

desist.

IN THE MATTER OF
NATIONAL MACARONI MANUFACTURERS ASSOCIATION
ET AL.

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 8524. Complaint, Aug. 2, 1962—Decision, Apr. 30, 1964

Order requiring a trade association of macaroni manufacturers and its members to cease carrying out any common course of action to establish the kinds and proportions of ingredients to be used in producing macaroni and related products or take any action to fix or manipulate the price of such ingredients.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have violated and are now violating the pro-

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visions of Section 5 of the Federal Trade Commission Act (15 U.S.C. Sec. 45), and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest hereby issues its complaint, charging as follows:

PARAGRAPH. 1. Respondent, National Macaroni Manufacturers Association, is a corporation organized and existing under and by virtue of the laws of the State of Illinois with its principal office and place of business located at 130 N. Ashland Avenue, Palatine, Illinois.

The membership of respondent Association is composed of corporations, partnerships and individuals who are engaged in manufacturing, selling or handling macaroni, spaghetti and related products.

Respondent Association functions as a medium for collective action by its members.

As of December, 1961, respondent Association had more than 140 members, of which those named in the caption and hereinafter described are representative. Membership in respondent Association is too numerous and too variable to allow for the naming and describing of each individual member.

The corporate Respondents named in Paragraph Two hereafter are fairly representative of the entire membership of respondent Association and are named in their capacity as members and as representative of all of the members of respondent Association as a class so that those members not specifically named are also made parties respondent herein.

PAR. 2. Respondent Ronzoni Macaroni Company is a corporation organized and existing under and by virtue of the laws of the State of New York with its principal office and place of business at 59-02 Northern Blvd., Long Island, New York. Respondent Emanuele Ronzoni, Jr. is President of respondent Ronzoni Macaroni Company and President of respondent Association.

Ravarino & Freschi, Inc., is a corporation organized, and doing business under and by virtue of the laws of the State of Missouri with its principal office and place of business at 4651 Shaw Blvd., St. Louis, Missouri. Respondent Albert Ravarino is president of respondent Ravarino Freschi, Inc., and first vice president of respondent Association.

Superior Macaroni Company is a corporation organized, existing under and by virtue of the laws of the State of California with its principal office and place of business at 704 Clover Street, Los Angeles. Respondent Fred Spadafora is president of respondent Superior Macaroni Company and second vice president of respondent Association.

Respondent Robert I. Cowen is third vice president of respondent Association.

Respondent Robert M. Green is secretary of respondent Association and editor of the Macaroni Journal which is the official publication of respondent Association.

PAR. 3. Respondent members of respondent Association are now and for several years last past have been engaged in commerce as "commerce" is defined in the Federal Trade Commission Act in that they manufacture macaroni, spaghetti and related products in their respective factories and sell and ship or cause to be sold and shipped said products between and among the several States and territories of the United States. Respondent members constitute most of the manufacturers of macaroni products in the United States. They produce and sell products annually having a valuation in excess of \$100,000,000.

PAR. 4. In the course and conduct of their businesses in commerce as described in Paragraphs Two and Three above, respondent members of respondent Association are in active competition with other corporations, firms and individuals engaged in the manufacture, distribution and sale of macaroni and related products and with other corporations, firms and individuals similarly engaged and with other corporations, firms and individuals engaged in the manufacture, sale and distribution of products competitive with macaroni and related products.

The Macaroni Industry

PAR. 5. Quality macaroni and spaghetti are made from semolina which is produced from durum (wheat). Semolina is prized for its amber color and the wheaty, almost "nut-like" flavor it gives to spaghetti, macaroni and noodles. Macaroni and spaghetti are also made from mixtures of semolina and wheat flour in various proportions, and from farina, a grind of flour from ordinary wheat. Respondent manufacturers produce most of the macaroni products consumed in the United States.

Durum is a very hard amber colored grain. It is grown in several states of the United States, the highest concentration of production being in the state of North Dakota which annually produces over 80% of the Nation's crop. Durum produced in North Dakota is recognized in world markets as being of the highest quality. Other durum growing areas in the world are in Italy, France, Algeria, India, South America, particularly in Argentina and Chili, and in Russia. The primary use for durum is for making macaroni, spaghetti and noodles.

PAR. 6. Durum is traded on the Minneapolis Grain Exchange in which demand and supply factors operate to establish price levels. Growers of durum and grain merchants, who buy from growers, constitute the supply factor; macaroni manufacturers and the millers

from whom they buy semolina and durum flour, constitute the demand factor. Since the demand for durum products stems almost entirely from macaroni manufacturers, the extent of their demand has a direct bearing on the price of durum and any agreement which affects that demand is an agreement relative to the price of durum.

PAR. 7. For several years last past and continuing to the present time respondents have acted and are now acting collectively between and among themselves and through and by means of respondent National Macaroni Manufacturers Association to suppress, lessen, eliminate and frustrate competition in the manufacture, sale and distribution of macaroni and related products and to fix or rig the prices of durum, semolina and durum flour by the use, among others, of the following acts, practices and methods:

Entering into and carrying out agreements and understandings between and among themselves and with others to fix and determine the quality of macaroni, spaghetti, noodles and related products to be offered for sale. For example, on or about August 16, 1961, at the Durum conference in Minneapolis, sponsored by the National Macaroni Manufacturers Association, respondents adopted a resolution effective September 1, that durum millers should offer a blend of 50% durum and 50% other types of wheat and that macaroni manufacturers should use these 50-50 blends in producing their products during the current crop year.

PAR. 8. Respondent's practices herein alleged and described have a dangerous tendency unduly to lessen competition and create monopoly; have the effect of eliminating quality competition in macaroni products; have tended to and do tend to prevent prices for durum from becoming established by free competition, as for example, the resolution to use a 50-50 blend of semolina and other flours had the effect of doubling the available supply of durum or reducing by one half the demand for it so that the growers of durum were deprived of the benefit of interaction between the actual supply of durum and the normal demand for it; tend to and do destroy the market for macaroni products by lowering the quality thereof; to deprive the consuming public of the high quality macaroni products to which they are entitled under a free competitive system; and are unfair within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Lynn C. Paulson and Mr. Hugh B. Helm supporting the complaint.

Mr. Edward H. Hatton, Thompson, Raymond, Mayer & Jenner of Chicago, Illinois, for respondents.

INITIAL DECISION BY HARRY R. HINKES, HEARING EXAMINER

FEBRUARY 8, 1963

A complaint was issued against the National Macaroni Manufacturers Association, and its members, as well as certain of its officers by name, and three corporate respondents as members of, and representative of the entire membership of, the Association. In the complaint, issued August 2, 1962, the respondents were charged with acting collectively over the past years, through the medium of the Association, to lessen competition in the manufacture, sale and distribution of macaroni and related products and to fix or rig the prices of durum, semolina and durum flour with the result of depriving the consuming public of the high quality macaroni products to which they are entitled under a free competitive system and preventing prices for durum from becoming established by free competition, all in violation of Section 5 of the Federal Trade Commission Act.

Counsel filed its appearance on behalf of the Association and its members, as well as each of the named respondents. Answer was duly made and a prehearing conference held on September 27, 1962, following which certain conclusions were reached as noted in the prehearing conference order issued October 3, 1962. Hearings were held in St. Paul, Minnesota, and Washington, D.C., and concluded on November 8, 1962. Briefs and reply briefs were filed by January 8, 1963. Proposed findings have been submitted and carefully considered. To the extent they differ from the findings hereinafter made, they are deemed rejected.

FINDINGS OF FACT

1. Respondent National Macaroni Manufacturers Association, hereinafter sometimes referred to as the Association, is a not-for-profit corporation, organized and existing under and by virtue of the laws of the State of Illinois since 1921, with its principal office and place of business located at 139 N. Ashland Avenue, Palatine, Illinois.

