

Syllabus.

IN THE MATTER OF
CREAM OF WHEAT COMPANY.

COMPLAINT, FINDINGS AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SECTION 5 OF AN ACT OF CONGRESS APPROVED SEPTEMBER 26, 1914.

Docket 890—April 11, 1925.

SYLLABUS.

- Where a corporation engaged in the packing of an extensively advertised and widely sold package cereal or breakfast food composed of purified middlings, and in the sale thereof on a uniform delivered price basis, to wholesalers and large retailers, and, from time to time, under a guarantee against decline in price, but which did not sell to mail-order houses, "collective purchasers," or purchasers buying for resale to other customers of the same class, and which occupied an important position in the market concerned; in pursuance of a policy directed to the observance of the minimum prices fixed by it for the sale of its said product at wholesale and at retail and by it based upon margins of average costs for individual stores which extend credit to customers, and maintain delivery, telephone, and similar services, and which it made known to its customers, and prospective customers, together with a request for their observance thereof, and an announcement of its purpose to refuse to supply those declining so to do, or those who themselves supplied price-cutting dealers;
- (a) Sought and secured agreements or understandings with customers and prospective customers binding them to maintain such prices, and to cooperate with it in securing the observance thereof by others;
 - (b) Solicited and secured information and reports from customers and from dealers and trade associations as to whether such customers were maintaining and disposed to maintain generally resale prices fixed by producers, and its own prices in particular;
 - (c) Solicited and secured reports from customers, of other customers who failed to observe its resale prices, and investigated and verified the same through further reports from customers, with a view to refusing further sales to those who had cut its resale prices;
 - (d) Notified other customers of its refusal to sell further to price cutters and required them not to sell the same on pain of themselves being refused further sales;
 - (e) Employed its sales agents to assist in such plan by reporting dealers who had failed to observe its resale prices, and to secure adherence thereto from customers or prospective customers, and furnished them with the names of price cutters to whom it had refused further sales and instructed them not to sell to the same; and
 - (f) Required an extra price for its products from price cutters in order to secure from them assurance of their future observance of its resale prices as a condition of reinstatement on the regular basis;

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With the capacity and tendency to (1) prevent the distribution of its product through channels through which they would flow under conditions of free competition, (2) substantially lessen and curtail price competition (a) both among its wholesale and retail distributor customers, and (b) among producers and distributors of other similar package cereal foods, and (3) enhance the price thereof to consumers, and thus increase the cost of living; and

With the effect of (1) so doing to the extent of the success of the aforementioned cooperative methods used in maintaining its said policy; (2) preventing the more efficient concerns, and chain stores from offering its product at lower prices, (3) depriving consumer customers of such stores of the benefit thereof, and (4) compelling them to pay for services neither asked nor received:

Held, That such a plan of resale price maintenance, under the circumstances set forth, constituted an unfair method of competition.

Mr. J. T. Clark for the Commission.

Davis, Severance & Morgan of St. Paul, Minn. and *Brown & Guesmer* of Minneapolis, Minn., for respondent.

COMPLAINT.

Acting in the public interest pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission charges that Cream of Wheat Company, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce in violation of the provisions of Section 5 of said Act, and states its charges in that respect as follows:

PARAGRAPH 1. The Cream of Wheat Company is now and was at all the times herein mentioned, a corporation organized under the laws of the State of North Dakota, and having its principal factory and place of business in the city of Minneapolis, State of Minnesota, and is now and for more than five years last past has been engaged in the manufacture and sale of a cereal food product known as "Cream of Wheat" to jobbers, wholesalers and retailers in various States of the United States. It causes the said product, when so sold, to be shipped from its said principal place of business in the city of Minneapolis to said purchasers at points in various States in the United States. In the course and conduct of its said business, respondent was and is in competition with other individuals, partnerships and corporations similarly engaged in the manufacture and/or sale of similar commodities of the same class.

PAR. 2. Respondent for more than five years last past has maintained and enforced in its said business and in the marketing of said product, a schedule of uniform prices fixed by it at which its

aforesaid customers have been and are required by respondent to resell its said product "Cream of Wheat" to retailers and consumers, and adopted and employed, and still employs, a system for the maintenance and enforcement of said resale prices wherein respondent sought and secured and still seeks and secures the cooperation of its aforesaid customers and wholesalers and retailers who deal in "Cream of Wheat." In the course of said cooperative enforcement of said system, respondent has employed and still employs, among others, the following means by which respondent and its distributors, customers and agents have undertaken to prevent others from obtaining the respondent's products at less than the prices designated by it:

(a) Requests its customers and dealers, both jobbers, wholesalers and retailers, to report those among their competitors who cut the resale price of "Cream of Wheat" as named by the respondent in its schedule as aforesaid;

(b) Requests its customers, jobbers, and wholesalers, to refuse to sell its product to dealers who do not maintain the resale prices so fixed by it;

(c) Refuses to sell to wholesalers and jobbers who do not refuse to sell its product to dealers who cut its resale prices;

(d) Notifies customers, jobbers, wholesalers, and retailers, in advance of shipment of its product to them, of its policy of fixing resale prices and reserving the right to refuse to sell to those who cut them;

(e) Customers, both jobbers, wholesalers, and retailers are asked by respondent, in advance of sales to them to express their attitude toward the maintenance of its resale prices, and their intention whether or not to maintain them, so that each shipment is made on an expression of intention of each customer to maintain prices.

(f) Similar inquiries are addressed by respondent to merchants who know the prospective customer, as to the latter's attitude and practice in the matter of maintenance of resale prices.

(g) Enters into informal arrangements, agreements, and understandings with various dealers, jobbers, wholesalers, and retailers, for the maintenance by them of said resale prices as a condition of opening accounts with said dealers, or of continuing to fill their orders for its said product.

(h) Employs salesmen and special agents to ascertain and report to it dealers who cut said resale prices.

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(i) Warns and threatens all jobbers, wholesalers, and retailers that it will refuse absolutely to sell its product to any and all who do not observe its resale prices.

(j) Refuses to sell its product to jobbers, wholesalers, or retailers whom it believes from information obtained from dealers, salesmen or special agents, or otherwise, are cutting its said resale prices or threatening to do so.

(k) Makes it a condition of sales of its product that the vendee shall not resell to, or divide with, competitors sales of its product, under any condition.

(l) Uses other equivalent cooperative means to enforce said system of price maintenance.

PAR. 3. The acts of respondent alleged in the two last preceding paragraphs, tend to constrain all jobbers, wholesalers, and retailers handling its product to sell the same uniformly at the prices fixed by respondent to retailers and to the public and to prevent them from selling such products and merchandise at such lower prices as they deemed would be adequate and warranted, and are adequate and warranted, by their respective selling costs and efficiency and thus tend to hinder and suppress competition in the sales of such product by jobbers, wholesalers, and retailers; respondent's said practices, therefore, tended and still tend unduly to restrain the natural flow of commerce and the freedom of competition in the channels of interstate trade.

PAR. 4. The above-alleged acts and things done by respondent are all to the prejudice of the public and respondent's competitors and constitute unfair methods of competition in commerce, within the intent and meaning of Section 5 of an Act of Congress entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER.

Pursuant to the provisions of an act of Congress approved September 26, 1914, the Federal Trade Commission issued and served a complaint upon the respondent, Cream of Wheat Company, a corporation, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act.

The respondent having entered its appearance and filed its answer herein, hearings were had and evidence was thereupon introduced on behalf of the Commission and the respondent, before John W. Bennett, an examiner of the Federal Trade Commission, duly appointed.

Thereupon this proceeding came on for a final hearing on the briefs and oral argument, and the Commission being fully advised in the premises makes this its finding as to the facts and conclusion:

FINDINGS AS TO THE FACTS.

PARAGRAPH 1. A stipulation as the facts, in lieu of testimony (Commission's Exhibit 1),¹ was entered into by counsel for the Commission and for the respondent, providing for offering by either party of testimony or other evidence of facts in addition to that therein stipulated, and testimony or evidence supplementing or explaining the same subject matter. Such additional, supplementary, and explanatory evidence was given in the form of testimony and exhibits chiefly, which make up the bulk of the record in this case. The following findings are based on all the evidence named.

PAR. 2. The respondent, Cream of Wheat Company, since 1897 and during all the times herein mentioned, has been, and still is, a corporation duly organized and existing under the laws of the State of North Dakota and a citizen of that State, and is, and has been for over twenty years last past, duly licensed and qualified in accordance with the laws of the State of Minnesota, to transact business in the State of Minnesota, and during the past twenty years has had, and still has, its principal place of business in the city of Minneapolis, Minn.

PAR. 3. The respondent, during all the times herein mentioned, has been, and still is, engaged exclusively in the business of packing and selling and distributing to its customers throughout the United States and in foreign countries, under the name of "Cream of Wheat," purified middlings, which said packing and selling is all done at and from the plant of respondent located in Minneapolis (except a plant at Winnipeg, which supplies the Canadian trade). Respondent and its distributors generally are engaged in interstate commerce in the sale of Cream of Wheat among the States of the United States and between the United States and foreign countries. Shipments to purchasers are made either directly from respondent's plant in Minneapolis, or from warehouses situated at other places in the United States, in which warehouses quantities of Cream of Wheat are kept by respondent, and from which warehouses shipments to purchasers are made under its direction.

Such warehouses are either private or public warehouses receiving shipments from respondent and storing the same, and making shipments therefrom on the order of respondent and at the usual warehouse charges for such purposes, which said charges are paid by re-

¹ Exhibits not published.

spondent. Such warehouses so used by respondent are located in about 40 cities scattered throughout the United States.

PAR. 4. Respondent employs no traveling salesmen. Respondent has at certain localities in the United States, soliciting sales agents, through whom it receives orders for Cream of Wheat, which orders are taken subject to acceptance by respondent and if accepted, are filled by respondent, or under its direction, either from its stock of Cream of Wheat in Minneapolis, or from the stock in one of its warehouses. Such agents, at the time of this stipulation and for varying periods prior thereto, are:

Lamont, Corliss & Co., 131 Hudson Street, New York City.

C. G. Whitcomb, 20 East Lake Street, Chicago, Ill.

Spohn & Thamer, Denver, Colo.

Spohn & Clark, Salt Lake City, Utah.

Cooney Brokerage Co., Billings, Mont.

The Johnson Leiber Co., Boise, Idaho.

Hodgson Brothers, Commission Company, Spokane, Wash.

Ariss, Campbell & Gault, Seattle, Wash.

Ariss, Campbell & Gault, Tacoma, Wash.

Ariss, Campbell & Gault, Portland, Oreg.

C. E. Cumberson Co., 25 Spear Street, San Francisco, Calif.

Bradley, Kuhl & Co., 849 Traction Avenue, Los Angeles, Calif.

L. H. Kassel & Co., Fort Worth, Tex.

With the exception of C. G. Whitcomb, none of said sales agents are engaged exclusively in the sale of Cream of Wheat. Lamont, Corliss & Co. are sales agents for the marketers of 10 different lines, in some of which their business exceeds that done by them in Cream of Wheat.

PAR. 5. The sales and distributing of Cream of Wheat by respondent in its business as above described, extend to all the States of the United States, and all territory within its jurisdiction, and, to some extent, to foreign countries. Respondent has sold, and now sells, principally to wholesalers or jobbers. The number of customers to whom it sells is approximately 4,500, which include nearly the entire number of wholesalers of cereal products and groceries in the United States. Cream of Wheat is sold at retail, that is, to the ultimate consumer, by nearly all retailers of groceries and cereal products in the United States, estimated by respondent to number over 300,000. The wholesalers or jobbers to whom respondent sells, resell, in turn, to retailers within the radius of their respective trades. Sales and deliveries are made by respondent at a uniform delivered price to such purchasers, f. o. b. cars at the place of purchaser's business.

PAR. 6. Respondent has sold, and now sells, direct to certain large retailers whose business enables them to buy in wholesale or carload lots, at the prices and upon the terms required by respondent from wholesalers. Among such retailers are certain so-called "chain store organizations." A "chain store organization," as here intended, is an individual, corporation, or partnership owning or operating a group of retail stores.

PAR. 7. Respondent refuses to sell to "collective purchasers," or buying pools of independent stores, as distinguished from "chain stores." Respondent refuses to sell to any customer who buys for the purpose of reselling to other customers of the same class, *e. g.* wholesalers, and respondent refuses to sell to a purchaser in carload lots and at carload prices, who buys for the purpose of dividing such shipments with other customers, or for the purpose of having "drop" shipments—that is, a part of a carload delivered at one point and another part of the same carload at another point. Respondent does not sell to mail-order houses. These practices described in this paragraph have been in force for the past 20 years.

PAR. 8. Respondent markets Cream of Wheat in unit packages of 28 ounces net per package, which are packed in wooden boxes, or cases, 36 packages to the case; and in making sales, respondent sells in either carload lots or less, delivered f. o. b. cars at customer's city, terms 30 days net or one per cent discount for cash, 10 days from date of invoice.

The average annual sales by respondent in the United States during the past 10 years have been about 600,000 cases. In the year 1921, they were approximately 675,000 cases. The gross sales receipts by respondent for the 10 years 1912–1921 were as follows:

1912, \$2,645,855; 1913, \$2,810,560; 1914, \$2,897,424; 1915, \$2,982,776; 1916, \$3,171,027; 1917, \$2,871,845; 1918, \$2,725,710; 1919, \$4,964,142; 1920, \$5,354,494; 1921, \$5,785,918.

PAR. 9. The unit packages of 28 ounces each, in which respondent sells its product, consist, besides the contents of Cream of Wheat, of paper-box containers or cartons, on each of which is the name "Cream of Wheat," together with the copyrighted illustration used by respondent in connection with its business, and the name of respondent and its place of business, namely, Minneapolis, Minn. The name "Cream of Wheat" is the peculiar and sole trade name used by respondent in its said business, and respondent has acquired and is the sole owner of the trade-mark of the said name "Cream of Wheat," and of the copyright covering the printed illustration shown on such carton in which said Cream of Wheat is packed, and respondent has used the said name and carton in its said business for

more than 20 years last past. The wooden boxes or cases in which said unit packages are sold are marked under the trade name of "Cream of Wheat."

