

While the relationships are terminable at will, they have continued for many years, and there is no reason to anticipate their early voluntary termination. In the opinion of the examiner these relationships constitute agreements, understandings or arrangements which fall within the cognizance of the antitrust laws, for the reasons hereafter indicated.

6. It is asserted by respondent Luria (whose position is echoed by a number of respondent mills) that “[i]n every case in which relations between buyers and sellers have been held to violate Section 3 of the Clayton Act and Sections 1 and 2 of the Sherman Act, there have been agreements between the sellers and the buyers which *bound* the buyers not to buy from competitors of the sellers” (p. 533 Luria Proposed Findings). While it is true that in a number of the cases cited there were binding legal agreements involved, this feature was not present in all of these cases nor in others which have been decided. Thus, in *Harley-Davidson*, 50 F.T.C. 1047, and *Outboard Marine Mfg. Co.*, 52 F.T.C. 1553, cited by respondents, there was no legal agreement binding the dealers to purchase exclusively from the respondent, although the latter did in practice seek to pressure dealers into following such a policy. In the *Outboard Marine* case the respondent contended that its “single dealing” policy was “a unilateral policy of customer selection, without agreement, understanding or condition of sale” and was permissible under the *Colgate* case. To this argument the examiner, whose decision was affirmed by the Commission, stated (at 1564) that: “The words [in Section 3] ‘condition, agreement or understanding’ were designedly employed by Congress to prevent evasions on technical arguments as to whether *informal understandings rose to the dignity of formalized written commitments*” (emphasis supplied). More recently, the Commission in *The Timken Roller Bearing Co.*, Docket 6504, [58 F.T.C. 98, 103] January 24, 1961, stated that “express written agreements are not needed to prove exclusive dealing”.

7. A number of the respondents seek support for their position, regarding the necessity for proving the existence of a binding legal agreement, in the observation made by Justice Frankfurter in the *Standard Stations* case (337 U.S. at 313-14), to the effect that if it was in fact as economically desirable as the defendant contended for gasoline service stations to confine their purchases to a single supplier, they would continue to do so “though not bound by contract”. The examiner does not interpret this dicta in the *Standard Stations* case as tantamount to a holding that, absent a binding legal obligation to deal exclusively, there can be no violation of Section 3 of the Clayton Act.

Holdings in other antitrust cases make it abundantly clear that this is not the law.

8. Section 3 of the Clayton Act and Sections 1 and 2 of the Sherman Act are in pari materia, insofar as they involve the concept of agreement, contract, understanding, combination or conspiracy. Section 3 of the Clayton Act involves sales or contracts to sell "on the condition, agreement, or understanding" that the purchaser will not deal in competing goods. Section 1 of the Sherman Act prohibits "[e]very contract, combination * * *, or conspiracy in restraint of trade", while Section 2 thereof prohibits, among other things, combinations or conspiracies to monopolize trade. Section 3 of the Clayton Act involves the specific prohibition of a type of practice which has also been held to be actionable under the more generally phrased prohibitions of the Sherman Act on contracts, combinations or conspiracies in restraint of trade or to monopolize trade. Thus in *Times-Picayune Publishing Co. v. U.S.*, 345 U.S. 594; and *Northern Pac. R. Co. v. U.S.*, 356 U.S. 1, tying arrangements were challenged as contracts, combinations or conspiracies in restraint of trade in violation of Section 1 of the Sherman Act, while in *International Salt Co. v. U.S.*, 332 U.S. 392, and in the *Standard Stations* case (*Standard Oil Co. of California v. U.S.*, 337 U.S. 293) tying and exclusive dealing arrangements were challenged as violations of both Section 3 of the Clayton Act and Section 1 of the Sherman Act. While the Sherman Act has been held to be "the more stringent law", insofar as the degree of proof of competitive impact is concerned (*Times-Picayune Pub. Co. v. U.S.* at 610), there is no significant difference between it and Section 3 of the Clayton Act with respect to the nature of the agreement or combination which must be established.

9. As noted in paragraph 6 above, respondents appear to recognize that the terms "condition, agreement or understanding" as used in the Clayton Act, and "contract, combination * * *, or conspiracy" as used in the Sherman Act, are substantially synonymous. However, their position is that in both instances the terms connote binding legal agreements. This position is contrary to the weight of authority. As recently stated by one with long experience in the field of antitrust law:¹¹⁵

An agreement, in antitrust parlance is not the same as an agreement in the law of private contracts. A conspiracy or combination—an agreement, if you will—is present where there is joint action. [Emphasis supplied.]

10. The above-quoted comment was occasioned by an analysis of the Supreme Court's recent decision in *U.S. v. Parke, Davis and Co.*,

¹¹⁵ Handler, *Annual Review of Antitrust Developments*, THE RECORD of the Association of the Bar of the city of New York, Vol. 15, No. 7 Oct. 1960, p. 370.

362 U.S. 29. The holding in the *Parke, Davis* case is not only contrary to respondents' position concerning the necessity for proving the existence of a binding legal agreement in restraint of trade, but also sets at rest its complementary argument that absent such an agreement a businessman has the untrammelled right to trade or not to trade with whom he chooses. In that case the defendant was charged with combining with retail and wholesale druggists to maintain the prices of its products. The District Court held that a violation of the Sherman Act had not been established because "the actions of [Parke, Davis] were properly unilateral and sanctioned by law under the doctrine laid down in *U.S. v. Colgate & Co.*, 250 U.S. 300", 164 F. Supp., at 829. The District Court, in holding that Parke, Davis' actions were "unilateral", had apparently misinterpreted the Supreme Court's ruling in the *Colgate* case that there could be no Sherman Act violation without a charge of "unlawful agreement", as meaning that there had to be an actual, express agreement, written or oral. The Supreme Court in *Parke, Davis* held, in substance, that agreements or combinations which violate the Sherman Act are not limited to "contractual arrangements, express or implied" (at 41).

11. The language just quoted is based upon the Court's earlier decision in *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, [1 S. & D. 170] which the Court cited in *Parke, Davis* as indicating that its decision in *Colgate* had been misconstrued. The *Beech-Nut* case likewise involved a charge of illegal resale price maintenance, except that the practice was challenged as an unfair method of competition under the Federal Trade Commission Act, rather than as a combination in restraint of trade under Section 1 of the Sherman Act. The parties had stipulated that there was no contract between the company and its distributors whereby prices were maintained. The dissenting opinion by Mr. Justice McReynolds, relying on the *Colgate* case, held that there could be no finding of an illegal agreement "when the existence of the essential contracts is definitely excluded" by stipulation. The majority opinion in *Beech-Nut*, as interpreted in the *Parke, Davis* case (at 41),

* * * did not read *Colgate* as requiring such contracts; rather, the Court dispelled the confusion over whether a combination effected by contractual arrangements, express or implied, was necessary to a finding of Sherman Act violation * * *.

Also cited in *Parke, Davis*, was the Court's decision in *U.S. v. Bausch & Lomb Optical Co.*, 321 U.S. 707, which involved a charge of resale price maintenance in violation of the Sherman Act. The Court in *Bausch & Lomb*, citing its earlier holding in *Beech-Nut* that there

Initial Decision

62 F.T.C.

could be a combination in restraint of trade "without agreements", held that the company's combination with distributors and wholesalers was illegal, stating (at 72³):

Whether this conspiracy and combination was achieved by agreement or by acquiescence of the wholesalers coupled with assistance in effectuating its purpose is immaterial. * * * In other words, an unlawful combination is not just such as arises from a price maintenance agreement, express or implied * * *. [Emphasis supplied.]

12. Based on its analysis of its earlier holdings in *Beech-Nut* and *Bausch & Lomb* the Court, in *Parke, Davis*, concluded (at 44):

The *Bausch & Lomb* and *Beech-Nut* decisions cannot be read as merely limited to particular fact complexes justifying the inference of an agreement in violation of the Sherman Act. Both cases teach that judicial inquiry is not to stop with a search of the record for evidence of purely contractual arrangements. * * * [W]hether an unlawful combination of conspiracy is proved is to be judged by what the parties actually did rather than by the words they used. [Emphasis supplied.]

13. It is true that *Parke, Davis* and the other cases discussed therein involved resale price maintenance arrangements. However, there is no reason why the logic of these decisions should not apply to exclusive dealing or tying arrangements, which are also cognizable under Section 1 of the Sherman as well as under Section 3 of the Clayton Act. Any doubt on this score was recently set at rest in *Osborn v. Sinclair Refining Co.*, CA 4, July 11, 1960, involving a charge that the defendant had required its dealers to purchase all of their requirements of tied-in tires, batteries and accessories from a source designated by it, in violation of Section 1 of the Sherman Act. The court, by Chief Judge Sobeloff, addressing itself to the question of whether there is a distinction between price fixing and tie-ins, insofar as the necessity for establishing that they are based on express agreement, observed that "it is no distinction to say that *Parke, Davis* was concerned with price fixing whereas here we have a tie-in."

Reversing the district court's dismissal of the complaint, based on the fact that the dealers were not required by express contractual provision to purchase their accessory requirements from defendant's designee, the circuit court, citing the Supreme Court's holding in *Parke, Davis* that "an unlawful combination is not just such as arises from a price maintenance agreement, express or implied", stated:

Although, standing alone, the above general findings do not, perhaps, disclose a tie-in accomplished by express agreement with dealers, such an express contract is not necessary. [Emphasis supplied.]

14. It seems clear, therefore, that in order to establish that Luria's sale of scrap to the mills was made "on the condition, agreement, or understanding" that the mills would purchase scrap from it exclu-

sively, within the meaning of the Clayton Act, or that the arrangements between Luria and the mills each constitute a "contract, combination * * * or conspiracy" within the meaning of the Sherman Act, it is not necessary to establish the existence of any binding contractual arrangement, express or implied, between them. It is also clear that the "essential agreement, combination or conspiracy may be implied from a course of dealings or other circumstances", as stated in *Frey & Son, Inc. v. Cudahy*, 256 U.S. 208, 210 (reversing the court of appeals' dismissal, which was based on the ground that "there was no formal written or oral agreement") or, as the Court expressed it in *Parke, Davis*, the agreement or combination may be proved "by what the parties actually did rather than by the words they used". See also *Osborn v. Sinclair*, *supra*, holding that a tying arrangement "may be inferred from a course of conduct".

Viewing the course of conduct and course of dealings between Luria and each of the mills, which have been heretofore discussed in detail, there is no question as to the existence of an agreement, understanding, or combination between each of the respondent mills and Luria pursuant to which each of the mills uses Luria as its substantially exclusive broker, and whereby a number of the mills buy from Luria substantially all of their scrap and the others buy from it substantially all of the scrap which they purchase on a brokerage basis.

15. In the foregoing discussion the question of the legality of the activities of Luria and the mills has been considered in the frame of reference of an agreement or combination, and as to the necessity for such agreement or combination to be of an express, binding nature. However, it may be noted that the conduct of the parties may also be subject to attack on grounds separate and apart from any agreement or other purposeful joint action. In the *Colgate* case itself the Court's pronouncement of the right of a trader "freely to exercise his own independent discretion as to the parties with whom he will deal" was subject to the qualification that this right existed: "In the absence of any purpose to create or maintain a monopoly" (at 307). This limitation on the right of a trader to choose the persons with whom he will deal was applied by the Court in *Lorain Journal Co. v. U.S.*, 342 U.S. 143, in which a newspaper publisher claimed the right to select its customers and to refuse to accept advertisements from whomever it pleased. The Court held that this "general right" was not "an unqualified one", and that (at 155):

The right claimed by the publisher is neither absolute nor exempt from regulation. Its exercise as a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act.

16. It is thus clear that the practices of Luria and the mills, insofar as they involve exclusive dealing, may also be subject to attack as attempts to monopolize within the purview of Section 2 of the Sherman Act, separate and apart from any agreement between them to deal exclusively. It may be noted, in this connection, that while the qualification on the right of a trader to deal freely appears to involve a subjective element, viz, an "intent" or "purpose" to create a monopoly, it has been generally accepted that: "The requisite intent * * * is not a 'specific' intent to monopolize, but rather a conclusion based on how the monopoly power was acquired, maintained or used". *Report of Attorney General's Committee to Study Antitrust Laws*, March 31, 1955, at 55. The courts have often inferred that a monopoly position has been "deliberately" maintained as a matter of "objective" rather than "subjective" intent, "relying on business practice to support the conclusion that men intend the natural consequences of their acts". *Id* at 56.

Line of Commerce

17. Before considering the legal questions raised concerning the nature of the competitive impact or restraint of trade which must be shown, it is well to discuss the preliminary question as to the line of commerce involved. As has been heretofore noted, respondents (particularly respondent Luria) contend that the line of commerce against which to weigh or consider the competitive impact or restraint of the arrangements between Luria and the mills should include pig iron as well as scrap, and that minimally it should include all scrap purchased by the mills, rather than merely that purchased from broker-dealer sources.

18. Respondents' position that pig iron as well as scrap should be included in the line of commerce is, of course, based on the "reasonable interchangeability" test established by the *Cellophane* case (*U.S. v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377). However, it is now generally accepted that this test is limited to cases arising under the monopolization clause of Section 2 of the Sherman Act and does not apply to cases involving a charge of incipient, rather than actual, restraint or monopoly, such as those arising under Sections 3 and 7 of the Clayton Act, where the test applied is whether the product has "sufficient peculiar characteristics and uses to constitute [it] sufficiently distinct from all other [products] to make [it] a 'line of commerce' * * *". *U.S. v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 593; *U.S. v. Brown Shoe Co.*, 179 F. Supp. 721; *U.S. v. Bethlehem Steel Corp.*, 168 F. Supp. 576; *Brillo Mfg. Co.*, 54 F.T.C. 1905; *Mytinger & Casselberry, Inc.*, Doc. 6962 [57 F.T.C. 717], September 28, 1960. It is open to question whether the rule in the *Cellophane* case applies even

in Section 2 Sherman Act cases, where the charge is an attempt to monopolize rather than actual monopolization. See *Cellophane* decision, footnote 23, at p. 395.

19. As has been heretofore found, scrap has sufficient peculiar characteristics and uses to constitute it a distinct product from pig iron for purposes of determining the appropriate line of commerce in this proceeding. See *Tampa Electric Co. v. Nashville Coal Co.*, 276 F. 2d 766 (CA6, 1960), reversed on other grounds, U.S. Sup. Ct., February 27, 1961, holding that coal and fuel oil were separate lines of commerce for purposes of Section 3 of the Clayton Act (29 LW 4237). In any event, even applying the reasonable interchangeability test of the *Cellophane* case, the evidence establishes that there are such significant limitations on the interchangeability of the two products, to constitute each a separate line of commerce.

20. The next question presented is whether scrap sold by all producers and vendors thereof should be considered the relevant line of commerce, as contended by respondent, or whether it should be limited to sales by brokers and dealers only, as contended by counsel supporting the complaint. It is suggested by respondents that it is improper to further subdivide a product or commodity market on the basis of the channels of distribution. This is precisely the position taken by the hearing examiner in *Mytinger & Casselberry, Inc.*, *supra*, in which he overruled the contention that vitamin preparations sold by the house-to-house method constituted the line of commerce, and held that the line of commerce was determined by the product and not the method of distribution or sale. However, the Commission reversed, stating that "each of the foregoing commercial areas can be properly deemed a separate market or line of commerce within the meaning of Section 3". In *International Boxing Club of N.Y., Inc. v. U.S.*, 358 U.S. 242, involving a charge of violation of both Sections 1 and 2 of the Sherman Act, it was contended that the relevant market should be considered to be the entire field of professional boxing, rather than merely a segment thereof, viz, championship boxing contests. While purporting to apply the more rigorous reasonable interchangeability test, the Court nevertheless held championship boxing contests to be an appropriate line of commerce, based on the finding of the lower court that there existed "a separate, identifiable market" for championship boxing contests.

21. As has already been heretofore found, approximately 90% of all scrap sold to consumers moves through brokers and dealers. While direct sources, such as industrial fabricators and railroads, sell some scrap directly to consumers, scrap is merely a by-product of their business. The supply and price of scrap are influenced largely by broker-

dealer transactions. Under all the circumstances, it is the conclusion and finding of the examiner that the broker-dealer scrap market constitutes the relevant market or line of commerce for purposes of this proceeding. However, as has been already noted, in view of the fact that the vast preponderance of scrap moves to the consumer through brokers and dealers, it makes little real difference in most cases whether Luria's market share is measured solely by the broker-dealer market or by total scrap sales.

Competitive Impact

22. Luria's position, in essence, is that while it is the largest broker in the industry, it does not dominate the industry or have a monopoly therein, and that there is accordingly no basis for any inference that its arrangements with the various respondent mills will unduly restrain competition. It cites, in this connection, the decision of the hearing examiner in the *Scott Paper Company* case, Docket 6559 [57 F.T.C. 1415], that there is "a vast difference between leadership and dominance", and that dominance cannot exist without control over "raw materials, production, price, channels of distribution, or entry of new competitors". Also cited are the classic holdings that monopoly power means the power to exclude competitors or control prices (*American Tobacco Co. v. U.S.*, 328 U.S. 781, 811), and that it "involves something more than extraordinary commercial success", but involves "something like the use of means which made it impossible for other persons to engage in fair competition" (*U.S. v. du Pont*, 351 U.S. 377).

23. Factually, Luria's argument is not supported by the record since, as has already been found, it does possess monopoly power and is dominant in a number of markets. Likewise, its power has involved more than extraordinary commercial success, having been gained to a considerable extent through the anticompetitive arrangements with the mills. Aside from this, however, Luria's legal argument is largely irrelevant since this proceeding does not involve a charge of monopolization under Section 2 of the Sherman Act where proof of monopoly power is necessary. The holding of the examiner in the *Scott Paper* case as to the necessity of showing power to fix prices and exclude competitors and the other indicia of market control has since been reversed by the Commission with the comment that "[s]uch power and control would amount to monopoly condemned by the Sherman Act", and need not be shown in a Section 7 Clayton Act case.

It may be noted that even in cases brought under Section 2 of the Sherman Act, where the charge involves an attempt, combination or conspiracy to monopolize, rather than actual monopolization, no "showing [is] required that the desired end of monopoly power was

attained". *Report of Attorney General to Study Antitrust Laws*, at 61. See also *Lorain Journal v. U.S.*, 342 U.S. 143, 153, holding that "it was not necessary to show that success rewarded appellants' attempt to monopolize", and citing with approval the holding in *Swift & Co., v. U.S.*, 196 U.S. 375, 396 that:

[W]hen that intent [to monopolize] and the consequent dangerous probability exist, this statute [the Sherman Act], like many others and like the common law in some cases, *directs itself against that dangerous probability* as well as against the completed result. [Emphasis supplied.]

24. To the extent that the complaint herein is based on the exclusive arrangements between Luria and each of the mills, it is unnecessary to establish that they did in fact create a monopoly in Luria. It is well settled that in exclusive dealing and tying cases proof of a reasonable probability of substantial competitive injury in the relevant market or line of commerce involved is sufficient to establish the illegality of such arrangements, without proof of actual competitive injury or of resultant monopoly. In *Standard Stations* and subsequent decisions of the "reasonable probability" test was held to be satisfied by proof that an exclusive arrangement will result in the foreclosure of competition in a substantial share of the relevant market, even though the supplier does not enjoy a dominant position in the market. See, e.g., *Dictograph Products Inc. v. FTC*, 217 F. 2d 821, *cert. denied*, 349 U.S. 940 [5 S.&D. 707]; and *Tampa Electric Co. v. Nashville Coal Co.*, U.S. Sup. Ct., February 27, 1961. While the Supreme Court in *Tampa Electric* reversed the lower court, it did so because the *Standard Stations* test had been applied to too restricted a market area, and not because of any disagreement with the test itself. In fact it reemphasized the validity of the test, stating that "an exclusive dealing arrangement * * * does not violate the section [Section 3] unless the court believes it probable that performance of the contract will foreclose competition *in a substantial share of the line of commerce affected*", and that "the competition foreclosed by the contract must be found to constitute *a substantial share of the relevant market*." [Emphasis supplied.]

25. Respondent Bucyrus Erie argues that since the complaint here is brought under Section 5 of the Federal Trade Commission Act, rather than Section 3 of the Clayton Act, "the slide rule approach of *Standard Stations* and *Dictograph Products* is not applicable". Respondent's suggestion that additional proof is required in proceedings not brought under Section 3 of the Clayton Act, apparently is based on the holding of the Court in the *Times-Picayune* case that the standard of proof of competitive impact of a tying arrangement is more rigorous under Section 1 of the Sherman Act (which the Court characterized as "the more stringent law") than under Section 3 of the

Clayton Act. It may be questioned whether the difference in proof under the two statutes is as great as suggested in view of the Court's later holding in the *Northern Pacific* case (356 U.S. at 6), that a tying arrangement may be illegal under Section 1 of the Sherman Act where the seller had "sufficient economic power to impose an appreciable restraint on free competition in the tied product", without a showing of dominance or monopoly power.

26. In any event, whatever may be the difference between the degree of proof of competitive impact required in a Section 1 Sherman Act case and that in a Section 3 Clayton Act case, the examiner is satisfied that no such difference exists between the latter and a Section 5 Federal Trade Commission Act proceeding involving an exclusive dealing charge. As has already been noted, the Federal Trade Commission Act has been held to reach not only violations of the Sherman and Clayton Acts, but also incipient violations thereof. Accordingly, it can hardly be equated with the Sherman Act, insofar as the degree of proof of competitive impact which is required. It has even been suggested that the Federal Trade Commission Act may require a lesser showing of competitive impact than under the Clayton Act. This view has been challenged by those who point out that since "the Clayton Act itself embodies an incipency test of violation * * * the incipency doctrine is compounded if Section 5 is used to stop in its incipency violations of incipient Clayton Act". Oppenheim, *Antitrust Highlights*, at 21 (Reprinted from Vol. 17, *ABA Antitrust Section Reports*, pp. 215-259).

27. Whatever may be the correctness of the view that the test of violation under the Federal Trade Commission Act is more lenient, the examiner is satisfied that it is certainly no stricter, than that in a proceeding brought under Section 3 of the Clayton Act. The shares of the various relevant markets from which competitors have been foreclosed here, are so staggering in most instances, that there can be no question the test of establishing a probable substantial lessening of competition as a result of the exclusive arrangements has been met. Furthermore, to the extent that proof beyond the mere fact that a substantial portion of the relevant market has been tied up by the exclusive arrangements is required, there is adequate evidence in the record from which a finding of the probable adverse competitive impact of these arrangements can be made.

Liability of the Mills

28. Several of the respondent mills, particularly Bethlehem, CF&I and U.S. Steel, argue that whatever liability may attach to Luria under its arrangements with the mills, the mills themselves cannot be held to be liable since Section 3 is directed against the seller or lessor in an

exclusive dealing arrangement, and not the buyer or lessee. U.S. Steel points out that in *FTC v. Motion Picture Advertising Service Co. Inc.*, involving a proceeding brought under Section 5 of the Federal Trade Commission Act based on exclusive contracts for the supplying of advertising films to theatres, the theatre owners were not joined as respondents and only the supplier of the films was held liable.

29. In opposition to the contention of the respondent mills, counsel supporting the complaint cite the holding in *Anchor Serum Co. v. FTC*, 217 F. 2d 867, 870 [5 S. & D. 718, 723] that "there is nothing in the language of the Act [Section 3] from which it can be inferred that two classes of contracts were contemplated, depending on whether the contract was initiated by the seller or the buyer." The court indicated that it was "immaterial whether the contract was for the benefit of the seller or the buyer" since "the determining factor is whether the contract had the proscribed effect." The *Anchor Serum* case does not directly dispose of the point raised by respondents since it does not decide whether the buyers may be held liable, but merely that the seller cannot escape liability on the ground that the buyers were the initiators of, and presumably stood to benefit from, the exclusive contracts. The case is significant, however, insofar as it indicates that the legality of an exclusive contract is determined by the nature of the restraint which it imposes on competition, and not on basis of whether it was initiated by the seller or the buyer.

30. This same principle was applied in *Tampa Electric Co. v. Nashville Coal Co.*, 276 F. 2d 766 (CA6, 1960), involving an exclusive contract for the sale of coal to a single buyer. The seller had contended that "the statutory history of Section 3 shows that the Act was not intended to apply to consumers * * *. In other words, [that] Congress was concerned only with attempts by sellers, who were economically powerful, to restrain competition in the distributive process" (at 770). To this the court responded: "The statutory language is not so restrictive." It pointed out that the statute "condemns certain transactions" which have the proscribed effect on competition, and concluded that: "A single contract of sale of sufficient magnitude, with performance extending over an extended period of time, can cause this result", even "where the seller did not occupy a dominant economic position in the industry."

Tampa Electric involved a declaratory judgment action by the buyer against the seller to have its contract with the seller declared valid and enforceable, after the seller had refused to perform under the contract for the alleged reason that it was illegal under Section 3 of the Clayton Act and Sections 1 and 2 of the Sherman Act. The court held that the contract "was in violation of Section 3 of the Clayton Act [and] was therefore illegal and unenforceable" (at 768). While this is not a

direct holding that the buyer can be enjoined from participating in the contract in a proceeding brought under Section 3, it indicates that illegality attaches on the basis of the restraint which the contract imposes, and that such restraint may originate from a buyer's participation as well as a seller's. As indicated above, the holding of the court in *Tampa Electric* was recently reversed by the Supreme Court on the ground that the lower court had not used the proper relevant market in determining the probable competitive impact of the contract. The Supreme Court did not, however, overrule the opinion of the lower court that Section 3 was not limited to sellers, and may apply to a single contract of sufficient magnitude. It agreed that "a single contract between single traders may fall within the initial proscription of the section," but pointed out that the contract had to "work a substantial—not remote—lessening of competition in the relevant competitive market." 29 LW 4237, 4241.

