IN THE MATTER OF

HEUBLEIN, INC., ET AL.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 8904. Amended Complaint, Nov. 16, 1976—Order, Oct. 7, 1980*

This order dismisses the Commission's November 16, 1976 amended complaint which alleged that the effect of Heublein, Inc.'s acquisition of a controlling interest in United Vintners, Inc. substantially lessened competition or tended to create a monopoly in the production, distribution and/or sale of wine in the United States. The Commission, in dismissing the complaint, held that the small lessening of actual competition resulting from the merger and the evidence in the record were insufficient to establish a violation of antitrust law.

Appearances

For the Commission: *Nelson M. Ishiyama, Laurence O. Masson* and *Mary L. Azcuenaga.*

For the respondent: *George J. Caspar,* Farmington, Ct.; *Richard E. Walton,* San Francisco, Ca.; *Lloyd W. McCormick, William H. Armstrong* and *Warren E. George, McCutchen, Doyle, Brown & Enersen,* San Francisco, Ca.; *J. Wallace Adair, Ralph J. Savarese, John DeQ. Briggs, III* and *Raymond A. Jacobsen, Jr., Howrey & Simon,* Washington, D.C.

AMENDED COMPLAINT

The Federal Trade Commission, having reason to believe that Heublein, Inc. (hereinafter "Heublein"), and Heublein Allied Vintners, Inc. (hereinafter "Vintners"), respondents herein, have violated the provisions of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18), and that the above-named respondents, Allied Grape Growers (hereinafter "Allied"), and United Vintners (hereinafter "United"), respondents herein, have further violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), through the acquisition by Heublein of a controlling interest in United, and that a proceeding in respect thereof would be in the public interest, hereby issues this amended complaint (hereinafter "complaint") pursuant to Section 11 of the amended Clayton Act and

* Original Complaint issued Nov. 27, 1972.

Section 5 of the Federal Trade Commission Act, stating its charges as follows:

I.

DEFINITIONS

1. For purposes of this complaint, the following definitions will apply:

A. *All wine.* All wine is a recognized industry term for expressing total production, distribution and/or sale statistics for table, dessert and sparkling wine. There are recognized statistical subdivisions in the wine industry, for example, imports and domestic wine or premium and standard wine. For simplification, however, the market share percentages used in this complaint are for "all wine" production, distribution or sale. [2]

B. *Table or dinner (hereinafter table) wines.* Table wines are still (non-effervescent) wine products. Their alcohol content is not over 14% by volume.

C. *Dessert or sweet (hereinafter dessert) wines.* Dessert wines are still wine products with over 14% alcohol by volume.

D. *Sparkling wines.* Sparkling wines are effervescent wine products. Their alcohol content usually ranges from 10 to 14% by volume.

II.

ACQUISITION

2. On or about September 17, 1968, as a result of negotiations commenced earlier during 1968, the Board of Directors of Allied and representatives of Heublein reached an agreement in principle whereby Heublein would acquire a controlling interest in United, a wholly-owned production and marketing subsidiary of Allied. The acquisition was approved by Allied's membership in late 1968. On or about February 21, 1969, the acquisition was completed, giving Heublein a controlling interest in United through its control of Vintners.

3. Under the terms of the acquisition agreement, Allied's members received shares of Heublein common stock valued at approximately $7,521,000, Heublein Series A preferred stock valued at approximately $20,319,000, and Heublein Series B preferred stock valued at approximately $5,000,000. Pursuant to the acquisition agreement, United was converted to a corporation with the same name and became a wholly-owned subsidiary of Vintners, a corpora-

tion organized for the purpose of this transaction. The members of Allied received all of the Class B common stock of Vintners, constituting 18% of Vintners' outstanding stock, and Heublein received all of Vintners' Class A common stock, which constituted 82% of Vintners' outstanding stock. The members of Allied formed a second non-profit cooperative association with the same name, succeeding to all assets and liabilities of its predecessor. All outstanding shares of Vintners' Class B common stock were contributed by the members to the new Allied organization.

III.

HEUBLEIN, INC.

