

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

Case No. CV 11-00503 AHM (RZx) Date April 11, 2011

Title MUNCHKIN, INC. v. PLAYTEX PRODUCTS, LLC

Present: The Honorable A. HOWARD MATZ, U.S. DISTRICT JUDGE

Stephen Montes

Not Reported

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys **NOT** Present for Plaintiffs:

Attorneys **NOT** Present for Defendants:

**Proceedings:** IN CHAMBERS (No Proceedings Held)

Before the Court is Defendant/Counter-Plaintiff Playtex's Motion for a Preliminary Injunction.<sup>1</sup> The Court heard oral argument on the Motion on March 14, 2011 and issued a tentative ruling to the parties. After receiving supplemental briefing from the parties on March 21, 2011 and March 25, 2011, the Court took this matter under submission. Now, after considering the parties' briefing, supplemental briefing, and the arguments made at the hearing, the Court DENIES Playtex's Motion because Playtex has failed to demonstrate that Munchkin's superiority claim is literally false.

## **I. BACKGROUND**

Playtex and Munchkin are competing producers of diaper pails. Playtex makes various diaper pail products for the disposal and odor control of soiled diapers, including the Diaper Genie, Diaper Genie II, and Diaper Genie II Elite (collective "Diaper Genie"); Munchkin makes the Arm and Hammer Diaper Pail ("Diaper Pail"). Munchkin filed an action against Playtex, and Playtex then filed counterclaims against Munchkin.

The current operative complaint is the First Amended Complaint ("FAC"), filed on February 8, 2011. (Dkt. 40). Playtex answered the complaint and filed counterclaims on February 14, 2011. (Dkt. 43).

### **A. Munchkin Action**

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<sup>1</sup>Dkt. 42.

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Munchkin makes seven claims for relief: (1)-(3) declaratory judgment; (4) false advertising under the Lanham Act; (5) false advertising under California's FAL; (6) unfair competition under the UCL; and (7) unfair competition under "common law unfair competition."

Claims (1) through (3) relate to Munchkin's own Diaper Pail claim. The Diaper Pail claim is: "The NEW #1 in Odor Control. Proven Better at Odor Control than Diaper Genie II & Diaper Genie II Elite in a laboratory test." FAC ¶ 19 & Exh. C (advertisement). Munchkin seeks a declaratory judgment in its favor declaring that: (1) its Diaper Pail claim is truthful (FAC ¶ 40); (2) it has not engaged in unfair competition by the assertion of its Diaper Pail claim (FAC ¶ 45); and (3) it has not engaged in deceptive trade practices by the assertion of its diaper pail claim (FAC ¶ 50).

Claims (4) though (7) relate to Playtex's superiority claims. The superiority claims include: "Proven #1 in Odor Control," "#1 Brand. For Ultimate Odor Control," and "Voted One of the Best Baby Products 11 times by readers of American Baby." Munchkin asserts that these claims are false because: (1) Playtex's products "do not provide the best odor control of any diaper pail on the market," FAC ¶ 54; and (2) Playtex's Diaper Genie II Elite could not have garnered the American Baby award 11 times, as the award is only given annually, and Playtex did not introduce the Diaper Genie II Elite product until late 2008. FAC ¶ 29. Munchkin includes a claim for an injunction from the Court enjoining Playtex from asserting the above allegedly false claims and "all related claims," and damages, including restitutionary and punitive damages.

**B. Playtex's Counterclaims**

Playtex answered Munchkin's Complaint, and filed counterclaims against Munchkin. Playtex claims Munchkin's peel-off sticker ("the Sticker") contains a false Superiority Claim ("Superiority Claim") that is harmful to Playtex and to consumers. The Sticker contains, in larger print, the Diaper Pail claim described above ("Proven Better at Odor Control than Diaper Genie II & Diaper Genie II Elite in a laboratory test."), but also states in extremely small type:

Proven #1 in odor control when tested in 2010 against Diaper Genie,

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Diaper Genie II Elite, Diaper Dekor Plus, Diaper Champ, Safety First Easy Saver Diaper Pail and Safety First Easy Step Diaper Pail, when used according to manufacturer's instructions by an independent accredited laboratory.