31. The examiner finds it unnecessary to decide whether, under the language of Section 3 of the Clayton Act, making it illegal for "any person * * * to lease or make a sale or contract for sale" of the nature and with the competitive impact therein described, the buyer or lessee in the transaction can be joined as a party. The instant proceeding is brought under Section 5 of the Federal Trade Commission Act, which has been held to cover transactions involving the same types of restraint as those condemned by the Clayton Act, but which technically may not fall within that Act. See, for example, *FTC v. Motion Picture Advertising Service Co.*, *supra*, where the contracts did not involve a sale or lease of goods, but a service agreement, which is not technically covered by Section 3; see also *Report of Attorney General*, *supra*, at 148-149 and *Oppenheim*, *supra* at 28, to the effect that "the Commission is legitimately entitled to challenge under Section 5 conduct economically equivalent to the anticompetitive practices in Clayton Act provisions but not reachable thereunder due to lack of technical prerequisites" (*Oppenheim* at 28). Since the arrangements between Luria and the mills are of the type covered by Section 3 or are at least economically equivalent thereto, to the extent such arrangements have the proscribed effect the buyers may be held accountable under Section 5 of the Federal Trade Commission Act, even though their activities may not be reachable under Section 3 of the Clayton Act because of the technical wording thereof. There may be occasions where it would not be appropriate to join the buyers as parties, as where they were unwilling victims of the exclusive arrangements. Such considerations do not apply here, however, where the arrangements are the result of the mutual desires and interests of Luria and the mills.

32. Certain of the respondent mills have raised additional objections to their being held liable, viz, (a) that their arrangements with Luria do not cover their entire scrap requirements, and (b) that the proportion of the particular market foreclosed by their arrangements with Luria is too insubstantial to affect competition. Turning to the first of these objections, the evidence does disclose that while some of the mills have used Luria as their exclusive broker, they have not purchased all of their scrap from it since some of their requirements have been obtained from fabricators, railroads and other direct suppliers, as well as from a few local dealers. However, in each instance, as hereafter noted, Luria has supplied the bulk of the mill's requirements.

33. It has been admitted by Luria or the mills involved, or the evidence establishes, that Luria supplies substantially all of the requirements for purchased scrap of the following respondent mills: Baldwin-Lima-Hamilton (Standard Works Division plant at Burnham, Pennsylvania), Columbia Malleable Castings, Phoenix, Central, CF&I, Roebling, Granite City, Detroit Steel (Portsmouth, Ohio Division—supplied by Luria's subsidiary Southwest), Lukens, McLouth, Edgewater and Bucyrus-Erie (Raspberry Street plant at Erie, Pennsylvania). With respect to those mills or plants which use Luria as their exclusive broker, but which do not purchase substantially all of their scrap from it, the record establishes that they obtained the following percentages of their purchased scrap from it during the last two years covered by the evidence (the percentages being expressed both in terms of purchases from broker-dealer sources, and of purchases from all sources):

Percentage of purchases from Luria by certain mills (1953-54)

Mill	1953		1954	
	Percent broker-dealer scrap	Percent total scrap	Percent broker-dealer scrap	Percent total scrap
Bethlehem.....	81.2	64.0	80.9	50.9
Bethlehem Pacific.....	75.4	66.6	80.4	72.3
United States Steel (Geneva).....	89.5	77.1	93.9	61.0
Weirton.....	70.2	66.5	69.8	64.1
Bucyrus-Erie (12th St.).....	65.0	65.0	64.5	64.5

34. As will be noted from the table, most of the mills involved purchased approximately two-thirds of their scrap from Luria, except for Bethlehem which in 1954, following the issuance of the complaint herein, cut its purchases from Luria to approximately 51%. However, this continued to represent the great bulk of its purchases from

broker-dealer sources, amounting to approximately 81% of such purchases. Despite the fact that these mills did not purchase all of their scrap requirements from Luria, the proportions of scrap involved are so substantial as to constitute a foreclosure of competition only slightly less effective than would have been accomplished had they purchased all of their requirements from Luria. The foreclosure was particularly marked in the broker-dealer line of commerce, barring substantially all other brokers and all but a few dealers from access to these mills. Legally, the situation is not dissimilar to that in *Osborne v. Sinclair, supra*, where the tying arrangement involved the bulk, but not all, of the dealers' requirements, and the court held:

Nor do we think a tie-in escapes condemnation as an unreasonable per se restraint because the buyer is not obligated to obtain all of his requirements of the tied product from the seller. * * * If a substantial amount of commerce is restricted by such arrangements, the standard for illegality would seem to have been met. (1960 Trade Cases Par. 69,771.)

Certainly the rule is no stricter in this proceeding, brought under Section 5 of the Federal Trade Commission Act, than in a Section 1 Sherman Act case.

35. Certain of the smaller respondent mills contend that even if there was an exclusive arrangement between them and Luria, the proportion of the market affected by their individual purchases is so slight as to preclude any finding of substantial competitive injury as a result of their participation. The argument of these respondents is based on the assumption that in the absence of an agreement, conspiracy or combination among the mills, their liability should be determined on a mill-by-mill basis, rather than on the basis of the aggregate of the purchases of all of the mills in a market area who are parties to an exclusive arrangement with Luria.

36. In the opinion of the examiner, it is unnecessary that there be an agreement, combination or conspiracy among the various mills in order to justify aggregating the purchases of all of the mills who have exclusive arrangements with Luria in a given market area, in order to determine the proportion of the market which is foreclosed by such arrangements. This is certainly true as far as determining the likelihood of competitive injury from the point of view of assessing the liability of the seller, Luria. Typically, in an exclusive dealing case, the share of the market affected by exclusive dealing agreements between a seller and numerous buyers is measured by the sum total of the purchases of the buyers in the relevant market, without regard to whether there is any agreement or combination among the buyers. Where such arrangements, in the aggregate, are determined to have the proscribed effect, insofar as fixing the seller's liability, the buyers who have each contributed to the seller's power should not be permitted

to escape liability by the fragmentation of their individual purchases. While there may have been no agreement or combination among the mills, they were all generally aware of the relative size and status in the industry of the seller with whom they were dealing.

In *FTC v. Motion Picture Advertising Service Inc.*, *supra*, the Court took into account the fact that the respondent and three other companies, not parties to the proceeding and not in combination with it, had foreclosed three-fourths of the market. (See dissenting opinion that in the absence of a conspiracy it was not proper to aggregate the shares of the market of the companies other than respondent). If it is proper to consider the aggregate of the market shares of parties having no relationship to one another, then certainly it is appropriate to consider the aggregate of the market shares of parties related to one another through a common supplier to whose economic position they all contributed. The fact that certain of the mills account for a relatively small share of certain scrap markets may be a factor to be considered in determining the breadth of the prohibition to which they should be subjected, as will hereafter be noted, but not in determining their basic liability as parties to an illegal series of exclusive arrangements. Such arrangements cannot be effectively terminated unless the buyers, as well as the seller, are ordered to cease and desist therefrom.

37. Finally, certain of the respondents point out that exclusive dealing arrangements are not necessarily illegal, and have been upheld where they fulfill an important economic need in the industry and are of limited duration. Cited in support of this contention are such authorities as *FTC v. Motion Picture Advertising Service Co. Inc.*, *supra*, and *U.S. v. American Can Co.*, 87 F. Supp. 18, 31, in the former of which exclusive contracts, not in excess of one year, were found not to be an undue restraint upon competition in view of "the compelling business reasons for some exclusive arrangement" (at 396). The arrangements here involved do not, in the opinion of the examiner, fall within any of the exceptions cited by respondents. They have been of indefinite or extended duration, and no compelling economic need has been demonstrated for the use of such arrangements. The evidence discloses that a number of nonrespondent mills, both large and small, have been able to fulfill their scrap requirements through the use of multiple brokers and dealers. Furthermore, the arrangements here involved have been so destructive of competition that their continuance on any basis would not be in the public interest.

The Illegal Acquisitions

38. The only two acquisitions as to which it has been found that counsel supporting the complaint have sustained the burden of proof

are those involving Luria's acquisition of the controlling stock interest in Pueblo Compressed Steel Corporation and in respondent Southwest Steel Corporation. The principal legal contention advanced by respondent Luria concerning these two acquisitions arises out of the alleged lack of substantial competition between Luria and the two companies at the time their stock was acquired by it. In the case of Pueblo Compressed Steel it is pointed out that they were on different market levels, the former being a dealer and Luria being a broker.

39. It has heretofore been found, as a fact, that Luria was in actual and potential substantial competition with both of the companies whose stock it acquired, and that the acquisitions were calculated to result in a substantial lessening of competition between the acquired and acquiring companies. However, even if Luria and the acquired companies were not in substantial competition, the acquisitions would still be illegal since the lessening of competition between them is only one of the grounds on which a stock acquisition may be illegal under the version of Section 7 of the Clayton Act which was in effect when the acquisitions were made. As stated in *U.S. v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, at 592:

[A]ny acquisition by one corporation of all or any part of the stock of another corporation, *competitor or not*, is within the reach of the section whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly of any line of commerce. [Emphasis supplied.]

In the *du Pont (General Motors)* case, du Pont's stock ownership in General Motors was held to be illegal under Section 7, although the two companies were not in competition (the former being a supplier of paints and fabrics to the latter), because of the anticipated substantial restraint on competition in the automobile finishes and fabrics markets in which du Pont was engaged.

40. As heretofore found, the Pueblo Compressed Steel Corporation and Southwest Steel Corporation acquisitions meet the statutory test not only because the effect thereof may reasonably be expected to result in a substantial lessening of competition between them and Luria in the markets where they operated, but because there is a reasonable likelihood that the acquisitions will substantially restrain commerce in such markets and tend to create a monopoly in Luria. Assuming, *arguendo*, that Luria and Pueblo Compressed Steel operate at different market levels, as Luria contends, Pueblo Compressed Steel at the very least occupies a position similar to that in the *du Pont* case as a supplier to Luria and, in addition, competes with other dealers in the area who are actual or potential suppliers to Luria. To this extent the acquisition may, and as has been found does, meet the statutory test concerning probable adverse competitive impact.

CONCLUSIONS OF LAW

1. It has been found that there exists a series of understandings, agreements, combinations and conspiracies between respondent Luria (including, in one instance, its subsidiary Southwest) and each of the respondent mills and other mills, whereby Luria (including, in one instance, its subsidiary Southwest) acts as the exclusive or substantially exclusive scrap broker for said mills, and whereby said mills purchase from Luria (or, in one instance, from its subsidiary Southwest) all or substantially all of the iron and steel scrap which they purchase, or all or substantially all of said scrap which they purchase from brokers. It has also been found that there exists or has existed an understanding, agreement, combination and conspiracy between a group of three scrap brokers or exporters of scrap, of which respondent Luria is the dominant member (said group being referred to herein as the Luria group), and an organization known as OCCF, which is the buying agency for a group of European steel mills affiliated with the European Coal and Steel Community, whereby the Luria group acts or has acted as the exclusive or substantially exclusive broker and supplier to the steel mills buying iron and steel scrap through the OCCF, of scrap originating in the United States and certain contiguous areas, and whereby the OCCF purchases or has purchased all or substantially all of such scrap through the Luria group.

2. It is concluded that the effect of the aforesaid understanding, agreements, combinations and conspiracies between respondent Luria (including its subsidiaries) and the respondent mills and other mills, and between the Luria group and the OCCF has been, is, or may be, substantially to lessen, hinder, restrain and suppress competition with respect to prices and otherwise in the purchase and sale of iron and steel scrap in interstate commerce and, in the case of the arrangement between the Luria group and the OCCF, also to lessen, hinder, restrain and suppress such competition in foreign commerce; unduly to burden the channels of free and open competition in the purchase and sale of iron and steel scrap in interstate commerce and, in the case of the arrangement between the Luria group and the OCCF, also to burden the channels of such competition in foreign commerce; to enable the respondents to dominate and manipulate various markets in which iron and steel scrap is purchased and sold; and to tend to create a monopoly in respondent Luria (including its subsidiaries) in the purchase and sale of iron and steel scrap in interstate and foreign commerce.

3. It is further concluded that the capacity, tendency and effect of the aforesaid understandings, agreements, combinations and con-

spiracies have been, are, or may be, among other things to divert trade to respondent Luria (including its subsidiaries) from its competitors; to lessen competition between and among various of the respondent mills and other mills in the purchase of iron and steel scrap; to cause respondent mills and other mills to refrain from purchasing iron and steel scrap from competitors of respondent Luria; to prevent competitors of respondent Luria (including its subsidiaries) from selling to the principal consumers of iron and steel scrap in certain areas; unduly to hinder and prevent iron and steel scrap brokers and dealers from competing with respondent Luria (including its subsidiaries) in purchasing and selling such scrap in interstate and foreign commerce; to coerce or cause suppliers and prospective suppliers of iron and steel scrap to sell to respondent Luria (including its subsidiaries) without regard to the comparative services and facilities offered by respondent Luria and those offered by competitors of respondent Luria; and to prejudice and injure other brokers, dealers, producers of iron and steel scrap, the public and consumers.

4. The acts and practices of respondents, as above found, are all to the prejudice of competitors of respondent Luria (including its subsidiaries) and to the prejudice of the public; have a dangerous tendency to hinder and prevent, and have actually hindered and prevented competition in the purchase and sale of iron and steel scrap in commerce, within the intent and meaning of the Federal Trade Commission Act; have unreasonably restrained such commerce in iron and steel scrap, and have a dangerous tendency to create a monopoly in respondent Luria in the purchase and sale of iron and steel scrap; and constitute unfair methods of competition and unfair acts and practices, in commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act.

5. It has been found that respondent Luria acquired all or a substantial part of the capital stock of Pueblo Compressed Steel Corporation and Southwest Steel Corporation. It is concluded that the effect of such acquisitions by respondent Luria, and of each of them, has been, is, or may be, to lessen, eliminate or suppress competition between said corporations; to lessen, eliminate, suppress and prevent competition with respect to prices and otherwise in the purchase and sale of iron and steel scrap in various sections of the United States; unduly to hinder and prevent iron and steel scrap dealers and brokers from competing with respondent Luria in purchasing and selling such scrap in interstate commerce; unduly to impede, hinder, and prevent sellers of iron and steel scrap in interstate commerce from choosing a customer other than respondent Luria or a company controlled by respondent Luria, and buyers of iron and steel scrap in interstate commerce from

choosing a supplier other than respondent Luria or a company controlled by respondent Luria; to tend to create in respondent Luria a monopoly in the purchase and sale of iron and steel scrap in various sections of the United States; and to prejudice and injure brokers, dealers, producers of scrap, the public and consumers.

6. The aforesaid stock acquisitions by respondent Luria, and each such acquisition, constitute violations of Section 7 of the Clayton Act as approved October 15, 1914.

7. The complaint charges that respondent Luria and respondent mills, acting separately and jointly, and respondents Luria and Hugo Neu acting jointly, engaged in other acts and practices in violation of Section 5 of the Federal Trade Commission Act, and that respondent Luria acquired all or a substantial part of the capital stock of various other corporations in violation of Section 7 of the Clayton Act as approved October 15, 1914, or of Section 7 of the Clayton Act, as amended and approved December 29, 1950. Except as otherwise hereinabove found, counsel supporting the complaint have failed to establish by reliable, probative and substantial evidence that said respondents have violated the law in the other respects charged in the complaint, and said charges will accordingly be dismissed.

8. Insofar as the charges in the complaint have been sustained, it is concluded that this proceeding is in the public interest.

9. All pending motions not herein specifically ruled upon are deemed to be without merit and are denied.

THE REMEDY

1. There are two questions which arise in connection with the order to cease and desist, as proposed by counsel supporting the complaint. The first is whether the order is too broad in certain of its prohibitions, insofar as it involves the smaller of the respondent mills. The second is whether the order goes far enough in endeavoring to restore competitive conditions in the industry. It is the opinion of the examiner that, for the reasons hereafter indicated, the proposed order is too broad in the former respect, and is not sufficiently broad or effective in the latter respect.

2. Counsel supporting the complaint propose that the mills not only cease agreeing to make all or substantially all of their scrap purchases from Luria, but that they also cease agreeing to make such purchases from "any other seller or supplier not a party hereto". In the opinion of the examiner such a broad prohibition would not be appropriate in the case of the smaller mills. While, as previously noted, such mills may properly be ordered to cease their exclusive arrangements with Luria because of the cumulative effect of their respective arrange-

ments with Luria, and in order to effectively terminate Luria's participation in such arrangements, the same considerations do not apply to arrangements which the mills may care to make with other suppliers. Where the restraint arises largely from a mill's relationship with a dominant supplier, rather than from its own dominant, major, or substantial position as a purchaser of scrap, it would not be proper to order it to cease entering into exclusive arrangements with other suppliers, concerning which there is no basis for any inference that a restraint similar to that involved in its arrangement with Luria will occur.

3. The mills who fall into this category and as to whom the order should be limited are the following:

a. *Edgewater Steel Company.* Edgewater is one of the smaller steel companies in the Pittsburgh-Youngstown area. Its annual scrap purchases from brokers and dealers between 1950 and 1954 ranged from 12,000 to 28,000 tons, and represented between .2% and .4% of the total scrap purchases from brokers and dealers by the steel mills in the area.

b. *Columbia Malleable Castings Corporation.* Columbia is one of the smaller mills in eastern Pennsylvania. Its annual scrap purchases from brokers and dealers between 1950 and 1954 ranged from 8,000 to 13,000 tons, and represented between .5% and 1.3% of the total scrap purchases from brokers and dealers by the steel mills in the area. If the North Atlantic area were considered the appropriate market area, the proportion of its scrap purchases would be even smaller, the maximum being .6% in 1954.

c. *Bucyrus-Erie Company.* Bucyrus-Erie's two plants involved in this proceeding are located at Erie, Pennsylvania. Erie is in the northwestern corner of Pennsylvania somewhat north of the Pittsburgh-Youngstown area, and is somewhat south of Buffalo which is in the North Atlantic area. The annual scrap purchases of its two Erie plants from brokers and dealers are approximately 9,000 tons. As related to the North Atlantic area this would represent .2% in 1953 and .4% in 1954 of the scrap purchased from brokers and dealers by the mills in that area. As related to the Pittsburgh-Youngstown area, it would represent .2% in 1953 and .3% in 1954 of the broker-dealer scrap purchases of the mills in that area.

d. *Baldwin-Lima-Hamilton Corporation.* Baldwin has been named as a respondent because of the activities of its Standard Steel Works in the Eastern Pennsylvania area. That plant's annual purchases from brokers and dealers between 1950 and 1954 ranged from 55,000 to 93,000 tons, and represented between 3.3% and 5.4% of the total broker-

dealer scrap purchases of the steel mills in the Eastern Pennsylvania area. In the broader North Atlantic area, Baldwin's purchases accounted for 2.1% in the peak year 1954.

e. *Detroit Steel Corporation.* The only scrap consuming plant of Detroit is its plant at Portsmouth, Ohio, which is supplied by respondent Southwest of Pittsburgh. The purchases of that plant from brokers and dealers have ranged from a peak of 286,000 in 1950 (the year it was acquired by Detroit), to a low of 55,000 tons in 1954, with the average annual purchases being about 200,000 tons. Although its purchases obviously are not insubstantial, there is no evidence as to what percentage they represent of the market area. In terms of the nearest area for which there are figures, viz, the Pittsburgh-Youngstown area, Portsmouth's purchases represent between 2 and 3% of the broker-dealer scrap purchased by the mills in that area.

f. *McLouth Steel Corporation.* McLouth, whose plant is located in Trenton, Michigan, has purchased between 225,000 tons and 385,000 tons annually from brokers and dealers during the period from 1950 to 1954. These tonnages are obviously not insubstantial. However, there is no evidence to show that it is a major or substantial consumer of scrap in the market in which it operates.

4. The examiner entertains no doubt that an order limiting the cessation of exclusive dealing by the mills to Luria only, should be entered with respect to respondents Edgewater, Columbia, Bucyrus-Erie, and Baldwin-Lima-Hamilton in view of their relatively insubstantial market positions as purchasers of scrap. The situation is not quite as clear in the case of respondents Detroit and McLouth, whose purchases are fairly substantial as compared to the mills in other areas. However, since the record is lacking in evidence that they are substantial factors in the particular market in which they operate or, indeed, as to the confines of such market, the examiner does not consider it appropriate to do more than order them to cease their relationship with Luria.

It has been suggested that even such an order is not justified as to the latter two mills in view of the lack of evidence that their arrangements with Luria have affected a substantial portion of the markets in which these mills operate. Such an argument might be valid if these were the only exclusive arrangements to which Luria was a party. However, in view of the fact that there is involved here "a seller with a dominant position" in the industry, and that it has also pre-empted the business of a number of other "outlets with substantial sales volume, coupled with an industry-wide practice of relying upon exclusive contracts" (*Tampa Electric Co. v. Nashville Coal Co.*, U.S. Sup. Ct., 29 Law Week at 4241), it is the opinion of the examiner that

the statutory test has been met as to the seller and that, in order to make the order effective, the buyers should also be placed under a restriction in dealing with the seller.

5. In the case of the remaining respondent mills, the volume of their scrap purchases and their market position are such that the broader order proposed by counsel supporting the complaint is justified. The position of these mills is as follows:

a. *Bethlehem Steel Company.* Bethlehem is the largest purchaser of scrap in the eastern part of the United States. Its scrap purchases from brokers and dealers during the postwar period have exceeded 2,000,000 tons in some years and have fallen below 1,000,000 tons only in 1949, when they were 933,000 tons. Its plants in the Eastern Pennsylvania area accounted for 43% of the total scrap purchased by the steel mills in the area from brokers and dealers in 1953, and 31% in 1954. The purchases of its plants in the broader North Atlantic area represented 54% of the purchases of broker-dealer scrap by the steel mills in that area in 1953, and 44% in 1954.

b. *Bethlehem Pacific Coast Steel Corporation.* Bethlehem Pacific is the largest purchaser of scrap on the Pacific Coast. Its purchases from brokers and dealers between 1950 and 1954 have ranged between 365,000 and 565,000 tons, and represented 51% of the total purchases from such sources by Pacific Coast mills in 1953, and 49% in 1954.

c. *Phoenix and Central Iron and Steel Companies.* Phoenix and Central, subsidiaries of Barium Steel Corporation, purchase between 200,000 and 400,000 tons of scrap annually from brokers and dealers. Their purchases have represented approximately 20% of the broker-dealer purchases of the steel mills in the Eastern Pennsylvania area in most years between 1950 to 1954. In 1954 their purchases represented 10.7% of the broker-dealer purchases by steel mills in the broader North Atlantic area.

d. *Lukens Steel Company.* Lukens is another substantial scrap purchaser in the Eastern Pennsylvania area. Its purchases from brokers and dealers have ranged between 200,000 and 350,000 tons annually, representing 25% of the total purchases of such scrap by the mills in the Eastern Pennsylvania area in 1954, and between 11% and 21% of such purchases in the other years from 1950 to 1953. Its purchases accounted for 12% of the broker-dealer scrap purchased by the mills in the broader North Atlantic area in 1954.

e. *Colorado Fuel and Iron Corporation and John A. Roebling's Sons Corporation.* CF&I is the largest purchaser of scrap in the Rocky Mountain area. Its Minnequa Works in Pueblo, Colorado purchased between 125,000 tons and 330,000 tons of scrap annually from 1950 to 1954, which represented between 57% and 82% of the total

scrap purchases from brokers and dealers by the steel mills in the Rocky Mountain area. CF&I's plants in the Eastern United States, including that of its subsidiary Roebling, purchased between 250,000 and 370,000 tons of scrap annually from brokers and dealers between 1950 and 1954. The purchases of these plants represented from 9% to 13% of the total broker-dealer scrap purchases of the steel mills in the North Atlantic area during this period.

f. *U.S. Steel Corporation.* U.S. Steel's plant at Geneva, Utah is the other large steel company in the Rocky Mountain area, in addition to CF&I's Minnequa Works. The purchases of the Geneva plant from brokers and dealers have ranged from 39,000 tons to 115,000 tons between 1950 and 1954, and represent the balance of the tonnage purchased by steel mills in the area not accounted for by those of CF&I's Minnequa Works. This would be between 18% and 43% of the total broker-dealer scrap of the steel mills in the area.

g. *Weirton Steel Company.* Weirton purchases between 450,000 and 715,000 tons of scrap annually from brokers and dealers. It is the third largest purchaser of scrap in the Pittsburgh-Youngstown area. Its purchases represented between 11% and 14% of the purchases from brokers and dealers by the steel mills in the area during the period from 1950 to 1954.

h. *Granite City Steel Company.* Granite City purchases between 275,000 and 400,000 tons of scrap annually. Except for the year 1954, it has been the largest purchaser of scrap in the St. Louis area. Its purchases account for between 40 and 50% of the purchases of broker-dealer scrap by the steel mills and principal foundries in the St. Louis area.

6. In addition to the provision that the steel mills cease agreeing to make all of their purchases from Luria or from any other supplier, counsel supporting the complaint have proposed that they be prohibited from "otherwise * * * follow[ing] a course of action * * * which may preclude sellers generally from competing for [their] business." An equivalent prohibition has been proposed with respect to respondent Luria, in addition to prohibiting it from agreeing to act as exclusive broker for the mills. The purpose of the generally phrased prohibition is apparently to prevent the use of restrictive arrangements other than those involving the exclusive purchase of scrap from Luria. In the opinion of the examiner this portion of the proposed order is too vague and indefinite to be enforceable. However, a provision prohibiting each mill not only from agreeing to buy all of its scrap from Luria, but from agreeing to use Luria as its exclusive broker or to otherwise prefer Luria in the placing of orders would be appropriate.

