold Separate”) and accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to section 2.34 of its Rules, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby

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makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent American Air Liquide, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 46409 Landing Parkway, Fremont, California 94538.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “American Air Liquide” or “Respondent” means American Air Liquide, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its controlled joint ventures, subsidiaries, divisions, groups and affiliates, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Messer” means Messer Griesheim Group GmbH & Co. KGaA, a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at Fuetingsweg 34, 47805 Krefeld, Germany, and its controlled joint ventures, subsidiaries, divisions, groups and affiliates, including, but not limited to, Messer Griesheim GmbH and Messer Griesheim Industries, Inc.
- C. “MGI” means Messer Griesheim Industries, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 3 Great

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Valley Parkway, Malvern, Pennsylvania 19355, and its controlled subsidiaries, divisions, groups and affiliates.

- D. “Acquirer” means the entity who acquires the Atmospheric Gases Divestiture Assets and Businesses pursuant to Paragraph II. or Paragraph III. of this Order.
- E. “Acquisition” means the acquisition by L’Air Liquide of the entire share capital of Messer Griesheim GmbH, as described in the Sale and Purchase Agreement dated as of January 19, 2004, between Messer Griesheim Holding AG, Messer, Messer Griesheim GmbH, Messer Industrie GmbH, Air Liquide International S.A. and L’Air Liquide (“Acquisition Agreement”), including the subsequent transfer of MGI to American Air Liquide.
- F. “Atmospheric Gases” means oxygen, nitrogen, and argon.
- G. “Atmospheric Gases Divestiture Assets and Businesses” means the Divested Atmospheric Gases Plants, and includes all of Messer’s interests in all tangible and intangible assets, business and goodwill used at or directly associated with the production, refinement, distribution, marketing or sale of Atmospheric Gases at the Divested Atmospheric Gases Plants including, but not limited to:
 - 1. all real property interests, including rights, title and interests in and to owned or leased property, together with all buildings, improvements, appurtenances, licenses and permits;
 - 2. all inventory; supplies; machinery; equipment; fixtures; furniture; tools and other tangible personal property, including vehicles and other distribution equipment (including trucks, tractors, trailers, rail cars and ISO containers); dispatch facilities and equipment (including, at the option of the Acquirer, the Planning and Logistics facility located in Chattanooga, Tennessee); storage tanks, vessels and cylinders; and equipment located at the facilities of customers whose supply agreements are divested to the Acquirer, including but not limited to

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- storage tanks, vessels and cylinders;
3. all spare parts located at the Divested Atmospheric Gases Plants; and, at the option of the Acquirer, any shared critical spare parts for any of the Divested Atmospheric Gases Plants that are stored at any other location;
 4. all customer lists and customer databases; *provided, however,* that Respondent may redact such customer lists and customer databases to retain information regarding customer supply arrangements not divested to the Acquirer;
 5. on a non-exclusive basis, all vendor lists, catalogs, sales promotion literature and advertising materials;
 6. non-exclusive rights and licenses to, and copies of, all research materials, inventions, technology and intellectual property, including but not limited to, patents, trade secrets and know-how, necessary to service customers as currently served or operate the Atmospheric Gases Divestiture Assets and Businesses at no less than the rate of operation (including, but not limited to, rates of production and sales) as of the Effective Date of Divestiture;
 7. at the option of the Acquirer, non-exclusive rights to all management information systems software, supply chain management software, dispatch, logistics and production software and any other software or proprietary information necessary to service customers as currently served or operate the Atmospheric Gases Divestiture Assets and Businesses at no less than the rate of operation (including, but not limited to, rates of production and sales) as of the Effective Date of Divestiture;
 8. non-exclusive rights to and copies of all technical information, specifications, designs, drawings, processes and quality control data;

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9. rights to or in any or all existing Atmospheric Gases customer supply agreements for which the customer has been ordinarily supplied by one or more of the Divested Atmospheric Gases Plants from July 1, 2003, to the Effective Date of Divestiture; *provided, however*, that, at the option of the Acquirer and with the prior approval of the Commission, the Acquirer may substitute an alternative package of customer supply agreements;
10. to the extent transferable or assignable, and, in the case of company-wide contracts, divisible, rights to and in all contracts and agreements, other than customer supply agreements, related to the production, refinement, distribution, marketing or sale of Atmospheric Gases at the Divested Atmospheric Gases Plants including but not limited to dealer, distributor, supply, power and utility contracts;
11. all customer and governmental approvals, consents, licenses, permits, waivers or other authorizations held by Messer for the production, refinement, distribution, marketing or sale of Atmospheric Gases at the Divested Atmospheric Gases Plants;
12. all rights under warranties and guarantees, express or implied;
13. all books, records and files; *provided, however*, that if such books, records and files also contain information relating to the production, refinement, distribution, marketing or sale of products at plants other than the Divested Atmospheric Gases Plants, then only those portions of the books, records and files relating to the Divested Atmospheric Gases Plants shall be included; and, *provided further*, that Respondent may retain a copy of any books and records that it is required by law to retain; and
14. all items of prepaid expense.

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Provided, however, “Atmospheric Gases Divestiture Assets and Businesses” does not include:

- a. Messer’s proprietary trade name and trademarks and any other rights to distribute or sell any items containing Messer’s name or logo;
- b. any Atmospheric Gases Plant or production facility other than the Waxahachie Plant, the Westlake Plant, the San Antonio Plant, the De Lisle Plant, the Vacaville Plant and the Irwindale Plant;
- c. any computers, servers, or telecommunications equipment shared through local and/or wide area telecommunications systems that are not physically located at the facilities associated with the Atmospheric Gases Divestiture Assets and Businesses;
- d. the offices located at the Malvern, Pennsylvania headquarters;
- e. the Planning and Logistics facility located in Richmond, Virginia;
- f. Messer’s specialty gases plant located in Houston, Texas;
- g. Messer’s interest in the San Diego, California storage depot formerly served by Cryoinfra’s Atmospheric Gases plant in Tijuana, Mexico;
- h. contractual rights to supply products other than those products produced at the Divested Atmospheric Gases Plants; and
- i. contractual rights to supply oxygen, nitrogen and other products to customers ordinarily supplied with argon, but not oxygen or nitrogen, by one or more of the Divested Atmospheric Gases Plants from July 1, 2003, to the Effective Date of Divestiture.

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- H. “Atmospheric Gases Plant” means a facility that produces Atmospheric Gases.
- I. “Commission” means the Federal Trade Commission.
- J. “De Lisle Plant” means Messer’s Atmospheric Gases Plant located in De Lisle, Mississippi.
- K. “Divested Atmospheric Gases Plants” means the Waxahachie Plant, the Westlake Plant, the San Antonio Plant, the De Lisle Plant, the Vacaville Plant and the Irwindale Plant.
- L. “Effective Date of Divestiture” means the date on which the mandated divestiture of the Atmospheric Gases Divestiture Assets and Businesses occurs.
- M. “Held Separate Business” means the Atmospheric Gases Divestiture Assets and Businesses and all Held Separate Business Employees.
- N. “Held Separate Business Employees” means all full-time, part-time, or contract employees whose duties take place at, or primarily relate to, the Held Separate Business or have taken place at, or primarily related to, the Held Separate Business at any time during the period commencing twelve months prior to the Effective Date of Divestiture, as well as all of the employees listed in Confidential Appendix A attached to this Order.
- O. “Irwindale Plant” means Messer’s Atmospheric Gases Plant located in Irwindale, California.
- P. “Key Divestiture Employees” means those Employees identified in Confidential Appendix B attached to this Order.
- Q. “San Antonio Plant” means Messer’s Atmospheric Gases Plant located in San Antonio, Texas.

