LEXSEE 1976 FTC LEXIS 68

In the Matter of KAISER ALUMINUM & CHEMICAL CORPORATION, a corporation.

DOCKET No. 9080

Federal Trade Commission

1976 FTC LEXIS 68

ORDER DENYING MOTIONS TO QUASH AND LIMITING SUBPOENAS DUCES TECUM

November 12, 1976

ALJ: [*1]

James P. Timony, Administrative Law Judge

ORDER:

The complaint in this proceeding challenges the acquisition by Kaiser Aluminum & Chemical Corporation ("Kaiser") of the Lavino Division of International Minerals & Chemical Corporation ("Lavino"), a producer of basic refractories. Basic refractories are non-metallic insulating materials. One use for basic refractories is in furnaces in the production of steel. Subpoenas duces tecum have been issued to 26 firms in the refractories industry at the request of respondent Kaiser. Six firms have each filed motions to quash or limit the subpoenas directed to them: Dresser Industries, Inc. ("Dresser"), Eltra Corporation ("Eltra"), Pfizer Inc. ("Pfizer"), The Carborundum Company ("Carborundum"), General Refractories Company ("General Refractories"), and Refractory Sales & Service Company ("RS&S").

Based on the memoranda of counsel, the affidavits, the oral argument held on November 3, 1976, and the testimony of the witness at that hearing, the motions to quash are denied but the subpoenas will be modified as stated herein.

Movants are Kaiser's competitors in the refractories industry. They are in a position to know facts concerning whether **[*2]** Lavino had ceased to be a significant competitor in the industry and to know about any increased competition that has resulted from Kaiser's acquisition of the Lavino assets.

The movants argue generally (1) that the information sought by the subpoenas is irrelevant to the issues in this proceeding or does not "constitute or contain evidence"; (2) that the information sought is confidential and that, as to such information, no adequate showing of "need" has been made; and (3) that the subpoenas' requests are excessively broad and unduly burdensome.

Relevance

Movants argue that Kaiser has not shown that the requested documents "constitute or contain evidence." Kaiser argues that it need only show "general relevancy" of the documents sought. The Rule is somewhat ambiguous. Rule 3.34(b)(1) provides that an application for a subpoena shall show "the general relevancy of the material and the reasonableness of the scope of the subpoena." Rule 3.34(b)(2) provides that:
"Subpoenas duces tecum may be used by any party for purposes of discovery or for obtaining documents, papers, books, or other physical exhibits for use in evidence, or for both purposes. When used for discovery **[*3]** purposes, a

subpoena may require a person to produce and permit the inspection and copying of nonprivileged documents, papers, or other physical exhibits which constitute or contain evidence relevant to the subject matter involved and which are in the possession, custody, or control of such persons."

Movants argue that Rule 3.34(b)(2) requires that discovery subpoenas must call not only for generally relevant documents but also for those which constitute or contain evidence.

The phrase "which constitute or contain evidence," as used in Rule 3.34(b)(2), apparently means no more than the word "relevant." Otherwise, while the Rule explicitly allows discovery subpoenas, only "evidence" could be gathered. "The process of interpretation... misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve." Markam v. Cabell, 326 U.S. 404, 409 (1945). Even if the wording of the Rule were apparent, that meaning will not be applied if it would lead to absurd results. FTC v. Retail Credit Co., 515 F.2d 988, 994-95 (D.C. Cir. 1975); FTC v. Tuttle, 244 F.2d 606, 614 (2d Cir. 1957), **[*4]** cert. denied, 354 U.S. 925.

In my opinion, Commission Rule 3.34(b) allows discovery of generally relevant documents which may aid in the preparation of respondent's defense even though they are inadmissible as evidence. This is the scope of discovery under the Federal Rules of Civil Procedure. Rule 26(b)(1); Moore's Federal Practice, Rules Pamphlet 620-21 (1975). n1/ The practice of the Commission has been to uphold subpoenas duces tecum upon a showing by any party that the requested information is generally relevant to the issues raised by the pleadings. FTC v. Menzies, 145 F. Supp. 164, 170 (D. Md. 1956), aff'd, 242 F.2d 81 (4th Cir. 1957), cert. denied, 353 U.S. 957; FTC v. U.S. Pipe & Foundry Co., 304 F. Supp. 1254, 1259 (D.D.C. 1959). Moreover, whether documents sought in discovery constitute or contain evidence cannot be resolved until the trial is under way. FTC v. Menzies, supra, 145 F. Supp. at 170. Movants' construction would have discovery subpoenas useful only during the trial. This awkward procedure was certainly not intended in Rule 3.34(b).

n1/ In United States v. Associated Merchandising Corp., 261 F. Supp. 553 (S.D.N.Y. 1966), the court discerned a difference between an investigative subpoena and an adjudicative subpoena, which at that time could be issued under the Commission Rules only for good cause. 261 F. Supp. at p. 558. In applying the rule, however, the court enforced the specification even where it was of doubtful relevance unless production would be unduly burdensome. 261 F. Supp. at p. 561.

