

Syllabus

IN THE MATTER OF

ISIDORE HALPERIN AND MORRIS ORENSTEIN TRADING
AS WELLWORTH SALES COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3470. Complaint, June 30, 1938—Decision, June 30, 1941*

Where two individuals engaged in the competitive interstate sale and distribution of watches, cameras, china and silverware, clocks, cigarette lighters, jewelry, cosmetics, bedding, kitchenware, and other articles of merchandise—

- (a) Made use of sales plan or method involving distribution of advertising or sales circulars and pull cards to prospective customers or representatives to induce them to sell said merchandise by means of a game of chance, gift enterprise, or lottery scheme, under a plan by which the particular article of merchandise received by customer and price paid therefor were determined and disclosed by pull card tab selected and detached by him, and operator of card, after selling all articles listed thereon and remitting amounts charged therefor to said individuals, who thereupon shipped him the merchandise thus sold, was compensated by an article which they included for him as a premium, or at his option, by deduction of cash premium from amount remitted; and thus, notwithstanding inconsistent and subterfuge "NOTICE TO PURCHASERS" on said pull tab device, advising customer of privilege of buying given article at price shown, or declining it,—

Supplied to and placed in the hands of others means of conducting lotteries in the sale and distribution of their said merchandise in accordance with aforesaid sales plan, involving game of chance to procure an article of merchandise at much less than its normal price, contrary to established public policy of the United States Government and in violation of criminal laws, and in competition with many who, unwilling to use such or other method contrary to public policy, refrain therefrom;

With result that many persons were attracted by their said sales method and by the element of chance involved therein and were thereby induced to buy and sell their merchandise in preference to that of their said competitors, whereby trade was unfairly diverted from such competitors to them;

- (b) Made such false and misleading representations and statements in aforesaid advertising circulars as "Free gifts—valuable premiums without cost to you" and "Two extra surprise gifts free"; facts being that none of their articles of merchandise designated as premiums or gifts was given away "free," but instead was delivered as compensation for services rendered; the price thereof was included in that of other articles of merchandise which representatives had to sell, or procure the sale of, before receiving such premiums or gifts; and, for a number of premiums, certain sums of money had to be paid in addition to services rendered; and
- (c) Made such false and misleading representations and statements therein as "42 pce. well-known silver tableware"; when in fact their merchandise designated as "silver tableware" was not made of solid silver, but of metal plated with silver;

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With capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that such representations were true and into the purchase of substantial quantities of their products as a result of such erroneous belief, whereby trade was unfairly diverted from their competitors to them:

Held, That such acts and practices were all to the prejudice and injury of the public, and their competitors, and constituted unfair methods of competition in commerce.

Before *Mr. Randolph Preston*, trial examiner.

Mr. D. C. Daniel and *Mr. L. P. Allen, Jr.*, for the Commission.

Nash & Donnelly, of Washington, D. C., and *Mr. Arthur D. Herrick*, of New York City, for respondents.

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 Isidore Halperin and Morris Orenstein, individually and trading as Wellworth Sales Co., hereinafter referred to as respondents, have violated the provisions of the said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents, Isidore Halperin and Morris Orenstein, are copartners trading under the name of Wellworth Sales Co., with their principal office and place of business located at 46 East Broadway, New York, N. Y. Respondents are now, and for some time last past have been, engaged in the sale and distribution of watches, cameras, china and silverware, clocks, cigaret lighters, jewelry, cosmetics, bedding, kitchenware, and other articles of merchandise, in commerce between and among the various States of the United States and in the District of Columbia. Respondents cause and have caused said products when sold to be shipped or transported from their place of business aforesaid to purchasers thereof in the various States of the United States and in the District of Columbia, at their respective points of location. There is now, and has been for some time last past, a course of trade by said respondents in such merchandise in commerce between and among the various States of the United States and in the District of Columbia. In the course and conduct of said business, respondents are in competition with other individuals and partnerships and with corporations engaged in the sale and distribution of similar or like articles of merchandise, in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of their business, as described in paragraph 1 hereof, respondents sell and distribute said articles of merchandise by means of a game of chance, gift enterprise, or lottery scheme. The respondents distribute or cause to be distributed to representatives and prospective representatives certain advertising literature, including a sales circular. Respondents' merchandise is distributed to the purchasers thereof in the following manner:

A portion of said sales circular consists of a list on which there are designated a number of items of merchandise and the prices thereof. Adjacent to the list is printed and set out a device commonly called a pull card. Said pull card consists of a number of tabs, under each of which is concealed the name of an article of merchandise and the price thereof. The name of the article of merchandise and the price thereof are so concealed that purchasers or prospective purchasers of the tabs or chances are unable to ascertain which article of merchandise they are to receive or the price which they are to pay until after the tab is separated from the card. When a purchaser has detached a tab and learned what article of merchandise he is to receive and the price thereof, his name is written on the list opposite the named article of merchandise. Some of said articles of merchandise have purported and represented retail values and regular prices greater than the prices designated for them, but are distributed to the consumer for the price designated on the tab which he pulls. The apparent greater values the regular prices of some of said articles of merchandise, as compared to the price the prospective purchaser will be required to pay in the event he secures one of said articles, induces members of the purchasing public to purchase the tabs or chances in the hope that they will receive articles of merchandise of far greater value than the designated prices to be paid for same. The fact as to whether a purchaser of one of said pull card tabs receives an article which has greater value and a higher regular price than the price designated for same on such tab, which of said articles of merchandise a purchaser is to receive, and the amount of money which a purchaser is required to pay, are determined wholly by lot or chance.

When the person or representative operating the pull card has succeeded in selling all of the tabs or chances, collected the amounts called for, and remitted the said sums to the respondents, the said respondents thereupon ship to said representative the merchandise designated on said card, together with a premium for the representative as compensation for operating the pull card and selling the said merchandise. Said operator delivers the merchandise to the purchasers of tabs from said pull card in accordance with the list filled out when the tabs were detached from the pull card.

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Respondents sell and distribute and have sold and distributed various assortments of said merchandise and furnish and have furnished various pull cards for use in the sale and distribution of such merchandise by means of a game of chance, gift enterprise, or lottery scheme. Such plan or method varies in detail but the the above described plan or method is illustrative of the principle involved.

PAR. 3. The persons to whom respondents furnish the said pull cards use the same in purchasing, selling, and distributing respondents' merchandise in accordance with the aforesaid sales plan. Respondents thus supply to and place in the hands of others the means of conducting lotteries in the sale of their merchandise in accordance with the sales plan hereinabove set forth. The use by respondents of said method in the sale of their merchandise and the sale of such merchandise by and through the use thereof and by the aid of said method is a practice of the sort which is contrary to an established public policy of the Government of the United States and which is in violation of criminal laws.

PAR. 4. The sale of merchandise to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure an article of merchandise at a price much less than the apparent normal retail price thereof. Many persons, firms, and corporations who sell or distribute merchandise in competition with the respondents, as above alleged, are unwilling to adopt and use said method, or any method involving a game of chance or the sale of a chance to win something by chance, or any method which is contrary to public policy, and such competitors refrain therefrom. Many persons are attracted by respondents' said method and by the element of chance involved in the sale of such merchandise in the manner above described, and are thereby induced to buy and sell respondents' merchandise in preference to merchandise offered for sale and sold by said competitors of respondents who do not use the same or an equivalent method. The use of said method by respondents, because of said game of chance, has the capacity and tendency to, and does, unfairly divert trade and custom to respondents from their said competitors who do not use the same or an equivalent method.

PAR. 5. In the course and conduct of their business, as hereinabove related, respondents cause and have caused various false, deceptive and misleading statements to appear in their advertising matter as aforesaid, of which the following are examples but are not all-inclusive:

Free Gifts—Valuable Premiums without cost to you

Select any gift from this folder that you desire. It will be yours at absolutely no cost

2 extra surprise gifts free

FREE—Choice of one of these extraordinary values—FREE

Others of said statements and representations appearing in respondents' said advertising matter are as follows:

All shipping charges are paid by us

We prepay all shipping charges right to your door

42 pce. well known silver tableware

PAR. 6. In truth and in fact, none of respondents' so-called premiums or gifts are given away "free" or without cost, but said premiums or gifts, which are represented as being "free" to said representatives, are either purchased with labor by them or the price of said premiums or gifts is included in the price of other articles of merchandise which the representatives must sell or procure the sale of before said premiums or gifts can be procured by them. For a number of premiums or gifts certain sums of money must be paid by said representatives in addition to the labor performed or services rendered. Respondents do not pay all shipping charges on their said products, but said representatives are required to pay certain specified sums of money as shipping charges on a number of respondents' said articles of merchandise.

When the word "silver" is used in describing a product, the purchasing public understands it to mean that the product is made of solid silver. The use of the word "silver" by respondents in describing their said tableware causes, and has caused, the purchasing public to believe that said tableware is made of solid silver. Respondents' said "silver" tableware is not made of solid silver, but, on the contrary, is made of inferior metal plated with silver.