2. The membership of respondent Association is organized into three classes: The active membership consists of corporations, partnerships, and individuals who are engaged in the manufacture of macaroni and/or egg noodles; the associate membership is composed of those actually engaged in lines or services essential to and/or connected with the macaroni producing industry; honorary membership is limited to persons or organizations who have rendered distinguished service to the industry.

3. The respondent Association functions as a medium for collective action by its members in a number of ways; for example, it publishes

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a magazine, the Macaroni Journal, devoted to the promotion of the welfare of the industry. It exchanges information about the price of raw materials, the quality of the products, the quantities of the products sold, exports and imports, machinery and methods of operation, and so forth. It employs a full-time secretary, Robert M. Green, respondent herein, to gather this information and prepare the Journal, as well as issue a weekly newsletter. It has employed a research director and the services of a laboratory. It has also employed the services of an advertising and publicity expert through the National Macaroni Institute, an organization created by the Association. There is also a Durum Relations Committee, set up by the Association to promote the growth of durum wheat. It has also combined to fight the ravages of Rust disease. The Association often holds meetings attended by the miller-suppliers of the active members to discuss and exchange views on common problems of the macaroni industry. Through the medium of the Association, the members have collectively retained legal services and set up a Standards Committee to work with the United States Department of Agriculture, as well as the Food and Drug Administration and the Quartermasters Corps. Similarly they have organized a Trade Practices Rules Committee to work with the Federal Trade Commission. They have collectively arranged for the production of films promoting the use of macaroni products. The members have also considered through the medium of the Association the collective importation of durum in 1954 and 1961.

4. As of December 1961 and as of the date of issuance of the complaint, respondent Association had 84 active members and 31 associate members. Membership in the Association is too numerous and too variable over the past years to permit the naming and describing of each individual member conveniently. In 1962, however, and as of the date of issuance of the complaint herein, the officers of the respondent Association were:

President, Albert Ravarino, named respondent herein; First Vice-President, Fred Spadafora, named respondent herein; Second Vice-President, Robert I. Cowen, named respondent herein; Secretary, Robert M. Green, named respondent herein.

5. As of August 2, 1962, the active members of the respondent Association were as follows:

American Beauty Macaroni Co.....	Los Angeles, Calif.
American Beauty Macaroni Co.....	Denver, Colo.
American Beauty Macaroni Co.....	Kansas City, Kans.
American Beauty Macaroni Co.....	St. Louis, Mo.
Quality Macaroni Div., American Beauty.....	St. Paul, Minn.
American Home Foods.....	Milton, Pa.
Angelus Macaroni Co.....	Los Angeles, Calif.

Anthony Macaroni Co.....	Los Angeles, Calif.
Asien Noodle Co.....	Wheeling, Ill.
Bay State Macaroni Co.....	Lawrence, Mass.
W. Boehm Co.....	Pittsburgh, Pa.
Bravo Macaroni Co.....	Rochester, N.Y.
Brice Foods	Omaha, Nebr.
California Paste Co.....	San Jose, Calif.
California Vulcan Macaroni Co.....	San Francisco, Calif.
John B. Canepa Co.....	Chicago, Ill.
Catelli Food Products.....	Montreal, Canada
Charbonneau, Ltd.....	Montreal, Canada
Cicero Macaroni Manufacturing Co.....	Cicero, Ill.
Constant Macaroni Co.....	St. Boniface, Canada
Costa Macaroni Co.....	Los Angeles, Calif.
Conte Luna Foods, Inc.....	Norristown, Pa.
The Creamette Co.....	Minneapolis, Minn.
The Creamette Co. of Canada.....	Winnipeg, Canada
Crescent Macaroni Co.....	Davenport, Iowa
Cumberland Macaroni Manufacturing Co.....	Cumberland, Md.
Delmonico Foods, Inc.....	Louisville, Ky.
Delmonico Foods of Florida.....	Tampa, Fla.
DeMartini Macaroni Co.....	Brooklyn, N.Y.
Dutch Maid Food.....	Allentown, Pa.
Florence Macaroni Manufacturing Co.....	Los Angeles, Calif.
Fresno Macaroni Co.....	Fresno, Calif.
Gioia Macaroni Co.....	Buffalo, N.Y.
Golden Grain Macaroni Co.....	San Leandro, Calif.
Golden Grain Macaroni Co.....	Seattle, Wash.
Gooch Food Products.....	Lincoln, Nebr.
A. Goodman & Sons.....	Long Island City, N.Y.
I. J. Grass Noodle Co.....	Chicago, Ill.
Horowitz & Margaretten.....	Long Island City, N.Y.
Ideal Macaroni Co.....	Bedford Heights, Ohio
Inn Maid Products.....	Millersburg, Ohio
Jenny Lee, Inc.....	St. Paul Minn.
Kellogg Co.....	Lockport, Ill.
Kientzel Noodle Co.....	St. Louis, Mo.
V. La Rosa & Sons, Inc.....	Brooklyn, N.Y.
La Premiata Division.....	Connellsville, Pa.
Russo Division.....	Chicago, Ill.
Tharinger Division.....	Milwaukee, Wis.
Luso-American Macaroni Co.....	Fall River, Mass.
Megs Macaroni Co.....	Harrisburg, Pa.
D. Merlino & Sons.....	Oakland, Calif.
C. F. Mueller Co.....	Jersey City, N.J.
National Food Products.....	New Orleans, La.
New Mill Noodle Co.....	Chicago, Ill.
Noody Products.....	Toledo, Ohio
Oakland Macaroni Co.....	Oakland, Calif.
OB Macaroni Co.....	Fort Worth, Tex.
Paramount Macaroni Manufacturing Co.....	Brooklyn, N.Y.
Philadelphia Macaroni Co.....	Philadelphia, Pa.

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Porter Scarpelli Manufacturing Co.....	Portland, Oreg.
Prince Macaroni Manufacturing Co.....	Lowell, Mass.
Prince Macaroni Manufacturing Co.....	Brooklyn, N.Y.
Prince Macaroni Manufacturing Co.....	Schiller Park, Ill.
Prince-Michigan Macaroni Co.....	Detroit, Mich.
Procino-Rossi Corp.....	Auburn, N.Y.
Ravarino & Freschi, Inc.....	St. Louis, Mo.
Refinde Macaroni Co.....	Brooklyn, N.Y.
Roma Macaroni Co.....	San Francisco, Calif.
Romi Foods, Ltd.....	Weston, Canada
Ronco Foods.....	Memphis, Tenn.
Ronzoni Macaroni Co.....	Long Island City, N.Y.
Peter Rossi & Sons, Inc.....	Braidwood, Ill.
San Diego Macaroni Co.....	San Diego, Calif.
San Giorgio Macaroni Inc.....	Lebanon, Pa.
St. Louis Macaroni Co.....	St. Louis, Mo.
Schmidt Noodle Co.....	Detroit, Mich.
Shreveport Macaroni Manufacturing Co.....	Shreveport, La.
Skinner Macaroni Co.....	Omaha, Nebr.
Superior Macaroni Co.....	Los Angeles, Calif.
U.S. Macaroni Manufacturing Co.....	Spokane, Wash.
Vivison Macaroni Manufacturing Co.....	Detroit, Mich.
Weber Food Products.....	Bell, Calif.
Weiss Noodle Co.....	Cleveland, Ohio
West Coast Macaroni Co.....	Oakland, Calif.
Western Globe Products.....	Los Angeles, Calif.
A. Zerega's Sons, Inc.....	Fairlawn, N.J.

