

combined SPF and UVA bars correlating to Coppertone Sport® and Neutrogena Ultimate Sport®. (D.I. 53 at 20-21)

19. There remains no dispute between the parties on the math: (1) plaintiff offers products ranging from SPF 15 to 70+ under the “Sport®” label, averaging SPF 38.5; (2) defendant offers products ranging from SPF 55 to 70+ under its “Ultimate Sport®” label, averaging SPF 64; and (3) the difference between average SPF’s “across the entire [ ] line[s]” (38.5 vs. 64) is a 40% SPF differential in favor of defendant’s line. (D.I. 93 at 28; D.I. 97) The “SPF” portion of the bars for both products differs by about 40%;<sup>7</sup> there is no literal falsehood here.

20. Additionally, the **PFA** scores obtained by defendant across the entire product lines averaged 30.2 for Neutrogena Ultimate Sport® and 16.7 for Coppertone Sport®.<sup>8</sup> There is a near 100% difference in the relative heights of the **UVA** bars.<sup>9</sup> Although the parties debate whether “UVA” is an appropriate measurement to convey to consumers, and whether it is essentially double-counted between the “UVA” and “SPF” portions of the bar chart, there is no dispute that PFA is a measurement of UVA protection. (D.I. 103 at 62:21-22; *id.* at 151:5-7; *id.* at 154:24-155:4; D.I. 105 at 465:4-

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<sup>7</sup>Because there are no values or scales associated with the bar graph, the truth or falsity of the bar graph must be ascertained using the relative proportions of the bars.

<sup>8</sup>(D.I. 93 at 28, citing D.I. 37 at 135-37) Plaintiff does not dispute defendant’s numbers, but does dispute whether defendant’s PFA testing was scientifically reliable to support an implied establishment claim.

<sup>9</sup>In its prior opinion, the court mistakenly stated that “[i]t appears as though the ‘PFA’ portion of the bars for both products differs by about 100% in height.” (D.I. 53 at 20) There is no “PFA” portion – the bars consist only of a (red) “SPF” portion and a (yellow) “UVA” portion. The court will amend its opinion accordingly.

5) The “UVA” bar for Neutrogena is approximately 100% larger than that for Coppertone; there appears to be a direct correlation between defendant’s data and the graph.

21. The court agrees with plaintiff that the bar graph is misleading in several other respects – the first of which is defendant’s utilization of “UVA” with “SPF” as a measure of protection in the first instance. “UVA” is a designation for ultraviolet light within the wavelength of 400 nm-315 nm – not a measurement of skin protection. Elsewhere, defendant has referred to either PFA or UVA-PF (protection factor) as units of measurement for UVA protection. (DTX-60; DTX-61; DTX-56-N293) Defendant does not argue that UVA is a measurement of protection in its reply papers, only that “there is nothing false about using PFA scores to make claims concerning UVA protection.” (D.I. 98 at 6) Defendant did not use PFA scores to draw its comparison.

22. Defendant stacked a UVA value (of unspecified number) atop a SPF value (of unspecified number) such that the Best line ad conveys that Neutrogena has twice the quantities of these measures. Plaintiff asserts that this stacking is literally false insofar as UVA protection is double-counted; it is subsumed within “SPF,” and provided separately (under “UVA”).

23. Plaintiff’s double-counting argument was addressed in the court’s preliminary injunction opinion. In view of inconsistencies between the experts regarding the percentage of UVA subsumed by the SPF measurement (20% vs. 10%), and evidence that consumers relate SPF strictly with UVB protection, the court declined to find (on that record) that the bar graph imparts an unambiguous message. (D.I. 53 at 19)

24. Having now had the benefit of trial, the court is persuaded that its initial impressions regarding literal falsity were incorrect. Due to the predominancy of UVB in the SPF measurement, SPF is commonly understood to refer to UVB rays. As noted in the court's prior opinion, the FDA has issued a statement to this effect. (D.I. 53 at 18-19) There is no dispute, however, that at least 10% of a "SPF" measurement correlates to UVA protection. (D.I. 98 at 7, citing D.I. 103 at 135:16-17 (20% UVA); D.I. 104 at 277:19-278:8 (10% UVA); *see also* D.I. 103 at 132:7-11)

