

IN THE MATTER OF

GREAT LAKES CHEMICAL CORPORATION, ET AL.

DISMISSAL ORDER, ETC. IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 9155. Complaint June 23, 1981—Decision and Order May 23, 1984.*

The Federal Trade Commission has dismissed the proceedings against Northwest Industries, Inc. and Velsicol Chemical Corp.

Appearances

For the Commission: *John V. Lacci.*

For the respondent: *William Fifield, Christian L. Campbell, Sidley & Austin*, Chicago, Ill. and *William G. Schaefer, Jr., Sidley & Austin*, Washington, D.C. for Northwest, Industries, Inc. and Velsicol Chemical Corporation.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging respondents, Great Lakes Chemical Corporation, Northwest Industries, Inc., and Velsicol Chemical Corporation, with violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

Respondents Northwest Industries, Inc. and Velsicol Chemical Corporation ("respondents"), their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreements is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such

* Complaint previously published at 103 F.T.C. 467.

agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25 of its Rules, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Northwest Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 6300 Sears Tower, in the City of Chicago, State of Illinois.

2. Respondent Velsicol Chemical Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 341 East Ohio Street, in the City of Chicago, State of Illinois.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That all proceedings in Docket No. 9155 against Northwest Industries, Inc. and Velsicol Chemical Corporation shall be dismissed.

Interlocutory Order

103 F.T.C.

IN THE MATTER OF
KAISER ALUMINUM & CHEMICAL CORPORATION

Docket 9080. Interlocutory Order, May 25, 1984

ORDER GRANTING EXTENSION OF *IN CAMERA* TREATMENT

Various exhibits in this proceeding have been subject to *in camera* treatment, pursuant to order of Administrative Law Judge James P. Timony. This order has now expired.

Third parties to this proceeding, Basic Incorporated ("Basic"), and J. E. Baker Company and Dolomite Brick Corporation ("Baker"), have requested a continuation of *in camera* treatment, by motions dated October 13, 1981 and October 15, 1981, respectively.

In Commission proceedings, requests for *in camera* treatment must show

that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved. The showing may consist of extrinsic evidence or, in certain instances, may be inferred from the nature of the documents themselves.¹

That showing can be made by establishing that the documentary evidence is "sufficiently secret and sufficiently material to [the applicant's] business that disclosure would result in serious competitive injury," and then balancing that factor against "the importance of the information in explaining the rationale of [Commission] decisions."²

The Commission agrees that an extension of *in camera* treatment for these documents is justified. These are documents detailing sales of specific lines of refractories and related products, data regarded as extremely sensitive by both firms. Even though the statistics in question are over five years old, the companies argue a serious injury would be done them by release of this information, which they have never made available to the public.

The countervailing interest in public disclosure of the information does not outweigh the likelihood of serious competitive injury. A public understanding of this proceeding does not depend on access to these data submitted by these third party firms. Moreover, as third parties, the requests of these companies deserve special solicitude. As a policy matter, extensions of confidential or *in camera* treatment in appropriate cases involving third party bystanders encourages cooperation with future adjudicative discovery requests.

¹ *H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961); see 16 C.F.R. 3.45(b) 1983).

² *General Foods Corp.*, 95 F.T.C. 352, 355 (1980); see *Bristol Myers Co.*, 90 F.T.C. 455, 456 (1977).

For the reasons stated above and in the referenced motions, the Commission will extend *in camera* treatment to documents submitted by these third parties, until December 31, 1985. This extension applies to CX 139E and 139H, and RX 499D and 499H.

IN THE MATTER OF
KAISER ALUMINUM & CHEMICAL CORPORATION

Docket 9080. Interlocutory Order, May 25, 1984

ORDER DEFINING THE SCOPE OF PROCEEDINGS ON REMAND

The Commission issued its complaint in this matter on April 27, 1976, alleging that Kaiser's February 28, 1974, acquisition of the Lavino Division of International Minerals and Chemicals Corporation was in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the FTC Act, 15 U.S.C. 45. An Initial Decision concluding that a violation had occurred issued October 12, 1978, and, on May 17, 1979, the Commission issued its Opinion and Order affirming a violation and ordering divestiture of the acquired assets.

In *Kaiser Aluminum & Chemical Corp. v. FTC*, 652 F.2d 1324 (7th Cir. 1981), the United States Court of Appeals for the Seventh Circuit vacated and set aside the Commission's order and remanded the case to the Commission for further proceedings consistent with the Court's main conclusion that the Commission had improperly applied the doctrine of *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974) to the facts of this case.

On December 21, 1981, the Commission directed the parties to file briefs as to what factual and legal issues should be determined and what further proceedings, if any, would be appropriate, following the remand of this matter to the Commission for further proceedings consistent with the Court of Appeals' opinion.¹

Complaint counsel take the position that only one issue need be addressed by the Commission on remand: whether upon the application of the legal principles of *United States v. General Dynamics Corp.*, supra, as interpreted by the Court of Appeals, the acquisition in question may substantially lessen competition in the relevant markets sustained upon judicial review. Complaint counsel argue that this single issue can be decided without reopening the record, and that the only further proceeding required is briefing of this issue.

Respondent Kaiser agrees that the principal issue on remand is whether, under the rule of *General Dynamics*, complaint counsel met their burden of proving that the acquisition may substantially lessen competition in the relevant markets. Kaiser believes that the complaint should be dismissed now without further briefing. However, in

¹ Briefs were filed by Kaiser Aluminum & Chemical Corporation ("Kaiser") and complaint counsel on February 12, 1982. Answering briefs by both parties were filed March 19, 1982. Kaiser moved to file a reply brief on March 26, 1982, and complaint counsel filed an opposition to this motion on April 7, 1982.

the event that such a dismissal is regarded by the Commission as inappropriate, Kaiser argues that certain additional issues should be addressed, and that the Commission should receive limited evidence, in the form of stipulation or affidavit, about industry developments subsequent to the closing of the record in 1978.