PAR. 7. The use by respondents of the false, deceptive, and misleading statements and representations set forth herein has had, and now has, the capacity and tendency to mislead and deceive, and has misled and deceived, a substantial portion of the purchasing public into the erroneous belief that such statements and representations are true, and into the purchase of substantial quantities of said respondents' products as a result of such erroneous belief. There are, among the competitors of respondents as mentioned in paragraph 1 hereof, manufacturers and distributors of like and similar products who do not make such false, deceptive, and misleading statements and representations concerning their products. By the statements and representations aforesaid, trade is unfairly diverted to respondents from such competitors, and, as a result thereof, substantial injury is being done, and has been done, by respondents to competition in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, are all to the prejudice of the public and of respondents' competitors and constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on June 30, A. D., 1938, issued and subsequently served its complaint upon the respondents, Isidore Halperin and Morris Orenstein, individually and trading as Wellworth Sales Co., charging them with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondents' answer thereto, testimony and other evidence in support of the allegations of said complaint were introduced by D. C. Daniel and L. P. Allen, Jr., attorneys for the Commission, and in opposition to the allegations of the complaint by Horace J. Donnelly, attorney for the respondents, before Randolph Preston, a trial examiner of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission on said complaint, answer thereto, testimony, and other evidence, report of the trial examiner upon the evidence and exceptions filed thereto, brief in support of the complaint (no brief having been filed by the respondents or oral argument requested), and the Commission having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondents Isidore Halperin and Morris Orenstein are copartners trading under the name Wellworth Sales Co., with their principal office and place of business located at 46 East Broadway, New York, N. Y. Respondents are now, and for some time last past have been, engaged in the sale and distribution of watches, cameras, china and silverware, clocks, cigarette lighters, jewelry, cosmetics, bedding, kitchenware, and other articles of merchandise in commerce among and between the various States of the United States and in the District of Columbia. Respondents cause, and have caused, said products, when sold, to be shipped or transported from their place of business in the State of New York to purchasers thereof located in various other States of the United States. Respondents maintain, and at all times

mentioned herein have maintained, a course of trade in said merchandise in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of their said business the respondents are engaged in competition with other individuals and partnerships and with corporations engaged in the sale and distribution of similar or like articles of merchandise in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of their business the respondents distribute advertising or sales circulars by the United States mails to prospective customers or representatives located in various States of the United States, for the purpose of inducing such customers to sell respondents' merchandise by means of a game of chance, gift enterprise, or lottery scheme commonly known as a pull card device. These circulars contain pictorial representations and descriptive matter with reference to merchandise offered as compensation for the sale of certain of respondents' merchandise, which merchandise is likewise described by pictorial representations, and otherwise, on said circulars. Each of said circulars contains what is commonly known as a pull card device.

Said pull card device consists of a number of tabs, under each of which are concealed the name of an article of merchandise and the price thereof. The name of the article of merchandise and the price thereof are so concealed that purchasers and prospective purchasers are unable to ascertain which articles of merchandise they are to receive or the prices to be paid therefor until after the tabs are separated or removed from the said pull tab device. Adjacent to said device there is a list of the articles of merchandise and the prices thereof corresponding to the various articles of merchandise and the prices thereof, as concealed under said tabs. When a purchaser has detached a tab and learned what article of merchandise he is to receive and the price thereof, his name is written on the list opposite the named article of merchandise. Some of said articles of merchandise have retail values and regular prices greater than the prices so designated for them but are distributed to the consumer or purchaser for the price designated on the tab which he pulls or removes from said device. The apparent greater values and regular prices of some of said articles of merchandise as compared to the prices the prospective purchaser will be required to pay in the event he secures one of said articles of merchandise induces members of the purchasing or consuming public to select and pull the tabs in the hope that they will receive articles of merchandise of far greater value than the designated prices to be paid therefor.

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The specific article which the purchaser receives, the amount of money which is required to be paid, and the obtaining of an article of greater value than the prices designated therefor are thus determined wholly by lot or chance.

