

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

SCHERING-PLOUGH HEALTHCARE)	
PRODUCTS, INC.,)	
)	
Plaintiff,)	
)	Civil Action No. 09-268-SLR
v.)	
)	
NEUTROGENA CORPORATION,)	
)	
Defendant.)	

AMENDED ANSWER AND COUNTERCLAIMS

Defendant Neutrogena Corporation (“Neutrogena”) by its attorneys Ashby & Geddes and Kramer Levin Naftalis & Frankel LLP, for its amended answer to the complaint filed by plaintiff Schering-Plough Healthcare Products, Inc. (“Schering”) and counterclaims responds as follows:

1. Denies the allegations of the first sentence of paragraph 1, except refers to the cited statutes for their full and complete terms. Denies the allegations of the second sentence of paragraph 1, except admits that Schering manufactures and sells Coppertone sun protection products. Denies the allegations of the third through sixth sentences of paragraph 1, except admits that Neutrogena is disseminating various advertisements and refers to the advertisements for their full and complete terms. Denies the allegations of the seventh sentence of paragraph 1, except admits that Schering purports to seek the requested relief.

2. Denies the allegations of paragraph 2, except admits that the parties exchanged correspondence and refers to that correspondence for its full and complete terms.

3. Admits, on information and belief, the allegations of paragraph 3.
4. Admits the allegations of paragraph 4.
5. States that the allegations of paragraph 5 assert legal conclusions as to which no response is required, and refers to the cited statutes for their full and complete terms.
6. States that the allegations of paragraph 6 assert a legal conclusion as to which no response is required.
7. Admits, on information and belief, the allegations of paragraph 7.
8. Admits the allegations of paragraph 8.
9. Admits the allegations of paragraph 9.
10. Denies the allegations of paragraph 10, except admits that a sport line of sun protection could in some respects be a separate marketing category.
11. Admits the allegations of paragraph 11.
12. Admits the allegations of paragraph 12.
13. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 13.
14. Admits, on information and belief, the allegations of paragraph 14.
15. Admits the allegations of paragraph 15.
16. Admits the allegations of paragraph 16.
17. Admits the allegations of paragraph 17.
18. Admits the allegations of paragraph 18.

19. Admits the allegations of paragraph 19.

20. Admits the allegations of paragraph 20.

21. Admits the allegations of paragraph 21.

22. Denies the allegations of paragraph 22, except admits that SPF measurements assess a sunscreen's ability to protect against the sunburning effects of sun exposure and PFA values gauge a sunscreen's protection against UVA rays.

23. Admits the allegations of paragraph 23.

24. Denies the allegations of paragraph 24, except admits that some but not all Coppertone sun protection products may protect against UVA and UVB rays.

25. Admits the allegations of the first sentence of paragraph 25. Admits the allegations of the second sentence of paragraph 25, except further states that the threshold for what is considered a "photostable" sunscreen product may vary from manufacturer to manufacturer.

26. Denies the allegations of paragraph 26.

27. Admit the allegations of paragraph 27.

28. Admits the allegations of paragraph 28.

29. Denies the allegations of the first sentence of paragraph 29, except admits that certain Coppertone products are photostable and protect skin from UVA and UVB rays. Denies the allegations of the second sentence of paragraph 29, except admits that certain Coppertone products protect against UVA or UVB rays and exhibit a certain degree of photostability but do not contain Helioplex.

30. Denies the allegations of paragraph 30, except refers to the advertisements for their full and complete terms.

31. Denies the allegations of paragraph 31.

32. Denies the allegations of paragraph 32, except refers to the advertisement for its full and complete terms.

33. Denies the allegations of paragraph 33.

34. Denies the allegations of paragraph 34, except refers to the advertisement for its full and complete terms.

35. Denies the allegations of paragraph 35.

36. Denies the allegations of paragraph 36.

37. Denies the allegations of paragraph 37, except refers to the advertisements for their full and complete terms.

38. Denies the allegations of paragraph 38.

39. Denies the allegations of paragraph 39.

40. Denies the allegations of paragraph 40.

41. Admits the allegations of paragraph 41.

42. Denies the allegations of paragraph 42, except admits that Coppertone Sport offers thirteen distinct sun protection products, with varying SPF levels of 15, 30, 50 and 70+.