PAR. 10. "Purified middlings" are the granules of wheat produced at different stages in the process of crushing the wheat berry in the manufacture of flour, separated by screening and wind from impurities and innutritious parts. About 74 per cent of the wheat made into flour passes through the stage of purified middlings. If more than 6 per cent of such purified middlings is drawn off, the quality of the flour is deteriorated. Of the total volume of purified middlings commercially available, a small fraction, approximately 5 per cent, is used by the respondent for its "Cream of Wheat." The purified middlings from hard wheat grown in the Northwest is used for Cream of Wheat and also for competing brands.

PAR. 11. Respondent buys in the open market certain quantities of purified middlings of such quality and size and color as accord with the standard of selection fixed by respondent for the uses for which Cream of Wheat is used, and packs and markets the same under its said brand of "Cream of Wheat." Such "middlings" so marketed by respondent is first cleaned by it of dust and extraneous matter by wind and gravity, and in passing through the machinery for such purpose and to deliver the same into the packing cartons, such "middlings" is subjected to heat not exceeding 180° F., by which impurities, in the form of animal life are diminished or eliminated. After such cleaning, the purified middlings is packed in cartons, which are sealed tightly to prevent or diminish deterioration through atmospheric changes or by the entrance of animal life such as weevils.

PAR. 12. Cream of Wheat, as sold by respondent, has acquired with the public a wide and favorable reputation, and the consumption has steadily increased in this country and foreign countries. It is used, after cooking, by the individual consumer as breakfast food, and in other ways.

PAR. 13. Purified middlings, as a cereal food, is sold under the name of "purified middlings" and also, in the United States, in various localities, in package form under various trade-marks or names, in competition with Cream of Wheat in interstate commerce.

Intrinsically, other brands of cereal foods prepared from purified middlings are as wholesome and as valuable as a food as "Cream of Wheat"; in fact, they are essentially the same except as to name.

PAR. 14. Respondent has always conducted, on a very large and expensive scale, a system of national advertising of Cream of Wheat in magazines and periodicals of the widest circulation such as the Ladies Home Journal and the Saturday Evening Post,

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PAR. 15. Respondent sells, it is roughly estimated, about 40 per cent of the package cereal foods prepared from purified wheat middlings and sold in the United States by concerns who advertise nationally. Such firms which advertise nationally sell the great bulk of package cereal foods prepared from purified wheat middlings.

PAR. 16. Sales and deliveries of Cream of Wheat are made by respondent at a uniform delivered price at any given time, or at a price which makes the cost of Cream of Wheat to all purchasers the same, f. o. b. cars their places of business, no matter at what points within the United States the places of business of such purchasers may be located. From September, 1916, to May, 1919, however, respondent charged higher delivered prices for Cream of Wheat delivered at points in the Pacific Northwest than for that delivered at points east of the Rocky Mountains.

PAR. 17. Excluding these exceptional figures for the Pacific Northwest, respondent's prices to wholesalers and the resale prices which it requested them to observe have been as follows:

	In car-load lots	In less than carload lots	Minimum resale price requested
Prior to Sept. 14, 1916.....	3.95	4.10	4.50
Sept. 14, 1916, to Apr. 15, 1917.....	4.75	4.90	5.40
Apr. 15, 1917, to May 11, 1919.....	5.05	5.20	5.75
May 11 to Nov. 22, 1919.....	6.65	6.80	7.50
Nov. 22, 1919, to Dec. 16, 1921.....	8.00	8.15	9.00
Dec. 16, 1921, to Dec. 16, 1922.....	6.65	6.80	7.50
Dec. 16, 1922, to —.....	6.05	6.20	6.90

PAR. 18. When it sells direct to retailers, respondent does so on the same terms as to payment and at the same prices which at the same time apply in its sales to wholesalers.

In the case of retailers to whom respondent sells direct, when the resale price per case (wholesale) was \$4.50 the minimum resale price per package was 14 cents.

When the resale price per case (wholesale) was \$7.50, the minimum resale price per package was 25 cents.

When the resale price per case (wholesale) was \$9, the minimum resale price per package was 30 cents.

PAR. 19. The term "resale price" as used in these findings means the resale price named by respondent, and "price cutting" and "price cutter" mean respectively selling below and sellers below such resale prices.

PAR. 20. Respondent's prices and resale prices were regularly communicated to customers and prospective customers in typewritten or

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mimeographed form, in connection with inquiries and orders from new customers and upon change of its prices by respondent.

PAR. 21. Soon after its organization in 1897, respondent adopted and has since maintained a policy of fixing and enforcing minimum resale prices at which Cream of Wheat should be sold by its vendees, and, among the means adopted by it to that end, it has advised its agents and customers and prospective customers from time to time of its resale prices and requested of its customers and prospective customers that they observe such resale prices in all their sales, declaring its purpose to refuse to accept or fill any further orders from those who should sell at prices below said minimum, or from those who supplied dealers who so cut its resale prices.

Respondent has informed itself as to cutting of its resale prices through advertisements and lists of prices put out by customers, which have come to its attention, and has solicited and been furnished in response with reports or information of cutting of its resale prices by customers, (a) from other customers, (b) from other dealers or associations of dealers, and (c) from respondent's sales agent. Where it learned by such means that customers were cutting its resale prices, or selling to others who were, it has been its policy to refuse further sales where it deemed such action necessary to prevent further cutting of its resale prices. Respondent, prior to 1913, entered into agreements and contracts with customers, by which in terms, they bound themselves to maintain its resale prices; and since it has at times sought and received from customers and prospective customers assurances of the observance of its resale prices amounting in substance to agreements or understandings to that end.

PAR. 22. Under date of January 25, 1913, respondent issued to the trade a letter, stating its purpose to be "to obviate any misunderstanding" as to its position "with regard to the question of maintenance of prices on our product" and to place before all its customers "a statement of our position which shall control as to all future dealings." It proceeds to "notify all our customers" that it hereby withdraws and rescinds all orders, rules, directions and requests, and (while denying the existence of any agreement, express or implied) we also withdraw and rescind, in so far as any such exist, all agreements, express or implied, actual or constructive, now or heretofore existing between this company and its customers with reference to the maintenance of prices by such customers, and that sales of Cream of Wheat shall not be affected by previous communications on that subject. It states that in the future, the respondent shall not sell to consumers, to retailers, or to chain or department

stores, but exclusively to wholesalers; that it shall not require of them any agreement to "maintain any price which we may establish or observe any rules which we may see fit to make. We do, however, request that they shall maintain, in their sales to their retail customers, such prices as we deem to be to the best interests of the consumer and to our own business and to the general trade," and that they would observe such rules as to sales as respondent may announce. Respondent warns that by this it does not intend to waive its right to refuse sales to any customer who fails to comply with any rule or request made by it, whose infringement it deems prejudicial to the interests named above, and that it will exercise such right so far as it may lawfully. It disclaims any purpose to create any restraint of trade or monopoly, but to protect the consumer from them from others.

It states that "in the case of a perishable product like Cream of Wheat, it is essential to the protection of the consumer" and its business that it be kept moving through the greatest possible number of dealers, to conserve the reliance of the consumer on its purity and freshness. It therefore "prohibits, so far as we may, practices which prevent" such distribution. "The prices fixed by us" are fair, it declares to consumer and dealers. "A wholesaler who buys in abnormally large quantities and cuts the price," it declares, creates unfair competition and acquires a monopoly, defeats proper distribution and causes stale goods to be offered for sale. "The only way," the letter concludes, to protect the value of its product and business to itself and the trade, "is by discouraging, through the announcement and enforcement of proper rules and requests, all practices by dealers which are repugnant to the object which we seek to attain."

PAR. 23. Respondent's general admissions of its practices relating to resale prices (Stipulation, Commission's Exhibit 1, paragraphs 17 and 19) are divided into two statements, paragraphs 17 and 19, purporting to cover its practices prior to and since January, 1913, the date of the letter, abstract of which appears in paragraph 22 hereof, as a dividing line. The stipulation contains the provision in paragraph 17 thereof: "Nothing contained in this paragraph 17 shall be deemed an admission by the Commission that the policy and practices as therein stated as existing prior to January, 1913, have not continued thereafter." Paragraph 17 of the stipulation includes the following: "Respondent also, prior to 1913, entered into agreements and contracts with customers, by which, in terms, they bound themselves to maintain its resale price." Paragraph 19 of the stipulation, being respondent's admissions as to its resale price practices

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subsequent to January, 1913, does not include agreements. It substantially repeats the other practices set out in paragraph 17. As these practices continued after January, 1913, so, the evidence shows, respondent did not abandon altogether agreements in substance with its customers to observe its resale prices, though it modified them in form. It employed such means of enforcing its resale prices, from time to time, as are more particularly set forth in the following findings.

PAR. 24. Early in 1921, the National Chain Store Grocers Association opened negotiations with the Cream of Wheat Company looking to sales of Cream of Wheat direct to its members, conducting retail stores. Paragraph 20 of the Stipulation (Coms. Ex. 1) covers the history of these negotiations, including correspondence. The letter of respondent's president to the association's secretary, dated February 28, 1921, in reviewing respondent's past dealings particularly with chain stores, contains references to "personal" agreements, "explicit understanding," "express understanding," "promises," by customers, past and existing, subsequent to 1913, to observe respondent's resale prices, on the keeping of which continuance of sales to them by respondent depends. In the letter of February 25, 1921, President Mapes makes the respondent's policy as outlined by him apply to wholesalers as well: "In other words we have continued to sell the American Stores Company and the National Grocery Company because they have kept their promises with regard to the resale price. We have refused to sell the Great Atlantic and Pacific Tea Company because they did not keep their promises. The same thing applies to wholesale grocers who are in no way connected with the retail trade, either directly or indirectly. We have not sold Reid-Murdock & Company of Chicago a case of goods for five or six years, for the reason that they refused to comply with our wishes with regard to resale prices to their retail customers, and we are frequently obliged to refuse sales to exclusive wholesalers for the same reason." Respondent's president states, in the same letter, "There is no reason, as far as the writer can see, why we might not be willing to sell concerns such as, for example, are represented by the officers whom you show on your letterhead, if we could be assured that, notwithstanding the fact that on account of their buying in carload quantities, they were not taking advantage of this to resell in their retail stores at a price lower than the ordinary retailer not connected with any chain store proposition, can afford to sell. Unfortunately, however, as was evidenced particularly in the case of the Great Atlantic and Pacific Tea Company, we can not always trust to their promises. They are by no manner of means the only sinners in this respect."

In his letter of March 26, 1921, President Mapes states that the only reason he saw why respondent might not sell to the chain stores was "the question as to whether or not we could depend on these chain stores to maintain what we would consider an adequate retail price on our goods, which at present we would say would be 30 cents a package." Distinguishing between chain stores constituting "an organization owned and controlled by one company" having a large number of retail stores "absolutely under their control," and loose associations of retail stores to enable its members to buy at wholesale prices, President Mapes states: "The second class, I can not see that it would be desirable for us to sell under any circumstances. The first class, such as you represent, we might be willing to place on our list of customers, always providing that we could be satisfied that they would absolutely maintain our resale retail price, in all of their stores. The difficulty, however, with this would lie in the fact as to whether or no the National Chain Store Grocers' Association could control their members. As you say, we are selling some of your members, and this is for the reason that, in as far as we know, they live up to their agreements. We do not sell, for example, the Great Atlantic & Pacific Tea Company, because they did not live up to their agreements, and we have no reason to suppose that their word is worth anything more now than it was several years ago." He then states: "Should we sell to members of your association, it would have to be on identically the same basis as we now sell to the wholesale grocery trade—namely, we do not exact any contract or make any agreements of any kind or nature whatsoever, with the wholesale grocer to whom we sell our goods, and after buying any quantity of our goods we do not question his right to resell it at any price which he may see fit. We do, however, suggest that, in the general interest of the trade, we consider it advisable that he should maintain a resale price," etc., stating terms of sale, etc. He then states the policy of the company to refuse further sales to dealers who cut respondent's resale prices, also to advise other customers of such refusal and cut off any customer who thereafter sells to such resale price cutters.

The correspondence in evidence between the respondent and the National Chain Store Grocers' Association and members of that association, looking to direct selling to the latter, read in the light of these opening letters of the series, show that respondent was operating in some cases on the basis of agreements to maintain resale prices, and that respondent's letters look to and result in agreements or understandings with its prospective customers for the maintenance of its resale prices, notwithstanding the express disclaimers in them

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of contracts or agreements; particularly in view of their repeated statements of the condition of sales, e. g., "always providing that we could be satisfied that they would absolutely maintain our resale retail price, in all their stores" (letter of March 26, 1921); "provided we can be satisfied that your company, including all of your branch stores, without exception, can see its way clear to comply with our request as to the price at which you will resell Cream of Wheat." etc. (Letter of April 22, 1921.)

The policy stated in respondent's letters is declared therein to apply to its dealings generally, that is, with wholesalers as well as retailers: "Bear in mind I am outlining no different method of procedure with any member of your association, than we follow with all of the customers which we now have on our books, which run into a great many thousands." (Letter of March 26, 1921.)

In accepting business with the National Association's members, respondent relied on their control of their unit stores in the matter of maintaining its resale prices, and their implied assurance that such control would be exercised to secure such observance. If respondent did not look to an agreement or understanding to that end, it could have merely exercised its right to cut off individual members of the chain organization which cut its resale prices. The letters of respondent to individual chain store organizations, repeating its statement to the national association of the condition as given above, of its doing business, look to assurance in advance or agreement, for the observance of its resale prices. The responses of individual chain store organizations, in accepting the offer of sales with the conditions as to observance of respondent's resale prices named in respondent's letters to them, show they understood them as calling for an agreement and that they responded on that basis. Respondent acted on such responses. Besides the cases referred to in paragraph 20 of the stipulation (Commission's Exhibit No. 1), the correspondence with Larkin & Co. (Commission's Exhibit No. 40) and with James Butler, Inc. (Commission's Exhibit No. 110) are instances of respondent's dealings with chain stores as to agreements or understandings, down to the time of the complaint herein, and later.

Illustrating more fully the character of the transactions between respondent and members of the National Chain Store Grocers' Association, following the negotiations between respondent and that organization described above and fully set out in paragraph 20 of the Stipulation, Commission's Exhibit No. 1, respondent on April 22, 1921, addressed a letter to Charles M. Decker & Bros., Thrift Stores, Inc., Orange, N. J., acknowledging their letter requesting

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that that company be again put on respondent's list of customers, and stating its terms as follows:

We will be very glad to add your company to our list of customers to whom we sell Cream of Wheat direct, provided we can be satisfied that your company, including all of your branch stores, without exception, can see your way clear to comply with our request as to the price at which you will resell Cream of Wheat, as well as in certain other respects which we will enumerate further on in this letter.

