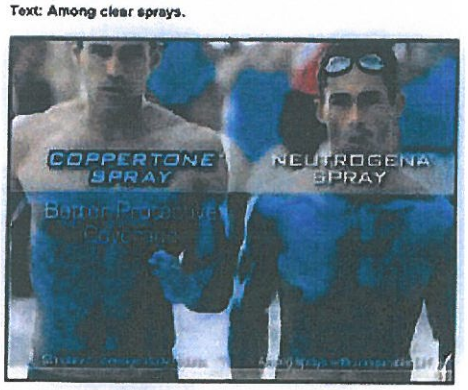
10. Defendant's counterclaims concern a Coppertone Sport® commercial that began airing in 2009 (hereinafter, "the CS commercial"). At trial, two versions of the CS commercial were introduced into evidence: a 16-second video clip; and a frame-by-frame pictorial. (DTX-1; DTX-2) Both are equivalent save for one segment that appears in the pictorial and not in the video sample. The commercial depicts two athletes running in the ocean, applying sunscreen spray, and then briefly running, swimming, and biking. The voice-over is as follows:

> You give your sport 100% – so should your sunscreen. Coppertone Sport® spray and Neutrogena spray provide the same amount of sun protection. Coppertone Sport® gives you better coverage. Waterproof, sweatproof – Coppertone Sport® – 100%.

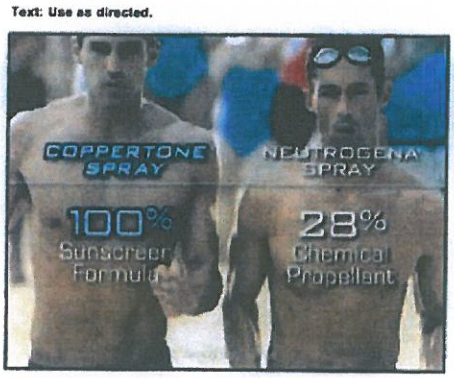
(DTX-1) The "better coverage" statement is made by the announcer in connection with the following visual.



better protective coverage.

The "Coppertone spray" user is covered by blue shading, while the "Neutrogena spray" user is covered by slightly lighter blue shading. The text "better protective coverage" is overlayed on the athlete using Coppertone Spray. Text at the bottom of the screen states: "Simulated coverage study results. Among sprays with comparable SPF."

11. The pictorial includes an additional scene not in the video clip admitted into evidence. That visual is as follows.



Neutrogena is 28% chemical propellant.

Across the chest of one athlete is "Coppertone spray"; "100% sunscreen formula" – on the other, "Neutrogena spray"; "28% chemical propellant." (DTX-2) The voice-over states: "Coppertone Sport® is 100% sunscreen. Neutrogena® is 28% chemical propellant." (*Id.*)

12. Defendant argues that plaintiff's claim of "better protective coverage" is literally false insofar as none of plaintiff's in vivo or in vitro testing established this fact. (D.I. 93 at 30-35) Defendant also asserts that plaintiff intended to convey a "better protection" message in the CS commercial; this claim is literally false because the testing supporting the CS commercial did not measure protection. (*Id.* at 36) Finally, defendant claims that the CS commercial violates the Lanham Act because it falsely states that Neutrogena Ultimate Sport® users cover themselves with 28% chemical propellant, which is untrue. (*Id.* at 36-38)

D. Legal Standards

13. Section 43(a) of the Lanham Act provides that

> a person who shall . . . use in connection with any goods or services . . . any false description or representation, including words or other symbols tending falsely to describe or represent the same . . . shall be liable in a civil action by any person . . . who believes that he is or is likely to be damaged by the use of such false description or representation.