43. Denies the allegations of paragraph 43.

44. Denies the allegations of paragraph 44.

45. Denies the allegations of paragraph 45.

46. Denies the allegations of paragraph 46, except admits that the sun protection products most purchased by consumers are in the SPF range of 30 to 49, that Neutrogena Ultimate Sport line of sunscreens consists of products which are SPF 55 and 70+, and that Coppertone Sport offers products which are SPF 15, 30, 50 and 70+.

47. Denies the allegations of paragraph 47.

48. Denies the allegations of paragraph 48, except refers to the advertisement for its full and complete terms.

49. Denies the allegations of paragraph 49, except refers to the advertisement for its full and complete terms.

50. Denies the allegations of paragraph 50, except refers to the advertisement for its full and complete terms.

51. Denies the allegations of paragraph 51.

52. Denies the allegations of paragraph 52, except admits that the Neutrogena Ultimate Sport line is comprised of five products with SPF levels of 55 and 70+.

53. Admits the allegations of paragraph 53.

54. Denies the allegations of paragraph 54, except admits that Coppertone Sport offers thirteen distinct sun protection products, with SPF levels ranging from 15 through 70+.

55. Admits the allegations of paragraph 55.

56. Denies the allegations of paragraph 56.

57. Denies the allegations of paragraph 57.

58. Denies the allegations of paragraph 58.

59. Denies the allegations of paragraph 59.

60. With respect to the allegations of paragraph 60, repeats and realleges each response contained in paragraphs 1 through 59 of this answer.

61. Admits the allegations of paragraph 61.

62. Admits the allegations of paragraph 62.

63. Admits the allegations of paragraph 63.

64. Denies the allegations of paragraph 64.

65. Denies the allegations of paragraph 65.

66. Denies the allegations of paragraph 66.

Answering Count I

67. With respect to the allegations of paragraph 67, repeats and realleges each response contained in paragraphs 1 through 66 of this answer.

68. Denies the allegations of paragraph 68, except refers to the advertisements for their full and complete terms.

69. Denies the allegations of paragraph 69.

70. Denies the allegations of paragraph 70.

71. Denies the allegations of paragraph 71.

72. Denies the allegations of paragraph 72.

Answering Count II

73. With respect to the allegations of paragraph 73, repeats and realleges each response contained in paragraphs 1 through 72 of this answer.

74. Denies the allegations of paragraph 74, except refers to the advertisements for their full and complete terms.

75. Denies the allegations of paragraph 75.

76. Denies the allegations of paragraph 76.

77. Denies the allegations of paragraph 77.

78. Denies the allegations of paragraph 78.

Answering Count III

79. With respect to the allegations of paragraph 79, repeats and realleges each response contained in paragraphs 1 through 78 of this answer.

80. Denies the allegations of paragraph 80, except refers to the advertisements for their full and complete terms.

81. Denies the allegations of paragraph 81.

82. Denies the allegations of paragraph 82.

83. Denies the allegations of paragraph 83.

84. Denies the allegations of paragraph 84.

Answering Count IV

85. With respect to the allegations of paragraph 79, repeats and realleges each response contained in paragraphs 1 through 84 of this answer.

86. Denies the allegations of paragraph 86.

87. Denies the allegations of paragraph 87.

88. Denies the allegations of paragraph 88.

89. Denies the allegations of paragraph 89.

90. Denies the allegations of paragraph 90.

91. Denies the allegations of paragraph 91.

92. Denies the allegations of paragraph 92.

93. Denies the allegations of paragraph 93.

First Affirmative Defense

94. The complaint fails to state a claim upon which relief may be granted.

Second Affirmative Defense

95. Relief is barred in whole or in part by the doctrines of waiver and/or laches.

Third Affirmative Defense

96. Relief is barred in whole or in part by the doctrine of unclean hands.

Neutrogena's Counterclaims

97. These counterclaims are for false advertising under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) and the state statutory and common law of unfair competition.

Schering has caused to be published and disseminated false and misleading advertisements that claim that only Coppertone NutraShield with Dual Defense provides both UVA/UVB protection and antioxidants that promote skin repair, when in fact Neutrogena and other sunscreen manufacturers market and sell such products.