Unlike the Federal Rules where the scope of depositions and subpoenas duces tecum used in discovery is the same, under the Commission's Rules of Practice, the use of depositions is more restricted than the use of subpoenas duces tecum. Compare Commission Rules 3.33 and 3.34. **[*5]**

The relevancy of the information sought is determined by laying the subpoena along side the defenses raised by Kaiser's answer to the complaint. FTC v. U.S. Pipe & Foundry Co., 304 F. Supp. 1254, 1260 (D.D.C. 1969); cf. Adams v. FTC, 296 F.2d 861, 867 (8th Cir. 1961), cert. denied, 269 U.S. 864; Moore Business Forms, Inc. v. FTC, 307 F.2d 188, 189 (1962). n2/ Here, Kaiser's answer puts at issue the question of whether the markets alleged in the complaint constitute appropriate or economically meaningful product categories in which to assess the efforts of the acquisition. Further, the answer contests whether the acquisition is likely to result in any substantial lessening of competition, and asserts (1) recent changes in the steel industry's demand for refractories, (2) the importance of a secure raw material supply, economies of scale, and research and development, and (3) competition in the refractories industry caused by the purchasing power of steel companies. To prove these defenses, Kaiser states (opposition Memo, pp. 6-7) that it must obtain such data as:

n2/ For this reason, movants' argument that respondent's discovery should be limited to that obtained by complaint counsel is without merit. **[*6]**

"(1) the identities, production levels, and market shares--and the changes in these factors over time as a result of the continuing technological changes in the industry--of the major refractories manufacturers and sellers; (2) the breakdown of each manufacturer's production among the product classes alleged by the Commission and into other categories making up the overall refractories industry; (3) the capabilities of existing refractories manufacturing facilities, the products they produce, and the corresponding cost and profit parameters; (4) the identities and purchasing practices of the major refractories purchasers; and (5) the industry perception, as indicated in business analyses, studies, and forecasts, of such matters as trends in market demand, competition, raw material supply, refractories technology, and the effects of the acquisition."

All of the specifications of the subpoenas bear a general relevancy to the defenses raised by respondent Kaiser. n3/ Movants are all competitors of respondent Kaiser in the production and sale of refractories. Information in the files of competing companies is frequently crucial in proceedings such as this one. In FTC v. **[*7]** Bowman, 149 F. Supp. 624, 628 (N.D. Ill. 1957), aff'd, 248 F.2d 456 (7th Cir.), the court emphasized the relevance of the kind of data sought here as follows:

> n3/ RS&S, a producer of refractories, argues that it does not produce basic refractories and does not supply refractories for use in furnaces in making steel. RS&S did, however, until two years ago advertise and sell a similar product, the ingredients for which it would obtain from other firms and "mix" for a customer. Similarly, one of Pfizer's divisions, "MPM," ceased producing refractories in 1972. Kaiser, however, is not limited in preparing its defense to the markets alleged in the complaint. And information concerning other refractories products is therefore relevant to the issues in this proceeding.

"In a proceeding under the anti-merger provisions of the Clayton Act, the share of the market affected by the merger and the effect on competitors engaged in the same line of commerce are crucial inquiries. The proceeding would be crippled if neither the Commission nor the party charged could produce by compulsory process the essential industry data."

See also Covey Oil Co. v. Continental Oil Co., **[*8]** 340 F.2d 993, 998 (10th Cir. 1965), cert. denied, 389 U.S. 1110; FTC v. Tuttle, 244 F.2d 605, 609, 614 (2d Cir. 1957), cert. denied, 354 U.S. 925; United States v. American Optical Co., 39 F.R.D. 580, 586 (N.D. Cal. 1966); United States v. Lever Bros. Co., 193 F. Supp. 254, 257 (S.D.N.Y. 1961).

Movants argue that the time period covered by the subpoenas is excessive. Proof of the long-term trends asserted by Kaiser will require reliance on industry statistics showing production levels, sales and other matters over a number of years. And Kaiser's demands for non-statistical data in studies and analyses of the industry are crietical to proof of industry trends and probable future effects of the acquisition. Such industry trends are relevant proof in a proceeding such as this one. United States v. General Dynamics Corp., 415 U.S. 486, 498, 501, 504-06 (1974). While the time period in some of the specifications is extensive (10 years), the courts have ordered production of such proof where relevant to issues raised in the pleadings such as the trends asserted here. Adams v. FTC, 296 F.2d 861, 867-68 (8th Cir. 1962), cert. **[*9]** denied, 369 U.S. 864; United States v. IBM, 66 F.R.D. 481, 483 (S.D.N.Y. 1975); cf. L. G. Balfour Company v. FTC, 1964 CCH Trade Cases, p. 79,221 (E.D. Va. 1964) (consent judgment). n4/

> n4/ Movants argue that data available from the United States Bureau of Census should be used to show trends in the refractories industry, and that individual company data should not be required. Kaiser points out, however, that the Census statistics are insufficient. For example, they report shipments, not sales. They do not permit a showing of the changes, if any, of concentration in the industry. They do not reflect how much of the total consists of shipments for use in foreign countries. And the categories of refractories have apparently changed over the years relevant to respondent's trend defense.

