

ESALON

Custom Formulated Hair Color

Challenger: National Advertising Division

Product Type: Cosmetics / Beauty Products / Toiletries

Issues: Implied Claims

Disposition: Substantiated in part/Modified-Discontinued

- **Advertisers are required to identify a message as advertising when it appears in a context that consumers may reasonably understand to be editorial content.**

Basis of Inquiry:

Claims made by eSalon for its custom hair color product on its website, on its Pinterest and Facebook pages, as well as in other social media, were reviewed by NAD as part of its ongoing monitoring program.

Express Claims:

- “Salon-grade Color crafted for you by experts, as if you’re in their chair.”
- “Individual color made just for you, not the masses. The perfect match...”
- “Our expert colorists craft your color, using thousands of color variations to personalize it for you. We consider everything from hair color history, amount of gray, skin tone, eye color, and more, to create your most flattering shade.”
- “The patent-pending technology enables individual customization on a large scale. Our hair colors are not pre-stocked. Every order is custom blended, bottled and packaged.”

Implied Claim:

- eSalon does not disclose that it sponsors the blog www.haircolorforwomen.com. Blog posts recommend eSalon products and appear to be unbiased and unconnected to eSalon.
- Online reviews of eSalon on www.totalbeauty.com appear to be unbiased reviews of actual consumers because they do not disclose a material connection to eSalon.
- The 2013 totalbeauty.com Reader’s Choice Award for hair color appears to be based upon unbiased reviews of actual consumers who have no material connection to eSalon.
- Photos of celebrities on eSalon’s Pinterest page, “Hair Colors We Love,” imply that the photographed hair was colored using eSalon.
- Twitter tweets from bloggers promoting eSalon fail to disclose a material connection between eSalon and the tweeter and, as a result, the tweets appear to be unbiased recommendations.
 - Layne@mamaQBlogsIt “Trips to the salon can be time consuming and really expensive! I love this great option from eSalon! You can save...<http://fb.me/2FigYaWPI>

- Savvy Sassy Moms@savvysassymoms eSalon The New Revolution In At-Home Hair Coloring <http://bit.ly/14e87cU> <--shhh don't tell your hairdresser

Advertiser's Position:

The advertiser advised NAD that its company implemented technology to create its at-home hair color product that would deliver the same quality and results as custom formulated hair dyes prepared by professional stylists to clients directly for at-home hair coloring. eSalon contended its research and development allows it to provide client consultation and hair color administration for mass-customization. It advised NAD that orders are placed by clients on eSalon's website. A colorist team reviews the orders and creates a custom formulation which is individually blended, packaged and shipped to clients for at-home application.

The advertiser's noted that its hair dyes are purchased from a manufacturer who provides hair dyes to professional hair stylists. Color experts supervise the process to ensure that the quality of the hair dye was comparable with the best hair dyes offered to professional stylists. eSalon further contended that its mass-customization technology that permits it to individually blend every bottle of hair dye for individual customization. The advertiser advised NAD that it employs cosmetology licensed colorists to custom formulate hair colors and that the dyes and precision equipment it uses give it the ability to dispense over 2,000 different shades of hair color. Additionally, the online form its clients complete allows it to customize the product based on a client's color history, amount of gray, hair texture, skin tone or eye color. These additional factors impact the formulation, for example, requiring a higher or lower hydrogen peroxide concentration, to adapt to the particular needs of the client.

Further, as to NAD's inquiry regarding reviews of eSalon online and in social media, eSalon advised NAD that it markets its product exclusively online. It markets eSalon by soliciting reviews of its product in traditional media as well as social media. It then promotes any content written about eSalon within advertising networks. As an example, eSalon explained that when an article about eSalon was featured in the Wall Street Journal last year, it paid advertising networks to drive traffic to the article. Additionally, eSalon will link to third party content about eSalon on its website, Facebook and Pinterest pages, as well as in its Twitter feed. The advertiser argued that any independent reviews of eSalon represent the opinions of third parties and are beyond the control of eSalon. In response to NAD's inquiry regarding its use of celebrity photographs and whether such use implies an endorsement of eSalon's product, the advertiser maintained that its website, Facebook and Pinterest pages clearly communicate the advertiser's intended message, that they like the hair color, not that the pictured person is endorsing their product.