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- R. “Vacaville Plant” means Messer’s Atmospheric Gases Plant located in Vacaville, California.
- S. “Waxahachie Plant” means Messer’s Atmospheric Gases Plant located in Waxahachie, Texas.
- T. “Westlake Plant” means Messer’s Atmospheric Gases Plant located in Westlake, Louisiana.

II.

IT IS FURTHER ORDERED that:

- A. Respondent shall divest, within six (6) months from the date this Order becomes final, the Atmospheric Gases Divestiture Assets and Businesses to a single Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission, absolutely and in good faith and at no minimum price.
- B. Respondent shall:
 - 1. not later than forty-five (45) days before the Effective Date of Divestiture, (a) provide to the Acquirer a list of all Held Separate Business Employees; (b) allow the Acquirer to interview any Held Separate Business Employees; and (c) subject to compliance with all laws, allow the Acquirer to inspect the personnel files and other documentation relating to such Held Separate Business Employees;
 - 2. not later than thirty (30) days before the Effective Date of Divestiture, provide an opportunity for the Acquirer to (a) meet personally, and outside the presence or hearing of any employee or agent of Respondent, with any one or more of the Held Separate Business Employees; and (b) make offers of employment to any one or more of the Held Separate Business Employees;
 - 3. not directly or indirectly interfere with the Acquirer’s offer of employment to any one or more of the Held

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Separate Business Employees, not directly or indirectly attempt to persuade any one or more of the Held Separate Business Employees to decline any offer of employment from the Acquirer, and not offer any incentive to any of the Held Separate Business Employees to decline employment with the Acquirer;

4. irrevocably waive any legal or equitable right to deter any Held Separate Business Employee from accepting employment with Acquirer, including, but not limited to, waiving any non-compete or confidentiality provisions of employment or other contracts with Respondent that relate to Atmospheric Gases;
5. not interfere with the employment by the Acquirer of any Held Separate Business Employee;
6. continue employee benefits to Held Separate Business Employees until the Effective Date of Divestiture consistent with the requirements of the Acquisition Agreement and the employee benefits provided to other similarly situated Messer employees that become employees of the Respondent after the Effective Date of Divestiture, including regularly scheduled or merit raises and bonuses, regularly scheduled vesting of all pension benefits, and reimbursement of relocation expenses;
7. provide a retention incentive bonus to Key Divestiture Employees who accept employment with the Acquirer, equal to ten (10) percent of such employees' annual salary to be paid upon the employees' completion of one (1) year of continuous employment with the Acquirer after the Effective Date of Divestiture;
8. subject to the provisions of Paragraph II.B.9. below, for a period of one (1) year from the Effective Date of Divestiture, Respondent shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any Held Separate Business Employees who have accepted offers of employment with the Acquirer to terminate their employment with the Acquirer; *provided, however, a*

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violation of this provision will not occur if: (1) the individual's employment has been terminated by the Acquirer; (2) Respondent advertises for employees in newspapers, trade publications, or other media not targeted specifically at the employees; or (3) Respondent hires employees who apply for employment with Respondent, as long as such employees were not solicited by Respondent in violation of this paragraph; and

9. notwithstanding the provisions of Paragraph II.B.8. above, for a period of six (6) months from the Effective Date of Divestiture, Respondent shall not employ or make offers of employment to any Held Separate Business Employees who have accepted offers of employment with the Acquirer unless any such individual's employment with the Acquirer has been terminated by the Acquirer.
- C. In the event that Respondent is unable to satisfy all conditions necessary to divest any intangible asset that is a permit, license, or right granted by any governmental authority, Respondent shall provide such assistance as the Acquirer may reasonably request in the Acquirer's efforts to obtain a comparable permit, license or right. In the event that Respondent is unable to satisfy all conditions necessary to divest any other intangible asset (including a contractual right), Respondent shall, with the acceptance of the Acquirer and the prior approval of the Commission, substitute equivalent assets or arrangements.
- D. The purpose of the divestiture of the Atmospheric Gases Divestiture Assets and Businesses, and of the other provisions of this paragraph, is to ensure the continued operation of the Atmospheric Gases Divestiture Assets and Businesses as a viable, ongoing business by an Acquirer that has the ability and incentive to invest and compete in the production, distribution, marketing and sale of

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Atmospheric Gases sold in liquid form, and to remedy the lessening of competition resulting from the Acquisition as alleged in Commission's Complaint.

III.**IT IS FURTHER ORDERED** that:

- A. If Respondent has not divested the Atmospheric Gases Divestiture Assets and Businesses as required by Paragraph II. of this Order, the Commission may appoint a trustee to divest ("Divestiture Trustee") the Atmospheric Gases Divestiture Assets and Businesses in a manner that satisfies the requirements of Paragraph II. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a Divestiture Trustee in such action to divest the relevant assets in accordance with the terms of this Order. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondent to comply with this Order.
- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Divestiture Trustee, Respondent shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

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- C. Within ten (10) days after appointment of a Divestiture Trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture or transfer required by the Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondent shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
 - 1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver or otherwise convey the relevant assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed.
 - 2. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period only two (2) times.
 - 3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered or otherwise conveyed by this Order and to any other relevant information as the Divestiture Trustee may request. Respondent shall develop such financial or other information as the Divestiture Trustee may request

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and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent shall extend the time for divestiture under this Paragraph III. in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondent from among those approved by the Commission; *provided further, however*, that Respondent shall select such entity within five (5) days of receiving notification of the Commission's approval.
5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the

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Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondent, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondent shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
 7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
 8. The Divestiture Trustee shall report in writing to Respondent and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
 9. Respondent may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may

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appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph III.

- F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order becomes final and every thirty (30) days thereafter until Respondent has fully complied with the provisions of Paragraphs II. and III. of this Order, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it has complied, is complying, and will comply with this Order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with this Order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

V.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed (1) dissolution of the Respondent, (2) acquisition, merger or consolidation of Respondent, or (3) any other change in the Respondent that may affect compliance obligations arising out of this Order, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in Respondent.

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VI.

IT IS FURTHER ORDERED that for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent, Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours of Respondent and in the presence of counsel, to all facilities, and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondent relating to any matters contained in this Order; and
- B. Upon five (5) days' notice to Respondent and without restraint or interference from it, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding any such matters.

VII.

IT IS FURTHER ORDERED that this Order shall terminate when all of the obligations of the divestitures required in Paragraph II. or Paragraph III. of this Order have been accomplished.