7. The most serious defect in the order proposed by counsel supporting the complaint is its ineffectiveness in restoring competitive conditions. In the opinion of the examiner the exclusive arrangements between Luria and the mills have so upset the competitive pattern in a number of the market areas covered by the evidence, that a mere prohibition on exclusive or preferential dealing by agreement or other joint action will not be effective in restoring normal competitive conditions in these markets. Luria has become so dominant in the industry and is so entrenched as a supplier to the respondent mills by virtue of its intimate familiarity with their scrap needs, policies and methods of doing business, that it will most likely continue to obtain the lion's share of their business even though there may be an ostensible termination of the agreements, understandings or arrangements which it has with them. Indeed, it may be difficult to determine whether the existing arrangements have been terminated, or have been merely modified somewhat to technically comply with the order in this proceeding.

Some inkling of the probable course of events can be obtained from observing what happened after the exclusive contract between the Luria group and the OCCF was terminated in December 1955. Despite such termination the Luria group, and later Luria alone, continued to supply the vast preponderance of the scrap purchased by the OCCF from the United States. During the period in 1956 for which statistical evidence is available the Luria group supplied 82% of such scrap. In 1957, when the OCCF began to purchase scrap from the United States pursuant to sealed bids, Luria received orders for approximately 70% of OCCF's requirements. Having become thoroughly familiar with the OCCF's requirements and policies, and having established sources of supply in this country, Luria continued to reap dividends from the earlier exclusive agreements even though they had ostensibly been terminated.

8. In the opinion of the examiner the momentum of the exclusive arrangements between Luria and the mills, which have been here found to be illegal, will continue to plague the industry and yield benefits to Luria, unless some remedy more drastic than that proposed by counsel supporting the complaint is adopted. What is required here is a provision which will induce the mills to place orders with other suppliers who submit offers comparable to Luria's. Merely prohibiting the mills from agreeing with Luria to use it as exclusive or preferential broker, or from agreeing to purchase all of their scrap from Luria will not accomplish this. By using one additional broker for a minor portion of their requirements the mills may find an avenue for the successful evasion of the order. Aside from any conscious effort to evade the order, there is a strong likelihood that they will

continue to favor Luria because of their confidence in it, born of the former illegal relationship. The only way to assure that Luria will not continue to benefit from its illegal exclusive arrangements, and to encourage the re-establishment of normal competitive conditions in the industry, is to prohibit the mills for a period of time from refusing to place orders for at least half of their purchased scrap requirements with other suppliers who submit offers comparable to those received from Luria, and from purchasing more than half of their scrap from Luria where comparable offers have been received from others.

9. Ample precedent exists for requiring a party or parties to an illegal combination to separately refrain from conduct which is related to that involved in the illegal combination, where such action is necessary to effectively restore competitive conditions which have been destroyed or seriously impaired by the combination. Thus in *FTC v. National Lead Co.*, 352 U.S. 419 [6 S. & D. 193, 199], the Commission was held to have the authority to prohibit the respondents not only from jointly fixing prices through the use of a zone delivered pricing system, but from individually using such system for a temporary but indefinite period, where it was found necessary to create "a breathing spell during which independent pricing might be established without the hang-over of the long-existing pattern of collusion" (at 425). See also the consent decree in *U.S. v. Republic Steel Co.*, 1953 CCH Trade Cases, par. 67,510, where the defendants were enjoined not only from jointly entering into exclusive dealing and other trade restraining agreements, but the defendant steel mill was individually required, for a period of 5 years, to make two-thirds of its production of the product in question available for sale to defendant fabricators and other fabricators without discrimination; and see the decree in *U.S. v. General Electric Co.*, 1952 CCH Trade Cases par. 67,291, where the defendants were not only enjoined from fixing prices and engaging in other trade restraining activities in concert, but one of them was separately enjoined from refusing to sell its products to distributors on nondiscriminatory terms for an indefinite period of time until it had "established to the satisfaction of this Court * * * that competitive conditions exist in the trade and commerce" of the product in question, and several defendants were each enjoined for a period of 3 years "in making purchases of [the products in question] from refusing to consider in good faith and on a non-discriminatory basis, having due regard for the circumstances of each case, solicitations for such purchases from all vendors".

10. It is the opinion and finding of the examiner that it is likewise necessary here to create a "breathing spell" during which normal competitive conditions can reassert themselves "without the hang-over

of the long-existing pattern" of the exclusive arrangements between Luria and the various respondent mills. Merely prohibiting the joint use of exclusive or substantially exclusive arrangements will not accomplish this. It is necessary, in addition, to make it incumbent on the mills, for a reasonable period of time, to give other suppliers an opportunity to compete with Luria on an equal basis.

11. In addition to the foregoing questions, which relate to the exclusive dealing charge, there is also presented a question involving the acquisition charge. Counsel supporting the complaint propose not merely that respondent Luria be required to divest itself of the stock and assets of the companies it acquired, but that it be enjoined from making any further acquisitions of competitors. In the opinion of the examiner the record fails to establish a pattern of acquisitions of such magnitude or nature as to justify a remedy as drastic as a perpetual injunction against further acquisitions, without regard to the size and competitive position of the company acquired, and the probable competitive impact of such acquisitions on particular markets. The need for such a broad prohibition requires a showing far stronger than is here present. See *Pillsbury Mills, Inc.*, Docket 6000 [57 F.T.C. 1274] (December 16, 1960), and *Scott Paper Company*, Docket 6559 [57 F.T.C. 1415] (December 16, 1960).

ORDER

1. *It is ordered*, That the respondent brokers, Luria Brothers & Company, Inc., and Southwest Steel Corporation, and the respondent mills, Bethlehem Steel Corporation, Bethlehem Steel Company, Bethlehem Pacific Coast Steel Corporation, United States Steel Corporation, National Steel Corporation, Weirton Steel Company, The Colorado Fuel and Iron Corporation, John A. Roebling's Sons Corporation, Central Iron & Steel Company (now known as Phoenix Iron & Steel Company), Phoenix Iron & Steel Company, Granite City Steel Company, Lukens Steel Company, Detroit Steel Corporation, McLouth Steel Corporation, Baldwin-Lima-Hamilton Corporation, Edgewater Steel Company, Bucyrus-Erie Company, and Columbia Malleable Castings Corporation (now known as Grinnell Corporation), their respective officers, agents, representatives and employees, directly or through any corporate or other device, in or in connection with the purchase or sale of or the offer to purchase or sell iron and steel scrap in interstate commerce, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any express or implied understanding, agreement, combination or conspiracy between said respondent brokers, or either of them, and any one or more of

said respondent mills, or between any respondent and others not parties hereto, to do or perform any of the following things:

a. For respondent brokers, or either of them, to act as exclusive or substantially exclusive broker or supplier of iron and steel scrap for any plant or all plants of any respondent mill or of any other buyer of iron and steel scrap not a party hereto, or to otherwise receive a preferential status or preferred treatment as broker or supplier of iron and steel scrap for any respondent mill or any other buyer of iron and steel scrap;

b. For any respondent mill to make all or substantially all of the iron and steel scrap purchases at any or at all of its plants from or through respondent brokers, or either of them; or to use respondent brokers, or either of them, as exclusive or substantially exclusive broker or supplier of iron and steel scrap for any or all of its plants, or otherwise give a preferential status or preferred treatment to said brokers, or either of them, as broker or supplier of iron and steel scrap;

c. For any of the following respondent mills: Bethlehem Steel Corporation, Bethlehem Steel Company, Bethlehem Pacific Coast Steel Corporation, United States Steel Corporation, The Colorado Fuel and Iron Corporation, John A. Roebling's Sons Corporation, National Steel Corporation, Weirton Steel Company, Central Iron & Steel Company (now known as Phoenix Iron & Steel Company), Phoenix Iron & Steel Company, Granite City Steel Company and Lukens Steel Company, to make all or substantially all of the iron and steel scrap purchases at any or at all of its plants from or through any other broker or supplier not a party hereto; or to use any other broker or supplier as the exclusive or substantially exclusive broker or supplier of iron and steel scrap for any or all of its plants, or otherwise give a preferential status or preferred treatment to any broker or supplier as broker or supplier of iron and steel scrap.

2. *It is further ordered*, That the respondent mills, Bethlehem Steel Corporation, Bethlehem Steel Company, Bethlehem Pacific Coast Steel Corporation, United States Steel Corporation, National Steel Corporation, Weirton Steel Company, The Colorado Fuel and Iron Corporation, John A. Roebling's Sons Corporation, Central Iron & Steel Company (now known as Phoenix Iron & Steel Company), Phoenix Iron & Steel Company, Granite City Steel Company, Lukens Steel Company, Detroit Steel Corporation, McLouth Steel Corporation, Baldwin-Lima-Hamilton Corporation, Edgewater Steel Company, Bucyrus-Erie Company, and Columbia Malleable Castings Corporation (now known as Grinnell Corporation), their respective officers, agents,

representatives and employees, directly or through any corporate or other device, in or in connection with the purchase or offer to purchase iron and steel scrap by them in interstate commerce, do each forthwith, and for a period of five (5) years from the date this order shall become final, cease and desist from:

a. Refusing to consider in good faith, and on a nondiscriminatory basis, offers to sell iron and steel scrap by brokers, dealers and suppliers other than respondent brokers and, where said offers are comparable as to price, quality and other material terms and conditions of sale as those which may have been received from respondent brokers during a like period, to place orders with such of said other brokers, dealers and suppliers as each such mill shall select, for at least 50% of its annual requirements of purchased iron and steel scrap, except to the extent said other brokers, dealers and suppliers have failed to offer or deliver scrap in sufficient quantities to enable any such mill to obtain said percentage of its requirements from such other brokers, dealers and suppliers;

b. Purchasing from respondent brokers, or either of them, more than 50% of each such mill's annual requirements of purchased iron and steel scrap, except to the extent it shall be unable to obtain at least 50% of such requirements from other brokers, dealers and suppliers on the basis of offers comparable as to price, quality and other material terms and conditions of sale as those which may have been received from respondent brokers during a like period, or such other brokers, dealers and suppliers have failed to deliver at least 50% of such requirements pursuant to orders placed with them.

3. *It is further ordered*, That respondent Luria Brothers & Company, Inc., its officers, agents, representatives and employees, acting separately or in combination with anyone else, whether a party to this proceeding or not, directly or through any corporate or other device, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any express or implied understanding, agreement, combination or conspiracy with any steel producing company or group of steel producing companies beyond the continental limits of the United States, or any buying organization, agent or other buyer acting for or on behalf of such steel producing companies, to act as the exclusive or substantially exclusive broker or supplier for such company or companies, of iron and steel scrap obtained in the continental United States or within the territorial jurisdiction of the United States.

4. *It is further ordered*, That respondent Luria Brothers & Company, Inc., do forthwith divest itself absolutely, in good faith, of:

a. All stock or other share capital, and all control over or interest in all stock or other share capital, of Pueblo Compressed Steel Corporation and Southwest Steel Corporation; and

b. All assets, properties, rights and privileges, tangible and intangible, acquired from Pueblo Compressed Steel Corporation and Southwest Steel Corporation since December 29, 1950; together with any assets or other properties of whatever description that may have been added thereto since December 29, 1950, as may be necessary to restore each said corporation to at least the same operating condition that existed, and competitive position that it occupied, when its assets or properties were so acquired, so as to retain neither directly nor indirectly any of the fruits of such acquisitions.

It is further ordered, That in the divestitures hereinbefore mentioned, none of the stock, assets, properties, rights or privileges to be divested shall be sold or transferred, directly or indirectly, to anyone who at the time of the divestiture is a stockholder, officer, director, employee, or agent of, or is otherwise directly or indirectly connected with, or under the control or influence of, respondent Luria Brothers & Company, Inc., or of any of said respondent's subsidiary, affiliated or related companies.

5. *It is further ordered*, That the complaint be, and the same hereby is, dismissed as to respondent Hugo Neu Corporation, and as to those allegations or portions thereof as have been hereinabove found not to have been sustained by the evidence.

OPINION OF THE COMMISSION

NOVEMBER 15, 1962

By Anderson, *Commissioner*:

This matter is before the Commission for consideration of the cross-appeals of the parties from the hearing examiner's initial decision which in part dismissed and in part upheld the complaint.

The Commission's complaint herein was issued January 19, 1954. It was subsequently amended on July 13, 1954, and again on April 16, 1956. Hearings began January 12, 1955, and continued thereafter at intervals until May 14, 1958. During the 113 days of hearing, 250 witnesses testified, producing a transcript in excess of 14,000 pages. More than 1,300 exhibits, many having a multiple number of pages, were received in evidence.

Because of the extraordinary circumstances presented by this highly

complicated matter, the hearing examiner departed from the usual Commission procedure of requiring all parties to make simultaneous filing of their proposed findings, conclusions and order, and directed complaint counsel to file theirs on November 10, 1958, while respondents were not required to file until they had had the opportunity to examine complaint counsel's filing. The respondents submitted their proposed findings on various dates up to January 13, 1959; and thereafter, until March 20, 1959, the parties were permitted to file cross-replies. The hearing examiner then took the matter under advisement.

The hearing examiner's initial decision was filed on March 29, 1961. In its 359 pages, the facts of record are painstakingly analyzed and concluded upon. While all parties have appealed, it is significant that relatively few exceptions are taken to the purely factual findings. We have reviewed the record in the light of the arguments advanced in the briefs, and the oral argument heard on November 21, 1961; and it is our decision that with the exception of the modifications noted herein the initial decision of the hearing examiner should be, and is, adopted as the decision of the Commission.

The Respondents

Two of the respondents herein, Luria Brothers & Company, Inc. (hereinafter sometimes referred to as Luria), and its subsidiary, Southwest Steel Company (hereinafter sometimes referred to as Southwest), are primarily engaged in the business of buying iron and steel scrap and reselling it to consumers who melt it down to produce "new" iron or steel. Luria and Southwest and other companies performing a similar function are known and referred to in the steel industry as "brokers." It should be pointed out that the term "brokers" as applied in this industry is somewhat inaccurate since these brokers are actually jobbers or wholesalers, buying scrap for their own accounts from dealers, industrial plants, railroads and others, and reselling it at a profit.

In certain market areas Luria is also engaged as a scrap "dealer." The distinction between a dealer and a broker is, at best, a tenuous one. Brokers ordinarily do not take physical possession of the scrap they deal in and can, and frequently do, operate without facilities other than an office. Dealers, on the other hand, usually take physical possession of scrap and operate "yards" wherein scrap is sorted, processed and stored. The chain of commerce ordinarily finds dealers selling to brokers, but they also quite frequently sell directly to consumers and, thus, directly compete with brokers.

Respondent Hugo Neu Corporation is primarily engaged in the importing and exporting of metals. This matter is concerned with Neu's activities as a broker buying scrap in the United States and selling it abroad.

The remainder of the respondents herein are consumers of scrap, operating furnaces wherein scrap or a combination of scrap and pig iron is melted down to produce "new" steel or iron. This group of consuming respondents is frequently referred to herein as "respondent mills," although in a strictly technical sense not all of them are mills as that term is used in the steel industry.

Certain respondent mills—Bethlehem Steel Company, Central Iron & Steel Company (now known as Phoenix Iron & Steel Company), Colorado Fuel and Iron Corporation (an original respondent herein and successor by merger to respondent John A. Roebbling's Sons Corporation), Detroit Steel Corporation, Granite City Steel Company, McLouth Steel Corporation, Phoenix Iron & Steel Company, United States Steel Corporation and Weirton Steel Company—are fully integrated steel companies, *i.e.*, they operate blast furnaces which produce pig iron (used in making steel) and also operate facilities for the production of semi-finished and finished steel from ingots. Other respondent mills—Bethlehem Pacific Coast Steel Corporation (now Pacific Coast Division of Bethlehem Steel Company), Edgewater Steel Company and Lukens Steel Company—are semi-integrated steel companies, which do not operate blast furnaces but do produce ingots and have finishing facilities. The remaining respondent mills—Baldwin-Lima-Hamilton Corporation, Bucyrus-Erie Company and Grinnell Corporation (formerly known as Columbia Malleable Castings Corporation)—operate iron or steel foundries to supply their own manufacturing or fabricating operations.

Bethlehem Steel Corporation and National Steel Corporation are not producers of iron and steel. The former's connection with this proceeding arises from its ownership of all the stock of Bethlehem Steel Company (and that of Bethlehem Pacific Coast Steel Corporation prior to its merger into Bethlehem Steel Company) while the latter's connection arises from its ownership and control of Weirton Steel Company.

While respondent mills account for a large percentage of the country's total iron and steel production, they do not include many significant integrated steel companies and a large number of small iron or steel foundries. It is estimated that the scrap purchases of respondent mills represent approximately 22% of the total scrap received by all domestic scrap consumers.

The Charges

The complaint is divided into two counts which contain no less than twenty separate charges of unfair practices. While all of the alleged unfair acts and practices are related in the sense that they allegedly unlawfully benefited Luria, they can be conveniently separated into four broad categories for the purpose of discussion.

The first group of charges is contained in Paragraph 9 of Count I. In subsections (a) and (b) thereof it is alleged that Luria and the mill respondents violated the Federal Trade Commission Act by entering agreements or understandings pursuant to which each mill purchased all or substantially all of its scrap requirements from Luria. Subsections (c) through (j) of Paragraph 9 charge as separate unfair practices eight acts or practices utilized by Luria or the mill respondents to effect and further their alleged agreements. Paragraph 9 contains all of the charges made against respondent mills.

A second series of allegations is contained in Paragraph 12 of Count I. In this section, respondents Luria and Neu are charged with having violated the Federal Trade Commission Act by conspiring among themselves and with others to restrain competition and create a monopoly in the export scrap market.

The third charge is found in subparagraph (b) of Paragraph 11 in Count I and in the whole of Count II. The charge here made is that Luria has effected a probable lessening of competition and tendency toward monopoly by acquiring all or a substantial part of the stock of certain corporations engaged in business as scrap brokers or dealers. The reason for the separation of the complaint into two counts is here apparent. Count II is brought under a different act, Section 7 of the Clayton Act (38 Stat. 731 and the amended section, 64 Stat. 1125), while Count I is entirely founded upon the Federal Trade Commission Act. Thus, the same acquisitions are charged as violative of two statutes.

A final group of charges is contained in Paragraph 10 and in subparagraph (a) of Paragraph 11 of Count I. In these sections, Luria is charged with a variety of alleged unfair acts or practices which are more or less independent of the charges made in other sections but which were pursued "for the purpose and with the effect" of reducing competition and creating a monopoly.

The Nature of the Violations Charged

At the outset it must be emphasized that this is a proceeding brought to arrest in their incipiency acts and practices which, if allowed to continue, would eventually produce a monopoly in the respondent

Luria Brothers & Company, Inc. The complaint charges violations of the Federal Trade Commission Act and Section 7 of the amended Clayton Act. This latter statute, in contrast with Section 5 of the Federal Trade Commission Act, deals with a defined and limited type of unlawful practice, the acquisition of the stock or assets of other corporations with probable anticompetitive effects. Thus, while respondent Luria argues strenuously that its acquisitions do not violate the Clayton Act, there is no dispute as to the nature of the charge made in complaint Count II.

On the other hand, the widest possible dichotomy of views exists as to the nature of the charges made in complaint Count I, and this is particularly true of the charge made in Paragraph 9 of Count I. Respondents argue that the practices indicted by Paragraph 9 of the complaint are exclusive dealing arrangements of the type specifically covered by Section 3 of the Clayton Act¹ and that, therefore, it is incumbent upon complaint counsel to adduce evidence in support of this paragraph which would be sufficient to satisfy a burden coextensive with the burden created by Section 3. Their brief phrases the argument in these words: "In a case in which Section 5 of the Federal Trade Commission Act is invoked against a practice for which criteria of legality are specifically prescribed in the Clayton Act, legality must be determined under the standards of the particular section of the Clayton Act relating to such practice." This argument has two weaknesses.

In the first place, it is legally untenable since the Supreme Court has very clearly held that acts or practices which are not sufficiently mature to violate the Sherman or Clayton Acts may violate the Federal Trade Commission Act.² In support of their argument, respondents cite various antitrust writers and the *Report Of The Attorney General's Committee To Study The Antitrust Laws*.³ The fact is that the opinions expressed in these unofficial writings are in direct conflict with the legal precedents we are bound to follow.

The second defect in respondents' argument is in its major premise that the charge made in Paragraph 9 is basically an "exclusive dealing"

¹ This section provides:

"Sec. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

² *Federal Trade Commission v. Motion Picture Advertising Service Co., Inc.*, 344 U.S. 392 [5 S. & D. 498] (1953).

³ Transmitted to the Attorney General March 31, 1955.

charge of the type countenanced by Section 3. The complaint cannot be so narrowly confined. It is directed against a much broader target than the relatively concise restraint encompassed by Section 3. This proceeding was not brought under Section 5 of the Federal Trade Commission Act because of jurisdictional strictures of the Clayton Act, but rather because the practices and acts here involved bear only superficial resemblance to those within the aegis of the latter statute. The goal of the complaint as a whole, and Paragraph 9 in particular, is to raise a roadblock in the path of monopoly.

The potential monopolizer at which the complaint is primarily aimed is respondent Luria. The respondent mills are named in this proceeding because they allegedly conspired with and aided and abetted Luria and because an order to cease and desist which did not include the mill respondents would be ineffective.⁴

This proceeding was brought to arrest an incipient monopoly, to enjoin activity which, if undeterred, would violate Sections 1 and 2 of the Sherman Act.⁵ That Section 5 was specifically designed for this purpose is too well established for discussion.⁶

Monopolization violative of the Sherman Act exists when a single trader has intentionally acquired the power to control market prices or to exclude competitors. Such a condition is unlawful and there is no need to show that the power over prices or the market has, in fact, been exercised. *American Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946).

At page 576 of the initial decision the hearing examiner correctly concludes: ". . . this proceeding does not involve a charge of monopolization under Section 2 of the Sherman Act . . ." We agree that such a charge is not made in the complaint and, of course, cannot be contemplated at this juncture. But "monopolization" is not the only practice made unlawful by Section 2. The section condemns with equal emphasis any "attempt to monopolize" or to "com-

⁴ The hearing examiner concluded: "Such arrangements cannot be effectively terminated unless the buyers, as well as the seller, are ordered to cease and desist therefrom." (Initial Decision at p. 583.)

⁵ "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal:"

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

⁶ *Fashion Originators Guild of America, Inc., et al. v. Federal Trade Commission*, 312 U.S. 457, 456 [3 S. & D. 345] (1941); *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643, 647 [2 S. & D. 116] (1931); *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441, 453 [1 S. & D. 170] (1922).

See also *Federal Trade Commission v. Gratz*, 253 U.S. 421, 434-435 [1 S. & D. 69] (1920). (Dissenting opinion of Justice Brandeis.)

bine or conspire . . . to monopolize." Thus, the act inveighs against monopoly and any deliberate conduct through which it may be accomplished. Such conduct is well within the purview of this complaint which charges that respondents entered "combinations, and conspiracies for the purpose and with the effect of lessening, . . . competition, and tending to create a monopoly"

An attempt to monopolize is established by proof that the respondent or defendant acted with deliberation and purpose, i.e., with "specific intent."⁷ The existence of "specific intent" is a conclusion based upon an examination of the business practices pursued by the potential monopolist.⁸ Some actions which clearly indicate deliberateness are the pursuit of acts and practices which violate other provisions of the antitrust laws such as entering agreements constituting restraints forbidden by Section 1 of the Sherman Act⁹ or making acquisitions violative of Section 7 of the Clayton Act.¹⁰ And it follows as a logical corollary that engaging in unfair or deceptive acts or practices within the scope of Section 5 of the Federal Trade Commission Act shows the existence of deliberateness. In this connection, Judge Wyzanski's language in *Union Leader Corp. v. Newspapers of New England, Inc., et al.*,¹¹ is particularly apt:

. . . to prove that a person has that type of exclusionary intent which is condemned in antitrust cases there must be evidence that the person who foresees a fight to the death intends to use or actually does use unfair weapons. Putting the same idea in another way, we may say that there is no sharp distinction between (a) the existence of an intent to exclude and (b) the use of unfair means.

While in Section 2 cases involving combinations or conspiracies to monopolize it is necessary to show intent, its proof merges into the proof of unlawful conspiracy. In *American Tobacco Co. v. United States*,¹² the Supreme Court, after stating that the existence of power to exclude competitors from a market is unlawful provided there exists the "intent and purpose to exercise that power," held:

Where the conspiracy is proved, as here, from the evidence of the action taken in concert by the parties to it, it is all the more convincing proof of an intent to exercise the power of exclusion acquired through that conspiracy.

From the *Tobacco* case we also learn that the distinction between a trade restraining conspiracy forbidden by Section 1 of the Sherman Act and a conspiracy to monopolize violative of Section 2 is dependent

⁷ *Swift & Co. v. United States*, 276 U.S. 311 (1928).

⁸ *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939).

⁹ *United States v. Yellow Cab Co.*, 338 U.S. 338 (1949).

¹⁰ *United States v. Columbia Steel Co.*, 334 U.S. 495, 532 (1948).

¹¹ 180 F. Supp. 125, 140 (D. Mass. 1959).

¹² 328 U.S. 781, 809 (1945).

upon the appetite of the conspirators. If their agreement "may stop short of monopoly" they violate only Section 1. If they are not "content with restraint short of monopoly" both sections are violated.¹³

Whether the charge be attempted monopolization or conspiracy to monopolize, it is necessary to determine with some exactness the market wherein the practices occurred. The criteria for the determination of the relevant market are essentially the same whether the case is brought under either the Sherman, Clayton, or Federal Trade Commission Acts. There are two principal facets to the concept of relevant market: the product involved and geographic area.¹⁴ The limits of each element must be determined with particularity since they together constitute both the battleground and the spoils in the battle of competition.

