

Complaint

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IN THE MATTER OF

CONTINENTAL WAX CORPORATION ET AL.

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

Docket. 7351. Complaint, Jan. 6, 1959—Decision, Mar. 29, 1963*

Order requiring Mount Vernon, N.Y., distributors of their liquid "Six Month Floor Wax", also known as "Continental Grip-Kote", to cease representing falsely—in newspaper advertising, by radio and television, and on the product can—that the wax would give six months' satisfactory use on floors, and to cease using "six months" in the trade name of the product.

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 Continental Wax Corporation, a corporation, and Lee Hall, Herbert Heller, and Jack Heller, 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 Continental Wax Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 10 Warren Place, Mount Vernon, New York.

Respondents Lee Hall, Herbert Heller, and Jack Heller 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 advertising, offering for sale, sale, and distribution of a household wax product known as Continental Six Month Floor Wax and/or Continental Grip-Kote to retailers for 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 product, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein

*As amended May 5, 1959.

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have maintained, a substantial course of trade in said product 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 sale of their household wax product, respondents have made certain false and misleading statements with respect to the durability and other characteristics of their product in advertisements contained in newspapers having interstate circulation, as well as over radio stations and television channels having sufficient power to carry over state lines, and further, have made false and misleading representations on the product itself, which product was and is shipped from the places of manufacture in the States of Indiana and New York to various other States of the United States.

Among and typical of the false and misleading statements contained in the said advertisements and representations referred to above, disseminated as hereinabove set forth, but not limited thereto, are the following:

A. Newspaper advertisements

SAVE TIME * * * end weekly waxing drudgery!

SAVE WORK * * * waxings last for *half a year!*

SAVE MONEY * * * a little goes a 6-month way! with 6 month floor wax

* * * * *

The new "living" wax—the world's first and only wax—*guaranteed* Not to Walk Away, Wash Away, Wear Away for SIX FULL MONTHS * * *

* * * The wax with built-in brilliance that keeps your floors shimmering bright for six months at a time! Wax your floors now and to keep them clean all they need for the next six months is just the occasional flick of a damp mop! * * *

B. Radio advertisements

Science announces the world's first and only Six Month Floor Wax.

Now for the first time in history, wax your floors just twice a year. * * *

Whether your floors are hardwood or linoleum, tile or terazzo, just a quick swipe and this new Six Month Floor Wax shines back in an instant, gleaming bright. So why be a slave to your floors? Save work, save time, save money. End weekly waxing once and for all with the wax that's guaranteed not to walk away, wash away, wear away for half a year * * * .

C. Television advertisements

Video

1. EXTERIOR SHOT OF SCHOOL
2. CAN STARTS FROM PINPOINT TO ZOOM UP
3. CAN ZOOMS UP TO FULL FRAME
4. CUT TO SHOT OF CLASSROOM INTERIOR; SUPER: "GUARANTEED FOR 6 FULL MONTHS"

Audio

1. Now—at last—
2. CONTINENTAL
3. SIX MONTH FLOOR WAX—the *living* wax—
4. guaranteed to last for six full months!

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| <p>5. CUT TO SHOT OF KIDS PLAYING IN ROOM</p> <p>6. FLIP TO SCARRED & MARRED TIGHT AREA. BUFFER COMES IN, BUFFS AND KEEPS BUFFING AREA</p> <p>7. PINPOINT ZOOM CAN FROM DEMO AREA, UP TO HALF FRAME: SUPER: "END WEEKLY WAXING"</p> <p>8. LOSE SUPER; ZOOM CAN UP FULL</p> | <p>5. Tests in this classroom proved even thousands of footsteps couldn't destroy SIX MONTH WAX!</p> <p>6. It protects and shines up to <i>six months</i> at a time with just occasional buffing!</p> <p>7. End weekly waxing forever!</p> <p>8. Get SIX MONTH FLOOR WAX today!</p> |
|--|---|

D. Advertisements on product

SIX MONTH FLOOR WAX

won't walk away, wash away, wear away for six full months!

SAVES WORK

Waxings last 6 months

Makers of Famous Six Month Floor Wax . . .

If you follow these simple directions your floors will require rewaxing only twice a year . . . and

YOU NEED NOT WAX AGAIN FOR 6 FULL MONTHS.

PAR. 5. Through the use of the aforesaid statements and other advertisements, respondents represented that their said household wax product will last and be effective for a period of six months, for all of the purposes for which said wax was advertised, or for which floor wax is used by the consumer, including scuff, dirt, and wear resistance; beauty; appearance; gloss; and protection.

PAR. 6. The statements and representations as set forth in the foregoing paragraphs were false, misleading and deceptive.

PAR. 7. In the conduct of their business, 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, 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' product 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.

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

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and of respondents' competitors and 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.

Mr. John T. Walker supporting the complaint.

Bass & Friend of New York, N.Y., for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

JUNE 4, 1962

Continental Wax Corporation, a corporation, Lee Hall, Herbert Heller and Jack Heller, individually and as officers of said corporation, hereinafter called respondents, are charged with falsely advertising their household wax product "Six Month Floor Wax" in violation of the Federal Trade Commission Act. Respondents answered and denied the substantial allegations of the complaint. During the course of hearings, upon motion of counsel supporting the complaint and over the objections of counsel for respondents, the complaint was amended to include allegations particularizing the respects in which it was claimed that respondents' advertising was false and deceptive.

