

Case #4877 (07/07/08)

THE HOME DEPOT, INC.

Behr Interior Paint

Advertising Agency:

Undisclosed

Challenger:

Power-Townsend Co.

Basis of Inquiry: Superiority claims made by Home Depot for its Behr interior paint in newspaper ads, internet ads, in-store banners and television and radio advertisements, were challenged by Power-Townsend Co. The following served as the basis for this inquiry:

“Rated #1 by a leading independent consumer publication.”

“Rated #1 by an independent national study.”

“Rated #1 four years in a row.”

“Rated #1 for coverage. And rated #1 for high-traffic areas.”

Challenger’s Position:

The challenger asserted that the advertiser’s claim that Home Depot’s Behr Premium Plus interior paint is “Rated #1 by a leading independent consumer publication” is unsubstantiated. While acknowledging that the findings of Consumer Reports supported this claim in the past, the challenger noted that the 2008 issue of Consumer Reports no longer ranks Behr Paints #1. Indeed, the challenger noted, the most current Consumer Reports rated Behr #2 in the category of “flat” paints, #5 in the category of “low-luster” paints, and #2 in the “semi-gloss” category. It was not rated #1 in any category, much less an “overall” category.

Moreover, contrary to the advertiser’s assertion, the challenger contended that the advertiser should not be allowed a lag time in withdrawing its advertisements falsely claiming that Consumer Reports continues to rank them #1. The challenger maintained that for one month, Home Depot was still using the old Consumer Reports ranking even though the new ranking was inconsistent with its #1 claim.

Further, to the extent that the advertiser has replaced its “Rated #1 by a leading independent consumer publication” with the claim “Rated #1 by an independent national study,” the challenger objected to this claim as well, contending that it was, similarly, unsupported. The challenger maintained that the methodology of the testing upon which the advertiser relies in support of this claim (by Marschall Labs) was not in compliance with industry standards. In any case, the challenger asserted, the actual rankings noted in the underlying tests (even if accepted as properly conducted) fail to support the claim that Behr Paint has been ranked #1 for the past four consecutive years.

I. The Challenger’s Contention that the Claim “Rated #1 by a leading independent consumer publication” is based on Outdated Data and, therefore, Unsubstantiated:

The challenger asserted that the above claims are misleading in that they are, alternatively, based on outdated data or unreliable testing.

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To the extent that the advertiser claims that its Behr Premium Plus interior paint has been “rated #1 by a leading independent consumer publication” the challenger asserted that such claim implies that the rating (from Consumer Reports) is current, which is not the case since the latest ranking in the 2008 Consumer Reports does not rank Home Depot’s Behr Paint as #1.

Further, the challenger asserted that given that the advertiser knew or should have known that the latest Consumer Reports rankings in February of 2008 no longer ranked Behr Paint as #1, the advertisements were not based on current data. The challenger asserted that the claims based on the Consumer Reports ranking were misleading. Given that Consumer Reports no longer ranks Behr Paint #1 any claim that Behr is #1 or that Behr has been #1 for four years running is unsupported.

The challenger also contended that NAD precedent makes clear that the advertiser’s claims are unsupported. For example, according to NAD’s decision in Grey Goose,¹ even detailed literally accurate representations may be misleading if subsequent testing proves competitor’s product is better than advertised. The challenger asserted that this applies not only to when a product has become more highly ranked in a more recent ranking, but also when a product’s ranking has fallen. The challenger maintained that the advertiser here may not choose to use data that was “frozen” rather than more up-to-date data.² Likewise, NAD has held that a party making a sales superiority claim must retain current sales data to ensure continued accuracy of the claim.³ The challenger argued that the same standard of the use of recent data should apply to sales and product superiority claims. At the very least, the challenger asserted, an advertiser making a sales superiority claim that covers only a specific period of time must conspicuously disclose both the source and time period it covers.⁴

II. The Challenger’s Contention that the Claims “Rated #1 by an independent national study” and “Rated #1 four years in a row” are Unsubstantiated:

To the extent that the advertiser claims that its Behr Premium Plus interior paint has been “Rated #1 by an independent national study”, or “Rated #1 four years in a row” by an independent national study, the challenger countered that the evidence from Marschall Labs upon which the advertiser relies is unreliable and, therefore, insufficient to support these claims.