Order

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by L’Air Liquide, Société Anonyme à Directoire et Conseil de Surveillance pour L’Etude et L’Exploitation des Procédés Georges Claude (“L’Air Liquide”) of Messer Griesheim GmbH, a subsidiary of Messer Griesheim Group GmbH & Co. KGaA, and the subsequent transfer of Messer Griesheim Industries, Inc. to Respondent American Air Liquide, Inc. and Respondent having been furnished thereafter with a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Agreement Containing Consent Orders and to place such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Hold Separate and Maintain Assets (“Hold Separate”):

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1. Respondent American Air Liquide, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 46409 Landing Parkway, Fremont, California 94538.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Hold Separate, the following definitions shall apply:

- A. “American Air Liquide” or “Respondent” means American Air Liquide, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its controlled joint ventures, subsidiaries, divisions, groups and affiliates, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Messer” means Messer Griesheim Group GmbH & Co. KGaA, a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at Fuetingsweg 34, 47805 Krefeld, Germany, and its controlled joint ventures, subsidiaries, divisions, groups and affiliates, including, but not limited to, Messer Griesheim GmbH and Messer Griesheim Industries, Inc.
- C. “MGI” means Messer Griesheim Industries, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 3 Great Valley Parkway, Malvern, Pennsylvania 19355, and its controlled subsidiaries, divisions, groups and affiliates.
- D. “Acquirer” means the entity who acquires the Atmospheric Gases Divestiture Assets and Businesses pursuant to Paragraph II. or Paragraph III. of this Order.

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- E. "Acquisition" means the acquisition by L'Air Liquide of the entire share capital of Messer Griesheim GmbH, as described in the Sale and Purchase Agreement dated as of January 19, 2004, between Messer Griesheim Holding AG, Messer, Messer Griesheim GmbH, Messer Industrie GmbH, Air Liquide International S.A. and L'Air Liquide ("Acquisition Agreement"), including the subsequent transfer of MGI to American Air Liquide.
- F. "Atmospheric Gases" means oxygen, nitrogen, and argon.
- G. "Atmospheric Gases Divestiture Assets and Businesses" means the Divested Atmospheric Gases Plants, and includes all of Messer's interests in all tangible and intangible assets, business and goodwill used at or directly associated with the production, refinement, distribution, marketing or sale of Atmospheric Gases at the Divested Atmospheric Gases Plants including, but not limited to:
1. all real property interests, including rights, title and interests in and to owned or leased property, together with all buildings, improvements, appurtenances, licenses and permits;
 2. all inventory; supplies; machinery; equipment; fixtures; furniture; tools and other tangible personal property, including vehicles and other distribution equipment (including trucks, tractors, trailers, rail cars and ISO containers); dispatch facilities and equipment (including, at the option of the Acquirer, the Planning and Logistics facility located in Chattanooga, Tennessee); storage tanks, vessels and cylinders; and equipment located at the facilities of customers whose supply agreements are divested to the Acquirer, including but not limited to storage tanks, vessels and cylinders;
 3. all spare parts located at the Divested Atmospheric Gases Plants; and, at the option of the Acquirer, any shared critical spare parts for any of the Divested Atmospheric Gases Plants that are stored at any other location;

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4. all customer lists and customer databases; *provided, however,* that Respondent may redact such customer lists and customer databases to retain information regarding customer supply arrangements not divested to the Acquirer;
5. on a non-exclusive basis, all vendor lists, catalogs, sales promotion literature and advertising materials;
6. non-exclusive rights and licenses to, and copies, of all research materials, inventions, technology and intellectual property, including but not limited to, patents, trade secrets and know-how, necessary to service customers as currently served or operate the Atmospheric Gases Divestiture Assets and Businesses at no less than the rate of operation (including, but not limited to, rates of production and sales) as of the Effective Date of Divestiture;
7. at the option of the Acquirer, non-exclusive rights to all management information systems software, supply chain management software, dispatch, logistics and production software and any other software or proprietary information necessary to service customers as currently served or operate the Atmospheric Gases Divestiture Assets and Businesses at no less than the rate of operation (including, but not limited to, rates of production and sales) as of the Effective Date of Divestiture;
8. non-exclusive rights to and copies of all technical information, specifications, designs, drawings, processes and quality control data;
9. rights to or in any or all existing Atmospheric Gases customer supply agreements for which the customer has been ordinarily supplied by one or more of the Divested Atmospheric Gases Plants from July 1, 2003 to the Effective Date of Divestiture; *provided, however,* that, at the option of the Acquirer and with the prior approval of the Commission, the Acquirer may substitute an alternative package of customer supply agreements;
10. to the extent transferable or assignable, and, in the case of company-wide contracts, divisible, rights to

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and in all contracts and agreements, other than customer supply agreements, related to the production, refinement, distribution, marketing or sale of Atmospheric Gases at the Divested Atmospheric Gases Plants including but not limited to dealer, distributor, supply, power and utility contracts;

11. all customer and governmental approvals, consents, licenses, permits, waivers or other authorizations held by Messer for the production, refinement, distribution, marketing or sale of Atmospheric Gases at the Divested Atmospheric Gases Plants;
12. all rights under warranties and guarantees, express or implied;
13. all books, records and files; *provided, however*, that if such books, records and files also contain information relating to the production, refinement, distribution, marketing or sale of products at plants other than the Divested Atmospheric Gases Plants, then only those portions of the books, records and files relating to the Divested Atmospheric Gases Plants shall be included; and, *provided further*, that Respondent may retain a copy of any books and records that it is required by law to retain; and
14. all items of prepaid expense.

Provided, however, “Atmospheric Gases Divestiture Assets and Businesses” does not include:

- a. Messer’s proprietary trade name and trademarks and any other rights to distribute or sell any items containing Messer’s name or logo;
- b. any Atmospheric Gases Plant or production facility other than the Waxahachie Plant, the Westlake Plant, the San Antonio Plant, the De Lisle Plant, the Vacaville Plant and the Irwindale Plant;
- c. any computers, servers, or telecommunications equipment shared through local and/or wide area telecommunications systems that are not physically located at the facilities associated with the

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Atmospheric Gases Divestiture Assets and
Businesses;

- d. the offices located at the Malvern, Pennsylvania headquarters;
 - e. the Planning and Logistics facility located in Richmond, Virginia;
 - f. Messer's specialty gases plant located in Houston, Texas;
 - g. Messer's interest in the San Diego, California storage depot formerly served by Cryoinfra's Atmospheric Gases plant in Tijuana, Mexico;
 - h. contractual rights to supply products other than those products produced at the Divested Atmospheric Gases Plants; and
 - i. contractual rights to supply oxygen, nitrogen and other products to customers ordinarily supplied with argon, but not oxygen or nitrogen, by one or more of the Divested Atmospheric Gases Plants from July 1, 2003 to the Effective Date of Divestiture.
- H. "Atmospheric Gases Plant" means a facility that produces Atmospheric Gases.
- I. "Commission" means the Federal Trade Commission.
- J. "Decision and Order" means:
- 1. until the issuance and service of a final Decision and Order by the Commission, the proposed Decision and Order contained in the Consent Agreement in this matter; and
 - 2. following the issuance and service of a final Decision and Order by the Commission, the final Decision and Order issued by the Commission.
- K. "De Lisle Plant" means Messer's Atmospheric Gases Plant located in De Lisle, Mississippi.