Hearings have been completed and proposed findings of fact, conclusions of law and order have been filed by respective counsel. All proposed findings and conclusions not found or concluded herein are denied. Upon the basis of the entire record the undersigned hearing examiner makes the following findings of fact and conclusions of law, and order based thereon:

FINDINGS OF FACT

1. The respondent Continental Wax Corporation is a corporation organized and doing business under the laws of the State of New York, with its principal office located at 10 Warren Place, Mount Vernon, New York. The respondents Lee Hall, Herbert Heller and Jack Heller are officers of the corporate respondent. They formulate, direct, and control the acts and practices of the corporate respondent, including those found herein. Their address is the same as that of the corporate respondent.

2. The respondents are now, and for several years last past have been engaged in the manufacture, advertising, offering for sale, sale and distribution of liquid floor waxes, including a household liquid floor wax called "Six Month Floor Wax," sometimes called "Continental Grip-Kote," to wholesale distributors and retailers for resale to the public. In the course and conduct of their business, the respondents now cause and for sometime last past have caused their

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liquid floor waxes, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States, and maintain, and for sometime last past have maintained, a substantial course of trade in said liquid floor waxes in commerce, as "commerce" is defined in the Federal Trade Commission Act.

3. In the conduct of their business, and for the purpose of inducing the sale of said "Six Month Floor Wax," respondents have made certain statements and representations with respect to the durability and other characteristics of said "Six Month Floor Wax" in newspaper advertisements having interstate circulation, on radio and television stations having sufficient power to carry over state lines, in printed material attached to the can containing the wax product and on the written guarantee and instructions attached to the metal can containing the "Six Month Floor Wax" (CX-1A).

4. Some of the statements and representations contained in respondents' advertising complained about will be set out herein. CX-1A is a one quart size metal can in which respondents' "Six Month Floor Wax" is marketed and sold. It is also sold in one gallon size cans. On the front and back of the can, CX-1A, are the following statements and representations, among others:

Self-Polishing	Waterproof
CONTINENTAL	
GRIP-KOTE	
for	SIX
all	
types	MONTH
of	
floors	FLOOR WAX
Protects like	
paste wax	
won't walk away, wash away,	
wear away for six full months!	

On the right side of the can, CX-1A, are the following statements and representations:

SAVES WORK
 Waxings last 6 months
 SAVES TIME
 No more floor scrubbing
 SAVES MONEY
 You use *less*
 With Genuine
 Carnauba Wax
 best for hardwood, linoleum,
 rubber, asphalt and vinyl plastic
 tile and terrazzo floors.

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* * * * *

Makers of famous Six Month Floor
Wax, tested and approved in 35 years
of heavy duty professional use.

Below the heading "Directions" on the right side of CX-1A are the following statements and representations:

* * * * *

FOR MARKS, SCUFFS
AND SPILLS

Unlike other waxes, marks, scuffs and spills can be removed easily by damp mopping with cold water. Let dry—rebuff to renew lustre.

NOW WAX ONLY TWICE A YEAR

If, in heavy traffic areas, your floors show signs of wear during the first month or so, they can be "repaired" by damp mopping and then applying an additional light coat of wax to these areas.

Thereafter, damp-mopping will keep your floors clean. And rebuffing, always in the direction from the least towards the most walked on areas—will renew their brilliance.

If you follow these simple directions, your floors can be kept looking like new and, you need not wax again for *six full months*.

The following statements and representations are contained in CX-1B, the guarantee and instruction booklet attached to CX-1A:

10 STEPS To Beautiful Floors

* * * * *

You don't re-wax for 6 months. If you follow these simple steps in caring for your floors, after the first month or so they will require re-waxing only twice a year—with occasional damp-mopping to keep them clean and rebuffing to keep them bright.

5. The following are some of the newspaper advertisements complained about:

WAXWORK COMES JUST TWICE A YEAR with the new Continental Grip-Kote Six Month floor wax. You'll be able to hibernate from waxing whether you're floored by hardwood, linoleum, terrazzo, vinyl, rubber or asphalt tile. This protecting wax will stand up under long walks, repeated washings. Self-polishing and slip-resistant, it needs only an occasional re-buffing to look bright again.

(The above statements and representations are contained in CX-3, a newspaper advertisement which appeared in the Chicago Daily Tribune, issue of Wednesday, March 18, 1959.)

End weekly waxing forever! Amazing Continental Six Month Floor Wax won't walk away, wash away, wear away for six full months—or your money back! Yes, Continental Six Month Floor Wax protects and shines up to six months at a time. Made with costly, imported Carnauba wax, Six Month Floor Wax—the living wax—keeps all types of floors sparkling bright without weekly waxing—an occasional buffing is all the care they need for half a year when you wax the Six Month way. Don't be a slave to your floors—get Continental Six Month Floor Wax today!

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(The above representations were contained in CX-6, newspaper advertisement placed by respondents in the Boston Traveler, issue of Wednesday, February 25, 1959.)

WAX YOUR FLOORS just twice a year with Continental 6-month floor wax!

* * * * *

Now, you can end weekly waxing! Continental 6-month floor wax will shine and protect your floors six months at a time. It's waterproof, self-polishing, slip-resistant. Won't walk away, wash away or wear away for a full half year! Made with costly imported Carnauba wax.

Save Time! No more wax scrub-ups.

Save Work! Waxings last for half a year.

Save Money! You use less—a little goes a 6-month way.

(The above advertisement, CX-20, appeared in the New York Daily News, issue of September 18, 1958.)