In summary, then, it is our view that proof of the violations charged by this complaint entails a showing: (1) that the respondents engaged in the various acts and practices described in the complaint; (2) for the purpose of restraining or monopolizing any part of trade or commerce; and (3) that respondents have either realized their objective or are likely to reach it if undeterred by an order to cease and desist.

The Alleged Unlawful Agreements Between Luria and the Mill Respondents

The central charge of the complaint is contained in Paragraph 9, and, in particular, in subsections (a) and (b) thereof. The charge there made reads as follows:

* * * Respondent brokers and respondent mills and other mills have entered into express and implied understandings, agreements, combinations, and conspiracies for the purpose and with the effect of lessening, hindering, restraining and suppressing competition, and tending to create a monopoly in respondent brokers in the interstate purchase and sale of iron and steel scrap. Pursuant to said understandings, agreements, combinations, and conspiracies, and in furtherance thereof, respondent brokers and respondent mills and other mills have acted and continue to act in concert and in cooperation in doing and performing the following methods, acts, and practices:

(a) Respondent brokers entered into understandings, agreements, and conspiracies with respondent mills and other mills to act as exclusive or substantially exclusive scrap brokers for said mills.

(b) Respondent mills and other mills agreed to and did make all or substantially all of their iron and steel scrap purchases from respondent brokers.

¹³ *Id.* at 788.

¹⁴ The statute writers use different terms to describe the relevant market. In Section 7 of the Clayton Act it is described as "any line of commerce in any section of the country." In Section 2 of the Sherman Act the authors succinctly refer to it as "any part of the trade or commerce among the several States, or with foreign nations."

Paragraph 9 contains eight additional subparagraphs lettered (c) through (j). These additional paragraphs charge as separate unfair trade practices the various steps and procedures which the respondents allegedly pursued to effect the agreements described in subparagraphs (a) and (b). The hearing examiner disposed of these additional charges in two different manners. With respect to subparagraphs (c), (d) and (e), he found that some, but not all, of the mill respondents had, in fact, engaged in these practices.¹⁵ However, the examiner entered no prohibition against these practices in his order to cease and desist because, even though proven, he did not regard them "as unfair practices in themselves." He considered them as "evidentiary indicia" of the existence of the type of agreements charged as unlawful in subparagraphs (a) and (b). He concluded, therefore, that an order directed against the practices described in subparagraphs (a) and (b) would insure the discontinuance of these practices. We agree with this analysis and decision.

The hearing examiner gave detailed consideration to the charges made in subparagraphs (f) through (j) of Paragraph 9 and concluded that the charges made therein had not been sustained. Our review of the evidence adduced in support of these allegations revealed no error in the hearing examiner's disposition of them. We affirm and adopt his findings and conclusions with respect thereto.

In addition, it would appear that the charges made in subparagraphs (i) and (j) are substantially moot since they deal with practices which took place when scrap was in short supply and regulated and allocated by the Office of Price Stabilization and the National Production Authority. Since the unlawful acts there charged depend upon the existence of such regulations and there is no present reason to believe that they will soon be reinstated, there is no demonstrated need for an order to cease and desist.

As the initial decision points out, the complaint is susceptible of being interpreted as charging a conspiracy or agreement between the mill respondents to appoint Luria as their exclusive broker. We concur with the hearing examiner's conclusion that the record lacks reliable and substantial evidence to support such a charge. The most that can be said of the evidence is that it indicates that several of the respondent mills were aware, at the time that they entered exclusive agreements with Luria, that other mill respondents had similar agreements with Luria. The evidence is summarized by complaint counsel

¹⁵ The hearing examiner in error treated subparagraph (e) as if it contained a charge against respondent mills, when, in fact, it is directed only against respondent Luria.

at page 100 of their brief. After admitting that there is no overt or direct evidence of conspiracy between the mills, the brief states:

There is direct evidence, however, that certain of the respondent mills selected Luria as their exclusive broker because Luria was also the exclusive broker for certain of their competitors, and that they did so for the purpose of lessening competition in the purchase of scrap. There is also evidence from which it must be inferred that all of the other respondent mills knew that Luria was the exclusive broker for the respondent mills, and other mills, with which they competed in the purchase of scrap, and that they continued their exclusive dealing agreements with Luria largely for the purpose of lessening competition in the purchase of scrap. These circumstances are sufficient to warrant a finding of conspiracy among the respondent mills to use Luria as their common exclusive broker for the purpose and with the effect of lessening competition.

Even taking the brief's description of the facts at full face value we cannot agree that the related circumstances are sufficient to warrant a finding of conspiracy among the respondent mills. There is no substantial evidence to support an inference that the mill respondents ever came to an expressed or tacit meeting of the minds or understanding as to purchasing from Luria. The fact that they may have been identically motivated with respect to Luria is an insufficient basis for a finding of conspiracy.

As stated above, we consider the charges made in subparagraphs (a) and (b) of complaint Paragraph 9 as directed against incipient Sherman Act violations. We do not view this proceeding as one which, except for obvious jurisdictional difficulties, would ordinarily be brought under Section 3 of the Clayton Act. It will be noted that the preamble paragraph of Paragraph 9 charges intent, that the agreements were entered "for the purpose and with the effect" of restraining competition and tending to create a monopoly in respondent Luria. Purpose or intent is an element foreign to the Clayton Act, and among the antitrust laws is found only in the Sherman Act.¹⁶

The hearing examiner does not make his position crystal-clear as to the theory of these charges. He finds that Luria's contention that it does not possess monopoly power is "largely irrelevant since this proceeding does not involve a charge of monopolization under Section 2 of the Sherman Act where proof of monopoly power is necessary." He does not, however, clearly eliminate the incipient Sherman Act theory since he points out that Section 3 of the Clayton Act and Sections 1 and 2 of the Sherman Act are *in pari materia* insofar as they involve the concept of agreements or conspiracy. He also discusses the fact that in cases brought under Section 2 of the Sherman Act where the

¹⁶ "Purpose of destroying competition or eliminating a competitor" is an element of a violation of Section 3 of the Robinson-Patman Act, but it is not an antitrust law. *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958).

charge involves an attempt to monopolize or a combination or conspiracy to monopolize rather than actual monopolization there is no necessity to show that actual monopoly power was acquired.

However, on balance, it would appear that the hearing examiner relies in the main upon a Section 3 theory. He discusses at some length the possible liability of buyers under Section 3, concluding "Since the arrangements between Luria and the mills are of the type covered by Section 3 or are at least economically equivalent thereto, to the extent such arrangements have the proscribed effect the buyers may be held accountable under Section 5 of the Federal Trade Commission Act, even though their activities may not be reachable under Section 3 of the Clayton Act because of the technical wording thereof"¹⁷ A principal clue to the examiner's theory is found in his failure to make the necessary finding in a Section 2 Sherman Act type proceeding that the acts and practices of the respondent were pursued deliberately with the intent to effect a monopoly.

Actually the difference between our view and that of the hearing examiner is not as great as may at first appear. As he pointed out, Section 3 of the Clayton Act and Sections 1 and 2 of the Sherman Act can be, and frequently are, brought to bear in exclusive dealing situations. In other words, an exclusive dealing arrangement has with frequency been held to be a conspiracy in restraint of trade violative of Section 1 of the Sherman Act or a conspiracy or attempt to monopolize trade violative of Section 2. Of course, a somewhat different burden of proof is required dependent upon which Act is charged.¹⁸

While our view of the applicable law is somewhat divergent from that held by the hearing examiner, we are in full agreement with his findings and conclusions as to the facts concerning this charge of unlawful agreement between Luria and the respondent mills. He found that while Luria had been a substantial factor in the scrap business in 1945, its principal strength was confined to the Eastern United States. In ten years time it extended its operations and became a dominant factor in other sections of the country, including the St. Louis area, the Rocky Mountain area and the West Coast. During this period it progressed from being a major factor in the Eastern United States to being "far and away" the dominant factor in the scrap business in that section. Its remarkable rise in each of these areas was due, for the most part, to the series of exclusive supply arrangements which it had with the respondent mills and other large scrap consumers.

¹⁷ Initial decision at p. 580.

¹⁸ *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953).

With several exceptions, there are no formal contracts between Luria and the respondent mills requiring the mills to deal exclusively with Luria. Bethlehem Pacific Steel Corporation and United States Steel Corporation did enter written exclusive dealing contracts. The answer of Colorado Fuel and Iron Corporation “. . . admits that on or about June 1, 1946, it entered into an oral understanding with respondent Luria, pursuant to which said Luria was to act as exclusive scrap broker solely for respondent Colorado’s mill at Pueblo, Colorado, and . . . said oral understanding continues in effect” Respondent Granite City Steel Company advised the Commission in writing: “In April 1950 we gave Luria Brothers & Company, Inc., an agreement for the exclusive supplying of our scrap requirements.”

For the most part, however, the existence of the exclusive agreements or understandings is established by the testimony and documents of record. There is ample evidence to show that the respondent mills looked to Luria and considered Luria obligated to keep their mills supplied with scrap and that Luria understands and accepts this obligation. For example, the vice president in charge of scrap buying of McLouth Steel Corporation stated in a letter to Luria: “As you know our scrap inventory position is very critical and you have been charged with the responsibility of keeping this plant in operation. We are depending on you to continue to take care of our requirements.” The scrap buyer for the Standard Steel Works Division of respondent Baldwin-Lima-Hamilton Corporation testified that he expected Luria to supply the grades and quantities of scrap which he required and that Luria understood what was expected of them. The man who was purchasing agent for Lukens Steel Company in 1929, when it commenced buying exclusively from Luria, testified: “. . . we made no contract or any such agreement; written agreement anyhow. It may have been oral.”

Although respondent Bethlehem Steel Company insists it has no agreement with Luria, the record shows instructions by the Bethlehem official responsible for scrap policy to his scrap buyer to “. . . write Pappas [a Rheem Manufacturing Company official] that Sp. Pt. [Rheem plant at Sparrows Point, Maryland] will be included in *overall scrap deal with Luria.*” [Emphasis supplied.]

At one time or another, practically all of the mill respondents have notified other brokers and dealers, Government agencies and scrap producers, such as railroads and factories, that Luria was the mills’ exclusive broker. The mill respondents consistently refused to accept offers of scrap from brokers competing with Luria although, in some cases, the turned-down brokers had been significant suppliers. On occasions, the mill respondents notified Luria of offers received from

other brokers or referred the offering brokers to Luria. Respondent Bethlehem once turned down an offer of 500 tons of scrap at \$42.50 per ton. The day following the offer Luria called the offering broker and agreed to purchase the scrap for \$43.50 per ton. The scrap was then shipped to Bethlehem.

The statistical evidence strongly indicates the existence of agreements between Luria and each mill respondent. Luria has been the almost exclusive supplier of mill respondents Lukens Steel Company, Grinnell Corporation, and Standard Steel Works Division of Baldwin-Lima-Hamilton since the 1930's. It is difficult to believe that the almost 100% exclusive dealing practiced by these respondents for such a long period of time is not the result of an agreement or understanding. And with those mill respondents whose substantially exclusive dealing with Luria is of less duration, the evidence shows a sudden supplanting of many former suppliers with the single supplier Luria. Such a massive change in an entire method of doing business would hardly be undertaken without some advance understanding.

The hearing examiner gave lengthy and detailed treatment to this aspect of the proceeding and the Commission endorses and adopts his findings and conclusions with respect thereto as they appear in Section II-B, 1 through 13, of the initial decision. We are also satisfied that he correctly analyzed the applicable legal authorities dealing with this question and see no reason for embellishing his discussion found in Section IV-B-1 of the initial decision. We are satisfied that there exists between Luria and each mill respondent an agreement, understanding, combination and conspiracy pursuant to which Luria supplies each of the mills with all or substantially all of its needs of scrap. The effect of these arrangements is to exclude competing scrap sellers from a substantial market and thus each of the agreements constitutes an unlawful conspiracy.¹⁹

We turn now to consideration of the effect which these agreements have had upon the relevant market and the respondents' purpose or intent in executing and performing them.

The Relevant Market

The concept of the relevant market has over-all application to this complaint; that is, it is of equal importance to both the Federal Trade Commission Act and Clayton Act charges. None of the activities allegedly pursued by the respondent are charged in the complaint as unlawful *per se*, and, therefore, each of them must be considered in the light of its probable effect upon the relevant market. As stated

¹⁹ *United States v. Paramount Pictures, Inc., et al.*, 334 U.S. 131, 160 (1948).

above, the relevant market concept breaks down into two principal divisions, that of product and that of area. We first consider the product involved.

The Product Involved

This matter is entirely concerned with iron and steel scrap, generated as a by-product of industry or as a result of the discard of items which have for some reason or other outlived their usefulness. The importance of scrap to the iron and steel producing industry can hardly be overstated. Approximately one-half of every pound of new steel produced in the United States is composed of scrap. The proportion of scrap used in relation to pig iron has been remarkably stable over the years. During the period from 1948 to 1954, the variation range was only 2.5%. This stability of proportionate use is all the more remarkable in view of the fact that the proportionate use by individual mills varies widely from the national norm. Integrated mills, that is, mills with facilities to produce their own pig iron, use a greater percentage of pig iron than nonintegrated mills. Mills operating electric furnaces prefer scrap to pig iron since it has less carbon and fewer other impurities. In some electric furnaces the charge consists entirely of scrap.

The respondents contend that pig iron is directly competitive with scrap, and the relevant product market here involved should consist of both products. Respondents argue that, for the most part, the two products are interchangeable and that the Supreme Court in *United States v. E. I. duPont de Nemours & Co.*²⁰ (*The Cellophane Case*) held that reasonably interchangeable products must be considered as a single line of commerce. Complaint counsel admit that pig iron and scrap "are to a large extent substitutable for each other."

The hearing examiner rejected the "reasonable interchangeability" test of *The Cellophane Case*, concluding that "it is now generally accepted that this test is limited to cases arising under the monopolization clause of Section 2 of the Sherman Act and does not apply to cases involving a charge of incipient, rather than actual, restraint or monopoly."²¹ The hearing examiner utilizes and relies upon what he and many of the writers believe to be the less stringent test of the *duPont-General Motors* case (*United States v. E. I. duPont de Nemours & Co.*²²). The test as announced there is whether the product has "sufficient peculiar characteristics and uses to constitute [it] sufficiently distinct from all other [products]." The hearing exam-

²⁰ 351 U.S. 377 (1956).

²¹ Initial decision at p. 574.

²² 353 U.S. 586 (1957).

iner then found as a fact that scrap has sufficient peculiar characteristics and uses to constitute it a distinct product from pig iron for the purposes of determining the appropriate line of commerce. He also held that there were sufficient limitations on the interchangeability of the two products to satisfy *The Cellophane Case* rule.

While the hearing examiner did not have the advantage of the Supreme Court's views on this point as set out in its recent opinion in *Brown Shoe Co. v. United States*,²³ he nevertheless arrived at the correct ultimate conclusion. In *Brown*, the Court explained that the ". . . outer boundaries of a product market are determined by the reasonable interchangeability . . ." test while within the broad market contained within such "outer boundaries" ". . . well defined submarkets may exist, which in themselves, constitute product markets for anti-trust purposes." Among the criteria or indicia to be considered in drawing the boundaries of such a sub-market are ". . . the product's peculiar characteristics and uses."

Thus the Supreme Court has laid to rest the apparent disharmony between the rules of the *Cellophane* and *duPont-General Motors* cases by the simple and eminently logical expedient of blending one into the other. In addition to the "peculiar characteristics and uses" criteria, the Court opines that "industry or public recognition of the submarket as a separate economic entity, . . . unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors" are to be considered as important indicia. It is apparent that application of these indicia to this matter clearly establishes the existence of a completely separate market for scrap. As we pointed out above, the demand for scrap has remained constant in relation to the demand for pig iron. This is probably due to the "peculiar characteristics" of scrap as found by the hearing examiner. There is little cross-elasticity of demand between scrap and pig iron. The price of scrap is extremely volatile, while the price of pig iron remains fairly stable. Scrap is produced and marketed in an entirely different fashion and for the most part by an entirely different group of competitors. Thus, as we view it, the practices engaged in by the respondents herein must be measured against a market composed of scrap alone.

The Relevant Geographic Markets

The hearing examiner measured the competitive effects of the various practices engaged in by the respondents in a market com-

²³ 370 U.S. 294 (1962).

posed of the entire Nation and in certain lesser geographical areas as follows:

North Atlantic area—The six New England States, plus New York, New Jersey, Delaware, Maryland, District of Columbia and eastern Pennsylvania.

Eastern Pennsylvania area—That part of Pennsylvania located east of McKean, Cameron, Clearfield, Cambria, and Somerset Counties.

Pacific Coast area—California, Oregon and Washington.

Rocky Mountain area—Arizona, Colorado, Utah, Idaho, Montana and Wyoming.

Pittsburgh-Youngstown area—An area extending from Johnstown, Pennsylvania, through Monessen and Washington, Pennsylvania; then northwest through Steubenville, Ohio, Weirton, West Virginia, and Youngstown, Ohio, to Warren, Ohio; then east through Sharon, Pennsylvania, and back to Johnstown through Butler, Pennsylvania.

St. Louis district—The metropolitan area of St. Louis and immediately contiguous areas in Missouri and Illinois.

The hearing examiner found that these “are the basic areas from which the mills draw the bulk of their scrap year in and year out.” Respondent Luria disputes the accuracy of this finding and charges that the examiner has, in fact, made contradictory findings. It points out, for example, that the hearing examiner found that certain areas do not produce sufficient scrap to satisfy the consumers located therein, and that as a result, dealers and brokers operating in these areas must reach out into other areas to obtain the additional quantities of scrap required. In the first place, we do not agree that the two findings are contradictory. The evidence clearly shows that steel mills are forced by freight costs to buy as much of their scrap as possible in areas contiguous to the point of consumption. This is true of all mills in all areas. The hearing examiner agrees that there were, and are, significant movements of scrap across the geographic market lines set out. It is our view that this finding is not inconsistent or incompatible with a finding that the mills draw the bulk of their scrap from the areas defined.

Secondly, we are not convinced of the merit of the proposition that the market to be considered is the entire area from which the mills draw scrap. Respondents contend that the examiner’s approach of limiting analysis to consuming areas was rejected outright in *Tampa Electric Co. v. Nashville Coal Co.*²⁴ Assuming the applicability of the *Tampa Electric* case as a precedent here, we cannot agree that it holds that the relevant market must be determined in relation to the sources

²⁴ 365 U.S. 320 (1961).

of the product involved. In *Tampa Electric* the court held that the relevant market consists of the area in which the seller and its competitors "effectively compete."²⁵ The court adopted the petitioning electric company's definition of the market as the area in which the 700 coal producers operating in the Appalachian coal area ". . . were willing to compete for the consumer potential."²⁶ As we see it, the court was simply reiterating the established view that the market is a sales area. In effect, all that *Tampa* holds is that the "pie" may not be sliced too thinly, i.e., there must be a demonstrable reason for the market boundaries drawn. The court could find no basis for the selection of "Peninsular Florida" as a separate market area and held it, therefore, an inadequate segment within which to measure the impact of the parties' restrictive contract. In this proceeding, the market lines were drawn to include the areas where most of the principal buyers are located and where the bulk of all scrap is consumed.

Moreover, there is, to our mind, a very significant difference between the factual situation presented in the *Tampa* case and in the instant matter. Here the product does not, like coal, originate in a relatively confined geographic area but springs from every single hamlet, farm and place of human abode in the country. From this myriad number of sources it flows to a relatively confined and limited number of purchasers—the mills and foundries. While the smaller foundries are rather widely scattered throughout the country, the customers taking the bulk of the scrap (from two-thirds to three-quarters of all scrap consumed domestically), that is to say, the huge steel mills, are concentrated within relatively confined geographic areas. And in our view it is this area, that is, the area wherein the purchases are made, that comprises the relevant geographic market. In the *Tampa* case the opposite was true. The product originated in a relatively confined area and was sold to a myriad number of users located throughout the country. The coal producers' market was ubiquitous, while the scrap sellers' market is highly concentrated. In its *Tampa* opinion the Supreme Court points out that the states of Florida and Georgia combined purchased only 2,304,000 tons of the 290,567,000 tons of coal sold in 1954 by the 700 coal producers (*id.* at 332). Thus the area, could not be considered an "appreciable segment" and was, in fact, a relatively insignificant market area. In contrast, here the areas chosen absorb the bulk of all scrap domestically consumed.

In essence, the market and supply picture with respect to scrap is that each individual consumer attempts to buy scrap from sources located in its immediate vicinity. When these sources become inade-

²⁵ *Id.* at 332.

²⁶ *Id.* at 331.

quate, the search is expanded in ever widening circles until the needs are supplied. Thus, to a great extent, the boundaries of the relevant geographic market are dependent upon the law of supply and demand. The areas are confined during periods of full supply and expanded during periods of scarcity of scrap. Of course, during both periods the mills tend to purchase the "bulk" of their supplies of scrap within an area of close proximity to the point of consumption. The hearing examiner found that the areas outlined in the initial decision reasonably coincide with the mills' natural and normal purchase areas, and respondent Luria has not convinced us that this finding is in error. Thus, it is our view that the regional markets described above represent areas of effective competition wherein the effect of the activities and practices engaged in by all of the respondents can properly be measured. The drawing of geographic market lines is definitely not an exact science. The most that can be accomplished along these lines is to attempt to define with reasonable accuracy and particularity the principal areas of effective competition. In our opinion this has been done.

The Amount of Commerce Controlled

Luria's position, that is, its share of the total commerce in iron and steel scrap in both the Nation and in four principal regional markets is revealed by the table attached as Appendix A. [pp. 639-640 herein]. The data contained in this tabulation are vigorously attacked by respondents, but it is our view that the statistics produced are the best and most accurate which can reasonably be obtained.

Luria principally objects to the failure to include within the tabulation the purchases of some 3,000 small scrap consumers who absorb between one-fourth and one-third of all domestically consumed scrap. The figures in evidence were secured by means of a survey addressed to the 70 principal iron and steel scrap consumers, who together represent approximately 99% of the country's total ingot capacity. The 3,000 scrap consumers not included in the survey are mostly small foundries. Because of their large number and relatively small individual needs it was deemed impractical to survey this entire group. It is Luria's contention that because this group was not surveyed it must be assumed that Luria sold no scrap whatsoever to them. However, this proposed conclusion is directly contradicted by the evidence of record. The hearing examiner concluded, on the basis of reliable evidence, that Luria is a substantial supplier to the nonsurveyed consumers and that their inclusion in the survey would not have produced a significant change in the result.

The tabulation covers only the purchases made by the surveyed mills from brokers and dealers and excludes from the total "universe" the purchases made by the mills directly from scrap producers such as railroads and industrial plants. It is indisputable that the "universe" includes all purchased scrap and not only broker and dealer scrap, but, as the hearing examiner points out, the exclusion of scrap purchased from direct suppliers does not affect the validity of the figures contained in the tabulation. The only effect of including the figures showing scrap purchased from direct suppliers would be to reduce slightly Luria's percentage of the universe.²⁷

Respondent Luria objects to the manner in which the purchases of two of the respondent mills, United States Steel and Bucyrus-Erie, are presented in the tabulation. While each of these mill respondents operate more than one scrap consuming facility, the tabulation includes within the respondents' purchases category the figures for only the one United States Steel plant located at Geneva, Utah, and the single Bucyrus-Erie plant located at Erie, Pennsylvania. The balance of the scrap purchases made by these respondents at all of their other plants is included in the figure showing purchases by nonrespondent mills. The reason for this division is reasonable and logical. Luria dealt with these two respondents on a plant-by-plant basis and with the other respondents on a company-wide basis. The complaint charges that United States Steel and Bucyrus-Erie are involved in this proceeding "especially because" Luria is the exclusive or substantially exclusive supplier to their single plants as named. The tabulation is, therefore, in complete harmony with the complaint and the facts as they exist.

It will be noted that Appendix A [pp. 639-640] compares Luria's

²⁷ The effect is illustrated by the following table which compares Luria's position in a national market consisting of the total purchases of the reporting mills with its position in a national market composed of the reporting mills' purchases from brokers and dealers:

PURCHASES OF SCRAP BY ALL REPORTING MILLS FROM (A) ALL SOURCES, (B) BROKERS AND DEALERS, AND (C) LURIA AND SUBSIDIARIES, 1947-1954

	(a) Total purchases, 1,000 gross tons	(b) From brokers and dealers		(c) From Luria and subsidiaries		
		1,000 gross tons	Percent of total	1,000 gross tons	Percentage of—	
					Total	Broker-dealer
1947.....	17,224	15,931	92.5	2,730	15.8	17.1
1948.....	18,741	17,319	92.4	3,258	17.4	18.8
1949.....	14,173	12,756	90.0	2,848	20.1	22.3
1950.....	19,791	18,235	92.1	5,369	27.1	29.5
1951.....	20,444	18,232	89.2	5,719	28.0	31.4
1952.....	22,367	20,620	92.2	6,875	30.7	33.3
1953.....	21,897	19,935	91.0	7,281	33.3	36.5
1954.....	15,807	14,099	89.2	4,751	30.1	33.7

position as a supplier to the respondent mills with its position as a supplier to nonrespondent mills. This comparison points up the part which Luria's dealings with the respondent mills played in securing for Luria its relative position in the market surveyed.