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- L. “Divested Atmospheric Gases Plants” means the Waxahachie Plant, the Westlake Plant, the San Antonio Plant, the De Lisle Plant, the Vacaville Plant and the Irwindale Plant.
- M. “Effective Date of Divestiture” means the date on which the mandated divestiture of the Atmospheric Gases Divestiture Assets and Businesses occurs.
- N. “Held Separate Business” means the Atmospheric Gases Divestiture Assets and Businesses and all Held Separate Business Employees.
- O. “Held Separate Business Employees” means all full-time, part-time, or contract employees whose duties take place at, or primarily relate to, the Held Separate Business or have taken place at, or primarily related to, the Held Separate Business at any time during the period commencing twelve months prior to the Effective Date of Divestiture, as well as all of the employees listed in Confidential Appendix A attached hereto.
- P. “Hold Separate Period” means the time period during which the Hold Separate is in effect, which shall begin on the date the Hold Separate becomes final and terminate pursuant to Paragraph V. hereof.
- Q. “Hold Separate Trustee” means the individual appointed to act as the Hold Separate Trustee pursuant to Paragraph II.D. hereof.
- R. “Irwindale Plant” means Messer’s Atmospheric Gases Plant located in Irwindale, California.
- S. “Key Divestiture Employees” means those Employees identified in Confidential Appendix B attached hereto.
- T. “Material Confidential Information” means competitively sensitive or proprietary information including, but not limited to, all customer lists, price lists, and marketing methods; *provided, however*, Material Confidential Information does not include information in the public domain or independently known to a Person from sources other than the Person to which the information pertains for this purpose.

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- U. “Person” means any individual, partnership, firm, trust, association, corporation, joint venture, unincorporated organization, or other business or governmental entity.
- V. “San Antonio Plant” means Messer’s Atmospheric Gases Plant located in San Antonio, Texas.
- W. “Vacaville Plant” means Messer’s Atmospheric Gases Plant located in Vacaville, California.
- X. “Waxahachie Plant” means Messer’s Atmospheric Gases Plant located in Waxahachie, Texas.
- Y. “Westlake Plant” means Messer’s Atmospheric Gases Plant located in Westlake, Louisiana.

II.

IT IS FURTHER ORDERED that:

- A. During the Hold Separate Period, Respondent shall hold the Held Separate Business separate, apart, and independent as required by this Hold Separate and shall vest the Held Separate Business with all rights, powers, and authority necessary to conduct its business; Respondent shall not exercise direction or control over, or influence directly or indirectly, the Held Separate Business or any of its operations, or the Hold Separate Trustee, except to the extent that Respondent must exercise direction and control over the Held Separate Business as is necessary to assure compliance with this Hold Separate, the Decision and Order, and all applicable laws.
- B. Respondent shall:
 - 1. During the Hold Separate Period, take such actions as are necessary to maintain the viability, marketability, and competitiveness of the Held Separate Business to prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets, except for ordinary wear and tear; and
 - 2. From the date Respondent executes the Agreement containing Consent Orders until the Hold Separate Period begins, take such actions as are necessary to assure that

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Messer maintains the viability, marketability, and competitiveness of the Held Separate Business to prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets, except for ordinary wear and tear.

- C. The purpose of this Hold Separate is to: (1) preserve the Held Separate Business as a viable, competitive, and ongoing business independent of Respondent until the divestitures required by the Decision and Order are achieved; (2) assure that no Material Confidential Information is exchanged between Respondent and the Held Separate Business, except in accordance with the provisions of this Hold Separate; and (3) prevent interim harm to competition pending the relevant divestitures and other relief.
- D. Respondent shall hold the Held Separate Business separate, apart, and independent on the following terms and conditions:
 - 1. Richard M. Klein shall serve as Hold Separate Trustee, pursuant to the agreement executed by the Hold Separate Trustee and Respondent and attached as Confidential Appendix C to this Hold Separate (“Trustee Agreement”).
 - a. The Trustee Agreement shall require that, no later than five (5) days after this Hold Separate becomes final, Respondent shall transfer to the Hold Separate Trustee all rights, powers, and authorities necessary to permit the Hold Separate Trustee to perform his/her duties and responsibilities, pursuant to this Hold Separate and consistent with the purposes of the Decision and Order.
 - b. No later than five (5) days after this Hold Separate becomes final, Respondent shall, pursuant to the Trustee Agreement, transfer to the Hold Separate Trustee all rights, powers, and authorities necessary to permit the Hold Separate Trustee to perform his/her duties and responsibilities, pursuant to this Hold Separate and consistent with the purposes of the Decision and Order.
 - c. The Hold Separate Trustee shall have the responsibility, consistent with the terms of this Hold Separate and the Decision and Order, for monitoring the organization of the

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Held Separate Business; for managing the Held Separate Business through the Manager; for maintaining the independence of the Held Separate Business; and for monitoring Respondent's compliance with its obligations pursuant to this Hold Separate and the Decision and Order.

- d. Subject to all applicable laws and regulations, the Hold Separate Trustee shall have full and complete access to all personnel, books, records, documents and facilities of the Held Separate Business and to any other relevant information as the Hold Separate Trustee may reasonably request, including, but not limited to, all documents and records kept by Respondent in the ordinary course of business that relate to the Held Separate Business. Respondent shall develop such financial or other information as the Hold Separate Trustee may reasonably request and shall cooperate with the Hold Separate Trustee. Respondent shall take no action to interfere with or impede the Hold Separate Trustee's ability to monitor Respondent's compliance with this Hold Separate and the Decision and Order or otherwise to perform his/her duties and responsibilities consistent with the terms of this Hold Separate.
- e. The Hold Separate Trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Hold Separate Trustee's duties and responsibilities.
- f. The Commission may require the Hold Separate Trustee to sign an appropriate confidentiality agreement relating to materials and information received from the Commission in connection with performance of the Hold Separate Trustee's duties.
- g. Respondent may require the Hold Separate Trustee to sign an appropriate confidentiality agreement prohibiting the disclosure of any Material Confidential Information gained as a result of his/her role as Hold Separate Trustee to anyone other than the Commission.
- h. Thirty (30) days after the Hold Separate becomes final, and every thirty (30) days thereafter until the Hold

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Separate terminates, the Hold Separate Trustee shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Hold Separate. Included within that report shall be the Hold Separate Trustee's assessment of the extent to which the Held Separate Business is meeting (or exceeding) its projected goals as are reflected in operating plans, budgets, projections or any other regularly prepared financial statements.

- i. If the Hold Separate Trustee ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate, the Commission may appoint a substitute Hold Separate Trustee consistent with the terms of this paragraph, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of the substitute Hold Separate Trustee within five (5) business days after notice by the staff of the Commission to Respondent of the identity of any substitute Hold Separate Trustee, Respondent shall be deemed to have consented to the selection of the proposed substitute trustee. Respondent and the substitute Hold Separate Trustee shall execute a Trustee Agreement, subject to the approval of the Commission, consistent with this paragraph.
2. No later than one (1) day after the Acquisition is consummated, Respondent shall enter into a management agreement with, and transfer all rights, powers, and authorities necessary to manage and maintain the Held Separate Business to, James Charles Doerr, Jr. ("Manager").
 - a. In the event that James Charles Doerr, Jr. ceases to act as Manager, then Respondent shall select a substitute Manager, subject to the approval of the Commission, and transfer to the substitute Manager all rights, powers and authorities necessary to permit the substitute Manager to perform his/her duties and responsibilities, pursuant to this Hold Separate.
 - b. The Manager shall report directly and exclusively to the Hold Separate Trustee and shall manage the Held Separate Business independently of the management of Respondent.

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The Manager shall not be involved, in any way, in the operations of the other businesses of Respondent during the term of this Hold Separate.