98. In addition, Schering has just begun airing television commercials for its Ultimate Sport sunscreen line making the false and misleading claims that (i) 28 percent of what Neutrogena Ultimate Sport Spray users spray on their bodies is chemical propellant, (ii) Coppertone Sport sprays have been proven to provide “better protective coverage” than Neutrogena Sport sprays, and (iii) Coppertone Sport sprays provide better sun protection compared to Neutrogena Ultimate Sport sprays.

The Parties, Jurisdiction, and Venue

99. Counterclaim-plaintiff Neutrogena is a Delaware corporation with its principal place of business in Los Angeles, California. Neutrogena manufactures and markets a line of premium-priced skin and hair care products which are distributed throughout the United States and in more than 70 countries.

100. Counterclaim-defendant Schering is a Delaware corporation with its principal place of business in Memphis, Tennessee. Schering develops, manufactures, licenses and distributes consumer healthcare products throughout the United States.

101. This Court has jurisdiction over the subject matter of the counterclaims pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331, 1338(a), and 1367.

102. Venue is proper in the District of Delaware pursuant to 28 U.S.C. § 1391.

Schering's False and Misleading Advertising Concerning Coppertone NutraShield

103. Schering and Neutrogena both market and sell sun protection products.

104. Schering markets and sells a sunscreen lotion called Coppertone NutraShield.

105. Beginning on or about March 2009, Schering began airing a television advertisement claiming that "Only NutraShield has Dual Defense. One, I get powerful sun protection and two, antioxidants that promote natural skin repair." (Exh. A, attached).

106. On or about April 1, 2009, Schering ran a print advertisement claiming that "Only new Coppertone NutraShield has Dual Defense. . . . Dual Defense gives you: (1) Advanced UVA/UVB sun protection / (2) Nourishing antioxidants that help neutralize free radicals to help skin repair itself." (Exh. B, attached).

107. These advertisements are false and misleading. Coppertone NutraShield products are not the only products that provide both UVA/UVB sun protection and antioxidants that promote skin repair.

108. Sunscreen manufacturers other than Schering market and sell sun protection products that provide both UVA/UVB protection and antioxidants that promote skin repair.

109. For example, Neutrogena markets and sells Neutrogena UltraSheer SPF 45, which provides both significant UVA/UVB protection and antioxidants that promote skin repair. Other sunscreen manufacturers likewise market sunscreens with similar characteristics.

110. The foregoing acts have occurred in or in a manner affecting interstate commerce.

Schering's False and Misleading Advertising Concerning Coppertone Sport

111. Schering markets and sells a line of sunscreen products called Coppertone Sport.

112. Neutrogena recently launched a competing sunscreen line called Neutrogena Ultimate Sport. This line of products is specifically designed to appeal to athletically active individuals who need sunscreens with higher levels of protection from the sun's damaging rays. Neutrogena is in the midst of the first, make-or-break selling season for this new product line.

113. Both the Coppertone Sport and Neutrogena Ultimate Sport lines include sport sunscreens in lotion and spray form.

114. On or about June 5, 2009, Schering began airing a new television commercial for the Coppertone Sport line attacking the Neutrogena Ultimate Sport spray products. (Exh. C, attached).

115. The commercial begins by stating, "You give your sport 100 percent so should your sunscreen. Coppertone Sport is 100 percent sunscreen. Neutrogena is 28 percent chemical propellant." The statements "100 percent sunscreen formula" next to "Coppertone Spray," and "28 percent chemical propellant" next to "Neutrogena Spray," are superimposed on the bodies of two swimmers.

116. Thus, the commercial makes the claim that when one uses a Neutrogena Ultimate Sport spray, 28 percent of what is sprayed on the body is chemical propellant. That statement is literally false and misleading; Neutrogena products spray only sunscreen on the

body. Moreover, the claim conveys the false and misleading message that Neutrogena Spray sunscreens are in some way inferior because they do not “give 100 percent.”

117. Coppertone Sport sprays and Neutrogena Ultimate Sport sprays employ different delivery systems, both of which are widely used with spray products. Coppertone Sport employs a “bag in a can” delivery system. The bag is surrounded by air, which forces the product out of the bottle when one presses the nozzle.