Decision:

NAD reviewed eSalon's advertising online and in social media to determine whether the advertiser's express claims were supported and whether consumers were likely to believe that certain content regarding eSalon online and in social media was editorial content based on the context in which the advertising appeared. The advertiser cooperated fully with NAD's inquiry,

providing support for its express claims and explaining to NAD its use of social media to market its product. NAD appreciated the advertiser's cooperation in this inquiry into its marketing and social media practices and noted that the social media strategies used by eSalon are not unique to eSalon. In fact, advertisers are increasingly looking to market their products through social media and content marketing, as advertisers search for alternative, more cost effective ways to reach and interact with consumers. The new context in which advertising appears poses challenges related to the obligation of advertisers to inform consumers when content posted online is advertising.

I. Express Claims

NAD reviewed the support provided for eSalon's express claims including claims that its product is, "salon-grade," "personalized hair color," "crafted by experts," "using thousands of color variations" which is "custom blended, bottled and packaged." NAD determined that eSalon's purchasing policies, procedures and technology supported its express claims. eSalon supported its salon-grade claims by demonstrating that it purchases the dyes for its products from a manufacturer who provides hair dyes to professional stylists and that eSalon uses the same concentration of hair dye as is used in professional products. Further eSalon's use of cosmetology licensed colorists to formulate hair colors, supported its claim that expert colorists craft eSalon hair color. Finally, eSalon's claims regarding individual customization and personalization of its product were supported by the technology eSalon has implemented which allows it to collect information from customers regarding their hair color, texture and color history, and custom formulate hair color ingredients based upon customer input and the review of its professional colorists, including the ability of consumers to submit photographs. As a result, NAD determined that the advertiser provided a reasonable basis to support its express claims.

II. Implied claims and Social Media

The advertiser maintains a presence on various social media platforms including Facebook, Twitter, and Pinterest and also maintains a blog, www.haircolorforwomen.com. eSalon promotes its product exclusively through social media, editorial and blogger reviews and the redistribution of those reviews in social media. The advertiser's product has been reviewed in an impressive number of traditional online, print and television media sources including, In Style, Lucky, Woman's Day, Good Housekeeping, Entrepreneur, The Wall Street Journal, MSN and Fox, as well as on the Today Show and CBS News. Additionally, eSalon's product has been promoted in online media by bloggers and on Twitter. NAD was concerned about whether some online content, which appeared to be editorial or user-generated content, was in fact generated by the advertiser, and whether consumers could clearly discern whether the content they were reading about eSalon was advertising or editorial content.

In general, advertisers have an obligation to inform consumers when they are advertising. This general principle is derived from Section 5 of the FTC Act which defines an act or practice as deceptive (1) if there is a representation or omission of information that is likely to mislead the consumer acting reasonably under the circumstances; and (2) if that representation or omission is

“material” – defined as an act or practice “likely to affect the consumer’s conduct or decision with regard to a product or service.”¹ This guidance has been used by the NAD and the FTC to hold advertisers responsible for advertising that appears in “editorial-like” formats, as consumers can be misled by the advertiser’s failure to disclose its connection to its own advertising content. Additionally, the FTC has issued more specific guidance reminding advertisers of their obligation to disclose material connections between themselves and a party or entity endorsing a product in its Guidelines to Endorsement and Testimonials.²

A. Hair Color for Women Blog

The advertiser’s blog, www.haircolorforwomen.com, posts tips on hair color, hair styles and other hair-related issues. Each blog post includes a promotion of eSalon. The blog, however, does not advise consumers clearly and conspicuously that eSalon maintains the blog. Both NAD and the FTC have reminded advertisers of their obligation to advise consumers when there is a connection between the advertiser and content that directly or indirectly promotes the advertiser’s product. In a prior case, NAD recommended that an advertiser that maintained a blog, Prostate Health Blog, clearly and conspicuously disclose that the blog was written and maintained by the advertiser, explaining, “the FTC has noted that it is in the public interest that publishers and advertisers avoid any possible deception by not placing advertisements whose format simulates that of a news or feature article.”³

Although the blog in question here carries a disclosure at the bottom of the webpage, stating, “2010 [Hair Color For Women](#). All Rights Reserved. This blog is sponsored by [eSalon.com](#),” NAD was concerned that the disclosure is not sufficient to advise consumers of the connection between eSalon and the blog. NAD has routinely held that effective disclosures must be “clear and conspicuous.”⁴ The FTC’s recently released guide, *.Com Disclosures: How to make Effective Disclosures in Digital Advertising* noted, “a disclosure is more likely to be effective if consumers view the disclosure and the claim that raises the need for disclosure (often referred to as a “triggering claim”) together on the same screen.”⁵ The disclosure on the www.haircolorforwomen.com blog appears in small print which a reader must scroll to the bottom of the page to view, and is not visible before a consumer reads the blog post and its promotion of eSalon. As a result, NAD recommended that the advertiser disclose that it maintains the blog clearly and conspicuously on the top of the landing page of the blog, where it will be easy to notice, read and understand by readers of the blog, as well as on each page or blog post, so consumers are aware of the connection between the blog and eSalon products that are

¹ See FTC letter dated February 20, 2005, www.ftc.gov/os/closings/staff/commercialalertletter.htm; see also *JS&A Group, Inc.*, 54 F.Reg 12593, Consent Order (March 28, 1989).