- c. The Manager shall have no financial interests affected by Respondent's revenues, profits or profit margins, except that the Manager's compensation for managing the Held Separate Business may include economic incentives dependent on the financial performance of the Held Separate Business if there are also sufficient incentives for the Manager to operate the Held Separate Business at no less than current rates of operation (including, but not limited to, current rates of production and sales) and to achieve the objectives of this Hold Separate.
- d. The Manager shall make no material changes in the present operation of the Held Separate Business except with the approval of the Hold Separate Trustee, in consultation with the Commission.
- e. The Manager shall have the authority, with the approval of the Hold Separate Trustee, to remove employees of the Held Separate Business and replace them with others of similar experience or skills. If any Person ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate, the Manager, in consultation with the Hold Separate Trustee, may request Respondent to, and Respondent shall, appoint a substitute Person, which Person the Manager shall have the right to approve.
- f. In addition to the Held Separate Business Employees employed as of the date the Consent Agreement is signed by Respondent, the Manager may employ such Persons as are reasonably necessary to assist the Manager in managing the Held Separate Business.
- g. The Hold Separate Trustee shall be permitted, in consultation with the Commission staff, to remove the Manager for cause. Within fifteen (15) days after such removal of the Manager, Respondent shall appoint a replacement Manager, subject to the approval of the Commission, on the same terms and conditions as provided in Paragraph II.D.2. of this Hold Separate.

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3. The Held Separate Business shall be staffed with sufficient employees to maintain the viability, marketability, and competitiveness of the Held Separate Business. To the extent that any employees of the Held Separate Business leave or have left the Held Separate Business prior to the Effective Date of Divestiture, the Manager, with the approval of the Hold Separate Trustee, may replace departing or departed employees with Persons who have similar experience and expertise or determine not to replace such departing or departed employees.
4. In connection with support services not included within the Held Separate Business that are being provided by Respondent or Messer, or which Respondent or Messer has contracted to provide to the Held Separate Business by third parties, Respondent shall continue to provide, or offer to provide, the same support services to the Held Separate Business as are being provided to the Held Separate Business by Respondent, Messer, or third parties as of the date the Consent Agreement is signed by Respondent. For services that Respondent or Messer previously provided to the Held Separate Business, Respondent may charge the same fees, if any, charged by Respondent or Messer for such support services as of the date the Consent Agreement is signed by Respondent. For any other services or products that Respondent or Messer may provide the Held Separate Business, Respondent may charge no more than the same price it charges others for the same services or products. Respondent's personnel providing such services or products must retain and maintain all Material Confidential Information of the Held Separate Business on a confidential basis, and, except as is permitted by this Hold Separate, such Persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any Person whose employment relates to any of Respondent's businesses, other than the Held Separate Business. Such personnel who have or may have access to Material Confidential Information shall also execute confidentiality agreements prohibiting the disclosure of any Material Confidential Information of the Held Separate Business.
- a. Respondent shall offer to the Held Separate Business any services that Messer provides to its other businesses directly or through third party contracts, or that Messer has provided

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directly or through third party contracts to the Atmospheric Gases Divestiture Assets and Businesses at any time since January 1, 2003. The Held Separate Business may, at the option of the Manager with the approval of the Hold Separate Trustee, obtain such services and products from Respondent. The services that Respondent shall offer the Held Separate Business shall include, but shall not be limited to, the following:

- (1) federal and state regulatory policy development and compliance;
- (2) human resources administrative services, including but not limited to procurement and administration of employee benefits;
- (3) environmental health and safety services, including, but not limited to, services to develop corporate policies and insure compliance with federal and state regulations and corporate policies;
- (4) financial accounting services;
- (5) preparation of tax returns;
- (6) audit services;
- (7) technical support and engineering services;
- (8) information technology support services;
- (9) processing of accounts payable and accounts receivable;
- (10) billing and collection services;
- (11) payroll processing;
- (12) maintenance and repair of facilities;
- (13) procurement of goods and services used in the ordinary course of business;
- (14) procurement of insurance, including, but not limited to, general and product liability insurance; and

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(15) legal services.

- b. The Held Separate Business shall have, at the option of the Manager with the approval of the Hold Separate Trustee, the ability to acquire services and products, including, but not limited to, those listed in Paragraph II.D.4.a. above, from third parties unaffiliated with Respondent.
5. Respondent shall cause the Hold Separate Trustee, the Manager, and each employee of the Held Separate Business having access to Material Confidential Information to submit to the Commission a signed statement that the individual will maintain the confidentiality required by the terms and conditions of this Hold Separate. These individuals must retain and maintain all Material Confidential Information relating to the Held Separate Business on a confidential basis and, except as is permitted by this Hold Separate, such individuals shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing, directly or indirectly, any such information to or with any other Person whose employment relates to any of Respondent's businesses other than the Held Separate Business. These individuals shall not be involved in any way in Respondent's businesses that compete with the Held Separate Business.
6. No later than ten (10) days after the date this Hold Separate becomes final, Respondent shall establish written procedures, subject to the approval of the Hold Separate Trustee, covering the management, maintenance, and independence of the Held Separate Business consistent with the provisions of this Hold Separate.
7. No later than five (5) days after the date this Hold Separate becomes final, Respondent shall circulate to employees of the Held Separate Business and to Respondent's employees who are responsible for or engaged in financial, management, production, distribution, sales or marketing functions relating to products or services that compete with product or services offered by the Held Separate Business, a notice of this Hold Separate and the Consent Agreement, in the form attached hereto as Attachment A.

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8. The Hold Separate Trustee and the Manager shall serve, without bond or other security, at the cost and expense of Respondent, on reasonable and customary terms commensurate with the person's experience and responsibilities.
9. Respondent shall indemnify the Hold Separate Trustee and Manager and hold each harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Hold Separate Trustee's or the Manager's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts or omissions, or bad faith by the Hold Separate Trustee or the Manager, or their respective agents.
10. Respondent shall provide the Held Separate Business with sufficient financial resources:
 - a. as are appropriate in the judgment of the Hold Separate Trustee to operate the Held Separate Business at no less than current rates of operation and at no less than historical the rates of operation;
 - b. to perform all reasonable maintenance to, and replacements of, the assets of the Held Separate Business;
 - c. to carry on all existing and planned capital projects and business plans for the Held Separate Business;
 - d. to carry on existing and planned bid and proposal plans for the Held Separate Business; and
 - e. to maintain the viability, marketability, and competitiveness of the Held Separate Business.
 - f. Such financial resources to be provided to the Held Separate Business shall include, but shall not be limited to, (i) general funds, (ii) capital, (iii) working capital; and (iv) reimbursement for any operating losses, capital losses, or

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other losses; *provided, however*, that, consistent with the purposes of the Decision and Order, the Manager may substitute any capital or research and development project for another of the same cost.

