

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Timothy J. Muris, Chairman
Mozelle W. Thompson
Orson Swindle
Thomas B. Leary
Pamela Jones Harbour

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In the Matter of)	
American Air Liquide, Inc., a corporation.)	DOCKET NO. [PUBLIC RECORD VERSION]
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)	

DECISION AND ORDER

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, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent 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 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 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;
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.

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.
- 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.
- 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 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 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 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.
- 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 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 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 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.

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.

By the Commission.

Donald S. Clark
Secretary

SEAL:
ISSUED:

[CONFIDENTIAL APPENDICES A-B REDACTED FROM PUBLIC RECORD VERSION]