

FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS, JULY 1, 1967, TO
DECEMBER 31, 1967

IN THE MATTER OF

CORAN BROS. CORPORATION ET AL.

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

Docket 8697. Complaint, July 20, 1966—Decision, July 11, 1967

Order requiring a Boston, Mass., distributor of commercial solders to cease misrepresenting the nature, quality or composition of any of its solder products.

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 Coran Bros. Corporation, a corporation, and John Coran and Charles Coran, individually and as officers 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 Coran Bros. Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State (Commonwealth) of Massachusetts, with its principal office and place of business located at 509 East 2nd Street in the city of Boston, State of Massachusetts.

Respondents John Coran and Charles Coran are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their 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 offering for sale, sale and distribution of commercial solders including wire solders designated "50/50 by volume" and "40/60 by volume." Said solders are sold to wholesalers and retailers for ultimate resale 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 Massachusetts to purchasers thereof located in various other States of the United States, 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, and for the purpose of inducing the purchase of their commercial wire solders, respondents have engaged in the practice of labeling and describing certain of said solders as "50/50 by volume" and "40/60 by volume."

PAR. 5. By and through the use of the aforesaid manner of labeling and describing said wire solders, the respondents represented:

(1) That their wire solder designated "50/50 by volume" is a 50/50 solder which is known in the trade as a solder containing 50% tin and 50% lead by weight.

(2) That their wire solder designated "40/60 by volume" is a 40/60 solder which is known in the trade as a solder containing 40% tin and 60% lead by weight.

PAR. 6. In truth and in fact:

(1) Their wire solder designated "50/50 by volume" is not a 50/50 solder as known in the trade as it contains less than 50% tin and more than 50% lead by weight.

(2) Their wire solder designated "40/60 by volume" is not a 40/60 solder as known in the trade as it contains less than 40% tin and more than 60% lead by weight.

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

PAR. 7. 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 products of the same general kind and nature as that sold by respondents.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had,

1

Initial Decision

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' products by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of the 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.

Mrs. Rose W. Sloan and Mr. Herbert L. Blume for the Commission.

Mr. Jack H. Backman and Mr. Jerrold C. Katz, Boston, Mass., attorneys for respondents.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

FEBRUARY 27, 1967

In the complaint, which was filed on July 20, 1966, the respondents are charged with the violation of Section 5 of the Federal Trade Commission Act in connection with the manner in which they described and labeled certain wire solders sold by them in commerce. The complaint reads in part:

PARAGRAPH FOUR: In the course and conduct of their business, and for the purpose of inducing the purchase of their commercial wire solders, respondents have engaged in the practice of labeling and describing certain of said solders as "50/50 by volume" and "40/60 by volume."

PARAGRAPH FIVE: By and through the use of the aforesaid manner of labeling and describing said wire solders, the respondents represented:

(1) That their wire solder designated "50/50 by volume" is a 50/50 solder which is known in the trade as a solder containing 50% tin and 50% lead by weight.

(2) That their wire solder designated "40/60 by volume" is a 40/60 solder which is known in the trade as a solder containing 40% tin and 60% lead by weight.

PARAGRAPH SIX: In truth and in fact:

(1) Their wire solder designated "50/50 by volume" is not a 50/50 solder as known in the trade as it contains less than 50% tin and more than 50% lead by weight.

(2) Their wire solder designated "40/60 by volume" is not a 40/60 solder as known in the trade as it contains less than 40% tin and more than 60% lead by weight.

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

PARAGRAPH SEVEN: 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 products of the same general kind and nature as that sold by respondents:

PARAGRAPH EIGHT: 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' products by reason of said erroneous and mistaken belief.

PARAGRAPH NINE: The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of the 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.

In the answer filed by the respondents, they admit the allegations of Paragraph Four, but deny that the statements and representations are false, misleading and deceptive.

Hearings were held at Boston, Massachusetts, on November 28, 29, and 30, 1966, at which time complaint counsel put in their case and the respondents submitted their defense. Testimony was received from a total of 22 witnesses called by complaint counsel. The defense submitted the testimony of one witness, respondent John Coran, who had testified in connection with the case-in-chief. On January 13, 1967, the parties filed proposed findings, together with briefs in support thereof. Replies thereto were filed by complaint counsel on January 23, 1967, and by respondents on January 25, 1967. The proposed findings and conclusions not hereinafter specifically found or concluded are herewith rejected. The following abbreviations have been used herein: "C." for Commission's Complaint; "A." for Respondents' Answer; "Par." for paragraph; "Tr." for Transcript of Proceedings; and "CX" for Commission's Exhibit. Upon consideration of the entire record herein, the hearing examiner makes the following findings of fact and conclusions:

Respondent Coran Bros. Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts with its office, manufacturing plant and principal place of business located on premises owned by it at 509 East 2nd Street, Boston, Massachusetts (C., Par. One; A., Par. 1; Tr. 21). After its organization in December 1947 or January 1948 to the year 1951, it was engaged in the scrap metal business (Tr. 47-8, 403). The corporation is now, and since 1951

has been, engaged in the manufacture, offering for sale, sale, and distribution of commercial solders that are mostly sold to wholesalers and retailers, located in approximately 30 States of the United States, for ultimate sale to the public (C., Par. Two; A., Par. 2; Tr. 36). Its gross sales in the years 1963, 1964, and 1965 were \$506,000, \$743,000, and \$829,000, respectively; for the first ten months of 1966, its gross sales were \$619,000 (Tr. 296-99). In the conduct of its business, the corporation now causes, and for some time last past has caused, its products, when sold, to be shipped from its place of business in Massachusetts to purchasers thereof located in various other States of the United States, and maintains, and at the times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act (C., Par. Three; A., Par. 3; Tr. 36-7).

The respondent John Coran is president and respondent Charles Coran is treasurer of the corporation (brothers) (Tr. 22, 67). Their address is the same as that of the corporate respondent (Tr. 21). They, together with Ruth Coran, the wife of John Coran, constitute the board of directors (Tr. 66). Since its inception, the corporation has been a family business (Tr. 45). John Coran owns 80% and Anne Coran, the wife of Charles Coran, 20%, of the stock of the corporation (Tr. 45). A third brother, Hyman B. Coran, did own 40% of the stock, but this was acquired by John Coran five or six years ago (Tr. 45). Although the respondents in their answer admit the allegation of the complaint that John Coran and Charles Coran "formulate, direct and control the acts and practices of the corporate respondent" (C., Par. One; A., Par. 1), the evidence establishes that Charles Coran functions only as a salesman for the corporation on a salary basis, and has no part in formulating any of the policies of the corporation (Tr. 66-9). John Coran, from the outset of the corporation, has set the policies of the corporation, and the acts and practices that are challenged in this proceeding are the results of a decision reached by him without consulting the other directors or the other stockholder (Tr. 29-30, 37, 40, 43, 45-6, 49-50, 66-7).

The record establishes that it has been industry practice for many years, and is current industry practice, when solders are labeled by numerical designations such as "50/50" and "40/60" that the first number before the slant mark (/) indicates the percentage of tin by weight and the second number after the slant mark (/) indicates the percentage of lead by weight. Further, the record also establishes that it has not been, nor is it

presently, industry practice to use the words "by weight" in connection with the aforesaid numerical designations, but that the use alone of such numerical designations indicates the percentage of tin and lead by weight.

Mr. Robert A. Putney, assistant manager of the metal division of the National Lead Company, having been employed by that company for 36 years (Tr. 136-37) testified:

Q. And as to product designation on the package or any other advertising description, to your knowledge, if you know, how has the product been sold as to product designation? With respect to tin-lead content?

A. Well, 50 per cent tin, 50 per cent lead wire solder would mean an alloy where per hundred pounds, you would use 50 pounds of lead and 50 pounds of tin.

Q. And would this apply to a 40/60 designation as well?

A. Forty pounds of tin and 60 pounds of lead, right.

Q. Based upon your knowledge of 36 years experience in the industry, has the product been sold on that weight basis?

A. Yes, it has (Tr. 140-41).

* * * * *

Q. Now, is it our understanding based on your marketing knowledge that prior to two years ago, approximately, all solders are or were described in the trade purely on a by weight basis as to tin-lead ratio?

A. If they were described as 50/50 or 40/60, the practice in the trade has been for those solders to contain 50 per cent tin, 50 per cent lead in the case of 50/50, and 40 per cent tin, 60 per cent lead in the case of 40/60.

Q. That is by weight, not volume?

A. By weight (Tr. 141-42).

Mr. Alan R. Oatey, vice president of L. R. Oatey Company, Cleveland, Ohio, manufacturers of plumbing, automotive and hardware supplies, as well as solders, testified (Tr. 214):

THE WITNESS: Well, it has been historical in the industry to mark the spools by the 50/50 designation or 40/60. That is considered to be weight. That is accepted by the industry, by the manufacturers, and by the people who consume the product.

* * * * *

THE WITNESS: I do know, and these numbers stand for—the first 50, the first number always stands for tin, and in this case, 50 per cent would be tin. This is important, too, because in the industry, the first number given is always tin. This is how it has been right along.

Respondent John Coran testified (Tr. 410):

Q. Mr. Coran, in connection with your wire roll solder sold in spools, particularly one-pound spools, how do you label the 50/50 solder sold by your company when it is sold by weight?

A. 50 slant 50.

Q. Do the words "by weight" appear?

A. No.

Wire solders labeled and designated "50/50 by volume" and "40/60 by volume" were first placed on the market by the respondent corporation in the year 1963. It pioneered in this type of labeling (Tr. 41-2). Thereafter other manufacturers employed the "by volume" label. John Coran, when asked, "Have other competitors labeled their product by volume?", answered: "I have seen at least one, maybe two. I have heard of several others, but I have never seen their labels" (Tr. 414). The Commission issued a complaint, dated August 2, 1966, against *Thomas F. Lukens Metal Company, et al.*, of Philadelphia, Pennsylvania (Docket No. C-1089), wherein, on the same date, the Commission entered a consent order to cease and desist from the practices challenged as unfair and deceptive [70 F.T.C. 479]. A complaint, dated September 21, 1966, was issued against *Bow Solder Products Co., Inc., et al.*, of Newark, New Jersey (Docket No. 8712), wherein a consent cease and desist order was entered on January 19, 1967 [71 F.T.C. 48]. In each instance, the order recited that it was for settlement purposes only and did not constitute an admission by the respondents that they had violated the law. The charges in both complaints were similar to those in this proceeding. Respondents' counsel brought out on cross-examination of Mr. Putney of National Lead Company that four or five years ago one of the branches of his company had, for a period of about six months, labeled a solder with the number "50," which had only 40% tin by weight. In this connection, Mr. Putney testified (Tr. 155):

Now, when we received the letter from the Federal Trade Commission about four years ago and we reviewed all of the names assigned to the various grades of solder that we make, and when we found this out, we stopped it. Mr. Oatey of L. R. Oatey Company testified on cross-examination that his company did label solders with the numbers "50" and "40," but they contained only 40% and 30% tin by weight, respectively, and the practice was discontinued over four years ago as a result of a letter from the Federal Trade Commission. Mr. Oatey said:

This letter was sent to most all manufacturers pointing out that there was problems in the solder industry and there has been problems for many years and they were being the clearing house for trying to correct this situation. They were asking the manufacturers to discontinue labeling solders by numbers and any other designation that would cause confusion in the type of solder that it was. With this, we discontinued the use of the number 40 and the number 50 (Tr. 232).

