

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

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

In the Matter of)
))
American Air Liquide, Inc.,)
 a corporation.))
_____))

DOCKET NO. C-4109
[PUBLIC RECORD VERSION]

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”):

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.
- 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. “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.
- 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.

- 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 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 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 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. 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.
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 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
 - (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.
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 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 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 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 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.

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.

By the Commission.

Donald S. Clark
Secretary

SEAL:

ISSUED: April 29, 2004

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

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 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.