The Commission agrees that the principal issue to be determined on remand is whether, under the principles of *General Dynamics*, the acquisition may substantially lessen competition in the relevant markets sustained by the Court of Appeals. Specifically, the issue is whether statistics establishing a *prima facie* case of violation based upon past market shares can be rebutted by other evidence casting doubt on the ability of the statistics accurately to predict future anticompetitive consequences. Among the factors to which such evidence might pertain are ease of entry into the market, the trend of the market either toward or away from concentration, and the extent of active price competition.² The Commission agrees with Kaiser that, given the time elapsed since the acquisition was consummated in 1974 and the closing of the record in 1978, it would be in the public interest to permit the parties to supplement the record with limited evidence concerning industry developments since the closing of the record, insofar as those developments pertain to the nonstatistical factors identified in *General Dynamics*. The evidence is to be submitted on an expedited schedule and in the form of stipulations and affidavits.³ See *United States v. General Dynamics Corp.*, 415 U.S. 486, 504-06 (1974); *United States v. E.I. duPont de Nemours & Co.*, 353 U.S. 586, 597-598 (1957).⁴

Kaiser argues that, in addition to the *General Dynamics* issue, the Commission should also consider: (1) whether complaint counsel's market shares established a *prima facie* case of violation in the markets sustained by the Court of Appeals; (2) whether the acquisition resulted in efficiencies and other benefits that made it on balance pro-competitive; and (3) whether ordering divestiture would offer a reasonable prospect of significantly increasing competition in the in-

² Although these factors are specifically mentioned by the Court of Appeals, they are not necessarily the only relevant ones. Other factors that may apply here could be any of those mentioned in Parts III.B and III.C of the 1982 Justice Department Merger Guidelines and Part III of the 1982 FTC Statement on Horizontal Mergers.

³ The Commission retains the option to order evidentiary hearings if necessary to resolve disputed issues of fact arising from the affidavits of the parties.

⁴ Evidence of industry developments subsequent to the closing of the record will be accepted on remand in this case because nearly six years have passed since the record was closed and because such evidence may be relevant to the *General Dynamics* issue remanded by the Court of Appeals for determination by the Commission. Although post-acquisition evidence should not be given "too much weight," *FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 598 (1965), there is authority for relying on "the best information available" in assessing a merger as old as this one. See *Consolidated Foods Corp.*, 380 U.S. at 605-06 (Stewart, J., concurring in the judgment). Moreover, as the Supreme Court noted in *United States v. General Dynamics*, 415 U.S. at 504-506, the preference to avoid post-acquisition evidence is based on the recognition that merger partners might temper their competitive conduct in the face of antitrust litigation. In this case, the passage of time and the emphasis that has been placed throughout this litigation on the issue of industry conditions rather than the post-merger conduct of the parties, justify the receipt of some form of post-acquisition evidence.

dustry and be in the public interest. In this regard, the Commission has a particular concern regarding the effect on all the issues in this proceeding of the reported termination of production, on August 31, 1982, of refractory brick at the Plymouth Meeting, Pennsylvania, and on suspension of operations at Gary, Indiana, at the end of 1983.⁵ Further, Kaiser has stated that it is seeking to sell both of these facilities, which may bear on relief issues in this proceeding. The Commission will permit the parties to address all the issues raised by Kaiser in their briefs, and to submit the evidence relating to those issues as discussed in the briefs.⁶ Submission of such evidence shall be limited to each party's initial filing. The parties may direct challenge to the acceptance by the Commission of any such evidence submitted, consistent with the definition of the scope of remand set out in this order and in the opinion of the Court of Appeals. The Commission reserves the power to accept or reject any such additional evidence.

Kaiser proposes a procedure whereby the parties would file briefs together with limited evidence about industry developments since the record was closed, in the form of affidavits and stipulations, to be followed by oral argument. With some modification, the Commission accepts Kaiser's basic suggestion, and directs the parties to file briefs, together with any stipulations and affidavits, as set forth below. Accordingly,

It is hereby ordered, That within 40 days of Kaiser's receipt of this Order, Kaiser shall file with the Commission and serve upon complaint counsel a brief, not to exceed 60 pages, together with any stipulations or affidavits regarding industry developments occurring after the close of the record;

It is further ordered, That within 40 days of complaint counsel's receipt of Kaiser's brief and any evidentiary submissions, complaint counsel shall file with the Commission and serve upon Kaiser a brief, not to exceed 60 pages, together with any stipulations or affidavits regarding industry developments occurring after the close of the record; and

It is further ordered, That within 20 days of Kaiser's receipt of complaint counsel's brief and any evidentiary submissions, Kaiser may file with the Commission and serve on complaint counsel a reply brief, not to exceed 30 pages, limited to matters discussed in complaint

⁵ Letters of Kaiser's counsel to the Commission, dated July 26, 1982, January 11, 1983, and October 11, 1983.

⁶ Kaiser states that it would not now plan to brief whether the two relevant markets sustained by the Court of Appeals were supported by substantial evidence, although it would expect to raise this issue in any future review petition it might file in the Court of Appeals. Accordingly, the Commission will not receive evidentiary submissions on that issue. However, the Commission will permit the parties to brief the issue of whether recent developments in legal and economic theory, as reflected in Part II.B.1 of the 1982 Justice Department Merger Guidelines, make it appropriate for the Commission to consider production substitution in identifying the relevant market(s) in this case.

counsel's brief. No further briefs or evidentiary submissions may be filed by either party, and oral argument is not contemplated as necessary to supplement the briefs.

