

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

COMMISSIONERS: **Deborah Platt Majoras, Chairman**
 Pamela Jones Harbour
 Jon Leibowitz
 William E. Kovacic
 J. Thomas Rosch

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In the Matter of)	
)	
Thermo Electron Corporation,)	Docket No. C-
a corporation.)	
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DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed merger of Respondent Thermo Electron Corporation (hereinafter “Thermo Electron”, “Respondent”, or “Respondent Thermo Electron”) and Fisher Scientific International Inc., and Respondent having been furnished thereafter with a copy of 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 Order (“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 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 Thermo Electron is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 81 Wyman Street, Waltham, Massachusetts 02454.

2. The Federal Trade Commission has jurisdiction over 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 the Order, the following definitions shall apply:

- A. "Thermo Electron" or "Respondent" means Thermo Electron Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its parents, joint ventures, subsidiaries, divisions, groups and affiliates controlled by Thermo Electron Corporation, and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.
- B. “Fisher Scientific” means, Fisher Scientific International Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at Liberty Lane, Hampton, New Hampshire 03842; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Fisher Scientific International Inc.
- C. “Genevac” means Genevac Limited, a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its offices and principal place of business located at The Sovereign Center, Farthing Road, Ipswich IP1 5AP, United Kingdom; and Genevac Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its offices and principal place of business located at 707 Executive Boulevard, Suite D, Valley Cottage, New York 10989, and their joint ventures, subsidiaries, divisions, groups, and affiliates controlled by either Genevac Limited or Genevac Inc.
- D. "Commission" means the Federal Trade Commission.
- E. “Acquirer” means any Person who receives the prior approval of the Commission to acquire the CVE Business pursuant to this Order.

- F. "Acquisition" means the proposed acquisition of Fisher Scientific by Thermo Electron pursuant to the Agreement and Plan of Merger, dated as of May 7, 2006, by and among Thermo Electron and Trumpet Merger Corporation, a wholly owned subsidiary of Thermo Electron, and Fisher Scientific.
- G. "Acquisition Date" means the date the Acquisition is consummated.
- H. "Confidential Business Information" means any information relating to the CVE Business before the Effective Date of Divestiture that is not in the public domain, including, but not limited to:
1. All contracts, agreements, bids, purchase orders, or other documents or information relating to any acquisition of goods or services related to the CVE Business;
 2. All marketing studies, marketing plans, data, or other documents or information relating to the CVE Business;
 3. All files and documents relating to Genevac's suppliers to the extent relating to Genevac;
 4. All customer files, customer payment records, price information, service records, and purchase history; and,
 5. All trade secrets, information about products or processes under development, and other intellectual property that is not in the public domain.
- I. "CVEs" means centrifugal vacuum evaporators, which use a combination of heat, vacuum, and centrifugal force to remove solvents from laboratory samples, evaporating off the solvents while preserving and drying the samples for storage, further analysis, characterization, or experimentation.
- J. "CVE Business" means all of Respondent's right, title, and interest in Genevac acquired in the Acquisition, including, but not limited to, all of Genevac's outstanding capital stock, tangible and intangible assets, properties, business and goodwill, *provided, however*, that cash, receivables or other non-unique assets may be excluded from the sale of the CVE Business at the request of the Acquirer and subject to the prior approval of the Commission.
- K. "Divestiture Agreement" means any agreement or contract that receives the prior approval of the Commission that is related to the divestiture required by Paragraph II. or IV. of this Order.

- L. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to Paragraph IV of this Order.
- M. "Effective Date of Divestiture" means the date on which Respondent (or a Divestiture Trustee) divests to a Commission-approved Acquirer the CVE Business completely and as required by Paragraph II or IV of this Order.
- N. "Fisher Catalogue" means the 2,500 plus page standard paper and internet catalogue published by Fisher Scientific International Inc., containing 200,000 plus items, including any foreign-language, industry-specific, country-specific, or region-specific version(s).
- O. "Key Employees" means the persons listed in Confidential Appendix 1.
- P. "Knowledgeable Employees" means any person employed by or under contract to Genevac at any time between May 7, 2006, and the Effective Date of Divestiture, including but not limited to, Key Employees, *provided, however*, that such person is still employed by Fisher Scientific or Genevac at the time Respondent's obligations under Paragraph II.C. of this Order arise.
- Q. "Retention Bonus" means the retention bonus and compensation described in Confidential Appendix 2.
- R. "Hold Separate" means the Order to Hold Separate and Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.
- S. "Governmental Entity" means any Federal, state, local or non-U.S. government or any court, legislature, governmental agency or governmental commission or any judicial or regulatory authority of any government.
- T. "Person" means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or governmental entity, and any subsidiaries, divisions, groups or affiliates thereof.

II.

IT IS FURTHER ORDERED that:

- A. Respondent shall divest, absolutely and in good faith and at no minimum price, the CVE Business to an Acquirer pursuant to and in accordance with the Divestiture Agreement within one hundred and fifty (150) days from the Acquisition Date.