4. Respondent Heublein is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its principal office and place of business located at 330 New Park Ave., Hartford, Connecticut. At all times relevant herein, Heublein sold and shipped its products in interstate commerce and thus it was engaged in commerce as "commerce" is defined in the Clayton Act, and was engaged in or its business affected commerce as "commerce" is defined in the Federal Trade Commission Act. [3]

5. At the time it acquired a controlling interest in United, Heublein was a major industrial corporation, a national leader in the sale of alcoholic beverages and a seller of specialty food products. Net sales for its fiscal years ending June 30 were: $1,466,095,000 in 1975; $1,283,002,000 in 1974; $1,013,115,000 in 1973; $922,190,000 in 1972; $629,845,000 in 1971; $586,295,000 in 1970; $523,799,000 in 1969 and $487,767,000 in 1968. In 1969, Heublein was the fifth largest company in the United States selling alcoholic beverages.

6. Notable among Heublein's distilled liquor products are vodka, gin, rum, tequila, Scotch and Canadian whiskey. Its Smirnoff vodka is the largest selling brand of vodka in the country and the second largest selling brand of liquor made in the United States. Heublein originated and continues to dominate the growing domestic market in the production and sale of prepared cocktails.

7. At the time of the acquisition of a controlling interest in United, Heublein was a competitor in the wine industry. Although its sales of wine produced in the United States were small, Heublein was a major wine importer. In 1967, it imported 1,100,000 gallons. This was approximately 5% of all the wine imported into the United States. Lancer's Vin Rose', produced in Portugal, was the nation's leading imported table wine in 1968 and continues to be one of the

nation's leading imported table wines. Heublein has had world distribution rights for this product since 1965. In addition, it was and is the sole importer of Harvey's Sherries & Ports, a line of dessert wines. Harvey's Bristol Cream Sherry was and is the leading imported sherry in the United States. Heublein also imported the Bertani line of wines from Italy, the Vinya and Quinta wines from Portugal and many others.

8. Since purchasing a controlling interest in United in February 1969, Heublein has expanded the company's production facilities, number of wine products and vineyard acreage. In addition, in June 1969, Heublein acquired the Beaulieu Vineyard of Napa, California and its distributor affiliate (hereinafter Beaulieu). Although small, Beaulieu is regarded as one of the nation's best wineries. For the year prior to the acquisition, it had sales of $1,589,087. Also, in 1969, half of the members of the St. Helena Cooperative of St. Helena, California agreed to divert their grapes from the St. Helena Winery to United. Further, in 1969 Heublein began the annual Premiere National Auction of Rare Wines. In addition to selling rare wines, the auction also sells "futures" in anticipated production of Heublein's wines. Finally, Heublein purchased Regina Grape Products Co. of Etiwanda, California in January 1971. Regina is primarily a producer of wine vinegar.

9. Heublein is an aggressive merchandiser and distributor of its products. It is one of the nation's major advertisers with an expenditure of approximately $35,000,000 in 1970 and $103,700,000 in 1975. In 1970 it was the second largest advertiser among companies in the liquor business. In 1975 it was the largest such advertiser. [4] Heublein's budget for its wine advertising is both substantial and expanding. Heublein distributes its alcoholic beverage products to state liquor agencies in the 18 states that monopolize the sales of such products and to approximately 600 independent wholesale distributors in the remaining 32 states, the District of Columbia and the territories of the United States.

IV.

ALLIED GRAPE GROWERS

10. Respondent Allied is an incorporated agricultural cooperative association organized, existing, and doing business under and by virtue of the laws of the State of California, with its principal office and place of business in Fresno, California. At the time of the sale of a controlling interest in United, respondent Allied was in the business of acquiring grapes in California and other states and

producing and marketing wines made therefrom through its wholly-owned subsidiary United. Said wines were sold throughout the United States. Since the sale of a controlling interest in United, respondent Allied has been engaged in the business of acquiring grapes in California and other states for sale to United for the production of wine to be sold throughout the United States. Therefore, at all times relevant herein, Allied was engaged in or its business affected commerce as "commerce" is defined in the Federal Trade Commission Act.

11. As a result of its agreements with Heublein, Allied retains an 18% interest in United through its ownership of shares in Vintners, the sole shareholder of United.