Answer/Counterclaims, ¶ 91. Playtex, in its counterclaims, also targets Munchkin's Preference Claim ("Preference Claim"), which states: "Moms prefer Munchkin 2 to 1 over Diaper Genie II in an independent, national, in-home study of 100 moms." *Id.* ¶ 106. Playtex's counterclaims include: (1) false advertising in the Superiority Claim under the Lanham Act; (2) false advertising in the Preference Claim under the Lanham Act; (3) unfair competition and false designation of origin under the Lanham Act; (4) false advertising in both the Superiority and Preference Claims under California's FAL; (5) common law unfair competition; and (6) violation of California's UCL.

In this Motion, Playtex seeks a Preliminary Injunction:<sup>2</sup> (1) restraining and enjoining Munchkin from making its Superiority Claim in commercial advertising or promotion; (2) restraining and enjoining Munchkin from "making any statement similar to the Superiority Claim, which claims superiority in odor control over Diaper Genie II and/or Diaper Genie II Elite," Dkt. 42-4, Proposed Order; and (3) ordering Munchkin to "physically remove all stickers affixed to the packaging of the A&H Diaper Pail that make the Superiority Claim from all units of product owned or under the control of Munchkin." Proposed Order, at 1-2.

## II. LEGAL STANDARD

As the Supreme Court has articulated,

A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

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<sup>2</sup>The Court previously denied Playtex's Ex Parte Application for a Temporary Restraining Order and Preliminary Injunction on January 26, 2011. Dkt. 31.

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*Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 374 (2008); *see also Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126-27 (9th Cir. 2009) (quoting *Winter*, 129 S. Ct. at 374).

A plaintiff also may obtain a preliminary injunction upon a showing of “serious questions going to the merits and a hardship balance that tips sharply towards the plaintiff . . . , so long as the plaintiff also shows a likelihood of irreparable injury and that the injunction is in the public interest.” *Alliance For the Wild Rockies v. Cottrell*, 622 F.3d 1045, 1046 (9th Cir. 2010) (internal quotation marks omitted) (holding that “the ‘serious questions’ approach survives *Winter* when applied as part of the four-element *Winter* test”).

“In all cases, the burden of persuasion remains with the party seeking preliminary injunctive relief.” WILLIAM SCHWARZER ET AL., FEDERAL CIVIL PROCEDURE BEFORE TRIAL, § 13:159 (2010) (citing *West Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950, 956 (11th Cir. 1982)). “Because a preliminary injunction is an extraordinary remedy, courts require the movant to carry its burden of persuasion by a ‘clear showing.’” *Id.* at § 13:159.1 (citing *City of Angoon v. Marsh*, 749 F.2d 1413, 1415 (9th Cir. 1984)). Courts are cautioned that, in issuing preliminary injunctions, “[t]o ensure vigorous competition and to protect legitimate commercial speech, courts . . . should give advertisers a fair amount of leeway, at least in the absence of a clear intent to deceive or substantial consumer confusion.” *Spalding Sports Worldwide v. Wilson Sporting Goods*, 198 F. Supp. 2d 59, 69 (D.Mass. 2002) (quoting *RPR v. Marion Merrell Dow, Inc.*, 93 F.3d 511, 515 (8th Cir. 1996)).

### III. LIKELIHOOD OF SUCCESS ON THE MERITS

In order to demonstrate the probability of success on a Lanham Act § 43(a) claim for false advertising, Playtex must demonstrate the following:

- (1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product;
- (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience;
- (3) the deception is material, in that it is likely to influence the purchasing decision;
- (4) the defendant caused its false

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statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a lessening of the goodwill associated with its products.

*Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997).

**A. Literal Falsity**

**1. Playtex's Burden**

A plaintiff may prove either that an advertisement claim is literally false or is literally true but misleading, to succeed under the Lanham Act. Here, Playtex claims it has demonstrated that Munchkin's Diaper Pail claim is literally false. The standard for proving literal falsity is as follows:

To prove that an advertisement claim based on product testing is literally false, a plaintiff must do more than show that the tests supporting the challenged claim are unpersuasive. Rather, the plaintiff must demonstrate that such tests are not sufficiently reliable to permit one to conclude with reasonable certainty that they established the claim made. A plaintiff may meet this burden either by attacking the validity of the defendant's tests directly or by showing that the defendant's tests are contradicted or unsupported by other scientific tests. Moreover, if the plaintiff can show that the tests, even if reliable, do not establish the proposition asserted by the defendant, the plaintiff has obviously met its burden of demonstrating literal falsity. When evaluating whether an advertising claim is literally false, the claim must always be analyzed in its full context.

