

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.