11. Respondent shall:

- a. not later than forty-five (45) days before the Effective Date of Divestiture, (a) provide to the Acquirer a list of all Held Separate Business Employees; (b) allow the Acquirer to interview any Held Separate Business Employees; and (c) in compliance with all laws, allow the Acquirer to inspect the personnel files and other documentation relating to such Held Separate Business Employees;
- b. not later than thirty (30) days before the Effective Date of Divestiture, provide an opportunity for the Acquirer to (a) meet personally, and outside the presence or hearing of any employee or agent of Respondent, with any one or more of the Held Separate Business Employees; and (b) make offers of employment to any one or more of the Held Separate Business Employees;
- c. not directly or indirectly interfere with the Acquirer's offer of employment to any one or more of the Held Separate Business Employees, not directly or indirectly attempt to persuade any one or more of the Held Separate Business Employees to decline any offer of employment from the Acquirer, and not offer any incentive to any of the Held Separate Business Employees to decline employment with the Acquirer;
- d. irrevocably waive any legal or equitable right to deter any Held Separate Business Employee from accepting employment with Acquirer, including, but not limited to, waiving any non-compete or confidentiality provisions of employment or other contracts with Respondent that relate to Atmospheric Gases;
- e. not interfere with the employment by the Acquirer of any Held Separate Business Employee;
- f. continue employee benefits to Held Separate Business Employees until the Effective Date of Divestiture consistent with the requirements of the Sale and Purchase Agreement

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by and between Air Liquide and Messer dated January 19, 2004, and the employee benefits provided to other similarly situated Messer employees that become employees of the Respondent after the Effective Date of Divestiture, including regularly scheduled or merit raises and bonuses, regularly scheduled vesting of all pension benefits, and reimbursement of relocation expenses; and

- g. provide a retention incentive bonus to Key Divestiture Employees who accept employment with the Acquirer, equal to ten (10) percent of such employees' annual salary to be paid upon the employees' completion of one (1) year of continuous employment with the Acquirer after the Effective Date of Divestiture.
- 12. Subject to the provisions of Paragraph II.D.13. below, for a period of one (1) year from the Effective Date of Divestiture, Respondent shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any Held Separate Business Employees who have accepted offers of employment with the Acquirer to terminate their employment with the Acquirer; *provided, however*, a violation of this provision will not occur if: (1) the individual's employment has been terminated by the Acquirer; (2) Respondent advertises for employees in newspapers, trade publications, or other media not targeted specifically at the employees; or (3) Respondent hires employees who apply for employment with Respondent, as long as such employees were not solicited by Respondent in violation of this paragraph.
- 13. Notwithstanding the provisions of Paragraph II.D.12. above, for a period of six (6) months from the Effective Date of Divestiture, Respondent shall not employ or make offers of employment to any Held Separate Business Employees who have accepted offers of employment with the Acquirer unless any such individual's employment with the Acquirer has been terminated by the Acquirer.
- 14. Except for the Manager, employees of the Held Separate Business, and support services employees involved in providing services to the Held Separate Business pursuant to Paragraph II.D.4., and except to the extent provided in Paragraph II.A., Respondent shall not permit any other of its

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employees, officers, or directors to be involved in the operations of the Held Separate Business.

15. Respondent's employees (excluding support services employees involved in providing support to the Held Separate Business pursuant to Paragraph II.D.4.) shall not receive, have access to, or use or continue to use any Material Confidential Information of the Held Separate Business except:

- a. as required by law; and
- b. to the extent that necessary information is exchanged:
 - (1) in the course of consummating the Acquisition;
 - (2) in negotiating agreements to divest assets pursuant to the Consent Agreement and engaging in related due diligence;
 - (3) in complying with the Hold Separate or the Consent Agreement;
 - (4) in overseeing compliance with policies and standards concerning the safety, health and environmental aspects of the operations of the Held Separate Business and the integrity of the financial controls of the Held Separate Business;
 - (5) in defending legal claims, investigations or enforcement actions threatened or brought against or related to the Held Separate Business; or
 - (6) in obtaining legal advice.

Nor shall the Manager or employees of the Held Separate Business receive, have access to, or use or continue to use, any Material Confidential Information about Respondent and relating to Respondent's businesses, except such information as is necessary to maintain and operate the Held Separate Business. Respondent may receive aggregate financial and operational information relating to the Held Separate Business only to the extent necessary to allow Respondent to prepare consolidated financial reports, tax returns, reports required by securities laws, and personnel reports. Any such information

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that is obtained pursuant to this paragraph shall be used only for the purposes set forth in this paragraph.

16. Respondent and the Held Separate Business shall jointly implement, and at all times during the Hold Separate Period maintain in operation, a system, as approved by the Hold Separate Trustee, of access and data controls to prevent unauthorized access to or dissemination of Material Confidential Information of the Held Separate Business, including, but not limited to, the opportunity by the Hold Separate Trustee, on terms and conditions agreed to with Respondent, to audit Respondent's networks and systems to verify compliance with this Hold Separate.

III.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed (1) dissolution of the Respondent, (2) acquisition, merger or consolidation of Respondent, or (3) any other change in the Respondent that may affect compliance obligations arising out of this Order, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in Respondent.

IV.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Hold Separate, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent, Respondent shall permit any duly authorized representatives of the Commission:

- A. Access, during office hours of Respondent and in the presence of counsel, to all facilities, and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of the Respondent relating to compliance with this Hold Separate; and
- B. Upon five (5) days' notice to Respondent and without restraint or interference from Respondent, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

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V.

IT IS FURTHER ORDERED that this Hold Separate shall terminate at the earlier of:

- A. three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. the day after the last of the divestitures required by the Decision and Order is completed; provided, however, that when an asset that is included within the Held Separate Business is divested pursuant to the Consent Agreement, that asset shall cease to be held by the Held Separate Business.

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ATTACHMENT A

**NOTICE OF DIVESTITURE AND
REQUIREMENT FOR CONFIDENTIALITY**

American Air Liquide, Inc., hereinafter referred to as “Respondent,” has entered into an Agreement Containing Consent Orders (“Consent Agreement”) with the Federal Trade Commission relating to the divestiture of certain assets and other relief in connection with Respondent’s acquisition of Messer Griesheim Industries, Inc.

As used herein, the term “Held Separate Business” means the Atmospheric Gases Divestiture Assets and Businesses and personnel as defined in Paragraph I.N. of the Order to Hold Separate and Maintain Assets (the “Hold Separate”) contained in the Consent Agreement. Under the terms of the Decision and Order (the “Order”) contained in the Consent Agreement, Respondent must divest certain assets, which are included within the Held Separate Business, within six (6) months of the date the Order becomes final.

During the Hold Separate Period (which begins after the Hold Separate becomes final and ends after Respondent has completed the required divestitures), the Held Separate Business shall be held separate, apart, and independent of Respondent’s businesses. The Held Separate Business must be managed and maintained as a separate, ongoing business, independent of all other businesses of Respondent, until Respondent has completed the required divestiture. All competitive information relating to the Held Separate Business must be retained and maintained by the persons involved in the operation of the Held Separate Business on a confidential basis, and such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any other of Respondent’s businesses, except as otherwise provided in the Hold Separate. These persons involved in the operation of the Held Separate Business shall not be involved in any way in the management, production, distribution, sales, marketing, or financial operations of Respondent relating to competing products. Similarly, persons involved in similar activities in Respondent’s businesses shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any similar information to or with any other

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person whose employment involves the Held Separate Business, except as otherwise provided in the Hold Separate.

Until the Held Separate Business is divested, Respondent must take such actions as are necessary to maintain the viability, marketability, and competitiveness of the Held Separate Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets, except for ordinary wear and tear.

Any violation of the Consent Agreement may subject Respondent to civil penalties and other relief as provided by law.

Analysis

**Analysis of Agreement Containing Consent Orders to Aid
Public Comment-4109**

I. Introduction

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from L’Air Liquide, S.A., which is designed to remedy the anticompetitive effects resulting from L’Air Liquide, S.A.’s acquisition of the entire share capital of Messer Griesheim GmbH (“Messer”) and the subsequent transfer of Messer Griesheim Industries, Inc. (“MGI”) to its wholly-owned subsidiary American Air Liquide.