Confidentiality

Each of the movants argues that the documents requested need not be produced because they are "confidential." The fact that information sought by a subpoena may be confidential does not excuse compliance. n5/ It is well established that confidential information of the type sought enjoys no exemption from mandatory production in discovery **[*10]** proceedings before administrative agencies or courts. Covey v. Continental Oil Co., 340 F.2d 993, 999 (10th Cir. 1965), cert. denied, 380 U.S. 1110; FTC v. Tuttle, 244 F.2d 605, 607, 609, 616 (2d Cir. 1957), cert. denied, 354 U.S. 925. Where the provisions of the protective order prevent dissemination of confidential information to competitors and where the information sought is relevant to the issues in the proceeding, the courts have dismissed objections to subpoenas duces tecum based on the confidentiality of the requested information. Covey Oil Co. v. Continental Oil Co., 340 F.2d at 999; Menzies v. FTC, 242 F.2d 81, 84 (4th Cir.), cert. denied, 353 U.S. 957 (1957); Graber Mfg. Co. v. Dixon, 223 F. Supp. 1020 (D.D.C. 1963); Hunter v. International Systems & Controls Corp., 51 F.R.D. 251, 255 (W.D. Mo. 1970).

n5/ General Refractories' assertion that the subpoena is unconstitutional in requiring the production of confidential commercial information is not persuasive. FTC v. Tuttle, 244 F.2d 605, 609 (2d Cir. 1957), $1cert. denied, 354 U.S. 925.

Furthermore, a showing of general **[*11]** relevance is sufficient to justify production of documents containing confidential business information and no further showing of "need" is necessary. See, e.g., FTC v. U.S. Pipe & Foundry Co., 304 F. Supp. 1254, 1256, 1259-60 (D.D.C. 1969); FTC v. Menzies, 145 F. Supp. 164, 170-71 (D. Md.), aff'd 242 F.2d 81 (4th Cir.), cert. denied, 353 U.S. 957 (1957). See also Olympic Refining Co. v. Carter, 332 F.2d 260 (9th Cir. 1964); Covey Oil Co. v. Continental Oil Co., supra; Hunter v. International Systems & Controls Corp., supra; and see Estate of Le Baron v. Rohm & Haas Co., 441 F.2d 575 (9th Cir. 1971). While some courts have required that a showing of "need" should accompany a showing of "general relevancy" to support mandatory production of trade secrets, these cases involved deleted provisions of the former discovery rules requiring a showing of "good cause" n6/ or unusual facts involving great burden on the responding company. Zenith Radio Corp. v. Radio Corp. of America, 106 F. Supp. 561, 564 (D. Del. 1952); Papercraft Corp. v. FTC, 472 F.2d 927, 930 (7th Cir. 1973); United States **[*12]** v. American Optical Co., 39 F.R.D. 580 (N.D. Cal. 1966).

n6/ See 4A Moore's Federal Practice, § § 34.01[8], 34.08 (1975). The Commission rule was changed in 1968.

A protective order was entered in this proceeding on July 29, 1976. This order provides appropriate procedures for identification of "confidential information" and narrowly restricts dissemination of such data. Movants could protect the confidentiality of the subpoenaed information pursuant to the terms of this order, or negotiate additional protections in the terms of the order. n7/

n7/ Two of the subpoenaed companies have received a modification of the protective order to exclude inside counsel from access to certain documents.

At the hearing on the motions to quash held on November 3, 1976, the administrative law judge made it clear that any reasonable request for a modification of the protive order would be granted. Examples of such modifications include, for example, having the documents returned to the subpoenaed companies at the conclusion of the case; providing that the documents could be used for this case only; limiting access to the documents to trial counsel; providing reasonable notice to the subpoenaed company prior to disclosure to any other agency, Congress, or a court, and before the documents are offered in evidence at the trial in this case; and granting an extension of time for compliance with the subpoena to allow a particular specification of the documents for which protection is needed (e.g., Motion by Carborundum Company to Extend Time, filed October 14, 1976). **[*13]**

Movants argue that any protective order issued by an administrative law judge would not be adequate because: (1) the Commission, on its own motion and without notice, might make the information available to Congress or another agency or the public; (2) the information might be made public by a court in a Freedom of Information Act suit; (3) the information might be "leaked" in an unauthorized release. These arguments are not persuasive. The Commission has recognized that it must accord confidential treatment to documents tendered under protective orders even where the orders are improper. Hood & Sons, Inc., 58 F.T.C. 1184 1190 (1961). Furthermore, once the documents sought by the subpoenas are covered by the protective order, and until they are offered in evidence, they will be kept in the files of trial counsel representing Kaiser, and Commission personnel will have access to them only for the purposes related to the litigation of this case. Any in camera order entered during the trial herein will provide reasonable notice before the documents are released. Moreover, the Freedom of Information Act specifically exempts from disclosure "trade secrets and commercial or **[*14]** financial information obtained from a person and privileged or confidential," 5 U.S.C. § 552(b)(4), and a possibility of a court-imposed release under that statute is unrealistic. And, while a "leak" could occur, the possibility is hypothetical and does not overcome the presumption of the regularity of administrative action. Cf. Md.-Nat'l Park & Planning Comm. v. Lynn, 514 F.2d 829, 830 (D.C. Cir. 1975).