118. Neutrogena Ultimate Sport sprays employ a chemical propellant, the gas isobutane, which forces the sunscreen formula out of the bottle when the nozzle is pressed. However, in the process the isobutane is eliminated and does not end up sprayed onto the body; the propellant itself does not interact with the skin because the propellant exists as a gas once outside the can. Only Neutrogena sunscreen ends up on the body.

119. Like Neutrogena, Schering also uses a gas-based delivery system for some of its spray products. Thus, Schering is well aware that such delivery systems do not result in propellant reaching the user’s skin.

120. The Coppertone Sport advertisement goes on to declare that “Coppertone gives you better protective coverage.” This statement is accompanied by images showing the swimmer using the Coppertone Sport spray with a deep blue covering, and the swimmer using the Neutrogena spray with a lighter covering. This claim is, according to the commercial, based on testing, namely “[s]imulated coverage study results among sprays with comparable SPF.”

121. Neutrogena is not aware of any data supporting such a claim. Neutrogena also believes that any such study Schering may have is unreliable and of no relevance to actual consumer use and therefore would not support Schering’s claim. Based on Neutrogena’s own

data, the claim is false and misleading; Neutrogena's spray is more uniform and target-specific than Coppertone's spray. In addition, the coverage provided by Coppertone's spray materially declines as the spray is dispersed until the can is empty.

122. In a different version of the commercial that Schering recently aired, Schering claims that Coppertone Sport in spray form is "the one proven to give better coverage" compared to "ordinary sprays" which provide "lighter coverage." (Exh. D, attached). This claim is false for the same reasons as set forth in paragraph 121 above.

123. Finally, the commercial as a whole conveys the false and misleading message that Coppertone Sport sprays provide better sun protection compared to Neutrogena Ultimate Sport sprays. That claim is false even according to Schering. Schering's papers filed in this action contend only that Coppertone Sport's highest SPF products provide at most parity protection compared to Neutrogena's Ultimate Sport products. And on average, Neutrogena's Ultimate Sport products, including the spray products, provide better sun protection than do Coppertone's Sport products.

124. The Coppertone Sport commercial is being aired during the very first selling season for the Neutrogena Ultimate Sport line. Neutrogena has invested in Ultimate Sport years of research and development, significant advertising expenditures, and the time and effort of many Neutrogena employees and executives. A significant portion of that investment could be lost if Schering is not barred from making its false and misleading claims about the Neutrogena Ultimate Sport line.

125. Unless and until Schering is ordered to cease making its false and infringing advertising claims, Neutrogena stands to suffer a loss of sales, hard-earned reputation, and consumer confidence that it may never be able to recoup.

126. Coppertone's advertising is intentionally, willfully and maliciously false.

127. The foregoing acts have occurred in or in a manner affecting interstate commerce.

First Counterclaim

128. Neutrogena repeats the allegations set forth in paragraphs 99 through 110.

129. Schering's advertising for its Coppertone NutraShield is false and misleading, and violates Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

130. Unless Schering is enjoined from continuing to make these false and misleading claims, Neutrogena will suffer irreparable harm, including a loss of goodwill, sales and profits, and erosion of its market share.

131. Neutrogena has no adequate remedy at law.

Second Counterclaim

132. Neutrogena repeats the allegations set forth in paragraphs 99 through 110 and 129 through 131.

133. Schering's advertising for its Coppertone NutraShield is false and misleading, and violates the Delaware Deceptive Trade Practices Act, Del. Code Ann. Tit. 6 § 2531 *et seq.* and the common law of Delaware.

134. Unless Schering is enjoined from continuing to make these false and misleading claims, Neutrogena will suffer irreparable harm, including a loss of goodwill, sales and profits, and erosion of its market share.

135. Neutrogena has no adequate remedy at law.

Third Counterclaim

136. Neutrogena repeats the allegations set forth in paragraphs 99 through 102 and 111 through 127.

137. Schering's advertising for its Coppertone Sport spray products is false and misleading, and violates Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

138. Unless Schering is enjoined from continuing to make these false and misleading claims, Neutrogena will suffer irreparable harm, including a loss of goodwill, sales and profits, and erosion of its market share.

