

Coty, Inc.

Sally Hansen Complete Manicure

Challenger: *O.P.I., Inc.*

- **In the absence of reliable consumer perception evidence, NAD steps into the role of the consumer to independently assess the messages reasonably conveyed by the challenged advertising.**

Basis of Inquiry: Print, point-of-purchase (“POS”) and internet advertising claims made by Coty, Inc., for its Sally Hansen Complete Manicure nail polish were challenged by O.P.I., Inc. (“the challenger”), a competing nail polish manufacturer. The claims at issue include:

“9 out of 10 Salon professionals preferred our formula to the leading salon brand.”

“All 5 Steps of a Salon Manicure in 1 Bottle”

Implied claim “The new Sally Hansen product line is actually available in and used by a significant number of salon professionals in a salon setting.”

In the print advertisement, next to a picture of many women’s fingers wearing a myriad of nail polish colors, appears the main claim *“All 5 Steps of a Salon Manicure in 1 Bottle.”* The five steps of a salon manicure are enumerated as (1) base coat; (2) strengthener; (3) growth treatment; (4) color; and (5) top coat. The claim *“9 out of 10 Salon professionals preferred our formula to the leading salon brand”* runs underneath the list of the five manicure steps.

Challenger’s Position:

I. *“9 Out Of 10 Salon Professionals Preferred Our Formula To The Leading Salon Brand”* Claim

The challenger explained that it produces nail and hand/foot care products, including nail lacquers (“polish”), strengtheners, base coats and top coats. The bulk of its business is in its professional lacquer line, OPI Nail Lacquers, sold only in nail salons and is the leading salon brand with fifty percent market share. The challenger also sells a nail polish called Nicole by OPI in retail stores. The advertiser is the leading mass marketed retail nail polish and its products are not sold in salons.

A. Preference Claim

The challenger argued that the study that the advertiser submitted to support its claim that *“9 out of 10 Salon professionals preferred our formula to the leading salon brand”* was fatally flawed for several reasons. The challenger took issue with the size and geographical diversity of the study panel, which consisted of twenty-five nail technicians from eight different cities, Atlanta, Georgia; Dartmouth, Massachusetts; Vernon Hills, Illinois; Montclair, California; St. Louis, Missouri; Tuscon, Arizona; Denton, Texas; and Lakewood, Colorado. The challenger argued

that the sample was much too small to support the strong “9 out of 10” claim, noting that one or two changes in respondents’ preferences would dramatically change the percentages. Further, the eight cities used in the study only included two areas in the eastern United States with the remaining cities located in the western region markets, and as such, was not diverse enough to produce sufficiently reliable results. The challenger also objected to the advertiser limiting the panelists to those who purchased nail products at an open to the public beauty supply store, where the challenger maintained its product is not sold. As a result, manicurists working at salons which purchase only at outlets available to salons exclusively were intentionally excluded from the survey. The challenger maintained that this criterion excluded seventy percent of manicurists, whom the challenger maintained were most likely veteran manicurists.¹ The challenger also argued that potential panelists were deselected if they stated preference for the OPI brand in the salon or for personal use.

Next, the challenger asserted that the advertiser’s attempt to blind the polish bottles by filing off the raised OPI logo on the cap was ineffective. The challenger argued that OPI has a distinctive trade dress including the cap and brush and salon professionals were likely to recognize the bottle. The challenger, through its experts, asserted that the proper blinding technique would have been to place both the advertiser’s and challenger’s nail polishes in stock bottles with stock caps.²

With regard to the methodology of the study, the challenger argued that the most critical deficiency was that the advertiser tested its “5-in-1” formula as a substitute for a salon manicure against the challenger’s professional OPI nail enamel with no base or top coat. Through its expert, the challenger maintained that this rendered the study meaningless because all OPI professional enamels are used in salons as intended -- with top and base coats. The challenger argued that the advertiser’s preference claim would have no appeal to consumers if it truthfully disclosed that the claim was based on performance of a “5-in-1” product against nail enamel only and not a full salon manicure.³

The challenger maintained that this deficiency was compounded by the fact that the respondents wore each nail polish for three days – a time period that would favor an initially shinier polish but not long enough to assess other material nail enamel performance attributes, such as resistance to chipping and fading.⁴ Base coats, the challenger explained, enhance the adhesion and longevity of the colored nail coating and also prevent the color from staining the underlying nail plate. As base coats are standalone products, formulators may disregard the question of gloss and surface hardness, and bias the resin mixture to maximize its adhesive properties. Thus,

¹ A 2009-2010 survey by Nails Magazine demonstrated that fewer than four percent of nail technicians reported that they frequently use “OTC beauty supply stores” as sources for purchasing nail polishes.

² The challenger also reported that the OPI brush could be removed from the cap and therefore the brush could be placed inside a stock bottle cap.

³ The base coat acts to even out the nail plate and help the polish adhere while also preventing the polish from staining the nail. The top coat seals the colored polish to help prevent chipping and adds shine.

⁴ The challenger pointed out that the survey instructions directed respondents to apply sample to clean, dry nails, remove it three days later and apply the second for three more days. Also, the challenger maintained that from the study that it could not confirm whether the two colors selected to test were color equivalents because the advertiser did not identify the tested shades.

the advertiser's study is too short in duration to meaningfully study the longevity performance of either nail polish. Salon professionals judge a nail polish's performance based on how well it wears between visits and therefore an assessment made after only three days is not an accurate predictor of performance. Moreover, three days is not a consumer relevant time period; according to a 2004 Gallup study of Women's Nail Care Practices, no respondent had a salon manicure performed more than six times per month.

The challenger further argued that the study suffered from an order bias that benefitted the advertiser's product. A total of seventeen out of twenty-five respondents sampled the challenger's product first.⁵ The challenger also asserted that the questionnaire employed excessive probing that further biased the results in the advertiser's favor. For example, in its paired preference questions, the advertiser queried, "which product do you prefer for applying?" as well as "which product do you prefer for ease of application?" and then "which brush do you prefer?" The challenger argued that the advertiser had essentially asked the same question three times. The challenger maintained that these questions favored the advertiser because of the eighteen respondents who selected Complete as their overall preferred product, nine cited the brush as reason for their selection.⁶

B. The Implied Claim

The challenger argued that consumers can reasonably interpret the claim that "*9 Out Of 10 Salon Professionals Preferred Our Formula To The Leading Salon Brand*" to mean that Complete nail polish is widely used in salons by salon professionals.

In response to the advertiser's argument that the distinctions between salon products and mass market products have little meaning for consumers, the challenger argued that it must have meaning otherwise the advertiser would not have chosen to advertise the "9 out of 10" preference claim. The challenger also took issue with the advertiser's argument that the fact that one prefers a product does not mean that one uses that product, primarily because the question from the survey questionnaire relied upon by the advertiser for its "9 out of 10" claim was "which product would you prefer to use in [your] salon on clients?"

⁵ The challenger argued that this represented a bias of "overall preference" of 82% from the second position.

⁶ The challenger argued that the advertiser's laboratory mechanical testing that it also was similarly unavailing. According to the challenger, the mechanical tests (*i.e.*, cupping test, reverse impact test and the slip angle test) comparing the strength of aluminum treated with Complete nail polish versus a "competitive salon product" was not consumer relevant because it was not performed on human nail surfaces. Further, the several tests that the advertiser performed were irrelevant to nail enamel performance. For example, the challenger argued that the cupping test determines the deformability of a substrate by applying pressure on the underside of a surface with a steel indenter to determine at what point cracks form in the coating. The challenger maintained that in the real world this would be equivalent to driving a steel rod through a finger to see when the nail polish cracks. Similarly, the reverse impact test assesses the deformation of a substrate when subjected to falling weight. In the slip angle test, two coated panels are placed horizontally facing one another while lifting the bottom panel to assess the angle at which the top breaks free. The challenger maintained that none of these tests reflected consumer relevant nail enamel performances.

The challenger noted that the advertiser had not submitted any evidence to support this reasonable interpretation of its claim. The challenger contended that the 2009 survey cited by the advertiser that purports to demonstrate that eighteen percent of consumers have used an unspecified Sally Hansen product in salons at least once during a one-year period, is not sufficient to support its implied claim. The same data shows that only about twenty-two percent of salon users have ever bought their own products to a salon. Assuming the reliability of this data, the challenger argued that this is not evidence of professional use of the Sally Hansen products in salons but rather evidence that people may sometimes bring their own nail polish to a salon.

II. “All 5 Steps of a Manicure in 1 Bottle” Claim.

The challenger maintained that the claim “All 5 Steps of a Manicure in 1 Bottle” reasonably conveys the message that the results of the nail treatment from Complete nail polish are comparable to results one would derive from a salon visit. The five steps – as defined by the advertiser - are base coat, enamel, growth treatment, strengthener and top coat. The advertiser provided a formulation comparison chart that purported to compare ingredients of Complete nail polish with the advertiser’s stand alone base and top coats, strengthener, hardener and growth treatment products. The challenger argued that a product ingredient list cannot establish product efficacy or prove performance capability as compared to a salon manicure.⁷

The challenger maintained that simply adding base coat ingredients to nail enamel can not equal the results of a salon manicure because of the function the base coat plays in a manicure. The base coat – which is applied before the enamel -- acts as a barrier between the enamel and the nail surface to prevent staining. Combining the base coat and enamel ingredients will not provide the same protection as a base coat which is applied first, allowed to dry and then enamel applied over the base coat. The challenger argued that advertiser did not submit any evidence regarding the protection against staining of the nail plate offered by Complete nail polish.

The challenger further argued that there is no evidence that Complete nail polish has a growth treatment ingredient. The advertiser has a separate growth product and the key ingredient that promotes nail growth is called “Spirulina Maxima Extract.” The challenger noted that Complete nail polish does not contain Spirulina Maxima extract. Further, the challenger maintained that the advertiser conceded that Complete does not contain a growth treatment, but instead contains

⁷ The challenger argued that the advertiser’s laboratory mechanical testing that it also was similarly unavailing. According to the challenger, the mechanical tests (*i.e.*, cupping test, reverse impact test and the slip angle test) comparing the strength of aluminum treated with Complete nail polish versus a leading salon brand was not consumer relevant because it was not performed on human nail surfaces. Further, the several tests that the advertiser performed were irrelevant to nail enamel performance. For example, the challenger argued that the cupping test determines the deformability of a substrate by applying pressure on the underside of a surface with a steel indenter to determine at what point cracks form in the coating. The challenger maintained that in the real world this would be equivalent to driving a steel rod through a finger to see when the nail polish cracks. Similarly, the reverse impact test assesses the deformation of a substrate when subjected to falling weight. In the slip angle test, two coated panels are placed horizontally facing one another while lifting the bottom panel to assess the angle at which the top breaks free. The challenger maintained that none of these tests reflected consumer relevant nail enamel performances.

a nail hardener which helps promote nail growth. The challenger argued that the advertiser is misleading consumers because it is counting one ingredient as two steps (growth treatment and hardener) in the claim “*All 5 Steps of a Manicure in 1 Bottle.*”

Advertiser’s Position:

I. “9 Out Of 10 Salon Professionals Preferred Our Formula To The Leading Salon Brand”
Claim

A. Preference Claim

The advertiser maintained that its express preference claim is substantiated by an in-depth, multi-day, blinded clinical study of the preferences between Complete and OPI nail polishes amongst twenty-five salon professionals from eight cities across the United States. An independent research company conducted the study and, the advertiser contended, the results demonstrated an overwhelming preference for Complete nail polish over OPI that was statistically significant at the ninety-five percent confidence level.

The twenty-five salon professional respondents were provided with an OPI and a Complete nail enamel sample in similar colors.⁸ Some respondents were given two pink shades and others two red shades in blinded bottles. They were instructed to apply and wear one product for three days, remove it and then wear the other nail enamel for three days. At the end of six days the respondents completed a series of eleven survey questions that addressed performance aspects of nail enamel products – e.g., ease of application, formula consistency, color intensity, shine and resistance to chipping. For each question, respondents were given the option of stating their preference between the two products or selecting a “no preference” option. The advertiser maintained that OPI was not found to be the preferred product in response to any one of the twelve questions. The final question, which the advertiser relied upon to support its “9 out of 10” claim, was “which product would you prefer to use in [your] salon?” Out of twenty five people, nineteen stated a preference for Complete nail polish, two preferred OPI and four had no preference.

In response to the challenger’s criticism that the OPI nail enamel was not applied according to typical usage, the advertiser rejoined that OPI nail enamel does not have any instructions on the label. The advertiser further argued that consumers typically do not use base or top coats when they paint their nails at home. In support of this position, the advertiser submitted, through its expert, a survey that purported to demonstrate, among other things, that women do not apply base and top coats as part of at-home manicures.⁹ Additionally, the study surveyed salon professionals whom the advertiser maintained possessed the expertise to evaluate the performance of two nail polish products without base and top coats. From a testing point of view, the products must be applied in the same manner so that salon professionals could directly compare Complete to OPI nail polishes under similar conditions.

⁸ The name of the OPI shade was unreported.

⁹ This survey was submitted confidentially under NAD Rules & Procedures.

The advertiser also maintained that the blinding of the OPI nail polish bottles was appropriate. The advertiser filed off the “OPI” engraved on the top of the challenger’s OPI bottle, instead of transferring the polish to a stock bottle, because the brush and feel of the cap is an important aspect of the overall nail polishing experience. Further, had the OPI brush not been used, the challenger would have argued that its absence also biased the results in the advertiser’s favor. The advertiser also contended that it did not completely exclude salon professionals that during the screening questionnaire that stated that OPI was their favorite brand, it simply capped the number of those who stated an express preference for OPI to fifty percent of the panel. In any event, after the study was completed, one hundred percent of the respondents who expressed an OPI preference in the screening questionnaire selected Complete nail polish as their overall preference.^{10 11}

B. The Implied Claim

The advertiser, through its expert, disputed the reasonableness of consumers taking away the message that the new Sally Hansen product line is actually purchased and used by a significant number of salon professionals in a salon setting. The advertiser’s expert asserted that the implied claim is illogical as the concept of purchasing the product in a “salon setting” is wholly independent from the use of Complete nail polish in a salon setting.

In any event, the advertiser argued that it can support the alleged implied claim. The advertiser explained that it represents over fifty-five percent of the mass retail market for nail care products in the United States. As a result, the advertiser maintained that while its products are not sold in salons, many consumers use Sally Hansen products in professional salon settings. The advertiser submitted tracking data from an advertising agency that demonstrated that twenty-two percent of nail salon patrons bring their own nail polish when they go to get to a manicure regardless of the salon’s preference to use a particular brand. Given its penetration, the advertiser argued, it is a fair inference that many salon customers are using the Complete nail polish at professional salons.

II. “All 5 Steps of a Manicure in 1 Bottle” Claim.

¹⁰ Moreover, Complete was preferred in all specific categories as well, including application ease, brush, consistency, high intensity color, resistance to wear and chipping.

¹¹ The advertiser also submitted, in confidence to NAD, the final report from a second QRS survey, that was conducted from March 10, 2010 to March 11, 2010. As the survey was conducted after the challenged advertising was distributed, the advertiser did not submit the second survey as substantiation for the challenged advertising, but claimed that it would use it to support preference claims going forward. The advertiser maintained the second survey addressed the flaws of the first survey in that it had a larger sample size, eliminated the “no preference” option and forced the respondent to select a preference and randomized the order of nail enamels. The second survey asked the panelists the following questions: (1) which product do you prefer for overall appearance on your nails; (2) which product do you prefer for ease of application; (3) which brush do you prefer; (4) which consistency do you prefer; (5) which product would you prefer to use in your salon with your clients; and (6) overall which product do you prefer?. The advertiser maintained that the study showed that 72% of the 99 salon professionals surveyed preferred Complete to OPI and 72% would also prefer to use Complete over OPI in the salon with their clients.

The advertiser explained that it clearly defines in the text of the advertisements the five steps of a salon manicure as (1) base coat; (2) strengthener; (3) growth treatment; (4) color; and (5) top coat provided by its Complete nail polish. In other words, rather than using multiple bottles of different formulas for each of the five functions, Complete nail polish combines them all in one product. The advertiser disagreed with the challenger that the steps to a salon manicure are universally understood as preparation of the hand, nail plate and cuticle and then application of a base coat, nail polish and top coat.

The advertiser also argued that the claim “*All 5 Steps of a Manicure in 1 Bottle*” is puffery – vague, subjective and fanciful. The advertiser maintained that no consumer could reasonably believe that Complete nail enamel would clean nails, moisturize the hand, cut the cuticles and buff the nail. Indeed, no reasonable consumer would believe that the “5 Steps” in the advertisement refers to anything other than the application of enamel to nail.

In support of its claim that Complete nail polish provides “5 Steps in 1,” the advertiser submitted a list of the ingredients in Complete which it asserted are known to perform more or one of these functions.¹² With regard to the challenger’s criticism that Complete does not contain an ingredient for nail growth, the advertiser argued that Complete contains corallina officinalis extract (coral extract) and hydrolyzed conchiolin protein, which are known for strengthening nails and Vitamin E for conditioning and flexibility. According to the advertiser, these materials are present in the base even after it dries and provides a protective finish that is strengthening, provides protection and therefore supports natural nail growth.

Decision:

I. “9 Out Of 10 Salon Professionals Preferred Our Formula To The Leading Salon Brand” Claim

A. Preference Claim

In support of its “9 Out Of 10 Salon Professionals Preferred Our Formula To The Leading Salon Brand” the advertiser submitted a study of the preferences between Complete and OPI mauve and red nail polishes amongst twenty-five salon professionals.¹³ The advertiser conducted its study in eight markets: Atlanta, Georgia; Dartmouth, Massachusetts; Vernon Hills, Illinois; Montclair, California; St. Louis, Missouri; Tuscon, Arizona; Denton, Texas; and Lakewood, Colorado. The participants were instructed to apply two coats of one nail enamel product to clean, dry nails on the morning of day one. No base or top coats were applied to either nail enamel. The participants wore the enamel without touching it up until the end of the third day. After removing the first enamel, the respondents answered a series of questions about the first

¹² The advertiser also submitted the results from a series of mechanical tests that comparing the adhesion, cupping, impact resistance, gloss, slip angle and hardness of OPI versus Complete Salon Manicure that purports to demonstrates performance parity in these categories.

¹³ The advertiser has the initial burden of presenting a reasonable basis for its claims. In support of its claim. See, e.g., Dominos Pizza, Inc. (Oven Baked Sandwiches), Report #5023, NAD/CARU Case Reports (May 2009).

product and then applied the second product in the same manner as the first product and again wore it without any reapplication for three days. After removing the second product, the respondents answered questions about the second product and then answered a series of twelve questions regarding which product they preferred.¹⁴ The advertiser based in its “9 out of 10” claim based on the answer to the last question, “which product would you use in the salon with your clients?”

While the challenger addressed what it believed was a myriad of methodological flaws with the advertiser’s study, it identified as the most problematic aspect of the study that the OPI nail enamel was not applied with base and top coats as is typical in a salon setting. There was no dispute between the parties that, in a salon, nail technicians apply base and top coats on their customers’ nails and that these additional coats enhance nail polish adhesion to the nail plate, protect the nail from staining, prevent chipping and wear and also add shine. The advertiser responded that the OPI polish was applied as consumers would apply it at home, *i.e.*, consumers typically do not use base or top coats when they paint their own nails. The advertiser submitted two surveys that it purports demonstrate that women do not apply base and top coats for at-home manicures.

NAD was troubled by the fact that the study compared the advertiser’s nail polish – that has base, color and top coats all in on bottle – to the challenger’s professional polish that was only colored enamel and was intended to be used with separate applications of base and top coats. NAD has previously found, across all product categories, that performance studies are fatally flawed if products are not tested according to usage instructions.¹⁵ Although OPI nail polish for professional use does not have instructions on the bottle, no argument was made to contradict the basic premise that salon manicures include base and top coats. Indeed, the challenged advertising itself defines a salon manicure as including base and top coats.

NAD considered but did not find availing the advertiser’s arguments that consumers supposedly do not use base and top coats for at-home manicures and therefore the study correctly applied the

¹⁴ The questions were (1) overall which product do you prefer?; (2) which product do you prefer for overall appearance on your nails?; (3) which product do you prefer for ease of application?; (4) which product do you prefer for applying?; (5) which brush do you prefer? (6) which consistency do you prefer?; (7) which dry time do you prefer?; (8) which product do you prefer for shine?; (9) which product do you prefer for resistance to wear?; (10) which product do you prefer for resistance to chipping? (11) which product do you prefer for ease of removal?; and (12) which product would you use in the salon with your clients?

¹⁵ North American Green/Mulch& Seed Innovation (HydraCX2), Report #4854, *NAD/CARU Case Reports* (May 2008); Avon Products, Inc. (CELLU-SCULPT Anti-Cellulite Slimming Treatment), Report #4124, *NAD/CARU Case Reports* (January 2004) (holding that the home use study, which instructed participants to apply the product for “at least 5 minutes each time” twice a day was not in accordance with the product’s use instructions which, though indicating that the product should be applied twice daily, did not specify the length of application time); Mission Pharmacal (Citracal), Report #3472, *NAD/CARU Case Reports* (July 1998) (holding that the advertiser’s testing, administered at inappropriately high dosages and under fasting conditions, contravened Os -Cal’s product use instructions); Amden Corporation (Smile White Tooth Whitening System), Report #4048, *NAD/CARU Case Reports* (July 2003) (holding that product testing submitted as substantiation for a performance claim should illustrate that the product was tested according to the product’s use instructions).

polishes as consumers would typically use them in the home.¹⁶ In the context in which it appears,¹⁷ the claim “9 Out Of 10 Salon Professionals Preferred Our Formula To The Leading Salon Brand” suggests that, both expressly and by implication, professionals assessed Complete nail polish as compared to a salon brand as used in a professional manicure. That this was the advertiser’s intended message is made clear by the fact the it based its claim on the responses to the question “which product would you use in the salon on your clients?” As the advertiser defined a salon manicure as including top and base coats, its testing should have at least included base and top coats on the challenger’s nail enamel. This is a significant and critical flaw when coupled with the fact the participants only wore each nail enamel for three days which, in addition to not being a consumer relevant time period, is not long enough to properly assess nail enamel performance attributes, such as resistance to chipping and fading.¹⁸

NAD was also concerned that the sample size of twenty-five people was too small to support such a strong claim.¹⁹ This concern was compounded by several other factors that NAD believes that had the potential to introduce bias into the study. More specifically, NAD questioned whether the eight markets that the advertiser tested in (Atlanta, Georgia; Dartmouth, Massachusetts; Vernon Hills, Illinois; Montclair, California; St. Louis, Missouri; Tuscon, Arizona; Denton, Texas; and Lakewood, Colorado) were representative of the universe of national salon technicians. For example, only one town in the northeastern United States was included and it was not a large urban area.²⁰ Second, the advertiser’s study failed to randomly

¹⁶ NAD noted that the OPI-sponsored survey Nail Application Survey submitted with the advertiser’s expert’s supplemental declaration found that 95.1% of people surveyed responded that they polish their nails at home. The survey also then reported that 39.3% of people always apply a base coat at home and 21.4% very frequently apply a base coat. Only 5.4% never applied a base coat. The percentages were very similar for top coats, at 39.3%, 30.4% and 0.0%, respectively. The other survey, Coty’s Nail Care Category Assessment Survey, which was submitted confidentially, reported similar data. Although NAD determined that consumers’ practices in the home were irrelevant in regard to the advertiser’s claim, even if that were not the case, the advertiser’s evidence does not necessarily support the conclusion the consumers do not use top or base coats at home.

¹⁷ In the print advertisement, next to a picture of many women’s fingers wearing a myriad of nail polish colors, appears the main claim “All 5 Steps of a Salon Manicure in 1 Bottle.” The five steps of a salon manicure are enumerated as (1) base coat; (2) strengthener; (3) growth treatment; (4) color; and (5) top coat. The claim “9 out of 10 Salon professionals preferred our formula to the leading salon brand” runs underneath the list of the five manicure steps.

¹⁸ Moreover, the respondents were not told that they were comparing a simple enamel to a multi-function nail product which featured ingredients that improve adhesion, prevent wear and chipping and increase shine.

¹⁹ The sample size also excluded nail technicians who shopped exclusively in professional beauty stores as opposed to open to the public beauty stores where Complete is sold. According to a small marketing survey conducted by Nails Magazine, only thirty percent of professional manicurists purchased items in open to the public stores. Thus the advertiser’s survey had the potential of excluding seventy percent of target population. See L’Oreal USA (L’Oreal Excellence Crème), Report #49938, *NAD/CARU Case Reports* (December 2008) (study determined to be insufficient where it excluded users of L’Oreal Excellence Crème, a hair dye with the largest market share). NAD was also concerned that the number of colors tested was too small to support such a broad claim.

²⁰ See L’Oreal USA (L’Oreal Excellence Crème), Report #, *NAD/CARU Case Reports* (2009)(general discussion of past cases where underinclusive sample frame has invalidated study). An explanation of how the cities in the advertiser’s study were chosen and whether or not the excluded population was likely to react differently from the included population may have alleviated this concern is in-line with sound methodological practices. See *Reference Manual on Scientific Evidence*, Shari Diamond, J.D. , et al, Reference Guide on Survey Research (2d Ed.) at p. 241. If the sample is drawn from an underinclusive universe, there is generally no way to know how the unrepresented members would have responded. *Ibid.*

rotate which enamel was tested first, and in fact seventeen out of twenty-five respondents used the challenger's product first. It is recognized that respondents may be more likely to select a product based on the order in which it was used in the study versus an actual preference for the product.²¹ Although order effects may be small, "no general formula is available that can adjust values to correct for order effects," and given the extremely small sample size of the study, a small order bias may have a large impact on the final results.

Lastly, NAD was concerned about the effectiveness of blinding the challenger's product by filing off the "OPI" logo. The filing appeared to be ragged and NAD noted that the OPI cap has a distinctive long, tapered shape.²² The advertiser maintained that it filed the logo off because the nail polish brushes are unique to each manufacturer and an important part of the nail polishing experience. NAD noted that the OPI brush is removable from the cap and as such could have been included in a neutral bottle.²³ In sum, the small sample size combined with the potential for bias in the study, especially in the aggregate, and the flawed methodology rendered its results insufficiently reliable to support the advertiser's "*9 Out Of 10 Salon Professionals Preferred Our Formula To The Leading Salon Brand*" claim.²⁴

Consequently, NAD recommended that the advertiser discontinue the claim "*9 Out Of 10 Salon Professionals Preferred Our Formula To The Leading Salon Brand.*"

B. The Implied Claim

In the absence of reliable consumer perception evidence, NAD stepped into the role of the consumer and independently assessed the messages reasonably conveyed by the challenged

²¹ *Reference Manual on Scientific Evidence*, Shari Diamond, J.D. , et al, Reference Guide on Survey Research (2d Ed.) at p. 255. It is also difficult to assess whether a question suffers from a primacy (likelihood of selecting first option) or recency effect (likelihood of selecting last option). Thus, the order should be rotated equally to eliminate doubt. *Ibid.*

²² The advertiser argued that recognition of the OPI bottle should have biased the results in favor of the challenger. However, the very problem with the effect of methodological flaws in studies is that they cannot be accounted for and one cannot simply guess as to how the conclusions would have been different if not for the error in design.

²³ In its second submission the advertiser submitted, in confidence to the NAD, the final report of a second study that it claimed addressed the concerns raised in this case, was statistically significant to the 99% confidence level and that it intends to use this study to support its preference claims going forward. (The advertiser agreed that because the study was conducted after the challenged advertising was distributed that it could not be used to support the challenged claim). NAD determined however, that while the study had a larger sample size, that it still suffered from many of the flaws, including but not limited to the most critical flaw, the failure to add base and top coats to the challenger's nail enamel during a two day time period (it was conducted from March 10, 2010 to March 11, 2010, even shorter than the first test). Also, the survey eliminated the "no preference" option, which NAD also determined to be a fatal flaw as respondents were forced to possibly artificially choose one product or another. NAD's concern regarding the "no preference" option in the first survey was not that there was such an option, but rather that the "no preference" responses were excluded from the data set. See footnote 24, infra. NAD had further concerns regarding the number of colors tested and the blinding techniques.

²⁴ Although the study was deemed insufficient in its entirety, an argument was also raised by the challenger that the "9 out of 10" claim was also insufficient because the advertiser did not count two "no preference" responses to the final survey question and therefore, at best, the advertiser only could support a "7 out of 10" claim. Given the methodological flaws with the survey, NAD determined that the advertiser's study also does not provide a reasonable basis for a "7 out of 10" claim.

advertising.²⁵ NAD determined that at least one reasonable interpretation of the “9 out of 10” preference claim is that Complete nail polish is actually available in, preferred by and used by a significant number of salon professionals in a salon setting.²⁶

The advertiser asserted that this implied message was supported by a survey that demonstrated that eighteen percent of consumers have used a Sally Hansen product (the advertiser has several Sally Hansen lines of nail enamel at various price points) in a salon.²⁷ The challenger countered that this is not evidence of professional use but rather evidence that people may sometimes bring their own nail polish to a salon. NAD determined that the whether or not consumers bring a Sally Hansen product to a salon, using a product or having an experience with a product is not synonymous with preferring a product. In any event, the implied message is that salon professionals prefer and use Complete in a salon setting and not whether consumers bring their favorite nail polish to the salon, a message that is not supported by the message in the record.²⁸ Therefore, NAD determined that the advertiser did not have evidence sufficient to support the implied claim, although this issue is moot in light of the fact that NAD recommended that the advertiser discontinue the underlying preference claim.

II. “All 5 Steps of a Manicure in 1 Bottle” Claim.

Having recommended that the advertiser discontinue its salon professional preference claim, NAD considered the claim “All 5 Steps of a Manicure in 1 Bottle” in a monadic setting. The claim that it is a manicure in a bottle is fanciful and NAD agrees with the advertiser that no consumer could reasonably believe that Complete nail enamel would, as the challenger suggested, clean and buff the nails, moisturize the hand and cut the cuticles. Rather, NAD found that consumers would understand “5 Steps” claim to be a reference to the attributes of the product as described in the challenged advertising: (1) base coat; (2) strengthener; (3) growth treatment; (4) color; and (5) top coat.²⁹ NAD determined that the advertiser’s product ingredient

²⁵ See e.g., Pfizer, Inc., (Zantac 150), Report #4437, *NAD/CARU Case Reports* (January 2006).