Movants suggest the application of a Mississippi River protective order, whereby the individual company data is given to an outside consultant who aggregates it, presenting industry statistics without disclosure of individual company data. This argument will be considered here. Cf. FTC v. Crowther, 430 F.2d 510 (D.C. Cir. 1970). This procedure is inappropriate for two reasons. First, since many of the subpoenaed parties have complied, they could probably identify

individual company data from a Mississippi River compilation using "subtractive techniques," the data on hand, and their general industry knowledge. Second, the economic evidence Kaiser intends to present in defense will require correlation of sales data, trends, profitability figures, **[*15]** plant capacity, and projections on an individual producer basis, and Mississippi River treatment would not provide a mechanism for such evidence.

Movants argue that they are not parties to the administrative proceeding and are being asked to disclose what they consider important information. However, in United States v. American Optical Co., 39 F.R.D. 580, 586 (N.D. Cal. 1966), the court held that defendants were entitled to production by competitors of documents showing, inter alia, sales in units and dollars. The court said:
"In cases such as this, the risk of competitive injury to third parties, and the seriousness of such potential injury, must be balanced against the need for the information in the preparation of the defense... Inconvenience to third parties may be outweighed by the public interest in seeking the truth in every litigated case.

See also, FTC v. Tuttle, 244 F.2d 605, 609 (2d Cir. 1957), cert. denied, 354 U.S. 925; and United States v. Lever Brothers Co., 193 F. Supp. 254, 257 (S.D.N.Y. 1961).

The fact that information sought by the subpoenas involves sensitive, financial and trade data does not limit the **[*16]** power to obtain it. FTC v. Tuttle, 244 F.2d at 616 (information relating to sales in dollars and units of various items); FTC v. U.S. Pipe & Foundry, 304 F. Supp. 1254 (D.D.C. 1969) (documents showing prices, sales, production costs, and profit and loss); United States v. American Optical Company, 39 F.R.D. 580 (N.D. Cal. 1966) (information concerning sales statistics, profit and loss and balance sheets); FTC v. Green, 252 F. Supp. 153 (S.D.N.Y. 1966) (breakdown of cost data by plants and categories); Singer Mfg. Co. v. Brother International Corp., 191 F. Supp. 322 (S.D.N.Y. 1960) (sales and price data); In the Matter of Dependable Merchandise Corp., 14 F.R.D. 257 (S.D.N.Y. 1953) (information concerning suppliers); Caldwell-clements, Inc. v. McGraw-Hill Publishing Co., Inc., 12 F.R.D. 531 (S.D.N.Y. 1952) (cost information). The court in Service Liquor Distributors v. Calvert Distillers Corp., 16 F.R.D. 507, 509 (S.D.N.Y. 1954), said:
"... [In] an action under the antitrust laws, based upon the alleged abuse of competition, a competitor's business records, where good cause has been shown, are not only not immune from **[*17]** inquiry, but they are precisely the source of the most relevant evidence."

Most of the other firms in the refractories industry have chosen to comply with the subpoenas directed to them. In United States v. Aluminum Co. of America, 193 F. Supp. 249 (N.D.N.Y. 1960), a suit alleging violation of Section 7 of the Clayton Act, disclosure of production and sales figures had been sought from a number of the defendant's competitors and the court recognized that the fact that not all of the competitors objected to the disclosure of the information is some indication that the harm resulting from disclosure is minimal. 193 F. Supp. at p. 250. See also, FCC v. Schreiber, 381 U.S. 279, 298-99 (1965); and United States v. American Optical Co., 39 F.R.D. 580, 587 (N.D. Cal. 1966).

Breadth and Burden

Movants claim that the subpoenas are invalid because their specifications are excessively broad and because compliance would impose cost, time and manpower burdens. Inspection of the subpoenas themselves shows that the specifications are clearly drawn so as to identify the categories of documents relevant to the issues in this proceeding. A more specific identification **[*18]** of documents for production would require familiarity with the particular documents in movants' files. Several of the specifications expressly indicate that summary statements of the requested data will be acceptable in place of the underlying documents.

The courts have upheld and enforced subpoenas duces tecum with specifications drawn in terms similar to those employed here. Genuine Parts Co. v. FTC, 445 F.2d 1382, 1389-90 (5th Cir. 1971); FTC v. St. Regis Paper Co., 304 F.2d 731, 732, 733 (7th Cir. 1962); FTC v. Bowman, 149 F. Supp. 624, 626 (N.D. Ill.), aff'd, 248 F.2d 456 (7th Cir. 1957).