12. Allied claims the contractual right to designate 8 members or 40% of the authorized number of directors of United, whichever is greater, for whom Vintners is obligated to vote. At the present time, eight members of the United board of directors are designees of Allied.

V.

UNITED VINTNERS, INC.

13. Prior to its acquisition by Heublein, respondent United was a wholly-owned subsidiary of Allied, an incorporated agricultural cooperative association organized, existing and doing business under and by virtue of the laws of the State of California. United is now a corporation organized, existing and doing business under and by virtue of the laws of the State of California. At all times relevant herein, United has had its principal office and place of business at 601 4th St., San Francisco, California. At the time of the acquisition, United was the sole operating entity of Allied, as all of Allied's production and marketing assets were held by United. When control of United was acquired by Heublein, United continued to hold and operate substantially all of said assets. At all times relevant herein, United sold and shipped its products in interstate commerce and thus it was engaged in commerce as "commerce" is defined in the Clayton Act and was engaged in or its business affected commerce as "commerce" is defined in the Federal Trade Commission Act. [5]

14. At the time of its acquisition, United was the nation's second largest seller of wine products. Net sales for its fiscal years ending August 31 were: $96,009,189 in 1968; $91,026,634 in 1967; and $86,231,076 in 1966.

15. Prior to its acquisition, United crushed the grapes delivered by Allied's approximately 1,600 members and processed and distrib-

uted the resulting wine. It also purchased some grapes from nonmembers. Approximately 30% of United's distribution was done through its own wholesale operations. The remainder of its sales were made by about 370 independent wholesale distributors. Allied retained a portion of the proceeds from the wine sales as a part of its capital fund and distributed the remainder to its members in proportion to the market value of the grapes each had delivered. Although the acquisition has caused some change in the procedure for determining grower compensation, United's function of crushing grapes, producing wine and distributing it has remained basically unchanged.

16. At its various wineries, United produces wines of all types, including table, dessert and sparkling. Most of these products are sold under brand names owned by United, for example, Italian Swiss Colony and Inglenook.

17. Subsequent to the acquisition, Heublein has expanded United's assets. A new glass plant near United's winery at Madera, California provides most of United's bottle requirements. In addition, a new plant for producing sparkling wines has been completed at Madera. The new facility doubled United's capacity for producing such wines. Finally, Heublein has delegated responsibility for the distribution of some of its imported wines to United.

VI.

HEUBLEIN ALLIED VINTNERS, INC.

18. Respondent Vintners is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business at 604 4th St., San Francisco, California. Vintners was organized for the purpose of this acquisition and all of its stock is held by Heublein and Allied. Its sole asset is 100% of the stock of United. Through United, Vintners is in the business of producing and marketing wines throughout the United States. Since its formation, Vintners has been engaged in commerce as "commerce" is defined in the Clayton Act, and has been engaged in or its business affected commerce as "commerce" is defined in the Federal Trade Commission Act.

VII.

TRADE AND COMMERCE

19. The product markets affected by Heublein's acquisition of a controlling interest in United are wine production, distribution and/or [6]sale generally, as reflected by "all wine" statistics, and wine's three product subcategories: table, dessert and sparkling; all of which are concentrated and nation-wide in geographic scope.

20. Wine sales in the United States are in the midst of a major expansion. They have increased from 145,186,000 gallons in 1955 to 267,084,000 in 1970 and to 367,574,000 gallons in 1975. Sales of table and sparkling wines by California wineries, wineries in other states and importers have all shared in the expansion. Sales of dessert wines, however, have decreased since 1955.

21. Wine sales in the United States are dominated by two wineries. In 1967–68, E. & J. Gallo Winery (hereinafter Gallo) and United made over 40% of the wine sales in the United States. Gallo's sales were slightly higher than United's. The third largest wine seller, Roma Wine Company (hereafter Roma), had less than 4% of the market.

22. An even higher concentration exists among California wineries that produce over 70% of the wine sold throughout the United States. In 1967–68, Gallo and United's production accounted for almost 60% of the wine produced in California and commercially sold throughout the United States. Roma, the third largest California producer, had less than 5% of California's national wine sales.

