UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

In the Matter of	)	
HEXION LLC,	)	**Docket No. C-4235**
a limited liability company;	)	
and	)	
HUNTSMAN CORPORATION	)	
a corporation.	)	

ORDER GRANTING IN PART PETITION TO REOPEN AND SET ASIDE ORDERS

On February 5, 2009, Respondent Hexion LLC ("Hexion") and Respondent Huntsman Corporation ("Huntsman") jointly filed a "Petition of Hexion LLC and Huntsman Corporation to Reopen and Set Aside Orders" ("Petition") seeking to reopen and set aside the Commission's Decision and Order and Order to Maintain Assets contained in Docket No. C-4235 (collectively, the "Orders"), issued on November 13, 2008, and October 2, 2008, respectively. The Respondents' request was made pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.51. Respondents based their Petition on change of fact in that the Orders were premised upon Hexion's acquisition of Huntsman, but the Respondents have terminated their proposed merger, withdrawn their Premerger Notification Filings, and represent that they no longer intend to close the transaction.[1]

[1] Petition at 5. Petition Exhibit 5 at ¶ 8; Petition Exhibit 6 at ¶ 13.

For the reasons stated herein, the Commission has determined to grant the Petition to reopen the matter and to set aside the Orders as to Respondent Huntsman. The Commission has further determined to set aside the Order to Maintain Assets and to modify the Decision and Order as to Respondent Hexion. The modification of the Decision and Order sets aside those requirements intended to remedy the anticompetitive effects of the proposed transaction, but imposes on Respondent Hexion a three (3) year requirement to seek the Commission's approval prior to any acquisition of any voting or nonvoting stock, share capital, equity, notes convertible into any voting or non-voting stock or certain assets of Huntsman, or any merger or other combination with Huntsman.

I. BACKGROUND

This matter arose from Hexion's proposed acquisition of Huntsman. Hexion and Huntsman entered into an agreement to merge on July 12, 2007, pursuant to which Hexion was to acquire all of Huntsman's outstanding voting securities. The Commission conducted an investigation after which the parties entered into an Agreement Containing Consent Orders in September 2008 ("Consent Agreement"). On October 2, 2008, the Commission issued a complaint ("Complaint") alleging that the merger would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in two relevant markets: specialty epoxy resins and methyl diisocyanate (MDI).

In order to resolve competitive concerns, and as a part of the Consent Agreement, the Commission issued a Decision and Order and an Order to Maintain Assets. Both Huntsman and Hexion are direct competitors in the production of specialty epoxy resins. Accordingly, the

Decision and Order requires Respondents to divest certain assets related to Hexion's specialty epoxy resin business not later than ten days after Hexion acquires Huntsman.[2]

The Commission identified other competitive concerns regarding the potential sharing of competitively sensitive information in the market for MDI. Hexion is a key supplier of formaldehyde, a critical component of MDI, to MDI producers. Huntsman is one of only four MDI producers. To address these concerns, the Orders limit the Respondents' access to, and use of, information obtained from the other MDI producers. In effect, the Orders prohibit Hexion's business people that supply formaldehyde to MDI producers from sharing competitively sensitive information about these customers with the business people at Huntsman who compete directly against these other MDI producers.

The Commission also issued an Order to Maintain Assets requiring Respondents, *inter alia*, to maintain the "full economic viability, marketability and competitiveness of the Specialty Epoxy Resin Product Business through its full and complete transfer to the Acquirer."[3] At the same time as the Order to Maintain Assets was issued, the Commission appointed Mr. Ilan Kaufthal to act as an Interim Monitor in this matter pursuant to Paragraph IV. of the Order to Maintain Assets and, when final, Paragraph V. of the Decision and Order. Under the Orders, the Interim Monitor is charged with monitoring Respondents' maintenance and divestiture of the specialty epoxy resins business.

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[2] Decision and Order ¶ II.A. *See also* ¶ I.R.