The remarkable rise in Luria's position in the national market is graphically illustrated in Appendix A [pp. 639-640]. During the eight-year period covered by the tabulation, Luria's percentage of the total scrap sales by all brokers and dealers in the United States rose from 17.1% to 33.7%. That this was due, for the most part, to the arrangements with the mill respondents is indicated by the fact that Luria's share of their purchases totaled only 35.9% in 1947 and rose to 78.5% in 1954. Luria's position with all surveyed nonrespondent consumers showed an increase of only approximately 7%, from 9% to 15.8%.

The substantial impact of the combined activities of Luria and the mill respondents is even more marked in the various regional markets covered by the tabulation. In the Pacific Coast area, Luria's percentage of the market increased from .2% in 1947 to 50.6% in 1954. This was due to the fact that Luria was, by 1954, supplying 80.4% of the mill respondents' scrap needs in that area. The other regional markets present a similar picture. In the North Atlantic market, Luria, by 1954, had amassed to itself 74.5% of the total broker and dealer scrap sales. This represented an increase of more than 100% over its market share in 1947 of 34.1%. That this was due to the deals with the respondent mills is shown by the fact that Luria's share of the purchases of nonrespondents remained substantially the same over this period while its share of the purchases made by respondents increased from 36.5% to 87.1%.

In 1954, Luria was supplying 83.3% of the scrap consumed by the reporting mills in eastern Pennsylvania. This represented an increase over 1947 of almost 100% and was accounted for, in the main, by the fact that Luria's share of the respondent mills' purchases increased from its 1947 figure of 50.1% to 89%.

Luria's position in the Rocky Mountain area did not show any improvement over the period from 1947 to 1954, for the simple reason that it had a virtual monopoly in this area during the entire period. Its smallest share of this market was 87.2% realized in 1951. In 1947 and 1954, Luria's share reached the startling figure of approximately 99%.

A market not covered by Appendix A [pp. 639-640] is the so-called St. Louis district. This market area contains only two large scrap consumers, the respondent Granite City and the Laclede Steel Company. Next in size are three large open hearth steel foundries,

American Steel Foundries, Scullin Steel Company, and General Steel Casting Corporation. The hearing examiner found that there were, in addition, some 40 to 50 scrap consumers in the area but that all of them together accounted for less than 20% of the broker-dealer scrap purchased. Respondent states that there are no statistics in the record to support this 20% figure. While the 20% figure is admittedly an estimate, we believe it to be founded upon sufficient facts to satisfy the substantial evidence requirement. This evidence includes the testimony and sales statistics of five of the largest brokers located in this market and the purchase figures of the largest foundries.

It is important and significant that the ingot producers, Granite City and Laclede, constitute the only market in this area for certain grades of scrap such as No. 2 bundles.

It is the Commission's view, and we so find, that the tabulation below, taken from the hearing examiner's initial decision, adequately and validly portrays Luria's position in the St. Louis district or market. Since the primary purpose of this tabulation is to depict the part played by the full-supply arrangement between respondents Granite City and Luria, the purchasers of Granite City are depicted separately.

SCRAP PURCHASES FROM BROKERS AND DEALERS BY FIVE MAJOR CONSUMERS,
ST. LOUIS DISTRICT, 1949-54

	1949	1950	1951	1952	1953	1954
Total all companies.....	603,716	909,178	920,549	889,268	796,188	630,272
Percent from Luria.....	16.5	31.0	51.7	42.5	51.6	45.4
Total Granite City.....	261,895	407,054	408,754	349,119	397,771	274,640
Percent from Luria.....	0.3	59.5	100.0	100.0	100.0	100.0
Total nonrespondents.....	341,821	502,124	511,795	540,149	398,417	355,632
Percent from Luria.....	28.7	7.9	11.1	5.4	3.3	3.1

The tabulation reveals that Luria increased its position in the St. Louis market during the period 1949 to 1954 from 16.5% of the broker-dealer scrap purchased by the five largest consumers to 51% in 1951 and 1953, declining to 45.4% in 1954. Here again the increase in Luria's share of the market was achieved entirely as a result of its exclusive arrangement with respondent Granite City.

The described statistical evidence reveals that Luria has achieved a monopolistic or near monopolistic position in several important scrap markets. In the national market and in the regional markets where it is dominant but not yet in control, the record shows a rapid increase in Luria's market share leading to the conclusion that monopoly or near monopoly may be in the offing. All in all the picture is not one of competitive health and vigor but one of market foreclosure and monopoly. We must now determine whether the condition was purposely effected, *i.e.*, did the respondents act with intent?

The Respondents' Purpose

It is our conclusion that the hearing examiner erred in not finding that the respondents together possess monopoly power over the scrap market. The most concrete example of this is found in the Rocky Mountain area where the only significant consumers appointed Luria as their exclusive supplier. All dealers in this market must sell to Luria and on such terms as Luria sees fit to impose. Luria may refuse to purchase from particular dealers and thereby cause their demise since scrap cannot be economically shipped long distances to other markets.

In all the other markets, and in the Nation as a whole, it would appear that the inevitable consequence of a continuation and extension of these full supply agreements would be to grant Luria monopoly power. Respondents argue that Luria can never achieve absolute monopoly power since its position is maintained at the mill respondents' sufferance. They point out that at any time they can terminate their arrangement with Luria, thereby rendering it powerless. While this may be true, it does not render Luria as a monopolist or potential monopolist more legally palatable. The record clearly shows that these full supply arrangements give Luria absolute power over all of the brokers and dealers who desire to or, in some instances, must, as an economic necessity, sell to the mill respondents. Luria has the power to control the prices which such brokers and dealers will receive for their scrap and has the power to exclude such competitors from the market which the mill respondents constitute. While this monopoly power may exist, as the mill respondents contend, at their sufferance, it is nonetheless monopoly power and unlawful.

It is unimportant that this power may never be used to actually control prices for it is unlawful *per se* when deliberately attained.²⁸ And since monopoly power was the necessary consequence or result of the full supply agreements, it must be found that the respondents purposefully and deliberately created it.²⁹

Several of the respondents admit that they deal with Luria exclusively, or nearly so, to prevent competition among brokers buying scrap for them. They argue that if several different brokers are attempting to obtain scrap to supply their needs, the brokers will bid against each other and thereby drive up the price of scrap. We fail to see how this argument aids respondents. In the first place, scrap brokers are not agents sent forth by the mill to buy scrap at whatever price they are able to negotiate with dealers or other suppliers. Scrap brokers are wholesalers who sell scrap to the mills at a price

²⁸ E.g., *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946).

²⁹ *United States v. Griffith*, 334 U.S. 100, 108 (1948).

agreed upon when an order is placed. When a broker accepts an order he may already have the scrap on hand or he may have to secure it in the market at the best price he can obtain, but, in either case, the price to the mill is fixed at the time the order is placed. The broker, not the mill, takes the risk of a subsequent market price rise. As the initial decision points out at I-B-16: "Because of market fluctuations and varying competitive conditions in various markets, the buying and selling of scrap by brokers is largely a speculative operation."

Moreover, if respondents' premise that dealing with a multiple number of brokers enhances prices had merit, we would expect that all significant consumers would be buying from only one broker. But this record reveals that many of the large steel mills are content to deal with several brokers, and one, Youngstown Sheet & Tube Company, does so "primarily" in order to be assured that it is getting the best price. It seems to us that the practice of requesting competing bids from competing brokers is more likely to produce lower prices than granting an exclusive deal to a single broker.

However, the practice of dealing with a single broker can very definitely have an effect upon prices if all of the significant consumers in the market, unilaterally or otherwise, decide to deal exclusively with the same broker. The danger here is clear, for the broker then would have absolute control over the prices paid to dealers and other suppliers since he represents the only entree to the consuming mills. And in a very real sense, that is what this case is about. In several markets Luria has acquired, or is well on the road to acquiring, monopoly power over the scrap industry. The source of this power is the mill respondents, and the vehicle used to bring it into being is the exclusive supply arrangements. It is of no consequence that the record does not establish that the exclusive use of Luria is the product of an agreement among the respondent mills for we are concerned here with effects rather than means. The effect of the exclusive arrangements here existing is, and has been, to exclude competing brokers from substantial markets, to grant monopoly power to Luria and to create a monopoly in Luria.

Viewed as attempts to stabilize prices for scrap and to eliminate competition, the agreements between Luria and the mill respondents constitute unreasonable restraints on trade, which would violate Section 1 of the Sherman Act. And it is our view that they likewise are conspiracies to monopolize within the meaning of Section 2 of the Sherman Act.

In addition to the statistical evidence of market foreclosure, there is much additional specific evidence of the adverse competitive effects of these exclusive supply arrangements. Dealers and brokers who

were formerly substantial suppliers to the mill respondents saw their sales to this market diminish to insignificance. While on occasion the mill respondents continued to purchase from these former suppliers, they placed them under severe limitations as to the points from which scrap could be shipped and on occasion required them to sell at prices as much as a dollar less per ton than the prices the same mill respondents were affording to Luria. These discriminatory practices are likewise unlawful restraints of the type condemned by the Sherman Act.³⁰

In our deliberations on this complaint, we have given weight to the substantial disparity in size and strength between Luria and its broker and dealer competitors.³¹ Luria is the only broker-dealer doing a substantially national business. All of the other brokers and dealers confine their operations to one or two of the regional markets and must of necessity operate profitably in that market or markets or perish.

Thus, it is our conclusion that this record demonstrates quite conclusively that the respondents have attempted to monopolize and have, in fact, monopolized significant parts of commerce and that, unless deterred, will eventually produce in respondent Luria a complete monopoly in most of the major markets for iron and steel scrap.

The Exclusivity Order

We have made extensive changes in Paragraph 1 of the order proposed by the hearing examiner. In the first place, we do not feel that the record will support an order of this type against respondent Southwest Steel Corporation. Standing alone, separated from Luria by an order of divestiture, Southwest is not a dominant factor in any market and the probable effects of an exclusive agreement between it and a mill or mills have not been explored.

We have also redrafted the prohibitions of the order to shift the emphasis from the conspiratorial aspects of the exclusive agreements to the acts or practices engaged in pursuant to the agreements. It seemed to us that the hearing examiner's order prohibited the mills and Luria from dealing exclusively pursuant to an agreement or conspiracy. Such an order may be interpreted as permitting a continuation of the exclusive dealing between the parties sans agreement. Such an order would be a hollow shell devoid of effect upon the practices found to be injurious to competition.

A principal objection raised by the mill respondents to the hearing examiner's order and one which applies equally to the order as redrafted by us is that it would prohibit a mill from purchasing "substantially all" of its scrap from Luria even though no other supplier

³⁰ *United States v. Crescent Amusement Co.*, 323 U.S. 173, 182-183 (1944).

³¹ *United States v. Griffith*, 334 U.S. 100, 107 (1948).

was available. Certainly we do not intend any such harsh result and in the unlikely event that the prospects of hardship of this type should arise we will not hesitate to grant hasty relief upon a showing properly made.

In subparagraph (c) of Paragraph 1 of his order, the hearing examiner directs all of the larger mill respondents³² to refrain from making all or substantially all of their scrap purchases from any broker or supplier not a party to this proceeding. We find ourselves in agreement with the mill respondents' contention that there is no record evidence to support a prohibition of this type. From this record there is no way to anticipate what the probable effect of a full supply contract between any plant belonging to these respondents and any other unknown broker or supplier may be. The full supply arrangements between Luria and the mill respondents are unlawful because of their dangerous tendency and because of the fact that they have, to a certain extent, created a monopoly in Luria. Full supply arrangements are not unlawful *per se*, but only insofar as they restrain, or have the tendency to restrain, competition. Whether a full supply agreement between the plants of these respondents and another broker or supplier of scrap unknown to us may have these effects must await another proceeding brought specifically to examine such an arrangement. In conformity with these views, we are striking subparagraph (c) of paragraph 1 of the hearing examiner's order in its entirety.

All of the respondents reserve their heaviest attack for the prohibitions contained in Paragraph 2 of the hearing examiner's order. This paragraph of the order is directed against all of the respondent mills and prohibits them from purchasing in excess of 50% of their requirements of scrap from respondent Luria for the next five years except to the extent that other suppliers have failed to offer or deliver scrap in sufficient quantities. That this is a novel prohibition in Federal Trade Commission orders cannot be denied, but its newness does not militate against its acceptance. Since the term "unfair trade practices" was left without exact definition in the Federal Trade Commission Act, so that the Commission would be empowered to deal with each new device or practice which competitors could devise, it would seem that new orders specially drafted to fit each new factual complex are to be desired rather than avoided.

We reject respondents' contention that this paragraph of the order is beyond the Commission's power to promulgate since it requires affirmative conduct. Any prohibition of specified conduct usually

³² Respondents Edgewater Steel Company, Columbia Malleable Castings Corporation, Bucyrus-Erie Company, Baldwin-Lima-Hamilton Corporation, Detroit Steel Corporation, and McLouth Steel Corporation are exempted from this prohibition because of their relatively small scrap purchases.

requires as its necessary counterpart that the respondent take affirmative action of a type not prohibited by the order. Moreover, even when viewed as requiring affirmative action, the Commission's power in this respect is clear.³³

Respondents next argue that the order is arbitrary. They point out that the competitive patterns differ widely from market to market and that, therefore, this "blanket order" is not related to the practices in any particular market area. The respondents ask, "What are the basic facts which led the Hearing Examiner to choose 50% for 5 years? Why not 30% for 2 years, or 10% for 1 year?"

It was apparent that the intendment of the hearing examiner was to restore to the area of free competition a reasonable segment of the market now foreclosed by these unlawful arrangements. His order is based upon his observation of this industry over a period of several years. The order is not unduly harsh since Luria is permitted to retain up to 50% of the volume of any plant. By freeing the remaining 50% to Luria's competitors, the hearing examiner intended to provide a "breathing spell" of five years, during which competition could be restored. Since the mill respondents are ordered to buy from suppliers other than Luria only when such other suppliers offer scrap, adequate in quantity and quality, on terms substantially similar to those offered by Luria, they are not subjected to an economic penalty nor need they ever be in a short supply situation.

We see very little substance to the argument that compliance with the provision is impossible because scrap needs vary from month to month and a mill cannot determine in advance its total annual needs. Future scrap needs are susceptible of reasonably accurate predictions and all that is required here is for the respondents to exercise good faith in making their estimate.

It is our opinion, and we find, that the basic prohibition of Paragraph 2 of the order promulgated by the hearing examiner is reasonable under the circumstances and is responsive to the factual situation found. We endorse and adopt the views of the hearing examiner expressed at page 592 of the initial decision:

In the opinion of the examiner the momentum of the exclusive arrangements between Luria and the mills, which have been here found to be illegal, will continue to plague the industry and yield benefits to Luria, unless some remedy more drastic than that proposed by counsel supporting the complaint is adopted. What is required here is a provision which will induce the mills to place orders with other suppliers who submit offers comparable to Luria's. Merely prohibiting the mills from agreeing with Luria to use it as exclusive or preferential broker, or from agreeing to purchase all of their scrap from Luria will not ac-

³³ E.g., *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 430 [6 S. & D. 193] (1957); *Bantam Books, Inc. v. Federal Trade Commission*, 275 F. 2d 680 [6 S. & D. 744] (2nd Cir. 1960), *cert. denied* 364 U.S. 819 (1960).

compish this. By using one additional broker for a minor portion of their requirements the mills may find an avenue for the successful evasion of the order. Aside from any conscious effort to evade the order, there is a strong likelihood that they will continue to favor Luria because of their confidence in it, born of the former illegal relationship. The only way to assure that Luria will not continue to benefit from its illegal exclusive arrangements, and to encourage the re-establishment of normal competitive conditions in the industry, is to prohibit the mills for a period of time from refusing to place orders for at least half of their purchased scrap requirements with other suppliers who submit offers comparable to those received from Luria, and from purchasing more than half of their scrap from Luria where comparable offers have been received from others.

In an effort to simplify and clarify this part of the hearing examiner's order, we have made extensive modifications therein. We have replaced his subparagraphs (a) and (b) with a single paragraph (a). We have also corrected what would appear to have been an inadvertent error. The hearing examiner's order as drafted would have required each mill respondent to place 50% of its annual requirements with suppliers other than Luria. Thus, the order would have been inoperative with respect to such mill respondents as United States Steel since more than 50% of its total corporate requirements are satisfied by other suppliers. As modified by us, the order now requires that 50% of each plant's requirements be placed with suppliers other than Luria.

The Export Trade Agreements

In Paragraph 12 of the complaint, it is charged that Luria entered agreements and conspiracies with respondent Hugo Neu Corporation and other unnamed parties for the purpose and with the effect of restraining competition "in interstate and foreign commerce, and tending to create a monopoly in said respondents in the sale of iron and steel scrap from the continental United States to customers located in other countries." The complaint then specifies in some detail an alleged agreement between respondent Neu and five of the leading steel producing companies of Japan, pursuant to which Neu was to act as their exclusive supplier for scrap exported from the United States. The complaint charges that Luria became a party to this agreement by means of a second agreement negotiated between it and Neu, pursuant to which Luria would supply part of the iron and steel scrap to be shipped to the Japanese combination.

While this arrangement with the Japanese mills is the only specific conspiracy with respect to export operations charged in the complaint, the examiner received a good deal of additional evidence pertaining to alleged conspiracies or unlawful practices engaged in by Luria with respect to export shipment to various European countries and Ar-

gentina. This additional evidence, however, did not involve respondent Neu. The evidence with respect to the other alleged unlawful activity was admitted under the theory that the complaint specified the Japanese conspiracy only as an example or illustration of a broad charge of combination and agreement involving the exporting of scrap.

The hearing examiner found that the charge of unlawful conspiracy growing out of the arrangement with the Japanese mills had not been sustained. We are in complete agreement with this conclusion. The facts of this situation are relatively simple. In July of 1953, respondent Hugo Neu Corporation entered a contract with a cooperative group of Japanese mills which called for the delivery of a maximum of 150,000 tons of steel scrap. The shipment was to be completed within six months after the lifting of United States export controls. The export restrictions were relaxed in October of 1953, and the full 150,000 tons of scrap was delivered during the next six months.

Luria came into the picture when Neu was unable to obtain the necessary scrap to fulfill its contract. In November 1953, Neu entered into an oral agreement whereby Luria undertook to supply scrap to Neu at Luria's cost for transshipment to the Japanese mills. In return Luria was to receive a portion of the profit of the resale to the Japanese. Of the 150,000 tons supplied to the Japanese under contract, 90,000 were actually obtained from Luria. After Neu's contract with the Japanese had been satisfied, the arrangement between Luria and Neu terminated.

In dismissing the complaint as to the respondent Neu, the hearing examiner pointed out that the record contained no definitive evidence as to Neu's position or strength in the scrap industry. He reasoned that the fact that Neu was unable to fulfill a contract for 150,000 tons of scrap without calling on Luria showed that it was not a dominant or major factor.

Insofar as Luria is concerned, he concluded that it participated in the arrangement between Neu and the Japanese mills as merely another supplier, albeit a large one. It was not a party to the original agreement, and Neu did not enter the agreement with the Japanese mills in the expectation that Luria would become a party. Thus, he concluded that Luria's participation in this arrangement was not unlawful.

It is the Commission's viewpoint that arrangements of the type here described may constitute unlawful restraints on trade if greater shares of commerce are involved and the contract persists for a more extended period. The evidence here clearly shows that the contract in question was never renewed nor was any similar contract ever executed. The contract had a relatively short life, and there is no present likelihood

that it will be reinstated. Under these circumstances, there is no reason or justification for an order against respondent Neu, and we affirm its dismissal from this proceeding.

The respondent Luria, however, was ordered by the hearing examiner to cease and desist from singly or in combination with others entering any agreements or combinations with foreign steel consumers pursuant to which Luria acts as the exclusive or substantially exclusive broker or supplier of scrap exported from the United States. This order of the hearing examiner is not founded upon Luria's activities with respect to the Japanese mills, but is based in its entirety upon certain agreements entered with a group of European steel mills.

In the early 1950's, the countries of West Germany, France, Italy, Belgium, the Netherlands, and Luxembourg, as a part of the common market or Schuman Plan, formed the European Coal and Steel Community. This cooperative authority was given power and supervision over the coal and steel industries of these countries. A central buying office was formed to purchase the scrap needed by the mills of the various countries. The central buying office, named Office Commun des Consommateurs de Ferraille, is commonly referred to by its initials OCCF.

In early 1954, OCCF invited three American scrap companies to its office in Brussels to discuss arrangements for its purchase of United States scrap. Each of the three American scrap companies was desirous of acquiring the exclusive right to supply OCCF. That Luria was so motivated is evidenced by the testimony of its vice president, Ralph Ablon, who arranged a separate conference with an OCCF official "to see if there wasn't some way whereby I could get all the business". However, instead of appointing one of the three applicants, OCCF advised them that all three had been selected.

Some time later, OCCF presented to the three companies a draft of a contract which it had prepared. The contract placed upon the three suppliers the joint obligation to supply OCCF's scrap needs from scrap obtained in the United States, Panama, Cuba, Puerto Rico, Aruba, Curacao, and Trinidad. This contract was signed by the representatives of the three companies on May 4, 1954, but was not approved by OCCF until July 14, 1954. The contract called for the shipment of an indefinite amount of scrap to OCCF in a range between 15,000 and 250,000 tons. The price was fixed at the lower of cost or the *Iron Age*³⁴ composite price, plus shipping expense, plus \$2.00 per ton commission. While the facts are not absolutely clear, it would appear that the contract was primarily awarded to Luria and that Schiavone-Bonomo Corporation had been included in the

³⁴ A trade publication which lists the prices paid for scrap by mills in the various markets.

group at the insistence of the Italian mills, and Western Steel International Corporation had been included at the instance of the German mills.

The three companies agreed to share equally in the venture. Western was to be responsible for the administration of all details abroad and Schiavone-Bonomo and Luria were responsible for the purchase and shipment of the scrap. This exclusive contract was operative through the year 1954 and was extended for two three-month periods and a six-month period to the end of 1955.

Almost before it became operative, the contract was, at Luria's request, amended in certain important particulars. The original contract called for the shipment of only No. 1 and No. 2 Heavy Melting Steel. It was modified to the extent that the Luria group was permitted to ship No. 2 Bundles to the extent of one-third of each cargo. The price formula was altered so that the ultimate price was based entirely on cost rather than the lower of costs or the *Iron Age* listed price. In addition, Canada was included within the area covered by the contract.

The total shipments under the contract far exceeded the maximum limit of 250,000 tons specified. During the year 1954, shipments by the Luria group totaled 543,000 tons. This amount was equal to 90.4% of the total amount of scrap shipped from the United States to OCCF countries in 1954. During the year 1955, the Luria group shipped 1,970,000 tons to the OCCF countries, which was equal to 95.3% of the total United States shipment to those countries.

At the end of 1955, for reasons which are not entirely clear, the OCCF advised Luria that the existing exclusive contract could not any longer be extended. However, there is documentary and other evidence to indicate that despite the absence of a binding contract it was OCCF's intention to continue to favor the Luria group with the majority of its United States purchases. The record contains no record of 1956 scrap shipments by the Luria group to OCCF beyond April. During that four-month period, the Luria group shipped 638,000 tons, or 82.1% of the total United States scrap shipped to the OCCF countries. In October 1956, OCCF entered another contract with Luria which specified that OCCF reserved the right to place orders with other suppliers. While the contract was entered with Luria alone, it was understood that the other two members of the group would participate in its performance on an equal basis. The record does not disclose the amount of scrap shipped pursuant to this contract.

The original OCCF contract contributed in a large measure to Luria's dominant position in the market consisting of that portion of

the scrap needs of foreign consumers which is satisfied by United States exports. Complete statistics are available for only the years 1954 and 1955.

In 1954, a total of 1,487,440 gross tons of scrap were exported from the United States. Of this total, Luria was responsible for 751,813 tons, or 50.5%. Luria's shipments equalled approximately 70% of the total United States shipments to the countries to which Luria shipped.

In 1955, United States exports of scrap totaled 4,566,346 tons. Luria was responsible for 2,150,217 tons, or 47.1% of the United States total. Its percentage of the total shipped to the countries with which it did business was approximately 55%.

As the hearing examiner pointed out, there can be no question but that the effect of the aforesaid exclusive dealing contract was to give the Luria group a monopoly on substantially all scrap exports to the OCCF countries from the United States and other areas in the Western Hemisphere. It seems equally clear to us that the purpose and intent of the contract was to grant such monopoly power and to take advantage of the near monopoly power Luria had in the purchase of scrap in the Eastern United States by reason of its exclusive arrangement with the respondent mills and others. Luria, and Luria alone, had sufficient market power to purchase the amounts of scrap needed by OCCF in the Eastern United States' market without causing a market price increase. In a report to OCCF urging the extension of the exclusive dealing contract, the Luria group advised:

An important aspect of the O.C.C.F. method of buying is our purchasing for you in a manner calculated not to disturb the American mills' supply. We are certain that it is unnecessary to point out how quickly this situation would change, both in relation to price and effect on American supply, were there many buyers competing for the same scrap instead of our group.

At a later point, this report boasts that the group's method of buying has been instrumental in lowering the price of scrap in spite of increased demand. It states:

We must also point out that, largely due to these accumulations, [large inventories maintained at ports] the composite price has dropped approx. 2 dollars within the past months despite increased American scrap consumption and increased foreign buying.

The report advised that such good results could not be expected in the future unless the group could operate "without the interference of other buyers for O.C.C.F."

While the hearing examiner found on the basis of the testimony of Luria's vice president that each of the three American exporters shared more or less equally in the effort and profit of the venture, there is evidence to indicate that Luria was the dominant party. For example, the group recommended to OCCF that in the future, cargo allocations

be split 50% to Luria Brothers, 25% to Western Steel International Corporation and 25% to Schiavone-Bonomo Corporation.

