





- 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.

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;

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.

- J. “De Lisle Plant” means Messer’s Atmospheric Gases Plant located in De Lisle, Mississippi.
- K. “Divested Atmospheric Gases Plants” means the Waxahachie Plant, the Westlake Plant, the San Antonio Plant, the De Lisle Plant, the Vacaville Plant and the Irwindale Plant.
- L. “Effective Date of Divestiture” means the date on which the mandated divestiture of the Atmospheric Gases Divestiture Assets and Businesses occurs.
- M. “Held Separate Business” means the Atmospheric Gases Divestiture Assets and Businesses and all Held Separate Business Employees.
- N. “Held Separate Business Employees” means all full-time, part-time, or contract employees whose duties take place at, or primarily relate to, the Held Separate Business or have taken place at, or primarily related to, the Held Separate Business at any time during the period commencing twelve months prior to the Effective Date of Divestiture, as well as all of the employees listed in Confidential Appendix A attached to this Order.
- O. “Irwindale Plant” means Messer’s Atmospheric Gases Plant located in Irwindale, California.
- P. “Key Divestiture Employees” means those Employees identified in Confidential Appendix B attached to this Order.
- Q. “San Antonio Plant” means Messer’s Atmospheric Gases Plant located in San Antonio, Texas.
- R. “Vacaville Plant” means Messer’s Atmospheric Gases Plant located in Vacaville, California.
- S. “Waxahachie Plant” means Messer’s Atmospheric Gases Plant located in Waxahachie, Texas.
- T. “Westlake Plant” means Messer’s Atmospheric Gases Plant located in Westlake, Louisiana.

**II.**

**IT IS FURTHER ORDERED** that:

- A. Respondent shall divest, within six (6) months from the date this Order becomes final, the Atmospheric Gases Divestiture Assets and Businesses to a single

Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission, absolutely and in good faith and at no minimum price.

B. Respondent shall:

1. not later than forty-five (45) days before the Effective Date of Divestiture, (a) provide to the Acquirer a list of all Held Separate Business Employees; (b) allow the Acquirer to interview any Held Separate Business Employees; and (c) subject to compliance with all laws, allow the Acquirer to inspect the personnel files and other documentation relating to such Held Separate Business Employees;
2. not later than thirty (30) days before the Effective Date of Divestiture, provide an opportunity for the Acquirer to (a) meet personally, and outside the presence or hearing of any employee or agent of Respondent, with any one or more of the Held Separate Business Employees; and (b) make offers of employment to any one or more of the Held Separate Business Employees;
3. not directly or indirectly interfere with the Acquirer's offer of employment to any one or more of the Held Separate Business Employees, not directly or indirectly attempt to persuade any one or more of the Held Separate Business Employees to decline any offer of employment from the Acquirer, and not offer any incentive to any of the Held Separate Business Employees to decline employment with the Acquirer;
4. irrevocably waive any legal or equitable right to deter any Held Separate Business Employee from accepting employment with Acquirer, including, but not limited to, waiving any non-compete or confidentiality provisions of employment or other contracts with Respondent that relate to Atmospheric Gases;
5. not interfere with the employment by the Acquirer of any Held Separate Business Employee;
6. continue employee benefits to Held Separate Business Employees until the Effective Date of Divestiture consistent with the requirements of the Acquisition Agreement and the employee benefits provided to other similarly situated Messer employees that become employees of the Respondent after the Effective Date of Divestiture, including regularly scheduled or merit raises and bonuses, regularly scheduled vesting of all pension benefits, and reimbursement of relocation expenses;





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

### III.

**IT IS FURTHER ORDERED** that:

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

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver or otherwise convey the relevant assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed.
2. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period only two (2) times.
3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered or otherwise conveyed by this Order and to any other relevant information as the Divestiture Trustee may request. Respondent shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent shall extend the time for divestiture under this Paragraph III. in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.
4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondent from among those approved by the Commission; *provided further, however*, that Respondent shall select such entity within five (5) days of receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondent, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.
6. Respondent shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
8. The Divestiture Trustee shall report in writing to Respondent and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
9. Respondent may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph III.
- F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

#### **IV.**

- B. Upon five (5) days' notice to Respondent and without restraint or interference from it, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding any such matters.

**VII.**

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

By the Commission.

Donald S. Clark  
Secretary

SEAL:

ISSUED: June 29, 2004

[Confidential Appendices A and B Redacted From Public Record Version, But Incorporated By Reference]