

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,

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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

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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).

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spondent'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

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

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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-Brace 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"

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(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

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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

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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

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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"
(or "Record") — A phonograph record either seven inches or twelve inches in diameter.
- "Jacket" — A cardboard cover, enclosing an LP, showing the names of the selections and artists, and sometimes depicting the artist.