When the person or representative operating the pull card has succeeded in selling all of the articles of merchandise listed under said tabs and has collected the amounts charged therefor, such sum is then remitted to the respondents and the respondents thereupon ship to said representative the merchandise sold by means of said device by said representative, together with a premium for the representative as compensation for operating the device and selling and distributing the said merchandise. Such premium is selected by said representative from articles of merchandise picturized in said sales or advertising circular. If the said representative so desires, he may deduct a cash premium in lieu of said merchandise premium. Said representative delivers the articles of merchandise to the purchaser thereof in accordance with the list filled out when the tabs were removed or detached from the device as above described. The advertising circular containing such pull card device contains all of the instructions which are given to the representative for the operation of said pull card device and the obtaining of the merchandise and premiums from the respondents.

Immediately above said pull tab device, there appears the following:

NOTICE TO PURCHASERS—On the back of each slip is printed the price of an article. If after deliberation you decide that you want to buy the article pay the holder of this book the price shown on slip. If you do not want the article, you need not buy it.

The Commission finds that regardless of said notice the said articles of merchandise have been, and are, in fact, sold and distributed by means of said pull card device in accordance with the sales plan or method hereinabove described. The successful operation of respondents' sales plan is dependent upon the ability of the operator to sell all the articles listed so as to permit remittance of the required amount to the respondents in order to obtain the merchandise purchased. The purchaser knows the articles listed and the price to be paid therefor before he selects and removes the tab from the pull tab device. The element of chance is the amount of money to be expended and the specific article to be purchased. The operation of the plan strictly in accordance with the above "Notice to Purchasers" would not tend to net the operator a return sufficient to warrant completion of the plan and would thereby make the plan inoperative, and to this extent such notice is merely a subterfuge.

Furthermore, all the instructions received by the representative or operator are contained in the advertising circular forwarded by the respondents, and there is no direction as to what should be done in the event all of the articles of merchandise are not sold or information as to the premium or compensation which can be obtained by such representative or operator in the event a purchaser refuses to accept the article listed on the tab removed from the pull tab device. Instead, said circulars contain the following or some similar instruction:

You collect the purchase price from your friend and after you have sold the 23 articles in this manner detach and fill out the order blank and mail it to us with the \$7.99 you have collected. Immediately upon receipt of your order we will send you the 23 articles, as well as your reward gift. The prices of the 23 articles range from 9¢ to 39¢—no more.

The order blank usually furnished by the respondents reads in part as follows:

After you have sold the 23 articles of merchandise and collected \$7.99 fill out this blank stating the correct number of premiums you have selected * * *. Please ship at once, all charges prepaid, the 23 articles of merchandise I sold amounting to \$7.99 and one of the valuable premiums.

PAR. 4. The Commission finds that the persons or representatives to whom respondents have furnished or distributed said sales or advertising circulars, containing said pull card device, use, and have used, the same in purchasing, selling, and distributing respondents' merchandise in accordance with the sales plan or method hereinabove described. Respondents have thus supplied to and placed in the hands of others a means of conducting lotteries in the sale and distribution of their said merchandise in accordance with the sales plan or method hereinabove described. Such merchandise has thus been sold or distributed by means of a game of chance, gift enterprise, or lottery scheme, and respondents have reaped the benefits therefrom. The use by the respondents of said sales plan or method in the sale of their merchandise, and the sale of said merchandise by and through the use thereof and by the aid of said sales plan or method is a practice of a sort which is contrary to an established public policy of the Government of the United States and in violation of the criminal laws.

PAR. 5. The sale of merchandise to the purchasing public in the manner above described involves a game of chance or the sale of a chance to procure an article of merchandise at a price much less than the apparent normal retail price thereof. Many persons, firms, and corporations who sell or distribute merchandise in competition with respondents in commerce among and between the various states of the United States are unwilling to adopt and use said method or any method involving a game of chance or a sale of a chance to win something by chance, or

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any method which is contrary to public policy, and such competitors refrain therefrom. Many persons are attracted by respondents' said method and by the element of chance involved in the sale of such merchandise in the manner above described and are thereby induced to buy and sell respondents' merchandise in preference to merchandise offered for sale and sold by said competitors of respondents who do not use the same or an equivalent method. The use of said method by respondents, because of said game of chance, has a capacity and tendency to, and does, unfairly divert trade to respondents from their said competitors who do not use the same or an equivalent method.

PAR. 6. In addition to the acts and practices hereinabove described, the respondents also cause, and have caused, various false, deceptive, and misleading statements to appear in their various advertising circulars, of which the following are typical examples:

Free gifts—valuable premiums without cost to you.

Select any gift from this folder that you desire. It will be yours at absolutely no cost.

2 extra surprise gifts free.

FREE—Choice of one of these extraordinary values—FREE

42 pce. well known silver tableware.