23. There are major barriers to entry to any firm wishing to make a significant entrance into the wine business. New winery equipment and the grapes for wine production are expensive. In addition, the return on investment is slow. The high cost of advertising presents a second barrier to any winery wishing to sell on a national or even regional basis. Consumer appeal, created by advertising, is an important element in the marketing of wine products.

24. Distribution represents another barrier to entry. Liquor distributors are selectively licensed, if not directly controlled, by state governments. Each state, the District of Columbia and the federal government have their own laws regulating liquor distribution. Thus, a winery is more limited in the distribution channels it may select than a non-liquor company. In addition, there is always the potential that a liquor company will require an independent wholesaler to carry and/or promote a full line of its liquor and wine

products. A wine company, not possessing such leverage, is at a disadvantage.

VIII.

EFFECT OF THE ACQUISITION

25. The effect of the acquisition by Heublein of a controlling interest in United may be substantially to lessen competition or to tend to create a monopoly in the production, distribution and/or sale of wine and its three product subcategories in the United States, [7] in violation of Section 7 of the Clayton Act, as amended; and the effect of the agreement by which Heublein, Allied and Vintners undertook to eliminate the actual and potential competition between Heublein and United may be to restrain trade unreasonably, and to hinder or have a dangerous tendency to hinder competition unduly, thereby constituting an unfair act and practice in commerce, in violation of Section 5 of the Federal Trade Commission Act. These effects may occur in the following ways:

A. Actual and substantial potential competition in the production, distribution and sale of wine may have been eliminated; high levels of concentration may be increased.

B. The entry and growth of new wineries and the expansion of existing wineries may have been retarded, limited, discouraged or even prevented.

C. Independent wineries may have been retarded, limited, discouraged or even prevented from purchasing better quality wine grapes as well as vineyard acreage for their production.

D. Independent wineries may have been deprived of an opportunity to compete for distribution rights and, thereby, ultimate sales to consumers to the detriment of the general purchasing public.

E. Mergers between potential entrants and viable wineries may result from the anticompetitive pressures resulting from Heublein's acquisition of a controlling interest in United.

F. Mergers between actual competitors producing and selling wine may result from the anticompetitive pressures resulting from Heublein's acquisition of a controlling interest in United.

IX.

VIOLATION

By reason of the foregoing, Heublein's acquisition through Vintners of a controlling interest in United, constitutes a violation of

Section 7 of the Clayton Act, as amended, and the agreement among Heublein, Allied and Vintners by which the acquisition was accomplished, constitutes a violation of Section 5 of the Federal Trade Commission Act.

Initial Decision by Alvin L. Berman, Administrative Law Judge

July 2, 1979

Preliminary Statement

The Commission's amended complaint, issued in November 1976, charged that Heublein, Inc. ("Heublein") and Heublein Allied Vintners, Inc. ("Vintners") violated Section 7 of the Clayton Act, as amended, (15 U.S.C. 18), and that Heublein, Vintners, Allied Grape Growers ("Allied") and United Vintners, Inc. ("United") violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) in connection with the acquisition by Heublein of a controlling interest in United.[1]

In its complaint, the Commission defined the relevant market as "all wine" which encompassed the total production, distribution and/or sales statistics for "table", "dessert" and "sparkling" wines which, in turn, were alleged to be recognized statistical subdivisions of the "wine industry". Table (or dinner) wines were defined as still (non-effervescent) wine products with alcohol content of not over 14 percent by volume; dessert (or sweet) wines were defined as still wine products with over 14 percent alcohol content by volume; and sparkling wines were defined as effervescent wine products with an alcohol content usually ranging from 10-14 percent by volume.

The challenged acquisition was alleged to have been consummated on or about February 21, 1969. Following is a summation of the specific allegations.

Heublein is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its principal office and place of business located in Hartford, Connecticut. At all relevant times, it was engaged in commerce or its business affected commerce as "commerce" is defined in the Federal Trade Commission Act.

At the time of the acquisition, Heublein was a major industrial corporation, a national leader in the sale of alcoholic beverages

[1] The original complaint, issued in November 1972, had named only Heublein as a respondent and had charged it only with violation of Section 7 of the Clayton Act by reason of its acquisition of a controlling interest in United.