6. As of August 2, 1962, the associate members were as follows:

ADM—Commander Larabee Mills.....	Minneapolis, Minn.
Amaco, Inc.....	Chicago, Ill.
Amber Milling Division, GTA.....	St. Paul, Minn.
Ambrette Machinery Corp.....	Brooklyn, N.Y.
Ballas Egg Products.....	Zanesville, Ohio
V. Jas. Benincasa Co.....	Zanesville, Ohio
Braibanti Co.....	New York, N.Y.
Buhler Corp.....	Minneapolis, Minn.
N. J. Cavagnaro & Sons.....	Brooklyn, N.Y.
Clermont Machine Corp.....	Brooklyn, N.Y.
DeFrancisci Machine Corp.....	Brooklyn, N.Y.
Dobeckmun Co.....	Cleveland, Ohio
Doughboy Industries, Inc.....	New Richmond, Wis.
E. I. DuPont Co.....	Wilmington, Del.
Faust Packaging Corp.....	Brooklyn, N.Y.
Fisher Flouring Mills Co.....	Seattle, Wash.
General Mills, Inc.....	Minneapolis, Minn.
Hoffman-LaRoche, Inc.....	Nutley, N.J.
Hoskins Co.....	Libertyville, Ill.
International Milling Co.....	Minneapolis, Minn.
Lawry's Foods, Inc.....	Los Angeles, Calif.
D. Maldari & Sons, Inc.....	Brooklyn, N.Y.

Merck & Co.....	Rahway, N.J.
Munson Bag Co.....	Cleveland, Ohio
North Dakota Mill & Elevator.....	Grand Forks, N. Dak.
Wm. H. Oldach, Inc.....	Philadelphia, Pa.
Rossotti Lithograph Corp.....	North Bergen, N.J.
Russell Miller-King Midas Mills.....	Minneapolis, Minn.
Schneider Brothers, Inc.....	Chicago, Ill.
U.S. Printing & Lithograph.....	New York, N.Y.
Vitamins, Inc.....	Chicago, Ill.
Wallace & Tiernan, Inc.....	Belleville, N.J.

7. The corporate respondents named in the complaint as members of, and representative of the entire membership of, the Association are and have been among the active members of the Association for the past several years. Respondent Ronzoni Macaroni Company is a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal office and place of business at 59-02 Northern Boulevard, Long Island, New York. Respondent Ravarino & Freschi, Inc., is a corporation organized and doing business under and by virtue of the laws of the State of Missouri, with its principal office and place of business at 4651 Shaw Boulevard, St. Louis, Missouri. Respondent Superior Macaroni Company is a corporation organized under the laws of the State of California, with its principal office and place of business at 704 Clover Street, Los Angeles, California. These corporate respondents, like the other active members of the Association, manufacture macaroni, spaghetti, and related products.

8. Respondent Emanuele Ronzoni, Jr., was and is the President of Ronzoni Macaroni Company, and was President of the respondent Association in 1961 and its immediate past President in 1962, as well as a member of the Board of Directors. He has also held various committee positions within the Association.

9. Respondent Albert Ravarino is the President of Ravarino & Freschi, was the First Vice-President of the Association in 1961, and its President in 1962. He has also been on the Board of Directors of the Association, as well as a member of various committees.

10. Respondent Fred Spadafora is President of Superior Macaroni Company, was the Second Vice-President of the Association in 1961 and First Vice-President in 1962. He, too, has been a member of the Board of Directors of the Association and of various committees of the Association.

11. Respondent Robert I. Cowen was the Third Vice-President of the Association in 1961 and its Second Vice-President in 1962. He has also been a member of the Board of Directors of the Association and on various committees.

12. Respondent Robert M. Green is now and has been for 10 years Secretary of the respondent Association as well as Secretary of the National Macaroni Institute. During the same period of time he was Editor of the Macaroni Journal.

13. The Association is governed by a Board of Directors which elects the officers of the Association, with the exception of the Secretary-Treasurer, from among their own numbers. The Board is composed of active members of the Association and chosen by a majority vote of the active members.

14. There are approximately 125 macaroni manufacturers of commercial importance in the United States. The Association's active membership accounts for 84 of that number. Its members normally purchase about 70 percent of the total volume of durum wheat products produced by the mills.

15. The Association is the only trade association representing the macaroni industry and for the past 10 years has spoken for the industry. Its publication, the Macaroni Journal, is the official organ of the Association.

16. Respondent members of the Association are and have been engaged in commerce as "commerce" is defined in the Federal Trade Commission Act in that they manufacture macaroni and related products in their respective factories, and sell or ship, or cause to be sold or shipped, said products between and among the several states and territories of the United States. They produce and sell products having an annual valuation in excess of \$100,000,000.

17. In the course and conduct of their business in commerce, respondent members of the Association are in active competition with other corporations, firms, and individuals engaged in the manufacture and sale of macaroni and related products, as well as with corporations, firms and individuals engaged in the manufacture and sale of products competitive with macaroni and related products. Respondent members of the Association are also in competition with each other in the manufacture and sale of macaroni products.

18. Macaroni products are food products made from dry dough manufactured from semolina, durum flour, farina flour or any combination of the foregoing. Semolina is the middling of durum wheat with a tolerance of 3 percent flour. Semolina is a granulated product, whereas durum flour is a powder form of durum wheat. Farina is the middlings of any variety of hard wheat other than durum, with farina flour the powder form. The highest quality macaroni products are made from 100 percent semolina and such products have the best consumer acceptance of all macaroni products. The manufacturers in the macaroni industry prefer to use 100 percent durum in their prod-

ucts because of the greater consumer acceptance of such macaroni products. This consumer acceptance arises from the fact that durum has superior cooking tolerances and color. To reduce the durum content of a macaroni product is to make the product inferior and lower its quality. Nevertheless, at times, macaroni manufacturers engage in some blending and some manufacturers use farina regularly. The industry as a whole, however, believes that its success depends upon the greater use of durum in its products and has consistently encouraged the greater production of durum wheat as the necessary ingredient of a quality macaroni product.

19. Durum is grown mainly in the North-Central states of the United States, and is a spring crop harvested in the latter part of August. It commands a premium price over other classes of wheat. Despite the premium price, however, most macaroni manufacturers prefer to use durum unless its cost rises beyond a level they consider reasonable.

20. Durum is traded on the Minneapolis Grain Exchange, in which demand and supply factors operate to establish price levels. Growers of durum and grain merchants who buy from the growers constitute the supply factor; macaroni manufacturers, millers and exporters constitute the demand factor. Demand has an effect on the price of durum, and any agreement that affects demand affects price.

21. Nearly all of the durum wheat ground in the United States is ground by seven mills in the Minneapolis, Minnesota, area. These mills are associate members of respondent Association and have been for the past 10 years.

They are:

1. ADM—Commander Larabee Mills, Minneapolis, Minn.
2. Amber Milling Division, G.T.A., St. Paul, Minn.
3. Doughboy Industries, Inc., New Richmond, Wis.
4. General Mills, Inc., Minneapolis, Minn.
5. International Milling Company, Minneapolis, Minn.
6. North Dakota Mill & Elevator, Grand Forks, N. Dak.
7. Russell Miller-King Midas Mills, Minneapolis, Minn.

22. Macaroni manufacturers usually contract with mills for their durum wheat requirements. These contracts vary in length, but customarily are 120 days in duration. The mills in turn seek to cover contractual commitments through the purchase of durum wheat, and then confirm the sale which is made subject to confirmation by the miller. The seven durum mills produce blends reluctantly since they are located where the durum is and not where the other wheat is, and also because of their added investment in durum grinding equipment. They go to blending only upon the insistence of their customers, the macaroni manufacturers.

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23. Over the past 10 years the demand for durum has stemmed almost entirely from domestic macaroni manufacturers inasmuch as the demand from exporters has been negligible except for the years 1956/57, 1960/61, 1961/62.