PAR. 7. The statements and representations hereinabove set out are false, deceptive, and misleading. None of respondents' articles of merchandise designated as premiums or gifts are given away "free," but, instead, said articles of merchandise which are represented as being "free" to said representatives are in fact delivered as compensation for services rendered, and the price thereof is included in the price of other articles of merchandise which the representatives must sell, or procure the sale of, before said premiums or gifts can be procured by them. For a number of premiums or gifts certain sums of money must be paid by said representative in addition to the labor performed or services rendered.

Respondents' merchandise designated as "silver tableware" is not made of solid silver but on the contrary is made of metal plated with silver.

PAR. 8. The use by the respondents of the false, deceptive, and misleading statements and representations as set forth herein has had, and now has, the capacity and tendency to mislead and deceive, and has misled and deceived, a substantial portion of the purchasing public into the erroneous belief that such statements and representations are true and into the purchase of substantial quantities of respondents' products as the result of such erroneous belief, and as a result trade has been unfairly diverted to the respondents from their competitors who are likewise engaged in the sale and distribution of similar or like

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articles of merchandise in commerce among and between the various States of the United States and in the District of Columbia.

CONCLUSION

The acts and practices of the respondents as herein found are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, answer of the respondents, testimony and other evidence taken before Randolph Preston, a trial examiner of the Commission theretofore duly designated by it, in support of the allegations of the complaint and in opposition thereto, report of the trial examiner upon the evidence and exceptions filed thereto, and brief filed in support of the complaint, and the Commission having made its findings as to the facts and its conclusion that said respondents have violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondents, Isidore Halperin and Morris Orenstein, individuals trading as Wellworth Sales Co. or under any other trade name, and their respective agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of watches, cameras, china, silverware, clocks, cigarette lighters, jewelry, cosmetics, bedding, kitchenware and other articles of merchandise in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Supplying to or placing in the hands of others pull cards or other devices which are to be used, or may be used, in the sale or distribution of said merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme;

2. Shipping, mailing, or transporting to agents or distributors or to members of the public, pull cards or other devices which are to be used, or may be used, in the sale or distribution of said merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme;

3. Selling or otherwise disposing of any merchandise by means of a game of chance, gift enterprise, or lottery scheme;

4. Using the term "free" or any other term of similar import or meaning to describe or refer to goods, wares, or merchandise which are given as compensation for services rendered;

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5. Using the unqualified term "silver" to designate or describe tableware or other articles of merchandise which are only plated with silver.

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

Complaint

IN THE MATTER OF

J. M. TAYLOR CO., INC., AND SAMUEL NITKE, CHARLES MYERS, AND ISADORE STEIN

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 3567. Complaint, Aug. 31, 1938—Decision, June 30, 1941

Where an individual, acting through a corporate instrumentality engaged in the competitive interstate sale and distribution of electric razors, clocks, electric mixers, traveling bags, pen and pencil sets, Glolite lighters, high-ball glasses, and other articles of merchandise—

Furnished various devices and plans of merchandising which involved the operation of games of chance, gift enterprises, or lottery schemes by which said merchandise was sold or distributed to the ultimate consumer wholly by lot or chance, and distribution by mail and other means of certain literature and instructions including, among other things, push cards, for use, as typical, under a sales plan providing that a purchaser paid from 1 cent to 25 cents depending on the number disclosed by disk chosen, and that the person who, by chance, selected that 1 of 30 feminine names on card corresponding to name concealed under card's large master seal received a set of "6 Strip Tease Highball Glasses, valued at \$7.50," as did the operator; and thus

Supplied to and placed in the hands of others means of conducting lotteries in the sale of his merchandise, in accordance with aforesaid sales plan, involving game of chance to procure an article at much less than usual price thereof, contrary to established public policy of the United States Government, and in violation of criminal laws, and in competition with many who, unwilling to use such or other method contrary to public policy, refrain therefrom;

With result that many persons were attracted by his said sales plan and the element of chance involved therein and were thereby induced to buy and sell his merchandise in preference to that of his said competitors, and trade was unfairly diverted to it from them;

Held, That such acts and practices were all to the prejudice and injury of the public and his competitors, and constituted unfair methods of competition in commerce.

Before *Mr. Randolph Preston* and *Mr. Arthur F. Thomas*, trial examiners.

Mr. D. C. Daniel and *Mr. L. P. Allen, Jr.* for the Commission.

Nash & Donnelly, of Washington, D. C., for respondents.

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 J. M. Taylor Co.,