Marschall Labs tests and ranks paints twice a year (in the first and third quarter). Marschall Labs break down its assessment of each paint into four broad categories; Liquid paint properties (5%), Appearance Properties (20%), Dry Performance (40%) and Application Properties (35%). These categories are further broken down into sub-categories of attributes which are tested separately, and their scores combined to create a score for the broader category. For example, Liquid Paint Properties is defined by the attributes of Heat and Freeze-thaw Stability. Appearance Properties are measured by the attributes of reflectance and sheen. Dry performance is measured by the attributes

¹ Sidney Frank Importing Company, Inc (Grey Goose Vodka), Report #4016, *NAD/CARU Case Reports* (February 2003).

² Id.

³ See, Applebee’s Neighborhood Grill & Bar (Applebee’s House Sirloin), Report # 3621, *NAD/CARU Case Reports* (February 2000).

⁴ See, World Finer Foods, Inc. (Bahlsen HIT Cookies), Report #3453, *NAD/CARU Case Reports* (March 1998).

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of Washability, Scrub Resistance and Burnish Resistance. Lastly, Application Properties is measured by the characteristics of hideability, touchup and leveling.⁵

It was the challenger's position that the underlying criteria used to rank the paints tested in the Marschall Labs reports and the weight accorded each rendered the results inaccurate. For example, the challenger argued that Marschall Labs should have weighted the factor "hiding/1 coat coverage" more heavily since that is most consumers' greatest concern when evaluating the performance of paint. According to the challenger, the Marschall Labs report only assigned a 10% weight to this factor ("average applied hiding") when, in fact, it should have been weighted closer to 50%. The challenger also contended that the criteria of "touch up" capability (i.e., ability to match existing paint when performing "touch-ups") was weighted too heavily because such a factor is less likely to affect the choice of an average consumer. The challenger also maintained that the use of leveling tests (demonstrating a level/smooth coat) is only appropriate for testing solvent-based paint, not the latex paints at issue here.

The challenger took special issue with the Marschall Labs 2007 results. The challenger noted that Stainmaster, which was rated number 2 in the third quarter with a with a score of 97, was not rated in the first quarter, whereas the advertiser, was rated a 97.5 in the third quarter but only a 95.0 in the first quarter, thus, *averaging* a score of 96.25, *below* that of Stainmaster). In this instance, the challenger pointed out, the advertiser did *not* average its scores (because it would have lost) but rather, improperly rather, used only the higher score from the quarter where it out-ranked Stainmaster.⁶

Lastly, the challenger maintained, Marschall Labs compared dissimilar attributes. For example, Marschall Labs awarded *different* performance points to *equally performing* paints based upon whether they were technically toned or untoned paints.⁷ The challenger asserted that the fact a paint it toned or untoned does not, by itself, justify the difference in points awarded when their performance was scored the same. Further, the challenger asserted, Marschall Labs inexplicably awarded different "final scores" to paints that received the same "raw laboratory findings score", using a score conversion that is not explained. It was the challenger's position that the data here was clearly manipulated and does *not* support the advertised rankings.

In any event, the challenger asserted, assuming *arguendo* that NAD accepts the methodology employed by Marschall Labs, the resultant rankings still fail to support the "Rated #1" claims.

According to the challenger, the results of the Marschall Labs report show that no one particular type of Behr paint consistently received a #1 Rating. Rather, while there is always at least one type of Behr paint that receives a #1 rating out of the two tests conducted per year, none is consistently

⁵ For each factor, the raw test findings are converted into scores. The total possible score is 100. It is unclear how the raw test findings are converted into final scores.

⁶ In other words, when averaging scores from the two quarters in 2007 and comparing to Stainmaster's one score; Stainmaster ranks highest rank. However, it permitted to compare only its best score to Stainmaster, the advertiser's Behr 1850 is ranked #1, Stainmaster is #2 and Behr 1050 is #3.

⁷ For example, there is a discrepancy between the 3rd quarter scores of Glidden Evermore EM 9924 and Behr Premium Plus 1850; both paints received a score of 6 in the test findings for "average applied hiding," but their *converted* scores were 5 and 7.7 respectively.

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#1. In other words, the challenger explained, the Behr paints selected to be tested are not identical each quarter, and the advertiser improperly *averages* the two rankings notwithstanding the fact that the two paints are not being compared to the same competitors in any given quarter. As such, the challenger posited, the advertiser cannot claim that it has been ranked #1 for the past four years based on this data.

The challenger asserts that Marschall Labs' tests show that the advertiser's Behr 1850 paint was rated #1 only three out of past eight quarters and that its Behr 1050 paint was rated #1 only two out of eight quarters.⁸ This, the challenger argued, is inadequate substantiation for the claim that Behr Premium Plus interior paint is "Rated #1" or "Rated #1 for four years in a row."

III. The Challenger's Position that there is No Basis for the Claim that they are "Rated #1 for Coverage...and Rated #1 in High-Traffic Areas":

The challenger asserts that Consumer Reports did not rank paints for "coverage" or "high traffic area" categories. Rather, the challenger stated, the "CR Quick Recommendations" in the 2008 Consumer Reports simply suggests a few paints in specific categories, but it never designates any paint as #1. Therefore, the challenger contended, the advertiser has no basis for this claim (and they are not substantiated by the Marschall Labs reports).

Advertiser's Position:

I. The Advertiser's Position that its Claim, "Rated #1 by a leading independent consumer publication" was Substantiated at the time it was made but has since been Discontinued:

Preliminarily, to the extent that certain advertisements claimed that its paint was "Rated #1 by a leading independent consumer publication," the advertiser stated that this claim was substantiated at the time that it was made. The advertiser stated that it ordered the discontinuation of the advertising campaign (based on the Consumer Reports' rankings) in February 2008 when the magazine issued its new ranking. According to the advertiser, any advertisements published with this claim after this point in time were advertisements that it was unable to prevent from running. The advertiser also noted that it discontinued use of these claims prior to the date of the challenger's complaint, and, therefore, the challenge as to the claims based on the Consumer Report's findings are moot. Further, in light of its independent testing (to be discussed), the advertiser stated that the latest Consumer Reports finding may very well be an aberration that will be corrected next year.

The advertiser asserted that NAD's decision in Grey Goose⁹, relied upon by the challenger, is irrelevant because it is factually distinguishable from the case at hand. The issue in Grey Goose centered not on a superiority claim but, rather, the use of outdated data to describe a competitor in a less favorable light. Likewise, the advertiser stated that the challenger's reliance upon the Applebee's case¹⁰ is misplaced as the issue therein focused on the specific categorization used to

⁸ i.e., over the past four years.

⁹ Sidney Frank Importing Company, Inc (Grey Goose Vodka), Report #4016, *NAD/CARU Case Reports* (February 2003).

¹⁰ Applebee's Neighborhood Grill & Bar (Applebee's House Sirloin), Report # 3621, *NAD/CARU Case Reports* (February 2000).

limit the scope of the superiority claim at issue, as opposed to the instant case where the advertisements make no such limitation. Further, the advertiser argued, the claim at issue in Applebee's was a sales superiority claim, materially different from the performance superiority claim at issue here. To the extent that the challenger relies on NAD's holding in World Finer Foods¹¹, the advertiser stated that this case turned on the appropriateness of basing a broad superiority claim on data covering a period under six months (as well as a sales superiority claim, materially different from the claim at issue here) and, as such, this case has little relevance to the instant matter.