² <http://www.ftc.gov/os/2009/10/091005revisedendorsementguides.pdf>

³ *Herbal Groups Inc. (Prostalex Plus)*, NAD/CARU Case Reports, Report #5005 (July 2009)(citing *JS&A Group*, 54 F.Reg 12593, March 28, 1989, Corporation ordered to cease and desist from “misrepresenting, either directly or indirectly, that an advertisement is an independent consumer or news program and not a paid advertisement.”)

⁴ *3M Company (Nexcare Comfort Ultra Fabric Bandages)*, Report # 4596 *NAD Case Reports* (November 2006); *Windmill Health Products (Chitosol Chitosan Fat Binding Diet System)*, Report # 3900 at 5 *NAD Case Reports* (April 2002).

⁵ <http://www.ftc.gov/os/2013/03/130312dotcomdisclosures.pdf> at 8.

promoted on the blog, whether they visit the landing page or arrive on the blog via a link to a blog post.

B. Blogger posts and tweets

NAD noted that the advertiser's product was promoted by third parties on twitter and in blog posts. NAD observed the multiple tweets regarding eSalon, including the following:

- Layne@mamaQBlogsIt "Trips to the salon can be time consuming and really expensive! I love this great option from eSalon! You can save...<http://fb.me/2FigYaWPI>
- Savvy Sassy Moms@savvysassymoms eSalon The New Revolution In At-Home Hair Coloring <http://bit.ly/14e87cU> <--shhh don't tell your hairdresser

eSalon contended that it was not responsible for the content of such third party posts. NAD was concerned, however, that eSalon promoted certain third-party posts by "retweeting" those posts or sharing the posts on Facebook, Pinterest or other Social Media. Additionally, the FTC Guidelines for endorsements and testimonials recommend that the advertiser advise reviewers of their disclosure obligation and further advise that the advertiser "should have procedures in place to try to monitor [...] postings for compliance."⁶ NAD determined that the advertiser is responsible for disclosing a material connection between itself and an endorser of its product when it uses such endorsements in its own advertising, including re-posting the endorsements on social media. Material connections that require disclosure include the receipt of a product for free, any compensation paid by eSalon for a review, or any incentives provided to the blogger or twitter user for "clicks" through to eSalon's website.⁷ To avoid the potential for consumer confusion, NAD recommended that the advertiser make it a practice to advise reviewers of their disclosure obligations, and discontinue its re-posting of reviews or endorsements on social media or modify such re-postings to disclose clearly and conspicuously any incentives eSalon provided for reviewing or promoting its products.

C. Pinterest Users and Reviews

The advertiser maintains a Pinterest page that includes a separate "User's and Reviews" page. The "User's and Reviews" page includes links to online content that review or discuss eSalon. Although eSalon provides links to editorial content that discusses or reviews eSalon, including the Wall Street Journal, MSN.com, Rachel Ray, and Good Housekeeping, it also links to its own www.haircolorforwomen.com blog. NAD advised eSalon that when it provides links to content on www.haircolorforwomen.com it should clearly and conspicuously disclose that the content to which the consumer is directed is maintained by eSalon. NAD was also concerned that

⁶ <http://www.ftc.gov/os/2009/10/091005revisedendorsementguides.pdf> see Section 255.5 Example 8.

⁷ <http://www.ftc.gov/os/2009/10/091005revisedendorsementguides.pdf> see Section 255.5 Example 8: "Assume now that the consumer joins a network marketing program under which she periodically receives various products about which she can write reviews if she wants to do so. If she receives a free bag of the new dog food through this program, her positive review would be considered an endorsement under the Guides."

consumers viewing the link to content on the website www.haircolorforwomen.com could believe that the content was independently generated editorial content, rather than content created by eSalon. This is particularly true as the links to articles on its blog are posted next to links to editorial content on eSalon, including links to reviews on Good Housekeeping.com, Totalbeauty.com and other editorial content. For all of these reasons NAD recommended that the advertiser clearly and conspicuously disclose its connection to www.haircolorforwomen.com in its links posted on Pinterest so that consumers are aware of the connection between the blog and advertiser.