Several movants assert that the subpoenas are oppressive and burdensome. This general, unsupported claim is not persuasive. Even where a subpoenaed third party adequately demonstrates that compliance with a subpoena will impose a substantial degree of burden, inconvenience, and cost, that will not excuse producing information that appears generally relevant to the issues in the proceeding. United States v. Morton Salt Co., 338 U.S. 632, 653-54 (1950); FTC v. Standard American, Inc., 306 F.2d 231, 235 (3d Cir. 1962). n8/ Furthermore, **[*19]** Kaiser has negotiated reasonable modifications designed to alleviate these difficulties and has offered to do so with movants.

n8/ RS&S argues the burdensomeness of the subpoena even though, of 16 refractories producers served with identical sixspecification subpoenas, only RS&S has moved to quash. See United States v. Aluminum Co. of America, supra. Further, five of the six specifications allow RS&S to provide schedules rather than documents and the sixth calls for all sales, advertising, promotional and instructional documents sent to customers concerning the applications of refractories products. That specification will be modified to require RS&S to provide representative examples of such documents.

The modifications of the specifications made in this order and memorandum should substantially reduce the burden described in the affidavits attached to the motions of Eltra and Pfizer.

Several movants have argued that the size and complexity of their businesses will result in large costs in complying with the subpoenas. In this regard, Judge Weinfeld noted in Application of Radio Corp. of America, 13 F.R.D. 167, 172 (S.D.N.Y. 1952):
"Inconvenience **[*20]** is relative to size. Any witness who is subpoenaed suffers inconvenience. An individual operating a small business, for example, or a corporation operated by a sole shareholder, may suffer, in like circumstances more inconvenience than [a major corporation] with... thousands of employees. But this inconvenience... is part of the price we pay to secure... the enforcement of our laws."

See also United States v. IBM, 62 F.R.D. 507, 510 (S.D.N.Y. 1974); Blank v. Talley Indus., Inc., 54 F.R.D. 627 (S.D.N.Y. 1972).

Several movants have requested that their costs incurred in complying with the subpoenas be reimbursed. Kaiser has agreed to inspect the documents at the place of business of the movant and to bear the cost of copying. Courts have required reimbursement of the costs for search in civil suits between private companies where a third party was complying with the subpoena. Celanese Corp. v. E. I. duPont de Nemours & Co., 58 F.R.D. 606, 612 (D. Del. 1973; Collins and Aikman Corp. v. v. J. P. Stevens & Co., 51 F.R.D. 219, 221 (D.S.C. 1971). Where the public interest is involved, however, and where the nonparty is in the industry in which alleged **[*21]** acts occurred, the nonparty has an interest in the litigation and would be affected by the judgment. There, only the cost of copying need be reimbursed. United States v. IBM, 62 F.R.D. 507, 510, and 526, 529 (S.D.N.Y. 1974); FTC v. Ace Books, Inc., 11 Pike and Fisher, Ad. Law 2d 943, 944 (S.D.N.Y. 1961).

Particular Specifications

In addition to moving broadly to quash or limit the subpoenas in their entirety, most of the movants have alternatively moved to quash or limit particular specifications. Movants' arguments about each specification will now be considered.

Specification 1

Specification 1 of the subpoenas provides as follows:
"1. *Provide documents sufficient to indicate the volume and dollar amount of your sales of refractories for each year beginning with 1967 and for the first six months of 1976, divided by seven digit Standard Industrial Classification code." n9/

n9/ The subpoenas provide that where a specification is preceded by an asterisk, schedules or tabulations may be produced in lieu of responsive documents.

This specification seeks information on the physical volume and dollar amount of movants' sales of refractories. **[*22]** The movants attack the time period for which the information is sought, Pfizer, Eltra and Carborundum claiming that data earlier than 1971 is irrelevant. One of Kaiser's defenses is that the refractories industry is undergoing a change as a result of technological change in the steel industry and that only with evidence of sales over a period of time sufficient to reflect the technological change--and sufficient to allow the effects of cycles and short-term fluctuations in the demand for steel to be separated out--can the alleged market shares be put in their proper perspective. Further, Kaiser argues that the sales trends to be developed with Specification 1 data are also essential to an understanding of how and why Lavino lost its independent competitive significance because of changing steel industry technology.

While it will produce such data back to 1971, Pfizer argues that the search of its files prior to 1971 is particularly burdensome since they are stored unsystematically in warehouses located throughout the country and, further, that the data is unreliable since it was not cross-checked as such sales data is now. Kaiser has stated its willingness to

accommodate the [*23] subpoenaed companies as to their manner of record keeping, in order to minimize the burden of complying with the subpoena. United States v. American Optical Co., 39 F.R.D. 580, 587 (N.D. Cal. 1966). Pfizer, of course, cannot produce records if they do not exist. Nor can it compile reports which require data from records which do not exist. Genuine Parts v. FTC, 313 F. Supp. 855, 857 (N.D. Ga. 1970), aff'd, 445 F.2d 1382 (5th Cir. 1971). On the other hand, the absence of compilations of information does not excuse the production of underlying records which would provide the requested information. United States v. IBM, 66 F.R.D. 187, 188 (S.D.N.Y. 1974).

Specification 2

Specification 2 of the subpoenas provides as follows:
"2. * Provide documents sufficient to indicate separately for each basic refractories product sold by you the volume and dollar amount of your sales for each year beginning with 1967 and for the first six months of 1976."