II. The Advertiser's Contention that its Claims "Rated #1 by an independent national study" and "Rated #1 four years in a row" are Wholly Substantiated:

The advertiser asserted that its new advertisements, replacing the phrase "based on a leading independent consumer publication" with "based on a leading independent study," properly disclose that the basis of its claims is the Marschall Labs reports. The advertiser explained that Marschall Labs is an independent laboratory with an extensive twenty-year background in industry testing and is used by many large paint manufacturers. Marschall Labs tests over 60 types of interior paint (comprising approximately 40 different national brands) and evaluates each paint's overall performance including its application, appearance and dry film qualities.¹² According to the statement from Dan Marschall of Marschall Labs, this lab utilizes testing methods and criteria premised upon ASTM protocol or common industry tests and are fairly standardized to provide accurate and useful comparisons and analyses of paint products.

The advertiser explained that Marschall Labs issues a report ranking interior flat paints twice yearly (1st and 3rd quarters). According to the advertiser, in the most recent reports Behr ranked highest among interior flat paints based on an average score of 96.25 out of 100 from the twice yearly testing. The advertiser asserted that the best manner in which to determine the #1 ranked flat paint for an entire given year is to average the two scores received by each paint over these two quarters. According to the advertiser, when the results are thus computed, Marschall Labs ranks either its Behr 1850 or 1050 #1 with the other in #2 in 2004, 2005 and 2006. Thus, the advertiser asserted, its claims that Behr Premium Plus interior paint is "Rated #1" for four years running is wholly substantiated by the Marschall Labs reports.

Contrary to the challenger's position, the advertiser asserted that the underlying test criteria used by Marschall Labs are sound and, further, that the challenger misrepresents the underlying criteria. Dan Marschall further explained that, contrary to the challenger's suggestion, there is no industry standard as to how much weight is to be accorded to each criterion. Therefore, there is no basis for the challenger's position that 50% of the score be based on the attribute (sub-category) of "hiding." The advertiser also asserted that the challenger underestimates the weight given to "hiding" by Marschall Labs. For example, the advertiser claims that Marschall Labs properly

¹¹ World Finer Foods, Inc. (Bahlsen HIT Cookies), Report #3453, *NAD/CARU Case Reports* (March 1998).

¹² For example, the lab tests the applied "hiding" of one or two coats of paint, as well as its adhesion, washability and scrub resistance and then, based on a total possible number of points for each criterion, assesses a numerical score for each and determines the rankings of overall quality based on total scores.

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assigned a weight of approximately 30% to “hiding” criteria by combining the “Appearance Properties Contrast Ratio Score” and “Applied Hiding Average Total Score.”

The advertiser also asserted that the challenger underestimates the importance of the “touch up” factor of paints and incorrectly asserts that “leveling” tests are only relevant for solvent-based paint (10% and 5% of total score, respectively). In fact, the advertiser maintained such tests are equally relevant in testing latex paint.

The advertiser also rejected the challenger’s assertion that Marschall Labs 2007 results were unfair because in the quarter where Behr had a higher rating, Stainmaster paint was not compared. The advertiser explained that that because Marschall Labs only evaluated Stainmaster in the third quarter of 2007, it is unfair to require the advertiser average its two scores from that year when Stainmaster cannot do so as well.¹³ It was the advertiser’s position that it should not be required to average two difference scores (thereby resulting in it receiving a lower score than Stainmaster) but, rather, that it should be able to use the higher of the two scores (which is higher than Stainmaster’s). The advertiser stated that by computing the 2007 results in this manner, its paint is clearly rated #1 in 2007 by Marschall Labs. In the alternative, the advertiser asserted that the scores should still be averaged and Stainmaster should be removed from consideration since it does not have a full year of scores. This, too, would place Behr 1850 and 1050 in first and second rank out of the averaged first and third quarter scores for 2007.