[3] Order to Maintain Assets ¶ II.K. The "Acquirer" specified in the Decision and Order was Spolek, a large chemical producer headquartered in the Czech Republic. Decision and Order ¶ ¶ I.HHH, I.A., and II.A.

After the Commission issued the Orders, Huntsman and Hexion determined to terminate their agreement to merge. On December 14, 2008, Huntsman and Hexion, entered into an agreement to terminate the merger and to settle certain claims surrounding Hexion's proposed merger with Huntsman.

II. THE PETITION

On February 5, 2009, Hexion and Huntsman filed their Petition. The Petition cites a number of burdens on Hexion caused by the continued application of the Orders, *inter alia*: (1) the Orders could limit Hexion's ability to respond to competitive conditions in the marketplace, because the Orders restrict Hexion's ability to close or reconfigure facilities;[4] (2) the Orders require Hexion to continue to compensate an Interim Monitor whose services are no longer needed to oversee the successful completion of the divestiture of the specialty epoxy resins business;[5] (3) the Orders prohibit Hexion from selling certain assets associated with its specialty epoxy resin business.[6] In addition, the Orders require both Respondents to establish and monitor compliance with procedures that control the flow of information related to the MDI products.[7] Hexion and Huntsman assert that the termination of their agreement to merge is a change of fact that eliminates the need for the Orders.[8]

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[4] Petition at 7.

[5] *Id.* at 7.

[6] *Id.* at 7.

[7] *Id.* at 7.

[8] *Id.* at 7.

III. STANDARD FOR REOPENING AND MODIFYING A FINAL ORDER

The Orders may be reopened and modified on the grounds set forth in § 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b). First, Section 5(b) provides that the Commission shall reopen an order to consider whether it should be modified if the respondent makes "a satisfactory showing that changed conditions of law or fact require the rule or order to be altered, modified or set aside, in whole or in part."[9] A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition.[10]

Second, Section 5(b) provides that the Commission may also reopen and modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification.[11] In the case of "public interest" requests, FTC Rule of Practice 2.51(b) requires an initial "satisfactory showing" of how modification would serve the public interest before the Commission determines whether to reopen an order and consider all of the reasons for and against its modification.

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[9] *See* 16 C.F.R. § 2.51(b).

[10] S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter"). *See also United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modify the Order. Reopening may occur even where the petition itself does not plead facts requiring modification.").

[11] Hart Letter at 5; 16 C.F.R. § 2.51.

A "satisfactory showing" requires, with respect to public interest requests, that the requester make a *prima facie* showing of a legitimate public interest reason or reasons justifying relief. A request to reopen and modify will not contain a "satisfactory showing" if it is merely conclusory or otherwise fails to set forth by affidavit(s) specific facts demonstrating in detail the reasons why the public interest would be served by the modification.[12] This showing requires the requester to demonstrate, for example, that there is a more effective or efficient way of achieving the purposes of the order, that the order in whole or part is no longer needed, or that there is some other clear public interest that would be served if the Commission were to grant the requested relief. In addition, this showing must be supported by evidence that is credible and reliable.

If, after determining that the requester has made the required showing, the Commission decides to reopen the order, the Commission will then consider and balance all of the reasons for and against modification. In no instance does a decision to reopen an order oblige the Commission to modify it,[13] and the burden remains on the requester in all cases to demonstrate why the order should be reopened and modified. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders.[14] All information

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[12] 16 C.F.R. § 2.51.

[13] *See United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) (reopening and modification are independent determinations).