Specification 2 seeks detailed information on movants' sales of "basic" refractories, the refractories alleged by the complaint to constitute the product market in which the effects of the acquisition are [*24] to be considered. Pfizer argues that since the colplaint alleges that "basic" refractories constitute a relevant product market, information regarding individual products within that market is irrelevant. Kaiser has not admitted that "basic" refractories constitute a relevant product market, and Kaiser is entitled to obtain data to test that alleged market, as well as the alleged submarkets.

Pfizer also argues that, while it has the original invoices, it does not maintain volume and sales data for each of its 500 individual trademark products, and has only such data for general trademark groupings for the 1967-1971 period. Pfizer argues that the alternative of turning over underlying documents to Kaiser would be equally burdensome since it would involve "turning over thousands of invoices located in dead storage in Old Bridge, New Jersey." The absence of compilations does not excuse the production of the underlying records, see Specification 1, and Kaiser's willingness to accommodate, supra, should reduce the burden at Old Bridge.

Specification 3

Specification 3 of the subpoenas provides as follows:
"3. * Provide documents sufficient to indicate for each refractories [*25] manufacturing facility owned or operated by you the refractories products which are or have been produced at the facility and the yearly manufacturing capacity of the plant for each such product."

Pfizer argues that, while it could provide information on its total plant capacity based on reasonable assumptions regarding product mix, it cannot provide it on a plant basis. Pfizer states that it manufactures 500 products; that the capacity of each of its plants depends on which products are being produced at the time; and that the product mix is in a constant state of flux. The absence of compilations does not excuse the production of underlying records, supra; but Pfizer cannot produce what it does not have, see Specification 1. (The failure to make such estimates now, however, may lead to further discovery efforts by depositions or subpoenas.)

Specifications 4 and 5

Specifications 4 and 5 of the subpoenas provide as follows:
"4. * Provide documents sufficient to indicate for the year 1975 and for the first six months of 1976 and the volume and dollar amount of your sales of refractories to each facility owned or operated by the 10 persons to whom you sold the greatest [*26] dollar amount of refractories (or as many additional persons as is necessary to account for 60 percent of your sales) during each such period, segregated by sales from each facility owned or operated by you.
"5. * Provide documents sufficient to allow the sales referred to in the previous specification to be divided by seven digit Standard Industrial Classification code."

These specifications seek information relevant to two of the market definition issues in this case. The complaint alleges that the relevant geographic market for refractories is the United States as a whole. (Complaint, P17.) Kaiser states that it does not know the pattern of sales and distribution of the refractories produced by other firms in the industry. The information sought by these specifications will be relevant to the question of geographic markets by providing information on industry patterns of distribution from manufacturing facility to consuming facility. Moreover, information regarding which of movants' customers purchase which refractories products is also important to the definition of the relevant product market. One of the tests of market definition is the existence of "distinct customers," [*27] Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962). Kaiser claims that this information will show that

there are no distinct customers for basic refractories. This information should be produced subject to an appropriate protective order.

Specification 6

Specification 6 of the subpoenas provides as follows:
6. Provide all sales, advertising, promotional, or instructional documents relating to the applications or uses of any refractories product sold by you."

Pfizer objects to this specification on the ground that the information sought is confidential, arguing that the specification is not limited to materials which were given by Pfizer to its customers or the trade. This limitation is reasonable. As limited, the specification will be enforced.

Specifications 7 and 8

Specifications 7 and 8 of the subpoenas provide as follows:
"7. Provide all studies, analyses, reports, memoranda, plans, forecasts, evaluations, or surveys prior to January 1, 1974, relating to the Lavino Division of International Minerals & Chemical Corporation or the Refractories Division of Kaiser Aluminum & Chemical Corporation.
"8. Provide all documents relating to the acquisition **[*28]** of assets of the Lavino Division of International Minerals & Chemical Corporation by Kaiser Aluminum & Chemical Corporation."

Pfizer challenges the relevancy of the documents sought by these specifications. The documents of Kaiser's competitors concerning Lavino and Kaiser's acquisition of Lavino assets are relevant to the issues in this proceeding.

Specification 9

Specification 9 of the subpoenas provides as follows:
"9. Provide all documents relating to the Refractories Division of Kaiser Aluminum & Chemical Corporation since January 1, 1974."

Eltra, Dresser, and Pfizer attack the request as irrelevant. Movants are Kaiser's major competitors and their files undoubtedly contain documents which would be relevant to this proceeding. Although the term "all documents" is broad, the time period and subject is narrow. The specification is not indefinite and calls for information important to Kaiser's defense.

Specification 10

Specification 10 of the subpoenas provides as follows:
"10. Provide all studies, analyses, memoranda, plans, forecasts, evaluations, or surveys relating to the refractories industry or any part thereof."