*Southland Sod Farms*, 108 F.3d at 1139 (internal quotation marks, alterations, and citations omitted).

In *Southland Sod Farms*, plaintiffs and defendants were competing producers of turfgrass seed and sod. *Id.* at 1137. At issue was defendants' comparative advertisement

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campaign claiming its turfgrass grew more slowly (a desirable characteristic in turfgrass because it results in less mowing and maintenance costs) than other turfgrass, including those produced by the plaintiffs. *Id.* The advertisements consisted of: (1) a bar chart comparing the weights of the grass clippings; (2) a claim that in an independent comparison test, defendant's product "tested best in major turf characteristics," and (3) a claim that on defendant's products (seed containers, for example) that its own grass required "50% less mowing based on tests conducted by our research firm." *Id.* The court reversed in part the district court's grant of defendant's motion for summary judgment, finding that the district court's determination that the statements were not literally false was erroneous. *Id.* at 1144. Specifically, the court found that the district court failed to read the advertisements "as a whole" and therefore erred in finding that they were not literally false. *Id.* at 1144-45.

Playtex's burden here is a significant one; it must do more than simply expose methodological weaknesses in Munchkin's test. As noted in *McNeil-P.C.C., Inc. v. Bristol-Myers Squibb Co.*, 938 F.2d 1544, 1549 (2d Cir. 1991), which both parties here cited:

To prove that an advertising claim is literally false, a plaintiff must do more than show that the tests supporting the challenged claim are unpersuasive. Rather, the plaintiff must demonstrate that such tests are not sufficiently reliable to permit one to conclude with reasonable certainty that they established the claim made.

*Id.* In *McNeil-P.C.C.*, the Plaintiff McNeil, the maker of Extra-Strength Tylenol ("ES Tylenol"), sought preliminary and permanent injunctive relief enjoining Bristol-Myers from making the claim that its product, AF Excedrin, "works better" to provide headache relief than ES Tylenol. *Id.* at 1546. The district court consolidated the hearing on the motion for a preliminary injunction with a trial on the merits, and after a three-day bench trial, held that "McNeil had met its burden of proving the falsity of Bristol-Myers' advertising claim by demonstrating that Bristol-Myers' own test data established that AF Excedrin did not outperform ES Tylenol to a statistically significant degree." *Id.* at 1545. The district court accordingly granted McNeil's motion for a permanent injunction. *Id.* at 1545-46. The Second Circuit affirmed the district court's granting of injunctive relief, holding that "McNeil sustained its burden of proving Bristol-Myers' superiority claim to

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be false.” *Id.* at 1549. The Court noted:

Despite Bristol-Myers’ arguments to the contrary, McNeil did more than merely critique and expose the methodological weaknesses of the AF Excedrin studies. McNeil affirmatively demonstrated to the satisfaction of the district court that a proper analysis of the period one data — which the court found to be the only relevant and reliable scientific data — conclusively established that AF Excedrin did not relieve pain better than ES Tylenol to a statistically significant degree. Such proof was sufficient to establish that Bristol-Myers’ superiority claim was false.

*Id.* at 1549-50. Therefore, while McNeil did not need “to conduct its own studies to establish the falsity of Bristol-Myers’ ‘works-better’ claim,” *id.* at 1549, McNeil nevertheless “affirmatively demonstrated” — by relying on and analyzing data generated by Bristol-Myers itself—that AF Excedrin did not “work better” than ES Tylenol.