The advertiser also rejected the challenger’s position that the Marschall Labs reports compare dissimilar products and that the challenger is simply incorrect in its assertion that untuned paint is of a lesser quality. The advertiser asserted that Marschall Labs properly evaluated and ranked the two categories of paint separately.¹⁴

III. The Advertisers Position that there is a Basis for the Claim that They are “Rated #1 for Coverage...and Rated #1 in High-Traffic Areas”:

While the challenger claims Consumer Reports never rated the “high traffic area” and “full coverage” categories, the advertiser claims that Consumer Reports called Behr “one of the best” in these categories, and despite the lack of an official rank, this should be equivalent to “#1.”

The advertiser further contended that the claim Behr was “rated #1 for coverage...and for high-traffic areas” is supported by the ranking in the 2008 issue of Consumer Reports.

DECISION:

¹³ If the scores from both reports in 2007 are averaged and then compared to Stainmaster’s one score; Stainmaster has a higher score. If allowed to compare their best score to Stainmaster, Behr 1850 is ranked #1, Stainmaster is #2 and Behr 1050 is #3.

¹⁴ To this end, Mr. Marschall also explained that the primary differences between toned and untoned paint is that the toned paint contains an additional tinting pigment to enhance its hiding capabilities and usually includes less titanium dioxide and that, due to these optical differences it is entirely reasonable to evaluate and rate them using different scoring systems. Moreover, he explained, a toned paint is not always necessarily of higher quality than an untoned paint and, in fact, if additional tinting pigment were added to an untoned paint to give it the same reflectance as toned paint, it would have greater hiding capability due to the higher quantity of titanium dioxide.

I. “Rated #1 by a leading independent consumer publication”

With respect to the challenged claim that the advertiser’s paint is “Rated #1” by a leading consumer publication,¹⁵ the advertiser informed NAD that the challenged claims were, in fact, permanently discontinued prior to the date of the complaint. As such, NAD lacked jurisdiction to review these claims and administratively closed the challenge as to this claims pursuant to section 2.2(B)(i)(d) of the NAD Procedures.¹⁶

II. “Rated #1 by an independent national study” and “Rated #1 four years in a row”:

With respect to the claims, “Rated #1 by an independent national study” And “Rated #1 four years in a row”, it is well-established that in an NAD proceeding, the advertiser has the initial burden of providing a reasonable basis for its claims. If NAD finds that an advertiser has provided a reasonable basis for its claim, the burden shifts to the challenger to show either that the advertiser’s evidence is fatally flawed or that the challenger possesses stronger, more persuasive evidence reaching a different result.¹⁷ With these principles in mind, NAD reviewed the advertiser’s evidence offered in support of these claims.

It appears undisputed that, at present there is no specific industry standard for rating interior paints “overall.” However, the fact that there is no industry standard for rating interior paints does not necessarily preclude an advertiser from making such a claim provided that an advertiser sets forth a reasonable basis for such claims based upon consumer relevant evidence. Here, while there may be no industry standardized methodology for rating interior paints “overall”, according to the statement from Dan Marschall of Marschall Labs, his lab utilizes testing methods and criteria premised upon ASTM protocol or common industry tests and are fairly standardized to provide accurate and useful comparisons and analyses of paint products.

In support of its claim, the advertiser relied upon data culled from testing by Marschall Labs. NAD observed that, according to its web site, Marschall Labs is an independent paints and coatings consulting and testing laboratory serving the coatings industry and offers services such as physical testing of coatings, raw material evaluations, and formulation studies, among others. Further, NAD noted, the four person team comprising Marschall Labs¹⁸ are active participants in various professional organizations including, Federation of Societies For Coatings Technology (FSCT); American Society For Testing and Materials (ASTM); Steel Structural Painting Council (SSPC); and the American Chemical Society (ACS).¹⁹ NAD further acknowledged that Marschall Labs has a twenty-plus year background in industry testing and that it is used by many large paint

¹⁵ And variations on this theme regarding Consumer Reports.

¹⁶ NAD accepted the advertiser’s assurance the any advertisement published after this point in time were those that it was unable to prevent from running and appreciated the advertiser’s voluntary discontinuance of the “Rated #1 by a leading independent consumer publication” claim.

