

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Edith Ramirez, Chairwoman
Maureen K. Ohlhausen
Terrell McSweeney

In the Matter of American Air Liquide Holdings, Inc., a corporation.)))))))	Docket No. C-
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DECISION AND ORDER

The Federal Trade Commission (“Commission”) havingn TJ 0 Tw 5.63 0 Td (,)Tj k@Tjld(8)4(hA) issue stating its charges in that respect, and having there to Maintain Assets and having accepted the executed C Consent Agreement on the public record for a period of consideration of public comments, now in further confo Commission Rule 2.34, 16 C.F.R. § 2.34, the Commissi jurisdictional findings and enters the following Decision

1. Re

H. “Confidential Information” means any and all of the following information:

1. all information that is a trade secret under applicable trade secret or other law;
2. all information concerning product specifications, data, know-how, formulae, compositions, processes, designs, sketches, photographs, graphs, drawings, samples, inventions and ideas, past, current and planned research and development, current and planned manufacturing or distribution methods and processes, customer lists, current and anticipated customer requirements, price lists, market studies, business plans, software and computer software and database technologies, systems, structures, and architectures;
3. all information concerning the relevant business (which includes historical and current financial statements, financial projections and budgets, tax returns and accountants’ materials, historical, current and projected sales, capital spending budgets and plans, business plans, strategic plans, marketing and advertising plans, publications, client and customer lists and files, contracts, the names and backgrounds of key personnel, and personnel training techniques and materials); and
4. all notes, analyses, compilations, studies, summaries, and other material to the extent containing or based, in whole or in part, upon any of the information described above;

Provided, however, that Confidential Information shall not include information that (i

- K. “Cost” means the actual cost of raw materials or parts, direct labor, utilities, administrative and third party expenses, and reasonably allocated operations, distribution, and factory expenses and shared corporate services overhead used to develop, manufacture, and supply the relevant good or service.
- L. “Divestiture Agreement” means any agreement between Respondent (or a Divestiture Trustee) and Acquirer that receives the prior approval of the Commission to divest the Gases Assets, including all related ancillary agreements, schedules, exhibits, and attachments thereto.
- M. “Divestiture Date” means the date on which Respondent (or the Divestiture Trustee) closes on the transaction to divest any of the Gases Assets to an Acquirer.
- N. “Divestiture Trustee” means the Person appointed by the Commission pursuant to Paragraph V. of this Order.
- O. “Gases Assets” means all of Respondent’s right, title, and interest in and to all property and assets, real, personal, or mixed, tangible and intangible, of every kind and description, wherever located, relating to operation of the Gases Business, including, but not limited to:
1. all real property interests (including fee simple interests and real property leasehold interests), including all easements, and appurtenances, together with all

6. all data and Records, including client and customer lists and Records, referral sources, research and development reports and Records, production reports and Records, service and warranty Records, equipment logs, operating guides and manuals, financial and accounting Records, creative materials, advertising materials, promotional materials, studies, reports, notices, orders, inquiries, correspondence, and other similar documents and Records, and copies of all personnel Records (to the extent permitted by law);
7. all intangible rights and property, including Intellectual Property owned or licensed (as licensor or licensee) by Respondent (to the extent transferable or licensable), going concern value, goodwill, and telephone and telecopy listings; and
8. all rights relating to deposits and prepaid expenses, claims for refunds and rights to offset in respect thereof;

Provided, however, that the Gases Assets need not include (i) the Retained Assets, (ii) the Retained Intellectual Property, or (iii) any part of the Gases Assets if not needed by Acquirer and the Commission approves the divestiture without such assets.

- P. “Gases Business” means the I&M Gases Business, CO₂ Business, and the Retail Business.
- Q. “Gases Employee” means any individual (i) employed on a full-time, part-time, or contract basis at any of the Gases Locations as of and after the date of the announcement of the Acquisition or (ii) identified by agreement between Respondent and an Acquirer and made a part of a Divestiture Agreement.
- R. “Gases Locations” means the locations identified on Appendix A of this Order.
- S. “I&M Gases Business” means the business of producing, refining, distributing, marketing, or selling atmospheric gases (liquid oxygen, liquid nitrogen, and liquid argon) and nitrous oxide conducted by either Air Liquide or Airgas prior to the Acquisition at their respective atmospheric gases and nitrous oxide locations identified in Appendix A of this Order.
- T. “Intellectual Property” means all intellectual property, including (i) commercial names, all assumed fictional business names, trade names, “doing business as” (d/b/a names), registered and unregistered trademarks, service marks and applications, and tradenames; (ii) all patents, patent applications and inventions and discoveries that may be patentable; (iii) all registered and unregistered copyrights in both published works and unpublished works; (iv) all rights in mask works; (v) all know-how, trade secrets, confidential or proprietary information, customer lists, software, technical information, data, process

technology, plans, drawings, and blue prints; and (vi) all rights in internet web sites and internet domain names currently used.

