

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

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

³ Order to Maintain Assets ¶ II.K. The “Acquirer” specified in the Decision and Order

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

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.

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 (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.

¹⁵ 16 C.F.R. § 2.51(b).

¹⁶ Decision & Order ¶ II.R.4.

Complaint ¶

¹⁹ Boston Scientific Corporation's acquisition of Guidant resulted in a separate consent order and divestiture. Decision and Order, *In the Matter of Boston Sci*

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

²¹ See Petition at p. 5.

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

²³ 4 Trade Reg. Rep. (CCH) ¶ 13,241.

²⁴ *See* Settlement and Release Agreement contained in 8-K, filed December 15, 2008,

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following Paragraph II, additions and modifiers 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.

III.

IT IS FURTHER ORDERED

VI.

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

By the Commission.

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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)