¹⁷ See, Alcoa, Inc. (Reynolds Handi-Vac Vacuum Sealer), Report #4823, *NAD/CARU Case Reports* (April 2008); Johnson & Johnson Vision Care, Inc. (Acuvue Advance for Astigmatism), Report #4772, *NAD/CARU Case Reports* (December 2007); S.C. Johnson & Son (Pledge Duster Plus), Report #4554, *NAD/CARU Case Reports* (September 2006).

¹⁸ Dan, John, George and Fred Marschall.

¹⁹ Indeed, Dan Marschall serves as the ASTM Task Group Chair for Application Properties D01.42.03 within D01.42 Architectural Coatings.

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manufacturers.²⁰ Marschall Labs tested over 60 types of interior paint and evaluated their of overall performance according to certain criteria.²¹

The results of the Marschall Labs demonstrate that no one Behr interior paint (i.e., Premium Plus 1850 or Premium Plus 1050) consistently received a #1 rating over the eight quarters reported. However, NAD noted that one constant was clear – in any given quarter one of the Behr paints (Premium Plus 1850 or 1050) occupied either #1 or #2 position in the ratings. NAD further observed that the data demonstrated that *the average* of the advertiser’s scores for its Premium Plus paints over the eight quarters reported were consistently the highest.²²

To the extent that the challenger asserted that Marschall Labs improperly awarded *different* performance points to *equally performing* paints based upon on whether they were technically toned or untoned paints, NAD was satisfied with Dan Marschall’s explanation that, due to the optical differences between toned and untoned paints, it was entirely reasonable to evaluate and rate them using different scoring systems.

NAD next considered the challenger’s position that the paints selected for testing in certain quarters were not necessarily identical for each quarter and that the advertiser improperly *averaged* its two rankings despite that the two paints were not being compared to the same set of competitors in any given quarter. NAD observed that while there is nothing in the record (i.e., by Marschall Labs, industry standard, or other source), affirmatively supporting a finding that it is customary practice in this industry to average such scores to create an overall yearly (#1) ranking, at the same time, there is no evidence demonstrating that it is in any way improper.

However, NAD, like the challenger, did question the Marschall Labs’ 2007 results insofar as concerned the advertiser’s use of only highest score for its ranking that year rather than the average as was done in other years. In the third quarter of 2007 Stainmaster was rated number 2 in the third quarter with a score of 97. The advertiser’s Behr Premium Plus 1850 was rated number 1 with a score of 97.5. However, in the first quarter, while Stainmaster was not rated at all and the advertiser’s 1850 paint was rated number 2 with a score of 95. The advertiser’s average score of 96.25 was less than Stainmaster’s score.

Keeping in mind that the concept of averaging its scores to obtain its rankings was initiated by the challenger (and not, according to any source in the record, attributable to Marschall Labs’ methodology), NAD questioned the appropriateness of the advertiser’s opting to not average its scores that year but, rather, to use only its higher score of 97.5 (as well as its argument that it was not required to average its scores when Stainmaster could not do and that a comparison of the just the top scores was reasonable). Likewise, NAD was troubled by the advertiser’s suggestion that, in the alternative, its scores could still be averaged but that Stainmaster should be removed entirely from consideration because it did not have a full year of scores (leaving the advertiser with a highest

²⁰ Its client base includes manufacturers such as Benjamin Moore, Sherwin Williams, Coronado, DuPont and others.

²¹ For example, the lab tests the applied “hiding” of one or two coats of paint, as well as its adhesion, washability and scrub resistance and then, based on a total possible number of points for each criterion, assesses a numerical score for each and determines the rankings of overall quality based on total scores.

²² For example, while Dutch Boy paint might have been rated #1 in a particular quarter, that manufacturer’s combined average top two scores for the two quarters was not higher than that of the advertiser’s paints.