CONTINENTAL "GRIP-KOTE"
6 MONTH FLOOR WAX

* * * * *

At last you can wax your floors just twice a year! CONTINENTAL SIX MONTH FLOOR WAX is guaranteed not to walk away, wash away, wear away for six full months—or your money back! SIX MONTH FLOOR WAX, the new *living* wax for your home, frees you from the back-breaking chore of weekly waxing! Now you can wax your floors the SIX MONTH way—and have beautiful, gleaming floors that need just occasional buffing to gleam mirror-bright for the next six months! Don't be a slave to weekly waxing! Get

CONTINENTAL SIX MONTH
FLOOR WAX today!

(The above advertisement, CX-30, appeared in the Baltimore Evening Sun, issue of Wednesday, February 18, 1959.)

6. Among some of respondents' radio advertising complained about are the following:

Imagine! Just an occasional buffing is all they need till 1959. You see, unlike many synthetic resin type waxes that wear away or crack and must be replaced every few weeks, the protective brilliance of Continental Six Month Wax is easily renewed with a buffing cloth. Continental is a new living wax for home use that keeps floors shimmering bright for half a year. So end weekly waxing drudgery. Wax your floors now the Continental Six Month way then don't wax again till next year.

(The above advertisement, CX-35, appeared on Radio Station WINS, New York, New York, on or about August 21, 1958.)

Now for the first time in history, wax your floor just twice a year. Yes, self-polishing Continental Grip Coat is guaranteed to protect and shine for six months at a time. Imagine! A new waterproof carnauba floor wax so tough it actually laughs at spots, spills, scuffs, streaks and stains.

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(The above advertisement, CX-36, was a two minute "spot" announcement which appeared on Radio Station WCBS, New York, New York, on, or about August 21, 1958.)

7. The following statements and representations were contained in television advertisements sponsored by respondents:

VIDEO

1. EXTERIOR SHOT OF SCHOOL
2. CAN STARTS FROM PINPOINT TO ZOOM UP
3. CAN ZOOMS UP TO FULL FRAME
4. CUT TO SHOT OF CLASSROOM INTERIOR; SUPER: "GUARANTEED FOR 6 FULL MONTHS"
5. CUT TO SHOT OF KIDS PLAYING IN ROOM
6. FLIP TO SCARRED & MARRED TIGHT AREA. BUFFER COMES IN, BUFFS AND KEEPS BUFFING AREA.
7. PINPOINT ZOOM CAN FROM DEMO AREA, UP TO HALF FRAME; SUPER: "END WEEKLY WAXING"
8. LOSE SUPER; ZOOM CAN UP FULL

AUDIO

1. Now—at last—
2. CONTINENTAL
3. SIX MONTH FLOOR WAX—the *living* wax—
4. guaranteed to last for six full months!
5. Tests in this class room proved even thousands of footsteps couldn't destroy SIX MONTH WAX!
6. It protects and shines up to six *months* at a time with just occasional buffing!
7. End weekly waxing forever!
8. Get SIX MONTH FLOOR WAX today!

(The above was received in evidence as CX-34 and is a twenty second television film commercial.)

VIDEO

MS JINX

HOLDS PRODUCT

TILT DOWN TO FLOOR

ON JINX

AUDIO

JINX: Hello. I'm Jinx Falkenburg and I've got a secret that's just too good to keep.

Continental Six Month Floor Wax. It's an amazing new self-polishing wax that protects and shines for up to six months at a time. Longer than even the costliest paste waxes.

Scuffs, streaks and stains disappear with just a flick of a damp mop. Continental actually renews itself without rewaxing.

It never turns yellow, never gives your floors that tarnished look. Your floors stay "brand new looking" month after month. Use Continental and you'll enjoy the six most carefree months of your life.

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VIDEO

PRODUCT STARTS PINPOINT ON GLEAMING FLOOR. RAPIDLY PULLS OUT TO FULL SCREEN.

ANIMATION: WORDS "WON'T WALK AWAY, WASH AWAY, WEAR AWAY FOR SIX FULL MONTHS" PULL OUT TO SCREEN CENTER AND MOVE UP.

SUPER: HARDWOOD, LINOLEUM, TILE OR TERRAZZO.

TURN CAN BOLD PRINT: "END WEEKLY WAXING" "NOW WAX ONLY TWICE A YEAR."

TURN CAN BOLD PRINT:
SAVE WORK
SAVE TIME
SAVE MONEY

CU PRODUCT CLEAN

(The above is CX-68, a television one minute "spot" announcement.)

FS SHOT OF DOOR. DOOR STARTS TO SWING OPEN AS CAMERA DOLLYS THRU.

WAIST SHOT OF JINX. SHE HAS MOP HANDLE IN HAND AND IS MAKING MOVEMENTS THAT COULD BE TAKEN FOR WAX APPLYING

JINX STOPS MOVEMENT. TALKS TO CAMERA

ON JINX

PICKS UP PIGGY BANK.

PRODUCT STARTS PINPOINT ON GLEAMING FLOOR. RAPIDLY PULLS OUT TO FULL SCREEN.

AUDIO

TEX: (V.O.) Only Continental—The self-polishing, six-month floor wax, guarantees it won't walk away, wash away, wear away for half a year or your money back. Perfect for all types of floors.

So end weekly waxing once and for all! Now, wax your floors just twice a year.

Save work—save time—save money.
Give your floors a six month shine.

Get Continental, the world's first and only Six Month Floor Wax—TODAY!

TEX: (V.O.) This is Tex. Here's Jinx.

Oh—oh. The weekly waxing grind?

JINX: Heavens, no. I only wax my floors twice a year. You see, I use Continental Six Month Floor Wax. An amazing new water-proof Carnauba wax that actually renews itself without rewaxing. Just look at these scuffs and stains left over from the children's party. But with just a flick of a damp mop, my floors gleam right back.