139. Neutrogena has no adequate remedy at law.

Fourth Counterclaim

140. Neutrogena repeats the allegations set forth in paragraphs 99 through 102, 111 through 127 and 137 through 139.

141. Schering's advertising for its Coppertone Sport spray products is false and misleading, and violates the Delaware Deceptive Trade Practices Act, Del. Code Ann. Tit. 6 § 2531 *et seq.* and the common law of Delaware.

142. Unless Schering is enjoined from continuing to make these false and misleading claims, Neutrogena will suffer irreparable harm, including a loss of goodwill, sales and profits, and erosion of its market share.

143. Neutrogena has no adequate remedy at law.

Wherefore, Neutrogena respectfully requests that the Court:

(i) enter judgment dismissing the complaint;

- (ii) issue a preliminary and permanent injunction ordering that Schering, its agents, servants, employees, representatives, subsidiaries and affiliates refrain from directly or indirectly using in commerce or causing to be published any advertising, packaging or other promotional material for its Coppertone NutraShield that claims or communicates that only Coppertone NutraShield provides both UVA/UVB protection and antioxidants to help repair skin;
- (iii) issue a preliminary and permanent injunction ordering Schering to issue appropriate corrective advertisements, reasonably designed to reach all people to whom its false advertising was disseminated, retracting the false claims contained in its advertising for Coppertone NutraShield;
- (iv) issue a preliminary and permanent injunction ordering that Schering, its agents, servants, employees, representatives, subsidiaries and affiliates refrain from directly or indirectly using in commerce or causing to be published any advertising, packaging or other promotional material for its Coppertone Sport line that states or communicates that 28 percent of what Neutrogena Ultimate Sport users spray on their bodies is chemical propellant or anything other than sunscreen;
- (v) issue a preliminary and permanent injunction ordering that Schering, its agents, servants, employees, representatives,

subsidiaries and affiliates refrain from directly or indirectly using in commerce or causing to be published any advertising, packaging or other promotional material for its Coppertone Sport line that claims or communicates that the Coppertone Sport line provides or has been proven to provide better protective coverage than does Neutrogena Ultimate Sport, or has been proven to give better coverage compared to ordinary sprays;

- (vi) issue a preliminary and permanent injunction ordering that Schering, its agents, servants, employees, representatives, subsidiaries and affiliates refrain from directly or indirectly using in commerce or causing to be published any advertising, packaging or other promotional material for its Coppertone Sport line that states or communicates that the Coppertone Sport line provides better protection against sun damage than does Neutrogena Ultimate Sport;
- (vii) issue a preliminary and permanent injunction ordering Schering to issue appropriate corrective advertisements, reasonably designed to reach all people to whom its false advertising was disseminated, retracting the false claims contained in its advertising for the Coppertone Sport line;
- (viii) award Neutrogena attorneys' fees and the costs and disbursements of this action; and

- (a) all of Schering's profits, gains and advantage derived from Schering's unlawful conduct, such damages to be trebled pursuant to 15 U.S.C. § 1117;
 - (b) all damages sustained by Neutrogena by reason of Schering's unlawful conduct, including all expenditures required to correct the false, misleading, unfair, and disparaging descriptions and representations alleged herein, such damages to be trebled pursuant to 15 U.S.C. § 1117;
 - (c) interest on the foregoing sums; and
- (ix) grant such other and further relief as the Court deems just and proper.

ASHBY & GEDDES

/s/ Steven J. Balick

Steven J. Balick (I.D. #2114)
John G. Day (I.D. #2403)
Tiffany Geyer Lydon (I.D. #3950)
500 Delaware Avenue, 8th Floor
P.O. Box 1150
Wilmington, Delaware 19899
302-654-1888
sbalick@ashby-geddes.com
jday@ashby-geddes.com
tlydon@ashby-geddes.com

Attorneys for Defendant

Of Counsel:

Harold P. Weinberger
Jonathan M. Wagner
Tobias B. Jacoby
Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, New York 10036
(212) 715-9100
hweinberger@kramerlevin.com
jwagner@kramerlevin.com
tjacoby@kramerlevin.com

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