Under the terms of the Consent Agreement, American Air Liquide is required to divest the air separation units (“ASUs”) and related assets currently owned and operated by MGI in the following six locations: (1) Vacaville, California; (2) Irwindale, California; (3) San Antonio, Texas, (4) Westlake, Louisiana; (5) DeLisle, Mississippi; and (6) Waxahachie, Texas. The divestiture will take place no later than six months from the date the Consent Agreement becomes final. The Consent Agreement also includes an Agreement to Hold Separate that requires American Air Liquide to preserve the ASUs as viable, competitive and ongoing operations until the divestiture is achieved.

The proposed Consent Agreement has been placed on the public record for thirty (30) days to solicit comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the proposed Consent Agreement or make it final.

Pursuant to a sale and purchase agreement dated January 19, 2004, L’Air Liquide, S.A. agreed to acquire the entire share capital of Messer. The aggregate purchase price of the transaction is approximately \$3.5 billion and includes \$1.3 billion of Messer’s

Analysis

debt that L'Air Liquide, S.A. has agreed to assume. As a result of this agreement, L'Air Liquide, S.A. will immediately transfer MGI, a wholly-owned subsidiary of Messer, which produces and sells industrial gases in the United States, to American Air Liquide. The Commission's complaint alleges that the proposed acquisition and subsequent transfer of MGI, if consummated, would violate 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, by lessening competition in the market for liquid argon in the continental United States and certain regional markets in the United States for liquid oxygen and nitrogen.

II. The Parties

L'Air Liquide, S.A. is a world leader in industrial and medical gases and related equipment. American Air Liquide is the parent corporation of the United States subsidiary that produces and supplies oxygen, nitrogen, and argon as well as many other industrial gases to customers for numerous applications in a variety of industries, including the petrochemical, manufacturing and fabrication industries as well as the medical field. American Air Liquide's subsidiary is the fourth largest supplier of industrial gases in the United States, with twenty seven (27) ASUs throughout the United States, most of which are in Texas and the Gulf Coast region.

Messer's U.S. subsidiary, MGI, is currently the fifth largest producer of liquid atmospheric gases (oxygen, nitrogen and argon) in the United States. MGI owns and operates twenty four (24) ASUs, including several located in Texas and the Gulf Coast region, as well as in northern and southern California.

III. Liquid Oxygen, Liquid Nitrogen, and Liquid Argon

Both American Air Liquide and MGI own and operate ASUs in the United States to provide customers with liquid atmospheric gases, including liquid oxygen, liquid nitrogen, and liquid argon.

Analysis

Each gas has specific properties that make it uniquely suited for the applications in which it is used. For most of these applications, there is no substitute for the use of oxygen, nitrogen, or argon. Customers would not switch to another gas or product even if the price of liquid oxygen, liquid nitrogen or liquid argon increased by five to ten percent.

Additionally, customers have three distinct distribution methods to choose from in receiving oxygen, nitrogen, or argon. These gases are available in cylinders, in liquid form, and through an on-site ASU or a pipeline. Customers choose a distribution method based on the volume of gas required. Customers who use liquid oxygen, liquid nitrogen, or liquid argon generally require volumes of these gases that are too large to purchase economically in cylinders, but too small to justify the expense of an on-site ASU or pipeline. In fact, even if the price of liquid oxygen, liquid nitrogen or liquid argon increased by five to ten percent, customers would not switch to another method of distribution.

Due to high transportation costs, liquid oxygen and liquid nitrogen may only be purchased economically from a supplier with an ASU located within one hundred and fifty (150) to two hundred and fifty (250) miles of the customer. Therefore, it is appropriate to analyze the competitive effects of the proposed acquisition using local geographic markets for liquid oxygen and liquid nitrogen. The relevant local markets in which to analyze the effects of this proposed acquisition are: Southern California, Northern California, Southern Texas, Western Louisiana, and the Central Gulf Coast. Because liquid argon is a more rare and more expensive gas than liquid oxygen and liquid nitrogen, it may be economically transported much greater distances.

Therefore, the continental United States and regions of the United States are the appropriate geographic markets in which to analyze the competitive effects of the proposed acquisition for liquid argon.

Analysis

The markets for liquid oxygen and liquid nitrogen are highly concentrated. In three of the five relevant geographic markets (Southern California, Northern California, and the Central Gulf Coast) American Air Liquide and MGI are two of only five companies supplying liquid oxygen and liquid nitrogen to customers. Additionally, MGI has been an aggressive participant in the market for these gases, offering low prices to customers and serving as a price restraint on the other suppliers. As a result, the proposed acquisition would enhance the likelihood of collusion or coordinated action between or among the remaining firms in each market. Furthermore, in the Southern Texas and Western Louisiana markets, MGI and American Air Liquide are the only producers capable of supplying liquid oxygen and liquid nitrogen to customers in those markets economically. By eliminating competition between these two suppliers in these areas, the proposed acquisition would allow American Air Liquide to exercise market power unilaterally, thereby increasing the likelihood that purchasers of liquid oxygen or liquid nitrogen would be forced to pay higher prices in these areas.

The market for liquid argon is also highly concentrated, with only five suppliers producing sufficient amounts of liquid argon to supply customers around the United States. The remaining firms are very small and local in nature, and produce liquid argon primarily to meet internal needs. Additionally, the five large suppliers of liquid argon all transport the product from ASUs in the middle and eastern part of the United States to customers on the West Coast, where the ASUs owned and operated by these suppliers do not produce enough argon to meet customers' demands. Over the past few years, MGI has had excess capacity in liquid argon which it has used to win new customers by offering low prices, especially to customers in Texas, Gulf Coast and California. By eliminating MGI as a competitor in the liquid argon market, particularly on the West Coast, the proposed acquisition would enhance the likelihood of coordinated action or collusion between or among the remaining firms, and could result in customers paying higher prices for liquid argon.

Analysis

Significant impediments to new entry exist in the markets for liquid oxygen, liquid nitrogen, and liquid argon. In order to be cost competitive in these markets, an ASU must produce at least two hundred and fifty (250) to three hundred (300) tons per day of liquid product. The cost to construct a plant of this size can be thirty (\$30) to forty (\$40) million, most of which is sunk and cannot be recovered. While an ASU can theoretically be constructed within two years, it is not economically justifiable to build an ASU before contracting to sell a substantial portion of the plant's daily capacity, either to an on-site customer or to several liquid customers. On-site customers normally sign long-term contracts, and as such opportunities to contract with these customers are rare, it is uncertain whether such an opportunity would arise at any time in the near future in any of the areas affected by the acquisition. It is even more difficult and time-consuming for a potential new entrant to try to contract with enough liquid gas customers to justify building a new ASU in a market. These customers are generally locked into contracts with existing suppliers that typically last between five (5) and seven (7) years. Even if the new entrant was able to contract with enough liquid customers to justify constructing a new ASU in any of the affected markets, the new entrant would still need to rely on suppliers already in the market to obtain liquid gases to service the new entrant's customers while the ASU was constructed. Given the difficulties of entering the market, it is unlikely that new entry could be accomplished in a timely manner in any of the markets for liquid oxygen or liquid nitrogen, and even more unlikely that entry would occur in a timely manner in all of the relevant markets. Additionally, as an ASU must produce large amounts of oxygen and nitrogen in order to produce any argon, a new entrant into the liquid argon market would not be able to economically build an ASU to produce only liquid argon, rather it would need to find customers to purchase all three gases. Therefore, it is unlikely that new entry would occur in the liquid argon market absent concurrent new entry in the liquid oxygen and nitrogen markets.