[14] *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

and material that the requester wishes the Commission to consider shall be contained in the request at the time of filing.[15]

IV. THE ORDERS WILL BE REOPENED

The Commission has determined to reopen the Orders and set aside the Orders as to Respondent Huntsman. Further, the Commission has determined to set aside the Order to Maintain Assets and to modify the Decision and Order as to Respondent Hexion. The Orders were issued to address the harm to competition arising from Hexion's acquisition of Huntsman. In fact, the Decision and Order explicitly states as its purpose "to remedy the lessening of competition alleged in the Commission's complaint in a timely and sufficient manner."[16] The Complaint alleges that the agreement between Hexion and Huntsman violates Section 5 of the FTC Act,[17] and "the [acquisition of Huntsman by Hexion], if consummated, would constitute a violation of Section 7 of the Clayton Act . . . and Section 5 of the FTC Act. . . .".[18] The Order to Maintain Assets is specifically designed to protect the divestiture assets pending their divestiture as required in the Decision and Order. The Interim Monitor's role is linked to Respondent's remedial obligations under these Orders. As noted above, Respondents have terminated the acquisition agreement, withdrawn their HSR filings, and the merger was never consummated. Accordingly, the basic premise of the Orders, the illegal acquisition that they were intended to

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[15] 16 C.F.R. § 2.51(b).

[16] Decision & Order ¶ II.R.4.

[17] Complaint ¶ 20.

[18] Complaint ¶ 21.

remedy, did not come to pass. Therefore, at this time, there is no reason to continue to require the Respondents to perform the remedial actions prescribed in the Orders.

The Commission has previously faced a similar situation (having issued a final order in a merger case where the merger ultimately did not occur) in *In the matter of Johnson & Johnson*, Docket No. C-4154. In that matter, Johnson & Johnson entered an agreement to acquire Guidant Corporation ("Guidant"). The Commission determined that the proposed acquisition raised competitive concerns in certain markets and accepted an agreement containing consent order. Before Johnson & Johnson could complete its acquisition of Guidant, Guidant agreed to be taken over by another company, *i.e.*, Boston Scientific Corporation.[19] Johnson & Johnson's acquisition of Guidant never closed. Subsequently, Johnson & Johnson filed a petition seeking to set aside the order based on changed conditions of fact citing in support of its petition that the order was premised upon Johnson & Johnson's acquisition of Guidant and that the acquisition was no longer possible. In setting aside that order, the Commission stated that "there is no reason to keep the Order in place" because "the basic premise of the Order, the unlawful acquisition that it was designed to remedy did not come to pass."[20] Unlike Guidant, however, Huntsman has not entered an agreement to be acquired by another entity. Accordingly, the potential exists that Hexion could seek to acquire Huntsman in a subsequent transaction.

The Commission invested significant resources in investigating Hexion's proposed acquisition of Huntsman. The investigation took over a year to complete. As a result of the

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[19] Boston Scientific Corporation's acquisition of Guidant resulted in a separate consent order and divestiture. Decision and Order, *In the Matter of Boston Scientific Corporation*, Docket No. C-4164, July 25, 2006.

[20] Order Reopening and Setting Aside Order, *In the Matter of Johnson & Johnson*, Docket No. C-4154, May 25, 2006.

investigation, the Commission found reason to believe that the proposed merger posed serious threats to competition. There has been no showing that the competitive conditions that gave rise to the Complaint no longer exist. Therefore, there is no reason to believe that such a combination of Hexion and Huntsman would not pose the same competitive concerns if it were consummated in the near future. Having already established the competitive effects presented by this acquisition, the Commission finds that it is in the public interest to avoid reinvestigating the issues that gave rise to the Complaint should the same or approximately the same combination be undertaken in the near term.

There still exists a credible risk that Hexion could seek to acquire Huntsman, especially in light of the current economic volatility. Huntsman remains an independent company. Deteriorating financial conditions and access to financing for the transaction as originally structured appear to have been the primary reasons the acquisition did not occur.[21] In fact, the parties attempted to close the transaction on October 28, 2008, but were deterred when the banking institutions that had originally committed to finance the transaction refused to do so.[22] This fact suggests that if the transaction could be restructured to address these financial issues, or if the economic climate were to change significantly, the acquisition could be revived. Accordingly, the Commission has determined to require Respondent Hexion to seek prior approval from the Commission before Hexion undertakes any acquisition of certain assets of Huntsman or any acquisition of, or merger or other combination with, Huntsman

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[21] *See* Petition at p. 5.

