

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.

Complaint

103 F.T.C.

IN THE MATTER OF

NATIONAL ASSOCIATION OF SCHOOL MUSIC DEALERS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT*Docket C-3134. Complaint, May 31, 1984—Decision, May 31, 1984*

This consent order requires a Coralville, Iowa trade association comprised of dealers specializing in the sale and servicing of school band instruments, among other things, to cease taking any action or encouraging its members to take any action which would interfere with how, or to whom a manufacturer distributes its products.

Appearances

For the Commission: *Thomas J. Keary and Robert G. Day*

For the respondent: *Ronald J. Dolan, Peabody, Lambert & Meyers,*
Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (15 U.S.C. 41 et seq.), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the National Association of School Music Dealers, Inc. has violated the provisions of said Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

1. Respondent, National Association of School Music Dealers, Inc. ("NASMD") is a non-profit corporation, organized and existing under the laws of the State of West Virginia, with its principal office located at 1212 5th Street, Coralville, Iowa.

2. NASMD is composed of both voting members, who conduct retail businesses for the promotion and sale of band musical instruments to school music departments, and non-voting members, who may be manufacturers or wholesale distributors of school musical instruments or related equipment. Respondent has approximately 200 retail dealers. NASMD was organized for, and serves its members, *inter alia*, as an instrumentality that facilitates the exchange of ideas concerning improved methods for conducting business in the sale and