As you know, in selling our product to our wholesale customers, we do not in any way make any agreement with them or attempt to make any agreement with them, as to the price at which they shall resell Cream of Wheat to their retail trade. In selling them, however, we request that in reselling Cream of Wheat to their retail trade they do so at a price not less than the price we request of them.

In the event a wholesale customer does not see fit to comply with our request as to the price at which he shall resell Cream of Wheat to his retail trade, we exercise the right which we legally have, and refuse to sell him any further quantity of our product.

In the case of your company, selling direct as it does, to the consumer, were we to put you on our list of customers for the direct sale of Cream of Wheat, it would be with the request that you resell to your consumer trade at a price, which at present would be not less than 30¢ per package.

This would apply, without exception, to each and every one of your branch stores. If any of these branch stores, for any reason whatever, sold Cream of Wheat for less than our requested price, we would certainly refuse to sell that branch, and all the other stores of your company, any further quantity of Cream of Wheat.

And, in the event we did so refuse to sell your company Cream of Wheat, we would undoubtedly so advise all the other companies in your association, as well as the wholesalers in your territory. And in advising them of our refusal to sell you, we would request them not to resell Cream of Wheat to you.

In the event they did sell you Cream of Wheat, contrary to our request, we would refuse to sell them further quantities of our product.

As stated above, if we can satisfy ourselves that our requests as stated above will be complied with, we will be very glad to sell Cream of Wheat to you direct. We are willing to do this in the case of companies such as yours because, through stock ownership of your branches, you can absolutely control the selling policy of those branches if you wish.

In the event we sell you Cream of Wheat direct, our price to you, at present, would be \$8.00 per case in car lots (minimum car 500 cases) or \$8.15 per case in less than car lots; terms 30 days net or 1 per cent discount if invoice is paid within 10 days of date of invoice.

The above car-lot price is the price delivered f. o. b. cars any regularly established commercial freight delivery station, where car-lot shipments are regularly received. The less-than-car-lot price is the price delivered f. o. b. warehouse door in any town or city where we have warehouse stocks, or f. o. b. any regularly established commercial freight delivery station in a town or city in which your company has a branch store—and in not less than five-case lots.

Under no circumstances do we make drop shipments of our product.

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In selling you Cream of Wheat it would be on the understanding that your purchases were for the sole use and sale from your own branch stores, and not to be resold or divided with your competitors, under any conditions.

We have gone into this matter at length, as, in the event we make a connection with your company, we want you to be thoroughly familiar with our selling policy. This policy we have maintained for a good many years, and is one we intend to maintain so far as we legally can in the years to come.

We thank you for your letter regarding this matter and shall await with interest your further favors.

Yours very truly,

CREAM OF WHEAT,

(Signed) By D. F. BULL, *Treasurer*.

This letter was repeated in identical terms on September 21, 1921.

Letters practically identical in terms with the above letter of April 22, 1921, were addressed by the respondent, in response to applications by members of the National Chain Store Grocers' Association for direct sales to them of Cream of Wheat, to:

Kroger Grocery and Baking Company, Cincinnati, Ohio; Pender-Dilworth, Inc., Norfolk, Va.; Sanitary Grocery Company, Inc., Washington, D. C.; The Fisher Brothers, Cleveland, Ohio; H. C. Bohack Company, Inc., Brooklyn, N. Y.; and others, representing together several thousand retail stores.

In its letter to the Pender-Dilworth Company, Inc., of Norfolk, Va., under date of January 12, 1922, stating its terms as set out in full in the letter to Decker Brothers above, the respondent added: "We are not shipping the order for 100 cases until we hear from you as we wish to be satisfied that your ideas with regard to the resale of our products at retail agree with our views before we place you on our list of customers for the direct sale of Cream of Wheat." The Pender-Dilworth Company, telegraphed to respondent under date of January 12, 1922: "Ship immediately 100 cases Stop Will comply with all conditions stop Yours 12 instant."

In reply to the letter of respondent of the form above indicated addressed to it under date of August 11, 1921, the Sanitary Grocery Company of Washington, D. C., replied under date of August 15, 1921:

Note all that you have said. Have read your letter carefully. We simply "saw wood" and do business as we have done in the past.

The respondent replying under date of August 26, 1921, writes:

We thank you for your letter of the 15th and are glad to note that your ideas coincide with ours with regard to the sale of Cream of Wheat, as indicated in our letter of August 11th.

Respondent under date of August 29, 1921, wrote to its sales agents, Lamont, Corliss & Company, as follows, referring to the Sanitary Grocery Company:

Their reply has been received and they agree to conform to our wishes. You may therefore accept their orders with the terms as stated in our letter of August 11th, and we trust you will be good enough to have your representative watch these people to see that they maintain a sale price in their retail stores at 30¢ per package.

In response to a letter similar to that of April 22, 1921, quoted above, and concluding: "We thank you for your order and shall await with interest your further favors," Albrecht & Company, of Akron, Ohio, replied under date of May 24, 1922: "If your price is reduced or advanced at any time in the future, if you will advise us your minimum price we will be glad to conform to it."

Respondent replied to this letter on May 31, 1922:

Please understand that we do not want any agreement with you, or anything like an agreement, as to how you shall resell our product. We simply reserve the right to refuse to sell you any more of our product in the event you did not see fit to comply with any request which we make of you, in connection with the sale of our product.

* * * * *

If you still wish us to send you 25 cases, of Cream of Wheat, kindly wire us at our expense, and we will immediately forward your order.

Under date of October 5, 1921, the H. C. Bohack Company, Inc., of Brooklyn, N. Y., a member of the National Chain Store Grocers' Association, applied to the respondent to be put on its list of customers whom it sold direct, and the respondent requested its sales agents, Lamont, Corliss & Company, under date of October 11, 1921, to give it a report on the applicant, which was done, and resulted in the respondent's addressing a letter setting out its terms as quoted above, in somewhat abbreviated form. On November 1, 1921, the Bohack Company, replied:

We are in receipt of your letter of October 26th, and we agree to live up to your requirements regarding the sale of Cream of Wheat.

Adding shipping directions. On November 7, 1921, the respondent wrote the Bohack Company, disclaiming agreements as to resale prices, and stating that Bohack Company's order of 500 cases of Cream of Wheat would be promptly filled.

In response to the circular letter (April 22, 1921, quoted above), the Larkin Co. of Buffalo, N. Y., wrote under date of September 15, 1921:

We have your favor of September 10th referring to our order No. 102.805 for 25 cases of Cream of Wheat. We wish to assure you that we will abide by any suggestion from you as to the retailing of Cream of Wheat and we are quite sure you will not have any trouble on any price cutting from us.

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On September 21, 1921, respondent sent its agents, Lamont, Corliss & Company, a copy of Larkin Co's. letter of September 15, asking its agents to see that its order was filled. And respondent on the same date wrote the Larkin Co. that "We will be very glad to receive any orders for Cream of Wheat with which you may see fit to favor us." (Commission's Exhibit No. 40.)

In response to application for direct sales of Cream of Wheat, respondent wrote James Butler, Inc., on February 20, 1922, a letter similar to those cited above, stating its terms for selling to chain stores and concluding: "We thank you for your letter regarding this matter, and shall await with interest your further favors."

On February 24, 1922, James Butler, Inc., wrote: "We are in receipt of your favor of the 20th inst., and contents carefully noted. We are fully in accord with your suggestion that the retail selling price of this product be maintained, which at present is 25 cents per package to the consumer and which we agree to carry out in all our branch stores."

On February 27, 1922, respondent wrote Butler, Inc., disclaiming any agreement as to resale prices and thanking Butler, Inc., for its order and indicating prompt shipment. (Commission's Exhibit No. 110.)

The foregoing propositions as to agreements are sustained by the evidence of this correspondence (Stipulation, paragraph 20) as a whole, notwithstanding the disclaimer of any agreement contained in the letters by respondent.

PAR. 25. The consideration referred to in respondent's letters, that members of chain stores, "can not resist the temptation to cut the resale price below a figure which the retailer not connected with a chain store but buying at the retail price directly from the wholesaler, can afford to sell it," emphasizes the need which respondent felt of being assured in advance that the chain stores would not cut its resale prices, and the importance to it of securing some binding agreement or assurance in order to keep them in line. That those resale prices requested of retailers involved an inordinate profit to chain stores which paid no wholesalers' profits, emphasizes also the suppression of competition involved by respondent's making their observance a condition of doing business with these chain stores.

PAR. 26. In its correspondence with customers, or with prospective customers, on the subject of resale prices, respondent generally has accompanied its statement of its policy and practices in relation thereto, as elsewhere set forth in these findings, with declarations in various forms to the effect that it did not make or wish any agreement that the customer addressed would maintain its resale prices, or anything resembling such an agreement.

The disclaimers by respondent in this correspondence or elsewhere of seeking or entering into agreements for the maintenance of its resale prices, must be judged in the light of the foregoing and other evidence of agreements hereafter cited. The correspondence referred to was addressed by respondent to prospective customers and its terms, as reasonably understood, must be taken to be the basis of their response and action and so intended by respondent. Court decisions had advised respondent that such agreements were unlawful, and disavowal of them and avoidance of formal agreements was expedient. But the question remains whether in fact such agreements existed, and we find that the evidence cited here and elsewhere in these findings establish that such agreements or understandings between respondent and customers for the maintenance of its resale prices were resorted to by respondent.

PAR. 27. Respondent's witnesses, Frederick Clifford and Daniel F. Bull, in their testimony, deny the correctness of the statement of the policy and practices of respondent in regard to its resale prices as set out by the letters of President Mapes discussed in the preceding paragraph and included in the Stipulation, Commission's Exhibit No. 1, paragraph 20, although Bull repeats much of their statements in letters to chain stores signed by him.

Emory Mapes was one of the original organizers and stockholders of respondent, and secretary and co-manager of its business and sales from 1900 to January, 1919, when he became sole general manager, including sales, and president. He conducted the business as general manager and president until his death in October, 1921, prior to the taking of testimony herein.

Frederick Clifford, respondent's witness, was also one of the organizers and original stockholders of respondent and treasurer and co-manager with Mapes of the business and sales department down to the time of Mapes becoming general manager and president in January, 1919, when he ceased to hold any office or have any part in the management. Clifford's separation from the management, according to his testimony, was due to a personal misunderstanding with Mr. Mapes. Clifford subsequently, in June, 1921, became a director, after two and one-half years, but held no executive capacity whatever.

Daniel F. Bull became treasurer in February, 1919, and was assistant manager under Mr. Mapes. He became general manager in November, 1921, after the death of Mr. Mapes and continued as such, acting in such capacity at the time of the hearing.

Clifford could not speak from knowledge acquired from any personal participation in the management of respondent's sales or

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correspondence after January, 1919. Bull had no connection with the company prior to 1919.

PAR. 28. In dealing with its customers generally, other than chain stores, in cases where cutting of its resale prices had come to its attention through reports of competing customers or respondent's agents or otherwise, respondent, in taking measures to correct such price cutting, while generally disclaiming a desire for agreements, so presented its policy as to resale prices that, as a fact, customers responded with assurances of their intention to adhere to its resale prices, and sales have continued or been resumed on that basis. This is illustrated by the following cases:

On March 2, 1921, respondent telegraphed S. S. Pierce Co. of Boston:

In reply to your wire of even date, will say, our New York agents advise us that you declined to maintain what we consider a fair resale price. We have consequently instructed them to decline your further orders until such time as this matter can be satisfactorily adjusted, if possible. We are writing you to-day fully.

On March 3, 1921, Lamont, Corliss & Co. of New York, respondent's sales agents in that territory, telegraphed respondent:

Referring to Mr. Mapes' letter of February 21, Pierce Company have restored price and Mr. Eaton, their buyer, has satisfied us that they intend to abide by your terms without exception. May we release orders for 50 cases sent you February 26th.

On the same date respondent telegraphed Lamont, Corliss & Co.:

Basing our action upon statements contained in your wire March 3, you may sell S. S. Pierce Co. until further advised.

On March 2 respondent advised S. S. Pierce Co. that Lamont, Corliss & Co.'s agent had no authority to make any promises for respondent. (Res. Exs. 10-13.)

Respondent on January 24, 1921, after acknowledging an order for five cases of Cream of Wheat from Hi Wo & Co., Benson, Ariz., wrote:

We should like to make shipment, but we find that on April 22, 1919, we wrote you that you had been complained against by other dealers for cutting prices. On July 26 we wrote you calling your attention to our letter of April 22 and asked for a reply thereto. This was a year and a half ago and we have not heard from you since. Before making shipment of this order to you we should like to have your positive assurance that you will respect our terms, remitting promptly within 30 days from date of invoice, and that you will also respect our request that these goods be sold at a price of not less than \$9 per case. Under this assurance we will take the matter up with you further.

Under date of January 29, 1921, Hi Wo & Co. wrote respondent:

We agree to your terms as stated in your letter of January 24, 1921. Please ship us the five cases of Cream of Wheat.

On February 8, 1921, respondent acknowledged Hi Wo & Co.'s letter of January 29, disclaiming any attempt to make an agreement as to resale prices, and stating its request for the observance of the same and its right to refuse to sell if not complied with.

On August 11, 1922, respondent addressed a letter to 13 wholesale grocers of San Antonio, Tex., and 31 wholesale grocers at other Texas points, referring to information it had of price cutting in those localities, and disclaiming any desire for an agreement for their maintenance, stated:

Believing, however, it to be to the best interests of all concerned that you do not resell at a price less than that requested of you by us, it is very probable that in the event you did not see fit to comply with any request we made of you we would avail ourselves of the constitutional right which we have of refusing to sell you any further quantity of our product. (Strip. Ex. 32.)

As a result of this communication, respondent entered into an understanding or agreement with wholesalers of San Antonio and other Texas points, that they should sell Cream of Wheat at respondent's suggested resale price. (Strip. Ex. 32, letters dated 4/27/22, 8/14/22, 8/15/22, 8/16/22, 8/17/22.)