25. Defendant's ad does not equate SPF with UVB alone, but it is literally false because it provides a separate "UVA" quantification which is neither an accurate description of protection nor completely independent of the SPF value. The Best line ad clearly conveys, through the use of different colors and labels, that "UVA" and "SPF" are different measurements, and this is undisputably not so. While it is true that these errors are present with respect to both products compared in the graph, the absence of bias caused by the double-counting does not eliminate the falsity of the message.<sup>10</sup>

### c. Implied falsity

26. The crux of plaintiff's argument in this regard is that the Best line ad does not convey that Coppertone Sport® has a lower **average** SPF "across the entire product line" (averaging SPF 15 to SPF 70+) than the Neutrogena Ultimate Sport® line (averaging SPF 55 to 70+). The bars of the graph are labeled "Neutrogena Ultimate Sport®" and "Coppertone Sport®," respectively, without reference to any SPFs for

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<sup>10</sup>Plaintiff asserts that, if UVA/UVB equates to PFA and SPF, the Best line ad's statement that Neutrogena has the "highest combined UVA/UVB protection across the entire Neutrogena® Ultimate Sport® line" is incorrect insofar as Coppertone's numbers are higher. The court need not evaluate this additional claim in view of its holdings.

either brand. Plaintiff essentially argues that consumers perceive the ad to reflect an apples-to-apples comparison of **similarly-labeled** sunblocks, for example, Neutrogena Ultimate Sport® SPF 70+ (as pictured) and Coppertone Sport® SPF 70+, while in fact the comparison is between the average SPFs of many products. The number of products compared in the depicted averages is not disclosed.

27. To make its claim that the Best line ad conveys an impliedly false message, “plaintiff bears the burden of proving actual deception by a preponderance of the evidence. . . it cannot obtain relief by arguing how customers could react; it must show how customers actually do react.” *Sandoz Pharma. Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222, 228-29 (3d Cir. 1990). To this end, plaintiff presented a survey conducted by Dr. Gary Ford (“Ford”), an independent consultant, which demonstrates (in his opinion) that “consumers perceive that they can get greater protection . . . and/or durability from Neutrogena than Coppertone after seeing [the Best line ad]. (D.I. 104 at 230:9-12)

28. Ford’s methodology included a “controlled experiment” where two groups of consumers were shown different advertisements – one group was shown the Best line ad (a “test group”) and one group was shown a “control advertisement” (“control group”). Ford stated that he prepared the control advertisement by excising the allegedly misleading claims from the control advertisement, while keeping the rest of the control advertisement similar to the Best line ad. (*Id.* at 210:21-24; 212:2-5) Ford concluded that approximately 24% of the respondents “perceived that [Neutrogena] either offered greater protection or greater durability than Coppertone.” (*Id.* at 221:13-17) It is plaintiff’s position, based on Ford’s results, that the Best line ad

deceived a substantial portion of the intended audience by communicating the false message that all Neutrogena Ultimate Sport® products provide better protection or more durability than Coppertone Sport®. See *Novartis*, 290 F.3d at 591 (“survey evidence demonstrating that 15% of the respondents were misled . . . is sufficient to establish actual deception or at least a tendency to deceive”).

29. Dr. Ford’s testimony was brief and summary-level, and the details of Dr. Ford’s methodologies are not readily apparent from his testimony or plaintiff’s briefing. Dr. Ford testified that the methodology he used is contained in his expert report, however, the report was admitted into evidence with all of the narrative sections redacted.<sup>11</sup> (D.I. 104 at 207:21-208:4; PTX-204) The court declines to accept Ford’s testimony on this record and, therefore, finds that plaintiff has not met its burden to prove actual consumer deception.

## **2. The CS Commercial**

### **a. Establishment claim**

30. The court agrees with defendant that the “better coverage” claim of the CS commercial is an establishment claim that is not supported by sufficiently reliable tests. The CS commercial<sup>12</sup> plainly states that “[s]imulated coverage study results [a]mong sprays with comparable SPF” are represented by the blue “coverage” layovers on the two athletes. To this day, plaintiff has never performed an *in vivo* coverage study on

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<sup>11</sup>Apparently, plaintiff redacted all of the text preceding the “results” portion of Ford’s report in response to an objection by defendant prior to trial.

<sup>12</sup>Both the video clip and frame-by-frame pictorial. (DTX 1; DTX-2)