When asked, "Are people apt to believe when you label that as a 50 as containing 50 per cent tin?", Mr. Oatey answered: "This is why we discontinued it. Exactly right" (Tr. 231).

A "50/50 by volume" solder has a tin content of 39% by weight (61% lead), and a "40/60 by volume" solder a tin content of approximately 29% by weight (71% lead). This is explained by the fact that tin has a specific gravity of 7.3 and lead 11.4 (Tr. 204). Specific gravity of solids (such as the metals, tin and lead) is defined as the ratio of the weight of any given volume of the substance to the weight of equal volume of water (*Webster's New Collegiate Dictionary*, 1961). Therefore, tin is 7.3 times, and lead 11.4 times, as heavy as water. Thus, it is apparent that the weight of tin in a "50/50 by volume" solder is considerably less than 50%, and the weight of tin in a "40/60 by volume" solder is considerably less than 40%.

The principal solders used in the plumbing trade are solders designated and labeled "95/5," "50/50," and "40/60." Mr. Charles A. Buresh, a plumber, testified that "95/5" containing 95% tin and 5% antimony is used "for high temperature work, heating—copper heating pipes * * * say, running water, say 220, 220 degrees through heating pipes with a lot of expansion and contraction, frequent expansion and contraction" (Tr. 369-370); that the higher the temperature, the more tin you would want in the solder (Tr. 371); and that he uses "50/50" for "General purpose work, which is most work" (Tr. 366). Mr. Robert O. Weider, who is in the plumbing and heating business, testified: "Well, of course, the more tin content there is to the solder, the better the solder or the finer the solder is" (Tr. 317); and that "50/50" suits his general requirements (Tr. 318). Mr. Oatey of National Lead Company testified that "when you reduce the tin content, you are reducing the strength of the joint" (Tr. 242); that "most of them [plumbers] like to use 50/50 because it is recommended by the copper people as being the solder to use. This is the standard of the industry" (Tr. 242); that "Some 40/60 may work" (Tr. 243); that "No, 30/70, you are getting down so low in tin content, that the solder is chalky" (Tr. 243); and that "40/60 is not too bad a solder, but you can tell the difference between 40/60 and 50/50" (Tr. 243).

There were received in evidence nine one-pound spools of wire solder, five labeled "50/50 by volume," and four labeled "40/60 by volume," the products of the corporate respondent, which had been purchased by Attorney Richard J. Walsh of the Commission's Boston office during the month of August, 1966 from four wholesale supply houses located in the States of Connecticut and Rhode

Island (Tr. 97-115; CX 8, 9, 11, 12, 13, 15, 16, 17, 19, 20, 21, 22, 23). The said spools of solder were submitted to the Arnold Greene Testing Laboratories, Inc., of East Natick, Massachusetts, for analysis to determine the tin and lead content (Tr. 106). Copies of the laboratory reports setting forth the results of the tests are in the record. With reference to the five samples labeled "50/50 by volume," the reports show that the percentage of tin content by weight varied from 38.8% to 41.10%. The reports on the four samples labeled "40/60 by volume" show the percentage of tin by weight varied from 29.02% to 29.17%, and the lead content by weight varied from 70.32% to 70.62%. (The percentage of antimony content by weight on the nine samples varied from 0.18% to 0.41%; Tr. 115-136.) The findings show that, within tolerable allowances, the volume of tin and lead in each of the spools is consistent with the labels (Tr. 135-36).

Complaint counsel recognize that the products in question contain the volume of tin and lead represented and are truthfully labeled, but contend that the use of the "by volume" designation by respondents has a capacity and tendency to mislead members of the purchasing public. It is the position of the respondents, in their brief filed with their proposed findings, "that the members of the trade and the general public can distinguish between ounces and pounds, meters and feet, *weight* and *volume*, cubes and squares, grams and ounces, and other universally accepted standards of measurement, where it is relevant to the requirements of their work"; and that, so long as the "by volume" designation is a truthful statement, there can be no deception.

The labeling of a product with a designation which is literally true but nevertheless misleading or confusing is contrary to the elementary legal prohibition against deception.

In *United States v. 95 Barrels of Vinegar, et al.*, 265 U.S. 438 (1924), the Court said (at 443) :

Deception may result from the use of statements not technically false or which may be literally true. * * * It is not difficult to choose statements, designs and devices which will not deceive. Those which are ambiguous and liable to mislead should be read favorably to the accomplishment of the purpose of the act.

The principles of the above quoted case, which arose under the Food and Drugs Law of 1906, have been extended to matters arising under the Federal Trade Commission Act covering a multitude of products including, by way of illustration and not

limitation, automotive lubricating oil,¹ lumber,² flour,³ and many other products.

In *Bockenstette, et al. v. F.T.C.*, 134 F. 2d 369 (10th Cir. 1943), the Court said (at 371):

Words and sentences may be literally and technically true and yet be framed in such a setting as to mislead or deceive.

See also *Koch, et al. v. F.T.C.*, 206 F. 2d 311 (6th Cir. 1953).

In *Korber Hats, Inc. v. F.T.C.*, 311 F. 2d 358 (1st Cir. 1962), the Court said (at 360-61):

[1] Section 5 of the Act makes unlawful unfair methods of competition and unfair or deceptive acts or practices in commerce. Congress thus gave the Commission a broad mandate to prevent public deception in the give and take of the market place. It is clear that what is an "unfair" method of competition can only be assayed in the environmental and marketing context of the particular practice put in issue. In *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 532, 533, 55 S.Ct. 837, 844, 79 L.Ed. 1570 (1935), the Court said: "What are 'unfair methods of competition' are thus to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest."

[2] The power of the Commission to issue cease and desist orders against mislabelling or false advertising was recognized at an early date. *Federal Trade Comm. v. Winsted Co.*, 258 U.S. 483, 42 S.Ct. 384, 66 L.Ed. 729 (1922). Courts have consistently upheld the Commission's efforts to compel manufacturers and retailers to adhere to a high level of honesty in connection with their labelling and advertising habits, see *Kalwajtys v. Federal Trade Commission*, 237 F. 2d 654, 656, 65 A.L.R.2d 220 (7th Cir., 1956), *cert. denied*, 352 U.S. 1025, 77 S. Ct. 591, 1 L.Ed.2d 597 (1957), and to "insist upon the most literal truthfulness" in marketing their goods. *Moretrench Corporation v. Federal Trade Commission*, 127 F. 2d 792, 795 (2nd Cir., 1942). In this area not only the cynical but the naive are to be protected and if the Commission, in its discretion, "thinks it best to insist upon a form of advertising clear enough so that, in the words of the prophet Isaiah, 'wayfaring men, though fools, shall not err therein,' it is not for the courts to revise their judgment." *General Motors Corp. v. Federal Trade Commission*, 114 F. 2d 33, 36 (2nd Cir., 1940).

[3] While advertising and labelling are frequently considered together, there is good reason to insist upon a higher degree of veracity in the latter. It may well be argued that consumers accept labelling statements literally while perhaps viewing with a more jaundiced eye the vaunted claims of the advertising media.

The question here is whether there is substantial evidence to support a finding that a consumer in buying the corporate re-

¹ *Royal Oil Corporation, et al. v. F.T.C.*, 262 F. 2d 741 (4th Cir. 1959); *Double Eagle Refining Co., et al., v. F.T.C.*, 265 F. 2d 246 (10th Cir. 1959), *cert. denied*, 361 U.S. 818; *Mohawk Refining Corporation, et al. v. F.T.C.*, 263 F. 2d 818 (3d Cir. 1959).

² *F.T.C. v. Algoma Lumber Co., et al.*, 291 U.S. 67 (1934).

³ *F.T.C. v. Royal Milling Co. et al.*, 288 U.S. 212 (1933).

1

Initial Decision

respondent's solders labeled "50/50 by volume" or "40/60 by volume" might be misled.

The record contains the testimony of the following five Commission witnesses who were engaged in the wholesale plumbing supply business:

Mr. Irving Rose, who has been in the plumbing supply business for forty years and is president of the Mattapan Supply Company with locations in Boston, Medford, and Mattapan, Massachusetts, with annual sales volumes somewhat in excess of one million dollars (Tr. 72-3), said that he bought solder from Coran only two or three times (Tr. 79). He testified further:

A. Well, we buy 95/5 solder. We buy that by the number. This we know. This is a guaranteed item to us, 95/5. We buy 50/50 or 40/60 as by volume. There is a certain marking on 50/50 that we buy by volume. They will tell us that it will be 43 per cent tin, 42 per cent, it will vary from time to time. We buy 50/50 solder, and if we tell them that we want exact 50/50 solder, they will tell us whether they can give it to us or not.

Q. Have you been familiar with solder which is labeled 50/50 by volume?

A. I would only be guessing if I say it (Tr. 76).

* * * * *

Q. Now, do you recall when you first came across a solder labeled 50-50 by volume?

A. As far as I know, this has been marked this way for the many, many years that I have been in business, the 50/50. There is a certain hyphen one way. I used to be able to tell the difference by the marking.

HEARING EXAMINER JOHNSON: The question was by volume.

THE WITNESS: By volume, yes.

HEARING EXAMINER JOHNSON: It had been marked that way?

THE WITNESS: I can't recall. I said I would be guessing if I said so (Tr. 77).

* * * * *

HEARING EXAMINER JOHNSON: If you read 50/50 by volume on the spool, would that make any difference to you?

THE WITNESS: I would believe it is 50/50 by volume.

HEARING EXAMINER JOHNSON: Yes, and you would not believe it is 50/50 by weight, would you?

THE WITNESS: I would not know what 50/50 by weight meant (Tr. 80).

Mr. Alfred Paul Ardente, of Providence, Rhode Island, has been selling plumbing supplies since 1946, doing business as The Ardente Supply Company, Inc. Prior thereto, starting in 1930, he was a plumber. The company buys and sells the corporate respondent's products. During the course of his examination, he was shown four spools of Coran solder (CX 20, 21, 22 and 23), which he had sold to Attorney Walsh of the Commission. When questioned with respect to the "By volume" label appearing on the exhibits, he stated (Tr. 262): "To us it really don't mean anything.

When I buy solder, I tell him I want 40/60 or 50/50 or 95/5, that's it." He added that he did not know if there is a difference between weight and volume. On cross-examination, he testified:

Q. Mr. Ardente, if you saw a solder labeled "50/50 by weight" and another solder labeled "50/50 by volume," would you know the difference?

A. No, I would not know the difference.

Q. You would not know the difference?

A. No.

Q. In other words, you just have no conception of the difference between weight and volume?

A. No (Tr. 265).

* * * * *

Q. In other words, you have no conception, actually, of the difference between weight and volume in general?

A. No, I take it for granted it is the same product. When I order 50/50, it should be 50 tin, 50 lead, and that's it (Tr. 266).

Mrs. Eleanor Rhian, of Providence, Rhode Island, testified that she has been running the Rhian Supply Company, which has been in business for 31 years, since her husband's death three years ago, and during the three years she has bought and sold Coran products (Tr. 266-68). She was shown the spools of solder labeled "50/50 by volume" (CX 16) and "40/60 by volume" (CX 17) which she sold to Attorney Walsh, and, upon being asked, "When you order the type of solder that we are referring to in these two exhibits, how do you specify the type of solder?", she replied: "Well, I order 40/60, 50/50, or 90/10, depending on what I need to fill orders" (Tr. 268). When asked what "by volume" means to her, she said: "It does not mean anything. I just read the number. That is it" (Tr. 269).