In January, 1922, respondent's sales agents in the territory including Los Angeles, Calif., telegraphed respondent, "San Diego jobbers have broken loose on all cereals and pancake flour, selling them in many instances at absolute jobbers' cost to the retailer," etc. Respondent wrote, January 12, in response thanking its agents for this information and stating that it was "writing each individual San Diego jobber today" and enclosing copy of such letter. This letter, after referring to the information received from its agents as to price cutting in San Diego, and disclaiming any purpose to secure any agreement as to resale prices and stating its resale prices and its right to refuse to sell for any reason, asked: "Will you therefore please write us upon your receipt of this letter and advise us definitely whether you are now, or have been in the past, selling Cream of Wheat to your retail trade at a price less than that required of you by us? We will appreciate a very prompt reply from you to this letter." This resulted in assurances of cooperation from the customers and to one of these, respondent wrote: "Since receiving your letter of February 4 we have made a very careful investigation of this territory. We believe that our customers in this territory will, in the future, see fit to comply with our request to sell Cream of

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Wheat to their retail trade at a price which at present is not less than \$7.50 per case, less 1 per cent discount if invoice is paid within ten days of date, or thirty days net." (Stipulation, Exhibit 6.)

On May 18, 1922, on the evidence of an invoice received from competitor of the Feilbach Company of Toledo, Ohio, respondent wrote the latter stating that it had in its hands such evidence of a sale of Cream of Wheat by it at less than the resale price requested by respondent and that respondent presumed that the customer did not "see fit to comply with our request in this respect;" and concluding "before taking any further action in regard to this matter, we would be very glad to hear from you in regard to this."

On May 29 the Feilbach Company wrote respondent enclosing information of price cutting by a competitor and concluding "we sincerely hope that you will succeed in getting this ruinous competition eliminated. We can assure you that you have our hearty cooperation."

On May 23 respondent, after acknowledging receipt of this information, wrote "the information we would like to obtain from you is whether you are now, or have been in the past, selling Cream of Wheat " for less than its requested resale price.

On May 25 the Feilbach Company wrote respondent, "it is very gratifying to us, that this matter is being adjusted and you can rest assured that you will have no further complaint from anyone in regard to our making any other price than \$7.50 as we have given our men positive instructions that this price must be maintained."

In October, 1920, respondent's sales agents in that territory advised it of cutting of its resale prices by John Scowcroft & Sons Company of Salt Lake City, Utah, and in response (October 19, 1920) respondent authorized its agents to refuse that firm further sales. On October 27 respondent's agents wrote that they had "explained very carefully to Mr. Joseph Scowcroft your policy of protecting the jobbers from price cutting," and "Mr. Scowcroft advises us that if you will again place them on the jobbers' list that they are under no condition cutting the price, and that in the event of any other jobber cutting, they will report same instead of taking the matter in their own hands."

On November 3, 1920, respondent wrote its agents authorizing them to reinstate the Scowcroft Company "letting them know that any future deviation from our resale price will result in their being cut off from our list of customers for good," and "with the thorough understanding on their part that they must maintain our desired resale price, in order to remain on our list of customers, you may reinstate them, temporarily, as above." (C. E. 38.)

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Cobb, Bates & Yerxa Company, of Boston, Mass., wholesale grocers, were reinstated May 1, 1922, upon respondent's list of customers of Cream of Wheat after having been cut off for refusing to observe respondent's resale prices upon that product. At the time of reinstatement, it was understood between respondent and Cobb, Bates & Yerxa that the latter should observe the former's resale prices upon Cream of Wheat, and sales were made by respondent to Cobb, Bates & Yerxa on that condition. (Stipulation, Ex. 4, letters dated 2/4/21, 2/15/21, 2/21/21, 2/28/21, 3/3/21, 3/5/21, 3/10/21, 3/14/21, 3/21/21, 5/1/22.)

In August, 1919, as a condition of respondent's selling its product to the Amsterdam Grocery Company, of New York, respondent entered into an understanding providing for the maintenance by such grocery company, its vendee, of respondent's suggested resale prices of Cream of Wheat. (Stip. Ex. 15; Memo. 8/20/1919.) Same as to B. Bendin, Inc. (Stip. Ex. 15; Memo. 10/10/1919.)

PAR. 29. Respondent's agents have been fully advised by respondent of its policy as to securing the observance of its resale prices, and have been furnished with copies of letters addressed to customers by respondent bearing on this subject in the agents' respective territories, and its agents have, at its direction and as part of their business relations to respondent, advised customers of respondent's resale prices and its terms of dealing or refusing to deal in respect thereto, and have conferred with customers and prospective customers as to their observance of such resale prices in the future, and reported to respondent agreements secured from dealers that they would observe such resale prices. These practices are illustrated by the following cases found in the record: (Commission's Exhibit 77, pp. 1351-1355; Stip. Ex. 13; letters 2/17/21; Stip. Ex. 15, Memo, 8/20/19; agreements, Stip, Ex. (8, 10/19/20; Stip. Ex. 4, 3/3/21; Stip. Ex. 16; Com.'s. Ex. 49, 3/2/21; 3/3/21, and telegram 3/3/21).

Respondent upon numerous occasions instructed its agents to watch the merchandising methods of customers of respondent, in order to see that respondent's rules and requests were being complied with.

Lamont, Corliss & Co., of New York, agents of respondent, were asked by respondent to advise it should John T. Connor Co., of Boston, Mass., which had been accepted as a customer by respondent, fail to observe respondent's suggested or requested resale prices for Cream of Wheat. (Coms. Ex. 14, especially letter of 5/27/21.)

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On August 8, 1921, respondent instructed its Portland agents, Ariss, Campbell & Gault, as follows:

We will of course expect you to keep in close touch with the situation in that territory and immediately advise us in the event those customers or any other of our customers do not see fit to comply with our request as to the resale of our product to their retail customers. (Com. Ex. 35, letter dated 8/2/21.)

On March 4, 1921, respondent notified Mason-Ehrman & Co., Portland, Oreg., that, so far as respondent knew, its Portland agents, Ariss, Campbell & Gault:

Where they do run up against a failure on the part of any of our customers to comply with our request for observance of minimum resale prices with regard to the resale of "Cream of Wheat," they have advised us promptly. (Com. Ex. 35, especially letter dated March 4, 1921.)

On April 15, 1921, Ariss, Campbell & Gault, of Portland, Oreg., agents of respondent, indicated they were interesting themselves in bringing to the attention of respondent cases of failure to maintain respondent's requested or suggested minimum resale prices. (Com. Ex. 35, letter dated April 15, 1921.)

On September 30, 1921, respondent instructed its agents, Bradley-Kuhl Company, of Los Angeles, Calif., to keep in close touch with and advise respondent as to why failure to comply with respondent's requests. This was in connection with resale price maintenance. (Com. Ex. 37, especially letters dated 9/30/21; 10/5/21; also letters dated 2/1/21 and 2/7/21 to Crombie & Co., former agents of respondent.)

Similar instructions or requests are found in Commission's Exhibit 40, letter dated 9/21/21; Com. Ex. 52, letter dated 7/10/19; Com. Ex. 55, letter dated 11/17/21; Com. Ex. 55, letter dated 11/22/21; Com. Ex. 56, letter dated 3/22/16; Com. Ex. 58, letter dated 12/21/21; Com. Ex. 70, letter dated 11/8/21; Com. Ex. 71, letter dated 8/2/21; Com. Ex. 77, letter dated 7/11/21; Com. Ex. 88, letter dated 9/30/19; Stip. Ex. 15, letter dated 8/23/19; Stip. Ex. 17, letter dated 11/3/20; Stip. Ex. 18, letters dated 5/15/20; 7/11/21, printed Stip. p. 48; letter dated 8/29/21. Printed Stip. p. 49; also see Com. Ex. 49, letter dated 3/5/21; Com. Ex. 50, letter dated 11/7/21; Com. Ex. 55, letter dated 11/22/21; Com. Ex. 58, letter dated 12/14/21; Com. Ex. 59, letter dated 2/21/22; Com. Ex. 59, letters dated 3/11/22, 3/15/22; Com. Ex. 84, memo. dated 4/19/21; Com. Ex. 84, memo. dated 4/29/21; Com. Ex. 100, letter dated 4/17/14.

PAR. 30. Respondent has utilized cooperative methods by which it has solicited and secured from customers or prospective customers themselves, or from other dealers or trade associations, information

and reports as to whether or not such customers or prospective customers have maintained and are maintaining, or are disposed to maintain generally resale prices fixed by producers, or respondent's resale prices in particular; and solicited and secured reports from customers, of customers who failed to observe its resale prices, and has investigated and verified such reports through further reports secured from customers as to such instances of price cutting, all with a view to refusing further sales to customers found to have cut its resale prices. Respondent has sought and secured agreements and understandings with customers and prospective customers that they would observe the resale prices designated by it. Respondent has sought and secured agreements, understandings and assurances from customers, including chain stores, and from the National Chain Store Grocers' Association, that they would cooperate with it in securing the observance of its resale prices.

Respondent from time to time addressed to prospective customers, form letters or questionnaires containing, among others, inquiries whether it was their policy to maintain strictly resale prices; and has from time to time addressed circular or uniform letters to customers in different cities or sections (Pittsburgh, Washington, Texas, California) where it had information price cutting existed, calling attention to such reports and inviting more or less directly statements as to whether those addressed had or were at the time cutting prices.

In December, 1921, respondent addressed such a letter to wholesalers in Pittsburgh, Pa., and Washington, D. C., referring to reports of price cutting, disavowing any desire for agreement of observance of its resale prices, stating that in case of price cutting "we will undoubtedly refuse to sell such customers any further quantities of Cream of Wheat," and concluding "In order that there may be no question about this matter, will you please write us, upon your receipt of this letter, and advise us definitely whether you now are, or have in the past, sold Cream of Wheat to your retail trade at a price less than that requested of you by us." In cases where an early response was not forthcoming, respondent wrote again asking for a reply. These inquiries resulted in assurance in some cases, of observances of respondent's resale prices and cooperation in their maintenance. (Stip. Com. Ex. 1, Par. 20; letter of 2/28/21, 3/26/21; 4/12/21, 4/22/21, 5/19/22; Stip. Ex. 32, Stip. Ex. 36, 2/20/22. Com. Ex. 17, 4/3/19, Com. Ex. 26, letter to Merchants' Grocery Company 6/17/21; Ex. 31, 10/27/21, 10/28/21.)

PAR. 31. On complaint of competitor customers, respondent cut off price-cutter customers' supplies of Cream of Wheat and refused fur-

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ther to sell Cream of Wheat to such price-cutter customers because such customers sold Cream of Wheat below suggested or requested minimum resale prices named by respondent.

In June, 1922, respondent refused to sell Cream of Wheat to N. M. Crawford & Son, wholesale grocers of Coleman, Tex., who had theretofore been supplied, because a competitor of Crawford & Son complained of them as price cutters on Cream of Wheat; and Crawford & Son acknowledged that they had sold Cream of Wheat at a price below that requested by respondent as a resale price. (Stip. Ex. 1.)

On complaint of B. Kotz & Son, a competitor, that Mazo Brothers Company, of Washington, D. C., was a price cutter as regards Cream of Wheat, respondent in January, 1922, refused to sell Mazo Brothers Company, giving as a reason that it had failed to observe in the sale of Cream of Wheat the resale prices suggested or requested by respondent. (Stip. Ex. 2.)

On complaint of a competitor of Snyder-Miller Company, wholesale grocers, of Washington, D. C., that the company was price cutting in the sale of Cream of Wheat, respondent, in January, 1922, refused to sell Snyder-Miller Company upon the ground that in selling Cream of Wheat the Snyder-Miller Company had not observed the resale minimum prices suggested or requested by respondent. (Stip. Ex. 3.)

On a complaint of a competitor of the Augusta Grocery Company, of Augusta, Ga., that such company was a price cutter with regard to Cream of Wheat, respondent refused, March 3, 1921, to sell any more Cream of Wheat to the Augusta Grocery Company, which had theretofore been supplied with the product, giving as a reason that the Augusta Grocery Company had failed to observe the resale prices suggested or requested by respondent. (Stip. Ex. 7.)

On November 23, 1920, on complaint of a competitor of John H. Wilkins Company, wholesale grocers of Washington, D. C., who charged the Wilkins Company with price cutting in the sale of Cream of Wheat, respondent refused to sell any more Cream of Wheat to John H. Wilkins Company, giving as a reason that in the sale of this product John H. Wilkins Company had failed to observe the resale prices suggested or requested by respondent. John H. Wilkins had been placed upon respondent's customers list about a month previous to that time after careful investigation by respondent's New York agents. (Stip. Ex. 8.)

PAR. 32. On complaint of competitor customers, respondent refused to sell supplies of Cream of Wheat to price cutter customers at the same prices and terms upon which it sold its product to customers

who observed its suggested or requested minimum resale prices. Respondent placed such price-cutter customers upon probation, while penalizing them as to prices charged to them for Cream of Wheat. If after probation over a period the price-cutter customers had shown that they had reformed and had observed respondent's suggested or requested minimum resale prices on Cream of Wheat, respondent reinstated them upon the understanding that they should continue to observe such resale prices.

February 7, 1921, upon information secured from Ariss, Campbell & Gault, sales agents at Portland, Oreg., that Mason-Ehrman & Co., wholesale grocers had sold Cream of Wheat at \$8.75 a case, while the resale price named by respondent was \$9 a case, respondent refused to sell further supplies of Cream of Wheat to Mason-Ehrman & Co., which it had theretofore supplied, giving as its reason that Mason-Ehrman had not observed the suggested or requested minimum resale price named by respondent on its product. (Com. Ex. 35, letters dated 2/7/21, 2/19/21, 2/25/21, 2/28/21, 3/4/21.)

On March 18, 1921, respondent offered, through its agents at Portland, Oreg., to place Mason-Ehrman & Co. upon probation for six months; that is, to supply them Cream of Wheat but at an advance or penalty of 35 cents a case over the regular price to competing wholesale customers who had not cut the resale price of Cream of Wheat. The offer was also made to Carr & Preston, wholesale grocers of Portland, Oreg., cut off by respondent on complaint of Mason-Ehrman & Co. that Carr & Preston too, were price cutters. (Com. Ex. 35, letters dated 3/18/21, 3/29/21, 4/2/21, 4/5/21, 4/7/21, 4/11/21, 4/13/21, 4/15/21, 4/16/21, 4/22/21, 5/9/21, 8/3/21.)