Our floors never get that dingy look. And talk about economy! Why, just one quart of Six Month Wax outlasts up to 6 quarts of ordinary wax.

and that's just like money in the bank.

ANXR: (V.O.) Only Continental—the self-polishing six month floor wax;

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VIDEO

ANIMATION: WORDS "WON'T
WALK AWAY, WASH AWAY,
WEAR AWAY FOR SIX FULL
MONTHS" PULL OUT TO SCREEN
CENTER AND MOVE UP.

SUPER: HARDWOOD, LINOLEUM,
TILE OR TERRAZZO

TURN CAN BOLD PRINT: "END
WEEKLY WAXING" "NOW WAX
ONLY TWICE A YEAR"

TURN CAN BOLD PRINT:
SAVE WORK
SAVE TIME
SAVE MONEY

ON PRODUCT CLEAN

AUDIO

Guarantees it
won't walk away, wash away, wear
away for half a year or your money
back.

Perfect for all types of floors.

So end weekly waxing once and for
all! Now, wax your floors just twice
a year.

Save work—save time—save money.

Give your floors a six-month shine.

Get Continental, the world's first and
only Six Month Floor Wax—TODAY!

(The above is CX-69, a television one minute "spot" announcement.)

8. During the hearings, upon motion of counsel supporting the complaint and over the objection of counsel for respondents, the original paragraphs 5 and 6 of the complaint were deleted and the following substituted:

PARAGRAPH FIVE: Through the use of the aforesaid statements and other advertisements, respondents represented that their said household wax product will last and be effective for a period of six months, for all of the purposes for which said wax was advertised, or for which floor wax is used by the consumer, including scuff, dirt, and wear resistance; beauty; appearance; gloss; and protection.

PARAGRAPH SIX: The statements and representations as set forth in the foregoing paragraphs were false, misleading and deceptive.

9. It is the contention of counsel supporting the complaint that, through the use of the statements and representations quoted in paragraphs 4, 5, 6, and 7 hereof, respondents represented that said "Six Month Floor Wax" will last and be effective for a period of six months for all the purposes for which said wax was advertised, or for which floor wax is used by the consumer, including scuff, dirt and wear resistance; beauty; appearance; gloss and protection. Further, the complaint alleges and Commission counsel contends that these statements and representations are false and deceptive for the reason that "Six Month Floor Wax" will not last and afford an effective coating of wax for a period of six months for all the purposes for which said wax was advertised or for which floor wax is used by the consumer, as alleged in Paragraph 5 of the amended complaint.

10. A reasonable and fair interpretation of the quoted statements and representations made by respondents in their advertising demonstrate that respondents have represented to the public that an effective

coating of "Six Month Floor Wax" will remain on the floor for a period of six months after application. In numerous advertisements in newspapers and on radio and television, some of which are quoted in paragraphs 4, 5, 6 and 7 hereof, this representation is made without qualification. No mention is made that the floor must be cleaned from time to time by sweeping, damp-mopping with a solution of "Six Month Floor Wax" and water, and then re-buffed. In fact, these particular advertisements emphasize to the public that, by using "Six Month Floor Wax" the housewife can eliminate weekly floor cleaning and re-waxing forever. It having been found that respondents have represented that "Six Month Floor Wax" will provide an effective coating of wax for a period of six months after application, the next question to decide is, is this statement true? Will "Six Month Floor Wax" provide an effective coating on the average household floor for a period of six months after its application? Commission counsel claims that it will not. Respondents contend that it will provide an effective coating for a period of six months.

11. The testimony of each of the witnesses who testified in support of and in opposition to the allegations in the complaint will not be separately discussed. Some of the expert witnesses who testified in support of the complaint were in the employ of competitors of respondents who, according to some of the exhibits received in evidence, have made advertising representations concerning their own products of a similar nature to those complained about in this proceeding. The fact that respondents' competitors may have made similar representations concerning the performance characteristics of their own floor waxes does not excuse respondents for any deceptive practices shown and found herein. However, the circumstance that these witnesses were in the employ of competitors of respondents and, in their demeanor and testimony, appeared to this hearing examiner to be biased and prejudiced against respondents and the performance characteristics of "Six Month Floor Wax," does have a bearing on their credibility and the weight to be given their testimony. These factors are being taken into consideration in this decision. Also, some of these witnesses testified concerning purported comparative tests which they had made of "Six Month Floor Wax" and other competitive waxes. Some of these tests were slanted in favor of the competitive wax or waxes. The standards set up for some of the tests were so selected that the results thereof did not reflect a true comparison of respondents' "Six Month Floor Wax" with the other waxes used in the tests. In other words, the results reflected a false superiority of the other waxes over "Six Month Floor Wax." Nevertheless, upon consideration of the entire record, including the testimony of other witnesses, the hearing exam-

iner finds that "Six Month Floor Wax" will not provide an effective coating of wax on the average household floor for a period of six months after application, as respondents have represented it will do.

12. Respondents also contend that their representation that "Six Month Floor Wax" will provide an effective coating of wax on the floor for a period of six months is not false and deceptive as alleged because of respondents' maintenance instructions printed on the can (CX-1A) and in the guarantee (CX-1B) attached to the can. These instructions are, when the waxed floor becomes dirty or scuffed, the floor should be swept, then damp-mopped with a 10% solution of "Six Month Floor Wax" and water, and then re-buffed. As stated in paragraph 10 hereof, irrespective of these instructions, much of respondents' advertising omits any reference whatsoever to maintenance and unequivocally represents that "Six Month Floor Wax" will provide an effective coating of wax on the floor for six months after application and no re-waxing will be necessary. Also, there is evidence to the effect that, even if respondents' maintenance instructions are followed by sweeping, damp-mopping with a 10% solution of "Six Month Floor Wax" and water, and then re-buffed, this will not always remove the dirt and scuff marks. Therefore, it is found that said statements and representations are false and deceptive, as alleged in the complaint.

