

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).¹⁶

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’s¹⁷ 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.

¹⁶Courts 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).

¹⁷Johnson & 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.¹⁸ (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.¹⁹ (D.I. 106 at 694:1-17)

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

¹⁸Erixon characterized these as differences in the “inactive ingredients.” (D.I. 104 at 420:10-11)

¹⁹The 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.

reliable to support plaintiff's coverage claim. When the *in vivo* test was designed, plaintiff did not identify specific goals vis-a-vis substantiation of the claim of better protective coverage. (D.I. 104 at 380:17-22) Plaintiff identified density, evenness and thoroughness as target measurements, but did not identify in advance what degree of superiority in which of the three categories it needed to demonstrate.²⁰ (*Id.* at 381:9-382:17) Plaintiff reevaluated the density evidence after it determined that Coppertone Ultra-Guard® did not prevail in the evenness and thoroughness categories.²¹ (*Id.*) Erixon admitted that density does not equal coverage;²² “that is why [plaintiff] measured evenness and thoroughness as well.” (*Id.* at 382:24-383:2)

42. Based upon the foregoing, there are too many problems with plaintiff's *in vivo* testing of Coppertone Ultra-Guard® and Neutrogena Fresh Cooling Mist® for it to meet the “sufficiently reliable” standard with respect to Neutrogena Ultimate Sport® spray sunscreen. Plaintiff utilized a non-standard protocol²³ designed to test protective coverage with no particular goal in mind. The course of the analysis was driven by the

²⁰This may have been partially due to the fact that density, evenness and thoroughness are “not established parameters in the literature.” (D.I. 104 at 370:23-25)

²¹Erixon stated, “[w]e decided to do the composite score and look at the data in a different way when we saw those results[.]” (D.I. 104 at 381:9-382:17) This composite score was not provided for in the protocol.

²²(D.I. 104 at 384:14-385:9; DTX-31C)

²³The court is cognizant of the fact (according to Erixon) that there is no standard test in the sunscreen industry to test protective coverage. (D.I. 104 at 367:12-14) The court does not seek to dissuade companies from developing novel protocols to test for properties (such as coverage) that are of interest to consumers. The issue in this case is not the novelty of plaintiff's test, but the overall unreliability of the test, a portion of which is attributable to the lack of protocol or cited industry support (even *post hoc*) for plaintiff's methods.

results obtained by the tests. There is no dispute that the ingredients and orifice size on the untested Neutrogena Ultimate Sport® spray sunscreen differ from the product tested. The court cannot discern a true **scientific** basis for plaintiff's attribution of the Neutrogena Fresh Cooling Mist® data to Neutrogena Ultimate Sport®.²⁴

43. At trial, plaintiff's witnesses stated that the *in vivo* study substantiated plaintiff's coverage claim. (D.I. 104 at 364:21-365:4; D.I. 103 at 103:11-21) In its papers, plaintiff essentially argues that the *in vivo* tests plus the subsequent *in vitro* tests substantiate its claim. (D.I. 94 at 27) There were no *in vitro* tests involving Neutrogena Ultimate Sport® conducted prior to the time the CS commercial aired. For this reason, the *in vitro* data does not demonstrate the necessary link between the Neutrogena Fresh Cooling Mist® photograph to Neutrogena Ultimate Sport®, as depicted in the CS commercial.

44. In conclusion, plaintiff elected not to test the competitive product at the heart of its advertisement and, instead, superimposed data from an *in vivo* test of **another** competitive product into its commercial. This type of unsubstantiated "scientific" claim is precisely what the Lanham Act seeks to prevent. Because the court finds that defendant has proven its Lanham Act and DTPA claims on this basis, it need not

²⁴According to Erixon, plaintiff's packaging experts measured the propellancy or the amount of propellant in the Ultimate Sport® can and found it to be "**basically** the same" as those that had been examined. (D.I. 104 at 352:10-20) (emphasis added) "[W]e, as a team, felt that we had sufficiently covered the claimed Coppertone spray versus Neutrogena spray among comparable SPFs based on the *in vivo* and original *in vitro* study that we did." In view of the foregoing, Erixon's testimony is less than convincing. (*Id.*)

discuss defendant's arguments with respect to plaintiff's "best protection" claim.²⁵

b. Literal falsity - 28% propellant

45. The court will briefly address the version of the CS commercial providing the "28% chemical propellant" statement. Defendant did not present survey evidence to support an implied message claim. It is defendant's opinion that the foregoing is an explicit message comparable to that found in *Coca-Cola Co. v. Tropicana Products, Inc.*, 690 F.2d 312 (2d Cir. 1982).²⁶