Mr. Abraham Feinstein, chairman of the board of the Republic Pipe and Supply Company of Roxbury, Massachusetts, has been in the plumbing supply business for over 35 years, but never sold any of the Coran solder (Tr. 273-74, 279). He testified (Tr. 275):

Well, we call the company up and order so many spools of 50/50, so many spools of 95/5, and so many spools of 40/60.

* * * * *

Well, that is how the plumbers ask for it and it is 50 per cent tin, 50 per cent lead.

He said there is no language or description on the solder package, other than the number, that had any significance to him in his business (Tr. 275). On cross-examination, he testified that he did not know if the spools of solder he had ordered were by volume or by weight (Tr. 276), and he never had occasion to do business

1

Initial Decision

with any solder marked "50/50 by volume" or "40/60 by volume" (Tr. 277).

Mr. Richard Rollins, manager for the past two years of the Atlantic Pipe and Supply Company of Boston, Massachusetts, with six years of experience in purchasing plumbing supplies, testified that he ordered spools of solder designated "50/50" and "95/5" (Tr. 335-36); that solder marked "50/50" contained 50% lead and 50% tin (Tr. 336); and that he "always figured it would be by volume" (Tr. 337).

The record also contains the testimony of the following nine consumer witnesses (six being engaged in the plumbing and heating trade) called at the instance of complaint counsel:

Mr. Robert L. Sawyer, a plumber since 1949, took over Edward Sawyer Company, Incorporated, of Mattapan, Massachusetts, a business his father started in 1918. When asked how he customarily bought tin-lead wire solder, he said: "Well, we order it 50/50 or 95/5. We, you know, place the order, we want so many spools of 50/50 and so many spools of 95/5" (Tr. 89-90). He testified that when at supply houses he had heard other people ordering solder: "They usually go to a counter and say I want a spool of 50/50, or a pound of 50/50—you know, a spool or a pound. That is it. Or give me a roll or a spool or a pound of 95/5" (Tr. 91). He said that he would know the difference between "by volume" and "by weight" (Tr. 93); and on being asked how much tin there would be in a solder marked "50/50 by volume," he answered (Tr. 94):

Well, if you make it down by weight, you would get a cubic foot of lead weighs approximately 400—some odd pounds and a cubic foot of tin weighs approximately 300—some odd pounds. I have not mathematically figured it out for a while. I think it comes to 40-60.

He testified further (Tr. 95):

Q. During the course of your experience in purchasing solder, have you ever had occasion to receive solder marked 50/50 by volume when you ordered 50/50 solder?

A. Well, it has been so long that we have bought these other brands of solder that I imagine we must have.

HEARING EXAMINER JOHNSON: Do you know?

THE WITNESS: To be honest with you, whether we have received it by volume?

HEARING EXAMINER JOHNSON: Yes.

THE WITNESS: The only way I can say is the way it was flowing, it was not 50/50 by weight, because we could not make a good tin joint.

HEARING EXAMINER JOHNSON: You could not say that you received some 50/50 by volume when you ordered 50/50 by weight, could you, definitely?

THE WITNESS: Well, definitely, I would say the way the solder was flowing, the joints were being made up, we could assume that it was not a 50/50 joint.

Mr. William A. Strickland, of the William L. Collins Company of South Boston, Massachusetts, has been in the plumbing and heating business for 26 years. He testified that in connection with his work he uses "50/50" and "95/5" solder 75% of the time; and, when asked if that was by weight or by volume, he said: "By volume. By volume, I assume, yes. I don't know. I assume by volume" (Tr. 255); and that when he orders solder for copper pipe, he specifies (Tr. 255):

Just 50/50 solder. It is noted in the trade as fine solder, 50/50 solder. It is usually on your spool and says 50/50. It does not say by volume or by weight. Specifically. We usually buy Dutton's solder and I know that is 50/50.

He stated that solder marked "50/50" or "50/50 by volume" is the same thing as far as he is concerned—he does not know the difference (Tr. 255-56). On cross-examination the following exchange took place:

Q. However, assuming that you saw a solder labeled 50/50 by weight and you saw another solder, 50/50 by volume, you would understand the difference, would you not?

A. No, I would not. I would assume it was the same.

Q. You would assume it was the same?

A. I could tell the minute I used it.

Q. You could tell when you used it?

A. It would not be fine enough, if it was 50/50 by weight, it would not be fine enough.

Q. It would not be fine enough?

A. 50/50 by weight is too light. That is why they use the 50/50. It usually says "fine" on it, for that purpose, I assume.

Q. You know the difference between volume and weight, of course?

A. Positively (Tr. 256).

* * * * *

Q. By any chance, have you ever used Coran Brothers solder?

A. No, I never have. I have never heard of it.

Q. You have never heard of it?

A. No, we use Dutton and Dutch Boy, Puritan.

HEARING EXAMINER JOHNSON: Do they label their's by volume?

THE WITNESS: No, they just say 50/50 fine (Tr. 258).

Mr. Harry B. Sandofsky, of the Sandy Plumbing Company, Dorchester, Massachusetts, has been in the plumbing business over 40 years, and has had as many as 97 plumbers in his employ (Tr. 283-84). He testified that in soldering copper piping he uses "50-50, mostly" (Tr. 284-85); that in ordering that solder, "I would say send me a case of 50/50 solder" (Tr. 285); that he had

1

Initial Decision

ordered "50/50" solder and sometimes he had been sent solder marked "50/50 by volume" (Tr. 286); that, as far as he was concerned, "50/50" and "50/50 by volume" were one and the same thing (Tr. 287). On cross-examination, he testified:

Q. I was not clear on your answer. When you get a spool of solder and it is marked 50/50, do you assume that to be 50/50 by volume?

A. I never found out what "by volume" means.

Q. I see. And you don't know what by volume means?

A. No, I do not.

Q. You have never inquired?

A. I have inquired (Tr. 290).

* * * * *

Q. What led you to make inquiry?

A. Because if I am, if I have been in the business for over 40 years and Mr. Blume and the other gentleman walks into my place and asks me a question about solder, then I felt like a darned fool not knowing what that meant. And for my own curiosity. I wanted to know what "by volume" meant.

Q. And you don't know what "by volume" means?

A. I have not been able to find out what "by volume" is, no.

Q. Did Mr. Blume tell you?

A. No, sir (Tr. 291).

* * * * *

Q. When you say 40/60, do you know what 40/60 refers to?

A. Yes.

Q. What is that?

A. That is 60 per cent lead and 40 per cent tin (Tr. 293).

After the last answer, the hearing examiner inquired if it was "by weight or volume," to which the witness replied (Tr. 293-94):

Judge, I cannot answer you. I cannot answer that question for you, because until I saw the spools coming through marked "by volume", I never knew what it was and as I say, since Mr. Blume was in my office, I have inquired and I have gotten such vast variations of answers that I still have not got the answer for you.

Mr. Frank N. Zabarsky is with the Electronic Brazing and Soldering Company located at Waltham, Massachusetts, specializing in soldering for electronic firms in and around Boston. This is all government work, such as rockets, missiles, radar and space (Tr. 302-304). He testified that he uses tin-lead wire solder designated as "50/50" on brass, steel, bronze, stainless and copper, and that, when ordering this solder, he asks for "50/50" (Tr. 304); that in making purchases he has never been shipped a solder designated "50/50 by volume" (Tr. 305); that if it said on the spool "50/50 by volume," he stated, "It would not make any difference as long as it is 50" (Tr. 305). On cross-examination, when asked if he would "understand the difference between 50/50

by volume and 50/50 by weight," he answered: "I would question it, what the story is, by volume or by weight. I'd never order it that way. * * * It would confuse me" (Tr. 306-307).

Mr. Robert O. Weider, with the company of Otto G. Weider located at Dorchester, Massachusetts, has been in the plumbing business since 1936 and employs five men (Tr. 315-316). He testified that the only type of solder that he purchases is "50/50," which suits his general requirements (Tr. 317-18); and that the first time he came across a solder labeled "50/50 by volume" was "the other day" (Tr. 318). When asked, "When you buy your solder, does it make any difference to you after you say the numbers whether it says by volume or not?", he replied (Tr. 320):

Well, in other words, what else could I buy? If a supplier supplies me with 50/50 by volume, I am sure I am not going to scout around and find some other solder that will say 50/50 by weight. I never seen a 50/50 by weight.

He also testified that he was getting the same quantity of tin in a solder labeled "50/50 by volume" as in a "50/50" solder (Tr. 321).

Mr. Richard W. Ross, manager of the machine and brazing shop of the Fab-Braze Corporation, Waltham, Massachusetts, an electronics business with approximately 50 men in the shop, has had 20 years experience as a machinist (Tr. 322-23, 333). He testified that in connection with his duties he purchases solder marked "50/50" (Tr. 324); that until he was shown Commission Exhibit 12 at the hearing, he had never seen a solder marked "50/50 by volume," and that if he received a solder labeled "50/50" by volume," it would be the same to him as a "50/50" solder (Tr. 329-333).

Mr. Gerald J. Vallati, of Dorchester, Massachusetts, doing business as the Gerald J. Vallati Company, has been in the plumbing and heating business since 1934, and employs one to three men (Tr. 341-42). He testified that the type of solder he uses is marked "50/50" or "95/5" (Tr. 343); that a "50/50" solder is 50% tin and 50% lead by weight (Tr. 341-351); that "about three years ago, two years ago, perhaps" he bought one spool labeled "50/50 by volume" (Tr. 352); that "I used part of it. I did not care too much—on the job I had to use it on, I mean, I would not want to take the chance. * * * It soldered all right, but back in my mind, I questioned it, you know" (Tr. 352); that he made inquiry about it at the supply house and "They told me that was 50/50 and that is it. I could not seem to break that down"

1

Initial Decision

(Tr. 353). He further stated (Tr. 357): "I objected. But I needed that solder at that particular time and I did not want to chase around, so I took it."

Mr. Ernest L. Cataldo, after five years as a jeweler, was employed by the Fab-Braze Corporation of Waltham, Massachusetts, for almost ten years, and at the time of his appearance as a witness he was with, and had been with, the Cambridge Wave Guide Company for two months (Tr. 358-360). He testified that 99 per cent of his soldering work at the Fab-Braze Corporation was with silver solder, but that he had on occasion used tin-lead solders, using mostly solders labeled "50/50" (Tr. 361-62). When asked, "If you know, would a solder marked 50/50 by volume have the same content as a solder marked 50/50?" he answered (Tr. 362): "Should if it is marked. * * * If it is marked that. I go by the number."

Mr. Charles A. Buresh has been a plumber for about 17 years and, with two partners, does business at Dorchester, Massachusetts, under the name of Boston Bath Company (Tr. 363-65). He testified: "Generally today, in our work—as a matter of fact, 99.9 per cent—it is either 50/50 or 95/5" (Tr. 366); and that "We look for numerals indicated on the end of the spool, and it usually says 50 over 50 or 95 over 5" (Tr. 368). When asked, "Now, if that spool, after the 50/50, for example, said 'by volume,' would that make any difference to you?", he answered (Tr. 368):

Well, I have not seen too many rolls like that. However, without stopping to actually think it over, I would still think that if I ordered 50/50 or 95/5, I would be getting those proportions of lead and tin.

