

assets, properties, rights or privileges to be divested under this order, the identity of all such potential purchasers, and copies of all written communications to and from such potential purchasers.

IN THE MATTER OF
HEUBLEIN, INC.

Docket 8904. June 26, 1973.

Order granting Allied Grape Growers leave to participate in these proceedings with respect to the issue of relief only, in a fashion to be determined by the administrative law judge in his discretion.

Commissioner Jones dissenting with dissenting statement.

DISSENTING STATEMENT

BY JONES, *Commissioner*.

The Commission displays a curious philosophy in its intervention determinations. Intervention requests from parties who assert potential injury if a violation of the law is *found* are typically granted whereas intervention requests by persons who claim potential injury if *no* law violation is found are summarily treated and almost uniformly denied.

I cannot agree that the Commissioners are less in need of special guidance and insights respecting the impact of their decisions on the interests of the public than they are as respects the impact of their decisions on the interests of particular individual firms. Indeed, I would go so far as to say the Commission has greater need of the insights and expertise of those persons asserting the needs of the public interest in a given Commission proceeding than they have of those asserting private and special interests in the outcome of such proceedings. This is so, in my judgment,

because of the fact that the interests of the public are frequently less tangible and more difficult to identify, quantify and evaluate than the interests of individual businessmen affected by a Commission order.

I can understand that there can be valid differences among Commissioners as to the intervention standards which might properly be applied to intervenors in Commission actions. I cannot understand, however, that there can be validly defensible differences in the circumstances governing the application of the relevant standards to intervenors asserting a business interest in the outcome of Commission proceedings and those who assert a more generalized public interest in the outcome.

In the instant case, the intervenor asserts a substantial and apparently significant interest in these proceedings which on its face is of such a nature as to suggest perhaps that Allied should have been named as a party to the proceeding. Therefore, I believe the proper disposition of the present intervention request would have been to have amended the complaint to name Allied as a party or to have conditioned its intervention on Allied's agreement to be bound by the order. However, since the Commission does not construe Allied's interest in these proceedings as warranting such action, I cannot agree with its decision to grant a limited intervention restricted to the issue of relief since I cannot differentiate the interest asserted by Allied in this proceeding from the interest asserted by the consumer intervenors in the ITT Wonder Bread case which the Commission summarily denied. I, therefore, dissent from this action of the Commission that the Wonder Bread intervention rationale is the standard which a majority of the Commission believes is applicable to intervention requests.

ORDER GRANTING LEAVE TO PARTICIPATE WITH RESPECT TO THE
ISSUE OF RELIEF

This matter is before the Commission upon the application of Allied Grape Growers for an interlocutory appeal from the administrative law judge's denial of application for leave to intervene filed January 31, 1973, and upon respondent's opposition thereto filed February 7, 1973. By order of March 15, 1973, the Commission granted Allied's petition to take an interlocutory appeal, and ordered supplemental briefs, which have since been filed by Allied (on March 28, 1973) and Heublein (on April 5, 1973).

Upon consideration of the materials before it, the Commission

has determined to grant Allied leave to participate in these proceedings with respect to the issue of relief only, either at a special hearing devoted to the issue of relief, or during such parts of the trial as may relate to the issue of relief, as distinguished from the issue of legality of the acquisition, in the discretion of the administrative law judge, as provided hereinafter.

Allied's concern with these proceedings appears to stem from its various legal relationships with respondent Heublein, United Vintners, Inc. (United), and Heublein Allied Vintners (Vintners). Allied's predecessor association (also called Allied) owned all of United, a marketing and production subsidiary with a large output of wine products. Pursuant to a contract with Heublein and other parties (referred to as the merger agreement), United was merged into Vintners, a newly formed California corporation. Allied received 18 percent of the stock of Vintners, while the remaining 82 percent of Vintners, and through it United, is owned by Heublein. The proposed order in this case would provide for divestiture by Heublein of its 82 percent interest in United.

Partial consideration for consummation of the merger agreement was the consummation of a "Supply Contract" by Heublein, Allied, Vintners, and United. In brief, the supply contract grants Allied the right to supply United's grape requirements for up to 80 years, depending upon whether it is renewed, as well as most of Heublein's California grape requirements for the same period. Heublein is forbidden under the contract from disposing of United's trademarked brands (which would, of course, diminish United's requirements for Allied's grapes). Heublein is obliged to exercise its 82 percent ownership of Vintners in such a way that one-third of Vintners' directors will be nominees of Allied, and Vintners is obliged to exercise its control of United in such a way that no fewer than 40 percent of United's directors will be Allied people.

It is clear from the foregoing, that in selling 82 percent of its marketing arm to Heublein, Allied intended thereby to retain sufficient contractual rights so that United would remain a large purchaser of grapes produced by Allied's grower-members. Allied now sees the rights and expectations with which it entered into its joint venture threatened by the Commission's complaint. There can be no doubt that a challenge to the validity of Heublein's acquisition of United threatens Allied's rights and may diminish the advantages flowing from those rights as contemplated by Allied when it entered into the joint venture with Heublein.

The administrative law judge determined that Allied had not demonstrated the requisite "good cause" justifying intervention under Section 5(b) of the Federal Trade Commission Act. The determination of whether or not justification exists to warrant intervention requires a delicate balancing process in which the interests of the applicant and the applicant's potential contribution to the proceeding must be weighed against the detriment to the public interest resulting from unduly complicating and prolonging the proceedings. In these circumstances, flexibility and precision are crucial, both in defining the precise issues as to which justification for participation exists, and in defining the type of participation that will best serve competing interests.

It is clear that "good cause" requires more than a mere showing that the applicant's contractual rights may be adversely affected by the outcome of a Commission proceeding. The determination of this issue necessarily depends on the particular circumstances of each case. In this case, applicant has demonstrated that, should the Commission determine that the acquisition is violative of Section 7 and order a divestiture of the acquired firm, applicant's important contractual rights may be abrogated and its very viability threatened. Clearly, the instant proceeding is no ordinary acquisition case.

While applicant's interests are considerable, it seems incontrovertible that as to the principal issue in this case—the question of liability, they will be represented with entire adequacy. Participation by Allied in the proceedings as to this issue would add little, while serving to delay the proceedings. It is the issue of appropriate relief as to which Allied may be inadequately represented, and as to which it may be in a position to contribute uniquely and substantially to the Commission's capacity to reach a just result.

Therefore, the Commission believes that under the circumstances, the appropriate solution to the problem is to provide that Allied may participate in the proceeding with respect to the issue of relief only, in a fashion to be determined by the administrative law judge in his discretion. For example, the administrative law judge may provide for a separate hearing devoted solely to the issue of relief, at which Allied may present witnesses and cross-examine those of Heublein and complaint counsel, or he may permit Allied to present and cross-examine witnesses throughout the course of the trial, but only to the extent that such participation materially bears on the issue of *relief*. With respect to other mat-

ters, Allied shall retain the status of *amicus curiae* as provided by the order of the administrative law judge.

For the foregoing reasons, the order of the administrative law judge is modified to provide for participation by applicant Allied