Analysis

IV. The Consent Agreement

The Consent Agreement effectively remedies the acquisition's anticompetitive effects in the markets for liquid oxygen, liquid nitrogen and liquid argon. Pursuant to the Consent Agreement, American Air Liquide will divest the six (6) air separation units listed in Section I to a single purchaser that will operate the ASUs as a going concern. The Consent Agreement provides that American Air Liquide must find a buyer for the assets, at no minimum price, that is acceptable to the Commission, no later than six (6) months from the date the Consent Agreement becomes final. If the Commission determines that American Air Liquide has not provided an acceptable buyer within this time period or that the manner of the divestiture is not acceptable, the Commission may appoint a trustee to divest the assets. The trustee will have the exclusive power and authority to accomplish the divestiture.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the acquisition. A proposed buyer of divested assets must not itself present competitive problems. Numerous entities are interested in purchasing the divested assets, including industrial gas suppliers that currently have a regional presence in the industry, but do not compete in the areas affected by the acquisition, as well as entities in related fields that are interested in entering into the production and sale of industrial gases. The Commission is therefore satisfied that sufficient potential buyers for the divested assets exist.

The Consent Agreement also contains an Agreement to Hold Separate. This will serve to protect the viability, marketability, and competitiveness of the divestiture asset package until it is divested to a buyer approved by the Commission. The Agreement to Hold Separate became effective on the date the Commission accepted the Consent Agreement for placement on the public record and will remain in effect until American Air Liquide

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successfully divests the divestiture asset package according to the terms of the Decision and Order.

The Consent Agreement contains a provision for the Commission to appoint a monitor-trustee to oversee the management of the divestiture asset package until the divestiture is complete, and for a brief transition period after the sale. In order to ensure that the Commission remains informed about the status of the asset package pending divestiture, about the efforts being made to accomplish the divestiture, and the provision of services and assistance during the transition period, the Consent Agreement requires the monitor-trustee to file periodic reports with the Commission until the divestiture is accomplished and the transition period has ended.

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Decision and Order or the Agreement to Hold Separate, or to modify their terms in any way.

Order

ORDER SETTING ASIDE ORDER

On September 8, 2003, Wright Medical Technology, Inc. (“Wright”), the respondent in the above-referenced order (“Order”), filed its Petition to Reopen and Modify Order (“Petition”) in this matter. Wright asks that the Commission reopen and modify the Order pursuant to Section 5(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45(b), and Section 2.51 of the Commission’s Rules of Practice and Procedure, 16 C.F.R. § 2.51, and consistent with the Statement of Federal Trade Commission Concerning Prior Approval and Prior Notice Provisions, issued on June 21, 1995 (“Policy Statement”).¹ The Petition requests that the Commission reopen and modify the Order to eliminate the prior approval provision in Paragraph IV of the Order. The thirty-day comment period on the Petition ended October 15, 2003. No comments were received. For the reasons discussed below, the Commission has determined to grant Wright’s Petition. Because there would remain no further affirmative obligations under the Order, the Commission has determined to set aside the Order in its entirety.

The Complaint in this matter alleges that Wright’s acquisition of Orthomet violated Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by lessening competition in the United States in the market of orthopaedic implants used or intended for use in the human hand.

The Order required Wright to transfer or license the Orthomet/Mayo Orthopaedic Finger Implant Research Assets (“Assets”), as defined by the Order, to the Mayo Foundation for Medical Education and Research (“Mayo”), within 5 days after the Order becomes final. See Order ¶ 2. The Order permitted Wright initially to grant Mayo a non-exclusive license to the

¹ 60 Fed. Reg. 39,745-47 (August 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

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Assets, but required Wright to terminate all of its rights to the Assets if Mayo were unable to find a second licensee within six months. See Order ¶ 3.

Wright delivered the Assets to Mayo and granted to Mayo a perpetual non-exclusive license to those Assets with a full right of sublicense. Mayo was unable to find a non-exclusive licensee, and Wright divested its remaining interest in the Assets to Mayo.

Paragraph IV of the Order prohibits Wright for ten years from the date the Order became final from acquiring any stock or other equity interest in any company that has filed an Application with the FDA relating to Orthopaedic Finger Implants, that has announced an intent to submit an application to the FDA, or that has received FDA approval relating to Orthopaedic Finger Implants, without the Commission's prior approval.

The Commission, in its Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," because the pre-merger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. § 18a, protected the public interest in effective merger law enforcement.² The Commission announced that it will "henceforth rely on the HSR process as its principle means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements."³

² Policy Statement at 2.

³ *Id.*

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The Commission stated that it will continue to fashion remedies as needed in the public interest, including narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its Policy Statement that “a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger, would, but for the provision, attempt the same or approximately the same merger.” The Commission also said that “a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger.”⁴ As explained in the Policy Statement, the need for a prior approval notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants and other relevant factors.

The Commission also announced, in its Policy Statement, its intention “to initiate a process for reviewing the retention or modification of these existing requirements” and invited respondents subject to such requirements “to submit a request to reopen the order.”⁵ The Commission determined that, “when a petition is filed to reopen and modify an order pursuant to ...[the Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced” in the Policy Statement.⁶

The presumption is that setting aside the general prior approval requirement of Paragraph IV of the Order is in the public interest.

⁴ *Id.* at 3.

⁵ *Id.* at 4.

⁶ *Id.*

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There is no evidence in the record that suggests that this matter presents any of the circumstances identified by the Policy Statement as appropriate for retaining a narrow prior approval provision, nor is there any indication of the circumstances that would warrant the substitution of a prior notice provision for the prior approval provision. There is nothing to suggest that the respondent would attempt the same or essentially the same merger that gave rise to the original complaint. In addition, it appears likely that future mergers would be HSR reportable. Wright completed the divestiture required by the Order. Nothing to overcome the presumption having been presented, and because the only remaining obligation under the Order is the prior approval requirement in Paragraph IV, the Commission has determined to reopen the proceeding in File No. C-3564 and set aside the Order.

Accordingly, IT IS HEREBY ORDERED that this matter be, and it hereby is, reopened, and that the Commission's order issued on April 4, 1995, be, and it hereby is, set aside as of the effective date of this order.

Letter Regarding Order

January 7, 2004

Jason P. Hood, Esq.
Vice President, General Counsel and Secretary
Wright Medical Technology, Inc.
5677 Airline Road
Arlington, TN 38002

Re: *In the Matter of Wright Medical Technology, Inc.*
Docket No. C-3564

Dear Mr. Hood:

This letter responds to the September 8, 2003, Petition (“Petition”) of Wright Medical Technology, Inc. (“Wright”) requesting that the Commission Reopen and Modify the Order and Eliminate the Prior Approval Provision of the Order. The application was placed on the public record for comments until October 15, 2003, and no comments were received.

After consideration of the Petition and other available information, the Commission has determined to approve the Petition. In according its approval, the Commission has relied upon the information submitted and representations made in connection with Wright’s Petition, and has assumed them to be accurate and complete. Because there remain no obligations on the part of Wright after the Commission reopened and eliminated the prior approval provision, the Commission also set aside the order.

By direction of the Commission.

Donald S. Clark
Secretary

Enclosure