* * * * *

That is right, a half pound, say a half pound of lead and a half pound of tin in a 50/50 one-pound spool.

On cross-examination, he testified:

Q. You understand the difference between weight and volume, do you not?

A. Yes.

Q. Now, if you saw a solder that was marked 50/50 by volume, you would understand the difference between something marked 50/50 by volume and a solder that you bought 50/50 by weight, would you not?

A. Possibly, if I sat down and thought it over. If I ordered solder on to a job and I had, say, a couple of men there working, busy with their jobs and so forth, I could get, say, a half dozen spools of the solder you are talking about and pay for it and not receive what I thought I was getting. I will answer it that way (Tr. 374-75).

* * * * *

I am in business. I don't go around looking and checking things carefully the way you are talking about. When I am on a job, sure I could pick up that, I could easily think I have 50/50 and so forth and not have it (Tr. 375).

On redirect examination, he testified (Tr. 376) :

Q. Mr. Buresh, if somebody sold you a solder labeled "50/50 by volume," how much tin would it contain by weight?

A. Well, since "volume" refers to cubic space—this isn't exactly the place to do mathematical work, sitting here. Since lead is a great deal heavier than tin, I would be inclined to say that I would be getting more lead than tin, even though it was marked 50/50. Generally, mechanics mean in the field working, if you order 50/50 solder, they get a bunch of rolls of solder and it says 50/50 and if they were doing plumbing and heating, they look at the 50/50 and say, it is all right, we will do that for the plumbing work, and 95/5, it is for the heating, they would go ahead. They would not look at it, say it is by volume, it is this, it is that; they would go ahead and do the job. They would expect they were getting 50 per cent lead and 50 per cent tin.

Q. By weight?

A. By weight, yes.

Respondents used only one witness in connection with their defense. John Coran testified that when he labeled a solder "50/50 by volume," it contained 50 per cent tin and 50 per cent lead by volume; that when a customer requests "50/50 by volume," the company sells him "50/50 by volume"; and that when a customer requests solder "50/50 by weight," they sell him "50/50 by weight" (Tr. 396-97). When asked, "when a customer requests solder as 50/50, what do you sell him?", he answered (Tr. 397) :

It depends on the customer. If he is an established, old customer, we sell him what he has had in the past, either 50/50 by weight or 50/50 by volume. If it is a new customer, we explain to him the difference between the two solders we make and let him make his own choice.

On cross-examination, he added (Tr. 402) :

Q. Now, how is that explanation made?

A. That we have two grades of solder. One is made by weight and one is by volume.

Q. Yes, sir.

A. And by weight are equal parts by weight and by the volume are equal parts by volume of—well, let me fish for proper words.

Naturally, the by volume solder contains less tin, is less expensive. This is the general explanation we give.

Q. You don't know, though, whether they give that explanation to their customers, do you?

A. Who?

Q. Of your own knowledge?

A. Who are "they"?

Q. Your customers?

A. I don't know whether they do or not, no.

He also testified on cross-examination that they sell mostly to wholesale plumbing supplies and hardware outlets; they do have

1

Initial Decision

a few plumbing contractors that they sell to, but customarily they do not sell to plumbers (Tr. 400).

The evidence establishes that the "by volume" designation employed by the corporate respondent in the labeling of its solders has the capacity and tendency to deceive and mislead members of the purchasing public. Most of the wholesale vendors of plumbing supplies, and their customers, including plumbers and others, do not know the difference between solders marked "50/50" (which is by weight) and the "50/50 by volume." They are guided by the numerical designation in the ordering, selling and purchasing of solder, and to them a solder labeled "50/50 by volume" is the same product labeled "50/50."

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

The use by the corporate respondent of the aforesaid 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 said respondent's products by reason of said erroneous and mistaken belief.

The aforesaid acts and practices of the corporate respondent, as herein found, were, and are, all to the prejudice and injury of the public and of the said 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.

It is the position of complaint counsel that any order entered herein should include John Coran in his individual capacity. (They concede that the complaint should be dismissed as to Charles Coran for lack of proof.) In their brief, they say (page 5), "there is more than adequate proof, particularly Mr. Coran's uncontradicted testimony to the effect that he is solely responsible for the overall management policy of the business of the corporation." A mere showing that an officer formulates, directs and controls the corporate policies and practices is not in itself sufficient to include in the order such an officer in his individual capacity. As the Commission and the courts have, in effect, stated, to justify naming an officer as an individual there must be something in the record suggesting that he would be likely to engage in these

practices in the future as an individual. One of the principal authorities relied upon by complaint counsel to support their position is *F.T.C. v. Standard Education Society*, 302 U.S. 112 (1937). There the Supreme Court recognized a finding by the Commission "that this corporation was organized by the individual respondent for the purpose of evading any order that might be issued," and stated (at 119) :

Since circumstances, disclosed by the Commission's findings and the testimony, are such that further efforts of these individual respondents to evade orders of the Commission might be anticipated, it was proper for the Commission to include them in its cease and desist order.

In the Matter of Maryland Baking Company, et al., Docket No. 6327, 52 F.T.C. 1679 (1956), the Commission upheld a dismissal of a complaint against an officer of the corporation as an individual, saying (at 1691) :

There is no showing, moreover, of any special circumstances which would indicate a likelihood that Joseph Shapiro would cause an evasion of the order against the corporation. He is, in any event, bound by the order as a corporate officer. In the absence of some special reason for naming Joseph Shapiro personally, the order against the corporation, and its officers, representatives, agents, and employees, would seem to be adequate.

In the Matter of Kay Jewelry Stores, Inc., et al., 54 F.T.C. 548 (1957), the Commission stated (at 561) :

The Commission has wide discretion in determining the necessity of attaching individual liability to insure the full effectiveness of an order to cease and desist. But where there is no record evidence showing justification and where "no other circumstances appear pointing to the necessity of directing the order against these parties in their individual as distinguished from their official capacities," their inclusion as individuals should not be approved.

In the Matter of The Lovable Company, et al., Docket No. 8620 (June 29, 1965) [67 F.T.C. 1326], where the hearing examiner in his initial decision, on the basis of a finding that (page 1332) "Said individual respondents formulate, direct and control the policies, acts and practices of Lovable," included in the order the officers in their individual capacities, the full five members of the Commission as now constituted modified the order, and in their opinion said (page 1336) :

In the case of the applicability of the order to the individual respondents, we feel that respondents' argument has merit. There is nothing in the record justifying an assumption by the Commission that these individual respondents might in the future violate Section 2(d) *in their individual capacities*. Respondents admit only that the individual respondents formulate, direct and control the policies, acts and practices of respondent corporation. There is no warrant in the record for finding that they do any of these things except

1

Initial Decision

in their capacities as officers. To justify naming an officer as an individual there must be something in the record suggesting that he would be likely to engage in these practices in the future as an individual. To argue otherwise would be to hold that in every order running against a corporation the officers who control its policies, acts and practices should be named. If acts are done as an officer they are done for the corporate respondent, and the order against the corporation will run against the officer as officer. That is all that is required in this case on this record.

There have been many cases before the Commission and the courts where this matter of individual responsibility has been involved, but the hearing examiner deems it sufficient to limit further discussion herein to two recent United States Court of Appeals cases.

In *Bascom Doyle v. F.T.C.*, 356 F. 2d 381 (5th Cir. 1966), where the petitioner sought reversal of a Commission order as it applied to him in his individual capacity, the Court said in part (at 383-84) :

These orders "are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future." *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 473, 72 S.Ct. 800, 803, 96 L.Ed. 1081 (1952). In this important respect the orders of the Commission differ in purpose from the penal provisions of the Sherman Anti-Trust Act. Therefore, whereas many corporate officials have been joined as individual defendants in Sherman Act prosecutions, this has not been the practice in the issuance of cease and desist orders. In the latter area, where future corporate activities are the sole concern of the Commission, individuals have only been included in the orders, in almost all instances, when deemed necessary to prevent evasion. The Supreme Court recognized this "threat of evasion" test in *Federal Trade Commission v. Standard Education Society*, 302 U.S. 112, 58 S.Ct. 113, 82 L.Ed. 141 (1937).

* * * * *

Since orders running against a corporation are automatically binding on the officials "responsible for the conduct of its affairs" (*Wilson v. United States*, 221 U.S. 361, 376, 31 S.Ct. 538, 543, 55 L.Ed. 771 (1911)), and these individuals may be punished by contempt if they prevent compliance by the corporation with the order, there seems to be little reason for including corporate officers as individuals in the orders unless there is a possibility of evasion, as was present in *Federal Trade Commission v. Standard Education Society*, *supra*. * * *

In *Flotill Products, Inc., et al. v. F.T.C.*, 358 F. 2d 224 (9th Cir. 1966), the Court said (at 233) :

In regard to the first ground of attack on the order, we note that the hearing examiner dismissed the complaint as to the Flotill executives in their individual capacities, finding that the corporate organization was stable and not a sham, and that "There is no showing and no suggestion of any special circumstances which would indicate a likelihood that the individual respondents would cause an evasion of any order which may be entered herein against the corporation." (R. 19.) In framing the order to include the in-

dividual petitioners, Chairman Dixon relied on no other fact than that the three individuals owned and controlled the corporation. He concluded: "Under such circumstances, when the corporation is merely the alter ego of individuals, we have generally felt that an order against the individuals is necessary." (R. 95.)

We find that the Commission has abused the discretion granted it in framing the order to include the individual petitioners. The rather cavalier use of the "alter ego" doctrine finds no support in the record, and the order points to no evidence to challenge the findings of the hearing examiner that the corporate entity has ever been used in such a way as to justify treating it as the "alter ego" of its owners. We agree with petitioners that naming them individually in the order is tantamount to a finding on the evidence that they have personally violated, or can be expected to violate, the Clayton Act. We have not been shown the evidence in the record, if any there be, which supports such a conclusion. Accordingly, the Commission order to be enforced should not refer to the petitioners in their individual capacities. Authority for such deletion is to be found in *Coro, Inc. v. F.T.C.*, 338 F.2d 149 (1st Cir. 1964) and *Rayex Corp. v. F.T.C.*, 317 F.2d 290 (2d Cir. 1963).

There is nothing in this record justifying an assumption that John Coran would cause an evasion of any order which may be entered herein against the corporation. On the contrary, the hearing examiner is convinced that there is no likelihood that the said respondent would cause an evasion of any such order. When asked by the hearing examiner, "Would there be any reason why you would want to change the corporate structure just to avoid any order on the part of the Commission?", Mr. Coran answered (Tr. 64): "I have no reason to do that. It would be detrimental to me." The complaint will be dismissed as to John Coran and Charles Coran in their capacities as individuals.

ORDER

It is ordered, That respondent Coran Bros. Corporation, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of solders, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

- (1) Using the designation 50/50 alone or in conjunction with the words "by volume" to designate, describe or refer to a commercial solder which does not contain 50% tin by weight: *Provided, however*, That it shall be a defense in any enforcement proceeding hereunder for respondent to establish that the tin content of a solder is within the permissible variations in composition allowed in the sampling procedures set forth in the then existing Specifications for Solder Metal

1

Opinion

as published by the American Society for Testing and Materials.