15 U.S.C. § 1125(a). There are two different theories of recovery for false advertising under section 43(a): "(1) an advertisement may be false on its face; or (2) the advertisement may be literally true, but given the merchandising context, it nevertheless is likely to mislead and confuse consumers." *Castrol, Inc. v. Pennzoil Co.*, 987 F.2d 939, 943 (3d Cir. 1993). The test for literal falsity is an objective one for the court's determination. "[I]f a defendant's claim is untrue, it must be deemed literally false" regardless of the advertisement's impact on the buying public. *Id.* at 943-44. Further, "only an unambiguous message can be literally false," and "[a] literally false message may be either explicit or conveyed by necessary implication when, considering the advertisement in its entirety, the audience would recognize the claim as readily as if it had been explicitly stated." *Novartis Consumer Health Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.,* 290 F.3d 578, 586-87 (3d Cir. 2002) (quoting *Clorox Co. v. Procter & Gamble Commercial Co.*, 228 F.3d 34, 35 (1st Cir. 2000)) (internal quotations omitted). "The greater the degree to which a message relies upon the viewer or consumer to integrate its components and draw the apparent conclusion, [ ] the less likely it is that a finding of literal falsity will be supported." *Id.* at 587 (internal quotations and citations omitted). Conversely, "[w]hen the challenged advertisement is implicitly rather than explicitly false, its tendancy to violate the Lanham Act by misleading, confusing or deceiving should be tested by public reaction." *Castrol*, 987 F.2d. at 943.

14. The DTPA prohibits conduct that "[d]isparages the goods, services, or business of another by false or misleading representation of fact" or that generally "creates a likelihood of confusion or of misunderstanding." 6 Del. C. §§ 2532 (a)(8) & (a)(12). As "a complainant need not prove competition between the parties or actual confusion or misunderstanding" to prevail in an action under the DTPA, 6 Del. C. § 2532(b), proof of a Lanham Act claim would necessarily meet the requirements for a claim under the DTPA.

E. Discussion

1. The "Best line ad"

a. Implied establishment claim

15. The court agrees with plaintiff that defendant's use of bar graphs signals that numerical values for "UVA" and "SPF" were derived from some manner of product testing. Because the Best line ad makes an "implicit establishment claim," i.e., one that "relies on scientific studies by making an implicit superiority claim or parity claim by showing a graph or diagram."[4] Plaintiff "must show that defendant's tests did not establish the proposition for which they were cited" in order to demonstrate literal falsity.[5]

16. Neither party has presented the court with the appropriate evidence it needs

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[4]*Procter & Gamble Pharms., Inc. v. Hoffman-La Roche Inc.*, 2006 U.S. Dist. LEXIS 64363, at *109 (S.D.N.Y. Sept. 6, 2006).

[5]*Castrol*, 977 F.2d at 63 (Where "defendant's ad explicitly **or implicitly** represents that tests or studies prove its product superior, plaintiff satisfies its burden by showing that the tests did not establish the proposition for which they were cited) (citation omitted) (emphasis added).

to do a proper analysis regarding defendant's PFA testing; plaintiff has not met its burden in this regard. Defendant presented its PFA values at the preliminary injunction hearing in this case; it relies on that testimony in its current papers. Plaintiff correctly points out that, during the bench trial, defendant did not expand on the summary-level testimony. Defendant cites only its witness's acknowledgment that PFA testing is a recognized industry measure for sunscreen performance. (D.I. 98 at 9-11) Defendant does not point to any specific data in its papers.[6] (*Id.*; D.I. 93 at 28)

17. The only testimony cited by plaintiff in support of its challenge to defendant's PFA-testing methodologies is a statement by Dr. Patricia Agin ("Agin"), a photobiologist and Fellow in plaintiff's Research & Development Group, that she would use the same midpoints for SPF in a PFA test. (D.I. 94 at 13, citing D.I. 108 at 154:13-21) Plaintiff argues in its papers that defendant failed to comply with this principle, but does not point to any testimony in support. Plaintiff cites no other testimony challenging defendant's methodologies. (D.I. 94 at 11-12) Notwithstanding the obvious deficiencies in defendant's substantiation of its PFA testing, plaintiff had the burden of proof on this issue, and it has not met that burden on this record.

b. Literal falsity relating to "UVA"

18. In its preliminary injunction opinion, the court found that the pre-trial record did not support a finding of literal falsity with respect to the differentials between the

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[6]Plaintiff points out several trial exhibits in which defendant's PFA data is contained, in its view, in incomplete form. (D.I. 94 at 12-14) Although defendant broadly cited plaintiff's PFA testing results, comprising nearly 200 pages of material (DTX 63; DTX 64), defendant has not clearly relied on any particular exhibits in its reply to plaintiff's implied establishment claim assertion.