

either sport-labeled spray<sup>13</sup> featured in the CS commercial. Plaintiff has only performed *in vivo* testing on the Coppertone Ultra-Guard® (SPF 50) and Neutrogena® Fresh Cooling Mist® (SPF 45) sprays. (D.I. 104 at 369:5-14) Those tests involved female subjects. (*Id.* at 370:6-8)

31. The blue layover in the CS commercial is directly derived from photographs taken from the Coppertone Ultra-Guard® and Neutrogena® Fresh Cooling Mist® *in vivo* studies. Those *in vivo* studies were completed at cyberDERM Clinical Studies (“cyberDERM”), an independent company. (PTX-127) After applying sunscreen according to provided instructions, UV photographs were taken of the female subjects’ abdomens and backs. (D.I. 104 at 321:10-17) The photographs were graded using three parameters to measure coverage: evenness, density, and thoroughness.<sup>14</sup> (*Id.* at 322:21-323:12) Coppertone outperformed Neutrogena in only the density category. (*Id.* at 336:16-25) Anna Erixon (“Erixon”), plaintiff’s full-time clinical research consultant for sunscreens, testified that a sunscreen that is better with respect to density (even if equal to another in evenness and thoroughness) will provide better coverage to the consumer. (*Id.* at 337:1-9)

32. After the *in vivo* study, plaintiff conducted an *in vitro* study (via cyberDERM)

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<sup>13</sup>The court dismisses plaintiff’s suggestion that the commercial is not literally false because it contrasts “Neutrogena spray,” as compared to “Neutrogena Sport” or “Neutrogena Ultimate Sport®.” The commercial plainly compares two different “sport” sunscreens, claiming that “[y]ou give your sport 100% – so should your sunscreen.” Coppertone Sport® is depicted on the athlete as “Coppertone spray;” the plain import of “Neutrogena spray” in this context is also the sport-branded version.

<sup>14</sup>Density referred to “the amount of product” on the skin; evenness referred to consistency of that density across the surface; and thoroughness referred to whether a subject “miss[ed] a spot.” (D.I. 104 at 322:25-323:7)

in which a robotic apparatus was utilized to spray sunscreens onto a cardstock substrate. (PTX-131) Sprays generated from full cans of Coppertone Sport®, Neutrogena Fresh Cooling Body Mist® and Neutrogena UltraSheer Body Mist® spray sunscreens (at three comparable SPF levels) were evaluated. (*Id.*; D.I. 104 at 343:21) Plaintiff found that Coppertone sprays deposited “two to three times” more product than the Neutrogena sprays. (D.I. 104 at 341:18-25; PTX-116)

33. Erixon testified that the testing confirmed that the results of the *in vivo* study were reproducible across multiple products in the first *in vitro* study and, as a result, plaintiff utilized the results from the *in vivo* study to make the CS commercial. (D.I. 104 at 348:23-350:21) Plaintiff selected UV photographs from the *in vivo* study that represented the mean and standard deviation for coverage density for Coppertone Ultra-Guard® and Neutrogena Fresh Cooling Mist®. The color from the two representative photographs was changed from (original) purple to blue (to avoid the look of sunburn) and overlaid with the male athletes in the CS commercial. (*Id.*)

34. It is undisputed that, as of the date the commercial aired, plaintiff had not tested either Coppertone Sport® or Neutrogena Ultimate Sport® sprays in an *in vivo* study. (*Id.* at 363:12-25) The two photographs in plaintiff’s commercial did not, therefore, represent actual data regarding either product in that advertisement. Erixon agreed that “neither photograph from [the] commercial represents what a Coppertone Sports or Neutrogena® Sports spray would look like according to the methodology that [plaintiff] used.” (*Id.* at 364:3-6)

35. Erixon testified that plaintiff did not test Neutrogena Ultimate Sport® spray because it only selected sprays with “comparable SPFs.” Neutrogena® Ultimate

Sport® came in a SPF 55 and SPF 70 spray; it is unclear why this was not comparable to plaintiff's SPF 50 and SPF 70 sprays in the CS commercial. (*Id.* at 365:10-16) Erixon also stated that only the "best selling products" were selected. (*Id.* at 366:3-6) Regardless of the reason, plaintiff elected not to test Neutrogena's sport-branded spray,<sup>15</sup> yet it ran a head-to-head advertisement comparing its own sport spray sunscreen with Neutrogena's.