13. Respondents also contend that the evidence adduced on behalf of the Commission with respect to the lasting qualities of respondents' "Six Month Floor Wax" relates to a different "Six Month Floor Wax" from that now being sold and distributed by respondents. This is so, say counsel for respondents, because the formulation of "Six Month Floor Wax" which has been manufactured and sold by respondents since March 1960, is a different formulation from the first and second formulations of "Six Month Floor Wax" which had been manufactured, distributed and sold by respondents. Respondents say that the first formulation of respondents' "Six Month Floor Wax" was manufactured and distributed from approximately 1956 until the end of 1958; the second formulation began to be manufactured, distributed and sold during December of 1958 or January 1959, and continued until March 1960, when the present formulation of "Six Month Floor Wax" began to be produced, distributed and sold by respondents. Respondents further say that neither the first nor second formulation of "Six Month Floor Wax" has been manufactured or distributed since March 1960, and the only evidence presented by counsel supporting the complaint with respect to the performance characteristics of "Six Month Floor Wax" relates to either the first or second formulations. Counsel for respondents say that none of the evidence offered by Commission counsel involved the current or third formulation of "Six

Month Floor Wax." Therefore, respondents argue, there was no evidence offered by counsel supporting the complaint as to the performance characteristics of the present formulation of "Six Month Floor Wax" from which it can be determined whether or not respondents' advertising and trade name is false and misleading; the only evidence in this respect, they contend, being the testimony of respondents' consumer witnesses who purchased "Six Month Floor Wax" after March 1960 and the testimony of the plant manager and chief chemist of the corporate respondent, Abraham Ashkin. Even assuming this to be true, it is no defense to the allegations in the complaint. If it were so held, any false advertiser could change the formula of his product from time to time and thus insulate himself from successful prosecution of proceedings instituted under Section 5 of the Federal Trade Commission Act.

14. It should also be pointed out that several consumer witnesses who testified on behalf of respondents testified concerning their use of and the performance characteristics of a floor wax manufactured and sold by respondents under the trade name "Continental 18." "Continental 18" is an industrial wax manufactured and sold by respondents for use in private and public office buildings, schools, hospitals, auditoriums, and indoor areas accustomed to heavy pedestrian traffic. The evidence shows that "Continental 18" is a heavier and longer lasting wax than "Six Month Floor Wax" and contains more expensive ingredients than "Six Month Floor Wax." Consequently, the two waxes are not comparable and "Continental 18" is not competitive with respondents' "Six Month Floor Wax" or other household liquid floor waxes. Therefore, the testimony of the consumer witnesses concerning the performance characteristics of "Continental 18" is not applicable to "Six Month Floor Wax."

15. The evidence shows that "Six Month Floor Wax" is a water emulsion self-polishing household liquid floor wax with performance characteristics similar or superior to competitive household liquid floor waxes, depending on the standards or criteria set for comparison. In any event, respondents' trade name "Six Month Floor Wax" and their advertising claims have the tendency to deceive a substantial portion of the purchasing public into the mistaken belief that "Six Month Floor Wax" will last for six months, when such is not the fact and to purchase substantial quantities of "Six Month Floor Wax" by reason of said mistaken belief. As a consequence, substantial trade in commerce has been, and is being unfairly diverted to respondents from their competitors and substantial injury has been and is being done to competition in commerce.

16. There remains the question of the appropriate remedy, if any,

with respect to the use of the words "Six Month Floor Wax" in the corporate respondent's trade name. As announced by the Supreme Court in *Federal Trade Commission v. Royal Milling Co., et al.*, 288 U.S. 212 [2 S. & D. 217] and *Jacob Seigel Co. v. Federal Trade Commission*, 327 U.S. 608 [4 S. & D. 476] a trade name should not be excised if a less drastic remedy will prevent the deception. In view of the finding herein that corporate respondent's use of the words "Six Month Floor Wax" in its trade name is deceptive, is there any change or modification in the trade name "Six Month Floor Wax" short of excision which will prevent the deception complained about? Qualifying words could be added to the trade name "Six Month Floor Wax," such as "Will not last for six months," or "Will last for one month," but this would not mitigate the confusion. The corporate respondent is already using the words "Continental Grip-Kote" on the can (CX-1A) as a part of its trade name, although in less prominent lettering than "Six Month Floor Wax." In the opinion of this hearing examiner, deception in corporate respondent's trade name can only be remedied by the complete excision of the words "Six Month Floor Wax."

CONCLUSION

The acts and practices of respondents as found herein are all to the prejudice and injury of the public and respondent's competitors and 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.

ORDER

It is ordered, That respondents, Continental Wax Corporation, a corporation, and its officers, and Lee Hall, Herbert Heller and Jack Heller, individually and as officers 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 the household liquid wax "Six Month Floor Wax," also known as "Continental Grip-Kote," or any other product of substantially similar composition or possessing similar properties, whether sold under the same name or any other name, forthwith cease and desist from:

1. Representing, directly or by implication, that said household liquid floor wax will last for a period of six months or for any other definite period of time which is in excess of that for which said wax product is usually and customarily effective, for any and all of the purposes for which liquid floor waxes are ordinarily used.