Carr & Preston accepted the probationary conditions imposed upon them by respondent and were reinstated as probationers at an advance price upon respondent's list of customers in August, 1921. (Com. Ex. 35.)

Allen & Lewis, wholesale grocers of Portland, Oreg., also complained of by Mason-Ehrman & Co., their competitor, as price cutters as to Cream of Wheat, were refused May 18, 1921, further sales of its product by respondent, who gave as a reason such resale price cutting by Allen & Lewis. Respondent also offered to sell Allen & Lewis on probation at an advance price of 35 cents a case. (Com. Ex. 35, letters dated 5/18/21, 7/30/21; Com. Ex. 36, letters dated 5/23/21, 5/25/21, 5/27/21, 6/6/21.)

Respondent, through its agents Ariss, Campbell & Gault, in July, 1921, entered into an understanding or agreement with Carr & Preston and with Mason-Ehrman & Co., wholesale grocers of Portland, Oreg., by which they undertook to maintain respondent's re-

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quested or suggested minimum resale prices in the sale of Cream of Wheat as a condition of being able to purchase from respondent future supplies of Cream of Wheat at prices charged wholesalers who maintained respondent's resale prices. (Com. Ex. 35, letter dated 7/30/21.)

Both Carr & Preston and Mason-Ehrman & Co., were restored as customers by respondent August 3, 1921, on the same basis as other wholesale customers. (Com. Ex. 35, letter dated 8/3/21.)

Respondent, in June, 1921, having learned that it was the Eugene Branch of Allen & Lewis which was price cutting on Cream of Wheat, and that the Eugene Branch was independent, reinstated Allen & Lewis, of Portland, Oreg., on its list of customers to be sold at usual wholesale prices and suspended Allen & Lewis, of Eugene, as price cutters. (Com. Ex. 35, letter dated 6/6/21.)

Meantime, Allen & Lewis, of Eugene, were placed by respondent upon the probationary list as price cutters instead of Allen & Lewis, of Portland, and were obliged to pay 35 cents a case extra for Cream of Wheat until they had expiated their offense. (Com. Ex. 36, letters dated 6/11/21, 6/14/21, 6/15/21, 6/20/21, 6/22/21, 6/27/21.)

On May 23, 1915, respondent suspended Lux Mercantile Co., of Topeka, Kans., for price-cutting and placed this company on its probationary list for six months, requiring it to pay the price charged retailers for Cream of Wheat. In June, 1917, because this probationer had observed respondent's suggested or requested resale prices on its product for a year, respondent reinstated the Lux Mercantile Co. on its list of wholesale customers who might buy at prices to wholesalers who were not price cutters, with an agreement or understanding that the Lux Mercantile Co. would thereafter, in the sale of Cream of Wheat, observe respondent's requested minimum resale price. (Com. Ex. 10, letters dated 5/28/17, 6/7/17.)

PAR. 33. Respondent asked customers to inform it of price-cutting on Cream of Wheat by competitors of these customers, and promised to cut off such price cutters. Respondent received and acted upon such information.

On April 17, 1922, respondent wrote Berdan Company, of Cleveland, Ohio, which it had cut from its list of customers because of failure to maintain respondent's requested or suggested resale prices in the sale of Cream of Wheat, to furnish it with proof of like price-cutting by Berdan Company's competitors, which proof was later sent as to Feilbach Company, of Toledo, Ohio. (Stip. Ex. 9.)

On April 9, 1919, respondent, by letter, solicited from Philip Becker & Co., of Buffalo, N. Y., information as to price-cutting of Becker Company's competitors in the sale of Cream of Wheat, and

promised to cut from respondent's list of customers any such price cutters. (Com. Ex. 17, letter dated 4/9/19.)

For similar instances, see also Com. Ex. 17, letters 4/22/19, 4/18/19, 4/22/19, 4/28/19, 5/5/19, 4/25/19, 4/17/19; Com. Ex. 18, letter dated 11/17/19; Com. Ex. 19, letter dated 10/24/21; Com. Ex. 20, letter dated 12/16/21; Com. Ex. 22, letter dated 12/14/21; Com. Ex. 23, 10/27/21; Com. Ex. 24, letters dated 6/1/20, 6/10/20, 4/20/22; Com. Ex. 25, letters dated 11/1/16, 11/4/16; Com. Ex. 26, letters dated 6/8/21, 6/17/21, 6/23/21, 6/28/21, 7/20/21, 7/29/21, 8/3/21; Com. Ex. 28, letters dated 12/19/21, 9/1/21, 9/16/21, 9/22/21, 9/29/21, 10/24/21, 10/29/21, 10/26/21, 11/17/21, 11/14/21, 11/7/21; Com. Ex. 29, letters dated 10/11/19, 12/18/19, 5/4/20, 6/4/20; Com. Ex. 30, letters dated 4/11/22, 4/15/22; Com. Ex. 35, letters dated 2/25/21, 3/4/21, 4/11/21, 4/15/21, 5/18/21; Com. Ex. 37, letters dated 9/27/20, 10/4/20, 10/15/20, 10/22/20, 9/15/21, 9/30/21; Com. Ex. 42, letters dated 10/28/19, 11/26/19, 12/18/19, 5/4/20; Com. Ex. 44, letters dated 3/1/19, 3/6/19, 3/25/19, 4/4/19, 4/19/19, 4/13/19; Com. Ex. 45, letters dated 4/21/19, 4/29/19; Com. Ex. 50, 12/1/21, 12/14/21; Com. Ex. 57, letter dated 5/4/20.

PAR. 34. Respondent systematically notifies, and has notified, prospective customers of Cream of Wheat of its policy looking toward maintenance of its suggested or requested resale prices in the sale of its product. Such notification is in such terms as to indicate that this is a condition which must be complied with if the customer wishes to continue to purchase supplies of Cream of Wheat from respondent. (See references in connection with Par. 28 above.)

Such sales conditions were laid down by respondent in the cases of E. H. Evans, Van Wert, Ohio, (Stip. Ex. 5, especially letter dated 4/21/21)†; Amsterdam Grocery Co., of New York City (Stip. Ex. 15, memo. dated 8/20/19, 8/23/19); North Hudson Grocery Co. (Stip. Ex. 16, letters dated 2/6/20, 2/18/20); Acme Grocery Co. (Stip. Ex. 17, letter dated 11/3/20); Beall-Sterling Co., Steubenville, Ohio (Stip. Ex. 33, letters dated 3/16/20, 3/20/20); Stratland-Anderson Mercantile Co. (Stip. Ex. 36, letters dated 2/16/22, 2/20/22, 3/16/22); Lux Mercantile Co., Topeka, Kans., (Com. Ex. 10, letters dated 3/11/16, 5/26/16); Pender-Dilworth Co., Inc., Norfolk, Va. (Com. Ex. 11, letters dated 10/15/18, 4/22/21, 4/28/21, 5/3/21, 1/12/22, 1/20/22); John T. Conner, Boston, Mass., (Com. Ex. 14, letters dated 4/22/21, 5/6/21, 5/10/21, 5/12/21, 5/27/21); Green Brothers Mercantile Co., Kansas City, Mo., (Com. Ex. 18, letters dated 9/6/16, 11/26/19); Goddard Grocery Co., St. Louis, Mo. (Com. Ex. 20, letter dated 1/14/22); Krause Greath, Inc., Galveston, Tex., (Com. Ex. 30, letter dated 2/28/22); Stephens-McKee-Bacon Co.,

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Lubbock, Tex., (Com. Ex. 33, letter dated 8/4/21); Adams-Gorin Co., Port Arthur, Tex., (Com. Ex. 34, letter dated 4/22/21); The Larkin Co., Buffalo, N. Y., (Com. Ex. 40, letters dated 9/10/21, 9/15/21, 1/15/22); The Schumacher Co., Houston, Tex., (Com. Ex. 43, letter dated 10/11/16); Hancock-Nelson Mercantile Co., Minnesota Transfer, St. Paul, Minn., (Com. Ex. 44, letters dated 10/14/20, 10/19/20); Foley Bros. Grocery Co., St. Paul, Minn. (Com. Ex. 46, letter dated 7/19/19); S. S. Pierce Co., Boston, Mass., (Com. Ex. 49, letters, etc., dated 3/2/21, 3/5/21, 3/8/21); Charles M. Decker & Bros., Orange, N. J., (Com. Ex. 69, letters dated 4/18/21, 4/22/21, 9/21/21, 9/26/21, 10/5/21, 12/5/21); H. C. Bohack Co., Inc., Brooklyn, N. Y., (Com. Ex. 70, letters dated 10/5/21, 10/26/21, 11/1/21); Progressive Grocery Stores, New York City, (Com. Ex. 77, letters dated 6/14/21, 7/11/21); The Fisher Bros. Co., Cleveland, Ohio, (Com. Ex. 78, letter dated 10/7/21); Baffert & Leon, Tucson, Ariz., (Com. Ex. 82, letters dated 1/10/22, 1/16/22); Davis Mercantile Co., Joplin, Mo., (Com. Ex. 90, letters dated 5/3/21, 5/13/21); Acme Food & Specialty Co., Fort Wayne, Ind., (Com. Ex. 91, letters dated 4/29/21, 5/12/21.)

PAR. 35. When respondent secured, through advertisements, price lists, agents, customers, or from other sources, information of price-cutting by its customers in the resale of Cream of Wheat, it wrote letters reiterating its policy that it would refuse to sell to a customer further supplies of Cream of Wheat should the customer fail to respect or adhere to respondent's suggested or requested minimum resale prices. In some instances, if the information was verified, it cut off the customer at once; in others, respondent requested expressions by customers as to whether they were adhering to respondent's suggested or requested resale prices, or whether they intended to adhere to such prices; or expressions both as to whether they had adhered to such prices and whether they intended to adhere to such prices. Where customers were thus cut off, refusal to comply with respondent's requested or suggested resale prices was usually given as the reason for such cutting off.

J. M. Crawford & Son, Cologne, Tex., (Stip. Ex. 1, letters dated 5/31/22, 6/5/22, 6/12/22); Snyder-Miller & Co., Washington, D. C., (Stip. Ex. 3, 12/7/21, 12/27/21, 1/13/22); Mazo Bros., Washington, D. C., (Stip. Ex. 2, letters dated 12/7/21, 12/21/21, 12/27/21, 1/13/22); Cobb, Bates & Yerxa Co., Boston, Mass., (Stip. Ex. 4, letters dated 2/15/21, 3/10/21, 3/21/21; also Com. Ex. 48, letters dated 2/28/21, 3/1/21—58 letters); San Diego, Jobbers, (Stip. Ex. 6, letters dated 1/12/22, 1/20/22, 2/2/22, 2/9/22, 2/7/22, 1/16/22, 1/18/22, 2/1/22, 2/17/22); Augusta Grocery Co., Augusta, Ga.,

(Stip. Ex. 7, letters dated 2/26/21, 3/7/21, 3/23/21); John H. Wilkins Co., Washington, D. C., (Stip. Ex. 8, 11/23/20, 2/4/21); The Berdan Company, Toledo, Ohio, (Stip. Ex. 9, letters dated 4/11/22, 4/13/22); Feilbach Company, Toledo, Ohio, (Stip. Ex. 9, letters dated 5/18/22, 5/20/22, 5/23/22); Frank C. Brown, Chicago, Ill., (Stip. Ex. 12, letter dated 7/16/21); Becker-Prentis, Inc., Buffalo, N. Y., (Stip. Ex. 22, letters dated 12/17/21, 1/12/22, 1/20/22); Colorado Jobbers (Stip. Ex. 23, letter dated 2/16/22; Stip. Ex. 36, letters dated 2/16/22, 3/16/22; Stip. Ex. 38, letters dated 9/13/21, 9/16/21, 2/21/22; Stip. Ex. 40, letter dated 3/11/22); Frank Lee Dickinson, Camden, N. J., (Stip. Ex. 24, letters dated 12/1/21, 12/7/21); Greenspan Bros. Perth Amboy, N. J., (Stip. Ex. 26, letter dated 11/3/21); M. Ainsa & Sons, Inc., El Paso, Tex., (Stip. Ex. 27, letters dated 11/7/21, 11/17/21); James A. Dick & Co., (Stip. Ex. 27, letters dated 12/1/21, 12/6/21); H. A. Marr Grocery Co., Denver, Colo., (Stip. Ex. 27, letters dated 6/6/21, 6/21/21, 8/29/21); Barber & Perkins Co., Philadelphia, Pa., (Stip. Ex. 29, letters dated 4/19/22, 5/16/22); Texas Wholesalers (Stip. Ex. 32, series sent to 13 San Antonio, Texas, jobbers, and replied to generally 8/11/22; also sent to jobbers, Galveston, Tex., and Fort Worth, Tex.; also Stip. Ex. 35, letters 4/15/22, 8/11/22, 5/2/22); Los Angeles, Calif., wholesalers, (Stip. Ex. 37, letters 11/11/19, 11/18/19, 12/6/19); Pittsburgh Wholesalers, (Com. Ex. 6, letter dated 12/8/21 sent to 25 wholesalers and answered by many 12/16/21); Lux Mercantile Co., (Com. Ex. 10, letters dated 10/27/16, 5/23/16); Washington, D. C. wholesalers who cut prices on Cream of Wheat (Com. Ex. 21, letters dated 12/7/21—sent to about 17 wholesalers at Washington, D. C.); Tri-State Grocery Co., El Paso, Tex., (Com. Ex. 22, letter dated 11/30/21); Price-cutting by western jobbers—Raymond Bros. & Clark Co., Lincoln, Nebr. (Com. Ex. 25, letter dated 10/27/16); W. L. Morgan & Co., Bowie, Ariz., (Com. Ex. 28, letters dated 9/1/21, 9/16/21, 9/22/21, 10/15/21, 11/9/21); Reno Customers and Resale Prices (Com. Ex. 31, letter dated 10/24/21); Portland, Oreg., Jobbers cutting prices in sale of Cream of Wheat (Com. Ex. 35, letters dated 2/7/21, 2/25/21, 3/4/21, 3/18/21, 3/29/21); Smart & Final Co. and Fred Shilling & Sons, Los Angeles, Calif., (Com. Ex. 37, letters dated 10/15/20, 10/22/20, 1/22/21); B. Kotz & Son, price cutters on Cream of Wheat (Com. Ex. 50, letters dated 11/5/21, 11/9/21); Jett-Wood Mercantile Co., Lamar, Colo., and others (Com. Ex. 54, letter dated 7/24/22); the Sheppard Strassheim Co., Chicago, Ill., price cutters on Cream of Wheat (Com. Ex. 61, letter dated 3/16/16); Marcus Bros., Pittsburgh, Pa., price cutters on Cream of Wheat

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(Com. Ex. 63, letter dated 12/1/21); Barnett Shapiro, Washington, D. C., (Com. Ex. 65, letter dated 12/7/21).