(2) Using the designation 40/60 alone or in conjunction with the words "by volume" to designate, describe or refer to a commercial solder which does not contain 40% tin by weight: *Provided, however*, That it shall be a defense in any enforcement proceeding hereunder for respondent to establish that the tin content of a solder is within the permissible variations in composition allowed in the sampling procedures set forth in the then existing Specifications for Solder Metal as published by the American Society for Testing and Materials.

(3) Misrepresenting by any numerical designation or in any other manner the nature, quality or composition of any of their solders.

It is further ordered, That the complaint be, and the same hereby is, dismissed as to John Coran and Charles Coran in their individual capacities.

OPINION OF THE COMMISSION

JULY 11, 1967

The complaint in this matter charges respondents with the violation of Section 5 of the Federal Trade Commission Act in connection with the manner in which they described and labeled certain wire solder sold by them in commerce.

The sole issue in this case for consideration by the Commission arises out of complaint counsel's appeal from that part of the hearing examiner's decision dismissing the individual respondent, John Coran. Neither side appealed the findings or conclusions of the hearing examiner that the substantive charge involving the mislabeling of the solder and the liability of the corporation were established, and that the case should also be dismissed against Charles Coran, another individual respondent. Oral argument was waived.

The hearing examiner dismissed John Coran as a party respondent on a finding that there is nothing in the record justifying an assumption that John Coran will cause an evasion of the order by the corporation or engage in the acts individually and apart from the corporation.¹

Complaint counsel's argument in the instant matter is that Coran Bros. Corporation is a closely held family entity which at the will of John Coran could be reorganized and the illegal prac-

¹ Initial Decision, p. 22.

tices continued. There is no question that if continuation of the illegal practices was sufficiently beneficial to justify the legal expense and other problems involved, the corporation could in fact be dissolved and the practices continued.

We believe that, on the facts presented by this record, the hearing examiner misinterpreted the requisites necessary to hold John Coran as a party respondent. John Coran should be named in his individual capacity as a party in this proceeding because the following set of facts were found by the examiner and are uncontested:

(1) John Coran is president of this closely held corporate respondent and owns 80 percent of the stock. The remaining 20 percent is owned by other family members.²

(2) John Coran is responsible for formulating, directing, and controlling the policies of the corporation.³

(3) John Coran was responsible for, and made, the decision to engage in the specific acts and practices which are challenged in this proceeding. This decision was reached by him without consulting the other directors or stockholders.⁴

The examiner apparently based his decision to dismiss John Coran on the authority of several cases which have discussed the possibility of evasion of orders by corporations and individuals concerned as a factor in determining whether to hold an individual personally responsible.⁵

Where proof of possible or intended evasion is demonstrated, an even stronger case is made for holding an individual personally liable. Such a factor is not, however, controlling.

In the instant matter, the facts concerning the organization and operation of the respondent corporation by John Coran were fully explored and presented.⁶ Because the factors outlined above

² Initial Decision, p. 5.

³ *Id.*

⁴ *Id.*

⁵ *E. g., Federal Trade Commission v. Standard Education Society*, 302 U.S. 112 (1937); *Bascom Doyle v. Federal Trade Commission*, 356 F. 2d 381 (5th Cir. 1966). In *Bascom Doyle* the court refused to hold an individual in his individual capacity because the individual was an employee, not an owner, of a wholly owned subsidiary of a publicly held corporation. The court distinguished the Doyle situation from the situations presented in *Standard Distributors, Inc. v. Federal Trade Commission*, 211 F. 2d 7 (2d Cir. 1954), and *Benrus Watch Co. v. Federal Trade Commission*, 352 F. 2d 313 (8th Cir. 1965), by stating that in these cases, the individuals held to be individually responsible were "officers in top control of the corporation; formulating, directing, and controlling corporate policies and practices. Since petitioner Doyle did not serve in such a controlling capacity in Pacific Molasses Company, it is not necessary in reaching a decision in this case to consider these two cases further."

⁶ In *Maryland Baking Co.*, 52 F.T.C. 1679 (1956); *Kay Jewelry Stores*, 54 F.T.C. 548 (1957); *Lovable Co.*, Docket No. 8620 (June 29, 1965) [67 F.T.C. 1326]; and *Flotill Products, Inc. v. Federal Trade Commission*, 358 F. 2d 224 (9th Cir. 1966), the records did not sufficiently demonstrate the specific responsibilities and activities of the individuals sought to be charged.

are present, it was not necessary, in order to subject him personally to the order, for the Commission counsel to go further and demonstrate an intent to evade or even a probability of evasion of the order against the corporation.

The public interest requires that the Commission take such precautionary measures as may be necessary to close off any wide "loophole" through which the effectiveness of its orders may be circumvented. Such a "loophole" is obvious in a case such as this, where the owning and controlling party of an organization may, if he later desires, defeat the purposes of the Commission's action by simply surrendering his corporate charter and forming a new corporation, or continuing the business under a partnership agreement or as an individual proprietorship with complete disregard for the Commission's action against the predecessor organization. In a similar case the Seventh Circuit has stated the law applicable to the facts as follows:

The Commission found, "Respondent Clyde C. Carr is president of, and the majority stockholder in, the corporate respondent, and has been such since he organized the corporation. The only other officers and stockholders are his son-in-law and daughter, who, together with him, constitute the board of directors. By virtue of stock ownership, officership, and active direction, the policies, activities, and practices of the corporate respondent are his."

Notwithstanding this undisputed finding, it is argued that petitioner Carr in his individual capacity should not be included in the order under attack. The record unmistakably discloses that the management, direction and activities of the corporation were those of Carr. A corporation can act or speak only through its authorized officers and agents. In the instant case it was Carr alone, and it is not discernible either how or why his activities as a person should be separated or distinguished from those of the corporation. In our view, he as an individual occupies precisely the same position as does the corporation. To think contrary means that an individual as the sole manager of and responsible for the activities of a corporation can escape liability on the flimsy pretext that he was merely acting on behalf of the corporation and not as an individual. We think he is a proper party to the cease and desist order and approve the Commission's action in this respect. Cf. *Federal Trade Commission v. Standard Education Society*, 302 U.S. 112, 120, 58 S.Ct. 113, 82 L.Ed. 141; *Sebrone Co. v. Federal Trade Commission*, 7th Cir., 135 F.2d 676, 678.⁷

The initial decision and order of the hearing examiner will be modified to conform to the views of the Commission as expressed herein and, as so modified, will be adopted as the decision of the Commission.

In view of the unusual circumstances presented by this record, Commissioners Elman and Jones do not believe it is necessary to hold individual respondent John Coran.

⁷ *Steelco Stainless Steel v. Federal Trade Commission*, 187 F. 2d 693, 697 (7th Cir. 1951).

FINAL ORDER

This matter having been considered by the Commission upon complaint counsel's appeal from that part of the hearing examiner's initial decision dismissing as a respondent John Coran, and upon briefs in support thereof and in opposition thereto; and

The Commission having concluded that on this record and the facts and circumstances set forth therein, it is necessary to hold respondent John Coran a party to this proceeding and that the order should be directed against him both as an officer of the corporation and as an individual:

Accordingly, *it is ordered*:

(1) That the initial decision be, and it hereby is, adopted as the decision of the Commission to the extent consistent with, and rejected to the extent inconsistent with, the accompanying opinion;

(2) That the following paragraph be, and it hereby is, substituted for the initial paragraph of the order contained in the initial decision:

It is ordered, That respondents, Coran Bros. Corporation, a corporation, and its officers, and John Coran, individually and as an officer of said corporation, 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 solders, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(3) That subparagraphs (1), (2), and (3) of the order contained in the initial decision be, and they hereby are, adopted for incorporation in the final order of the Commission;

(4) That the last paragraph of the order contained in the initial decision be revised to eliminate therefrom the name of John Coran;

(5) That the order contained in the initial decision, modified as herein provided, be, and it hereby is, adopted as the order of the Commission.

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

In view of the unusual circumstances presented by this record, Commissioners Elman and Jones do not believe it is necessary to hold individual respondent John Coran.

IN THE MATTER OF
COLUMBIA BROADCASTING SYSTEM, INC., ET AL.
ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 8512 Complaint, June 25, 1962—Decision, July 25, 1967

Order requiring the Nation's leading producer and distributor of phonograph records to cease lessening competition in the mail order record market by conspiring with other record manufacturers to fix or control royalties paid recording artists, costs of records, and preventing other record clubs from acquiring phonograph records of certain manufacturers on the same terms as respondent acquires such records.

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 Columbia Broadcasting System, Inc., and Columbia Record Club, Inc., hereinafter referred to as respondents, have violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C.A. Sec. 45), 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:

[As hereinafter used, the following terms will have the designated meanings:

- “Artist” — Instrumental, vocal or recitative performer who records for a producer or manufacturer of records.
- “Catalog” — A printed listing of all available phonograph records by title offered to customers by a manufacturer or producer under his labels.
- “Dealer” — A retailer primarily engaged in over-the-counter selling of phonograph records, musical supplies and related products to ultimate consumers.
- “Disc” — A phonograph record either seven inches or
(or “Record”) twelve inches in diameter.
- “Jacket” — A cardboard cover, enclosing an LP, showing the names of the selections and artists, and sometimes depicting the artist.

	Complaint	72 F.T.C.
“Label”	— The manufacturer’s trade name or trade style under which a record is merchandised.	
“r.p.m.”	— Speed in revolutions per minute of turntable.	
“LP”	— A long-playing, twelve inch disc designed to be played on a turntable revolving at 33 $\frac{1}{3}$ r.p.m.	
“Single” (or “45”)	— A seven inch disc designed to be played on a turntable revolving at 45 r.p.m.	
“Master” (or “Master recording”)	— An original recording or duplicate thereof embodying the performance of an artist on magnetic recording tape or wire or on a lacquer or wire disc or other material from which a phonograph record may be manufactured.	
“Licensed Master”	— A master to which the right to manufacture, distribute, sell and advertise has been granted.	
“Press”	— Manufacture (records)	
“Subscription method” (or “Club method”)	— A method of direct sale whereby the consumer contracts to buy a specified number of records within a designated period of time.]	

COUNT I

PARAGRAPH 1. Respondent Columbia Broadcasting System, Inc., hereinafter referred to as CBS, is a corporation organized and existing under the laws of the State of New York with its office and principal place of business located at 485 Madison Avenue, New York 22, New York. It maintains eight operating divisions, including News, Television Network, Television Stations, Radio, Electronics, Laboratories, International Divisions and Records. During 1960 its total volume of business amounted to approximately \$464,500,000.

Respondent CBS, through its Columbia Records Division, hereinafter referred to as Division, is now, and for many years last past has been, engaged, directly or indirectly, in the recording, manufacture, sale and distribution of phonograph records. Said records bear respondents’ labels, including: “Columbia”; “Epic”; “Perfect”; “Stereo 7”; “Alpine”; “Legacy”; “Harmony” and

"Okeh". It is the largest manufacturer of phonograph records in the United States, owning and operating four pressing plants located in Bridgeport, Connecticut; Pitman, New Jersey; Terre Haute, Indiana and Los Angeles, California.

Respondent CBS, through Division, manufactures LPs and singles from masters embodying performances it has recorded. CBS sells and distributes said LPs and singles through approximately eleven wholly owned distributors to dealers and others for resale to members of the public; and to approximately twenty-eight independent distributors for resale to dealers and others. In addition, CBS sells and distributes LPs directly to members of the purchasing public through the Columbia Record Club, a wholly owned subsidiary, hereinafter described.

