

IN THE MATTER OF
**HEC BARTH, TRADING AS HEC BARTH LABORATORIES
AND DARK-EYES LABORATORIES**

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

Docket 2608. Complaint, Oct. 31, 1935—Decision, Apr. 30, 1937

Where an individual engaged in sale, under name "Dark Eyes," of a combination two-bottle eyebrow and eyelash stain containing silver nitrate and pyrogallol and prepared in black and in brown, and distributed in practically every State through department stores, drug stores, and beauty shops, and, as thus engaged, in substantial competition with others similarly engaged in sale and distribution, or in manufacture, sale, and distribution, of eyebrow and eyelash stains or dyes in commerce among the several States and in the District of Columbia—

- (a) Represented, in advertising his said products in newspapers and periodicals of general circulation and by radio, that the same was safe and harmless and a new discovery, and that use thereof gave permanent beauty to, or was a permanent darkener of, eyebrows and eyelashes, facts being said product was a caustic which would destroy tissue, possibility of danger through use thereof was enhanced if applied by an unskilled person or in an unskilled manner, and it was neither safe nor harmless nor a new discovery, new growth made new applications necessary, and it did not accordingly give permanent beauty nor permanently darken the eyelashes and eyebrows through use thereof; and
- (b) Represented that he owned, operated, or controlled a laboratory in which said product was made, facts being product in question was made for him by a company which owned the formula thereof, and in which he owned no interest and over which he exercised no control;

With effect of misleading a substantial portion of the purchasing public into the erroneous belief that such representations were true, and with result that such public, as a consequence of mistaken and erroneous beliefs induced by such false and misleading statements, brought a substantial volume of his products, and trade was unfairly diverted to him from competitors likewise engaged in sale and distribution of such darkeners or stains, or in the manufacture, sale and distribution thereof, and who truthfully represent the effects of their products when applied to the eyebrows and eyelashes; to the substantial injury of competition in commerce:

Held, That such acts and practices were to the prejudice of the public and competitors and constituted unfair methods of competition.

Before *Mr. Robert S. Hall*, trial examiner.

Mr. DeWitt T. Puckett for the Commission.

Mr. Sid Mogul, of Chicago, Ill., for respondent.

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COMPLAINT

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, having reason to believe that Hec Barth, doing business under the trade names of Hec Barth Laboratories and Dark Eyes Laboratories, hereinafter referred to as respondent, has been or is using unfair methods of competition in commerce, as "commerce" is defined in said act, and it appearing to said Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Hec Barth, is an individual trading as Hec Barth Laboratories and Dark Eyes Laboratories, with his office and principal place of business in the city of Chicago, State of Illinois.

At and from said city and under said trade names, he is now and for several years last past, has been engaged in the sale of beautifying preparations, among which is a product sold by him for use by women in the coloring of their eyelashes and eyebrows under the name of "Dark Eyes."

PAR. 2. This said product, described in paragraph 1 hereof, is sold by respondent to wholesalers and jobbers of beautifying products, to drug stores, beauty parlors, barbershops, and to ultimate consumers thereof, the latter being supplied through the United States mails. Said drug stores sell the same to the consuming public. Said beauty parlors and barber shops use the same in the coloring of the eyelashes and eyebrows of women.

Respondent, when said product is so sold by him, causes the same to be shipped from the said city of Chicago, State of Illinois, into and through other states of the United States, to his said purchasers at their respective places of business or residence.

PAR. 3. In the sale of the said "Dark Eyes," respondent is in substantial competition with corporations, copartnerships and individuals engaged in selling and offering for sale in interstate commerce of compounds, chemicals or materials for use and used in the coloring or dyeing of eyelashes and eyebrows of women.

PAR. 4. Respondent, in aid of the sale of said "Dark Eyes," has advertised and is now advertising the same in newspapers, magazines and periodicals of general circulation in the United States and in pamphlets, booklets, letters, printed testimonials, and other printed matter and by and through the use of photographs and other

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pictures, caused by the respondent to be circulated among said customers and prospective customers, and on labels attached to the containers thereof and in and through radio broadcasts which reach said customers and prospective customers residing in several of the States of the United States. In and through said advertising media, respondent makes the following among other false and misleading representations as to his said product:

1. That respondent owns, operates, or controls a laboratory or laboratories where said product is manufactured by him.

2. "Give your eyes this permanent beauty with Dark Eyes"—"The new permanent darkener"—"Permanent color and beauty with Dark Eyes"—"The new permanent eyelash and eyebrow darkener"—"Lasts from four to five weeks."

3. "Dark Eyes", when used as directed, is safe and harmless.

4. "Dark Eyes" is a new discovery.

5. The use of "Dark Eyes" gives your eyelashes and eyebrows lasting youth or lasting beauty.

6. Thousands of smart women prefer this modern beauty way to possess attractive eyes.

7. "Dark Eyes" is perfectly harmless to use and absolutely safe.

PAR. 5. The representations set forth in the paragraph last above are false and misleading in that:

1. Respondent owns and maintains no laboratory, and the said product "Dark Eyes", is manufactured for him;

2. The use of "Dark Eyes" does not give permanent beauty; it is not a permanent darkener. It does not assure permanent color and beauty; if it is "permanent", it will last longer than four or five weeks, and if it lasts only four or five weeks, it is not permanent. The name "Dark Eyes" is a misnomer; it is the eyebrows and eyelashes and not the eyes that are colored by it;

3. "Dark Eyes" is not safe or harmless, and its use may result in harm to the user thereof; the use of "Dark Eyes" as directed may result in injury to the eye or the skin or flesh about the eye, or elsewhere;

4. "Dark Eyes" is not a new discovery. The ingredients contained in it have been used for many years in the coloring or dyeing of eyebrows and eyelashes;

5. The use of "Dark Eyes" does not give eyelashes and eyebrows lasting youth or lasting beauty.

6. The use of "Dark Eyes" does not constitute a modern or better way to possess attractive eyes.

7. "Dark Eyes" is not perfectly harmless to use or absolutely safe;

PAR. 6. Each and all of the said representations described in Paragraph Four hereof, have and have had the capacity and tendency to mislead and deceive the purchasing public into the erroneous belief that they are true, and each and all of the said representations have and have had the tendency and capacity to induce the purchase of said respondent's product and have and have had

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the tendency and capacity to divert trade from and otherwise injure respondent's said competitors.

PAR. 7. The above alleged acts and practices are all to the prejudice of the public and to respondent's said competitors and constitute unfair methods of competition within the intent and meaning of Section 5 of an Act of Congress, entitled, "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled, "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, on October 31, 1935, issued and served its complaint in this proceeding upon respondent, Hec Barth, an individual, doing business under the trade names of Hec Barth Laboratories and Dark-Eyes Laboratories, charging him 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 respondent's answer thereto, testimony and other evidence in support of the allegations of said complaint were introduced by DeWitt T. Puckett, attorney for the Commission, before Robert S. Hall, an examiner of the Commission, theretofore duly designated by it, and in opposition to the allegations of the complaint by Sid Mogul, attorney for the respondent; and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final hearing before the Commission on the said complaint, the answer thereto, testimony and other evidence, and briefs in support of the complaint and in opposition thereto, no request for oral argument having been made, and the Commission having duly considered the same, 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. The respondent, Hec Barth, is an individual trading as Dark-Eyes Company. Until about a year ago he employed the trade names Hec Barth Laboratories and Dark-Eyes Laboratories. The business is located at 412 Orleans Street, Chicago, Ill. He is now, and since April 1934, has been, engaged in the sale and

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distribution of a product by the name of "Dark-Eyes," an eyebrow and eyelash stain. The product is put up and prepared for the market in small bottles, each containing approximately 1.3 drams of the preparation. Each package contains two bottles. Bottle number one contains primarily silver nitrate, and bottle number two contains primarily pyrogallol. It is prepared in two colors, namely, black and brown.

The formula for the black product is:

Bottle No. 1:

Silver Nitrate U. S. P.-----	4.75 parts
Ammonium Hydroxide C. P.-----	1.30 parts

The above are dissolved in a pectic vehicle in sufficient quantity to make the whole measure 100 parts.

Bottle No. 2:

Pyrogallol (Resublimed U. S. P.)-----	3.25 parts
Solvent (Distilled Water)-----	96.25 parts

The formula for the brown product is:

Bottle No. 1:

Silver Nitrate U. S. P.-----	3.25 parts
Ammonium Hydroxide C. P.-----	.80 parts

Both are dissolved in a pectic vehicle in sufficient quantity to make the whole measure 100 parts.

Bottle No. 2:

Pyrogallol (Resublimed U. S. P.)-----	2.50 parts
Solvent (Distilled Water)-----	97.50 parts

The main difference between the formula for the brown product and the black product is that the brown product contains less silver nitrate and pyrogallol per unit measure.

The product is applied by first applying the liquid in bottle number one to the eyelashes or eyebrows with a camel's hair brush. When the first application is dry the liquid in bottle number two is then applied with another small camel's hair brush. Contact between the two liquids causes an immediate precipitation of color.

When orders are received for respondent's product, he causes it to be shipped and transported from Chicago, Ill., to the purchasers thereof located at various points in States of the United States other than the State of Illinois. The product is distributed in practically every State of the United States through department stores, drug stores, and beauty shops. An introductory or trial size package is sent through the mails direct to the purchasers thereof. The respondent has, since 1934, maintained a constant current of trade in said product, in commerce, among and between the various States of the United States.

At all times since the respondent entered into business, he has been in substantial competition with other individuals, and with partnerships and corporations engaged in the sale and distribution, or in the manufacture, sale and distribution, of eyebrow and eyelash stains or dyes, in commerce, among and between the several States of the United States and in the District of Columbia.

PAR. 2. The respondent has advertised, and is now advertising, said product, in newspapers, periodicals, and magazines of general circulation in the United States. The product was advertised by radio during 1934. Representative of said advertising claims are the following statements:

"Give your eyes this permanent beauty with 'Dark-Eyes' "—"The new permanent darkener"—"Permanent color and beauty with 'Dark-Eyes' "—"The new permanent eyelash and eyebrow darkener"—"Lasts from four to five weeks".

"Dark-Eyes", when used as directed, is safe and harmless.

"Dark-Eyes" is a new discovery.

The use of "Dark-Eyes" gives your eyelashes and eyebrows lasting youth or lasting beauty.

Thousands of smart women prefer this modern beauty way to possess attractive eyes.

"Dark-Eyes" is perfectly harmless to use and absolutely safe.

Each package of the product contains a direction sheet, which bears the expressions, among others, "Permanent," "Harmless," and "Harmless to Eyes, Hair and Skin." On the outside of the package itself appears the word "Permanent."

Respondent represented until about a year ago that he owned and operated a laboratory where the product "Dark-Eyes" was manufactured. However, respondent has never at any time actually owned or operated, or directly and absolutely controlled, a laboratory in which the product was manufactured. In fact, the product is manufactured for the respondent by the W. W. Baldwin Company of 412 Orleans Street, Chicago, Ill., owners of the formula for the product. Respondent has never owned any interest in, or exercised any control over, the said W. W. Baldwin Company. Respondent's said product does not give permanent beauty, nor are the eyelashes and eyebrows permanently darkened by use of the product. When new lashes appear, or as the hair grows new applications of the product are necessary to darken the new growth. Said product is not a new discovery. Its active ingredients, silver nitrate and pyrogallol, have been used in stains or eyebrow darkeners for many years.

The respondent's product is not harmless or absolutely safe, but is injurious to the eyes of some users. Women users of the product testified at the hearings. Mrs. Ethyl Weinberg Astrachan of Chi-

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cago, Ill., purchased a package of respondent's product at Field's store in Chicago and used the product in accordance with the directions supplied with it. Immediately after the application, her eyes began to pain her considerably and a severe headache set in. She suffered with her eyes for a period of three months. Dr. John William Wall, an eye specialist of Chicago, Ill., who attended Mrs. Astrachan during her said illness, concluded that Mrs. Astrachan's trouble with her eyes was caused by the application of the respondent's product to her eyelashes and eyebrows.

Mrs. Mary W. Buettner of Cleveland, Ohio, purchased a package of respondent's products from a department store in Cleveland, Ohio, and applied the product in accordance with the instructions enclosed in the package. When she awoke the following morning, her eyes were inflamed, swollen and discolored. About four weeks elapsed before her eyes become normal. Mrs. Buettner had applied other eyelash stains and dyes to her eyelashes on previous occasions with no ill effect. Dr. Norman McGay of Cleveland, Ohio, who attended Mrs. Buettner during her aforesaid illness, found Mrs. Buettner suffering from a very badly swollen eczematous condition around the left eye, over the bridge of the nose and a little over the right eye. The left eye was almost swollen shut. The forehead over the eyebrows and across the bridge of the nose was badly discolored with some chemical. He found Mrs. Buettner to be suffering from a localized condition caused by some local application, which he concluded to be the product she applied on that occasion.

Mrs. Margaret S. Werntz of Shaker Heights, Ohio, went to a beauty shop in Cleveland, Ohio, about eleven o'clock on the morning of December 14, 1935, and had her eyelashes stained with the respondent's said product. About six o'clock that night her eyes began watering and smarting, followed by pains in and near the eyeballs. The following morning her eyes were swollen and completely closed, and she remained totally blind for one week. Mrs. Werntz could not read for three months. Dr. James Roder Bell of Cleveland, Ohio, Mrs. Werntz' attending physician during her said illness, concluded, after having treated Mrs. Werntz' eyes for three weeks, that her injury resulted from the application of respondent's product to her eyelashes and eyebrows.

One percent silver nitrate solutions are used by the medical profession as an antiseptic. It is applied to the eyes of new born babes to prevent gonorrheal infection. When something stronger than a one percent silver nitrate solution is required, in treating certain conditions of the eyes, some drug other than silver nitrate is used. Silver

nitrate solutions containing as much as 2.5% silver nitrate are used as a disinfectant when applied to parts of the body other than the eyes.

The solution in bottle number one of the respondent's said black product contains 4.75% of silver nitrate U. S. P. The solution in bottle number one of respondent's said brown product contains 3.25% of silver nitrate U. S. P. The silver nitrate solution is applied to the eyelashes or eyebrows and permitted to remain there a few moments before the solution contained in bottle number two is applied.

It is established by the testimony of medical authorities and chemical experts that respondent's product is a caustic, and will destroy tissue. Silver nitrate and pyrogallol, if not mixed in the exact molecular proportions, will give off an excess of the silver nitrate or free pyrogallol, and the uncombined silver nitrate has the same effect that it would have if used separately, and the uncombined silver nitrate can produce injury. The possibility of danger through use of the respondent's product is enhanced of course, if applied by an unskilled person or in an unskillful manner.

PAR. 3. Many of respondent's competitors who sell and distribute, or manufacture, sell and distribute, eyebrow and eyelash darkeners or dyes, in interstate commerce, do not in any way misrepresent the effects of their products when applied to the eyebrows and eyelashes.

PAR. 4. The use by respondent of the representations set forth above, in his advertising literature, has had and now has the capacity and tendency to mislead and deceive and has misled a substantial portion of the purchasing public into the erroneous belief that said representations are true. As a consequence of the mistaken and erroneous beliefs induced by the false and misleading statements and representations above referred to, the purchasing public has purchased a substantial volume of respondent's products with the result that trade has been unfairly diverted to the respondent from his competitors likewise engaged in the business of selling and distributing eyebrow and eyelash darkeners or stains, or in the manufacture, sale, and distribution of eyelash darkeners or stains, who truthfully represent the effects of their products when applied to the eyebrows and eyelashes of persons. As a result thereof, substantial injury has been and is now being done by respondent to competition, in commerce, among and between the various States of the United States and the District of Columbia.

CONCLUSION

The aforesaid acts and practices of the respondent, Hec Barth, are to the prejudice of the public and of respondent's competitors, and constitute unfair methods of competition in commerce, within the

intent and meaning of Section 5 of an Act of Congress, approved September 26, 1914, entitled, "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of respondent, the testimony and other evidence taken before Robert S. Hall, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, and briefs filed herein, no request for oral argument having been made, and the Commission having made its findings as to the facts and its conclusion that said respondent has violated the provisions of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

It is ordered, That the respondent, Hec Barth, individually and trading as Hec Barth Laboratories and Dark-Eyes Laboratories, or under any other trade name, his agents, representatives and employees, in connection with the sale and distribution of an eyelash darkener now known as "Dark Eyes," or any other product containing the same or substantially the same ingredients, sold under that name or under any other trade name, in interstate commerce or in the District of Columbia, do forthwith cease and desist from representing:

1. That said product is safe and harmless.
2. That said product is a new discovery.
3. That the use of said product gives permanent beauty to or is a permanent darkener of the eyebrows and eyelashes.
4. That respondent owns, operates or controls a laboratory or laboratories until and unless he does in fact actually own and operate, or directly and absolutely control a laboratory or laboratories wherein said product is compounded.

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

Syllabus

IN THE MATTER OF
PERFECT MANUFACTURING COMPANY

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

Docket 2899. Complaint, Aug. 14, 1936—Decision, Apr. 30, 1937

Where a corporation engaged in manufacture, and sale to purchasing and consuming public in various parts of the United States, through use of trade name "Sav-An-Upper Company," of preparation, among others, known and designated as "Sav-An-Upper," and thus branded, labeled, and packed for sale and distribution by it, trading under name "Sav-An-Upper Company," and by its agent-salesmen to purchasing and consuming public; in advertising its said product, in the course and conduct of its said business and as a means of obtaining services of such agent-salesmen to handle and sell the same, in sales magazines and periodicals of general circulation and in circulars and other mail matter distributed to prospective agents and containing sales talks and instructions, and through representations in said advertisements, distributed as aforesaid, and which were eventually communicated to customers and consumers, actual and prospective—

- (a) Represented that its said product had unusual sales appeal, or that selling qualities or possibilities thereof were most exceptional, and that large sums of money might commonly or easily be made by agents in handling and selling the same, through such statements as that men and women everywhere were making tremendous profits, up to 202%, in the sale thereof, that an investment of \$1.50 could build itself into tens, hundreds, and thousands of dollars in just a short while, and that earnings up to \$5,000 a year should be reached by quite a few, and others of like import and effect;
- (b) Represented that its said product, when applied to objects, possessed and imparted the quality, condition, and effect of permanency and would renew articles to which it was applied, such as trunks, luggage, school and shopping bags, or make scuffed shoe tops look as neat and good as the day they left the factory, and similar statements; and
- (c) Represented that it owned or operated the million dollar company which was, or would be, back of salesmen selling its said product, and that such company had a world-wide business and prospering agents everywhere;

Facts being such statements and representations were false, deceptive, misleading and exaggerated in various particulars, its said product did not possess the sales appeal or possibilities claimed for it, agents and salesmen could not and did not realize, through sale thereof, large earnings and profits held out to them, product did not produce or impart a coating which was permanent in character or which would renew or restore objects, no matter how old, worn or scuffed they might be, to a new or like new condition, and it did not own, control, or operate any million dollar company or business with world-wide trade or connections, or any company or business even approximating such financial size, status, or importance;

With tendency and capacity to cause agents and salesmen to form mistaken and erroneous beliefs that such a company, and with world-wide business and prosperous agents everywhere, was back of them, and that product in question had a selling power or appeal which it did not possess, and that large and