Additionally, the advertiser's Pinterest "Users and Reviews" page links to content posted by third party bloggers and other reviewers of eSalon's products. NAD advised the advertiser that when it promotes or redistributes content posted by bloggers and other reviewers, as discussed more fully above, eSalon bears responsibility for disclosing any connection between itself and the blogger or other reviewer when it reposts or provides links to that content.

D. Product Reviews on Totalbeauty.com

The advertiser touts its award for "Best Hair Color 2013" from totalbeauty.com in its online advertising. The totalbeauty.com 2013 Reader's Choice Award is based upon user reviews of eSalon's product. NAD noted that eSalon had over 200 reviews of its product and that its average product rating was 9.5. A high percentage of eSalon reviewers were designated as "newbies" and had reviewed only eSalon and no other products.⁸ As a result, NAD was concerned that eSalon had provided incentives for these reviews. The advertiser assured NAD that it did not provide incentives for posting reviews on totalbeauty.com, and explained that encourages its customers to review the product but that compensation is not given for any reviews. While not taking issue with the advertiser's assurances that incentives were not provided in this instance, NAD cautioned the advertiser that to the extent incentives are given for reviews, such incentives must be disclosed.⁹

II. Endorsement claims

⁸ TotalBeauty.com is a website that reviews beauty products and independently rates and reviews each product based upon specified guidelines. TotalBeauty.com allows consumers to review products and gives reviewers ratings or designations based upon how many products the reviewer has reviewed. Each review includes the reviewer's designated status and the number of product reviews posted. A "Newbie" is a reviewer who has posted fewer than – reviews.

⁹ NAD noted that false reviews of products on websites have been the subject of investigations by the FTC and state attorneys general. See e.g. <http://ftc.gov/opa/2010/08/reverb.shtm> ("Public relations agency hired by video game developers will settle Federal Trade Commission charges that it engaged in deceptive advertising by having employees pose as ordinary consumers posting game reviews at the online iTunes store, and not disclosing that the reviews came from paid employees working on behalf of the developers ... 'Advertisers should not pass themselves off as ordinary consumers touting a product, and endorsers should make it clear when they have financial connections to sellers.'"); <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-agreement-19-companies-stop-writing-fake-online-reviews-and> ("Attorney General Eric T. Schneiderman today announced that 19 companies had agreed to cease their practice of writing fake online reviews for businesses and to pay more than \$350,000 in penalties.")

NAD was concerned about the advertiser's use of photographs of celebrities in social media, including on its Pinterest and Facebook pages, to promote eSalon. Although the advertiser contended that the photographs were only used to feature the celebrity's hair color choices, the FTC Guidelines concerning the use of Endorsements and Testimonials defines endorsements to include using the likeness of a celebrity:¹⁰

A television advertisement for a particular brand of golf balls shows a prominent and well-recognized professional golfer practicing numerous drives off the tee. This would be an endorsement by the golfer even though she makes no verbal statement in the advertisement.

Given the clear guidance from the FTC, NAD was concerned that consumers could reasonably interpret the use of a celebrity likeness on the advertiser's Facebook and Pinterest pages as an implied endorsement by the celebrity. As a result, NAD recommended that the advertiser discontinue its use of celebrity likenesses on its website unless the celebrities have actually endorsed the product.

Conclusion:

NAD determined that the advertiser provided a reasonable basis for its express claims including its claims, "salon-grade," "personalized hair color," "crafted by experts," "thousands of color variations," and "custom blended, bottled and packaged" were substantiated. As to the advertiser's implied claims, NAD recommended that the advertiser disclose, clearly and conspicuously, at the top of its blog and on each page or post, that eSalon maintains the blog. Additionally, NAD recommended that the advertiser advise reviewers of their disclosure obligations when it provides incentives for posting online reviews or content about eSalon, and further recommended that the advertiser disclose any incentives it provides for posts about eSalon when eSalon promotes or otherwise redistributes such posts. NAD further recommended that eSalon disclose its connection to the blog, www.haircolorforwomen, when it posts content from the blog on Pinterest or other social media. Finally, NAD recommended that the advertiser discontinue its use of non-endorser celebrity photos on its website or in social media, as such use implies an endorsement of eSalon by the depicted celebrity.

Advertiser's Statement:

eSalon was pleased that the justification provided for all its direct claims were well taken and will take into account the recommendations suggested by NAD in future advertising. **(#5645 LB, closed 10/17/2013)**

¹⁰ FTC Guidelines concerning the use of Endorsements and Testimonials §255.0 Example 5 <http://ftc.gov/os/2009/10/091005revisedendorsementguides.pdf>.