[22] Petition at p. 5. Petition Exhibit 5 ¶ 8. Exhibit 6 ¶ 11.

This decision is consistent with the *Statement of the Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions*[23] ("Policy Statement"). In the Policy Statement, the Commission said that prior approval provisions may be used "where there is a credible risk that a company that engaged or attempted to engage in any anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." Given the aforementioned reasons, the Commission finds that such a credible risk exists here and, therefore, a limited prior approval requirement is the appropriate remedy to prevent the recurrence of anticompetitive conduct. Hexion has consented to the prior approval provisions contained in the modified Order.

The prior approval requirements of the modified Order exempt certain acquisitions of Huntsman stock by Apollo Investment Fund VI, L.P., and certain of its affiliates that acquired $250,000,000 of senior notes convertible into Huntsman common stock (collectively "Apollo Group VI") pursuant to a settlement agreement terminating the merger.[24] Those acquisitions could be construed as indirect acquisitions of Huntsman by Hexion because Apollo Group VI has an ownership interest in and a close relationship with Hexion. However, the Commission has concluded based on the terms of the agreements that define these acquisitions that the Commission does not need to undertake a further review of those third party acquisitions and has drafted the Order accordingly. Specifically, on December 14, 2008, several parties, including Huntsman, Hexion and Apollo Group VI, entered into an agreement to terminate Hexion's proposed merger with Huntsman and to settle certain claims surrounding the proposed merger

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[23] 4 Trade Reg. Rep. (CCH) ¶ 13,241.

[24] *See* Settlement and Release Agreement contained in 8-K, filed December 15, 2008, Exhibit 10.1 and related Note Purchase Agreement. Contained in Appendix 1 to this Order.

("Settlement and Release Agreement"). If the notes acquired by Apollo Group VI are converted, Apollo Group VI would hold a minority stake in Huntsman.[25] However, these notes are subject to a Voting and Standstill Agreement that imposes a number of passive investor requirements, including, *inter alia*, a prohibition from seeking or proposing to influence or control the management, board of directors, policies or affairs of Huntsman or its subsidiaries.[26] In reviewing the provisions of the Settlement and Release Agreement and related agreements, the Commission concluded that any acquisition by Apollo Group VI of voting securities in Huntsman pursuant to these agreements would not in fact be an acquisition by Hexion. Given these considerations, the Commission has determined specifically to exempt the conversion by Apollo Group VI of the notes that are the subject of the Note Purchase Agreement and the related Voting and Standstill Agreement from the prior approval requirements of Paragraph II of the Order and has included a specific proviso to that effect in the modified Order.

Accordingly,

IT IS ORDERED, that this matter be, and it hereby is, reopened, and the Order to Maintain Assets is set aside in its entirety;

IT IS FURTHER ORDERED, that, as to Respondent Huntsman, the Decision and Order is set aside; and

IT IS FURTHER ORDERED, that, as to Respondent Hexion, the provisions of the Decision and Order are modified to read as follows, including, *inter alia*, the addition of the

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[25] Given the conversion and anti-dilution provisions of the Note Purchase Agreement, it appears that conversion of all the notes would give Apollo Group IV (not Hexion) an approximate 12 % share of the outstanding common stock of Huntsman.

[26] *See* Huntsman Corp Form 8-K, filed December 23, 2008, Exhibit 10.3. Contained in Appendix 1 to this Order. That agreement applies to Hexion as well as to Apollo Group VI.

following Paragraph II, additions and modifications to the definitions, and revisions to certain retained paragraphs, and all other provisions are set aside:

ORDER

I.

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

A. "Hexion" or "Respondent" means Hexion LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Hexion (including, but not limited to, Hexion Specialty Chemicals, Inc. and Nimbus Merger Sub Inc.) and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Huntsman" means Huntsman Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Huntsman, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Commission" means the Federal Trade Commission.