2. Using the words or term "six month" or any other words or term denoting a definite period of time, in the trade name, to designate or describe the household liquid wax product, which is in excess of that for which said product is usually and customarily effective.

OPINION OF THE COMMISSION

By ANDERSON, *Commissioner*:

This matter is before the Commission for consideration of respondents' exceptions to the hearing examiner's initial decision holding them to have violated the Federal Trade Commission Act. Respondents, a corporation and three of its officers, are charged by the complaint with false advertising of a household floor wax sold under the trade names "Six Month Floor Wax" and "Continental Grip-Kote."

In his proposed finding of fact submitted to the hearing examiner, counsel for respondents avers: "The sole issue is whether six-month wax will last for six months." Hearings to resolve this "sole issue" produced approximately 2,300 pages of testimony. More than 200 exhibits were introduced into evidence with most of them having multiple pages, so the documentary evidence alone equals approximately 1,000 pages.

All of the hearing examiner's findings and conclusions with respect to this factual issue are contained in paragraph 11 of the initial decision. In this paragraph the hearing examiner advises that the testimony of the witnesses "will not be separately discussed"; that some of the witnesses who testified in support of the complaint were in the employ of respondents' competitors and appeared to be biased and prejudiced against respondents and their product; and that the tests conducted by these biased witnesses of the respondents' wax and their own products showed a false superiority of the other waxes over respondents' product. All of the thousands of pages of testimony and documents dealing with the sole factual question involved in this proceeding are disposed of in the following sentence: "Nevertheless, upon consideration of the entire record, including the testimony of other witnesses, the hearing examiner finds that 'Six Month Floor Wax' will not provide an effective coating of wax on the average household floor for a period of six months after application, as respondents have represented it will do."

This is, of course, not a factual finding at all but the broadest type of conclusion which is of no value whatsoever to the parties and to the Commission. No one can tell what evidence was relied upon and, except for the reference to the unidentified biased competitor witnesses, we have no clue as to which evidence was disbelieved. But

certainly at some stage in this proceeding someone must make factual findings on the lone factual issue and this task now falls upon the Commission.

Before embarking on an attempt to discover whether the record evidence establishes either that "Six Month Floor Wax" will or will not "last" for six months, it is necessary to define the issue with more exactness. The first question to be determined is just what did the respondents represent their product would accomplish or, stated another way, how would the consuming public interpret the representations made by the respondents. The complaint alleges in Paragraph 5 that the respondents had represented that their "* * * product will last and be effective for a period of six months, for all of the purposes for which said wax was advertised, or for which floor wax is used by the consumer, including scuff, dirt, and wear resistance; beauty; appearance; gloss; and protection."

This would appear to be a correct interpretation of the representations made by the respondents in their advertising. Approximately seven and one-half pages of the initial decision are devoted to quoting the respondents' advertising and there is no need to set out any of it here. Suffice it to say, we feel that the record establishes beyond question that the respondents have represented that six month floor wax will perform all of the functions for which a floor wax is normally purchased and used and will continue to perform these functions for a period of six months of normal household use.

Respondents' counsel contends, and the record supports him therein, that consumers purchase wax for the two purposes of beautification and protection. There is some argument between the parties as to which is the most important function in the mind of the purchasing consumer and there is record evidence on both sides of this question, but we see no reason or necessity to resolve this satellite issue, for we are sure that both factors are of importance to most consumers. There can be no doubt that respondents' advertising recognizes the consumer desire for both faculties since it stresses both protection and beauty.

And as we view it, the two factors of appearance and protection cannot be neatly segregated one from the other, for certainly few home owners would tolerate a dirty, scuffed and heel-marked floor even though the wax applied thereto was still present and affording protection. This record establishes beyond question that a certain amount of the dirt tracked in upon shoes becomes imbedded in the wax covering on a floor in such a manner that it is physically impossible to remove it without removing the wax. The record also shows that certain types of scuff marks, such as those made by composition or rubber soles and heels, will, on occasion, mar the floor even though a coating of wax is

present. These marks cannot be removed without removing the coat of wax. Thus, the record clearly shows and, as a matter of fact, the respondents' attorney conceded in oral argument before us, that a floor subjected to normal use will not maintain its beauty for six months under a coating of six month floor wax. Thus, the only question left to be decided is whether six month floor wax will afford protection to a floor for a period of six months.

The record contains the results of numerous tests conducted upon respondents' product. The tests were conducted in both research laboratories and in the homes of consumers. For the most part they were concerned with the wax's appearance after periods of use and were usually terminated when the wax no longer had a suitable appearance because of ground-in dirt, streakiness or scuff marks. However, several tests and a good deal of the testimony did concern itself with the durability of the respondents' wax as an effective floor-protecting agent. We turn now to a brief examination of this evidence.

Most of the tests conducted on respondents' product involve subjective analysis of the test results by persons experienced in such evaluations. Sections of flooring were covered with wax and subjected to varying degrees of wear, either from actually being walked upon or by a mechanical device designed to simulate wear. At the conclusion of the wearing period the experts examined the flooring and rendered their opinion as to its degree of gloss, the amount of dirt impregnated in the wax, the number of scuff marks and the amount of wax remaining on the surface. Of course, evaluations of this kind are subject to human error and experts can, and do, differ in their opinion as to the results of a test. However, the durability of a wax, that is, the length of time and the amount of wear which the wax will stand before it is completely eroded away by footprints, can be measured quite accurately by a radioactive isotope test. In this test the wax itself is impregnated with radioactive Carbon 14. The wax is then applied to the floor in the normal fashion and subjected to a measured amount of wear. It is possible to fairly accurately tell how much wax has been eroded away by taking periodic Geiger counter readings of the wax surface. The results of two tests of this type conducted on respondents' product are contained in this record. One of the tests was conducted by Franklin Research Company, a manufacturer of floor maintenance materials primarily for the industrial trade; the other was conducted by York Research Corporation, an independent testing laboratory.