During 1960 CBS' net sales of records amounted to more than \$54,000,000. Its expenditures for advertising and sales promotion, excluding amounts expended by the Columbia Record Club and by a subsidiary through which distribution to its wholly owned branches is effected, amounted to approximately \$2,156,406.

PAR. 2. During 1955, respondent CBS formed and put into operation the Columbia Record Club, Inc., hereinafter referred to as Club, a wholly owned corporate subsidiary of CBS. The Club is a corporation organized and existing under the laws of the State of New York with its office and principal place of business located at 799 Seventh Avenue, New York, New York.

The Club conducts a subscription method of business through which it offers to sell, sells and ships LPs to members of the purchasing public, located throughout the United States, pursuant to contracts whereby the Club member chooses a specified number of records, in accordance with an initial offer, hereinafter referred to as an "enrollment offer," at a special price in return for a commitment to purchase a specified additional number of records within a year at the "regular list price." The "regular list price" as used in this connection, and sometimes hereinafter referred to as "suggested list price," is the price at which CBS suggests that dealers resell its records to members of the purchasing public at retail. The suggested list prices of the majority of records offered through the Club are \$3.98, \$4.98, \$5.98 and some at \$6.98. After a member has fulfilled his contractual commitment he is eligible to receive a "bonus" or "free" record for each two additional records purchased at specified regular list prices. Respondents maintain warehouses in Terre Haute, Indiana; Brooklyn, New York and Santa Barbara, California, from which points the Club ships records to its members.

Respondent CBS, through the Club, engages in extensive advertising and promotional campaigns by direct mail, newspapers and nationally circulated magazines. For example, during 1960, advertising expenditures were approximately 5½ million dollars. Its advertisements appeared in such newspapers as the New York Times, Chicago Tribune and many others as well as in such magazines as Life, Time, Saturday Evening Post, Esquire, Holiday, Good Housekeeping, National Geographic, and numerous others.

An actual and representative advertisement of the Club directed to the attention of members of the public reads, in part, as follows:

* * * the greatest savings ever offered by any record club BRAND-NEW SELECTION—Today's best-selling albums from America's leading record companies—exclusively from the *Columbia* record club! Any 6 of these superb \$3.98 to \$6.98 long-playing 12-inch records—in your choice of REGULAR high fidelity OR STEREO for only \$1.89 if you join the Club now and agree to purchase as few as 6 selections from the more than 400 to be made available during the coming 12 months * * * at regular list price plus small mailing and handling charge. * * *

Through this device members of the public who take advantage of CBS' enrollment offer are able to purchase phonograph records at prices that are substantially lower than the prices paid for the same phonograph records by dealers who compete with the Club in selling or attempting to sell to ultimate consumers. Moreover, a Club member meeting his entire year's obligation pays prices that are lower per record than those paid by said dealers.

As a result of respondents' extensive promotional campaign, together with the wide choice of recordings afforded the consumer by reason of respondents' control of the works of numerous artists pursuant to licensing arrangements, hereinafter described, the approximate net sales and membership of the Club have increased annually as follows:

Year	Net sales (Excluding mailing and handling charges)	Number of Members
1955 (Aug. 15 through Dec. 31)	\$1,174,000	125,175
1956	7,401,000	409,084
1957	14,888,000	687,652
1958	23,629,000	993,104
1959	30,391,000	1,052,060
1960 (Jan. through Oct.)	30,590,000	1,322,297

PAR. 3. Respondents, in the course and conduct of their business, ship their records, hereinafter referred to as "products" whether produced from owned or licensed masters, as hereinafter described,

or cause said products to be shipped from the place or places of manufacture and have been, and now are, engaged in "commerce," as that term is defined in the Federal Trade Commission Act.

Respondents, in the course and conduct of their business are in competition in commerce, as hereinafter described, with other manufacturers, including licensors, as hereinafter described, and with dealers except insofar as such competition has been lessened, restrained or otherwise injured, as hereinafter alleged.

PAR. 4. Phonograph records are mechanical reproductions of masters embodying musical and other performances by well-known and famous artists. Said performances are unique, distinctive and nonsubstitutable. As they grow in popularity, public demand is created for the specific artist, performance and label under which the recording has been produced. As a result, dealers are obliged, for business reasons, to stock all, or as many as feasible, of the recordings that have become popular under specific labels. Correspondingly, the success of a record manufacturer is enhanced by increasing the number of masters and labels it can control and promote. Customarily included among such recordings are those manufactured from original masters of CBS and those manufactured from licensed masters, as hereinafter defined.

Respondent CBS, through its ability to recruit and otherwise obtain control of the works of artists and through its control of manufacturing and distributional facilities, is an important factor in the business of manufacturing, distributing and selling phonograph records, and the records so manufactured and distributed by it constitute an essential and substantial element in the operation of retail phonograph record businesses operated in the United States. Prior to 1958 respondents advertised, sold and distributed through the Club, LPs that were produced from masters owned and controlled by CBS and bearing the labels "Columbia" and "Epic." From 1958 to the present, an important part of respondents' promotion of the Club through newspaper, magazine and other advertisements, has consisted of advertisements depicting to and otherwise informing members of the public that offerings of the Club include numerous LPs produced under labels other than, and in addition to, "Columbia" and "Epic."

PAR. 5. Dealers are compelled to stock a substantial number of records produced from masters owned or controlled by CBS as well as from the licensed masters, as hereinbelow discussed. Said dealers are in competition with the Club for the patronage of members of the purchasing public who are the ultimate consumers of said products. Said dealers are compelled to pay higher prices

than those paid by ultimate consumers purchasing through the Club for LPs manufactured and distributed by CBS and for records manufactured and distributed by the licensors, as hereinbelow discussed. For example, an ultimate consumer who joins the Club pursuant to the terms of the representative offer set forth in Paragraph Two, *supra*, and who orders only popular LPs bearing suggested list prices of \$3.98, pays \$1.89 for his first six LPs and \$3.98 each for the next six LPs purchased during the first twelve months of his enrollment. Said consumer pays a total of \$25.77 for twelve LPs, exclusive of the advertised "small mailing and handling charge," or an average of \$2.14 per LP. Said consumer may choose freely among LPs manufactured from original masters of CBS as well as from LPs manufactured from licensed masters, as hereinbelow discussed, in determining which records he will receive pursuant to his enrollment offer of six records for \$1.89 as well as pursuant to his purchase of six additional records at suggested list price. At the same time dealers are obliged to pay the price of \$2.47, or in the event of a special promotion of which they might avail themselves, prices ranging as low as \$2.22 each for records of the same grade and quality, exclusive of cost of delivery.

PAR. 6. In 1958, and from time to time thereafter, CBS has entered into contracts, hereinafter referred to as Licensing Agreements, with various manufacturers of phonograph records, hereinafter referred to as Licensors. The said Licensing Agreements provide that the Licensor shall grant to CBS, for the purpose of sale by direct mail as distinguished from over-the-counter sale by retail store outlets, the sole and exclusive right, privilege and license to manufacture, distribute, sell and advertise under the Licensor's label or labels, through the Club, to ultimate consumers, LPs manufactured from all original masters owned or controlled by the Licensor at the time the Licensing Agreement is negotiated and also those acquired during the term of the Licensing Agreement. Original masters thus obtained are referred to herein as Licensed Masters. The Licensing Agreements provide that CBS shall pay royalties to the Licensor computed upon a percentage of net sales, as defined in each Agreement.

From 1958 and as of September, 1961, CBS had pressed approximately 6,685,419 LPs pursuant to the Licensing Agreements; the said LPs produced by respondents have been offered for sale and sold under the Licensors' labels through the Club. From 1958 and as of October, 1961, CBS paid royalties to the Licensors, pursuant to the Licensing Agreements, approximately in the amount of

\$656,425.97. As of November 1961, the Club had used and sold LPs representing approximately 331 titles, collectively, from the Licensors' Catalogs. The exclusivity provisions of said Licensing Agreements, as hereinafter discussed, have foreclosed access by actual and potential mail-order competitors, to more than 1000 records representing more than 450 important artists.

Generally, the Licensing Agreements are effective for three or more years and are renewable at the option of respondents. The approximate dates of execution of the Licensing Agreements, names of the Licensors, names of their labels, examples of the types of recordings produced by each, and names of some of the leading artists and titles thereof, are set forth as follows [p. 34] :

PAR. 7. The Licensors are competitors of CBS in the manufacture, sale and distribution of phonograph records, including singles and LPs. The LPs, produced by said Licensors from duplicate Licensed Masters, have been and are among the most popular, by type, by label and by artist, in the industry and are included among those phonograph records that dealers are obliged to stock, as hereinabove discussed.

The exclusivity provisions of all the Licensing Agreements, except that with Vanguard, preclude the Licensors from offering or selling any of their products by direct mail to consumers and from offering or selling any of their products or licensing any of their masters to any third party for the purpose of offering for sale or selling said products by direct mail to consumers. However, said Licensors may and do produce records from masters that are duplicates of and identical to the Licensed Masters and sell them, directly or indirectly, to dealers for resale to consumers.

The Licensing Agreements further provide as follows:

1. No royalty shall be payable with respect to records distributed to members of the Club as a result of an enrollment offer or those distributed as "bonus" or "free" records.
2. Respondents shall use the Licensor's label or labels on all phonograph records manufactured from the Licensed Masters as well as on jackets or other such customary containers for such records.
3. The Licensors "recognize" that it is the policy of respondents to pay no more than half of customary artist royalty with respect to records sold by the Club and the Licensors "agree in general to conform to this policy."

In addition, various of the respective Licensing Agreements contain provisions that:

Complaint

72 F.T.C.

Date	Licensors	Label	Type	Artists
May 1958	Caedmon Publishers	"Caedmon"	Spoken Word	Basil Rathbone Robert Frost
March 1959	Verve Records, Inc.	"Verve"	Popular Jazz Novelty	Ella Fitzgerald Gene Krupa Shelly Berman
April 1960	Mercury Record Corp.	"Mercury" "Emarcy"	Popular Classical	Patti Page Antal Dorati
September 1960	Warner Bros. Records, Inc.	"Warner Bros."	Popular Specialty	Everly Bros. Bob Newhart
October 1960	Kapp Records, Inc.	"Kapp" "Medallion"	Popular	Jane Morgan Roger Williams
June 1961	Vanguard Recording Society, Inc.	"Vanguard"	Folk Classical Spoken Word	Odetta Mischa Elman Charlton Heston
July 1961	United Artists Records, Inc.	"United Artists"	Popular and Motion Picture Sound Track	Eydie Gorme Steve Lawrence "Never on Sunday"
October 1961	Liberty Records, Inc.	"Liberty"	Novelty Popular	David Seville ("Chipmunks") Julie London
January 1962	Bernard Lowe Enterprises, Inc.	"Cameo" "Parkway"	Popular	Chubby Checker Bobby Rydell

1. The Licensor is restricted with respect to release dates of records produced by it from duplicate Licensed Masters to be distributed, directly or indirectly, to dealers.

2. The Licensor agrees not to offer records manufactured from duplicate Licensed Masters "for sale (to distributors) at distress prices."

3. The price at which the Club sells records manufactured from certain Licensed Masters "shall be not less than the price at which a similar * * * (type and kind) recording on the 'Columbia' label" is being sold by the Club.