PAR. 36. Respondent has refused to modify its demand as to the observance by its vendees in the sale of Cream of Wheat of the minimum resale prices suggested or requested by respondent, even where the vendee maintained he was not giving such service as would warrant the margin which such resale price would give such vendee, and that it would mean essentially higher prices to consumers than were charged in the service stores and would entail undue profit to the retailer.

Pender-Dilworth Co., Inc., Norfolk, Va., (Com. Ex. 11, letters dated 4/28/21, 5/3/21, 5/7/21, 5/12/21, 1/12/22); John T. Conner Co. (Com. Ex. 49, letters dated 5/6/21, 5/10/21, 5/12/21, 5/27/21); S. S. Pierce Co., Boston, Mass., (Com. Ex. 49, telegrams and letters dated 3/2/21, 3/3/21, 3/4/21, 3/5/21, 3/5/21, 3/8/21; See also Com. Ex 40, letter dated 9/10/21; Com. Ex. 48, letters dated 2/28/21; etc.)

PAR. 37. Respondent, for sales direct from its Minneapolis office, and after February, 1921, for practically all its sales, probably through stenciled numbers on its shipping cases, had a means of tracing the shipments of Cream of Wheat to dealers who had failed to adhere to its resale prices, or had supplied Cream of Wheat to dealers refused sales because of selling below respondent's resale prices, or had failed to observe its request not to divide shipments with others. (Com. Ex. 113, letters dated 1/13/09; memo. dated 8/20/20; Com. Ex. 4, letters dated 3/4/21, 3/7/21; Rec. 979, 980, 984, 987.)

Cream of Wheat is subject to deterioration with age but the extent of such deterioration, or the period the product remains fresh, has not been fixed by evidence in this proceeding. Respondent replaces damaged or deteriorated goods with fresh goods. The stenciled numbers placed upon packing cases of Cream of Wheat serve to identify the contents of such cases as to the date of preparation at the factory and in that way aid respondent in knowing whether its products have reached consumers with sufficient promptness to insure their being fresh and in good condition. Stenciled numbers have been used for this purpose.

PAR. 38. Among other features of respondent's policy and practices regarding resale prices stated by respondent's president and general manager in the correspondence with the National Chain Store Grocers' Association (Stipulation, paragraph 20, Com. Ex. 1) is the following: After stating that in case a customer sells Cream of Wheat at less than the requested resale price, respondent refuses to fill any of his future orders, "In addition to the above,

will say, in case that any wholesale customer of ours does not see fit to comply with our request with regard to resale price, and as a consequence we refuse sales to him, we notify all of our other customers within a certain radius of our action in the premises, and request them in turn not to sell any of our goods to the party to whom we have refused sales. If any of our other customers last above alluded to, do not see fit to comply with our request, but do resell our goods to the party to whom we have refused sales, we in turn refuse to sell to the party reselling our goods to the party to whom we have requested them not to sell." (Letter of respondent's president, March 26, 1921); likewise after stating that if any of the chain store branch stores "for any reason whatever, sold Cream of Wheat for less than our requested price, we would certainly refuse to sell that branch, and all the other stores of your company, any further quantity of Cream of Wheat," respondent adds: "and, in the event we did so refuse to sell your company Cream of Wheat we would undoubtedly so advise all the other companies in your association, as well as wholesalers in your territory. And in advising them of our refusal to sell you, we would request them not to resell Cream of Wheat. In the event they did sell you Cream of Wheat, contrary to our request, we would refuse to sell them further quantities of our product." (Letter of D. F. Bull, treasurer, April 22, 1921.) President Mapes's letter of March 26, 1921, makes the foregoing apply to all respondent's customers by the clause quoted in the preceding finding.

Respondent admitted (Stipulation, Com. Ex. 1, par. 19(3) that it "advised other customers, in some cases, that respondent had refused further sales to customers because of price cutting, suggesting that 'in the general interest of the trade it would be good policy for you to decline filling any orders' from them, and that 'it would be for your best interests to decline to fill any orders for Cream of Wheat which they may see fit to place with you, and in some cases declaring, variously, that if customers refuse to observe this request, respondent 'refuses to sell' or would refuse or intended to refuse to sell such customers; and in at least one case respondent refused further sales to a customer because he had sold Cream of Wheat to another customer to whom respondent had refused to sell because of price cutting." No case of such refusal to sell appears in the record.

All these practices and policy as stated by respondent's president and general manager, and as indicated in his letter of March 26, 1921, are reiterated substantially by Mr. Bull, as treasurer, in his letter to individual chain stores of the National Association (letter

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of April 22, 1921). In this letter Mr. Bull adds: "We have gone into this matter at length, as, in the event we make a connection with your company we want you to be thoroughly familiar with our selling policy. This policy we have maintained for a good many years, and is one we intend to maintain so far as we legally can in the years to come."

PAR. 39. After having stricken from its list of customers dealers who had failed to maintain respondent's suggested or requested resale prices in the sale of Cream of Wheat, respondent has, by means of letters or through its agents, notified other dealers of its action and requested other dealers not to sell Cream of Wheat to the customers thus cut off, reenforcing respondent's request by an intimation or a threat that such sales to the rejected dealer would result in the seller also being cut off from supplies of Cream of Wheat by respondent. (Stip. Par. 19(3); Stip. Ex. 4, especially letters dated 2/28/21, 3/1/21; Stip. par. 20, letter of Mar. 26, 1921; as to general policy, also Com. Ex. 11.)

On February 15, 1921, respondent refused to sell Cream of Wheat to Cobb, Bates & Yerxa, of Boston, Mass., which it had theretofore been supplying with that product, giving as a reason that those dealers had failed to observe respondent's requested or suggested resale prices in the sale of Cream of Wheat. Immediately thereupon, respondent addressed letters to several wholesale dealers in Cream of Wheat telling them of respondent's having cut from its list of customers Cobb, Bates & Yerxa Company, and suggested that:

It would be for your best interests to decline to fill any orders for "Cream of Wheat" which they may see fit to place with you. (Stip. Ex. 4, especially letters 2/15/21, 2/28/21, 3/1/21; Com. Ex. 48, letters dated 2/28/21, 2/1/21—58 letters.)

Early in 1921 respondent cut from its list of customers for Cream of Wheat Mason-Ehrman & Co., of Portland, Oreg., wholesalers whom it had theretofore been supplying with that product. They had failed to observe respondent's suggested or requested resale prices in the sale of Cream of Wheat. February 7, 1921, respondent wrote to its agents in Portland, Ariss, Campbell & Gault, that:

It might be well for you to advise all the other jobbers of Portland of the action we have taken in this matter, so that they will thoroughly understand our wishes with regard to resale price must be respected or we shall exercise the option of refusing to sell those who do not consider it advisable to comply with our request. (Com. Ex. 35, letter dated 2/7/21.)

Similar action was taken with regard to Carr & Preston, wholesalers, of Portland, Oreg. (Com. Ex. 35, letters dated 3/4/21; Com. Ex. 71, letter dated 3/4/21.)

For similar instances, see Com. Ex. 56, letter dated 3/22/16; Com. Ex. 57, letter dated 11/17/21; Com. Ex. 61, letters dated 3/15/16, 3/16/16—13 letters; Com. Ex. 62, letter dated 2/26/21; Com. Ex. 73, letter dated 2/26/21.

Respondent announced repeatedly to its customers that it would refuse to supply Cream of Wheat to customers who supplied price cutters. (Stip. p. 15, printed copy; Com. Ex. 4, letter dated 3/1/21; Tri-State Grocery Company, Com. Ex. 22, letter dated 11/17/21; Ariss, Campbell & Gault, Com. Ex. 35, letter dated 2/7/21; The Larkin Company, Com. Ex. 40, letter dated 9/10/21; Cobb, Bates & Yerxa, Stip. Ex. 4; Com. Ex. 48, letters dated 2/28/21, 3/1/21; Pender-Dilworth Co. Inc., Com. Ex. 11, letter dated 4/22/21; John T. Connor Co., Com. Ex. 14, letter dated 4/22/21; Charles M. Decker, Stip. par. 20; Charles M. Decker & Bros., Inc., Com. Ex. 69, letter dated 9/21/21; H. C. Bohack Co., Inc., Com. Ex. 70, letter dated 10/26/21; Progressive Grocery Stores, Com. Ex. 77, letter dated 6/14/21; Fisher Bros. Co., Com. Ex. 78, letter dated 10/7/21.)

PAR. 40. In some cases, dealers or associations of dealers have collected for respondent data as to whether its suggested or requested minimum resale prices were being maintained and aided in circulating statements as to its policy of minimum resale price control in the sale of Cream of Wheat and aided in enforcing that policy. (Stip. p. 15 and Stip. pp. 36 to 44, inclusive; Stip. Ex. 4, letters dated 2/3/21, 2/4/21, 2/5/21, 2/10/21, 2/11/21, 2/15/21; Stip. Ex. 5, especially letters dated 4/6/21, 4/11/21, 2/21/21, 4/12/21; Com. Ex. 60, letters dated 8/16/21, 8/17/21, 9/2/21, 9/6/21.)

Respondent cooperated with the Iowa-Nebraska-Minnesota Grocers' Association in sending to the members of that association, in the form of a circular letter of the association, a portion of a letter from respondent to H. A. Marr in which was set forth respondent's resale-price-maintenance policy and the consequence of failure by dealers to observe and adhere to such policy. This was accompanied by a warning paragraph from John Mehlhop, jr., secretary and treasurer of the association, admonishing members against doing the thing that H. A. Marr, grocer, had done. (Stip. Ex. 28, letters dated 8/29/21, 9/1/21; Com. Ex. 60, letters dated 8/16/21, 8/17/21, 9/6/21; Cir. Let. or bulletin 9/2/21.)

Immediately before sending out the association's circular as to Cream of Wheat resale price maintenance, Mr. Mehlhop made specific inquiry of some of the Iowa-Nebraska-Minnesota Wholesale Grocers Association's members as to whether they were getting full list prices for Cream of Wheat, and he received some replies that they had not been doing so.

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After receiving the circular, some of these wholesale grocers insisted upon list prices, stating that they had done so as a consequence of what was set forth in the association's letter. (Com. Ex. 60, letters dated 8/16/21, 8/17/21, 9/6/21.)

In some cases respondent secured the cooperation of associations and dealers in determining in advance of its accepting orders from a prospective customer whether such prospective customer was a price cutter or whether he would adhere to respondent's suggested or requested minimum resale prices in the sale of Cream of Wheat.

E. J. Evans, Van Wert, Ohio (Stip. Ex. 5, letters dated 4/6/21, 4/11/21); Federal Coffee Co. of Cleveland, Ohio (Stip. Ex. 10, 1/21/22, 1/24/22, 2/3/22, 2/3/22, 2/11/22, 5/4/22); American Grocery Company, Whiddon Stores (Stip. Ex. 31, memo. and letters dated 3/4/19, 3/5/19, 2/28/19, 1/19/19, 1/25/19; Com. Ex. 7, letter dated 2/28/19); The Beall-Sterling Company, Steubenville, Ohio (Stip. Ex. 33, letters and memo. dated 2/1/20, 3/15/20, 3/16/20, 3/11/20).

PAR. 41. Resale price maintenance has been for years the special sales policy of respondent in the sale of Cream of Wheat. It has been aggressively asserted. When information had come to respondent that any vendee had failed to adhere to such policy respondent has ordinarily adopted effective means of enforcing such observance through methods and agencies hereinabove set forth.

The methods found in paragraphs 24 and 28 to 40, inclusive, above, to have been used by the respondent involve and require continuous cooperation and concert of action between and among respondent and its distributors, customers and agents; and these methods constitute cooperative methods employed to procure the sale by dealers of respondent's product at prices named by the respondent and methods by which respondent, its distributors, customers and agents undertake to prevent others from obtaining the respondent's product at less than the minimum resale price designated by it.

Such policy has not been changed although the methods of stating such policy and methods of enforcing such policy have been modified so as to be less direct. Since February, 1922, respondent has been less aggressive in its enforcement of its requested or suggested minimum resale prices for the sale of its product (Stip. Com. Ex. 1 Par. 20, letter 5/19/22; Par. 19, Exs. 1, 2, 3, 4, 6, 9, 10, 22, 24, 26, 28, 29, 31, 32, 35, 36, 40; Com. Ex. 24, 30, 54, 57).

PAR. 42. Respondent has had upon its books 6,500 live customers between January 1, 1913, and December 20, 1922. Of this number it has ceased to sell 2,000. Evidence in this proceeding shows that 53 were eliminated for failure to observe and adhere to respondent's

suggested or requested resale prices, and of these 24 were later reinstated by respondent. It is not established by competent evidence in this proceeding that a greater number than 53 customers were eliminated for such failure to observe respondent's resale prices, nor is it established by competent evidence in this proceeding that a greater number were not eliminated for such reason.