Luria argues that the appointment of the Luria group as the exclusive supplier to OCCF was entirely the decision of OCCF, and that it had made a decision to select 2, 3, or 4 brokers before Luria was ever contacted. While the evidence on this point is, in our opinion, equivocal, we accept respondents' contentions as facts since complaint counsel does not contest them. But as we view it, these facts are not controlling. No matter how the restraining agreement originally came into being, evidence clearly shows that respondent Luria eagerly embraced it and, moreover, did everything in its power to assure the continuation and extension of the exclusive dealing provision. One is not absolved of complicity in a contract which restrains trade simply because he did not originate the idea. This agreement had the effect of excluding competing United States scrap suppliers from an appreciable market. It is this effect which makes the contract unlawful. Moreover, the restrictive agreement cannot be divorced from Luria's other activities in the domestic scrap market. The agreement and the subsequent attempts to have it renewed and extended constitute clear evidence of an attempt to monopolize a significant part of commerce.

The hearing examiner's order dealing with this violation is appropriate and we adopt it without change.

The Acquisitions of Other Companies

Paragraph 11 of Count I of the complaint charges, *inter alia*, that Luria violated Section 5 of the Federal Trade Commission Act by acquiring all or a substantial part of the capital stock of certain scrap broker or dealer corporations "for the purpose and with the effect of thereby lessening or eliminating, suppressing, and preventing competition with said respondent by such dealers and brokers in the buying and selling of iron and steel scrap, of lessening and suppressing competition generally in the buying and selling of iron and steel scrap, and of creating and maintaining a monopoly in said respondent." Count II of the complaint charges the same acquisitions constitute violations of Section 7 of the Clayton Act.³⁵

While the two charges are founded upon what are basically identical facts, the charges are distinguishable. Under the Section 5 charge,

³⁵ With the exception of an abandoned charge dealing with the alleged acquisition of a stock interest in Apex Steel and Supply Company, the questioned acquisitions were all made prior to December 29, 1950, the effective date of the Clayton Act amendment which forbids the purchase of the "assets" of corporations where the effect may be deleterious to competition (64 Stat. 1125). Thus we are here only concerned with the Act as originally approved on October 15, 1914 (38 Stat. 731).

Opinion

it must be shown that Luria's purpose in making the acquisitions was to injure competition or create a monopoly. Thus this charge is, in effect, a charge of attempted monopolization. Under the Section 7 count, it must be shown that the effect of the acquisitions may be to injure competition or to create a tendency toward monopoly without regard for Luria's purpose. Complaint counsel proposed to the hearing examiner a two-part order which would have (1) required Luria to divest itself of its entire interest in five acquired companies, and (2) enjoined it from acquiring any future control in any company engaged in the business of buying and selling iron and steel scrap as a broker or dealer.

The hearing examiner found that only two of the acquisitions, Pueblo Compressed Steel Corporation and Southwest Steel Corporation, were made in violation of Section 7 of the Clayton Act and ordered Luria to divest itself of the stock of these corporations. He dismissed the Section 5 charge as unproven.

The complaint charges that Luria acquired all, or a substantial part, of the capital stock of six corporations which were allegedly engaged as brokers or dealers in scrap. Four of the acquisitions were found to be not unlawful and the hearing examiner's order would permit their retention. Complaint counsel have appealed the hearing examiner's refusal to order divestiture of three of the companies acquired, A. M. Wood & Company, Lipsett, Inc., and Lipsett Steel Products, Inc. We first consider this appeal.

The Acquisition of A. M. Wood & Company

The A. M. Wood Company was a small, family-owned scrap brokerage corporation operating in the eastern Pennsylvania market, with its office in Philadelphia, Pennsylvania. It was acquired by Luria in 1947. A. M. Wood's sales in the eastern Pennsylvania market in 1947 represented less than 1% of the scrap purchased by the steel mills and major foundries in that market. Its total sales in 1947 equalled only 12,745 gross tons.

Luria continued to operate A. M. Wood as a separate brokerage concern after the acquisition and made no public announcement of its ownership. Thus, some dealers were unaware of the fact that Wood was owned by Luria, but there is no evidence that Luria secured an unfair advantage because of its unpublicized control.

The hearing examiner found that Luria and Wood had not been in "substantial competition" prior to the acquisition; that Wood was of "minuscule size" and in a "moribund state" at the time of acquisition and concluded that the acquisition did not have the requisite injurious tendency. The Commission is in full agreement with these findings

and conclusion and the appeal of complaint counsel must, therefore, be denied.

The Acquisition of the Lipsett Companies

On May 4, 1948, Luria acquired all of the outstanding stock of Lipsett, Inc., and Lipsett Steel Products, Inc. There is no record evidence to indicate that either of these companies were, prior to the acquisition, engaged as scrap brokers or dealers, as alleged in the complaint. As a matter of fact, the record is not clear as to just exactly what business they were engaged in. It would appear that Lipsett Steel Products, Inc., was nothing but a corporate shell at the time of acquisition since it had been organized for only about five months. The record indicates that Lipsett, Inc., was engaged to an unknown extent in demolition and construction work and that as a part of its demolition business, it generated scrap of which some was sold to Luria. The record is silent, however, as to the extent of such scrap sales or as to the acquired companies' standing in any relevant market. Lipsett, Inc., continued to operate after the acquisition in the demolition and construction business.

After the acquisition, Luria operated Lipsett Steel Products, Inc., as a scrap dealer. A scrap yard was acquired in Brooklyn, New York, in 1950, and another in Los Angeles in 1951. After 1950, Lipsett Steel Products, Inc., became a substantial scrapyards dealer, but it appears that its success was primarily due to the efforts of Luria and was not the result of any special intrinsic qualities it possessed at the time of acquisition. In the words of the hearing examiner:

So far as appears from the record, Luria could just as well have established additional yards in its own name or in that of a newly-formed subsidiary. The fact that it did so in the name of Lipsett Steel does not provide a basis for retroactively imputing adverse competitive implications to the initial acquisition, * * *.³⁸

Complaint counsel do not seriously dispute the foregoing factual findings and conclusions. They admit the record "does not contain pre-acquisition statistics" and does not indicate "the extent of its business activities before it was acquired by Luria"; or "what business it was engaged in up to 1950"; and that with respect to the relevant market, the record shows only "The Lipsett companies were located in New York City and presumably operated essentially in that market." Certainly this is an inadequate basis for a requested order of

³⁸ Initial decision, at p. 499.

divestiture. The hearing examiner's conclusion that Luria's acquisition of these corporations did not violate Section 7 of the Clayton Act is correct and must be affirmed.

The hearing examiner found that two of the acquisitions made by Luria violated Section 7 of the Clayton Act, and he issued an order requiring divestiture. We consider now Luria's appeal of this finding and order.

The Acquisition of Pueblo Compressed Steel Corporation

Pueblo Compressed Steel Corporation was incorporated in the State of Colorado on August 3, 1942, and since that time has been engaged as a scrap dealer. Its only yard is located in Pueblo, Colorado, where it is convenient to the Pueblo plant of Colorado Fuel & Iron Corporation (CF&I).

During the same month in which it was incorporated, Pueblo Compressed Steel Corporation entered into an agreement with CF&I, pursuant to which CF&I agreed to purchase all of the scrap offered to it by Pueblo, including all bundled scrap compressed or baled in the Pueblo yard, and to refrain from purchasing from others bundled scrap which had been converted at any place within a radius within 200 miles in all directions from Pueblo. The agreement went into effect in October 1942, and was to continue for a period of five years.

In the spring of 1946, Luria and CF&I entered an agreement pursuant to which Luria was to act as the exclusive broker for CF&I's plant at Pueblo. Shortly after this exclusive arrangement was announced to the trade, Luria, through an intermediary, acquired 50% of the outstanding shares of Pueblo. This first acquisition was made July 3, 1946. Approximately a year later, on August 31, 1947, it acquired an additional five shares, giving it the controlling interest. The balance of the outstanding Pueblo stock was acquired ten years later on May 21, 1957.

The hearing examiner found that Luria's purpose in acquiring control of Pueblo was to resolve the conflict between its exclusive brokerage arrangement with CF&I and the above-described supply agreement between Pueblo and CF&I. After the acquisition, Pueblo sold most of its scrap to Luria, who in turn sold it to CF&I.

Prior to entering into the contract with Pueblo in 1942, CF&I had been buying most of its scrap from direct scrap producers such as railroads. In 1945, it purchased only 53,000 tons from dealers and brokers. Pueblo supplied approximately 11% of this total. In 1945, Luria had not yet entered the Rocky Mountain area.

In 1946, the year of Luria's acquisition, Pueblo processed 27,782 gross tons of scrap, which was equal to 8% of the total purchased scrap consumed in Colorado. This market is characterized by many small scrap suppliers and dealers. The volume of even the larger dealers is generally under \$100,000.00 per year. Pueblo, at the time of acquisition, was one of the largest dealers with total sales in 1946 of \$379,621.00. In the succeeding two years after the acquisition, 1947 and 1948, the sales volume increased to \$858,826.00 and \$1,201,663.00, respectively. These sales figures placed Pueblo far in the lead of all other dealer-competitors. Thus, it would appear that Luria's acquisition of Pueblo achieved the elimination of a sizeable competitor and materially augmented its competitive position and ability to dominate the scrap industry in the Rocky Mountain area. The acquisition's effect, therefore, "may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."

While the hearing examiner found, and we are in agreement, that the acquisition does have the requisite competitive effects prescribed by Section 7, the order of divestiture cannot stand, for the record fails to support the mandatory finding that Pueblo was, at the time of the acquisition, engaged in commerce. The initial decision does not disclose the facts upon which the conclusion of commerce is based. Complaint counsel's answering brief relies entirely on the fact that CF&I had agreed to refrain from buying bundled scrap converted within 200 miles of Pueblo, and that area included States other than Colorado. Respondent, however, argues with telling effect that, although this radius does include other States, there is absolutely no evidence that Pueblo ever made any purchases in States other than Colorado. As a matter of fact, there is some evidence that Pueblo did not operate in its full 200-mile allotted territory. Further, it is incorrect to characterize the contract between Pueblo and CF&I as giving Pueblo the right to buy scrap for CF&I in a 200-mile area. CF&I merely agreed to refrain from buying bundled scrap which had been processed within 200 miles of Pueblo. Thus, the agreement need not be construed as allotting a buying area to Pueblo, and lacking some record showing as to how the contract operated, we cannot assume that Pueblo extended its operations to the full periphery of this 200-mile area.

While the failure of the record to establish that Pueblo was at the

time of acquisition in interstate commerce bars a Section 7 violation, it has no effect whatsoever upon the attempted monopoly charge made in Paragraph 11 of the complaint. As we pointed out above, Luria does have a monopoly position in the Rocky Mountain area. It acquired Pueblo for the purpose and with the effect of forging the last link of a complete monopoly. However, this situation will be remedied by the order prohibiting the continuation of exclusive dealing between Luria and the two mill respondents found in this market.³⁷

The Acquisition of Southwest Steel Corporation

On February 1, 1950, Luria purchased all of the outstanding stock of Southwest Steel Corporation, a scrap broker-dealer engaged in interstate commerce, having its principal office and place of business in Pittsburgh, Pennsylvania. At the time of the acquisition, Southwest had yard or branch offices in various places in the Eastern United States, including Memphis, Tennessee; McKeesport, Glassport and Pittsburgh, Pennsylvania. In the year of the acquisition, 1950, Southwest opened a new brokerage office in Portsmouth, Ohio. The McKeesport yard was closed approximately a year after the acquisition. The Memphis yard was "transferred" to Luria who continued to operate it. At the time of the acquisition, Southwest owned a controlling interest in Continental Iron & Steel Corporation, a scrap broker operating in the New York area.

The hearing examiner found that prior to the acquisition, Luria and Southwest had competed substantially in both the purchase and sale of scrap. It would appear, however, that the record does not supply figures to disclose the precise extent to which they competed in the purchase of scrap. The most that can be found with respect to this element is that they did compete. Both companies had yards in Pittsburgh; both companies purchased scrap in the New York area; and both purchased, to a certain extent, along the Mississippi River.

The picture is much clearer with respect to competition in the sale of scrap to consumers. The evidence indicates that Southwest and Luria were in substantial and direct competition in the sale of scrap to consumers in the Pittsburgh-Youngstown area. The augmentation of Luria's position in this market as a result of its 1950 acquisition of Southwest is illustrated by the following tabulation:

³⁷ The Geneva, Utah, plant of United States Steel Company and the Pueblo, Colorado, plant of Colorado Fuel and Iron Corporation are the only significant scrap consuming units in the Rocky Mountain area.

Opinion

62 F.T.C.

*Purchases by all major consumers in the Pittsburgh-Youngstown market*³⁸

[Gross tons]

	Total purchases from brokers and dealers	Total purchases from Luria ³⁹ Brothers	Luria Brothers percentage ³⁹
1945.....	3, 636, 772	551, 052	15. 2
1946.....	3, 242, 309	677, 568	20. 9
1947.....	4, 637, 205	947, 892	20. 4
1948.....	5, 167, 085	1, 062, 837	20. 6
1949.....	3, 771, 057	987, 317	26. 2
1950.....	5, 902, 631	2, 198, 293	37. 2
1951.....	5, 376, 487	1, 729, 935	32. 2
1952.....	6, 134, 485	2, 169, 547	35. 4
1953.....	5, 417, 524	1, 979, 401	36. 5
1954.....	3, 172, 631	1, 142, 953	36. 0

³⁸ Luria's challenge to the validity of this tabulation is similar to the charges it levels against Appendix A [pp. 639-640]. It complains that the tabulation should list Luria's share of the total purchases of the reporting mills rather than merely its share of the reporting mills broker and dealer purchases. As we view it, acceptance of this proposal would not materially change the picture which the figures present. For example, Luria's percentage of the market in 1945 would be 13.49% rather than the 15.2% indicated by the tabulation above. Its 1950 postmerger share would be 34.9% rather than 37.2%. Luria also objects to the failure of the survey upon which the tabulation is based to include the purchases by the smaller consumers and foundries located in this area. The hearing examiner concluded, and we agree, that the inclusion of these additional small consumers in the survey would not have materially altered its results since it is reasonable to find, and the record supports, a finding that Luria serves as great a percentage of this unsurveyed group as it does the reporting mills.

³⁹ 1950 through 1954 figures include purchases from subsidiary Southwest Steel Corporation.

In 1949, the year prior to the acquisition, Southwest sold 220,666 tons of scrap to the major consumers located in this area. The table shows Luria's sales during that year to the same group of consumers totaled 987,317 tons. Southwest's sales represented 5.9% of the total purchases made by said major consumers from broker-dealer sources. Luria's percentage of this market in 1949 was 26.2% of the total purchases. Luria's share of the market during the 5-year period prior to the acquisition averaged approximately 20%. During the first five postmerger years, it averaged 35%. Almost all of this increase was contributed by Southwest. Its separate share of the broker-dealer market after the acquisition was: 1950—14.3%, 1951—11.9%, 1952—14.3%, 1953—13.3%, 1954—8.8%.

The hearing examiner extensively examined the relative strength of the other brokers competing with Southwest and Luria in the Pittsburgh-Youngstown market. He concluded on the basis of reliable and probative evidence that Southwest was, next to Luria, "far and away the largest single factor" in the market in 1949. The sales of the next largest company were only about one-half or less of the sales of Southwest. The respondent Luria contests the validity of these findings, primarily challenging the accuracy of the sales figures and market statistics upon which they are founded. We have carefully examined this contention and conclude that the record is adequate to support

the findings made. While it is true that in certain instances the figures used were arrived at by calculation or presumption, there is nothing invalid about such an approach when the exact figures are either not available or can only be produced through the expenditure of an unreasonable amount of time and expense. Respondent has utterly failed to demonstrate the inaccuracy of any of the figures used and did not offer different figures of its own.

As a result of our review of all of the record facts pertaining to this acquisition, we are satisfied that the hearing examiner's ultimate findings and conclusions are correct, reasonable and, indeed, the only findings possible under these circumstances. In particular we endorse Finding 53 of the initial decision, which reads as follows :

53. From the evidence as a whole, including the substantial share of the market held, respectively, by Luria and Southwest when the acquisition occurred; the adverse conditions in the industry when the acquisition took place; the relative size and strength of Luria and Southwest in comparison with their competitors in the market; the substantial additional entree which the acquisition afforded Luria into the Pittsburgh district plants of U.S. Steel (the largest single purchaser of scrap in the market), as well as into the plants of other substantial customers, such as Jones & Laughlin and Pittsburgh Steel, to which Southwest was a substantial supplier; and from the other facts and circumstances discussed above indicative of the potentialities which the acquisition had for curtailing competition between the two respondent brokers both in the buying and selling of scrap, it is concluded and found that Luria's acquisition of the stock of Southwest was calculated to result in a substantial lessening of competition between the two companies, and to restrain commerce in the Pittsburgh-Youngstown market and other markets, and tended to create a monopoly in Luria in said market and other markets. The record fails to establish, however, that Luria's failure to publicize its acquisition of control of Southwest gave it any substantial unfair competitive advantage in the buying or selling of scrap.

Thus, we are satisfied that Luria's acquisition of Southwest violates Section 7 of the Clayton Act. And we are equally sure that effective and lively competition in the Pittsburgh-Youngstown market requires that the two major brokers in the area be competitors, unaffiliated with each other.

Moreover, in harmony with the hearing examiner's finding that the acquisition was "calculated" to lessen competition, we find that the acquisition was a deliberate and purposeful step toward an eventual monopoly. Luria consciously acquired the largest and most effective competitor in the market thereby eliminating its competition and augmenting Luria's own position of dominance.

The Acquisition Order

As we pointed out above, complaint counsel requested the hearing examiner to enjoin Luria from making any future acquisitions of

competitors. The hearing examiner denied this request, saying at page 594 of the initial decision:

In the opinion of the examiner, the record fails to establish a pattern of acquisitions of such magnitude or nature as to justify a remedy as drastic as a perpetual injunction against further acquisitions, without regard to the size and competitive position of the company acquired, and the probable competitive impact of such acquisitions on particular markets. The need for such a broad prohibition requires a showing far stronger than is here present.

Considered as a matter of law, we find ourselves at odds with this conclusion. It is apparent that the hearing examiner considered the acquisition or merger aspects of this proceeding as separate and divorced from all of the other charges in the complaint. He relies solely on his finding that the record " * * * fails to establish a pattern of acquisitions of such magnitude or nature as to justify * * *" the remedy of enjoining future acquisitions. In our view the necessity for a remedy prohibiting future acquisitions is not determined solely by the respondent's past pattern of acquisitions but by a review of many factors, including the character of past violations of all kinds, the market position or degree of dominance achieved and the probability that future acquisitions will violate the law. In *United States v. W. T. Grant Co.*,⁴⁰ the Supreme Court stated:

The purpose of an injunction is to prevent future violations, *Swift & Co. v. United States*, 276 U.S. 311, 326 (1928) and, of course, it can be utilized even without a showing of past wrongs. But the moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive.

An order prohibiting future acquisitions unless they are shown to be without adverse competitive effects is, in our opinion, less harsh than an order of divestment. The latter order may require a massive disruption of the corporate organization and is, in effect, to require a forced sale which may conceivably result in a considerable loss. The hearing examiner's view that stronger evidence is required to support an injunction is at odds with that of the courts, which have found evidence to be insufficient to justify divestiture, but adequate to entitle the Government to injunctive relief against future acquisitions.⁴¹

The hearing examiner's decision would afford the public no pro-

⁴⁰ 345 U.S. 629 (1953).

⁴¹ *United States v. Jerrold Electronics Corp., et al.*, 187 Fed. Supp. 545 (D.C. Pa. 1960); affirmed *per curiam* 365 U.S. 567 (1961).

tection against the 100% monopolization of markets already dominated except the tedious and lengthy procedure of a new complaint and trial for each acquisition. It would then be faced with the usual problem of attempting to unscramble assets and restore as healthy competitors companies which may possibly have been completely demolished and their assets scattered to the four winds. While this is a burden incident to any Section 7 proceeding, it should not be assumed when it is so clearly unnecessary.

This record shows that Luria has acquired a near monopoly position in several appreciable markets throughout the Nation. For example, in 1954, in the eastern Pennsylvania market, Luria had 83.3% of the total broker-dealer scrap sales. In that year, it had 74.5% of the total broker-dealer sales in the North Atlantic market. Given these statistics, it seems to us apparent that any future acquisitions of scrap brokers' or dealers' companies by Luria in these markets will, of necessity, further diminish competition and unlawfully increase Luria's near monopoly position. The same situation is present in other markets, albeit to a lesser extent.

The hearing examiner does not describe the "far stronger" evidence which he deemed necessary to justify an injunctive remedy of this type but he apparently gave no weight to the facts showing that Luria's near monopoly position has been acquired by resort to acts violative of the antitrust laws. This was error. In considering the need for an injunction against future acquisitions in *United States v. Crescent Amusement Co.*,⁴² the Supreme Court stated:

The growth of this combine has been the result of predatory practices condemned by the Sherman Act. The object of the conspiracy was the destruction or absorption of competitors. It was successful in that endeavor. The pattern of past conduct is not usually forsaken. Where the proclivity for unlawful activity has been as manifest as here, the decree should operate as an effective deterrent to a repetition of the unlawful conduct and yet not stand as a barrier to healthy growth on a competitive basis. The acquisition of a competing theatre terminates at once its competition. Punishment for contempt does not restore the competition which has been eliminated. And where businesses have been merged or purchased and closed out it is commonly impossible to turn back the clock.

In that case, the court held that what was needed was an order which would not flatly prohibit all future acquisitions but which would re-

⁴² 323 U.S. 173, 186 (1944).

strain them lacking an affirmative showing that such acquisitions would not unreasonably restrain competition. It is our view that this is an appropriate remedy in this matter. However, in the expectation that our order directed against continuation of exclusive dealing between Luria and the mills will effect a substantial relief of the anticompetitive conditions existing in the markets, it is our belief that a perpetual injunction against future acquisitions is not required. A five-year period of enforced abstinence from acquisitions should accomplish the desired end of providing a "breathing space" within which competition may be restored.

To prevent the possibility of the injunction having unintended harsh results, we deem it best that an escape clause be contained therein which will permit Luria to make such acquisitions as it can affirmatively show will not have adverse competitive effects. We are willing to assume the burden of scrutinizing Luria's proposed acquisitions for the five-year period since it is certain to prove less onerous than the alternative presented by the hearing examiner's approach of bringing a new and separate action with each future acquisition. An appropriate order drawn along these lines will issue.

The Remaining Charges

In Paragraphs 10 and 11(a), Luria is charged with having purposefully injured competition and created a tendency toward monopoly by utilizing various unfair practices. The hearing examiner dismissed all of these charges either as unproved or as lacking in competitive effect. Complaint counsel's appeal takes exception to each of the dismissals.

Our review of the extensive evidence adduced in support of these charges disclosed no error in the hearing examiner's disposition of them. These peripheral charges consumed trial time out of proportion to their importance and an extensive discussion here would serve no useful purpose. We are satisfied with the hearing examiner's decision on these charges and adopt his findings and conclusions with respect thereto as our own.

The various appeals by respondents and complaint counsel are granted to the extent heretofore indicated.

Commissioner Elman dissented to the decision in this matter, and Commissioners MacIntyre and Higginbotham did not participate.

Opinion

APPENDIX A

IRON AND STEEL SCRAP

COMPARISON OF PURCHASES BY REPORTING MILLS FROM LURIA BROTHERS AND SUBSIDIARIES WITH TOTAL FROM ALL BROKERS AND DEALERS, BY DESIGNATED AREAS

Area	1947			1948			1949			1950		
	Luria Brothers and Subsidiaries		Total brokers and dealers (1,000 gross tons)	Luria Brothers and Subsidiaries		Total brokers and dealers (1,000 gross tons)	Luria Brothers and Subsidiaries		Total brokers and dealers (1,000 gross tons)	Luria Brothers and Subsidiaries		Total brokers and dealers (1,000 gross tons)
	1,000 gross tons	Percent- age ¹		1,000 gross tons	Percent- age		1,000 gross tons	Percent- age		1,000 gross tons	Percent- age	
United States, total.....	15,931	17.1	17,319	3,258	18.8	12,756	2,848	22.3	18,235	5,369	29.4	
Nonrespondents ²	11,102	9.0	12,561	1,375	10.9	8,954	962	11.0	13,125	2,242	17.1	
Respondents.....	4,829	35.9	4,757	1,883	39.6	3,802	1,886	49.1	5,110	3,128	61.2	
Pacific Coast, total.....	1,005	.2	1,152	(³)	(⁴)	906	60	6.6	894	104	11.7	
Nonrespondents.....	603	.3	722	(³)	(⁴)	566	44	7.8	550	32	6.0	
Respondents.....	403	---	430	---	---	340	15	4.5	364	72	19.9	
Rocky Mountain, total.....	231	99.3	306	287	94.0	287	283	98.6	355	338	95.2	
Nonrespondents.....	---	---	---	---	---	---	---	---	---	---	---	
Respondents.....	231	99.3	306	287	94.0	287	283	98.6	355	338	95.2	
North Atlantic, total.....	3,229	1,103	3,119	1,187	38.1	1,988	931	46.8	2,713	1,480	54.6	
Nonrespondents.....	644	159	662	140	21.1	499	125	25.0	698	190	27.2	
Respondents.....	2,586	943	2,458	1,048	42.6	1,490	806	54.1	2,015	1,290	64.0	
Eastern Pennsylvania, total.....	1,620	786	1,626	842	51.8	1,015	592	58.3	1,323	958	72.4	
Nonrespondents.....	296	123	315	133	42.1	189	86	45.5	281	147	52.2	
Respondents.....	1,324	663	1,310	710	54.2	826	506	61.2	1,043	811	77.8	

See footnotes at end of table.