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(being the fifth largest company in the United States so engaged) and a seller of specialty food products. Among its distilled liquor products was Smirnoff Vodka, the largest selling brand of vodka in the country and the second largest brand of liquor produced in the United States. Heublein originated and dominates the growing domestic market in the production and sale of prepared cocktails. In addition to selling a small amount of wine [3]produced in the United States, Heublein was a major wine importer. Its imports included Lancers Vin Rose which was produced in Portugal and was the nation's leading imported table wine in 1968. It continues to be one of the nation's leading imported table wines. Heublein was and is the sole importer of Harveys Sherries and Ports, a line of dessert wines which includes Harveys Bristol Cream Sherry which was and is the leading imported sherry into the United States.

Heublein is an aggressive merchandiser and distributor of its products. It is one of the nation's major advertisers. It was the second largest advertiser among companies in the liquor business in 1970 and the largest such advertiser in 1975. Heublein's budget for wine advertising is both substantial and expanding. It distributes its alcoholic beverage products to state liquor agencies in the 18 states that monopolize the sale of such products and to approximately 600 independent wholesale distributors in the remaining 32 states, in the District of Columbia, and in the territories of the United States.

Allied Grape Growers is an incorporated agricultural cooperative association organized, existing and doing business under and by virtue of the laws of California with its principal office and place of business in Fresno, California. At the time of its sale to Heublein of the controlling interest in United, Allied was in the business of acquiring grapes in California and other states and producing and marketing wines made therefrom through United, its wholly-owned subsidiary. At all times relevant herein, Allied was engaged in commerce or its business affected commerce, as "commerce" is defined in the Federal Trade Commission Act.

Prior to the acquisition of the controlling interest of United by Heublein, United was a wholly-owned subsidiary of Allied. United was the sole operating entity of Allied; all of Allied's production and marketing assets were held by United. At all times relevant herein, United had its principal office and place of business in San Francisco, California, was engaged in commerce as "commerce" is defined in the Clayton Act and was engaged in or its business affected commerce as "commerce" is defined in the Federal Trade Commission Act.

At the time of its acquisition, United was the nation's second largest seller of wine products. United crushed the grapes delivered by Allied's approximately 1,600 members and processed and distributed the resulting wine. It also purchased some grapes from nonmembers. Approximately 30 percent of United's distribution was accomplished by its own wholesale operations with the remainder through about 370 independent wholesale distributors. Since the merger, United's function of crushing grapes, producing wine and [4] distributing wine products has remained basically unchanged. United produces wines of all types, including table, dessert and sparkling, and sells most of its products under brand names which it owns, for example, Italian Swiss Colony and Inglenook.

Heublein Allied Vintners, Inc. ("Vintners") is a corporation organized, existing and doing business under and by virtue of the laws of California with its principal office and place of business in San Francisco, California. Vintners was organized for the purpose of the acquisition and all of its stock is held by Heublein and Allied. Its sole asset is 100 percent of the stock of United. Through United, Vintners is in the business of producing and marketing wines throughout the United States and since its formation has been engaged in commerce as "commerce" is defined in the Clayton Act and has been engaged in or its business has affected commerce as "commerce" is defined in the Federal Trade Commission Act.

Under the terms of the acquisition agreement, United was converted from an agricultural cooperative association to a corporation with the same name, organized, existing and doing business under and by virtue of the laws of the State of California. It became a wholly-owned subsidiary of Vintners, the corporation organized for purpose of the transaction. Allied's members received all of the class B common stock of Vintners which amounted to 18 percent of Vintners' outstanding stock. Heublein received all of Vintners' class A common stock which constituted 82 percent of Vintners' outstanding stock. The members of Allied formed a second non-profit cooperative association with the same name which succeeded to all assets and liabilities of its predecessor. All outstanding shares of Vintners' class B common stock were contributed by the members to the new Allied organization. In summary, United, which had been a wholly-owned production and marketing subsidiary of Allied was reorganized as a for profit corporation with 100 percent of its stock owned by Vintners; and as a result of the various organizations and reorganizations recited in the complaint, Vintners was created as a corporation owning 100 percent of United with Heublein owning 82 percent of Vintners and Allied owning 18 percent.