The York laboratory tests was conducted at the instance of, and paid for by, the respondents. Both complaint counsel and respond-

ents' counsel placed copies of the results of this test in evidence and each finds support for his contentions in it. Such a versatile document deserves close scrutiny and attention.

The York test, conducted in the summer and fall of 1958, was supervised by the president of York Research Corporation, Mr. Warren C. Hyer, who was called as a witness to explain it. The test was conducted in an area of heavy traffic flow in the York laboratory. The test floor tiles were thoroughly cleaned and then coated with "Six Month Floor Wax" impregnated with a radioactive isotope of Carbon 14. The test area was then exposed to normal traffic for a period of five weeks. It was damp-mopped and hand-buffed once a week. A photoelectric counter determined the number of passes, *i.e.*, people walking or passing over the area. The counter indicated a traffic density of approximately 6,000 passes per week. At the end of each week, the radioactivity, and, hence, the amount of wax remaining, was measured by a Geiger counter. After five weeks the test was discontinued "because the radioactivity count was approaching the background level." The witness Hyer testified that at the end of the five-week period more than 96 percent of the wax had worn away.

All of this part of the test results would appear to be perfectly clear. It would seem that practically all of the wax had been eroded by 6,000 passes or walkovers per week during a five-week period. But the conclusions drawn by the testing laboratory seem to be in irreconcilable conflict with the test result itself. It is stated that the test area was subjected to traffic which was roughly equivalent to one year of home use. The mathematics leading to this conclusion are, at best, obscure. The "conclusions" section of the test advises that investigations by the laboratory show that the floor in the average home of a typical family of four persons will be subjected to 600 passes per day. According to this section of the test, the test floor was subjected to 40,000 passes during the five-week period.¹ When we divide 600 passes into 40,000 we get a quotient of 66 days. Thus, using the test conclusions' questionable figures, it would appear that 96 percent of the wax was eroded after a little more than two months of normal household wear.

In the last paragraph of the test conclusions, it is stated that the original wax coating would be left on the test area for a period of six months from the time of original application and that observations would be made at the end of this period. For a reason unexplained, the test was not continued for an additional five months but for merely one additional month. At the end of this time the area had been sub-

¹ The conflict between 6,000 passes for five weeks, totaling 30,000 passes, and the conclusions' 40,000 passes is unexplained in the test results or the testimony.

jected to an additional 26,000 passes, for a total of 66,000. It is concluded in an addendum to the original test results that there was sufficient wax remaining on the floor to produce a satisfactory luster when buffed with a commercial floor machine. If we again use 600 as the average number of passes to which the floor in an average home is subjected, it would appear that the test area was subjected to the equivalent of 110 days of home use. We can attach little significance to the witness Hyer's conclusion that the test floor was subjected to an amount of wear equivalent to home use "of from six months to one year" for this conclusion is in direct conflict with the test figures which show that the area was at the most subjected to the equivalent of 110 days of home wear. Moreover, the witness' testimony is inconsistent with the flat statement in the test conclusions (signed by him) that after only five weeks of wear the area was subjected to traffic "roughly equivalent to one year of home use."

It is our conclusion that this test shows conclusively that six month floor wax will not last on the floor of an average home for a period of six months but will be worn away in substantially less time. This conclusion is supported by the other radioactive isotope test conducted by Franklin Research Company. That test was conducted under circumstances roughly equivalent to the York test except that the test floor was subjected to only 5,000 passes or walkovers. At the conclusion of that period of wear (equivalent to less than 9 days of home wear), approximately 43 percent of the wax had been worn away. The witness who testified concerning that test stated that he knew of no other accurate method to determine the amount of wax physically removed from a floor by wear.

The radioactive isotope test we just described constitutes the only evidence in the record from which it can be definitely found that a stated amount of wax was removed from the floor by a stated amount of wear. All of the other evidence is concerned with the appearance of a floor after a measured amount of wear. As we stated at the outset, it is impossible to completely divorce appearance from durability in this field, for once a floor becomes unsightly the housewife must refurbish it whether wax remains thereon or not. Thus, several tests were conducted and continued until the point where the wax, in the opinion of the witnesses (housewives or experts), was no longer satisfactory. For example, Consumers Union, a nonprofit organization providing information to consumers on a wide variety of products, conducted a wear test in which the wax was subjected to only 3,000 walkovers. Mr. Morris Kaplan, the technical director of Consumers Union, testified that it was his opinion, based on the results of this test, that "Six Month Floor Wax" would not have a durability of six

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months under normal circumstances. Mr. Kaplan admitted that the test conducted by Consumers Union would not give a definitive finding that wax would not remain on the floor for six months. But he concluded that since, after the relatively mild tests to which it was subjected, the "degree of streakiness was poor, the degree of scratching resistance was poor, and the degree of scuffing resistance was poor and the general appearance was poor," that the function of the wax in protecting the floor and in providing a generally good appearance "had been seriously impaired" at the conclusion of the test. Another witness from Consumers Union, Dr. Ashton M. Lyon, who held a Ph.D. in chemistry, supported Mr. Kaplan's opinion, testifying, "My opinion is that on the basis of all the factors observed in our traffic performance test, that it was unlikely that it would be a satisfactory floor wax film at the end of six months."

