

records available for inspection by the Commission.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the form and manner in which they have complied with this order.

IN THE MATTER OF

HEUBLEIN, INC.

Docket 8904. Order, Nov. 11, 1975

Granting of joint motion to withdraw matter from adjudication for settlement purposes.

Appearances

For the Commission: *William A. Arbitman, Nelson M. Ishiyama and Jeffrey Klurfeld.*

For the respondents: *Ralph J. Savarese, John D. Wintrol, J. Wallace Adair and Robert E. Hebda, Howrey, Simon, Baker & Murchison, Wash., D.C. George J. Casper, Secretary and General Counsel, Hartford, Conn. and McCutchen, Doyle, Brown & Enevsen, San Francisco, Calif.*

ORDER GRANTING JOINT MOTION TO WITHDRAW MATTER
FROM ADJUDICATION

The administrative law judge has certified a joint motion to withdraw this matter from adjudication for settlement purposes (Rules of Practice, Section 3.25(b)). The motion is opposed by Allied Grape Growers, whom we allowed to participate in these proceedings on the limited issue of relief by our order of June 26, 1973 (82 F.T.C. 1826).

The complaint alleged that on or about Feb. 21, 1969, respondent Heublein acquired a controlling interest in United Vintners, Inc., a wholly-owned production and marketing subsidiary of Allied. United is now a wholly-owned subsidiary of Heublein Allied Vintners, Inc., in which Heublein has an 82 percent interest and Allied the remainder.

The acquisition was alleged to have violated Section 7 of the Clayton Act. The notice order would require divestiture, within nine months from the date the order becomes final, of all assets acquired by Heublein and would allow individuals or groups of individuals who were

members of Allied on Aug. 31, 1968, first option to purchase the divested property.

The proposed consent order, agreed to by complaint counsel and counsel for respondent Heublein, would exclude from divestiture certain trademarks,¹ properties and equipment and does not provide that members of Allied will have a first option.² The proposed order requires that divestiture be accomplished within two years from the date the order becomes final subject to the following proviso:

That the running of the period within which respondent must divest shall be suspended until the effect of this consent agreement and the obligations imposed on Heublein by this consent agreement on the rights and obligations of Heublein, United and Allied Grape Growers ("Allied") relating to the grape supply contract executed by said firms on February 19, 1969, and the legality of said supply contract are finally adjudicated or resolved and, *Provided, further*, however, that the divestiture period will not be suspended unless a proceeding to resolve any unresolved issues with respect to the effect of this consent agreement upon said rights and obligations and the legality of said supply contract is instituted no later than sixty (60) days after this order becomes final.

The grape supply contract purports to grant Allied the right to supply United's grape requirements for up to 80 years as well as much of Heublein's California grape requirements for the same period. The contract also provides that Allied would have a first option to purchase United's capital stock.

The proposed consent order makes no further reference to the supply contract. However, Exhibit A to the joint motion provides that, in the event the current supply agreement is held to be illegal or inoperative, alternative supply agreements for shorter periods of time and smaller percentages of requirements would become effective.

The Commission granted Allied leave to participate in these proceedings with respect to the issue of relief "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* * *." (82 F.T.C. 1826, 1828). The Commission, in granting Allied limited participation, recognized "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.³ Allied now sees the rights and expectations with which it entered into its joint venture threatened by the Commission's complaint." (82 F.T.C. at 1828).

Although the instant motion was opposed by Allied, the law judge

¹ Inglenook, Annie Green Springs, T.J. Swann and any trademark owned by respondent for a refreshment wine product.

² Respondent has, however, indicated a willingness to add to the proposed consent order a provision granting Allied a right of first refusal.

³ Heublein asserts that the supply contract was not consideration for the acquisition. However, whether or not it was consideration, the important point is that Allied claims that its contract rights could be jeopardized by a divestiture order.

concluded that the motion was "unopposed" within the meaning of Section 3.25(b) of the rules of practice, and that he was, accordingly, required to certify the motion to the Commission. The law judge, however, included in his certification a recommendation that the joint motion be denied.

We agree with the law judge's determination that he was required to certify the joint motion to the Commission. We also concur in his conclusion that the opposition of a non-party participant does not necessarily preclude acceptance of a consent order. Non-parties are permitted to participate in our proceedings upon a determination that they will make a sufficiently important contribution to our understanding of one or more issues to outweigh any delays and other added costs resulting from their participation. We see no reason why non-party participants should be afforded a right to veto a proposed agreement. We disagree, however, with the law judge's recommendation that the joint motion be denied. The judge recommended that we deny the motion for the following reasons:

1. The number of issues and the prolonged hearings that may be required preliminary to acceptance of the consent agreement and the possibility that the consent agreement may then not be accepted, in which event the entire case would still have to be tried anew, but would be substantially delayed by virtue of the interim proceedings;
2. The apparent reliance of complaint counsel and respondent in agreeing upon the consent order upon the mistaken belief that an order allowing the transfer of the property back to Allied under right of first refusal would *per se* violate the principles of the antitrust laws;
3. The inappropriateness of submission of a consent order where the meaning and effect thereof on interested parties requires subsequent adjudication with provision for delay in implementing that order of two years following finality of that subsequent adjudication. A consent order should be intrinsically clear as to its meaning and intent. This comment is particularly applicable to complaint counsel who recognize, but take no position on, issues that have been raised;
4. The approach of determining private rights as between parties as a condition precedent to considering the consent order—as opposed to considering the consent order but taking into account private rights and equities as appropriate;
5. The determination of contractual rights and obligations between Heublein and Allied as to property proposed to be kept by Heublein, and a rewriting of the contractual obligations between Heublein and Allied as to such property. These appear to be individual rights and obligations not appropriate for Commission determination.

We disagree that any hearings, prolonged or otherwise, would be required preliminary to provisional acceptance of the consent agreement. The first step in our consideration of a consent agreement is our determination whether the proposed consent order is adequate to protect the public interest. In the event that the Commission determines that the proposed order is inadequate, the agreement will be rejected and there will, of course, be no need to hear Allied's objections to the agreement.

In case the agreement is provisionally accepted, it will be placed on

the public record, and members of the public, including Allied, will have an opportunity to raise any and all objections to the agreement. At that time Allied would have an opportunity to argue that hearings were required on its claim that the proposed order is inconsistent with its rights and interests.

Other questions raised by the law judge and Allied about the merits of the consent agreement can best be considered by the Commission in connection with its determination whether to provisionally accept the agreement. Accordingly,

It is ordered, That the joint motion to withdraw this matter from adjudication be, and it hereby is, granted.