Carborundum asserts that "Specification **[*29]** 10 purports to call for all documents 'relating to the refractories industry or any part thereof'." Eltra states that it would require production of "literally all Eltra documents which relate to the refractories industry." The specification does not use the term "documents" but rather refers 3 6"studies, analyses, memoranda, plans, forecasts, evaluations or surveys." Studies and analyses of the industry generated by the major companies in the refractories business may very well contain relevant information concerning the effect of the acquisition on competition or the trends alleged by Kaiser in defense. Rather than calling for all documents relating to the refractories industry, the specification was intended to be limited to significant documents which discuss the industry in some detail. Because such words as "memoranda" might be construed to involve almost any paper in movants' files, this specification, as well as the others (11-15, 19-20) which call for "all studies, analyses, memoranda, plans, forecasts, evaluations, or surveys," will be limited to mean studies and analyses of the industry prepared or considered by officers or employees who work in a policy-making or top **[*30]** management capacity for the subpoenaed companies.

Dresser argues that such studies are particularly confidential and that the exchange of such business information unconnected with a judicial proceeding might violate the antitrust laws. Dresser assumes that the protective order entered in this case to protect the confidentiality of such information is ineffective, and that argument can be disregarded as hypothetical. Moreover, an argument can be made that:
"... [It] is not against the public interest to distribute knowledge of trade facts, however detailed. ... Intelligent conduct of business implies, not only knowledge of trade facts but an understanding of them. To this understanding editorial

comment and free discussion by those engaged in the business and by others interested are aids. Opinions oppressed may be unsound; predictions may be unfounded; but there is nothing in the Sherman Law which should limit freedom of discussion, even among traders."

American Column & Lumber Co. v. United States, 257 U.S. 377 (1921) (Brandeis, J. dissenting). See also dissenting opinion of Mr. Justice Marshall in United States v. Container Corporation of America, 393 U.S. **[*31]** 333, 340 (1969).

Movants also argue that the studies in their files are opinions for which they paid experts a great deal of money, and Kaiser should not have this information without paying for it. "To clothe all such expert testimony with privilege solely on the basis that the expert 'owns' his knowledge [or has sold it to the subpoenaed firm] would be to seal off too much evidence important to the just determination of disputes." Kaufman v. Edelstein, CCH 1976-1 Trade Cases P60,841, p. 68,672 (S.D.N.Y. April 20, 1976). Such opinions, previously formed, can be subpoenaed. Carter-Wallace, Inc. v. Otte, 474 F.2d 529, 536 (2d Cir. 1972), cert. denied, 412 U.S. 929 (1973).

Specification 11

Specification 11 of the subpoenas provides as follows:
"11. Provide all documents relating to your market share and/or competitive position or that of any other person in the manufacture and/or sale of any refractories and all documents relating to your business plans or marketing objectives respecting any refractories."

Specification 11 of the subpoenas issued at the request of Kaiser to third parties is the same as Specification 11 of a subpoena issued to Kaiser **[*32]** by the Federal Trade Commission. Kaiser has complied with the Federal Trade Commission's requests for these documents, and many of those documents have been identified as FTC exhibits in this case. This specification calls for relevant information.

To reduce the burden involved, this specification will be modified by replacing the word "documents" where it appears with "studies, analyses, memoranda, reports, plans, forecasts, evaluations, or surveys."

Specification 12

Specification 12 of the subpoenas provides as follows:
"12. Provide all studies, analyses, memoranda, reports, plans, forecasts, evaluations, or surveys relating to the supply of raw materials for use in the manufacture of any refractories."

The complaint defines the product markets on the basis of the raw materials from which the refractories are made. n10/ Kaiser is entitled to challenge those product markets. Further, Kaiser asserts that the performance of the refractories industry is greatly affected by the supply of raw material. For example, Kaiser asserts that Lavino was totally dependent on purchasing that raw material from Dresser; that Dresser is the largest manufacturer of "basic" refractories **[*33]** in the world and the dominant producer of refractory grade magnesia in the United States; and that this caused Lavino's disappearance as a viable competitive factor in the refractories industry prior to the acquisition by Kaiser. The information on raw materials supply is therefore relevant.

n10/ According to the complaint, basic refractories are refractories made out of "magnesia, magnesite, dolomite, chromite or chrome ore or a combination thereof."

Specifications 13, 14, and 15

Specifications 13, 14, and 15 of the subpoenas provide as follows:
"13. Provide all studies, analyses, memoranda, reports, plans, forecasts, evaluations, or surveys relating to any refractories research and development.
"14. Provide all studies, analyses, memoranda, reports, plans, forecasts, evaluations, or surveys relating to any refractories patents.
"15. Provide all studies, analyses, memoranda, reports, plans, forecasts, evaluations, or surveys relating to economies of scale or advantages of size or breadth of product line in the refractories industry or any part thereof."

Specifications 13 through 15 are similar to Specification 12. Each is relevant to Kaiser's defenses regarding **[*34]** Lavino's alleged inability to compete effectively in the refractories industry. Each is also important in connection with the alleged barriers to entry in the industry and Kaiser's position that the acquisition has resulted in increased

competition. These specifications do not seek every "document" in the movants' files relating to research and development, patents, and economies, but rather are limited to significant documents studying and analyzing these matters. Such documents are relevant to the subject matter of this proceeding.