PAR. 43. In connection with the subject of respondent's practices as to cutting off of customers because of their cutting its resale prices, respondent's counsel offered in evidence the report of an employee, the witness Warren, general office manager of respondent since September, 1920, of the result of an examination of all the company's office files covering the history of its transactions from 1913 to 1922, with customers with whom it had ceased, for any reason, to do business during that period. This examination, which consumed two or three months, was made by Warren and employees of respondent under him (boys in the office and a former woman employee, R. p. 820) under the general direction of Mr. Bull, the general manager. This report purported to give in tabulated form the number of customers with whom respondent had ceased to do business with reasons therefor, including those subsequently reinstated. The latter involved an examination of all its files of existing customers, as well as all old files of discontinued customers, numbering together four or five thousand. These files consisted of so-called "ticklers," comprising, in separate packages for each customer, the records and correspondence relating to his standing as to sales, etc., and including a miscellany of papers and more or less voluminous. (Com's. Exs. 113 and 114.) The witness Warren, or those under him who prepared the report, had no part in the policy or management of respondent's business or sales. The reasons for discontinuance of sales, Warren and Bull testified, appeared generally on the face of the files, that is, in memoranda readily understood. Doubtful cases were referred to Mr. Bull or Mr. Thompson, the secretary. The files, Warren testified, were in unsatisfactory shape when he took employment with respondent in 1920, and the "tickler" files did not contain all the information necessary as to those customers prior to that time. The report as offered in evidence purported to show that there were 53 cases in which further sales were refused because of cutting of respondent's resale prices; 24 cases of reinstatement after refusals to sell because of such price cutting; 360 cases, because customers were not wholesalers according to respondent's standards; 1,938 cases where respondent had ceased selling because dealers had gone

out of business; 84, because dealers had retail connections; 71, because dealers were chain stores or buying associations; 29, because they involved drop shipments; 17, because dealers had ceased to handle cereals and 5, because dealers had a storage plant only. (R. p. 1183, et seq.) The report also purported to show 77 cases in which respondent had taken no action where cutting of respondent's resale prices appeared. This evidence was objected to, for establishing the entire number of refusals to sell by respondent for price cutting, but not as showing the report of respondent's investigators. A motion was made to strike on the grounds that the evidence, as offered, was not the best evidence which was available in the files themselves and involved conclusions as to matter not within the knowledge of the witness, and, as to the parts of report as to cessations of sales not involving any question of price cutting, that they were irrelevant and immaterial. The offer as to cases where no action was reported to have been taken for price cutting was specifically objected to as a conclusion and not admissible when the files themselves were available. These objections were sustained by the examiner who, however, expressly ruled that the testimony of the witnesses Bull or Warren so far as they testified on the subject of refusals to sell because of price cutting, of their own knowledge, should be received.

While the Commission regards the objection of counsel, tested by the rules of legal evidence, as well taken, it has nevertheless taken all this evidence into consideration and given it such weight as it seems entitled to in the light of the other evidence spread on the record in the correspondence, exhibits and elsewhere as to the policy and practices of respondent, and particularly the written statement reiterated by respondent's president and general manager that cases of refusal to sell for price cutting numbered many hundreds and the testimony of the Commission's examiner who examined respondent's files, that he spent two or three weeks only in "delving into" the files and that he estimated a complete examination would have taken six months, and the results of his examination in the matters in question, in Commission's exhibits.

Whatever be the evidence and the fact as to the number of instances of respondent's cutting off dealers because of their cutting its resale prices, the Commission does not regard it, standing alone, as of decisive or, therefore, important character. The more effective any system of resale price maintenance, the fewer the occasions to withhold sales because of price cutting. It would naturally not be resorted to except as a means to maintain that system, as the main purpose always is to sell goods and not decline sales.

The respondent systematically represented to customers and prospective customers that it would refuse further sales to those who cut its resale prices and it did so when it judged it necessary to its general policy of maintaining its resale prices.

In January, 1922, the respondent advised its agents in San Diego, Calif., referring to reports from them of price cutting, that, if verified, "we will refuse to sell them (jobbers) our product if we have to cut off the whole city of San Diego."

PAR. 44. Respondent's notification of and request for observance of its minimum resale prices are addressed by it to its vendees, wholesalers or retailers only, as distinguished from vendees of those vendees.

PAR. 45. Respondent's policy of naming and enforcing adherence to minimum resale prices for its product, by the methods above set forth, has had the capacity and tendency, and has had the effect so far as enforcement has been successful, of substantially lessening and curtailing price competition among wholesale and retail customers, distributors of Cream of Wheat, and to enhance the price thereof and to prevent the consuming public from getting the benefit from efficiency of operation on the part of more efficient dealers.

PAR. 46. Respondent's policy of resale price maintenance by the methods above set forth has had the tendency and effect, as far as successful, in connection with the dominant position of Cream of Wheat in the market for purified middlings in package form, of lessening and curtailing price competition among distributors of package cereal foods prepared from purified middlings and to enhance the price of such package cereal foods to consumers. (Tr. 1758-9; 1760-1; 1764-7; 1774; 1809-10.)

PAR. 47. Respondent's policy of naming and enforcing adherence to minimum resale prices for its product, taken in connection with its nation-wide advertising and its dominating position in the market for package cereals having as a base or raw material purified wheat middlings, has had the capacity and tendency, and in so far as its enforcement was successful, has had the effect of substantially lessening or curtailing price competition among producers of package cereal foods prepared from purified wheat middlings and to enhance the price of such package cereal foods to consumers and thus increase the cost of living. (Tr. 1758-9; 1661; 1764, 5, 6, and 7; 1809-10.)

PAR. 48. Respondent's resale prices for Cream of Wheat are based upon margins of cost of doing business averaged for individual stores which give customers credit and maintain delivery, telephone and like services. (Tr. p. 366.)

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Respondent, in naming and enforcing such resale prices, lessens, curtails and prevents substantial competition between chain stores, vendees of respondent, and between such chain stores and other retail dealers, and it causes prices of such vendees to consumers to tend toward uniformity at or above the minimum resale prices named by respondent, and prevents chain stores from offering Cream of Wheat at the lower prices which such stores could afford to ask because of lower operating expenses, and prevents consumer customers of these stores from securing such lower prices as might be secured were such chain stores free to name their own prices for the sale of Cream of Wheat without interference from respondent, and makes such consumer customers to pay for service which they have not asked for and have not received. (Com. Ex. 11, letters dated 4/22/21, 4/28/21, 5/3/21, 5/7/21, 5/12/21, 1/12/22, 1/22/22; Com. Ex. 14, especially letters dated 5/6/21, 5/10/21, 5/12/21; Tr. 1721; Tr. 1644, 5, 6, 7 & 8; Tr. 1819-1823; Tr. 1751-1765. Inference from entire evidence in the proceeding, Tr. pp. 1648, 9, 50, 51 & 52.) Tr. 1819-1823.

PAR. 49. Prices at which Cream of Wheat was sold to consumers by retailers, whether or not vendees of respondent, have tended toward the minimum requested or suggested resale prices named by respondent or the prices higher than such suggested resale prices. Average resale prices for Cream of Wheat set forth in the monthly Labor Review for August, 1922, for about fifty cities in the United States, show that the averages for July 15, 1921, were at or above respondent's resale prices in about 36 per cent of the averages given and below 64 per cent of such averages; May 15, 1922, at or above in about 75 per cent of the averages given and below in about 26 per cent; June 15, 1922, at or above in about 77 per cent of the averages given and below in about 23 per cent. (Res. Ex. 14.)

The averages as given in the monthly Labor Review were founded upon reports of from 10 to 26 retail stores in each of the cities reporting, some of which might have been chain stores. (Tr. pp. 1700-1703.)

Such figures were not reported in sufficient detail in the Review to determine the percentages of agreement and disagreement of individual prices or individual sales. A single departure from round price figure like 30 cents or 25 cents, the resale prices named at the period tabulated, would make the average figure deviate from the round figure unless a compensating deviation occurred in the opposite direction, so that the figures showed only that in the percentages of sales given the average prices were at, or above or below, the resale prices named by respondent. Departures of the average figure from

the resale price figures were usually slight. The respondent did not consider it a violation of its request should a customer sell above its suggested resale price. (Res. Ex. 14-140 Inc., compared with figures in Tr. 1841 and 1842; Tr. 1701.)

PAR. 50. Respondent's policy of naming and enforcing the minimum resale prices to wholesale dealers had a tendency to cause such resale prices to remain uniform at the resale prices suggested or requested by respondent, and so far as successful did bring about such uniformity and the total failure of price competition among such wholesale dealers. There were departures from such suggested or requested resale prices. (Com. Ex. 17, letter dated April 9, 1919; Tr. p. 604; General Trend of documentary evidence.)

PAR. 51. Prices of Cream of Wheat less than the minimum price named by respondent to its vendees, whether dealers at retail or dealers at wholesale, were not so low as to involve a loss to the dealer but were satisfactory to the dealer in cases where respondent had refused to sell or had cut off the dealer as a customer for Cream of Wheat for the reason that such dealer was cutting such requested, or suggested resale prices. Respondent's policy has been applied by respondent to price cutting generally and not confined to cases where Cream of Wheat has been used as a "leader" or a "lure." (Com. Ex. 14, especially letters dated 5/6/21, 5/10/21, 5/12/21; Com. Ex. 11, especially letters dated 4/22/21, 4/28/21, 5/3/21, 5/12/21, 1/12/22, 1/20/22; Tr. pp. 1644, 5, 6, 7, 1739-1744 Inc.)

PAR. 52. Incidental to its policy of resale price maintenance, respondent has maintained uniform delivered prices for Cream of Wheat. Such uniform delivered prices have the capacity and tendency of lessening competition in commerce and of increasing prices and living costs, and are discriminatory and economically unfair as between customers and respondent. (Tr. 1775-1779, 1801-9.) In adopting and enforcing its policy of making delivered prices on its product uniform throughout the United States, the respondent does not treat its customers equitably, and its policy tends to enhance prices for its products to the consuming public. (Tr. 1751-1765, 1766, 7, 8, and 9, 1774, 1801-1809.)

PAR. 53. Respondent's policy of naming and enforcing resale prices in the sale of Cream of Wheat has the capacity and tendency to prevent and, when successful, has had the effect of preventing the distribution of its product through the channels through which it would flow under conditions of free competition. (Tr. 1751-1765; Tr. 1819-1823. See also reference to par. 11.)

PAR. 54. The naming and enforcing of resale prices on nationally advertised articles sold in the grocery trade is not the usual nor general practice but on the contrary is exceptional and unusual, and respondent's practice in this respect is unique in its particular field. (Tr. pp. 1647, 1648, 1710, 1711; also 1730-1734 Inc.)

PAR. 55. The correspondence of respondent with its customers and agents put in evidence by the Commission, forming the bulk of the documentary evidence (Stip. Exs. 1-40 and Com. Exs. 2-110) on which the foregoing findings are based, was the result of an examination of only a fraction of such correspondence in respondent's files. The Commission's examiner who made the investigation spent about two weeks examining respondent's correspondence files and estimated that the examination of all of them would have consumed six months. The examiner referred to testified that he delved in the files, selected a number of cases which he thought were representative, following up cross references relating to resale price practices, and stopped when he thought he had developed what was respondent's sales policy. (Rec. pp. 61-70.)

PAR. 56. In connection with the examination of the respondent's chief witness Clifford, counsel for respondent offered in evidence, as part of his testimony, a paper prepared by the witness, which counsel designated as an "opinion." Objection was made to this form of evidence on the grounds that the paper in question was largely argumentative and dealt with conclusions, which it was the Commission's province to make, and that the witness had not qualified as an expert for the scope of the questions discussed in the paper, and that the proper form of his evidence was question and answer, with opportunity for objections and cross-examination. This objection was sustained by the examiner on the grounds that the witness had not qualified as an expert for the scope of the subjects discussed in his paper and on the other grounds urged. The paper in question, however, was later introduced and spread on the record occupying 20 pages. (R. pp. 1605-1626.) The Commission regards the examiner's ruling as sound and finds that the paper was properly described as an "opinion" and that it dealt largely in arguments and conclusions as to the subjects for the Commission's decision, and should properly have been reserved for argument by counsel. The Commission has, however, considered the contents of this paper in reaching its conclusion and has respected this expression of opinion from the point of view of the witness.

PAR. 57. The Cream of Wheat Company agreed in writing, by letter dated December 6, 1920, that in the event of a readjustment in the

price of Cream of Wheat, it would protect its jobbing customers against a decline in price, such protection, however, not to exceed the jobber's direct purchases for a period of 30 days prior to the issuance of price reduction circular, and such protection to apply only on stock of Cream of Wheat actually on hand or in transit at the time of the issuance of the price reduction circular, such guarantee to hold good until the first of June, 1921, unless previously abrogated; and that from time to time such agreement was extended up to February 1, 1922; that on December 11, 1922, the Cream of Wheat Company, by letter of that date, agreed to protect its customers against a decline in price, such protection, however, not to exceed the customer's direct purchases from the company invoiced within a period of 30 days prior to December 16, 1922, and to apply only to the stock of Cream of Wheat actually in the customer's hands or in transit to the customer on December 16, 1922.

PAR. 58. Referring to the resale prices named by respondent for wholesalers and retailers as stated in paragraphs 17 and 18 above, and as showing the relations of the margins, or price mark-up, represented by such resale prices compared with the cost of doing business, and the range of such operating costs, by wholesale and retail grocers, the following figures are admitted as a basis for judging the price competition normally existing and the interference or restraint of it, which the minimum uniform resale prices requested by respondent represent:

(a) Such resale prices for wholesalers were approximately 10 per cent more than the prices paid to respondent by such vendees who purchased in less than carload lots, and approximately 12½ to 14 per cent more than the prices paid to respondent by such vendees who purchased in carload lots.

Computing on the basis of such resale prices, the margins between the prices paid to respondent by its vendees and the prices for resale by such vendees were 9⅓ per cent for less than carload lots and 11⅓ per cent to 12 2/9 per cent for carload lots.

(b) According to the report of the Joint Commission of Agricultural Inquiry, Part No. 4, "Marketing and Distribution," submitted to Congress October 15, 1921, the average cost of operating wholesale grocery stores in this country for the years 1916 to 1921, in terms of percentages of sales receipts (the same basis as the last paragraph above), was as follows:

	Per cent.		Per cent.
1916.....	8. 48	1919.....	8. 42
1917.....	8. 49	1920.....	8. 52
1918.....	8. 68	1921.....	10. 16

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According to the same report the average costs of operating retail grocery stores for the same period stated in percentages of sales receipts were as follows:

	Per cent.		Per cent.
1916-----	15.20	1919-----	14.20
1917-----	15.50	1920-----	14.60
1918-----	14.30	1921-----	16.80

(c) According to Bulletin No. 9 of the Harvard Bureau of Business Research ("operating expenses in wholesale grocery business," chiefly for the year 1916) total operating costs ranged from 6.7 per cent to 13.74 per cent of sales receipts, the common figure being 9.5 per cent.

According to Bulletin No. 14 of the same bureau for the year 1918, total operating costs of wholesale grocers ranged between 6.15 per cent and 14.79 per cent, the common figure being 9.1 per cent.

According to Bulletin No. 19 of the same bureau for the year 1919, the total operating costs of wholesale grocers ranged between 4.35 per cent and 14.71 per cent, the common figure being 9.1 per cent.