At the instance of one of respondents' competitors, the Foster D. Snell Corporation, an independent testing laboratory, conducted a "household use" test of six month floor wax. Mr. Daniel Schoenholz, Director of the Product Development Department of the Snell laboratory, testified concerning the test. In the Snell test, 12 housewives were asked to clean their floors, apply "Six Month Floor Wax" and to notify the Snell laboratory when the floors required rewaxing. Within 40 days all of the housewives had notified the laboratory that the floor was no longer satisfactory. The median time the wax endured as an acceptable covering was 15 days. The principal reasons for dissatisfaction with the floor wax were that it had become impregnated with dirt, had heel marks and had lost its gloss.

For the most part, respondents based their defense upon the testimony of consumer-user witnesses. Quite a few of the witnesses had not used respondents' consumer brand of "Six Month Floor Wax" but had used one of respondent's industrial waxes made from a different formula. Several of the consumer witnesses did not testify concerning the use of "Six Month Floor Wax" in the home but described its performance in public buildings such as churches, schools, barber shops and stores. There is no way to determine the amount of traffic to which the wax was subjected in these places and there is nothing in the testimony which would support a finding that "Six Month Floor Wax" would endure as an effective floor covering in a home for six months. Several of the witnesses did testify that the wax was used in the kitchens of their homes, but this evidence too is unconvincing on the question of the durability of the wax. For example, one witness in Kansas City testified that she used it on the kitchen in a home but when asked how long the wax endured, she replied, "Well, I waxed the kitchen every three or four months and then wiped it up with cool

water in between. So actually just how long I had that on there I don't know."

It is the Commission's conclusion, based on all of the evidence adduced in this record, that Continental's "Six Month Floor Wax" will not endure for six months as a satisfactory covering of a floor subjected to the typical wear of an average home. Thus we find that all of the factual allegations of the amended complaint have been established by probative and substantial evidence.

The respondents' principal objection to the order proposed by the hearing examiner concerns the injunction against further use of the trade name "Six Month Floor Wax." It is contended that the Commission is without power to enjoin the further use of this name since the complaint does not specifically charge that the trade name itself is false and deceptive. This argument seems to conflict with the plain facts. Paragraph 4 of the complaint plainly includes the name "SIX MONTH FLOOR WAX" as "among and typical of the false and misleading statements" disseminated by the respondents. But aside from this fact which, as we see it, is in itself fatal to respondents' contention, we would certainly not hesitate to enjoin the future use of this trade name even if the complaint did not specifically charge it as deceptive. This is more than a trade name; it is an allegation concerning the performance of a product. It would certainly be anomalous to prohibit the respondents from representing that their wax would endure as an effective floor covering for six months and permit them to continue referring to it as "Six Month Floor Wax." Certainly, we recognize the continuing viability of the rule announced in *Federal Trade Commission v. Royal Milling Co.* (288 U.S. 212, 217) [2 S. & D. 217] that trade names should not be ordered excised "* * * if less drastic means will accomplish the same result." But, as the hearing examiner correctly pointed out, it is impossible to qualify the representation "Six Month Floor Wax" without directly contradicting it and thus any qualification would produce additional confusion.

The desired result of affording complete protection to the public from the misrepresentations promulgated by the respondents can only be obtained in this instance by complete eradication of the name "Six Month Floor Wax".

The record reveals that respondents have made two changes in the formula from which the wax is produced. The first formulation was manufactured and distributed from 1956 through 1958. Most of the evidence in the record, including the isotope tests, is concerned with this formulation. The second formulation was distributed from the last month in 1958 or the beginning of 1959 until March 1960. In March 1960, a second change was made in the formula and so far as

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the record reveals the product today produced and sold is made from this latest formula. It is respondents' contention that the order to cease and desist is founded upon evidence dealing with the performance of waxes which they no longer produce and that the only evidence with respect to the performance of its present product shows that the product will endure on a floor for six months. The evidence to which the respondents allude consists of the testimony of consumer users residing in the New Orleans, Louisiana, area. It is our view that this testimony will not support respondents' contention concerning the durability of their wax, and, further, there is no probative evidence in this record to support a conclusion that the longevity of respondents' product was improved by the changed formula. As a matter of fact, there is expert testimony in the record from the respondents' chemist who originated the "Six Month" formula to the effect that the first change in the formula decreased the effective life of the product. And, further, there is no showing in this record that the consumers who testified in New Orleans had actually used wax produced from respondents' latest formula.

As the initial decision points out, the Commission's right to enjoin false advertising of a product cannot be foreclosed by a midstream change in the product itself. Were we to hold otherwise, a loophole or escape hatch of gigantic proportions would be created. Certainly the Commission does not intend that its order be operative against products which are substantially unlike the product whose advertising the evidence reveals to be false and misleading. If, in fact, the respondents' current product is completely unlike the "Six Month Floor Wax" with which the evidence in this record deals and it will effectively endure for six months, then the order is inoperative with respect to it, for respondents would have a complete defense in an enforcement proceeding. But, on this record, the respondents have not established that their current product differs in any material respects from their earlier products and we consider the order as applicable to all of respondents' waxes.

With the exception of its failure to make factual findings on the effective life of respondents' product, the initial decision is adequate and, as supplemented by this opinion, will be adopted as the decision of the Commission.

Commissioner Elman concurring in the result.

FINAL ORDER

This matter having been heard by the Commission upon respondents' exceptions to the hearing examiner's initial decision and upon briefs and oral argument in support thereof and in opposition thereto; and

Complaint

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The Commission having rendered its decision ruling on respondents' exceptions:

It is ordered, That respondents' exceptions to the initial decision be, and they hereby are, denied.

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

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