Specifications 16, 17, 18, and 19

Specifications 16, 17, 18, and 19 of the subpoenas provide as follows:
"16. Provide all documents relating to the profitability of your refractories business, whether measured in terms of gross profit, profit contribution, net profit, return on invested capital, return on assets, return on equity, or any similar term.
"17. Provide all documents relating to the profitability of each refractories manufacturing facility that you own or operate, whether measured in terms of gross profit, profit contribution, net profit, return on invested capital, return on assets, return on equity, or any similar term.
"18. **[*35]** Provide all documents relating to the profitability of any refractories product or refractories product line sold by you, whether measured in terms of gross profit, profit contribution, net profit, return on invested capital, return on assets, return on equity, or any similar term.
"19. Provide all studies, analyses, reports, memoranda, plans, forecasts, evaluations, or surveys relating to the profitability of any other refractories producer or of the refractories industry or any part thereof."

Specifications 16 through 19 deal with the profitability of the refractories industry. All of the movants argue that they seek irrelevant and confidential information. As noted above, the profit data will be adequately protected under protective orders. Profit data may well be relevant to the issue of the effects of an acquisition. United States v. Black and Decker Mfg. Co., CCH 1976-2 Trade Cases P61,033, at p. 69,572 (D. Md. Aug. 20, 1976); British Oxygen Co., 1973-76 CCH Transfer Binder P21,063, at p. 20,920 (FTC Dec. 8, 1975); Thompson, Mergers, Monopolization, and Marketing: The Problem of Priorities at the FTC, 640 Antitrust & Trade Reg. Rep. D1, D2-D3 (1973). **[*36]** See also Budget Request and Justification of the Federal Trade Commission for the Fiscal Year 1976, in Hearings Before a Subcommittee of the House Committee on Appropriations, 94th Cong., 1st Sess, Pt. 7, at 262-65 (1975). Cf. United States v. IBM, 66 F.R.D. 186 and 215 (S.D.N.Y. 1974). n11/

n11/ The term "all documents" as used in Specifications 16-18 will be modified to call for schedules offering sufficient information to explain the accounting practices followed in preparing the schedules.

Specification 20

Specification 20 of the subpoenas provides as follows:
"20. Provide all studies, analyses, memoranda, reports, plans, forecasts, evaluations, or surveys relating to consumption or purchase of refractories by the steel industries or any part thereof."

Specification 20 will provide information relevant to market definition issues and will enable Kaiser to develop evidence about the relationship between the refractories industry and its principal consumer, the steel industry. The trend in the consumption of refractories products as steel industry technology has changed is relevant to the issues in this case. United States v. General **[*37]** Dynamics Corp., 415 U.S. 486, 506 (1974).

Specifications 21 and 22

Specifications 21 and 22 of the subpoenas provide as follows:
"21. Provide all documents relating to any actual or considered research and development or production arrangement between you and any steel company. n12/
"22. Provide documents sufficient to indicate for each basic refractories product sold by you for each year beginning with 1967 and for the first six months of 1976 the five persons who purchased the greatest dollar amount of each such product and the volume and dollar amount of your sales of each such product to each such person." n13/

n12/ Pfizer's doubts about the term "production arrangement" apparently were not shared by the other refractories producers who have complied with the subpoenas. United States v. American Optical Co., 39 F.R.D. 580, 587, n.9 (N.D. Cal. 1966) (Gignoux, D.J.). The term is not indefinite, and further elaboration undoubtedly will be provided by counsel for Kaiser who have indicated their willingness to aid in the reasonable compliance with the subpoenas.

n13/ In complying with Specification 22 movants may provide summaries or tabulations in accordance with Instruction 3 of the subpoenas. **[*38]**

Kaiser alleges that the purchasing power of the steel industry insures competitive performance of the refractories industry. The information sought by these specifications is relevant to the development of Kaiser's defense. United States v. Hughes Tool Co., CCH 1976-2 Trade Cases P61,046, at p. 69,698 (C.D. Cal. 1976); United States v. Black & Decker Co., CCH 1976-2 Trade Cases, P61,033, at p. 69,582 (D. Md. 1976); F. Scherer, Industrial Market Structure and Economic Performance, 246 (1970).

Specification 23

Specification 23 is included only in the subpoena addressed to Dresser:
"23. Provide all documents relating to the magnesia supply contract dated January 1, 1972, between you and Lavino Division of International Minerals & Chemical Corporation."

The specification is related to Kaiser's defense that Lavino was dependent on Dresser for its most critical raw material.

Conclusion

For the reasons stated above, the motions to quash or limit filed in this proceeding by Dresser Industries, Inc., Eltra Corporation, Pfizer Inc., The Carborundum Company, General Refractories Company, and Refractory Sales & Service Company are denied, except as noted **[*39]** herein.

Further, the movants and the parties shall settle orders regarding any application for protection of disclosure of confidential information, consistent with the views expressed herein and the protective order issued on July 29, 1976.

IT IS ORDERED that by a date not more than ten (10) days from the date of this order movants shall inform counsel for respondent of an early date on which they will comply with the subpoenas as modified herein.