D. "Apollo Group VI" means the parties to the Note Purchase Agreement listed as purchasers, *i.e.*, Apollo Investment Fund VI, L.P., Apollo Overseas Partners VI, L.P., Apollo Overseas Partners (Delaware) VI, L.P., Apollo Overseas Partners (Delaware 892) VI, L.P., Apollo Overseas Partners (Germany) VI, L.P. and AAA Guarantor - Co-Invest VI, L.P.

E. "Development" means all research and development activities, including, without limitation, the following: test method development; stability testing; toxicology; formulation, including without limitation, customized formulation for a particular customer(s); process development; manufacturing scale-up; development-stage manufacturing; quality assurance/quality control development; statistical analysis and report writing; and conducting experiments for the purpose of obtaining any and all Product Approvals. "Develop" means to engage in Development.

F. "Formulated System" means the exact combination and proportion of epoxy resins, curing agents, reactive diluents and other components that achieves a particular set of application and end-use characteristics in a final product.

G. "Huntsman Advanced Materials" means the division of Huntsman that manufactures, develops, and sells epoxy resins and Specialty Epoxy Resins.

H. "MDI" means methylene diphenyl diisocyanate and/or diphenylmethane diisocyanate.

I. "Note Purchase Agreement" means the Note Purchase Agreement dated December 23, 2008, contained in Exhibit 10.1 of Huntsman Corporation Form 8-K filed on December 23, 2008, attached as Appendix 1 to this Order.

J. "Specialty Epoxy Resins" means all value-added high performance epoxy resin products, including, without limitation, epoxy novolac resins, glycidyl amine resins, cycloaliphatic epoxy resins, brominated resins, mono and multifunctional reactive diluents, curing agents, specialty blends and solutions, and Formulated Systems, Developed, in Development, researched, manufactured, marketed or sold by Huntsman Advanced Materials.

K. "Voting and Standstill Agreement" means the Voting and Standstill Agreement dated December 23, 2008, contained in Exhibit 10.3 of Huntsman Corporation Form 8-K filed on December 23, 2008, attached as Appendix 1 to this Order.

II.

IT IS FURTHER ORDERED that:

A. Respondent Hexion shall not acquire, directly or indirectly, without the prior approval of the Commission,

1. any voting or non-voting stock, share capital, equity, notes convertible into any voting or non-voting stock, or other interest in Huntsman;

2. any assets owned or controlled by Huntsman used in, or used within six (6) months of the acquisition in, the research, manufacture, distribution, marketing or sale of Specialty Epoxy Resins; or

3. any assets owned or controlled by Huntsman located within North America that manufacture MDI or that have manufactured MDI within six (6) months of the acquisition.

B. Respondent Hexion shall not consummate, directly or indirectly, without the prior approval of the Commission, any merger or other combination with Huntsman.

PROVIDED, HOWEVER, that Paragraph II.A. shall not apply to any conversion by Apollo Group VI of the Huntsman Corporation convertible senior notes held by Apollo Group VI into common stock of Huntsman Corporation pursuant to the Note Purchase Agreement if Apollo Group VI complies with the provisions of the Voting and Standstill Agreement.

III.

IT IS FURTHER ORDERED that one (1) year after the date this modified Order becomes final, annually for the two (2) years on the anniversary of the date this modified Order becomes final, and at other times as the Commission may require, Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this modified Order.

IV.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to:

A. any proposed dissolution of Respondent;

B. any proposed acquisition, merger or consolidation of Respondent; or

C. any other change in Respondent, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

V.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to the Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. access, during business office hours of the 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 related to compliance with this Order, which copying services shall be provided by the Respondent at the request of the authorized representative(s) of the Commission and at the expense of the Respondent; and

B. to interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

VI.

IT IS FURTHER ORDERED that this modified Order shall terminate on June 4, 2012.

By the Commission.

Donald S. Clark
Secretary

SEAL
ISSUED: June 4,2009

APPENDIX 1

FORM 8-K
HUNTSMAN CORP - HUN
Filed: December 23, 2008 (period: December 23, 2008)

and

FORM 8-K
HUNTSMAN CORP - HUN
Filed: December 15, 2008 (period: December 15, 2008)