46. In *Coca-Cola*, the advertisement at issue was an orange juice commercial featuring Olympic athlete Bruce Jenner.²⁷ Reviewing the district court's denial of a motion for preliminary injunction, the Second Circuit found the commercial false on its face because the orange juice product in question ("Premium Pack") is "heated and sometimes frozen prior to packaging." *Id.* at 318. Further, "pasteurized juice as it comes from the orange" was "blatantly false" because pasteurized juice does not come

²⁵Use of the word "best" in advertising usually constitutes nonactionable puffery, as compared to an actionable falsehood; this is not the case, however, where a claim is juxtaposed with a comparison to a competitor's product. See *W.L. Gore & Assocs., Inc. v. Totes, Inc.*, 788 F. Supp. 800, 808-09 (D.Del. 1992).

²⁶The Second Circuit in *Coca-Cola* undertook a plenary review of the evidence presented; this approach was abrogated by Federal Rule of Civil Procedure 52(a). See *Johnson & Johnson v. GAC Intern., Inc.*, 862 F.2d 975, 979 (2d Cir. 1988). The Second Circuit has subsequently cited *Coca-Cola* as good law in terms of its literal falsity finding. See *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 159 (2d Cir. 2007). The Third Circuit has also relied on the opinion. See *Novartis*, 290 F.3d at 594; *Castrol*, 987 F.2d at 943.

²⁷In that commercial, Jenner stated, "It's pure, pasteurized juice as it comes from the orange;" he then hand-squeezes an orange into a Tropicana® carton while an announcer states: "It's the only leading brand not made with concentrate and water." *Coca-Cola*, 690 F.2d at 314.

from an orange; pasteurization “entails heating the juice to approximately 200 [degrees] Fahrenheit[.]” *Id.* Even if the word “pasteurized” could be viewed as qualifying the visual images, the commercial “nevertheless represented that the juice is only squeezed, heated and packaged when in fact it may actually also be frozen.” *Id.*

47. *Coca-Cola* may not be completely analogous on its facts, but it does support defendant’s literal falsity case in several important respects. The Second Circuit declined to find that the words used (“pasteurized”) qualified the import of the visual image which made the “explicit representation that Premium Pack is produced by squeezing oranges and pouring the freshly-squeezed juice into the carton.” *Id.* at 318. The Court also read the audio and visual components together to derive at the ultimate import of the ad, that is, the “represent[ation] that the juice is only squeezed, heated and packaged” and never frozen. *Id.*

48. The ultimate import of plaintiff’s CS commercial, in the court’s opinion, is that the Neutrogena sunscreen as applied **on** the athlete contains 28% chemical propellant. This is undisputedly false – the 28% propellant (by weight) of the Neutrogena can is used to expel the sunscreen and primarily evaporates when the aerosol is used.²⁸ The CS commercial plainly states that “Neutrogena **is** 28% chemical propellant.” (DTX-2) (emphasis added) The CS commercial contrasts two **sunscreens**, not two **cans** or delivery methods. The plain import of the statement that “Neutrogena **is** 28% chemical propellant” is that the Neutrogena **sunscreen** is 72% sunscreen and 28% propellant.

²⁸Defendant’s initial claim in this litigation was that none of the propellant reaches the skin. It is the court’s understanding that it is currently undisputed that some minor amount may reach the skin, but neither party contends that the ratio is mathematically significant.

The overlay of the words “Neutrogena” and “28% propellant” on the (bare) chest of one of the athletes (as compared to, for example, pictures of the respective cans) reinforces the message that 72% sunscreen and 28% propellant is applied to the body, rather than merely contained inside the can. There is no qualifying statement or language from which a consumer could conclude that the propellant is not deposited onto the skin in this amount or, alternatively, that the sunscreen (lotion) expelled by the can is 100% (and not 72%) sunscreen. This is an unambiguous message conveyed by necessary implication and, therefore, is literally false. See *Novartis*, 290 F.3d at 586-87 (“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.”) (citation and internal quotations omitted).

III. CONCLUSION

49. For the foregoing reasons, the court finds that both the Best line ad and the CS commercial (in both forms) violate the Lanham Act and the DTPA.²⁹ An order shall issue by which the parties will be directed to address the scope of the appropriate injunctive relief.

²⁹The court notes that these advertisements were essentially meaningless and, therefore, of no help to the consuming public who, finally, is paying attention to the health concerns presented by overexposure to the sun. Both parties failed in their efforts to walk that fine line between literal truthfulness and consumer deception in advertising. Sadly, it is the American consumer who ultimately ends up the real loser in these advertising wars.