[In thousand bushels]

Year	Mill grind	Feed and other use	Seed	Exports	Total disappearance
1952-53	23, 668	1, 703	2, 940	3, 075	31, 386
1953-54	11, 915	1, 603	2, 287	41	15, 846
1954-55	5, 862	687	1, 803	0	8, 352
1955-56	8, 500	2, 285	3, 067	239	14, 091
1956-57	14, 984	4, 212	3, 022	10, 580	32, 798
1957-58	21, 463	4, 923	1, 307	293	27, 986
1958-59	22, 713	4, 225	1, 740	0	28, 687
1959-60	21, 844	2, 078	2, 270	0	26, 192
1960-61	23, 438	3, 022	2, 389	5, 256	34, 105

	Durum (million bushels)
1961-62	
Carryover, July 1, 1961	20
Production	19
Imports	--
Supply	39
Exports, including shipments	16
Domestic disappearance	18
Carryover, June 30, 1962	5

24. On or about August 14, 1953, at the industry durum conference in Chicago, Illinois, sponsored by the respondent Association, the members adopted a resolution, reported by the Macaroni Journal as follows:

* * * that the durum millers extend available durum supplies during the coming year by offering (1) a 50-50 blend of semolina and farina, made from a mixture of durum and hard wheat. By definition this product will contain not more than 3% flour; (2) a 50-50 blend of durum and hard wheat in grain form. The flour content of this product will have to be determined when there is more information on the milling qualities of the new crop durum.

Durum patent flour will also be a 50-50 blend. *Semolina is not to be offered to any buyer after August 14*, although existing contracts, of course, are to be filled. [Emphasis supplied.]

The Macaroni Journal for December 1953 also refers to the August 14 meeting as "It was decided at this meeting that all durum mills should produce a blend of 50% durum wheat and 50% hard spring wheat or hard winter wheat to make the best possible use of available durum."

In March 1954, the then President of the Association spoke of the August 14 meeting, saying: "In August the prompt action of the industry, at a meeting called by the Association to put the industry on a

50-50 blend to make the best possible use of the available durum, won universal approval." The August 14 resolution was voted upon by a show of hands on the question whether the macaroni manufacturers wanted the mills to offer a blend. It was stated that unless the mills held to a blend they would run out of wheat in December or January and would stand idle thereafter. Both the millers and the manufacturers wanted to know what was going to be done and the vote taken upon the resolution was a clear signal to the millers that their customers, the macaroni manufacturers, would order blends instead of 100 per cent durum, as well as a clear signal to the manufacturers that such blends would be available from the millers.

25. In September 1957, respondent Green reported that:

* * * the industry was approached by grain importers in the spring of 1954 with the proposition that durum wheat from abroad was available to this country and an exchange of surplus varieties of wheat held by the United States would be accepted in payment, with the difference in market value made up in dollars. The durum millers preferred to wait to see what the 1954 crop would produce before they would make any commitments to attempt to get imported wheat.

26. Over the past 10 years the Association through its official organ, the Macaroni Journal, has reflected the acute awareness and the motivation of its members respecting the cost of durum. In the Journal for October 1953, we read:

Albert Ravarino of Ravarino & Freschi, St. Louis, stated that he had just returned from Europe and had observed that Italian manufacturers use blends of wheat for macaroni products. He questioned why this country let so much durum be exported last year when it was known then that durum was in short supply. The answer given to this question was that *exporters had entered the open market and purchased durum supplies at prices higher than American millers were willing to pay*, and that stocks from the surplus supplies of the Commodity Credit Corp. that were exported were secondary grades not wanted by the millers.

Some manufacturers felt that blending durum with hard wheat should be their own prerogative and should not be done by the mills, but the great majority of manufacturers felt that a uniform product from the durum mills would give the industry greater stability in quality *and price* and make the best use possible of the available durum. [Emphasis added.]

In the Journal for October 1954, in an article entitled "Industry Meets to Consider Durum Problem," it was reported:

The premium for semolina-farina blend may run much higher than the 50¢ differential which generally prevailed last year.

In the Journal for April 1957, it was reported that a delegation of the manufacturers stated to the Department of Agriculture that:

The milling industry would undoubtedly have ground much more durum through the current crop year *had not the price of durum wheat been maintained at such a high level*. This high level resulted because of the very liberal export subsidies which took so much of our durum wheat out of the domestic market.

Had the price of durum wheat averaged around \$2.59 per bushel, Minneapolis, which is the Government loan level, the macaroni industry would have used a much more liberal percentage of durum. *There is a limit to how much premium the macaroni manufacturers can and will pay for durum*, and because of the high export subsidies on durum wheat, the price of durum was kept so high that as a result domestic consumption was seriously curtailed. [Emphasis added.]

In January 1956, the Journal reported:

The macaroni industry is interested in the production of macaroni products at the highest level of quality possible, and, therefore, will undoubtedly revert back to production of macaroni products from 100% durum *when durum wheat sells at not too great a premium over breadwheats*. Like any other industry, the macaroni industry is competitive. Macaroni products compete with low cost items such as rice, beans and potatoes. *The macaroni industry at most times in the past has paid a slight premium* for durum products over breadwheat products because of their ability to produce quality macaroni products. [Emphasis added.]

In May 1956, the Journal quoted the Association's then president:

If the industry had not used this wisdom and caution, but instead had impulsively rushed into the general use of 100% durum, *prices of durum would have skyrocketed*, forcing increases in macaroni prices which the keenly competitive retail food market would not tolerate.

* * * * *

Like any other industry, the macaroni industry is competitive. Its products compete with low cost items such as rice, beans and potatoes, and today it further competes with many new convenience foods. It has in the past paid a *slight premium* for durum products over breadwheat products and it will continue to do so. [Emphasis added.]

In February 1957, the Journal reported that the greatest number of manufacturers thought that 50 cents was the premium durum should command. In December 1955, the Journal carried an article which in part said:

* * * The present durum price range of \$2.85-3.00 per bushel allows durum semolina to compete favorably with hard wheat farina which will gradually rebuild the macaroni market for the durum grower. This could not be accomplished if durum prices were \$3.50 and higher, as was the situation in 1954.

This "ceiling" of \$3.50 is apparently, however, not an absolute one. As the Journal reported in November 1961, with durum selling at between \$3.25 and \$3.42 per bushel, only a slight increase in the macaroni price resulted:

* * * The sharp increases in raw material costs have brought about the first general price advance in macaroni products in five years. Across the country the average increase has amounted to about one and one-half cents a pound for macaroni products, one cent a pound for noodle products.

27. One hundred percent durum went off the market in 1953 and the 50-50 blend became the best product available. The industry continued to use blends throughout the rest of 1953, the whole of 1954 and

1955, and until June 1956. The Macaroni Journal reported in February 1956:

But the improvement in supply inevitably forced durum prices down. From a high of \$4.40 at the start of 1955, durum prices slid steadily to a range of \$2.57/\$2.72 at the end of the year.

The industry action of 1953 also had the effect of lowering the quality of the macaroni product made from the grind available.

28. In January 1956, the industry "* * *" unanimously expressed its intent to revert to the use of 100% durum as quickly as supply and price would make it possible." The then President of the Association stated:

If the industry had not used this wisdom and caution, but instead had impulsively rushed into the general use of 100% durum, prices of durum would have skyrocketed, forcing increases in macaroni prices which the keenly competitive retail food market would not tolerate.

Similarly, in the January 1956 Macaroni Journal a representative of the millers reported:

The macaroni industry is interested in the production of macaroni products at the highest level of quality possible, and, therefore, will undoubtedly revert back to production of macaroni products from 100% durum when durum wheat sells at not too great a premium over breadwheats.

In June 1956 at an industry conference sponsored by the Association it was resolved that the manufacturers be urged to discontinue the use of blends. The 1956 resolution in effect told the millers what the manufacturers wanted to buy thereafter and foretold what they did in effect, with few exceptions, buy thereafter. Thereafter, the industry went back to the 100 percent durum standard throughout the rest of 1956, the whole of 1957, 1958, 1959, 1960, and until August 1961.

29. In 1954 during the height of the durum shortage and the use of limited amounts in macaroni products, per capita consumption of macaroni products fell to 6.3 pounds. With the resumption of the use of 100 percent durum subsequently, the per capita consumption rose to 7.3 in 1958 and continued at around that level until August 1961.