Here, in oral argument, Playtex, upon request of the Court, provided three citations as examples of “the best authority . . . that would warrant the issuance of a preliminary injunction based upon dubious methodology that was used.” Tr. of Mar. 14, 2011 Hearing, at 20:1-3. These citations are: *Falcon Stainless, Inc. v. Rino Companies, Inc.*, 2008 WL 5179037 (C.D. Cal. Dec. 9, 2008) (Stotler, J.); *Pfizer, Inc. v. Miles, Inc.*, 868 F. Supp. 437 (D.Conn. 1994); and *Playtex Products, Inc. v. Procter & Gamble, Co.*, 2004 WL 1658377 (S.D.N.Y. July 26, 2004).<sup>3</sup>

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<sup>3</sup>*Playtex v. Procter and Gamble*, 2004 WL 1658377, is procedurally distinguishable from the case before this Court. In *Playtex*, the court granted a permanent injunction against Procter & Gamble, “prohibiting it from continuing to falsely advertise and promote its Tampax Pearl tampons as superior in comfort, protection, and absorbency to Playtex Gentle Glide tampons.” 2004 WL 1658377 at \*1 (internal modifications omitted). The court issued the injunction *after* a unanimous jury verdict in favor of Playtex finding that Procter & Gamble violated the Lanham Act by making the above claim in its advertisements. *Id.* Here, the Court does not have the benefit of the findings of a jury after a full trial, and so reliance on *Playtex* as support for the granting of a preliminary injunction seems misplaced.

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In *Falcon Stainless*, the plaintiff Falcon, a manufacturer of water heater connector tubes, sought preliminary injunctive relief against its competitor Rino, which had claimed that its connectors exceeded the flow rate of Falcon’s connectors. 2008 WL 1658377, at \*1. Falcon claimed Rino engaged in false advertising in making this assertion. Falcon demonstrated the unreliability of Rino’s tests results in two ways: (1) by showing that “Rino’s test was not a controlled comparison test” and (2) by contradicting Rino’s test results with “its own set of controlled tests.” *Id.* at \*5. Falcon had conducted its own tests, hiring a separate laboratory to conduct a comparison test of its water connectors with Rino’s water connectors, which showed “that under standardized conditions, Falcon’s water connectors do not flow less water than Rino’s water connectors.” *Id.*, at \*2. So the court granted partial injunctive relief. However, *Falcon Stainless*, therefore, like *McNeil-P.C.C.* and *Southland Sod*, demonstrates the high burden on a party seeking a preliminary injunction on the basis of false advertising. In *Falcon Stainless*, the plaintiff Falcon produced its own independent testing. Here, Playtex provides only criticism of Munchkin’s methodology, and not the additional “something more” — an affirmative demonstration of the falsity or irrelevance of Munchkin’s data — required to meet the high burden for a preliminary injunction.

*Pfizer v. Miles*, 868 F. Supp. 437, also demonstrates the high burden required for a party seeking a preliminary injunction for false advertising. In *Miles*, the court granted in part Miles’s — the counterclaimant’s — motion for a temporary injunction where Miles demonstrated the irrelevance of the underlying scientific study on which Pfizer based its superiority claim. In that action, Pfizer and Miles each manufactured competing hypertension medications. Pfizer manufactured Procardia XL and Miles manufactured Adalat CC. *Miles*, 868 F. Supp. at 441. Pfizer sought to enjoin Miles from engaging in an allegedly false and misleading promotional campaign equating Adalat CC to Procardia XL. *Id.* at 440. Miles filed a counterclaim seeking to enjoin Pfizer from disseminating allegedly false and misleading information about Adalat CC. *Id.* The court granted in part Miles’s request for injunctive relief, holding that Miles demonstrated the falsity of Pfizer’s claim that “one would have to use two Adalat CC [tablets] to get the benefits of one Procardia XL.” *Id.* at 453. The court found that Miles demonstrated that the scientific article on which Pfizer relied for its claim was irrelevant to the relationship between the two competing drugs, because it compared Procardia XL not with Adalat CC but with Adalat Retard, a different product. *Id.* The Court found that the article/study, together with a letter Pfizer sent to physicians making the superiority claim,

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communicated a literal falsity under the Lanham Act “because the letter and article imply that scientific tests established that Procardia XL [Pfizer’s product] is proportionately more effective, or superior, to Adalat CC [Miles’s product].” *Id.* at 454. In other words, Miles affirmatively demonstrated that Pfizer had relied on a completely irrelevant study as the basis for its superiority claim.