Opinion

Area	1951			1952			1953			1954		
	Total brokers and dealers (1,000 gross tons)	Luria Brothers and Subsidiaries		Total brokers and dealers (1,000 gross tons)	Luria Brothers and Subsidiaries		Total brokers and dealers (1,000 gross tons)	Luria Brothers and Subsidiaries		Total brokers and dealers (1,000 gross tons)	Luria Brothers and Subsidiaries	
		(1,000 gross tons)	Percent-age		1,000 gross tons	Percent-age		1,000 gross tons	Percent-age		1,000 gross tons	Percent-age
United States, total.....	18,232	31.4	6,875	33.3	19,985	36.5	7,281	36.5	14,099	4,751	33.7	
Nonrespondents ²	12,567	15.0	2,335	16.3	13,404	17.3	2,318	17.3	10,068	1,588	15.8	
Respondents.....	5,665	67.7	4,540	72.3	6,531	76.0	4,963	76.0	4,030	3,164	78.5	
Pacific Coast, total.....	1,202	25.5	424	33.1	1,066	45.8	488	45.8	821	416	50.6	
Nonrespondents.....	686	8.6	109	15.3	517	14.4	74	14.4	421	94	22.3	
Respondents.....	516	37.9	315	55.7	549	75.4	414	75.4	400	322	80.4	
Rocky Mountain, total.....	450	30.3	323	90.6	222	95.5	212	95.5	214	211	98.9	
Nonrespondents.....	450	30.3	323	90.6	222	95.5	212	95.5	214	211	98.9	
Respondents.....	3,280	2,034	2,596	68.8	4,196	73.1	3,069	73.1	2,145	1,597	74.5	
North Atlantic, total.....	771	20.9	257	31.1	866	25.3	219	25.3	426	99	23.2	
Nonrespondents.....	2,509	1,826	2,339	79.3	3,331	85.6	2,850	85.6	1,719	1,498	87.1	
Respondents.....	1,644	1,187	1,387	74.1	2,058	78.9	1,625	78.9	1,015	845	83.3	
Eastern Pennsylvania, total.....	330	181	224	56.0	425	45.6	194	45.6	162	86	53.1	
Nonrespondents.....	1,314	1,006	1,163	79.0	1,633	87.6	1,431	87.6	833	759	89.0	

United States Steel Corp., except its Columbia-Geneva Steel Division, Utah District, and by Bucyrus-Erie, except its plants located in Erie, Pa.

¹ All percentage figures throughout table were calculated before tonnage figures were rounded to thousands.

² Data shown for "nonrespondents" throughout table include purchases by the

† Less than 500 gross tons.

‡ Less than 0.05 percent.

DISSENTING OPINION

NOVEMBER 15, 1962

By Elman, *Commissioner*:

Begun almost a decade ago, this case has already produced a mountain of words, and I am reluctant to add some of my own. But the difficulties I find in the Commission's disposition of the case may also be encountered by others, including a reviewing court. It may be worthwhile, therefore, to outline the reasons why I cannot join the majority opinion.

Broadly described, the facts of the case are quite simple: The period covered by the complaint was the Korean conflict, when steel and scrap were in extremely short supply. In the space of a few years the scrap market became concentrated to a striking degree in the hands of a single company. Luria was able to achieve this dominant position because many of the Nation's largest steel mills purchased all or substantially all their scrap requirements from it. As a result, many of these mills' previous suppliers of scrap were squeezed out competitively.

In such a factual situation, there are at least four theories which, either separately or together, might conceivably support a conclusion of illegality. I shall discuss below each of these theories and its relevance to this proceeding on the basis of the record now before the Commission. As will appear, the fourth of these theories is the one that seems to underlie the Commission's decision. A preliminary *caveat* must, however, be sounded.

A major problem with the majority opinion, as I read it, is that one cannot be sure of the precise theory on which the case is being decided. Like the complaint, the opinion is liberally sprinkled with references to "agreements", "understandings", "combinations", "conspiracies", "unfair practices", "incipient monopoly", "exclusive dealing arrangements", and other familiar antitrust war-horses. But—and it may be that this is a subjective reaction that will not be shared by others—in the majority opinion these old and faithful warriors seem not to be marching progressively in a straight and unwavering line towards a clearly defined objective but to be rambling over the field, moving uncertainly in several loosely drawn lines and in various different directions at the same time. As a result, one cannot speak with absolute assurance of *the* theory of the majority opinion. At all events, in order that my own position may be made clear, I shall proceed now to examine each of the four possible theories of decision that might be applicable to the factual situation here.

(1) The examiner in his initial decision focused upon the arrangements between Luria and each of the mills whereby the latter bought

its scrap requirements from Luria. He found these arrangements to be "equivalent" to exclusive dealing agreements prohibited by Section 3 of the Clayton Act, and therefore in violation of Section 5 of the Federal Trade Commission Act. As the majority opinion points out (p. 607), however, the examiner did *not* find that these arrangements "were pursued deliberately with the intent to effect a monopoly."

The difficulty with the examiner's theory is that the record does not show that each mill's practice of purchasing exclusively from Luria was not equally consistent with the hypothesis that, in this period of short supply, it considered that Luria was the supplier best able to furnish scrap of the kind needed, at the time needed, and in the quantities needed. The arrangements between Luria and the mills were not exclusive in the sense that they tied the mills to a single source of supply. Like a housewife who buys milk for her family regularly and exclusively from a single dairy, a mill buying scrap from Luria remained free to stop doing so at any time and for any reason. The so-called exclusive supply arrangements neither restrained the mills' freedom to buy from other suppliers nor foreclosed Luria's rival suppliers from the opportunity to sell to the mills. If, like the housewife, a mill's patronage of Luria was not an exclusive dealing arrangement in the Section-3-of-the-Clayton-Act sense, was not tainted by an anticompetitive motive or purpose, and was not part of an illegal conspiracy or concert of action with others, the examiner's theory would not support a conclusion of illegality.

(2) A second possible theory of violation would be that the mills conspired or agreed that each would use Luria as its exclusive buying agent for the purpose of restraining competition in the purchase of scrap. But, although alleged in the complaint, this was not proved. At the close of the case-in-chief, the examiner dismissed the complaint to the extent that it charged such a conspiracy or agreement among the mills. So that, on the present record, the majority could not, and do not, find violation on any theory of "horizontal" conspiracy or agreement among the mills.

(3) A third possible theory of violation, which might have provided a plausible basis for a conclusion of illegal conduct by the mills, was neither alleged nor proved. As the majority opinion states (p. 602), "The potential monopolizer at which the complaint is primarily aimed is respondent Luria." The complaint might, however, have been predicated on the theory (1) that it was the mills, not Luria, which held the dominant economic power in the market for scrap; (2) that, in the sellers' market which prevailed during the Korean conflict, it was in the self-interest of the mills to avoid competition among themselves in obtaining scrap; and (3) that in this situation each mill considered

that, if it purchased scrap directly or through its own broker, competition among the mills in procuring scrap would result in bidding up the price, whereas if they all bought their scrap requirements from a single central broker, the price would be kept down since a supplier of scrap, being compelled to deal with one broker representing all buyers, could not play off one buyer against another.

On such a theory, it might have been shown that, without a conspiracy or agreement among them, each mill used Luria as its exclusive broker for the purpose of restraining competition in the market for scrap, knowing that each of the other mills was following the same practice for the same purpose and with the same knowledge. Had it been alleged and proved, this theory of violation might have supported an order prohibiting each of the mills from using Luria, or any other broker, to accomplish monopolistic or other anticompetitive objectives. But the present record was not made on any such theory, and the majority neither rely upon nor refer to it.

(4) I come, finally, to the theory of violation on which the majority do seem to base their decision. As already indicated, I am not altogether sure that my understanding of the majority opinion is correct. At the risk of misstating it, therefore, I would express the theory accepted by the majority as follows: (1) Luria deliberately attempted to monopolize the scrap market; (2) each of the mills conspired with Luria to achieve such a monopoly, deliberately aiding and abetting it in its monopolistic attempt; (3) the proof of such attempt and conspiracy to monopolize, and of the existence of a deliberate monopolistic purpose and intent, both as to Luria and the mills, is found in the *unlawful* exclusive dealing agreements or understandings between Luria and each mill; (4) those agreements or understandings were unlawful because of their effects on competition, and the purpose with which they were entered is therefore immaterial; and (5) nonetheless, being unlawful, the agreements or understandings establish the requisite "specific intent" to monopolize, both in Luria and the mills.

The majority opinion proceeds on the premise (p. 603) that

An attempt to monopolize is established by proof that the respondent or defendant acted with deliberation and purpose, i.e., with "specific intent." The existence of "specific intent" is a conclusion based upon an examination of the business practices pursued by the potential monopolist. Some actions which clearly indicate deliberateness are the pursuit of acts and practices which violate other provisions of the antitrust laws * * *. (Footnotes omitted.)

And where in this record do the majority find the illegal acts and practices "which clearly indicate deliberateness"? In the so-called exclusive dealing arrangements between the mills and Luria. On the majority's theory of the case, the illegality of each mill's patronage of Luria is the linchpin of decision, upon which depends the crucial

finding of attempted monopolization and conspiracy to monopolize.

Thus, although the opinion purports to reject the examiner's theory that the mills' practice of buying scrap from Luria constituted exclusive dealing agreements in violation of Section 3 of the Clayton Act, the majority nevertheless are driven to embrace his conclusion that these arrangements were "exclusive" and hence unlawful.

The majority opinion, reflecting the difficulties involved in simultaneously both rejecting and accepting the examiner's Section 3 theory, states (pp. 606-607) that the examiner's theory of the case is not "crystal clear", that "on balance, it would appear that the hearing examiner relies in the main upon a Section 3 [of the Clayton Act] theory", and that "Actually, the difference between our view and that of the hearing examiner is not as great as may at first appear."

Later on in the majority opinion, in the part specifically devoted to "The Respondents' Purpose" (pp. 618-620), a general finding is made of a purpose to monopolize, on the part of both Luria and the mill respondents. But this finding is expressly and entirely based upon the illegality of the "exclusive" dealing agreements between Luria and each mill. No other factual support is cited. To overcome the absence from this record of express indications of "deliberateness" or "specific intent", the Commission states "that there exists between Luria and each mill respondent an agreement, understanding, combination and conspiracy pursuant to which Luria supplies each of the mills with all or substantially all of its needs of scrap. The effect of these arrangements is to exclude competing scrap sellers from a substantial market and thus each of the agreements constitutes an unlawful conspiracy." (Majority opinion, p. 609.) "It is of no consequence", the opinion further states (p. 619), "that the record does not establish that the exclusive use of Luria is the product of an agreement among the respondent mills for we are concerned here with effects rather than means."

The majority opinion thus puts all its eggs in one basket. Everything is made to depend on the *illegality* of the exclusive patronage of Luria by each of the mill respondents. If that drops out, the rest of the basket falls with it.

As I have already pointed out in discussing the examiner's theory of violation, the practice whereby each mill bought its scrap requirements from Luria cannot be held illegal merely on the basis of its effects on Luria's competitors. Each mill was not "tied" exclusively to Luria in its purchases of scrap, and its practice of buying exclusively from Luria was as consistent with a purpose of assuring itself a dependable source of supply as with an unlawful monopolistic or anti-competitive purpose. The examiner, as I have also pointed out, did

not find any such unlawful purpose, and the majority opinion (p. 607) expressly notes but does not disturb his initial decision in that regard.

If, as I believe, the record fails to establish that each mill's patronage of Luria was "exclusive" in the Section-3-of-the-Clayton-Act sense, or was part of an unlawful conspiracy or agreement, or was accompanied by a monopolistic or anticompetitive purpose, such buying practices by the mills cannot be characterized as "unlawful" in order to dispense with the need for adducing adequate proof of a "specific intent" to monopolize.

Moreover, even if the mills' use of Luria as their exclusive scrap broker could be relied on to show a monopolistic purpose on their part, that would not suffice to show that Luria, against which the order here is primarily directed, had a like monopolistic purpose. Assuming that, so far as the mills were concerned, they deliberately set out to create a monopoly in the scrap market for Luria, it would still be necessary to prove that Luria attempted to obtain such a monopoly for itself or acquired it through illegal means. If there be such proof in the record, the majority opinion does not refer to it.

Finally, my difficulties with the Commission's disposition of this case are not limited to those which emerge from a reading of the majority opinion.

Reflecting its emphasis upon the role of Luria and upon the alleged exclusivity of the arrangements between it and the mills, the Commission's order is directed primarily against Luria. But, if the danger to competition derives as much from the mills as from Luria, the latter's elimination as a "monopolist" broker in scrap would in itself accomplish only part of the necessary relief. Nothing in the order would prevent the mills from establishing some other broker as a monopolist and using it for the purpose of eliminating competition in the purchase of scrap—assuming, of course, that the record showed that Luria had been so used.

Moreover, the Commission's order, based as it is upon events of nearly a decade ago, has little relevance to present conditions in the scrap market. As already noted, the period covered by the complaint was a sellers' market in which the mills had a clear interest in purchasing through a single broker. It is common knowledge that in recent years, however, the steel industry has been characterized by production falling far short of capacity. Whether, and how, this has affected the competitive situation today in the market for scrap is something on which the record sheds no light.¹ And, similarly, the

¹The 1962 Institute of Scrap Iron & Steel Yearbook, in discussing the market for scrap during 1961, states that "With steel production for the year hovering around 70 per cent of capacity, only a spurt during the Spring brought scrap demand up to expectations. Domestic consumption of purchased scrap was 22.6 million gross tons compared with the

Order

62 F.T.C.

extent to which the elimination of Luria's "monopolistic" position (assuming it still exists today) in the scrap business will have practical benefits for the public is a matter for conjecture.

In this posture of the case, with so much time, money, and energy having been expended in this drawn-out proceeding, it is not necessary to conclude that the complaint should be dismissed. The Commission has another alternative: to bring the record up-to-date by conducting a broad economic investigation into present-day conditions in the scrap business, and, on the basis of such an inquiry, to determine what corrective administrative action, if any, is required to maintain or reestablish healthy competition. If illegal practices be found, they should be promptly corrected. But, to accomplish that objective, the Commission should be able to find ways and means more effective than the action which the two members of the Commission, who in this case comprise a majority, are taking today.

ORDER PROVIDING FOR THE FILING OF EXCEPTIONS TO PROPOSED FINAL ORDER

NOVEMBER 15, 1962

The Commission having rendered its decision in part adopting and in part modifying the initial decision and the order to cease and desist contained therein and having determined that pursuant to § 4.22(c) of the Commission's Rules of Practice respondents should be afforded the opportunity to file exceptions to certain paragraphs of the Commission's Proposed Final Order:

It is ordered, That respondents may, within twenty (20) days after service upon them of this order and attached Opinion Of The Commission, file with the Commission their exceptions to any provisions of numbered paragraphs 1, 2, and 4 of the hereinafter set out Proposed Final Order, a statement of their reasons in support thereof, and a proposed alternative form of order appropriate to the Commission's decision; and that counsel supporting the complaint may, within ten (10) days after service of respondents' exceptions, file a statement in reply thereto supporting the proposed order.

It is further ordered, That if no exceptions to the Commission's Proposed Final Order are filed within twenty (20) days, the said

previous year's 23.6 million and 1959's 25.7 million," and that "The factors creating this decline in the scrap industry have been present for several years with varying impact" (pp. 5-6). It also indicates that monthly consumption of purchased scrap has declined from about three million gross tons in January 1953, to less than two million tons in December 1961, while scrap inventories at consumers' plants increased from six million to nearly eight million tons.

243

Order

Proposed Final Order shall then become the final order of the Commission.

PROPOSED FINAL ORDER

1. *It is ordered*, That the respondent broker, Luria Brothers & Company, Inc., its officers, agents, representatives and employees, directly or through any corporate or other device, in or in connection with the sale of iron and steel scrap in commerce, do forthwith cease and desist from:

Contracting or agreeing to act or acting as exclusive or substantially exclusive broker or supplier of iron and steel scrap for any plant or plants of any respondent mill or of any other buyer of iron and steel scrap not a party hereto, and from inducing or receiving preferential status or favored treatment of any nature as broker or supplier of iron and steel scrap for any respondent mill or any other buyer of iron and steel scrap.

2. *It is further ordered*, That the respondent mills, Bethlehem Steel Corporation, Bethlehem Steel Company, Bethlehem Pacific Coast Steel Corporation, United States Steel Corporation, National Steel Corporation, Weirton Steel Company, The Colorado Fuel and Iron Corporation, John A. Roebling's Sons Corporation, Phoenix Iron & Steel Company, Granite City Steel Company, Lukens Steel Company, Detroit Steel Corporation, McLouth Steel Corporation, Baldwin-Lima-Hamilton Corporation, Edgewater Steel Company, Bucyrus-Erie Company, and Grinnell Corporation, their respective officers, agents, representatives and employees, directly or through any corporate or other device, in or in connection with the purchase of iron and steel scrap in commerce, do each forthwith cease and desist from:

(a) Purchasing, or contracting or agreeing to purchase, all or substantially all of the iron and steel scrap requirements of any plant or plants from or through respondent Luria Brothers & Company, Inc., and from giving preferential status or favored treatment of any nature to said broker, as broker or supplier of iron and steel scrap.

(b) During a period of five (5) years from the date this order shall become final, purchasing in excess of 50% of the annual requirements of purchased iron and steel scrap of any plant or plants from respondent Luria Brothers & Company, Inc., except to the extent that iron and steel scrap, adequate in quantity and quality, is not available from other suppliers on terms which are substantially similar and competitive with the terms offered by respondent Luria Brothers & Company, Inc.

Order

62 F.T.C.

3. *It is further ordered*, That respondent Luria Brothers & Company, Inc., its officers, agents, representatives and employees, acting separately or in combination with anyone else, whether a party to this proceeding or not, directly or through any corporate or other device, do forthwith cease and desist from:

Entering into, continuing, cooperating in, or carrying out any express or implied understanding, agreement, combination or conspiracy with any steel producing company or group of steel producing companies beyond the continental limits of the United States, or any buying organization, agent or other buyer acting for or on behalf of such steel producing companies, to act as the exclusive or substantially exclusive broker or supplier for such company or companies, of iron and steel scrap obtained in the continental United States or within the territorial jurisdiction of the United States.

4. *It is further ordered*, That respondent Luria Brothers & Company, Inc., do forthwith cease and desist from:

During a period of five (5) years from the date this order shall become final, acquiring, directly or indirectly, through subsidiaries or in any other manner, the assets, stocks, share capital, or any other interest in any business, corporate or otherwise, which is engaged in the business of buying or selling iron and steel scrap as a broker or dealer, unless and until the Commission, upon application and proper showing in support thereof, shall first find that the planned acquisition will not unduly restrain competition.

5. *It is further ordered*, That respondent Luria Brothers & Company, Inc., do forthwith divest itself absolutely, in good faith, of:

(a) All stock or other share capital, and all control over or interest in all stock or other share capital of Southwest Steel Corporation; and

(b) All assets, properties, rights and privileges, tangible and intangible, acquired from Southwest Steel Corporation since December 29, 1950; together with any assets or other properties of whatever description that may have been added thereto since December 29, 1950, as may be necessary to restore said corporation to at least the same operating condition that existed, and competitive position that it occupied, when its assets or properties were so acquired, so as to retain neither directly nor indirectly any of the fruits of such acquisition.

It is further ordered, That in the divestiture hereinbefore mentioned, none of the stock, assets, properties, rights or privileges to be divested shall be sold or transferred, directly or indirectly, to anyone

who at the time of the divestiture is a stockholder, officer, director, employee, or agent of, or is otherwise directly or indirectly connected with, or under the control or influence of, respondent Luria Brothers & Company, Inc., or of any of said respondent's subsidiary, affiliated or related companies.

6. *It is further ordered*, That the complaint be, and the same hereby is, dismissed as to respondents Southwest Steel Corporation and Hugo Neu Corporation, and as to those allegations or portions thereof as have been found not to have been sustained by the evidence.

It is further ordered, That respondents shall, within ninety (90) days from the date of service upon them of this order, submit in writing for the consideration and approval of the Federal Trade Commission their plans for compliance with this order, including the date within which compliance can be effected.

It is further ordered, That the hearing examiner's initial decision as modified and supplemented by the accompanying opinion and this order be, and it hereby is, adopted as the decision of the Commission.

Commissioner Elman dissenting and Commissioners MacIntyre and Higginbotham not participating.

ON RESPONDENTS' EXCEPTIONS TO THE PROPOSED FINAL ORDER

FEBRUARY 13, 1963

By the Commission:

Pursuant to § 4.22(c) of the Commission's Rules of Practice, the respondent Luria and each of the mill respondents have filed exceptions to the proposed order to cease and desist issued by the Commission on November 15, 1962. An answer opposing allowance of said exceptions has been filed by counsel supporting the complaint. The Commission has carefully considered the exceptions and opposition thereto and in this memorandum states its conclusions and announces its decision thereon.

Several of the exceptions filed by the respondents are merely reiterations of previously ruled-upon questions and others constitute little more than disagreement with the Commission's decision to issue an order to cease and desist. Comment here on such exceptions would be repetitious and unproductive. On the other hand, several of the exceptions are properly directed to revised portions of the order and to these exceptions we now direct our attention.

The respondent Luria points out that Paragraph 1 of the order "* * * does not make it clear that what is involved is the total scrap supplied to each plant." As we view it, this exception would equally apply to Paragraph 2 of the order. The hearing examiner's initial

decision, which was adopted by the Commission, points out that a consuming steel mill receives, or may receive, its scrap from three different sources. Most of the mills, and in particular those which are forwardly integrated, produce large amounts of scrap as a by-product of their operations. This so-called "home scrap" is, of course, reused by the mills and not infrequently makes up a substantial part of their total scrap requirements. "Home scrap" is only incidentally involved in this proceeding and when the order speaks of a mill's "requirements", as it does in Paragraph 2(a) or forbids Luria to act as the "exclusive or substantially exclusive" supplier to any mill, it refers to a mill's need for scrap from outside sources, i.e., from direct suppliers and from brokers or dealers. Scrap from these sources is collectively referred to throughout this case as "purchased scrap" and we have used this term in Paragraph 2(b) of the order. In the interests of clarity and consistency, we will order that Paragraphs 1 and 2(a) be amended to make it manifest that a mill's requirements of "purchased scrap" is the subject thereof.

Both respondent Luria and the mill respondents plead that the order is vague and indefinite in that terms such as "substantially all," "preferential status," and "favored treatment" are incapable of exact definition and do not inform the respondents of precisely what is prohibited. Respondents had previously raised this objection with respect to similar words appearing in the hearing examiner's proposed order. Since we did not specifically deal with this in our opinion, it is appropriate that we comment on it here. By forbidding the mills to purchase, or Luria to supply, "all or substantially all" of the mills' requirements of "purchased scrap," we, of course, contemplate situations of the type disclosed by this record. We are concerned that an order which merely forbids the purchase or supply of "all" of a mill's requirements could be easily evaded by the receipt of a miniscule single shipment from a competing broker or dealer. By adding the words "substantially all" to the order, we hope to guard against this deficiency and to plainly indicate that compliance with this order can only be effected by the mill respondents purchasing a substantial portion of their requirements of "purchased scrap" from suppliers other than Luria.

As for the terms "preferential status" and "favored treatment," the order plainly envisions the type of conduct practiced by the respondents as revealed in this record. Certainly, minimally, the respondents may not receive or grant any of the types of discriminations which would violate the Robinson-Patman Act. Brokers dealing with the mill respondents must receive like pay for like goods and services and they cannot be restricted to limited shipping points while Luria

is granted the right to ship from all points. To comply fully with this provision, all that is required is for the mill respondents to make sure that Luria is not granted any discriminatory competitive advantages over its competitors in supplying scrap to the mill respondents and for Luria to refrain from the inducement or receipt of such advantages.

Perhaps the most serious exception raised by respondent Luria is that Paragraph 1 fails to take into consideration the fact that Luria may not be in a position to know whether it is the exclusive or substantially exclusive supplier to any mill or whether the mill is giving it preferential status or favored treatment. Luria asks that the paragraph be amended by insertion of the word "knowingly" before the word "acting" and before the words "inducing or receiving preferential status." Complaint counsel's opposition to this exception avers that "It is idle for it [Luria] to say it may not be in a position to know * * *." We are not so sure. Certainly this record reveals that in many instances Luria was not only aware of its exclusive position but knowingly induced it and did everything in its power to maintain the position. But this order is operative against Luria's activities with all customers, present and future, and it is not reasonable to expect that Luria will be completely familiar with the exact scrap requirements of all customers. It seems to us that basic justice decrees that Luria should not be held to account or made subject to penalties for conduct violative of this order unless it can be shown that it knew, or should have known, that it was supplying substantially a customer's full requirements. Thus we shall adopt the respondent's suggestion and insert the word "knowingly" in Paragraph 1 as suggested, with the understanding, of course, that the term "knowingly" encompasses constructive, as well as actual, knowledge.

The mill respondents raise the point that Paragraph 2(a) does not specify any period of time in respect of which the terms "all" and "substantially all" are to be applied. In response to this exception we shall amend Paragraph 2(a) of the order to make it clear that a plant's annual requirements of purchased scrap are dealt with therein.