30. The carryover of durum wheat on July 1, 1960, from the crop year 1959/60, was 18 million bushels. During the ensuing year, July 1960 through June 1961, 34 million bushels of durum wheat were produced, making a total supply of 52 million bushels during that year. Of this amount, 6 million were exported and 26 million used domestically, leaving an actual carryover as of June 30, 1961, of 20 million bushels. Such a large carryover, however, was not known in 1961 by Government sources or the industry. Instead, the carryover as of June 30, 1961, was reported to be only around 12 million bushels.

31. In January 1961, the Macaroni Journal reported that Italy had bought substantial amounts of American and Canadian wheat. France, also, was reported as having harvested a poor crop of durum wheat in 1960 and as having purchased very large quantities in Canada. In March 1961, the first signs of a drought condition in the domestic durum crop appeared, and in May and June serious fears were expressed for the crop. According to the testimony of the manager of one of the mills, there was a durum shortage in the foreign markets apparent in the "spring of 1961" and the mills knew that such markets would be "looking to the United States for supplies." The time was pinpointed to April, May, and June of 1961. In the month of June, exporters bought some 6 million bushels of durum wheat from the Commodity Credit Corporation. This was followed on July 1 by a Government crop estimate of only 16 million bushels instead of the 26 million bushels previously estimated for 1961/62.

The unusual export activity in durum was duly noted in the Macaroni Journal which, in May 1961, reported a substantial sale of durum during the last week of March for export to France and Germany. The June issue of the Journal reported the export sale of some 2 million bushels, as well as the complete sell-out of Canadian durum.

The impending shortage of durum wheat was also recognized by the mills. One of them made test runs of blends in June 1961. Others similarly made early tests.

32. At the annual meeting of the Association in July 1961, the shortage of durum was discussed and the importation of some 5 million bushels of Canadian durum considered. Reference was made to the higher price of durum because of the prospects of a crop shortage. A resolution was approved, asking the Secretary of Agriculture to curtail further exports of durum, stating that the domestic market might "be forced to use wheats of inferior quality other than durum, thereby placing the domestic macaroni industry at a competitive disadvantage to imported products made with 100% durum semolina." Since the industry knew that foreign supplies of durum were scant, they must have realized that imported macaroni would be made from durum or semolina exported from this country to such foreign countries. Apparently, therefore domestic macaroni manufacturers were assuming that the foreign manufacturers would get the domestic durum crop. Plans were made for an industry meeting of growers, millers, and manufacturers in August.

33. A meeting of growers, millers, and manufacturers was held in Minnesota on August 15, 1961, sponsored in part by the Association. The meeting was open to anyone who wanted to attend, and was attended by all sorts of people and organizations involved in the

industry. The durum millers attended the August 1961 meeting in order to learn the manufacturers' plans for coping with the shortage. Similarly, the manufacturers attended the meeting to learn what sort of raw materials they could expect from their miller-suppliers in the event of shortage. The durum carryover as of July 1961 was reported as 12 million bushels. Of this carryover, export sales were reported to have taken 6 million bushels, practically all in June. Another two million bushels were expected to be sold for export and were actually sold to France while the meeting was in session. The balance of four million bushels was expected to be used up by the mills by the time the new crop came in. The new crop was estimated at around 18 million bushels, against a normal domestic disappearance of about 29 million bushels leaving a shortage for the crop year of 1961/62 of about 11 million bushels.

The reporter of the above figures, a Mr. Von Blon, of a milling company, also outlined several alternatives in view of the prospective shortage. One was to continue 100 percent durum as long as possible, saying, "If a few manufacturers decided to do this and others were forced to compete, we would have something approximating this situation. The result would be that by early in 1962 we would have exhausted our supplies of durum wheat completely and would undoubtedly be paying astronomical prices during the winter months for dwindling supplies." A second alternative would be to eliminate durum completely, which was felt to be unwise in the light of industry's experience with consumer dissatisfaction with durum substitutes. The third and preferred course of action was to stretch out the supplies as long as possible by using blends of 50 percent durum and 50 percent other wheat, saying "Not only will this third alternative provide the best products available to macaroni manufacturers this year, but it will minimize price fluctuations for raw materials. The more we can spread out the buying of durum wheat, the better the possibility that the fluctuation in the price of durum wheat will be held within reasonable limits." Mr. Von Blon concluded his remarks by requesting that the macaroni manufacturers there present provide the millers with an "expression of opinion." Pursuant thereto, the manufacturers met and exchanged views on the shortage. At least one participant argued that the manufacturers pass a resolution making a 50-50 blend mandatory. Association records show that this participant was a member of the Association in 1961. After the record was closed and briefs in this proceeding filed, counsel for the respondents asked to introduce evidence purporting to show that the participant became a member at least a month after the meeting. This request was refused for the reasons noted in the order denying the motion, but it is of little consequence in the determination of this issue.

It is of not great significance whether the person making such a suggestion was a member or not. The important issue for determination is whether the Association, through its membership embarked upon the course of conduct suggested by that participant, pursuant to an agreement.

34. A resolution was adopted by the manufacturers and by the Association in due course:

Effective September 1, durum millers should offer a blend of 50% durum and 50% other types of wheat whose characteristics most closely resemble durum and that macaroni manufacturers should use this 50-50 blend to maintain the highest quality possible to best utilize the available supply of durum during the current crop year.

Several of the participants voting for the resolution nevertheless expressed the opinion that they did not feel bound by it. One of the manufacturers, having secured an ample supply of durum during the spring of 1961, continued to use 100 percent durum during the crop year 1961/62; another manufacturer having used up its supply of semolina, went to a straight farina usage without any durum.

By and large, however, the macaroni manufacturers went to a 50-50 blend in line with the resolution adopted at the meeting in 1961, calling upon durum mills to offer a 50-50 blend of durum and other wheat, and macaroni manufacturers to use such 50-50 blends. Mills having commitments to produce semolina fulfilled such contracts, even after the August 1961 meeting, before switching to blends.

35. During the crop years 1959/60 and 1960/61, the seven durum mills used about 95 percent durum wheat to 5 percent other wheat. In 1961/62, however, they used about 50 percent of each. Much of the durum used in 1961/62, however, went to complete contracts made before the August resolution. Some of it also was processed by the mills and exported as semolina. Some of the durum was also blended at the mills instead of being sold as 100 percent semolina. As a result the amount of 100 percent semolina sold by the mills pursuant to contracts made after August 1961 was quite small. From reports filed by these mills, it appears that they produced about 25 percent pure semolina to 75 percent blends and other wheat products, and of the 25 percent semolina, about half may have been pursuant to contracts made before August 1961¹ and some went for export instead of domestic use. As respondent Green stated in a letter to the Agricultural Stabilization and Conservation Service in October 1961, "100% semolina is still being quoted in Minneapolis but there are very, very few takers because of the extremely high prices." It appears, therefore, that the

¹ For example, one of the largest mills reported that 73 percent of the 1961/62 pure semolina production went to fulfill contracts made prior to the August resolution.

amount of 100 percent semolina sold domestically after August 1961 was negligible.

36. The October 1961 letter to the Agricultural Stabilization and Conservation Service from respondent Green characterized the August 1961 resolution as a "general agreement." The letter also stated that close to 14 million bushels of some 30 million bushels available for crop year 1961/62 had already been exported or bought for export as of October 1 and that "the trade reports that the exporters are still in the market." The total purchases by exporters during the crop year 1961/62 actually exceeded 16 million bushels but at the end of that crop year, as of June 30, 1962, there was a domestic durum carry over of five million bushels nevertheless. It thus appears that the mills failed to use over 21 million bushels of durum during the crop year 1961/62 either because it was not bought (five million bushels) or because it was bought by exporters (16 million bushels). These 21 million bushels, if used by domestic macaroni manufacturers in addition to the 4 million actually used, would have provided a domestic supply of some 35 million bushels, or more than the amount normally needed for domestic quality production.