Here, as discussed more fully below, Playtex has failed to affirmatively demonstrate, through an analysis of Munchkin’s tests and data, either that Munchkin’s product does not control odor better than its own product or that Munchkin’s study or test is irrelevant.

Playtex essentially makes two arguments as to why Munchkin’s claim is literally false: (1) Munchkin’s test does not support its superiority claim; and (2) Munchkin’s tests are not reliable. Playtex Supp. Br., Dkt. 67, at 2, 8. The Court addresses each of these arguments in turn.

## 2. Munchkin’s Testing as Support for Its Superiority Claim

Munchkin’s superiority claim is an establishment claim, as it “represents that a particular product attribute has been proven by medical or scientific evidence.” *Miles*, 868 F. Supp. at 452 (citing *McNeil-P.C.C.*, 938 F.2d at 1549). The parties do not dispute that the claim is an establishment claim. “The truth or falsity of such a claim is tested by whether the supporting evidence possessed by the advertiser is adequate to ‘establish’ the proposition in question.” *Id.*

Playtex claims Munchkin’s superiority claim is literally false because the analytical test does not support or “establish” the claim that Munchkin is number one in odor control because Munchkin: (a) failed to test for diaper or any other odor; and (b) did not conduct the test either in accordance with the manufacturer’s instructions or with reference to real world usage of the diaper pail products. Playtex Supp. Br., Dkt. 67, at 2, 8.

Munchkin conducted two tests, a “sensory” and an “analytical” test. Sweetbaum Decl., Exh. H. The “sensory” test used “human sniffers” and the “analytical” test measured the concentration of parts per million of ammonia in the air. Exh. H, at 131.

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Munchkin claims to base its superiority claim on the analytical test. Heber Decl., ¶ 13 (“the sensory tests, on the other hand, produced no results at all”).

**a. Testing Design**

Playtex seeks to undermine Munchkin’s testing on two levels: first, that it “was not designed to test *odor* superiority of products,” Playtex Supp. Br., Dkt. 67, at 3 (emphasis in the original); and second, that it tested only one compound, ammonia. *Id.* at 4.

**i. Correlation with human perception**

Playtex claims Munchkin’s superiority claim is literally false, first, because Munchkin has made no effort to correlate its data to odor that human users may perceive in using their products (Ennis Decl. ¶¶ 14-15, 17, 34; Stone Decl. ¶¶ 12-14, 22; Rousso Decl. ¶¶ 26-28). Mot., at 6-7. Munchkin readily admits that its test was “not designed to evaluate the human perception of the odor. It was designed to measure the odor capturing or reducing ability of pails, and used ammonia as a surrogate odorant to make those evaluations.” Heber Tr., 76-77. As Munchkin notes, its superiority claim focuses specifically on *odor control* and not on whether humans tend to perceive odor more or less after a given amount of elapsed time. Playtex provides no authority or support for a requirement that Munchkin’s testing use a human sensory panel. In fact, Dr. Heber noted that analytical testing (as opposed to sensory testing) of an odorant “can help determine the impact of that odorant on a human in terms of showing what that human is exposed to.” Heber Tr., 40:21-23. Dr. Heber also emphasized why the analytical test was a preferred method to human sensory panel testing, stating, “Analytical testing of ammonia allows one to quantify the precise amount of ammonia being measured and factors out the inherent subjectivity of using human sniffers to evaluate odor reduction effectiveness.” Heber Decl., ¶ 11. For these reasons, the Court finds Playtex has failed to meet its burden of demonstrating that because Munchkin failed to use human sensory testing, Munchkin’s statement was literally false.

Second, Playtex claims that Munchkin took no steps to determine what an average person could actually smell in terms of levels of ammonia. Playtex Supp. Br., Dkt. 67, at 4. However, in his declaration, Dr. Heber provides the example of an article from the

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Oxford Journal of Chemical Senses determining odor detection thresholds via testing with the single odorant of ammonia, and adds, “It is also well-known, tested and documented in the relevant research literature that odor threshold for humans to smell the presence of ammonia is as low as 2-3 parts per million (ppm).” Heber Decl., ¶ 6 & Exh. B. He also notes that an analytical test, such as the one used here, requires knowledge of the property of the odorant used and the known response of the human nose to that odorant, otherwise known as “the hedonic tone behavior curve of the odorant.” Heber Tr., at 43. With that information, which was available here (that humans could detect ammonia at as low as 2-3 ppm), an analytical test is sufficient to measure odor reduction effectiveness.