36. In response to the present litigation,<sup>16</sup> plaintiff commissioned a second *in vitro* study to compare Neutrogena Ultimate Sport® SPF 55 and 70 and Coppertone Sport® SPF 50 and 70 sunscreens. (D.I. 97 at 18; D.I. 104 at 352:21-353:12) Erixon testified that the results of this second study were comparable to that of the first; similar differences between the Coppertone and Neutrogena sprays were demonstrated [assumedly, in terms of spray density]. (D.I. 104 at 354:12-16) Erixon does not consider this second *in vitro* test support for the CS commercial (which had already run by this point), but would consider it supportive of future advertisements. (*Id.* at 355:21-356:6)

37. The issue at bar is whether plaintiff's *in vivo* testing of Coppertone Ultra-Guard® and Neutrogena Fresh Cooling Mist®, in view of its *in vitro* testing on Coppertone Sport®, Neutrogena Fresh Cooling Body Mist® and Neutrogena UltraSheer

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<sup>15</sup>Plaintiff states (in a footnote) in its papers, without citation, that "[t]he Neutrogena® Ultimate Sport® spray products were not on the market at the time of the *in vivo* study." (D.I. 94 at 23, n.19) Erixon testified to the contrary. (D.I. 104 at 365:11-21) Even if plaintiff were correct, it is of no benefit to plaintiff's case that it ran an advertisement against an unreleased product without having tested that product as its commercial claimed.

<sup>16</sup>The protocol for this study is dated November 12, 2009. (*Id.* at 353:19-20)

Body Mist®, is sufficiently reliable to permit a consumer to conclude with reasonable certainty that plaintiff established its claim that Coppertone Sport® spray provides “better protective coverage” than Neutrogena Ultimate Sport® spray. The “sufficiently reliable” standard assumes that the tests in question, if reliable, would prove the proposition for which they are cited. *See Castrol, Inc. v. Quaker State Corp.*, 977 F.2d 57, 63 (2d Cir. 1992). It is defendant’s burden to demonstrate that plaintiff has not proven that its tests were reliable. *Id.* (citation omitted).<sup>17</sup>

38. In support of its position, plaintiff relies on Erixon’s testimony that the *in vivo* study established that the “bag-on-valve type **form** of product” provided better coverage than the “aerosol **form** of product” employed by Neutrogena— regardless of the formulation. (D.I. 97 at 13, citing D.I. 104 at 338:14-18) (emphasis added) The court finds this conclusion too sweeping to be properly based on a comparison of just one of plaintiff’s products and one of defendant’s products.

39. This conclusion is consistent with the undisputed fact that Neutrogena Ultimate Sport® spray has a different formulation and different orifice size for its aerosol can than does Fresh Cooling Mist®. Johnson & Johnson’s<sup>18</sup> Senior Director for Scientific Affairs, Dr. Yohini Appa (“Appa”), testified that formulation differences between Neutrogena Fresh Cooling Mist® spray and Neutrogena Ultimate Sport® spray are such that extrapolation of test results from one to the other is impossible.

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<sup>17</sup>Courts have applied the preponderance of the evidence standard in assessing whether this burden of proof has been met. *See, e.g., Pfizer, Inc. v. Miles, Inc.*, 868 F. Supp. 437, 460 (D. Conn. 1994).

<sup>18</sup>Johnson & Johnson Beauty includes Neutrogena, Aveeno, and other brands.

Specifically, there is 40% more octocrylene (a sunscreen additive), 30% more of a “skin substantive polymer,” and other solubilizers (e.g., butyl octyl salicylate) in the Ultimate Sport® spray.<sup>19</sup> (D.I. 105 at 481:8-483:12) These ingredients “go into actual protection performance.” (*Id.*) Defendant also presented the testimony of Dr. Nahed Mohsen, a consultant with experience in aerosol design, who testified that results of coverage testing on one product cannot be extrapolated to another product because of the difference in ingredients and orifice design. (D.I. 105 at 532:2-16)

40. Plaintiff rightfully criticizes defendant’s witnesses for failing to detail in what manner these factors affect spray performance or to substantiate this claim with any scientific evidence. Nevertheless, different Neutrogena sprays have differently sized spray orifices; the Ultimate Sport® spray orifice is smaller than that for Fresh Cooling Mist® spray. (D.I. 104 at 355:7-12; 420:15-16) Erixon admits that this could produce a different result when tested *in vivo*. (*Id.* at 420:17-19) Plaintiff’s Director of Packaging, Science and Technology Michael Tune, when asked whether a smaller orifice could result in a higher spray rate, stated generally that “many factors [ ] influence spray rate;” there are “too many other factors” to “categorically” state that a small orifice results in a particular spray.<sup>20</sup> (D.I. 106 at 694:1-17)

41. Even had plaintiff tested the right products, its *in vivo* test is not sufficiently

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<sup>19</sup>Erixon characterized these as differences in the “inactive ingredients.” (D.I. 104 at 420:10-11)

<sup>20</sup>The court finds this testimony convincing, as it seems to comport with the generally-accepted scientific principle that compositions of different molecular weights tend to have different properties. In this context, some differences in the formed aerosol droplets and their trajectories appear to be more likely than not.