37. The cash price of durum during the first half of 1961 (corresponding to the last half of the crop year 1960/61) averaged \$2.26 per bushel. In June 1961, the price advanced to \$2.41; in July, to \$2.83; in August, to \$3.11, and rose steadily the rest of that calendar year until December when the price reached \$3.65 per bushel. By June 30, 1962, however, the price of durum had dropped to \$2.70.

38. During the crop year 1961/62, approximately 14 million bushels of durum were milled for domestic use. (Plus about 4 million bushels for seed, etc.) This represented a drop of some 9 million bushels from the 23 million bushels milled in the previous crop year. Such a decline in the mill use of durum would normally have a negative or depressing effect on the price of durum.

39. There is a low price elasticity for bread and other final forms of wheat, such as macaroni products. This causes relatively small declines in consumption with any increase in prices. This relationship is estimated to be approximately 10 to 1; that is, a price increase of 10 percent will cause a consumption decline of 1 percent. It is further estimated that the cost of the wheat in a wheat product is approximately 10 percent of the latter's price. Consequently, in a macaroni product selling for 20 cents, the wheat cost would be about 2 cents, and a 100 percent increase in such wheat cost would result in a 2 cent or 10 percent increase in the price of a macaroni product. This in turn would result in the decline of such macaroni products' consumption of about 1 percent. The evidence of such relationship is uncontroverted.

Discussion

The law against price-fixing is so clearly defined that an extended discussion of it here is needless. It is well established that collective action to tamper with price is illegal per se. *United States v. Socony-Vacuum Oil Company, Inc.* 310 U.S. 150 (1940). It is equally well-settled law that the Federal Trade Commission can deal with price-fixing under its power to prevent unfair methods of competition. *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948).

If the purpose and practice alleged runs counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of competition. *Fashion Originators Guild v. Federal Trade Commission*, 312 U.S. 457 (1941).

It is not only an outright agreement upon prices that the Commission may reach, but any and all concerted action to eliminate, lessen or restrain price competition. The device of curtailing production is rarely if ever employed by itself, but usually in conjunction with price fixing activities and also with restrictions of distribution. But any agreements to limit the number of producers in an industry, impose production quotas or suspend the production of a commodity are illegal per se. *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921); *Salt Producers Association v. F.T.C.* 134 F. 2d 354 (7th Cir. 1943).

Concerted efforts to raise, depress, fix, peg or stabilize prices are conclusively presumed to be undertaken in order to lessen or eliminate competition. Other motivations are immaterial.

It makes no difference whether the motives of the participants are good or evil; whether price fixing is accomplished by express contract or some more subtle means; whether the participants possess market control; whether the amount of interstate commerce affected is large or small; or whether the effect of agreement is to raise or to decrease prices. *United States v. McKesson & Robbins*, 351 U.S. 305 (1956).

The respondents urge dismissal of the complaint for three primary reasons:

- (1) There was no agreement made by the respondents.
- (2) If there were an agreement made by the respondents, it was not for the purpose and with the effect of affecting prices.
- (3) The corporate respondents in this proceeding are not representative of the Association members.

The Agreement

As the Court stated in *United States v. Morgan*, 118 F. Supp. 621, 634 (S.D.N.Y. 1953):

Either there is some agreement, combination or conspiracy or there is not. The answer must not be found in some crystal ball or vaguely sensed by some process

of intuition, based upon a chance phrase used here or there, but in the evidence adduced in the record of the case which must be carefully sifted, weighed and considered in its every aspect. This is an arduous but necessary task.

Respondents emphasize the fact that the language of the 1961 resolution was not binding in its terms. In fact, the urging of one participant to that effect was specifically rejected at the meeting. In addition, some of the members at the meeting testified that the resolution was not considered to be binding. It was referred to by some as "consensus of opinion" or a "recommendation."

The language used to describe the alleged agreement, however, is not controlling. In *Advertising Specialty National Association et al. v. Federal Trade Commission*, VI S. & D. 76, 238 F. 2d 108 (1st Cir. 1956), the court upheld a Commission finding of an agreement to maintain prices despite the respondents' resolutions and discussions represented as "recommendations or a 'consensus of opinion' as to good practice in the industry, a consensus which involved 'absolutely no obligation' and which was not binding on anyone * * * petitioners point to evidence that the secretary of the Association on two occasions cautioned the membership that they should not participate in 'collusive action' to fix prices. * * * and the Association's constitution and the member's creed * * * 'were not taken seriously.'"

The respondents' argument on that point, in any event, appears contradicted by the statements and behavior of the respondents. Respondent Green in a letter to the Agricultural Stabilization and Conservation Service in October 1961 spoke of "an agreement." The minutes of the July 1961 meeting refers to the unwillingness of the millers to *commit* themselves on blending. As in the *Advertising Specialty* case, *supra*, it is to be expected that the respondents would deny that there was an agreement, coupled with the argument that this was merely parallelism in business behavior. That is, that each individual miller and manufacturer independently decided to abandon the 100 percent durum standard in favor of a 50-50 blend or less, in view of the impending shortage of durum. If it were merely business parallelism, there could be no finding of conspiracy.

One of the tests enunciated by the courts to differentiate conspiracy from parallelism is the test of self-interest. As the court said in *Independent Iron Works, Inc., v. United States Steel Corp.* 177 F. Supp. 743 (N.D. California S.D. 1959) :

"Reasonable businessmen will act similarly when presented with the same problem." The anti-trust laws were not made to prohibit businessmen from adopting sound business policies merely because competitors had already adopted the same or a similar policy.

An inference of conspiracy is permissible only where the conduct is adopted by a competitor "in apparent contradiction to its own self-interest." *Milgram*

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v. Loew's Inc. 3 Cir., 1951, 192 F. 2d 579, 583. An inference of conspiracy would only arise from similar business conduct if it appeared more to the interest of competitors to adopt different practices. *Chorak v. RKO Radio Pictures* 9 Cir., 1952, 196 F. 2d 225, 229, *certiorari denied*, 1952, 344 U.S. 887, 73 S. Ct. 329, 97 L. Ed. 702.

Applying this test of self-interest here, we find that the respondents were confronted with an apparent durum shortage in the summer of 1961. The threat of a shortage was apparent as early as January 1961. The self-interest of each macaroni manufacturer would have compelled each of them to go into the durum market and obtain whatever durum they could lay their hands on while there was still some durum available. That there was some durum available as late as October 1961 is reported by the respondents themselves. Instead, however, the respondents chose to wait until after August 1961 and then abandon the use of 100 percent durum, rendering their macaroni product inferior in quality. Such behavior is not consistent with self-interest.

It is argued that the macaroni manufacturers, being in competition with other macaroni manufacturers as well as with manufacturers of competitive grocery products such as potatoes, rice, beans, and other cereal foods, are compelled to keep the price of their product at reasonable levels and that any increase in price results in a decrease in consumption of the macaroni product. The record shows, however, that even with an increase in the cost of raw material (wheat) of as much as 100 percent, the wheat product's price would advance moderately, perhaps only about 10 percent; such a moderate increase in the price would cause only a negligible decrease in consumption. The respondents, being particularly involved in the marketing of macaroni products, must be taken to be aware of this. Similarly, they are admittedly aware of the consumer reaction resulting from the substitution of other wheats for durum in their products. The record shows that in previous years when the industry switched to a blend, per capita consumption was only about 6.3 pounds as against 7.3 pounds in 1961. Going to the use of blends, therefore, posed the threat of a consumption loss of about 14 percent. The alternatives were, therefore, quite clear: Sustain a consumption loss of 14 percent by going to a blend, or a consumption loss of one, two or three percent by buying durum at \$4.50 per bushel, which would be roughly 100 percent higher than the "normal" price of about \$2.25 per bushel, and raising the price of the macaroni product accordingly. Actually, however, the price never got as high as \$4.50 so that the increased cost would have been even less than calculated above, with a smaller increase in price and a smaller drop in consumption. Self-interest should have dictated to

each manufacturer the use of durum instead of a blend; instead, the industry went to a blend.

If, of course, there was no durum available, the reasoning applied above would not prevail. It must be conceded that the industry thought there was going to be a shortage. The carryover from the previous crop year, as reported in August 1961, was only 12 million bushels and the 1961/62 crop was estimated around 18 million bushels. In previous years the domestic disappearance per year was around 28 million bushels, with no exports. In 1961/62, however, the total disappearance reached 34 million bushels (not including the five million bushel carry over at the end of June 1962), with domestic users (manufacturers, seed, etc.) taking 18 million thereof. The exporters outbid the domestic users for the balance. The shortage, therefore, was not absolute as in 1953/54/55 when the total disappearance ranged between eight and 16 million bushels, with practically no exports. Instead, this was the result of a deliberate decision not to buy, thus permitting the exporters to take 16 million bushels at a price higher than the domestic industry was willing to pay. As demonstrated above, this unwillingness to pay was contrary to the interest of each manufacturer in the light of their own experiences.

Moreover, it is difficult to believe that any macaroni manufacturer would deliberately resort to the use of a blend, thus deteriorating the quality of his product and risking a substantial drop in consumer acceptance, unless he was reasonably sure that his competitors would do likewise. If there were a real shortage of durum, he could have that assurance, but since the shortage was only the result of a refusal to compete in price with the exporters, he could not be sure that his competitors would be similarly unwilling to pay the higher price for durum in order to maintain high per capita consumption of their product. It follows, therefore, that each macaroni manufacturer must have known that his competitors would not stay with the 100 percent durum standard, such knowledge being given to him at the August 1961 meeting. It is argued that the meeting was for the purpose of exchanging views and discussing the shortage. Such purpose, however, could be realized by the exchange of official statistical data that is available to the respondents through Government sources and otherwise. The meeting served the additional purpose, it seems, of acquainting all members of the industry with a program of behavior that was expected of each of them and resulting in what respondent Green termed a "general agreement."

There is another facet to this array of circumstances indicating an agreement. The industry was well aware of what happened in

1953 when a real shortage of durum occurred. At that time, also, there was a "consensus of opinion" that the industry used blends of durum. Then, however, we had one additional fact: The industry resolution of 1953 said specifically that "semolina is not to be offered to any buyer after August 14, although existing contracts are to be filled," and a 50-50 blend became the best available. Such a prohibition on the production of semolina was not spelled out in the 1961 resolution. The records of the mills, however, for crop year 1961/62 show that the results in 1961 were not much unlike the results of 1953, with relatively negligible amounts of 100 percent durum semolina sold to domestic users after the August resolution.

In summary, therefore, it appears, and the examiner so concludes, that both in 1953 and 1961 the industry met and reached an agreement that each manufacturer would use a blend rather than 100 percent durum, and that this program of use would continue for the rest of the crop year with relatively few exceptions.

The Purpose of the Agreement

Respondents argue further that even if they reached an agreement, that agreement was not motivated with the intent or purpose of establishing, fixing, or pegging the price of durum wheat, but that the action taken was in all respects reasonable under the circumstances. They argue that the purpose of the agreement was to preserve the quality of the product to the greatest extent possible consistent with the apparent available supply, citing the fact that the resolution so stated specifically and that several of the witnesses so testified. They cite *Maple Flooring Association v. United States*, 268 U.S. 563 (1925) in which the court held:

* * * trade associations or combinations of persons or corporations which openly and fairly gather and disseminate information as to the cost of their product, the volume of production, the actual price which the product has brought in past transactions, stocks of merchandise on hand, approximate cost of transportation from the principal point of shipment to the points of consumption * * * and who * * * meet and discuss such information and statistics without, however, reaching or attempting to reach any agreement or any concerted action with respect to prices or production or restraining competition, do not thereby engage in unlawful restraint of commerce.

The court, however, recognized that the activities of a trade association were illegal if such activities resulted in "concerted action to lessen production arbitrarily or to lessen price beyond the levels of production and price which would prevail if no such agreement or concerted action ensued." This distinction was referred to in *United States Malsters Association v. FTC*, IV S. & D. 428, 152

F. 2d 161 (7th Cir. 1945) where the court referred to *United States v. Socony-Vacuum Oil Co.*, *supra*, wherein the court stated:

"For the systems there under attack were methods of gathering and distributing information respecting business operations. It was noted in those cases that there was not present any agreement for price-fixing."

See also, *Sugar Institute Inc. v. United States* 297 U.S. 553 (1936) where the court noted that although the dissemination of market information may have the effect of price and production stabilization, standing alone, it cannot be said to be unlawful. A combination, however, to make and supply information as a part of a plan to impose unwarrantable restrictions, as, for example, to curtail production and raise prices, is unlawful.

Respondents contend that the purpose of the resolution agreed upon among themselves was to encourage the use of durum so as to maintain the quality of the macaroni product and diminish the possibility of a decline in consumption. One of the witnesses testified that the purport of the resolution was to encourage the use of at least 50 percent durum in a blend. This interpretation, however, appears far-fetched. The minutes of the meeting and the subsequent reports thereof are replete with references to the shortage of durum. The keynote speaker at the meeting carefully outlined his estimates of the durum supply and noted that with the use of *not more* than 50 percent durum the expected supply of durum could be stretched out over the crop year. The use of any amount greater than 50 percent durum would have made the expected durum supply run short of the year's requirements. On the contrary, the recommendation seemed to be clearly maximum recommendations; that is, to see that manufacturers should use not more than 50 percent durum and in so doing conserve the supply for the industry's annual use estimate. As such it was not a recommendation for the preservation of quality, but for the deterioration of quality, since a reduction in the amount of durum used in a macaroni product lowers its quality and consumer acceptance. If, then, the resolution cannot be deemed a recommendation for the preservation of quality, we must consider what other purposes were exhibited by the participants at the meeting. The keynote speaker, Mr. Von Blon, referred to the industry payment of "astronomical prices during the winter months for dwindling supplies" if the industry did not resort to the use of blends. He also recommends the use of a 50-50 blend to "minimize price fluctuations * * * within reasonable limits." In everyone's mind was the industry's experiences of 1953 when the use of blends was resorted to during a crop shortage. The Macaroni Journal reported that exporters had entered the market (in 1956) and purchased durum at prices higher than American millers

were willing to pay; a uniform product would give the industry greater stability in quality and price; that the price differential in favor of durum over other wheats might run higher than 50 cents; that more durum would have been ground if the price were not as high; that "if the industry had not used this wisdom and caution [the adoption of a 50-50 blend] but instead had impulsively rushed into the general use of 100 percent durum, prices of durum would have sky-rocketed"; that the greatest number of manufacturers felt that 50 cents was the premium durum should command; that a durum price of \$2.85/\$3.00 a bushel allows durum-semolina to compete favorably with hard-wheat farina; that a price of about \$3.25/\$3.50 for durum means a price increase of about 1½ cents a pound for macaroni products.