Since the acquisition in February 1969, Heublein has expanded

United's assets and production facilities, the number of its wine products and its vineyard acreage. A new glass plant near United's winery at Madera, California, provides most of United's bottle requirements. A new plant for producing sparkling wines has been completed at Madera, doubling United's capacity for producing such wines. Heublein has delegated responsibility for the distribution of some of its imported wines to United. [5]

In June 1969, Heublein acquired the Beaulieu Vineyard of Napa, California ("Beaulieu"), and its distributor affiliate. Although small, Beaulieu is regarded as one of the nation's best wineries. Also in 1969, half of the members of the St. Helena Cooperative of St. Helena, California, agreed to divert their grapes from the St. Helena Winery to United. In 1971, Heublein purchased Regina Grapes Products Company of Etiwanda, California which is primarily a producer of wine vinegar.

The product markets alleged to have been adversely affected by Heublein's acquisition of a controlling interest in United are wine production, distribution and/or sale generally and wine's three product subcategories: table, dessert and sparkling, all of which are concentrated and nationwide in geographic scope. Wine sales are alleged to be in the midst of a major expansion with sales of table and sparkling wines by California wineries and wineries of other states and importers having shared in the expansion. Sales of dessert wines, however, have decreased since 1955.

Wine sales in the United States are alleged to be dominated by two wineries: Gallo Winery ("Gallo") and United. In 1967–68, these two companies accounted for over 40 percent of the wine sales in the United States with Gallo's sales being slightly higher than United's. The third largest wine seller, Roma Wine Company, had less than 4 percent of the market.

It is alleged that there are major barriers to entry to any firm wishing to make a significant entry into the wine business inasmuch as new winery equipment and the grapes for wine production are expensive and the return on investment is slow. A second barrier to any winery wishing to sell on a national or regional basis is the high cost of advertising. Consumer appeal, created by advertising, is an important element in the marketing of wine products. Another barrier to entry is distribution. Liquor distributors are either directly controlled or selectively licensed by state governments. Each state, the District of Columbia, and the federal government have laws regulating liquor distribution. Thus, a winery is more limited in the distribution channels it may select than a non-alcoholic beverage company. Further, there is the potential that a liquor company will require an independent wholesaler to carry and/or promote a full line of its liquor and wine products to the detriment of competing wineries. Therefore, a wine company not possessing such leverage is at a disadvantage.

The effect of the merger was alleged as follows:

> The effect of the acquisition by Heublein of a controlling interest in United may be substantially to lessen [6]competition or to tend to create a monopoly in the production, distribution and/or sale of wine and its three product subcategories in the United States, in violation of Section 7 of the Clayton Act, as amended; and the effect of the agreement by which Heublein, Allied and Vintners undertook to eliminate the actual and potential competition between Heublein and United may be to restrain trade unreasonably, and to hinder or have a dangerous tendency to hinder competition unduly, thereby constituting an unfair act and practice in commerce, in violation of Section 5 of the Federal Trade Commission Act. These effects may occur in the following ways.
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> A. Actual and substantial potential competition in the production, distribution and sale of wine may have been eliminated; high levels of concentration may be increased.
>
> B. The entry and growth of new wineries and the expansion of existing wineries may have been retarded, limited, discouraged or even prevented.
>
> C. Independent wineries may have been retarded, limited, discouraged or even prevented from purchasing better quality wine grapes as well as vineyard acreage for their production.
>
> D. Independent wineries may have been deprived of an opportunity to compete for distribution rights and, thereby, ultimate sales to consumers to the detriment of the general purchasing public.
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> E. Mergers between potential entrants and viable wineries may result from the anticompetitive pressures resulting from Heublein's acquisition of a controlling interest in United.
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> F. Mergers between actual competitors producing and selling wine may result from the anticompetitive pressures resulting from Heublein's acquisition of a controlling interest in United. [7]

Respondents in substance denied the material allegations of the complaint. In addition, Heublein and United alleged that for a number of years competition in several segments of the wine industry has been dominated by Gallo and that prior to the challenged acquisition, United was declining competitively and, but for the acquisition, was destined to remain an ineffective competitor.

As noted above, Allied was not named as a party in the original