4. The Licensor agrees not to reduce the suggested list price of his LPs "for sale through normal retail channels" without giving six-months written notice to CBS.

5. The Licensor agrees not to sell to certain specified subscription method sellers.

PAR. 8. During the past ten years, the industry has witnessed an increasing demand for records as a medium of home entertainment. The development of improved techniques in the manufacture of record players and in the mechanical reproduction of performances of artists has contributed in part to such increased demand. In this period, for example, the LP was introduced and so gained acceptance as to account presently for approximately 80% of the money spent by members of the purchasing public for records. Such consumer interest has reflected itself in an increase of sales of records for the period 1950 through 1960 of more than 200%.

The long-playing record market has been for many years last past and is now dominated by three companies: CBS; RCA Victor Record Division of Radio Corporation of America, hereinafter referred to as RCA; and Capitol Records, Inc., hereinafter referred to as Capitol.

PAR. 9. Historically, the large majority of records distributed by manufacturers were offered for resale to consumers through dealers. Other methods of distribution to the consumer have arisen in recent years; one of these has been the Club method by means of which the consumer may purchase directly from the manufacturer. Subsequent to the formation of the Columbia Record Club, RCA and Capitol began their own respective record Clubs which they presently operate in competition with respondents as well as with dealers. Initially, each of the said three Clubs offered only records produced from its own masters and bearing its own labels, to the consuming public. RCA and Capitol have continued to operate in this manner. The said three Clubs presently account for approximately 20% of the money spent by members of the pur-

chasing public for records; of that percentage figure, the CBS share is approximately half.

Respondents' acts and practices, separately and cumulatively, set forth hereinbefore in connection with the Licensing Agreements, have had and now have the purpose or effect of giving respondents an unfair competitive advantage that is not the natural result of free and open competition.

The approximate percentages of market shares of the said three companies, collectively, and of CBS, individually, during 1960, were as follows:

PERCENTAGES OF TOTAL MARKET SHARES

	CBS, RCA and Capitol aggregate	CBS
All records	40	20
All LP's	50	24
Classical LP's	75	28
Original "cast" LP's	90	50
Subscription Method LP's (Clubs)	97	53

PAR. 10. The aforesaid Licensing Agreements, individually and collectively, have a dangerous tendency unduly to hinder competition or tend to create a monopoly and are being engaged in for the purpose, or with the effect, of creating in respondents the undue power, and respondents have in fact regularly exercised the power, to:

1. Fix and maintain uniform prices of competitors' products at prices identical to those of respondents' own products.
2. Cause the Licensors to sell LPs to dealers, directly, or indirectly, at prices that are regularly higher than the prices charged by respondents for identical LPs sold through the Club directly to consumers.
3. Divide or allocate various markets and channels of distribution in connection with the sale or offering for sale of LPs produced under the Licensors' labels by respondents and the Licensors from Licensed Masters or duplicates thereof.
4. Establish and compel the Licensors to adhere to a fixed differential between the amounts paid as artist royalties for records sold to members of the public through dealers and the amounts paid as artist royalties for records sold to members of the public through the Club.
5. Hinder, lessen or suppress competition between respondents and the Licensors and between respondents and other manufacturers of phonograph records.

6. Hinder, lessen or suppress competition between respondents and other companies engaged in the subscription method of selling phonograph records.

7. Hinder, lessen or suppress competition between respondents and dealers in the sale of all phonograph records, including LPs produced under the Licensors' labels by respondents and by the Licensors from Licensed Masters or duplicates thereof.

8. Exclude from the market, or potentially to exclude, dealers who are regularly and customarily supplied, directly or indirectly, by respondents and by the Licensors and who have been, and would be now, in actual and open competition with the Club were it not for the competitive disadvantage to which they are subjected by respondents' aforesaid acts and practices engaged in pursuant to said Licensing Agreements.

9. Monopolize or attempt to monopolize the manufacture, sale and distribution of LPs generally, and of LPs sold through the subscription method of distribution.

PAR. 11. The aforesaid method of offering for sale and selling, directly or indirectly, LPs manufactured from respondents' original masters to dealers at prices higher than those charged to consumer-customers of the Club is unfair; has the capacity, tendency and purpose or effect of establishing and maintaining a competitive advantage to the Club over the dealer; has the dangerous tendency unduly to hinder competition between respondents and dealers in the sale of phonograph records; and has the purpose or effect of monopolizing or attempting to monopolize in respondents the manufacture, sale and distribution of records generally, and the retail sale and distribution of LPs.

PAR. 12. The acts, practices, methods and agreements of respondents, separately and cumulatively, as hereinabove alleged, are all to the prejudice of competitors of respondents; have a dangerous tendency to frustrate, hinder, suppress, lessen, restrain and eliminate, and have actually frustrated, hindered, suppressed, lessened, restrained and eliminated competition and opportunity to compete in the manufacture, sale and distribution in commerce of phonograph records within the intent and meaning of the Federal Trade Commission Act; have resulted in an unfair competitive advantage to respondents' record Club over dealers and over respondents' subscription method competitors; have a dangerous tendency to destroy, hinder and prevent competition between dealers and subscription method sellers with respondents in the sale of LPs; have a dangerous tendency to create in respondents a monopoly in the manufacture, sale and distribution of long-

playing phonograph records and in the manufacture, sale and distribution of all phonograph records; and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

COUNT II

PARAGRAPH 1. The allegations of Paragraphs One through Nine of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 2. In the course of operating the Club, respondent CBS has engaged, and is presently engaged in placing or causing to be placed advertisements directed to members of the purchasing public.

Said advertisements contain, among other things, references to and illustrations of various LPs bearing respondents' trademarked names "Columbia" and "Epic" and various LPs bearing the trademarks and other names of the aforesaid Licensors. Said advertisements also contain certain depictions, statements and claims that represent, among other things, to members of the purchasing public the following:

1. That they may purchase "Any 6 of these superb \$3.98 to \$6.98 long-playing 12-inch records * * * for only \$1.89."

2. That certain combinations of six of the depicted LPs have a "retail value up to \$36.88" or a "retail value up to \$37.88."

3. That the subsequent purchase of "six selections from more than 400 to be offered during the coming 12 months," pursuant to the Club member's contractual obligation, will be made "at regular list price plus small mailing and handling charge" or "at usual list price plus small mailing and handling charge."

PAR. 3. Through the use of the aforesaid statements and the amounts in connection with the terms "retail value," "regular list price" and "usual list price," respondents have represented and now represent that said amounts are the prices at which the merchandise referred to is usually and customarily sold at retail in the trade areas where such representations are made, and through the use of said amounts and the lesser amounts that the difference between said amounts represents a saving to the purchaser from the price at which said merchandise is usually and customarily sold in said trade areas.

PAR. 4. In truth and in fact, the amounts set out in connection with the aforesaid statements and the terms "retail value," "regu-

lar list price" and "usual list price," were not and are not now the prices at which the merchandise referred to is usually and customarily sold at retail in the trade areas where such representations are made, but are in excess of the price or prices at which the merchandise is generally sold in said trade areas, and purchasers of respondents' merchandise would not realize a saving of the difference between the said higher and lower price amounts.

The aforesaid representations have been and are, therefore, false, misleading and deceptive.

PAR. 5. The use by the 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' products by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondents from their competitors and substantial injury has thereby been, and is being, done to competition in commerce.

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 have constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

INITIAL DECISION BY DONALD R. MOORE, HEARING EXAMINER

SEPTEMBER 30, 1964

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	41
Statement of Proceedings	41
Statement of the Case	43
Explanatory Notes	43
FINDINGS OF FACT	45
I. The Phonograph Record Industry	45
Technological Developments	45
Industry Growth	47
Retail Outlets	48
Distributors and Subdistributors	51
Record Manufacturers	52
Product Alternatives Available to Customers	56
Advertising	57
II. The Respondents and Their Business	57
Manufacture and Sale of Records	59

	Page
III. Columbia Record Club and Its Competitors	63
Club Operations	67
Other Record Clubs	72
IV. Licensing Agreements	75
Nature of the Agreements	76
Summary of Outside Label Contracts	80
The Caedmon and Verve Contracts	88
Position of Licensors	90
Catalog Distribution and Exclusivity	91
Purpose and Effect of Exclusivity	95
Background of the Agreements	96
Price Fixing	105
The Caedmon and Verve Pricing Provisions	107
The Royalty Price Provisions	115
The Curious Case of Allan Cohen	125
Artists' Royalties	132
Other "Concerted Activity"	134
Communications About Artists	136
Repertoire and Release Schedules	139
Sales Information	140
Copyright Information	140
Influence Over Repertoire	144
V. Dual Pricing	145
Prices Paid by Club Members	149
Prices Paid by Dealers for Columbia Records	152
Prices Paid by Dealers for Outside Label Records	159
VI. Competitive Effects	160
The Relevant Market	160
LPs Not a Separate Market	161
Individual Records Not Separate Markets	170
Record Clubs Not a Separate Line of Commerce	172
Monopoly Charges	176
Industry Growth	176
Ease of Entry	177
Columbia's Share of Sales	179
Price and Other Competition	180
Other Competitive Effects	183
Dealers	183
Manufacturers	201
Clubs and Other Mail-Order Sellers	214
Benefits to Industry and Public	231
Opinion Testimony of Economic Expert	237
VII. Price Representations	239
Club Advertising	241
Meaning and Uses of "List Price"	245
Consumer Testimony	247
Discounting and List Prices	248
MEMORANDUM OPINION	254
A. Introduction	254
Summary of the Facts	256

27

Initial Decision

MEMORANDUM OPINION—Continued

	Page
A. Introduction—Continued	
The Allegations of the Complaint	257
B. Dual Pricing ("The Price Squeeze")	262
Mailing and Handling Charges	265
"Net Prices"	266
C. The Licensing Agreements	267
Price Fixing	268
Other "Concerted Activity"	271
Exclusionary Provisions	272
Statutory Tests	272
Relevant Market	278
Monopoly Charges	282
Competitive Effects	283
D. Price Representations	294
E. Conclusion	296
CONCLUSIONS OF LAW	297
ORDER	298
APPENDIX—Supplemental Findings	298

PRELIMINARY STATEMENT

Statement of Proceedings

The complaint in this matter was issued June 25, 1962, charging Columbia Broadcasting System, Inc., and Columbia Record Club, Inc., with violation of the Federal Trade Commission Act in the sale of phonograph records. Respondents were duly served and filed answer on September 4, 1962, admitting certain of the factual allegations of the complaint but denying generally any violation of law.

The case was initially assigned to another hearing examiner, and two prehearing conferences were held under his auspices—on September 12, 1962, and October 10, 1962.

On November 30, 1962, the case was reassigned to the present hearing examiner. A further prehearing conference was held on January 3, 1963.

Hearings began January 16, 1963, and concluded on August 9, 1963. Sessions were held in New York, Philadelphia, Washington, Chicago and Los Angeles. There were some recesses, but the trial continued substantially on a day-to-day basis.

The record consists of nearly 11,000 pages of trial transcript and approximately 1,400 exhibits, consisting of thousands of pages of textual, statistical and tabular material, in addition to a large volume of advertisements of respondents and their competitors.

The case in support of the complaint was rested April 15, 1963. The respondents opened their defense case on May 6, 1963, and

rested July 31, 1963. Hearings for the reception of rebuttal evidence began August 7 and ended August 9, 1963.