- B. At the option of the Acquirer, and subject to the prior approval of the Commission, the Respondent, prior to or as of the Effective Date of Divestiture, shall enter into a non-exclusive, commercially reasonable agreement with the Acquirer for the distribution of Genevac's CVE products through the Fisher Catalogue. Respondent shall not permit or provide, and the agreement shall prohibit, access by any of Respondent's employees with duties primarily relating to the research, development, manufacture, marketing, sales or service of Respondent's CVEs to Confidential Business Information or to information relating to the Acquirer's sales of CVEs through the Fisher Catalogue (except to the extent agreed to by the Acquirer).
- C. Unless otherwise agreed with the Acquirer, and subject to the prior approval of the Commission:
1. Not later than forty five days before the Effective Date of Divestiture, Respondent shall to the extent permitted by applicable law: (i) provide to the Acquirer a list of all Knowledgeable Employees; (ii) allow the Acquirer an opportunity to interview any Knowledgeable Employees; and, (iii) allow the Acquirer to inspect the personnel files and other documentation relating to such Knowledgeable Employees; and,
 2. Not later than thirty days before the Effective Date of Divestiture, Respondent shall provide an opportunity for the Acquirer: (i) to meet personally, and outside the presence or hearing of any employee or agent of Respondent, with any one or more of the Knowledgeable Employees; and, (ii) to make offers of employment to any one or more of the Knowledgeable Employees; and,
 3. Respondent shall: (i) not directly or indirectly interfere with the Acquirer's offer of employment to any one or more of the Knowledgeable Employees, directly or indirectly attempt to persuade any one or more of the Knowledgeable Employees to decline any offer of employment from the Acquirer, or offer any incentive to any Knowledgeable Employee to decline employment with the Acquirer; (ii) irrevocably waive any legal or equitable right to deter any Knowledgeable Employee from accepting employment with the Acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondent that directly or indirectly relate to CVEs or Genevac; and, (iii) continue to extend to any Knowledgeable Employees, during their employment by Genevac prior to the Effective Date of Divestiture, all employee benefits offered by Respondent, including regularly scheduled or merit raises and bonuses, and regularly scheduled vesting of all pension

benefits;

4. Respondent shall pay a Retention Bonus to any and all Key Employees; and,
 5. Respondent shall not solicit, negotiate, hire or enter into any arrangement for the services of all or any of the Key Employees for two (2) years from Effective Date of Divestiture.
- D. For a period of one year from the Effective Date of Divestiture, Respondent shall not, directly or indirectly, solicit, negotiate, hire or enter into any arrangement for the services of all or any of the Knowledgeable Employees employed by the Acquirer, unless such employee's employment has been terminated by the Acquirer.
- E. Respondent shall comply with all terms of the Divestiture Agreement, and any breach by Respondent of any term of the Divestiture Agreement shall constitute a violation of this Order. If any term of the Divestiture Agreement varies from the terms of this Order ("Order Term"), then to the extent that Respondent cannot fully comply with both terms, the Order Term shall determine Respondent's obligations under this Order. Notwithstanding any paragraph, section, or other provision of the Divestiture Agreement, any failure to meet any condition precedent to closing (whether waived or not) or any modification of the Divestiture Agreement, without the prior approval of the Commission, shall constitute a failure to comply with this Order.
- F. The purpose of the divestiture of the CVE Business to the Acquirer is to create an independent, viable and effective competitor in the relevant markets in which the CVE Business was engaged at the time of the announcement of the Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

- A. Respondent shall:
1. not provide, disclose or otherwise make available any Confidential Business Information to any Person except as set forth in Paragraph III.B. of this Order; and,
 2. not use any Confidential Business Information for any reason or purpose other than as otherwise required or permitted by this Order.

- B. Notwithstanding Paragraph III.A. of this Order and subject to the Hold Separate, Respondent may use Confidential Business Information only (i) for the purpose of performing Respondent's obligations under this Order, the Hold Separate, or the Divestiture Agreements; or, (ii) to ensure compliance with legal and regulatory requirements; to perform required auditing functions; to provide accounting, information technology and credit-underwriting services, to provide legal services associated with actual or potential litigation and transactions; and to monitor and ensure compliance with financial, tax reporting, governmental environmental, health, and safety requirements; or, (iii) for inclusion within the periodic financial reports that Genevac may provide Respondent but only to the extent that any Confidential Business Information is aggregated so that data as to individual customers are not disclosed.

IV.

IT IS FURTHER ORDERED that:

- A. If Respondent fails to complete the divestitures required by Paragraph II. of this Order within the time periods specified therein, then the Commission may appoint a Divestiture Trustee to divest the CVE Business to an Acquirer and to execute Divestiture Agreements that satisfy the requirements of Paragraph II of this Order.
- B. Neither the decision of the Commission to appoint a Divestiture Trustee, nor the decision of the Commission not to appoint a Divestiture Trustee, to divest any of the assets under this Paragraph IV. shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, for any failure by the Respondent to comply with this Order.
- C. If a Divestiture Trustee is appointed by the Commission or a court pursuant to Paragraph IV. of this Order to divest the CVE Business to an Acquirer, Respondent shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
1. The Commission shall select the Divestiture Trustee, 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 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.