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score for the year). NAD was concerned that a high ranking score was being summarily discarded because it did not fit in to the advertiser's mode of calculating rankings – again, a mode which was of the advertiser's device, *not* Marschall Labs. NAD deemed it inappropriate to do so.

In so finding, NAD was mindful that the claim at issue, “Rated #1” and “Rated #1 for four years in a row” by an “independent national study” are particularly compelling and powerful claims – claims which raise consumer expectations. NAD determined that consumers would reasonably expect there to be virtually indisputable supporting data in support of these claim. In reaching this determination, NAD could not ignore the fact that while this claim is no longer premised upon a leading consumer publication's testing – a publication that is generally regarded as performing impartial, comprehensive testing that is beyond reproach – this new claim follows directly on the heels of that widespread campaign. NAD concluded that the touted “independent national study” (and the resultant data) upon which the “Rated #1” claim is based, would be reasonably interpreted by consumers to be more incontrovertible than is actually be the case.²³

In addition to the foregoing, of particular concern to NAD was the weight afforded to certain criteria in the underlying testing offered in support of the advertiser's Rated #1 claim. The Marschall Labs test appears to judge paints in four overall categories: (1) Liquid Paint Properties (comprised of characteristics such as viscosity, free-thaw stability difference and heat stability difference); (2) Appearance Properties (comprised of characteristics such as Contrast Ratio, Reflectance, Sheen); (3) Dry Performance (comprised of characteristics of “washability” of pencil, crayon, lipstick, etc., Scrub Resistance, etc.); and (4) Application Properties (comprised of “Applied Hiding, touch up, leveling, sag resistance, drying time, etc.).

According to Dan Marschall paint qualities that are often considered important to paint manufacturers, raw materials suppliers and to consumers include hiding power, touch-up and leveling, but there is no industry standard that determines the weight that should be afforded to each paint quality when comparatively scoring paint performance. The advertiser itself also pointed to Consumer Reports which stated that it judges interior latex paints on the basis of “hiding power” (opacity), flow and leveling (how smooth the paint looks when applied), mar resistance (the ability to resist change when paint is scratched or rubbed), and touch-up performance (the difference in gloss and color between paints applied with a brush and those applied with a roller). Therefore, the advertiser argued, there is no basis for the challenger's position that 50% of the score be based on the attribute (sub-category) of “hiding” and that it was entirely proper for Marshall Labs to assign a weight of approximately 30% to the “hiding” criteria by combining the “Appearance Properties Contrast Ratio Score” and “Applied Hiding Average Total Score.”

NAD posited that, to the extent that none of the cited sources directs that any one attribute be given any more weight than another, it could be said that, dependent upon the particular consumer's needs one factor or another might be more important. For example, for a raw materials supplier, Liquid Paint Properties such as viscosity, free-thaw stability difference and heat stability difference might be more of a concern that say, washability (a sub-characteristic of Application Properties)... Similarly, a general consumer with small children might deem washability or mar resistance to be more important than, “Reflectance” (a sub-characteristic of “Appearance Properties.” In this

²³ Or at least as sound as that performed by the leading consumer publication (which no longer rates the advertiser #1).

respect, NAD noted that the advertisements are directed at a general consumer audience whereas the underlying studies, weighted as they were, were not specifically designed for advertising claim substantiation.

While NAD did not specifically take issue with the fact that the category of Liquid Paint Properties (viscosity, free-thaw stability difference or heat stability difference) was accorded a weight of only 5% of the total score or that a weight of 40% being accorded to Dry Performance (adhesion, washability, scrub resistance, burnish resistance, water spotting, etc.), NAD did take issue with the weight accorded to the sub-categories of the larger category of “Application Properties.”

According to the evidence, although the category “Application Properties” *as a whole* was accorded 35% of the total score, this overall category was comprised of sub-categories with the following weights: Applied Hiding – 10%; Touch Up – 10%; Leveling – 5% and other sub-categories making up the final 10%. Indeed, given that both Consumer Reports and Dan Marschall noted the importance of these specific paint qualities, NAD was particularly troubled by the fact that Applied Hiding, Touch Up and Leveling were accorded as little weight as was detailed in the Marschall Labs report.