According to Bulletin No. 26 of the same bureau for the year 1920, operating costs of wholesale grocers ranged from 5 per cent to 17.4 per cent, the common figure being 9 per cent.

For the retail grocery business, according to the Bulletin No. 5 of Harvard Bureau, 1915, operating costs ranged from 10.4 per cent to 25.2 per cent of sales receipts.

According to Bulletin No. 18, 1919, the operating costs of the retail grocery business ranged from 6.57 per cent to 25.35 per cent of the sales receipts, the common figure being 14.6 per cent.

"The common figure" is defined by the bureau as follows:

The common figure in each case is the one around which the figures from all the wholesalers center. It is the predominant, typical or most frequent figure—the one that is used by wholesale grocers as a standard with which to compare their own results. (Bulletin No. 9.) (Com. Ex. No. 1, p. 8, printed copy.)

Retailers: (a) When the resale price (wholesale) was \$4.50 per case (prior to Sept. 16, 1916), the respondent's sale price to retailers, as well as wholesalers, was \$3.95 for carload lots and \$4.10 for less than carload lots. On the basis of \$3.95, the cost per unit package to the retailer (36 packages to the case) was 11 cents, leaving a margin of 3 cents between that and the retail resale price of 14 cents, or 27.2 per cent of the purchase price and 21.43 per cent of the resale price.

On the basis of \$4.10 a case, or 11.388 cents a package, the margin was 2.612 cents, or 22.93 per cent of the purchase price and 18.657 per cent of the resale price.

When the resale price (wholesale) was \$7.50 a case (April, 1917, to November, 1919) the respondent's sales price to retailers and wholesalers alike was \$6.65 for carload lots and \$6.80 for less than carload lots.

On the basis of \$6.65 per case, the cost per unit package to the retailer was 18.47 cents leaving a margin of 6.53 cents or 35.35 per cent of the purchase price, and 26.12 per cent of the resale price.

On the basis of \$6.80 a case, or 18.88 cents a package, the margin was 6.12 cents or 32.41 per cent of the purchase price, and 24.4 per cent of the resale price.

When the resale price (wholesale) was \$9 a case (Nov., 1919, to Dec., 1921) respondent's sales price to retailer and wholesaler alike was \$8 for carload lots and \$8.15 for less than carload lots.

On the basis of \$8 per case, the cost per unit package was 22.22 cents, leaving a margin of 7.8 cents, or approximately 35 per cent of the purchase price and 25.93 per cent of the resale price.

On the basis of \$8.15 a case, or 22.64 cents a package, the margin was 7.36 cents a package or 32.39 per cent of the purchase price, and 24.56 per cent of the resale price.

(b) When the resale price for the wholesaler who bought in less than car lots was \$4.50 per case, the margin between such price and the price to the wholesaler who bought in carload lots at \$3.95 a case was 55 cents a case, or 12.22 per cent of the resale price in percentages of sales receipts; and the margin between such resale price and the price to the wholesaler who bought in less than carload lots at \$4.10 a case was 40 cents a case, or 8.88 per cent of the resale price.

When the resale price for the wholesaler who bought in less than car lots was \$5.40 per case, the margin between such price and the price to the wholesaler who bought in carload lots at \$4.75 per case was 65 cents a case, or 12.07 per cent of the resale price in percentages of sales receipts; and the margin between such resale price and the price to the wholesaler who bought in less than carload lots at \$4.90 a case was 50 cents, or 9.26 per cent of the resale price.

When the resale price for the wholesaler who bought in less than car lots was \$7.50 per case, the margin between such price and the price to the wholesaler who bought in carload lots at \$6.65 a case was 85 cents, or 11.33 per cent of the resale price in percentages of sales receipts; and the margin between such resale price and the price to the wholesaler who bought in less than carload lots at \$6.80 was 70 cents, or 9.33 per cent of the resale price.

When the resale price to the wholesaler who bought in less than car lots was \$9 a case, the margin between such price and the wholesaler's price who bought in carload lots at \$8 a case was \$1, or 11.11

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per cent of the resale price in percentages of sales receipts; and the margin between such resale price and the price to the wholesaler who bought in less than carload lots at \$8.15 a case was 85 cents, or 9.44 per cent of the resale price.

PAR. 59. As a result of respondent's policy of resale price maintenance, and other elements of its distributive merchandising system, respondent has been able to maintain the following margins between the prices of its raw materials and its lowest selling prices, its prices for sales in car lots.

The following figures as to the margin between the cost of purified middlings and prices for Cream of Wheat are based upon the calculations made from prices of flour (Com. Ex. 104) increased by \$1 per barrel, which was the maximum price at any time for purified middlings (Rec. 1639-40). Averages were taken for different periods and compared with figures in the record, pp. 1841-43. Flour and middlings were taken as 196 pounds to the barrel and Cream of Wheat at 63 pounds to the case and both reduced to a pound basis before comparisons were made. The evidence shows that Cream of Wheat consists wholly of purified middlings cleansed, sterilized by means of moderate heat and carefully packed in cartons.

(a) From January, 1913, to August 1, 1916, about 3.57 cents a pound or about 132 per cent of the price of purified middlings was the largest average margin, and about 2.50 cents a pound or about 66 per cent of the price of purified middlings, the smallest. In other words, the price of Cream of Wheat in car lots was 66 to 132 per cent above the price of purified middlings.

At the same time the margin between respondent's price of Cream of Wheat to wholesalers and its suggested resale price to wholesalers was a trifle less than 14 per cent of respondent's price.

The margin between respondent's car-lot price to retailers and its suggested minimum resale price to retailers was 27.2 per cent of respondent's price.

Ultimate consumers served by retailers who are direct vendees of respondent, in accordance with respondent's prices and suggested resale prices, paid a margin from 112 to 196 per cent above the wholesale price of purified middlings for purified middlings sold under the name of Cream of Wheat from January 1, 1913, to August 1, 1916.

Ultimate consumers paid 8 cents a pound for purified middlings in the form of Cream of Wheat while millers sold purified middlings at prices ranging from 2.7 cents to 3.77 cents a pound. In other words, the ultimate consumer paid at retail for purified middlings sold as Cream of Wheat 212 to 300 per cent of the wholesale price for purified middlings.

(b) From September 14, 1916, to April, 1917, such margin was about 2.54 cents a pound or about 50 per cent of the price of purified middlings at wholesale. In other words, respondent's price for Cream of Wheat in car lots was about 50 per cent above the wholesale price of purified middlings.

At the same time the margin between respondent's price for Cream of Wheat to wholesale dealers and its suggested resale price for wholesale dealers was about 13.5 per cent of respondent's car-lot prices.

(c) From May to November, 1919, such margin was about 3.87 cents a pound or about 58 per cent of the price of purified middlings at wholesale. In other words, respondent's price for Cream of Wheat in car lots was about 58 per cent above the wholesale price of purified middlings.

At the same time the margin between respondent's price of Cream of Wheat to wholesale dealers and its suggested resale price for such dealers was about 12.8 per cent of respondent's car-lot prices. The margin between respondent's car-lot price to retailers and its suggested minimum resale price for retailers was 35.35 per cent of respondent's car-lot price.

Ultimate consumers served by retailers who bought direct from respondent, in accordance with respondent's prices and suggested resale prices, paid an average minimum margin of 113 per cent above the wholesale price of purified middlings for purified middlings sold under the name of Cream of Wheat.

Ultimate consumers paid 14.27 cents a pound for purified middlings sold as Cream of Wheat while millers sold purified middlings at wholesale at 6.68 cents a pound, or the retail price to consumers of Cream of Wheat was 213 per cent above the wholesale price of purified middlings.

From November 19, 1919, to December, 1921, such margin was about 6.85 cents a pound or about 117 per cent of the price of purified middlings at wholesale. In other words, respondent's price of Cream of Wheat in car lots was about 117 per cent above the wholesale price of purified middlings.

At the same time the margin between respondent's price for Cream of Wheat to wholesale dealers and the suggested resale price for such dealers was about 12.5 per cent of respondents car-lot price.

The margin between respondent's carlot price to retailers and its suggested minimum resale price for retailers was 35 per cent of respondent's car-lot price.

Ultimate consumers served by retailers who bought direct from respondent, in accordance with respondent's prices and suggested

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resale prices, paid an average minimum margin of 196 per cent above the wholesale price of purified middlings for purified middlings sold under the name of Cream of Wheat.

Ultimate consumers paid 17.13 cents a pound for purified middlings sold under the name of Cream of Wheat while millers sold purified middlings at wholesale at 5.85 cents a pound, or the ultimate consumer paid 296 per cent of the wholesale price of purified middlings.

(e) From December, 1921, to December, 1922, such margin was about 6.32 cents a pound or about 149 per cent of the price of purified middlings at wholesale. In other words, respondent's price for Cream of Wheat in car lots was about 149 per cent above the wholesale price of purified middlings.

At the same time the margin between respondent's price of Cream of Wheat to wholesale dealers and its suggested resale price for such dealers was about 12.8 per cent of respondent's car-lot price.

The margin between respondent's carlot price to retail dealers and its suggested minimum resale price for retail dealers was 35.35 per cent of respondent's car-lot price.

Ultimate consumers served by retailers who bought direct from respondent, in accordance with respondent's prices and suggested resale prices paid in this period an average minimum margin of about 237 per cent above the wholesale price of purified middlings for purified middlings sold under the name of Cream of Wheat.

Ultimate consumers paid 14.27 cents a pound for purified middlings sold under the name of Cream of Wheat while the millers sold purified middlings at wholesale for 4.23 cents a pound, or the ultimate consumers paid 337 per cent of the price of purified middlings for Cream of Wheat.

(f) From December, 1922, to November, 1923, such margin was 5.80 cents a pound or about 153 per cent of the price of purified middlings at wholesale. In other words, respondent's price for Cream of Wheat in car lots was about 153 per cent above the price of purified middlings.

Ultimate consumers served by retailers who bought direct from respondent, in accordance with respondent's prices and suggested resale prices paid in this period an average minimum margin of about 216 per cent above the wholesale price of purified middlings for purified middlings sold under the name of Cream of Wheat.

Ultimate consumers paid 12 cents a pound for purified middlings sold as Cream of Wheat while millers sold purified middlings at wholesale at 3.8 cents a pound, or the ultimate consumers paid 316 per cent of the wholesale price of purified middlings for Cream of Wheat.

CONCLUSION.

The practices of the said respondent, under the conditions and circumstances described in the foregoing findings, are unfair methods of competition in interstate commerce, and constitute a violation of the Act of Congress approved September 26, 1914, entitled "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent, and testimony and evidence submitted, the trial examiner's report upon the facts and exceptions thereto, and the Commission having made its findings as to the facts and its conclusion that the respondent has violated the provisions of an Act of Congress approved September 26, 1914, entitled "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes."

Now therefore it is ordered, That the respondent, Cream of Wheat Company, its officers, agents, employees, and successors, do cease and desist from carrying into effect its policy of securing the observance of minimum resale prices for its product, by cooperative methods in which the respondent and its distributors, customers, and agents undertake to prevent others from obtaining the company's product at less than the prices designated by it, or from selling to others who fail to observe such prices—(1) by seeking and securing, directly or through its sales agents, contracts, agreements, or understandings with customers or prospective customers that they will maintain the resale prices designated by it, or that they will cooperate with it to secure the observance by others of said resale prices; (2) by the practice of (a) soliciting and securing from customers or prospective customers themselves or from dealers or trade associations, information as to whether or not such customers or prospective customers have maintained and are maintaining, or are disposed to maintain generally resale prices fixed by producers, or, respondent's resale prices in particular, and (b) soliciting and securing reports from customers, of customers who fail to observe its resale prices, and investigating and verifying such reports through further reports secured from customers as to such instances of price cutting, all with a view to refusing further sales to customers found to have cut its resale prices; (3) by notifying other customers, in case of refusal by respondent of further sales to price cutters, of such refusal and

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requiring them not to sell such price cutters on pain of themselves being refused further sales; (4) by employing its sales agents to assist in such plan by reporting dealers who have failed to observe its resale prices, and to secure adherence thereto from customers or prospective customers, and furnishing said agents the names of customers to whom it has refused further sales because of price cutting, and instructing them not to sell to such customers; (5) by requiring an extra price for its product from price cutters in order to secure from them assurance of their future observance of its resale prices as a condition of reinstatement on the regular basis, or (6) by utilizing any other equivalent cooperative means of accomplishing the maintenance of prices fixed by respondent.

It is further ordered, That the respondent, Cream of Wheat Company, shall within sixty days after the service upon them of a copy of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist hereinbefore set forth.

Complaint.

IN THE MATTER OF

RALPH E. DINGS AND LIONEL SCHUSTER, A PARTNERSHIP DOING BUSINESS UNDER THE NAME AND STYLE OF DINGS & SCHUSTER.

COMPLAINT, FINDINGS AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SECTION 5 OF AN ACT OF CONGRESS APPROVED SEPTEMBER 26, 1914.

Docket 1014—April 23, 1925.

SYLLABUS.

Where a firm engaged in the manufacture and sale of paints, varnishes, shellac, and substitutes for shellac, including shellac compounds composed of from 60 per cent to 80 per cent of shellac gum, with the adulteration or addition of 40 per cent to 20 per cent of resin or other gums dissolved in alcohol, sold said compounds labeled "White Shellac" and so advertised the same, in competition with concerns which sold their products labeled and branded in accordance with the spirit and purpose of a resolution adopted by the National Varnish Manufacturers' Association and other organizations, and designed to prevent the debasement of the term "shellac" and to protect the purchasing public through providing for the use on labels and in advertising of products not composed exclusively of shellac gum dissolved in alcohol, of the word "compound" together with the word "shellac," where the latter content equaled or exceeded one-half the total solid content, and for the use of the word "substitute" or "imitation" together with the word "shellac" in other cases; with the effect of misleading and deceiving a substantial part of the purchasing public into believing such compounds to be composed solely of genuine shellac gum dissolved in alcohol, and of inducing the purchase thereof in that belief:

Held, That the sale of such compounds labeled and advertised as above set forth, constituted an unfair method of competition.

Mr. William A. Sweet for the Commission.

COMPLAINT.

Acting in the public interest pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission charges that Ralph E. Dings and Lionel Schuster, a partnership doing business under the name and style of Dings & Schuster, hereinafter referred to as respondents, have been and are using unfair methods of competition