At the hearings, testimony and other evidence were offered in support of and in opposition to the allegations of the complaint. Such testimony and evidence have been duly recorded and filed in the office of the Commission.

Both sides were represented by counsel, participated in the hearings and were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues.

After the conclusion of all the evidence, proposed findings of fact and conclusions of law and a proposed form of order, accompanied by supporting briefs, were filed by counsel supporting the complaint and counsel for respondents. Voluminous replies to those proposals and briefs were filed by counsel for both parties.

Because of the fact that this is a "big case," with a staggering record, there was a deviation from the timetable normally prescribed under § 3.21 of the Commission's Rules of Practice (August 1, 1963).

The normal 90-day deadline for filing the initial decision after closing of the hearings was extended to allow counsel for the parties adequate time in which to prepare and present their respective proposals and contentions, as well as to afford the hearing examiner an opportunity to consider such proposals and contentions and to review the voluminous record, in order to reach an informed determination of the issues and to prepare an appropriate initial decision.

The proposed findings and supporting briefs of both parties were filed January 22, 1964. Exceptions and reply briefs were filed April 1, 1964. The submittals and counter-submittals of the parties totaled 1,409 pages.

The examiner heard oral argument on April 28, 1964. Counsel there added 173 pages to the transcript to bring the total to 11,147 pages.

Proposed findings not adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matters.

After carefully reviewing the entire record in this proceeding, together with the proposed findings, conclusions and order filed by both parties, as well as their respective replies, the hearing examiner finds that this proceeding is in the interest of the public and, on the basis of such review and his observation of the witnesses,

hereinafter makes findings of fact, enters his conclusions drawn therefrom, and issues an appropriate order.

Statement of the Case

The issues and the opposing contentions of counsel are set forth in detail in the Memorandum Opinion *infra*. However, a brief outline of the charges contained in the complaint is appropriate here. In summary, the complaint—

(1) Challenges the legality of licensing agreements between the Columbia Record Club and certain smaller record manufacturers (outside labels) providing for Club distribution.

(2) Accuses Columbia of monopolizing, attempting to and tending to monopolize the entire record industry as well as various claimed submarkets.

(3) Alleges that the Club sells Columbia records and records of the outside labels to consumers at lower prices than dealers pay and that this alleged differential is unfair.

(4) Alleges that the advertising employed by the Club is misleading.

The practices are alleged to be unfair and deceptive and to constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.

Explanatory Notes

Record References—As required by § 3.21(b) (1) of the Commission's Rules of Practice, the findings of fact include references to principal supporting items of evidence in the record. Such references to testimony and exhibits are thus intended to comply with that Rule and to serve as convenient guides to the principal items of evidence supporting the findings of fact. It should be understood that they do not necessarily represent complete summaries of the evidence considered in arriving at such findings. Where reference is made to proposed findings submitted by the parties, such references are intended to include their citations to the record in connection with such proposals.

References to the record are made in parentheses, and the abbreviations used are as described *infra*.

Supplemental Findings—The findings made and conclusions reached by the examiner on certain subjects made it unnecessary for him to discuss in his primary findings certain matters that might be significant if a contrary decision were to be made. For example, the examiner has ruled that it is not appropriate to

consider LPs as a separate market in this proceeding, and findings on such a purported market thus are inapposite.

However, against the possibility that the Commission may take a different view, the examiner has made supplemental findings on such subjects and incorporated them in an Appendix. If the Commission should reverse as to any of such matters, the delay attendant upon a remand for further findings will be avoided.

Abbreviations—Certain abbreviations are used in the course of this initial decision. Commission exhibits are abbreviated *CX*; respondents' exhibits, *RX*. References to testimony ordinarily cite the name of the witness and the transcript page number—for example, Ackerman 4165. Otherwise, the abbreviation "Tr." is used.

Counsel supporting the complaint are ordinarily referred to as Government counsel or the Government, and witnesses called by Government counsel may be referred to as Government witnesses.

The voluminous post-trial submittals of counsel have been necessarily abbreviated. The proposed findings of fact of Government counsel are abbreviated *CPF*, coupled with a paragraph number. The Government's brief is referred to as *Argument*, with page citation, and the Government's reply to respondents' submittals is simply referred to as *Reply*, again with page citations.

The proposed findings of respondents are abbreviated *RPF*, accompanied by a paragraph number. Respondents' exceptions to the proposed findings of the Government are referred to as *Exceptions*. Respondents' main brief is designated *Memorandum* and its reply brief as *Reply Memorandum*.

In Camera Exhibits—In certain of the findings, the examiner has disclosed information contained in exhibits held *in camera*. Such action was taken advisedly and in conformity with the provision of Paragraph III (D) of the examiner's order dated January 2, 1964, entitled "Order Ruling on Requests for *In Camera* Treatment of Documents." That paragraph provided that—

The right of the hearing examiner and the Commission to disclose or use *in camera* material or information to the extent necessary for the proper disposition of this proceeding is specifically reserved.

That reservation was based, in turn, on § 1.133 of the Commission's Statement of *General Procedures* (August 1, 1963). That section provides for confidentiality of evidence *in camera* but recognizes that "its use may become necessary in connection with adjudicative proceedings."

As the examiner interprets the cited provision, *in camera* status does not preclude the examiner or the Commission from disclosing,

in findings or opinions, such data as may be necessary for an adequate and informative exposition of the factual or legal issues involved in a particular proceeding. To the extent that *in camera* material has been published, it was done on that basis.

FINDINGS OF FACT

I. The Phonograph Record Industry

The phonograph record industry is a relatively new industry which began around the turn of the century, following Thomas Edison's invention of the phonograph. When Columbia entered the industry in 1938, total sales to consumers had been in a state of decline for almost two decades. From over \$100,000,000 in 1921, sales had dropped to \$26,000,000 in 1938.

By way of contrast, sales in 1961 had climbed to \$587,000,000 (CX 199b; Lieberson 4774).

In the late Thirties, records were being sold in a relatively small number of retail shops with little active promotion or advertising (Gallagher 8848). Record companies were few in number; even fewer had national distribution (Ackerman 4228).

The industry consisted basically of two companies, Radio Corporation of America (hereinafter referred to as "RCA") and Decca Records, which together accounted for approximately 75% of total sales. RCA was substantially larger than Decca; it had the most extensive classical catalog, contracts with the leading artists and symphony orchestras, and over 90% of classical record sales (Lieberson 4775-80; Chapin 7292-94).

Columbia's entry had its impact. It immediately set out to develop its catalog. In the area of classical music, it began recording works by contemporary composers, entered into agreements with classical artists and orchestras, and in 1940 cut its prices in half. In the field of popular music, Columbia began to discover and develop new talent (Lieberson 4781-85; Miller 7139-42).

Other companies entered the industry in the next decade and retail sales grew, but by the end of the 1940's there were still relatively few record companies, and only six or seven of any stature (CX 199b; Miller 7139, 7144).

Technological Developments

Until 1948, the industry had produced primarily "78s"—records which revolved on a phonograph turntable at a speed of 78 revolutions per minute (r.p.m.). The 78 r.p.m. record was

generally ten to twelve inches in diameter and contained three to four minutes of playing time on each side. In the field of popular music, 78s usually contained one song per side; on the other hand, symphonies and other long classical works, generally packaged in sets or albums, often required five or more separate records. Made of shellac, the 78s were breakable, bulky and heavy (Lieberson 78-79, 4783-84, 4792-93; Marek 1862; CX 192, p. 14; RX 44, p. 24).

Shortly after its entry into the industry, Columbia began experimenting with the development of a long-playing record (hereinafter referred to as the "LP") which operated on a phonograph turntable at a speed of $33\frac{1}{3}$ r.p.m. After years of laboratory research and development, Columbia introduced the LP commercially in 1948.

By turning at a slower speed than the 78 r.p.m. record, the LP provided more playing time. Usually twelve inches in diameter, the LP afforded 25 to 30 minutes of recorded music on each side—or the equivalent of six or more 78s. Made of vinyl, the LP was nonbreakable, lighter, less bulky, easier to store and provided better sound than the 78 r.p.m. shellac record.

The LP, moreover, practically cut the price of recorded music in half. For example, Handel's "Messiah," which formerly required up to eighteen 78 r.p.m. records costing about \$18, became available to consumers on two LPs at half the price; "South Pacific," which sold for about \$8 to \$9 on seven 78s, sold for about half that price on one LP; and a full-length performance of "Aida," which formerly required about thirty 78s, became available on two or three LPs (Chapin 7295-97; Woodell 7063; Lieberson 78-83, 4785-86, 4790-93; Marek 1862; CX 199b).

Columbia immediately offered the LP to all members of the record industry. While many companies began producing this new type of record at once, the innovation was "greeted with shouts of despair in some quarters"—including, apparently, RCA headquarters.

RCA simultaneously had been experimenting with its own long-playing record (hereinafter referred to as the "single"), which turned at 45 r.p.m. and thus also accommodated in a smaller amount of space on one record more music than the 78 r.p.m. record. Like the LP, the single was nonbreakable, lighter and less costly than the 78. The single, generally seven inches in diameter, usually contained three to four minutes of music, or one song, per side.

RCA at first refused to market LPs and, instead, proceeded to record all types of music on singles. To bolster this venture, RCA offered for sale an inexpensive phonograph that could play only 45 r.p.m. records (Liebersen 4786-95; Marek 1886-88; Hammond 7268; Miller 7159-61).

There followed the competitive "battle of the speeds" between 45 and $33\frac{1}{3}$ r.p.m. records. Within a few years, however, Columbia began producing 45s and RCA started to make $33\frac{1}{3}$ s.

Today, most established record companies market records of both speeds; virtually all phonographs are equipped to play both speeds, as well as 78s and sometimes other speeds. Almost every form of recorded music, particularly popular music, constituting the bulk of industry sales, appears on both speeds, as well as on 78s (Liebersen 4789-95).

LPs and singles now account for well over 90% of the industry's output. In 1961, the industry sold, in units, 182,000,000 singles and 173,000,000 LPs.

In addition to 78 r.p.m. records, the industry also produces extended-play records (EPs), which are 45 r.p.m. records seven inches in diameter with about eight minutes, or two songs, per side; seven inch single records revolving at $33\frac{1}{3}$ r.p.m.; and records which revolve at only 16 r.p.m. Moreover, in recent years, considerable repertoire has been issued on prerecorded tapes, in competition with phonograph records (CX 199a; Liebersen 4786-89; Gallagher 8890-94; RX 619b; RX 693, pp. 81-86).

In 1952, Columbia anticipated the development of stereophonic records by its wide distribution of a small phonograph which introduced the concept of sound coming from two places (Liebersen 4795). Stereo was commercially introduced six years later by a small company which had been recently organized (Frey 2005; CX 199b; CX 321; RX 437c; Gallagher 8762-63; Noonan 6854-55). Stereo records provide sound coming from different directions rather than a limited central source as in the case of monaural recordings (Chapin 7297; CX 192, p. 13; RX 41, pp. 18-19). Like the innovation of LPs and singles, stereo has further broadened the market for record buyers (Chapin 7297-98; RX 42, p. 26).

Industry Growth

Although opinions may vary as to the exact causes, it is undisputed that technological advances in the recording art, along with marketing innovations, have significantly broadened consumer interest in records as a medium of home entertainment,