- U. “License” means a royalty-free, fully paid-up, perpetual, irrevocable, non-exclusive, transferable, and sublicensable license and such tangible embodiments of the licensed rights (including, but not limited to, physical and electronic copies) as may be necessary or appropriate to enable Acquirer to use the rights.
- V. “Multi-Product Customer” means any customer who purchased from Respondent, as of the Acquisition Date, both (i) atmospheric gases (liquid oxygen, liquid nitrogen, and liquid argon) or nitrous oxide and (ii) any other products or services.
- W. “Multi-Location Customer” means any customer who purchased from Respondent atmospheric gases (liquid oxygen, liquid nitrogen, and liquid argon) or nitrous oxide, as of the Acquisition Date, both (i) from the Gases Locations and (ii) from other facilities of Respondent.
- X. “Person” means any individual, partnership, corporation, business trust, limited liability company, limited liability partnership, joint stock company, trust, unincorporated association, joint venture or other entity or a governmental body.
- Y. “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.
- Z. “Retail Business” means the business of selling hardgoods, welding products, and gases conducted by Airgas prior to the Acquisition at the retail locations identified in Appendix A of this Order.
- AA. “Retained Assets” means:
 - 1. Corporate Trade Names and portions of website content, domain names, or e-mail addresses that contain Corporate Trade Names;
 - 2. Software that can readily be purchased or licensed from sources other than Respondent and which has not been materially modified (other than through user preference settings), or enterprise software that Respondent also uses to manage and account for businesses other than the Gases Business;
 - 3. Corporate headquarters of Air Liquide and Airgas;
 - 4. Assets located outside of the United States;

5. Assets relating to the Gases Business that are shared with, or also pertain to, retained businesses of Respondent, including but not limited to, plants and facilities, computers, telecommunications equipment, and Tangible Personal Property, unless such assets primarily relate to the operation of any or all of the Gases Business;
 6. Data and Records that contain information (a) that relates to both the Gases Business and to retained businesses of Respondent, or (b) of which Respondent has a legal obligation to retain the original copies; *provided, however*, that Respondent shall provide copies of those portions of such data and Records that relate to the Gases Business;
 7. Insurance benefits, including rights and proceeds; and
 8. Any assets, rights, or interests relating to the production, refinement, distribution, marketing, or sale of packaged gases (including packaged atmospheric gases), such as dewars, cylinders, or cylinder fill plants, other than the Retail Business.
- BB. “Retained Intellectual Property” means any Intellectual Property, other than Retained

4. For a period of two (2) years after divestiture of any of the Gases Assets, Respondent shall not solicit the employment of any Gases Employee who becomes employed by an Acquirer at the time any of the Gases Assets are divested; *provided, however*, that a violation of this provision will not occur if: (i) the individual's employment has been terminated by an Acquirer, (ii) Respondent advertises for employees in newspapers, trade publications, or other media not targeted specifically at the employees, or (iii) Respondent hires employees who apply for employment with Respondent, so long as such employees were not solicited by Respondent in violation of this paragraph.

D. At the option of an Acquirer, Respondent shall:

1. For a period of twelve (12) months after the divestiture

2. Respondent shall (i) ensure that the Monitor has full and complete access to all Respondent's personnel, books, records, documents, and facilities relating to compliance with this Order or to any other relevant information as the Monitor may reasonably request, and (ii) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform his duties pursuant to this Order;

3. The Monitor (i) shall serve at the expense of Respondent, without bond or other security, on such reasonable and customary terms and conditions as the Commission may set, and (ii) may employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, and other representatives

- G. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute Monitor in the manner described in this Paragraph IV.
- H. The Commission may on its own initiative or at the request of the Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

V.

IT IS FURTHER ORDERED that:

- A. If Respondent has not fully complied with the divestiture and other obligations as required by Paragraph II.

E. 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, and to take such other action as may be required to divest the Divestiture Assets.
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, or in the case of a court-appointed Divestiture Trustee, by the court.
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 reqt2Bntay.dpo(e)4(nnur)3(t26.05 0.94 0)Tj ()Td

- F. The Commission may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.
- G. 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 V.
- H. 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 divestitures and other obligations or action required by this Order.
- I. The Divestiture Trustee may be the same person as the Monitor appointed under this Order.

VI.

IT IS FURTHER ORDERED that:

- A. The Divestiture Agreement shall be incorporated by reference into this Order and made a part hereof, and Respondent shall comply with all terms of such agreement. The Divestiture Agreement shall not limit or contradict, or be construed to limit or contradict, the terms of this Order and nothing in this Order shall be construed to reduce any rights or benefits of Acquirer or to reduce any obligations of Respondent under such agreement.
- B. If any term of the Divestiture Agreement varies from Paragraphs I.-IX. 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. Respondent shall not modify, replace, or extend the terms of the Divestiture Agreement without the prior approval of the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5).

VII.

IT IS FURTHER ORDERED that:

- A. Respondent shall file a verified written report with the Commission setting forth in detail

IX.

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 and upon five (5) days' notice to Respondent, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission: