

ONTEL PRODUCTS CORPORATION

Pink Armor Nail Gel

Challenger: Coty Inc.
Product Type: Cosmetics/Beauty Products/Toiletries
Issue: Performance Claims/Demonstrations
Disposition: Modified/Discontinued

- **It is well-established that an advertiser must possess substantiation for claims made in its advertising prior to their dissemination.**
- **“Before” and “after” photographs are product performance claims and, therefore, they must be supported, accurate and representative of the level of product efficacy that a reasonable consumer can expect to achieve.**

Basis of Inquiry: Product demonstrations and performance claims made in broadcast, print and Internet advertising, as well as on product packaging, by Ontel Products Corporation for its Pink Armor nail gel product were challenged by Coty Inc., a competing manufacturer of nail products. The following claims formed the basis of NAD’s inquiry:

“Before” and “after” photographs/product demonstrations

Express Claims:

“Your nails won’t peel, chip or crack no matter what the attack.”

“Rock Hard Finish.”

“[G]uaranteed to transform cracked, brittle and weak nails into healthy, stronger, brighter nails with just one coat, once a week.”

“[W]ith just one coat, once a week, [i]t’s like getting a professional nail treatment at home manicure at home!”

Challenger’s Position:

I. “Before” and “after” photographs/product demonstrations

The challenger argued that the product demonstrations are deceptive for the following reasons: 1) they drastically misrepresent the rate at which nails grow—while nail growth varies, nails typically grow 1.5 inches *per year* (or one-tenth an inch each month) thus nails are incapable of growing to the lengths depicted in the challenged advertisements in just one month; 2) the comparative demonstrations falsely represent how a consumer’s fingernails will appear after using the Pink Armor nail gel product because the “after” photo in the demonstrations show meticulously manicured, polished and painted nails, a look that cannot be achieved solely by using the product; and 3) they imply that Pink Armor is capable of healing diseased fingernails

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and inflamed cuticles, health conditions for which Pink Armor (a purely cosmetic product) has no effect. The challenger maintained that it conducted a four-week internal study which shows that Pink Armor's only effect was to make nails slightly shinier which belies the dramatic results depicted in the challenged demonstrations.

In support of its position, the challenger referred to FTC and NAD precedent on "before" and "after" product demonstrations which make clear they must accurately depict product performance. The challenger rejected the advertiser's argument that the "before" and "after" photographs are puffery. Rather, they constitute actual product performance claims, creating expectations that consumers can transform short, broken and diseased nails into longer, stronger, healthier nails impervious to any chipping or cracking simply by using Pink Armor Nail Gel. The challenger argued that the comparative demonstrations are false and misleading because the fingernails that appear in the "after" photographs have been artificially enhanced using various polishing, coloring and manicuring techniques. The challenger noted that the inclusion of the "dramatization" disclosure in some of the comparative demonstrations is both incorrect and misleading because the results depicted are not achievable.

The challenger maintained that the advertiser's evidence is comprised solely of anecdotal evidence (consumer feedback) and, as such, is insufficient to support the challenged demonstrations and claims. As for the advertiser's reliance on the ingredient, keratin, to support its claims, the challenger maintained that while keratin helps support nail growth, there is no evidence that it can produce the results depicted in the comparative demonstrations or that it can heal damaged or diseased nails.

The challenger asserted that the challenged television commercial includes a computer-generated "graphic simulation" which purports to demonstrate how the product works. The simulation shows a woman applying Pink Armor to a fingernail which begins to glimmer upon contact as the voiceover states "the Keratin Gel goes deep down to repair and restore, helping battered nails recover faster." Concomitantly, the inside of the woman's nail is shown where the nail cells appear to be healing after which the outside of the nail is shown with a glimmering pink color and white tip. The challenger argued that this graphic simulation is factually and scientifically inaccurate because the product cannot and does not go "deep down" to repair or restore the nail because it is merely a nail protectant and the cells of the nail plate are already dead.

II. Express Claims: "Your nails won't peel, chip or crack no matter what the attack"; "Rock Hard Finish"; "[G]uaranteed to transform cracked, brittle and weak nails into healthy, stronger, brighter nails with just one coat, once a week"; "[W]ith just one coat, once a week, [i]t's like getting a professional nail treatment at home manicure at home!"

The challenger argued that the challenged television commercial also features a demonstration in which a woman places her manicured fingernails in a casserole dish of rocks and moves her hand vigorously around the dish and, upon removing her hand, reveals her perfect nails and states that by using Pink Armor "your nails won't peel, chip or crack no matter what the attack." The image of this demonstration is also shown on the advertiser's website alongside the claim that

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Pink Armor provides a “Rock Hard Finish.” Taken together, the advertiser maintained that the demonstration is literally false because Pink Armor Nail Gel alone cannot confer the strength and protection depicted in the demonstration, adding that the woman in the commercial is clearly wearing nail polish and/or other coating on her fingernails to shield her nails from damage. The accompanying claims are likewise false because they communicate the unsupported message that consumers who use Pink Armor will never experience any peeling, chipping or cracking.

The challenger also argued that the advertiser’s claim that consumers need only apply “one coat [of the product], once a week,” shown in the television commercial and on the advertiser’s website, is unsupported because it directly contravenes its own product use instructions (specifically, an insert in the package) which instruct users to “[a]pply 2 coats of Pink Armor to [their] bare natural nails” on a weekly basis. (emphasis added) The instructions also encourage users to “[a]pply a fresh coat regularly for enhanced results” and note that “[f]or touchups, you can recoat over dry Pink Armor at anytime,” further demonstrating that the “one coat [of the product], once a week” claim is unsupported.

The challenger maintained that the challenged claims do not constitute puffery. The challenger maintained that the advertiser’s reliance on the Sally Hansen Complete Manicure case¹ to support its argument that these claims are puffery is misplaced. In that case, the challenged claim “All 5 Steps of a Manicure in 1 Bottle” was appropriately deemed to be puffery because no consumer could reasonably interpret the claim to mean that a nail polish could perform all of the physical tasks associated with a manicure. Here, however, the challenged claims are unqualified promises of product performance which are reinforced by a demonstration where a woman runs her hand through a dish of rocks without damaging any of her perfectly manicured nails as well as other images of miraculously transformed nails.

The challenger argued that the advertiser’s proposed revisions, including the addition of the term “dramatization” to the “before” and “after” photographs on its website, is not sufficient to correct the inaccurate messages conveyed. Further, the advertiser’s proposed modification of its website copy from “with just one coat, once a week, [i]t’s like getting a professional nail treatment” to “two coats, once a week, [i]t’s like getting a professional nail treatment” is similarly unsupported because it has failed to provide any evidence that two coats of Pink Armor can provide the results depicted in the challenged advertising.²

¹ Coty Inc. (Sally Hansen Complete Manicure), Report #5201, *NAD/CARU Case Reports* (August 2010).

² The similar claim is “Pink Armor is...[g]uaranteed to transform cracked, brittle and weak nails into healthy, stronger, brighter nails with just one coat, once a week.” The challenger also noted that the advertiser’s proposed modification (“two coats, once a week, [i]t’s like getting a professional nail treatment”) is also insufficient because neither the television commercial nor the website includes a disclosure indicating that a consumer must use Pink Armor for four consecutive weeks to achieve the dramatized (i.e., unattainable) results. Although this disclosure appears on the product packaging, the advertiser has provided no explanation as to why it should not appear on its website and in its television commercial. The challenger also argued that the proposed change failed to address the similar claim (“one coat [of the product], once a week”) that continues to appear in the challenged television commercial which will confuse consumers especially when the commercial appears in isolation.

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Advertiser's Position:

The advertiser argued that its product packaging clearly and conspicuously states that the “before” and “after” photographs are dramatizations. The advertiser maintained that these dramatizations constitute puffery because consumers are accustomed to seeing dramatizations in advertising. The advertiser argued that the “before” photographs do not show yellow, diseased fingernails and that the “after” photographs feature fingernails that have only been filed with an emery board and coated with Pink Armor nail gel. The advertiser also argued that claims such as “won’t peel, chip or crack no matter what the attack” and “Rock Hard Finish” also constitute puffery.³

The advertiser maintained that the challenged comparative demonstrations and express claims are supported by positive testimonials from uncompensated consumers who used Pink Armor and reported that their nails were stronger, healthier and growing more quickly after weeks of use.⁴ The advertiser also argued that its claims are further supported by the keratin in its product which is widely regarded in the nail industry as strengthening nails and supporting nail growth. The advertiser also noted that the target audience of the challenged advertisements is not a vulnerable one as would be the case for weight loss or hair loss products.

The advertiser agreed to make the following modifications to its advertising: 1) adding the term “dramatization” to the “before” and “after” photographs to avoid any potential consumer confusion; 2) revising its website to state a) that the product should be used for four consecutive weeks to obtain the desired outcome; and b) that two coats should be applied each time in accordance with product use instructions; and 3) revising the YouTube page for its Pink Armor product to include the same disclosures that appear on the Pink Armor website.

Decision:

I. “Before” and “after” photographs/product demonstrations

It is well-established that an advertiser must possess substantiation for claims made in its advertising prior to their dissemination.⁵ “Before” and “after” photographs are product performance claims and, therefore, they must be supported, accurate and representative of the level of product efficacy that a reasonable consumer can expect to achieve.⁶ Further, actual

³ The advertiser maintained that the challenged commercial is no longer running on television and will be shown exclusively on its website.

⁴ The advertiser maintained that there are over 150 customer reviews with an average of 4-5 stars.

⁵ Too Faced Cosmetics (Lip Injection Extreme Lip Plumping Treatment), Report #4276, *NAD/CARU Case Reports* (January 2005). See also *FTC Policy Statement Regarding Advertising Substantiation*, Appended to Thompson Medical Co., 104 F.T.C. 648, 839 (1984), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987) (noting that the reasonable basis doctrine requires that firms have substantiation before disseminating a claim), at <http://www.ftc.gov/ftc-policy-statement-regarding-advertising-substantiation>.

⁶ Lifestyle Lift Holdings, Inc. (Lifestyle Lift®), Report #4654, *NAD/CARU Case Reports* (April 2007).

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product testing is the most direct and affirmative means by which to assess a product's performance capability.⁷

The front and side panels of the Pink Armor Nail Gel product package prominently feature “before” and “after” photographs. The “before” photographs feature a woman's short and visibly damaged or diseased fingernails. In contrast, the “after” photographs depict perfectly manicured, shiny, noticeably longer and pink fingernails after four weeks of use—in fact, the “after” photograph on the side panel features what appears to be a perfectly manicured *artificial* nail.⁸ The “dramatization” disclaimer appears below the photographs.

In the challenged television commercial, there are many “before” and “after” photographs depicting a visibly short and damaged/diseased nail in the “before” photograph and a noticeably longer, pink and well-manicured nail in the “after” photograph. These photographs appear in conjunction with the following: 1) consumer testimonials promoting Pink Armor Nail Gel's efficacy,⁹ 2) a demonstration of the announcer putting her hands into a bowl filled with rocks and moving her hands around vigorously to show that with Pink Armor, her nails “won't chip, peel or crack whatever the attack,” and 3) a depiction of the keratin rich gel penetrating deep into the nail bed to “[h]elp battered nails recover faster.”

The advertiser submitted no product testing in support of its “before” and “after” photographs/product demonstrations or its performance claims. Instead, the advertiser submitted an affidavit from the commercial's producer explaining the following: 1) the four individuals featured in the on-screen testimonials were instructed to use the product twice a week for four to six weeks and not to get a manicure for the duration of product use; 2) the video was shot after four to six weeks of product use; 3) the individuals in the commercial were not compensated; and 4) their testimonials are based on their personal experience using the product. The advertiser also submitted product reviews from Amazon.com of satisfied users as further support for its “before” and “after” product demonstrations.

It is well-established that endorsements and testimonials cannot replace reliable evidence as support for advertising claims, notwithstanding that they may reflect the honest opinions of satisfied users.¹⁰ The FTC's Endorsements and Testimonials Guides clarify that “[a]n advertisement employing endorsements by one or more consumers about the performance of an advertised product or service will be interpreted as representing that the product or service is effective for the purpose depicted in the advertisement. Therefore, the advertiser must possess and rely upon adequate substantiation, including, when appropriate, competent and reliable scientific evidence, to support such claims made through endorsements in the same manner the advertiser would be required to do if it had made the representation directly, *i.e.*, without using endorsements. Consumer endorsements themselves are not competent and reliable scientific

⁷ Preval® (ActiFade™ Complete Age-Defying System), Report #4747, *NAD/CARU Case Reports* (November 2007).

⁸ Similarly, the back of the product packaging also features what appear to be perfectly manicured *artificial* nails.

⁹ Testimonials include “no splitting and healthy nails”; “my nails have become longer and stronger with Pink Armor” and “Pink Armor is supposed to repair, seal and strengthen and it absolutely does.”

¹⁰ Alde Associates, LLC (daniPro Nail Polish), Report #5565, *NAD/CARU Case Reports* (March 2013).

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evidence.”¹¹ The Guides also state that “[i]f the advertiser does not have substantiation that the endorser’s experience is representative of what consumers will generally achieve, the advertisement should clearly and conspicuously disclose the generally expected performance in the depicted circumstances, and the advertiser must possess and rely on adequate substantiation for that representation.”¹²

Regardless of how heartfelt the testimonials of the users in the commercial (or those of satisfied customers on Amazon.com) are, they are no substitute for reliable product testing demonstrating that consumers who use the product as instructed will achieve results similar to the nails depicted in the “after” photos on the product packaging and in the commercial. Further, the advertiser provided no evidence to counter the challenger’s argument regarding typical nail growth (namely, 1.5 inches per year, or one-tenth an inch each month), which is significantly less than what is depicted in the “before” and “after” photographs/product demonstrations. Similarly, the producer affidavit is not proof of what consumers can typically expect to achieve when using the product according to its use instructions.

As for the “dramatization” disclaimer on the product packaging and the advertiser’s website, NAD has determined that dramatizations, while an acceptable means of conveying a message, must nonetheless be accurate and substantiated.¹³ Just recently, the FTC, in a case it settled against Nissan North America, Inc., made clear that a false product demonstration (which was shown in conjunction with a mice-type super which states “Fictionalization. Do Not Attempt”) violated Section 5(a) of the FTC Act.¹⁴

Here, the advertiser’s use of the “dramatization” disclaimer in connection with the “before” and “after” photographs on the product packaging and in the Internet advertising does not insulate it from its responsibility to provide evidence that consumers will typically achieve nails similar to those depicted in the “after” photograph when using the product according to its use instructions.

¹¹ Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 CFR § 255.2(a), at <http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf>.

¹² *Id.* at 16 CFR § 255.2(b).

¹³ Natural White, Inc. (Rapid White® Tooth Whitening System), Report #3995, *NAD/CARU Case Reports* (January 2003) (noting that the depicted “before” and “after” depictions could reasonably be interpreted to mean that consumers could anticipate similar dramatic results after using Rapid White); *see also Church & Dwight Co., Inc. (Arm & Hammer® Liquid Laundry Detergents)*, Report #5658, *NAD/CARU Case Reports* (December 2013), fn. 72 (noting that while the term “Dramatization” is shown onscreen during the challenged television commercial, there is no evidence that consumers would understand the advertiser’s intended message that “Dramatization” refers both to the fact that the product is not actually manufactured by pouring baking soda back into the bottle, as well as the fact that the “two scoops” claim and imagery merely characterize the presence of a functionally significant amount of baking soda in the 4X concentrated products).

¹⁴ In the challenged commercial, a Nissan Frontier pickup truck is shown speeding up a steep hill to rescue a dune buggy that is trapped in sand atop the hill, ultimately pushing the dune buggy over the hill. Before the Nissan Frontier is shown, a mice-type super which states “Fictionalization. Do Not Attempt” appears. The narrator subsequently states “[t]he mid-size Nissan Frontier with full-size horsepower and torque. Innovation for doers, innovation for all.” In reality, however, Nissan failed to accurately represent the performance of the actual, unaltered Nissan Frontier under the depicted conditions because the Nissan Frontier and the dune buggy were pulled to the top of the hill by cable and the sand dune is significantly less steep than depicted. In the Matter of Nissan North America, Inc., Complaint, at ¶¶ 5, 7, 8.

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With respect to the depiction of visual simulation of the keratin penetrating the nail bed to heal damaged or diseased nails, even assuming as true that keratin when applied to the surface of the nail is known to strengthen nails, there is no evidence in the record that keratin works systemically, i.e., that it can penetrate the nail bed, which is comprised of *dead* cells, and repair or heal damaged or diseased nails.

For all the foregoing reasons, NAD recommended that the “before” and “after” photographs and the visual simulation of the keratin penetrating the nail bed be discontinued.¹⁵

II. Express Claims: “Your nails won’t peel, chip or crack no matter what the attack”;
“Rock Hard Finish”; “[G]uaranteed to transform cracked, brittle and weak nails into healthy, stronger, brighter nails with just one coat, once a week”; “[W]ith just one coat, once a week, [i]t’s like getting a professional nail treatment at home manicure at home!”

NAD considered the advertiser’s puffery arguments, noting that statements that are mere puffing do not require substantiation. In determining whether claims constitute puffery, NAD looks to the following factors: (1) whether the representations concern general matters that cannot be proven or disproved, (2) whether the statements are distinguishable from representations of specific characteristics that are measurable by research or test, or (3) whether the wording uses expressions of opinion that will be discounted by the buyer.¹⁶

Product performance claims, unlike puffery, must be supported by reliable product testing.¹⁷ NAD noted that Pink Armor Nail Gel has many sets of product use instructions. The instructions on the product packaging make no reference to the number of times one must apply Pink Armor while the product insert, titled “Read Before First Use!,” states “Apply 2 coats of Pink Armor to your bare nails - allow to dry thoroughly between coats. Remove once weekly with any nail polish remover and repeat.”¹⁸ In contrast, the challenged television commercial and the advertiser’s website promote the product’s efficacy based on the product being applied with “one coat, once a week.” Regardless of how often applied or the number of coats, the advertiser has failed to provide *any* product testing to support the challenged performance claims. Specifically, the claim “Your nails won’t peel, chip or crack no matter what the attack” is an objectively provable performance claim and is reinforced by the depiction of the announcer inserting her manicured nails into a rock bed and moving her hands around in it. Similarly, “[G]uaranteed to transform cracked, brittle and weak nails into healthy, stronger, brighter nails with just one coat,

¹⁵ NAD advised the advertiser that any depiction of product performance must be supported by reliable and robust product testing prior to the dissemination of such depictions in any future advertising. While the challenger submitted in-house testing to demonstrate that the “before” and “after” photographs exaggerate the product’s efficacy, NAD did not need review this testing because the advertiser failed to provide a reasonable basis to support the challenged claims and product demonstrations.

¹⁶ Envirocon Technologies, Inc. (Lemi Shine® Performance Booster and Lemi Shine® Rinse Agent), Report #5543, *NAD/CARU Case Reports* (January 2013).

¹⁷ Preval® (ActiFade™ Complete Age-Defying System), Report #4747, *NAD/CARU Case Reports* (November 2007).

¹⁸ The product packaging states: “Apply Pink Armor directly to your natural nails. You may re-coat at anytime. Can be removed with any nail polish remover.”

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once a week” is also an objectively provable performance claim which is reinforced by “before” and “after” photographs with which it is shown.

In contrast, NAD determined that the claims “Rock Hard Finish” and “[W]ith just one coat, once a week, [i]t’s like getting a professional nail treatment at home manicure at home!” constitute permissible advertiser puffing because no reasonable consumers would expect their nails to be as hard as a rock (even when shown in conjunction with a woman moving her manicured nails around vigorously in a rock bed) or that they could get a professional manicure (which involves a multi-step cleaning and shaping process) simply by using Pink Armor Nail Gel.¹⁹

Accordingly, NAD recommended that the advertiser discontinue the unsupported performance claims “Your nails won’t peel, chip or crack no matter what the attack” (together with the depiction of the woman moving her nails around vigorously in the rock bed) and “[G]uaranteed to transform cracked, brittle and weak nails into healthy, stronger, brighter nails with just one coat, once a week.”

Conclusion:

NAD recommended that, given the lack of reliable supporting evidence in the record, the “before” and “after” photographs and the visual simulation of the keratin penetrating the nail bed be discontinued.

NAD determined that the claims “Rock Hard Finish” and “[W]ith just one coat, once a week, [i]t’s like getting a professional nail treatment at home manicure at home!” constitute permissible advertiser puffing. However, NAD recommended that the advertiser discontinue the unsupported product performance claims “Your nails won’t peel, chip or crack no matter what the attack” (together with the depiction of the woman moving her nails around vigorously in the rock bed) and “[G]uaranteed to transform cracked, brittle and weak nails into healthy, stronger, brighter nails with just one coat, once a week.”

Advertiser’s Statement:

While Ontel disagrees with the NAD’s determination regarding Ontel’s before and after pictures, Ontel will nonetheless abide by the NAD’s recommendation in deference to the NAD and the self-regulatory process by removing the existing before and after picture combination from the website, television commercial and on the packaging of future production runs.

As previously noted, Ontel is no longer running the PINK ARMOR product commercial on television. Ontel also agrees to remove the current commercial from the website. Ontel will take NAD’s recommendations under advisement for any future commercial that airs on television or its website as part of its marketing campaign.

¹⁹ NAD noted that the advertiser agreed to modify the claim and “[W]ith just one coat, once a week, [i]t’s like getting a professional nail treatment at home manicure at home!” to state “two coats, once a week, [i]t’s like getting a professional nail treatment.”

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Ontel is pleased that NAD agrees that the phrases “Rock Hard Finish” and “[W]ith just one coat, once a week, [i]t’s like getting a professional nail treatment at home manicure at home” are merely puffery. Ontel will take under advisement the NAD’s recommendation to discontinue the following phrases: “Your nails won’t peel, chip or crack no matter what the attack” and “[G]uaranteed to transform cracked, brittle and weak nails into healthy, stronger, brighter nails with just one coat, once a week.” (#5701 AMU, closed 03/27/2014)