Without opining as to the validity of the challenger’s position that “hidability” should comprise 50% of the total overall score, NAD noted that the advertiser only reached the “30% weight level for the “hiding criteria” by *combining* the sub-category “Applied Hiding Average Total Score” (given a weight of only 10%) with an wholly separate larger category “Appearance Properties” (weighted 20%). Aside from the question of how the other category of “Appearance Properties” relates or impacts a paint’s hideability, NAD noted, this characteristic was accorded *twice* as much weight as the attribute “Hiding.” Similarly, NAD noted, while both Consumer Reports and Dan Marschall noted the importance of a paint’s “Touch Up” and “Leveling” capability, this test only weighted these attributes 10% and 5% respectively (the latter weight being equivalent to that accorded freeze-thaw/heat stability differences.)

NAD is cognizant of the fact that in advertising claim substantiation, perfection is not required but, rather, that claim substantiation is based on a determination of whether an advertiser has provided a reasonable basis for its claims.²⁴ On this record, however, NAD determined that the evidence was insufficiently reliable to provide a reasonable basis for the consumer expectations likely to raised by the advertiser’s “Rated #1 by an independent national study” And “Rated #1 four years in a row” claims and recommended that they be discontinued.

III. The Claims “Rated #1 for Coverage...and Rated #1 in High-Traffic Areas”:

To the extent that the advertiser relied upon Consumer Reports Quick Pick Recommendations (i.e., stating that its paints topped the list of those paints with the “best chance for covering in one coat”

²⁴ See, The Valvoline Company (Valvoline Zerex G-05 Extended Life Antifreeze), Report #4375, *NAD/CARU Case Reports* (August 2005); Colgate-Palmolive Company (Palmolive Oxy Plus), Report #4252, *NAD/CARU Case Reports* (October 2004); Colgate-Palmolive Company (Palmolive Plus Dishwashing Liquid), Report #3195, *NAD/CARU Case Reports* (April 1995).

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or for “walls that take a beating”), NAD simply noted that these Consumer Reports are out-dated.²⁵ The March 2008 Consumer Reports ratings make clear that the advertiser was not rated #1 for 2008, and no longer listed *first* in the Consumer Reports March 2008 “Quick Picks” for “coverage” and “high traffic areas.” As such, NAD recommended that these claims be discontinued. This is not to say, however, that the advertiser cannot still promote the fact that its paints were listed *among* the Consumer Reports 2008 “Quick Picks” for “one-coat coverage” and “toughest for high-traffic areas.”

Conclusion:

NAD concluded that the evidence was insufficiently reliable to provide a reasonable basis for the consumer expectations likely to be raised by the advertiser’s “Rated #1 by an independent national study” and “Rated #1 four years in a row” claims and recommended that they be discontinued. NAD further concluded that the record was insufficient to provide a reasonable basis for the claims that the advertiser’s Premium Plus paint is “Rate #1 for Coverage” or “Rated #1 for High Traffic Areas.” However, nothing in NAD’s decision precludes the advertiser from promoting the fact that its paints were listed *among* the Consumer Reports 2008 “Quick Picks” for “one-coat coverage” and “toughest for high-traffic areas.”

Advertiser’s Statement:

Home Depot U.S.A., Inc. thanks the NAD for its careful consideration of this matter. Home Depot is pleased that the NAD concluded that the company demonstrated that the average of the testing scores for Behr’s Premium Plus paints over the eight quarters reported from 2006-07 were consistently the highest rated. Home Depot disagrees with the conclusions in the decision regarding the remaining claims. Nonetheless, the company supports the NAD’s voluntary self-regulatory process and will modify those claims accordingly. (#4877 MSZ/km, closed 07/07/2008)

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²⁵ Indeed, NAD observed that the advertiser’s paints were not included in the best paints for “walls that take a beating” Quick Pick in the Consumer Reports 2005 Recommendations.