With this background of specific price discussions, together with the **apparent unwillingness** of the industry to pay much more than \$3.00 a bushel for durum and the reference at the 1961 meeting to the effect upon prices that blending, as well as failure to blend would have, the conclusion is inescapable that at least one of the purposes for the resolution was the stabilization of price at what the industry regarded as reasonable levels. Whether or not other objectives were also present is immaterial. *United States v. McKesson & Robbins, supra.*

It matters not whether the respondents were in a position to control the market nor that the prices lacked uniformity. "* * * To the extent that the [respondents] raised, lowered or stabilized prices they would be directly interfering with the free play of market forces * * * Nor is it important that prices paid by the combination were not fixed * * *. In terms of market operation stabilization is but one form of manipulation." *United States v. Socony-Vacuum Oil Co., supra.*

The Class Action

This proceeding is brought against the Association and its members, as well as against three corporate respondents as representative of the entire membership, and five individuals as officers of the Association. Respondents argue that the evidence does not disclose these corporate respondents to be representative of the entire membership of the Association, nor the connection of the officers to the challenged activities. Counsel supporting the complaint on the other hand cite *Advertising Speciality National Association, et al. v. FTC, supra.* That decision held a class action appropriate where the unnamed respondents were in fact represented by counsel who entered his appearance for "all respondents." With that jurisdictional question disposed of, the court went on to hold that the proceeding was a proper class suit. It found

"that the members of the Association were so numerous as to make it impracticable to bring all of them before the Commission," citing *Tisa v. Potofsky*, 90 F. Supp. 175 (D.C.S.D. N.Y. 1950) where a membership of 50 rendered a joining impracticable. The court further found that the named respondents were representative of the entire class, citing 3 Moore's Federal Practice, 3425 (2d Edition 1948):

In determining the question [of adequate representation] the court must consider (1) whether the interest of the named party is co-extensive with the interest of the other members of the class; (2) whether his interests are antagonistic in any way to the interests of those whom he represents; (3) the proportion of those made parties as compared with the total membership of the class; (4) any other factors bearing on the ability of the named party to speak for the rest of the class.

The court found that the members of that association had common and consistent interests, had considered themselves part of an integrated industry within a common boundary, had an adequate proportion of parties, and no reasons had been presented which would detract from the ability of the named parties to speak for the entire class.

The parallel of this proceeding to the *Advertising Speciality* case cited above is remarkable. In this proceeding, counsel has entered an appearance for the Association, the corporate respondents, the named officers of the Association, and the Association members. There is, therefore no jurisdictional question involved and counsel for the respondents so concedes. As to the impracticability of naming all of the Association members, it should be noted that the membership varies from year to year and numbers at this time about 84, which brings it well within the decision of *Tisa v. Potofsky*, *supra*. As respects the representative character of the named respondents, it should be noted that the active membership of the Association is limited to persons engaged in the manufacture of macaroni and egg noodles. The named corporate respondents are admittedly so engaged. The members of the Association represent themselves as being part of an integrated industry with common interests. The presidents of the three corporate respondents have been representing the membership of the Association by virtue of the official posts they hold and have held in the Association over many years. Indeed, it is difficult to see how any more representative choice could have been made.

Finally, as respects the individual respondents named as officers of the Association, there appears to be little doubt as to their leadership within the Association. The Macaroni Journal of the Association is replete with their statements. There appears, therefore, no basis for excluding such individuals from an order which encompasses their activities as officers of the Association.

Opinion

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Conclusion of Law

The respondents named in this complaint, as well as the unnamed members of the respondent Association, have agreed upon a common course of action to fix and determine the quality of macaroni products and to thus fix, rig and manipulate the price of durum wheat. This behavior constitutes an unfair method of competition prescribed by Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That respondent National Macaroni Manufacturers Association, a corporation, respondents Albert Ravarino, Fred Spadafora, Robert I. Cowen, and Robert M. Green, as officers of said Association; respondents Ronzoni Macaroni Company, Ravarino & Freschi, Inc., and Superior Macaroni Company, corporations, in their capacity as members of the respondent National Macaroni Manufacturers Association and as representative of the entire membership of the National Macaroni Manufacturers Association; said respondents' agents, representatives, employees, successors and assigns; and any and all members of respondent National Macaroni Manufacturers Association, in or in connection with the manufacture, sale, or distribution, in commerce as "commerce" is defined in the Federal Trade Commission Act, of macaroni and related products, do forthwith cease and desist from entering into or carrying out any planned or concerted course of action, understanding, or agreement between any two or more of said respondents or between any one or more of said respondents and others not parties hereto, to do or perform any of the following acts or things:

Fix or manipulate prices for durum, semolina or durum flour;

Fix or determine or establish the kind or kinds of flour or blends thereof, to be used in macaroni and related products or to otherwise fix or determine the quality or composition of macaroni and macaroni products.

OPINION OF THE COMMISSION

APRIL 30, 1964

The complaint in this matter charges, in essence, that the principal domestic manufacturers of macaroni products, acting through respondent trade association, entered into an agreement fixing the composition of such products at a 50% semolina-50% farina blend; that they did so in order to depress the price of durum wheat, from which semolina is produced; and that such an agreement violates Section 5 of the Fed-

eral Trade Commission Act. After full evidentiary hearings, the hearing examiner rendered his initial decision, upholding the complaint and entering an order to cease and desist. Respondents have appealed. We have concluded that the findings of fact and conclusions of law of the examiner are correct, but have modified the cease and desist order in minor respects.

"Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223. This rule applies to combinations among purchasers as well as among sellers (*Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 235); for sellers, as well as buyers, are entitled to the benefits of competition. *Id.*, at 236. Since respondents' action in fixing the composition of macaroni products was clearly the result of agreement, the critical question is whether the purpose and effect of the agreement were to manipulate the price of durum wheat.

Macaroni products are ordinarily made from 100% semolina; if they contain less semolina they are considered inferior. At the time the agreement challenged here was entered into, it appeared that durum wheat, from which semolina is produced, would be in short supply, and consequently that prices for durum would skyrocket if the macaroni manufacturers bid freely among themselves for the available supply. The record shows that the challenged agreement was intended to ward off such price competition by lowering total industry demand to the level of the available supply. Since the macaroni industry is the only market for durum, and since the parties to this agreement dominate the domestic macaroni industry, it seems clear that the agreement actually affected in a substantial degree the price of durum during the period in which the agreement was in effect.¹

Respondents contend that the agreement was a reasonable response to a condition of shortage. However, fluctuations in the supply of raw materials occur continually, especially in agricultural industries. Fluctuations in supply ordinarily produce fluctuations in price. To permit concerted action designed to regulate or control such effects on the price structure would eliminate competition as a market regulator from large areas of the economy. We doubt whether respondents would concede that the durum producers, in periods of oversupply, could lawfully agree among themselves to limit production and thereby drive up the price of durum to the macaroni industry; but what the macaroni producers have done in the present case is in principle the same.

¹ The members of the respondent trade association normally purchase about 70% of the total volume of the durum wheat products produced in this country.

Final Order

65 F.T.C.

We do not hold that all efforts at product standardization, or all buying agencies or other cooperative buying arrangements, or all attempts to cope with scarcity or other conditions of economic dislocation, are unlawful under the antitrust laws. See Kaysen & Turner, *Antitrust Policy* 151-52 (1959). But where all or the dominant firms in a market combine to fix the composition of their product with the design and result of depressing the price of an essential raw material, they violate the rule against price-fixing agreements as it has been laid down by the Supreme Court.

FINAL ORDER

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission having rendered its decision granting in part and denying in part the aforementioned appeal and directing modification of the initial decision:

It is ordered, That the following order be, and it hereby is, substituted for the order contained in the initial decision:

ORDER

It is ordered, That respondent National Macaroni Manufacturers Association, a corporation, respondents Albert Ravarino, Fred Spadafora, Robert I. Cowen, and Robert M. Green, as officers of said Association; respondents Ronzoni Macaroni Company, Ravarino & Freschi, Inc., and Superior Macaroni Company, corporations, in their capacity as members of the respondent National Macaroni Manufacturers Association and as representative of the entire membership of the National Macaroni Manufacturers Association; said respondents' agents, representatives, employees, successors and assigns; and any and all members of respondent National Macaroni Manufacturers Association, in or in connection with the manufacture, sale, or distribution, in commerce as "commerce" is defined in the Federal Trade Commission Act, of macaroni and related products, do forthwith cease and desist from entering into or carrying out any planned common course of action, understanding, or agreement between any two or more of said respondents or between any one or more of said respondents and others not parties hereto, to do or perform any of the following acts or things:

Fix or establish the kinds or proportions of ingredients to be used in producing macaroni and related products, or take any other concerted action, for the purpose of fixing or manipulating the price of such ingredients.

It is further ordered, That the hearing examiner's initial decision as modified herein be, and it hereby is, adopted as the decision of the Commission.

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