2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the CVE Business to an Acquirer pursuant to the terms of this Order and to enter into Divestiture Agreements with the Acquirer pursuant to the terms of this Order, which Divestiture Agreements shall be subject to the prior approval of the Commission.
3. Within ten (10) days after appointment of the Divestiture Trustee, Respondent shall execute a (or amend the existing) trust agreement (“Divestiture Trustee Agreement”) that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to divest the CVE Business to an Acquirer and to enter into Divestiture Agreements with the Acquirer. The Divestiture Trustee Agreement shall prohibit the Divestiture Trustee, and each of the Divestiture Trustee’s consultants, accountants, attorneys, and other representatives and assistants from disclosing, except to the Commission (and in the case of a court-appointed trustee, to the court) Confidential Business Information; *provided, however*, Confidential Business Information may be disclosed to potential acquirers and to the Acquirer as may be reasonably necessary to achieve the divestiture required by this Order. The Divestiture Trustee Agreement shall terminate when the divestiture required by this Order is consummated.
4. The Divestiture Trustee shall have six (6) months from the date the Commission approves the Divestiture Trustee Agreement described in Paragraph IV. of this Order to divest the CVE Business and to enter into Divestiture Agreements with an Acquirer that satisfies the requirements of Paragraph II. of this Order. If, however, at the end of the applicable six-month period, the Divestiture Trustee has submitted to the Commission a plan of divestiture or believes that divestiture can be achieved within a reasonable time, such divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; *provided, however*, the Commission may extend such divestiture period only two (2) times.
5. The Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities of Respondent related to Genevac’s manufacture, distribution, or sale of CVEs, related to the CVE Business, or related 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 his or her responsibilities.

6. The Divestiture Trustee shall use reasonable 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 at no minimum price and the Divestiture Trustee's obligation to expeditiously accomplish the remedial purpose of this Order; to assure that Respondent enters into Divestiture Agreements that comply with the provisions of Paragraph II. of this Order; to assure that Respondent complies with the remaining provisions of this Order; and to assure that the Acquirer obtains the assets required to research, develop, manufacture, sell and distribute CVEs and to operate the CVE Business in a manner to achieve the purposes of this Order. The divestiture shall be made to, and the Divestiture Agreements executed with, an Acquirer in the manner set forth in Paragraph II. of 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 acquiring entity, the Divestiture Trustee shall divest to the acquiring entity or entities 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.
7. The Divestiture Trustee shall serve, without bond or other security, at the 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 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 trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Respondent. The Divestiture Trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the Divestiture Trustee's locating an Acquirer and assuring compliance with this Order. The powers, duties, and responsibilities of the Divestiture Trustee (including, but not limited to, the right to incur fees or other expenses) shall terminate when the divestiture required by this Order is consummated.

8. 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.
 9. If the Commission determines that the Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in Paragraph IV. of this Order.
 10. The Commission or, in the case of a court-appointed 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 comply with the terms of this Order.
 11. The Divestiture Trustee shall have no obligation or authority to operate or maintain the CVE Business.
 12. The Divestiture Trustee shall report in writing to Respondent and to the Commission every two (2) months concerning his or her efforts to divest the CVE Business and Respondent's compliance with the terms of this Order.
- D. Respondent shall comply with all terms of the Divestiture Trustee Agreement, and any breach by Respondent of any term of the Trustee Agreement shall constitute a violation of this Order. Notwithstanding any paragraph, section, or other provision of the Divestiture Trustee Agreement, any modification of the Divestiture Trustee Agreement, without the prior approval of the Commission, shall constitute a failure to comply with this Order.

V.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order.

VI.

IT IS FURTHER ORDERED that:

- A. Within thirty (30) days after the date this Order becomes final and every thirty (30) days thereafter until the Respondent has fully complied with the provisions of Paragraphs II. and IV. of this Order, Respondent shall submit to the Commission (with simultaneous copies to the Divestiture Trustee(s), as appropriate) verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II. and IV. of this Order. Respondent shall include in the reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraph II.A. of this Order, including a description of all substantive contacts or negotiations for the divestitures and the identity of all parties contacted. Respondent shall include in the reports copies of all material written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing the obligations; and,
- B. One (1) year from the date this Order becomes final on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondent shall file verified written reports with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order.

VII.

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, Respondent shall permit any duly authorized representative of the Commission:

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

VIII.

IT IS FURTHER ORDERED that this Order shall terminate ten (10) years from the date this Order becomes final.

By the Commission.

Donald S. Clark
Secretary

SEAL:
ISSUED:

Confidential Appendix 1 and Confidential Appendix 2

[Redacted From Public Record Version But Incorporated By Reference]