The respondent United States Steel Corporation objects to the order's application to its Geneva, Utah, plant. It alleges that only respondent Luria is capable of supplying this plant with the scrap it needs and that the practical effect of the paragraph as now drafted would make it necessary for this respondent to purchase scrap from West Coast and Chicago suppliers. It is pointed out that the higher freight rates accruing on shipments from these suppliers would impose higher material costs on the Geneva plant and adversely affect its competitive situation. This objection was previously made to the

Final Order

62 F.T.C.

order of the hearing examiner by the other respondents and we briefly discuss it at page 620 of our opinion. Certainly we do not expect any of the respondent mills to operate under the economic handicap of higher scrap prices stemming from the application of this order. We believe that the record clearly indicates that additional suppliers of scrap are ready and anxious to do business with United States Steel Corporation's Geneva plant. The record reveals that brokers who offered to sell scrap to the Geneva plant were turned down and that the plant then purchased the identical scrap through respondent Luria.

Several of the mill respondents object to the application of the order to plants owned by them or their subsidiaries where the record does not contain evidence as to the buying practices of said plants. It is argued that the restrictive effect of the order should be confined to plants located in geographic markets where anticompetitive conditions have been found to exist. These objections overlook the fact that the Commission has found a tendency to monopoly in a market consisting of the entire country, as well as in the lesser geographic areas defined. The record reveals that Luria's share of the national broker-dealer scrap market increased from 17 percent in 1947 to almost 34 percent in 1954. It is the Commission's view that this trend cannot be inhibited unless the order has broad application to Luria's activities wherever and with whomever practiced.

FINAL ORDER

FEBRUARY 13, 1963

Respondents having filed exceptions to the proposed final order and the Commission having determined for the reasons set out in the accompanying memorandum that certain of said exceptions should be allowed and the proposed final order modified in certain respects:

It is ordered, That the proposed final order be modified to read as follows and that as modified it be, and hereby is, entered and adopted as the final order of the Commission:

1. *It is ordered*, That the respondent broker, Luria Brothers & Company, Inc., its officers, agents, representatives and employees, directly or through any corporate or other device, in or in connection with the sale of iron and steel scrap in commerce, do forthwith cease and desist from:

Contracting or agreeing to act or knowingly acting as exclusive or substantially exclusive broker or supplier of purchased iron and steel scrap for any plant or plants of any respondent mill or of any other buyer of iron and steel scrap not a party hereto, and from knowingly inducing or receiving preferential status or

avored treatment of any nature as broker or supplier of purchased iron and steel scrap for any respondent mill or any other buyer of iron and steel scrap.

2. *It is further ordered*, That the respondent mills, Bethlehem Steel Corporation, Bethlehem Steel Company, Bethlehem Pacific Coast Steel Corporation, United States Steel Corporation, National Steel Corporation, Weirton Steel Company, The Colorado Fuel and Iron Corporation, John A. Roebling's Sons Corporation, Phoenix Iron & Steel Company, Granite City Steel Company, Lukens Steel Company, Detroit Steel Corporation, McLouth Steel Corporation, Baldwin-Lima-Hamilton Corporation, Edgewater Steel Company, Bucyrus-Erie Company, and Grinnell Corporation, their respective officers, agents, representatives and employees, directly or through any corporate or other device, in or in connection with the purchase of iron and steel scrap in commerce, do each forthwith cease and desist from:

(a) Purchasing, or contracting or agreeing to purchase, all or substantially all of the annual requirements of purchased iron and steel scrap of any plant or plants from or through respondent Luria Brothers & Company, Inc., and from giving preferential status or favored treatment of any nature to said broker, as broker or supplier of iron and steel scrap.

(b) During a period of five (5) years from the date this order shall become final, purchasing in excess of 50% of the annual requirements of purchased iron and steel scrap of any plant or plants from respondent Luria Brothers & Company, Inc., except to the extent that iron and steel scrap, adequate in quantity and quality, is not available from other suppliers on terms which are substantially similar and competitive with the terms offered by respondent Luria Brothers & Company, Inc.

3. *It is further ordered*, That respondent Luria Brothers & Company, Inc., its officers, agents, representatives and employees, acting separately or in combination with anyone else, whether a party to this proceeding or not, directly or through any corporate or other device, do forthwith cease and desist from:

Entering into, continuing, cooperating in, or carrying out any express or implied understanding, agreement, combination or conspiracy with any steel producing company or group of steel producing companies beyond the continental limits of the United States, or any buying organization, agent or other buyer acting for or on behalf of such steel producing companies, to act as the exclusive or substantially exclusive broker or supplier for such company or companies, of iron and steel scrap obtained in the

continental United States or within the territorial jurisdiction of the United States.

4. *It is further ordered*, That respondent Luria Brothers & Company, Inc., do forthwith cease and desist from:

During a period of five (5) years from the date this order shall become final, acquiring, directly or indirectly, through subsidiaries or in any other manner, the assets, stocks, share capital, or any other interest in any business, corporate or otherwise, which is engaged in the business of buying or selling iron and steel scrap as a broker or dealer, unless and until the Commission, upon application and proper showing in support thereof, shall first find that the planned acquisition will not unduly restrain competition.

5. *It is further ordered*, That respondent Luria Brothers & Company, Inc., do forthwith divest itself absolutely, in good faith, of:

(a) All stock or other share capital, and all control over or interest in all stock or other share capital of Southwest Steel Corporation; and

(b) All assets, properties, rights and privileges, tangible and intangible, acquired from Southwest Steel Corporation since December 29, 1950; together with any assets or other properties of whatever description that may have been added thereto since December 29, 1950, as may be necessary to restore said corporation to at least the same operating condition that existed, and competitive position that it occupied, when its assets or properties were so acquired, so as to retain neither directly nor indirectly any of the fruits of such acquisition.

It is further ordered, That in the divestiture hereinbefore mentioned, none of the stock, assets, properties, rights or privileges to be divested shall be sold or transferred, directly or indirectly, to anyone who at the time of the divestiture is a stockholder, officer, director, employee, or agent of, or is otherwise directly or indirectly connected with, or under the control or influence of, respondent Luria Brothers & Company, Inc., or of any of said respondent's subsidiary, affiliated or related companies.

6. *It is further ordered*, That the complaint be, and the same hereby is, dismissed as to respondents Southwest Steel Corporation and Hugo Neu Corporation, and as to those allegations or portions thereof as have been found not to have been sustained by the evidence.

It is further ordered, That respondents shall, within ninety (90) days from the date of service upon them of this order, submit in writing for the consideration and approval of the Federal Trade

243

Complaint

Commission their plans for compliance with this order, including the date within which compliance can be effected.

It is further ordered, That the hearing examiner's initial decision as modified and supplemented by the accompanying opinion and this order be, and it hereby is, adopted as the decision of the Commission.

By the Commission, Commissioners MacIntyre and Higginbotham not participating. Commissioner Elman, having dissented from the Commission's decision, does not concur in this order.

IN THE MATTER OF
WEISFIELD'S, INC.

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

Docket C-313. Complaint, Feb. 13, 1963—Decision, Feb. 13, 1963

Consent order requiring sellers in Seattle, Wash., to cease representing falsely—in newspaper advertising and otherwise—that excessive "REG." amounts were the usual prices at which they sold watches, electric shavers, phonographs, etc., and that purchasers at such prices would "save ½ and more".

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Weisfield's, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Weisfield's, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 800 South Michigan Street, in the city of Seattle, State of Washington.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale and sale of watches, electric shavers, phonographs, and other articles of merchandise at retail to the public.

PAR. 3. In the course and conduct of its business, respondent now causes, and for some time last past has caused, its said merchandise to be shipped from its principal place of business in the State of Washing-

ton to its several stores in various other States of the United States, for sale to the purchasing public. In such instances shipments are made to respondent's stores in States other than that in which such shipments have originated, and respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act. In addition to the aforesaid articles of merchandise, respondent also causes advertisements and other promotional material to be transported and shipped from its aforesaid place of business in the State of Washington to the various other States in which its several stores are located.

PAR. 4. In the course and conduct of its business as aforesaid, and for the purpose of inducing the purchase of its said articles of merchandise, respondent has made numerous statements and representations in advertisements inserted in newspapers with respect to the retail prices of its said merchandise and the savings resulting to purchasers.

Typical and illustrative of the aforesaid statements, but not all inclusive thereof, are the following:

REMINGTON ROLL-A-MATIC ELECTRIC SHAVER
REG. 29.95 16.88

REMINGTON ROLL-A-MATIC ELECTRIC SHAVER
REG. 26.95 16.88

REMINGTON ROLL-A-MATIC ELECTRIC SHAVER
... Lady's Shaver ... REG. 18.50 12.88
.. Men's Shaver! ... REG. 26.95 17.88

RONSON ELECTRIC SHAVER
... REG. 29.95 19.88

1066 SCHICK 3 SPEED RAZOR
REG. 31.50 SPECIAL ONLY 19.88

DELUXE ARVIN
4-SPEED PORTABLE ...
REG. 49.95

WEISFIELD'S SPECIAL LOW PRICE 29.88

MODEL 81P15
NEW ARVIN 4 SPEED PORTABLE PHONOGRAPH
REG. 24.95 19.95

MODEL 81P15
NEW ARVIN 4 SPEED PORTABLE PHONOGRAPH
REG. 24.95 17.95

SAVE ½ AND MORE ON ONE OF TOP 5
NATIONALLY ADVERTISED WRIST WATCHES
... REG. 49.50 18.88

NOW! SAVE ½ AND MORE ON ONE OF 5
TOP NATIONALLY ADVERTISED WATCHES
REG. 65.00 SPECIAL 32.50

GENT'S CROTON WRIST WATCH
. . . REGULAR \$99.50 \$49.75

PAR. 5. By and through the use of the above-quoted statements, and others of similar import not specifically set out herein, the respondent represented that the higher stated prices set out in said advertisements in connection with the term "REG." were the prices at which the advertised merchandise had been usually and customarily sold by respondent at retail in the recent, regular course of business and that the differences between the higher and lower prices represented savings to purchasers from respondent's usual and customary retail prices.

PAR. 6. In truth and in fact, the higher prices set out in said advertisements in connection with the term "REG." were in excess of the prices at which the advertised merchandise had been usually and customarily sold by respondent in the recent, regular course of business and the differences between the higher and lower prices did not represent savings to purchasers from respondent's usual and customary retail prices.

Therefore, the statements and representations as set forth in Paragraphs 4 and 5 hereof were and are false, misleading and deceptive.

PAR. 7. In the conduct of its business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of merchandise of the same general kind and nature as that sold by respondent.

PAR. 8. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's merchandise by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with vio-

lation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Weisfield's, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 800 South Michigan Street, in the city of Seattle, State of Washington.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Weisfield's, Inc., a corporation, and its officers, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of watches, electric shavers, phonographs, or any articles of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the words "REG.", regular price, or words of similar import, to describe or refer to the retail price of merchandise when such amount is in excess of the price or prices at which the merchandise has been usually and customarily sold by respondent at retail in the recent, regular course of its business.
2. Representing, directly or by implication, that:
 - (a) Any amount is respondent's usual and customary retail price of merchandise when it is in excess of the price or prices at which such merchandise is usually and customarily sold by respondent at retail in the recent, regular course of its business.

Complaint

(b) Any saving from respondent's usual and customary retail price is afforded to the purchasers of respondent's merchandise unless the price at which it is offered constitutes a reduction from the price or prices at which said merchandise has been usually and customarily sold by respondent in the recent, regular course of its business.

3. Misrepresenting, by means of comparative prices, or in any other manner, the savings available to purchasers of respondent's merchandise.

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

IN THE MATTER OF

PEARLS BY DELTAH, INC., ET AL.

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

Docket C-314. Complaint, Feb. 13, 1963—Decision Feb. 13, 1963

Consent order requiring a Pawtucket, R. I., distributor of imitation pearls to cease using the coined term "Cultique" and the word "cultured" in advertisements and on containers in which the pearls were offered for sale.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Pearls by Delatah, Inc., a corporation, and Gilbert Sachs, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Pearls by Delatah, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island, with its principal office and place of business located at 560 Mineral Spring Avenue, in the city of Pawtucket, State of Rhode Island.

Gilbert Sachs is an individual and is an officer of said corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices here-

Complaint

62 F.T.C.

inafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of imitation pearls to wholesalers, retailers for resale to the public, and to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of Rhode Island to purchasers thereof located in various other States of the United States, and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business as aforesaid, respondents have made numerous statements and representations concerning the composition and characteristics of their said imitation pearls. Said statements and representations have been made in advertisements appearing in magazines, periodicals, and other publications, and on the containers in which said imitation pearls are offered for sale. Typical and illustrative of the foregoing but not all inclusive thereof as set forth in attached copy of respondents' advertising, which is incorporated herein as Exhibit A,* and made a part hereof, are the following:

Presenting the Cultique
ROYAL TREASURE NECKLACE
Deltah's fabulous simulated pearl creation
with the priceless look
of precious cultured pearls!

Cultique is presented in this Royal Treasure Chest, which has
lift-out tray and jewelry compartment.

Compare costly
oyster grown
cultured pearls with
Cultique
the amazing simulated
pearl copy by Deltah.

Now—the precious look of expensive cultured pearls is yours to
enjoy when you possess a Cultique strand of luminous, iridescent
simulated pearls! The resemblance is amazing—an exclusive
exciting creation by Deltah!

Cultique
SIMULATED PEARLS
By Deltah
Pearls by Deltah Inc.

*Exhibit A omitted in printing.

(Pictured in connection therewith are strings of beads having the appearance of pearls and a jewelry case bearing words of which only "Cultique" and "Deltah" are legible.)

PAR. 5. By means of the foregoing statements and depictions, and others similar thereto but not specifically set out herein, respondents have represented, directly or indirectly, through the use of the coined term "Cultique" alone, and in connection with the aforesaid statements and depictions, that said beads and earrings are made of cultured pearls.

PAR. 6. In truth and in fact, said beads and earrings are not composed of cultured pearls, but are made of imitation pearls, which are made from beads coated and finished to have the appearance of cultured pearls. Therefore, the statements and representations referred to in Paragraphs 4 and 5 were, and now are, false, misleading and deceptive, and have, and have had, the capacity and tendency to mislead the purchasing public into a belief that said beads and earrings are made of cultured pearls.

PAR. 7. In the course and conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms, and individuals engaged in the sale of products of the same general kind and nature as those sold by respondents.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' articles of merchandise by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of the respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5(a) (1) of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement makes the following jurisdictional findings, and enters the following order:

1. Respondent Pearls by Deltah, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island, with its office and principal place of business located at 560 Mineral Spring Avenue, in the city of Pawtucket, State of Rhode Island.

Respondent Gilbert Sachs is an officer of said corporation, and his address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Pearls by Deltah, Inc., a corporation, and its officers, and Gilbert Sachs, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of imitation pearls or any other articles of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the term "Cultique", the term "cultured" or any other words phonetically similar to the word "cultured" to describe, identify or refer to imitation pearls; provided, however, that nothing herein shall prohibit the use by respondents of statements truthfully and nondeceptively comparing the appearance of respondents' imitation pearls to the appearance of cultured pearls.

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

Complaint

IN THE MATTER OF

SIDNEY J. GREENBLAT ET AL. TRADING AS G & G
MFG. & SOUVENIR COMPANYORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT*Docket 8535. Complaint, Oct. 10, 1962—Decision, Feb. 19, 1963*

Order requiring Minneapolis, Minn., distributors of inexpensive jewelry and souvenirs to cease misrepresenting in their catalogs the materials, composition, quality, and origin of their merchandise, as in the order below in detail set forth.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Sidney J. Greenblat and Marvin J. Greenblat, individually and as copartners trading as G & G Mfg. & Souvenir Company, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH. 1. Respondents Sidney J. Greenblat and Marvin J. Greenblat are individuals trading as a copartnership under the name of G & G Mfg. & Souvenir Company. Their office and principal place of business is located at 20 North Fourth Street, in the city of Minneapolis, State of Minnesota.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the manufacturing, advertising, offering for sale, sale and distribution of inexpensive jewelry and souvenir items to retail stores for resale to the purchasing public.

PAR. 3. In the course and conduct of their business respondents now cause, and for some time last past have caused, their said articles of merchandise, when sold, to be shipped from their place of business in the State of Minnesota to purchasers thereof located in various other States of the United States and the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business as aforesaid, and for the purpose of inducing the sale of said articles of merchandise, respondents have made certain statements and representations with

respect thereto in their catalogs. Typical and illustrative thereof, but not all inclusive, are the following:

1. POPE JOHN JEWELRY

On the front disc is the POPE etched in Gold.

2. 10-Commandments Candy Dish Almost 4"—The Ten Commandments in miniature gold print against a Pearl-White background in a Gold color bowl.
3. BIRTHSTONE Cross Necklace Dainty Crosses with varied colored pronged stones.
4. Sweater Guard Assortment Genuine Mother-of-Pearl for all ages.
5. RINGS
 - BOYS' TURQUOISE RINGS
 - MEN'S TURQUOISE RINGS
 - GIRLS' TURQUOISE RINGS.
6. INDIAN GOODS
 - MINK-TRIM DOLLS
 - PEWEE TWINS.
7. Boxed Colored Pearls E-N SETS.

PAR. 5. Through the use of the aforesaid statements and others of similar import and meaning not herein specifically set forth, respondents have represented, directly or indirectly:

1. That on the front disc of their Pope John jewelry, a likeness of the Pope of the Roman Catholic Church is etched in gold.
2. That The Ten Commandments are imprinted upon their aforesaid candy dish in gold.
3. Through use of the word "Birthstone", and otherwise, that their Cross necklace contains natural stones.
4. That their sweater guard is composed of genuine Mother-Of-Pearl.
5. That their aforesaid rings designated "Turquoise" contain genuine Turquoise.
6. Through the use of the term "Indian Goods", that their Mink-Trim dolls and Pewee Twins are made by Indians.
7. That their products designated "Boxed Colored Pearl E-N Sets" contain genuine pearls.

PAR. 6. In truth and in fact:

1. The likeness of the Pope on their Pope John jewelry is not etched in gold and does not contain gold.
2. The Ten Commandments on their candy dish are not imprinted in gold and do not contain gold.
3. Their Cross necklace does not contain natural stones, but contains imitation stones.
4. Their sweater guard is not composed of genuine Mother-Of-Pearl, but an imitation thereof.
5. Their aforesaid rings designated "Turquoise" do not contain genuine Turquoise, but contain imitation Turquoise.

6. Said Mink-Trim dolls and Pewee Twins are not made by Indians.

7. Said Boxed Colored Pearl E-N Sets do not contain genuine pearls, but contain imitation pearls.

Therefore, respondents' aforesaid statements and representations referred to in paragraphs 4 and 5, are false, misleading and deceptive.

PAR. 7. By the aforesaid acts and practices, respondents have placed in the hands of retailers and dealers the means and instrumentalities by and through which they may mislead the public as to the materials, composition, workmanship and origin of said products.

PAR. 8. In the conduct of their business and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of articles of merchandise of the same general kind and nature as that sold by respondents.

PAR. 9. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' articles of merchandise by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Mr. Marvin G. Rosenbaum supporting the complaint.

No appearance filed for respondents.

INITIAL DECISION BY JOSEPH W. KAUFMAN, HEARING EXAMINER

The complaint herein, charging respondents with violation of Section 5 of the Federal Trade Commission Act by the making of false and misleading representations in their catalogs for the purpose of inducing the sale of merchandise, was issued on October 10, 1962, and was duly served upon respondents by registered mail on October 16, 1962. The respondents have not filed their answers to this complaint within the time required (nor did they appear at the time and place set for hearing) and are now in default. Pursuant to the provisions of Rule 4.5(2c) of the Commission's Rules of Practice for Adjudicative Proceedings, the hearing examiner hereby declares the respondents in

default and now finds the facts to be as alleged in the complaint, and issues his initial decision containing such findings, appropriate conclusions drawn therefrom and order to cease and desist, as follows:

FINDINGS OF FACT

1. Respondents Sidney J. Greenblat and Marvin J. Greenblat are individuals trading as a copartnership under the name of G & G Mfg. & Souvenir Company. Their office and principal place of business is located at 20 North Fourth Street, in the city of Minneapolis, State of Minnesota.

2. Respondents are now, and for some time last past have been, engaged in the manufacturing, advertising, offering for sale, sale and distribution of inexpensive jewelry and souvenir items to retail stores for resale to the purchasing public.

3. In the course and conduct of their business respondents now cause, and for some last past have caused, their said articles of merchandise, when sold, to be shipped from their place of business in the State of Minnesota to purchasers thereof located in various other States of the United States and the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. In the course and conduct of their business as aforesaid, and for the purpose of inducing the sale of said articles of merchandise, respondents have made certain statements and representations with respect thereto in their catalogs. Typical and illustrative thereof, but not all inclusive, are the following:

1. POPE JOHN JEWELRY—On the front disc is the POPE etched in Gold.
2. 10-Commandments Candy Dish Almost 4"—The Ten Commandments in miniature gold print against a Pearl-White background in a Gold color bowl.
3. BIRTHSTONE Cross Necklace Dainty Crosses with varied colored pronged stones.
4. Sweater Guard Assortment Genuine Mother-of-Pearl for all ages.
5. RINGS
 - BOYS' TURQUOISE RINGS
 - MEN'S TURQUOISE RINGS
 - GIRLS' TURQUOISE RINGS.
6. INDIAN GOODS
 - MINK-TRIM DOLLS
 - PEWEE TWINS.
7. Boxed Colored Pearls E-N SETS.

5. Through the use of the aforesaid statements and others of similar import and meaning not herein specifically set forth, respondents have represented, directly or indirectly:

1. That on the front discs of their Pope John jewelry, a likeness of the Pope of the Roman Catholic Church is etched in gold.

2. That The Ten Commandments are imprinted upon their aforesaid candy dish in gold.

3. Through use of the word "Birthstone", and otherwise, that their Cross necklace contains natural stones.

4. That their sweater guard is composed of genuine Mother-Of-Pearl.

5. That their aforesaid rings designated "Turquoise" contain genuine Turquoise.

6. Through the use of the term "Indian Goods", that their Mink-Trim dolls and Pewee Twins are made by Indians.

7. That their products designated "Boxed Colored Pearl E-N Sets" contain genuine pearls.

6. In truth and in fact:

1. The likeness of the Pope on their Pope John jewelry is not etched in gold and does not contain gold.

2. The Ten Commandments on their candy dish are not imprinted in gold and do not contain gold.

3. Their Cross necklace does not contain natural stones, but contains imitation stones.

4. Their sweater guard is not composed of genuine Mother-Of-Pearl but an imitation thereof.

5. Their aforesaid rings designated "Turquoise" do not contain genuine Turquoise, but contain imitation Turquoise.

6. Said Mink-Trim dolls and Pewee Twins are not made by Indians.

7. Said Boxed Colored Pearl E-N Sets do not contain genuine pearls, but contain imitation pearls.

Therefore, respondents' aforesaid statements and representations referred to in paragraphs 4 and 5, are false, misleading and deceptive.

7. By the aforesaid acts and practices, respondents have placed in the hands of retailers and dealers the means and instrumentalities by and through which they may mislead the public as to the materials, composition, workmanship and origin of said products.

8. In the conduct of their business and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of articles of merchandise of the same general kind and nature as that sold by respondents.

9. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of sub-

stantial quantities of respondents' articles of merchandise by reason of said erroneous and mistaken belief.

CONCLUSION

The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents Sidney J. Greenblat and Marvin J. Greenblat, individually and trading as copartners under the name of G & G Mfg. & Souvenir Company, or under any other name, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of jewelry, souvenir items, or any other articles of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or indirectly:
 - (a) That the likeness of Pope John on respondents' POPE JOHN jewelry is etched in gold or that The Ten Commandments appearing on respondents' candy dishes are imprinted in gold;
 - (b) That respondents' Cross necklaces contain natural stones; that respondents' sweater guards are made of genuine Mother-Of-Pearl; or that their rings heretofore designated "Turquoise" contain natural Turquoise;
 - (c) Through the use of the word "Pearl" or any other word or words of similar import or meaning, that imitation pearls are genuine pearls; provided however, that the foregoing shall not be construed to prohibit the use of the word "Pearl" to describe the appearance of said imitation pearls if, whenever used, the word "Pearl" is immediately preceded, in equally conspicuous type, by the word "imitation" or the word "simulated", or other words of similar import or meaning, so as to clearly indicate that said imitation pearls are not genuine pearls but imitations thereof.
2. Representing directly or indirectly that:
 - (a) Pictures, characters, symbols or designs are imprinted, etched, or otherwise placed on products in gold, or in any

other material or by any manner or means unless such is the fact;

(b) Products contain or are made or composed in whole or in part of gold, natural stones, Mother-of-Pearl, Turquoise or any other material or substance not actually used or contained therein;

(c) Any of respondents' products not actually made or produced by Indians or any other race or group have been so made or produced;

(d) Imitation pearls are genuine pearls.

3. Furnishing or otherwise placing in the hands of retailers or dealers the means and instrumentalities by and through which they may mislead or deceive the public in the manner or as to the things hereinbefore prohibited.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 4.19 of the Commission's Rules of Practice, effective June 1, 1962, the initial decision of the hearing examiner shall on the 19th day of February 1963, become the decision of the Commission; and accordingly:

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

IN THE MATTER OF

JACK B. STEIN TRADING AS
UNIVERSAL BUSINESS SYSTEMS OF NEW JERSEY

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

Docket C-315. Complaint, Feb. 19, 1963—Decision, Feb. 19, 1963

Consent order requiring a Newark, N.J., seller of skip-tracing forms to collection agencies, finance and loan companies, dealers selling on installment accounts, etc., to cease using such subterfuges to obtain information concerning the purchasers' delinquent debtors as simulating official and government forms and United States Government checks, arranging for mailing the forms from Washington, D.C., with official sounding names on the return envelopes, and representing falsely that debtors would collect a substantial sum of money by filling in the questionnaires.