²⁶ General Mills, Inc. (Pillsbury Toaster Strudel Frozen Toaster Pastries), Report # 4867, *NAD/CARU Case Reports* (June 2008) (in the context of the challenged advertising, where a boy is eating a toaster strudel and nodding approvingly, the claim “the one kids want to eat” is an implied taste preference claim).

²⁷ Both parties discussed that a “gray market” exists in the nail enamel profession where sometimes professional nail polishes end up on drug store shelves with out the consent of the manufacturer, primarily in New York City. NAD did not discount the possibility that a renegade salon could sell the advertiser’s Sally Hansen line. Nothing in the record however suggests that this is more than an aberration.

²⁸ The advertiser maintained that the challenger was arguing that an advertiser could never make a prospective (i.e., seeking preferences or endorsements of experts before launching a new product) preference claims. NAD disagrees. NAD has permitted a “doctor endorsed” claim for such a product where the survey was reliable and the claim narrowly tailored. The Proctor & Gamble Company (Secret Clinical Strength), Report # 4682, *NAD/CARU Case Reports* (June 2007)

²⁹ With regard to the challenger’s argument that the advertiser is misleading consumers because it is counting one function as two steps, NAD noted that Complete nail polish contains corallina officinalis extract, hydrolyzed conchiolin protein, and Vitamin E that provides a protective finish that strengthens, provides protection and therefore supports natural growth.

list which included ingredients that have been recognized to provide the listed attributes provided a reasonable basis for its claim “*All 5 Steps of a Manicure in 1 Bottle.*”³⁰

Conclusion:

NAD recommended the advertiser discontinue its “*9 out of 10 Salon professionals preferred our formula to the leading salon brand*” claim because the surveys were not sufficiently reliable to provide a basis for the advertiser’s claim. NAD also determined at least one reasonable interpretation of the unqualified “9 out of 10” preference claim is that Complete nail polish is actually available in, preferred by and used by a significant number of salon professionals in a salon setting, a message not supported by the evidence in the record. .

Lastly, NAD determined that the advertiser had provided a reasonable basis for its monadic claim that Complete has “*All 5 Steps of a Salon Manicure in 1 Bottle.*”

Advertiser’s Statement:

Coty is the leading seller of mass market nail care products and is committed to innovation and technological superiority. In this spirit, Sally Hansen Complete Salon Manicure gives today’s busy woman the option of using one product for multiple nail care needs, as opposed to three or more.

Accordingly, Coty is pleased that the NAD has noted there is support for the only performance claim at issue in this proceeding – *All 5 Steps of a Salon Manicure in 1 Bottle* recognizing the innovative formulation contains attributes of 1) a base coat; 2) strengthener; 3) growth treatment; 4) color and 5) a top coat. Coty appreciates this conclusion.

Nevertheless, Coty does not agree with the NAD finding that the preference test methodology was flawed. Especially disappointing was the assertion that OPI nail color is intended to be used only in salons with a base and top coat for purposes of comparison with the Complete Product. Indeed, OPI’s own heavily promoted nationwide distribution of its enamel product at JC Penny demonstrates that every single unit is sold without any instruction to use with base and top coat.

Coty appreciates the NAD's review of the methodology of the study Coty submitted in support of the Preference Claim that “*9 out of 10 Salon professionals*” prefer the Complete product. While Coty disagrees with the suggestion of NAD that the Preference Claim should be discontinued, Coty will nonetheless abide by this suggestion in deference to NAD and the self regulatory process as future advertising is developed. Coty likewise intends to take NAD's comments and critiques of the summary of its second preference study (which did not serve as the basis for the

³⁰ The advertiser also submitted the results from a series of mechanical tests (*i.e.*, cupping test, reverse impact test and the slip angle test), to demonstrate that Complete performed at a comparable level with OPI nail polish. The underlying documentation of the tests, however, including any evidence as to how these tests are consumer relevant, are not in the record.

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preference claim at issue) into account as new advertising for the Sally Hansen Complete product is created. (**#5201 KAD, closed 08/05/2010**)

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