Playtex, for the above reasons, has failed to demonstrate a likelihood of success on its Lanham Act claim, by failing to demonstrate the literal falsity of Munchkin’s testing design.

ii. Ammonia as the only odorant

Playtex argues Munchkin’s superiority claim is literally false because the testing of ammonia as the primary odorant in diaper odor was “arbitrary.” Rousso Decl ¶¶ 7, 28; Ennis Decl. ¶¶ 14, 16-17, 30-35. Mot., at 6-7. Specifically, Playtex claims a diaper odor claim is not substantiated by ammonia release testing because the number of particles in the air (parts per million) of ammonia is not an accurate indication of how effective a product is at controlling odor. Playtex Supp. Br., Dkt. 67, at 4.

For example, Playtex’s declarant John Rousso states, “Munchkin has provided no basis, and I know of none through personal experience or in the science or literature, for choosing one odorant, ‘ammonia’, as a proxy for diaper odor, which is itself comprised of a host of other malodorants . . . [which] well may be far more significant than, or mask, the odor of ammonia to the extent that it is present in actual diaper pails during normal use. Rousso Decl ¶ 7. *See also* Rousso Decl. ¶ 28 (“In addition, the Analytical Test Reports do not provide any statistical or other analysis to address . . . what, if any, correlation can be shown between the ammonia solution utilized and/or the levels of ammonia detected and actual diaper ‘malodor’, which our studies suggest is primarily due to the presence and smell of feces.”). Dr. Daniel Ennis, another of Playtex’s declarants, similarly noted: “I do not know of any support, and it has not been produced in this case,

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for the position [sic] that ammonia is the one and only chemical that needs to be quantified to predict diaper malodor.” Ennis Decl. ¶ 14.

In response to these statements, Munchkin declarant Dr. Albert Heber defends the use of ammonia as an odorant in these tests. Indeed, he asserts that it is appropriate to use ammonia as the single and only odorant. He notes,

Based on my experience and research, ammonia would be generated quickly by a soiled diaper. Ammonia is produced by the breakdown of urea. This process is accelerated when urine and feces are mixed as would obviously happen in a soiled diaper. Because ammonia creates a foul odor, and can even sting the eyes in a high enough concentration, it is a primary offensive odorant one would expect to find in soiled diapers.

Heber Decl., ¶ 9. Dr. Heber also notes that it is a “common and generally accepted practice in this field to test a single odorant.” Heber Decl., ¶ 10.

Playtex claims Dr. Heber’s declaration is undermined by admissions made in his deposition, including: (1) the statement that odorants are not interchangeable; (2) the assumption, without supporting testing, that all diaper malodorants would behave like ammonia; and (3) that Heber has not studied ammonia levels in human diaper waste and based his conclusions here on his study of barnyard animals. Playtex Supp. Br., at 5. However, given Munchkin’s explanations for its choice of ammonia, and the context of these statements in the entirety of Dr. Heber’s deposition, these admissions, as excerpted by Playtex, do not rise to the level of an affirmative demonstration of Munchkin’s reliance on irrelevant data.

Playtex also claims Munchkin’s claim is literally false because it measured only a single *odorant*, which is not a measurement of *odor*. Playtex Supp. Br., at 3. However, Playtex’s distinction does not take into account that a test may determine the impact of an odorant on human perception if the threshold amount for human detection of the odorant is known. As Dr. Heber noted, “[a]n odorant is the chemical compound that if it has a sufficient amount of concentration will elicit an olfactory response in the human nose.” Heber Tr., at 20:15-17.

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Moreover, Playtex is unable to support its claim that Munchkin ought to have measured another substance besides ammonia, because there is no industry-wide standard for diaper odor formulation. Ennis Tr., at 142 (“Q. [Y]ou indicate that there is not an industry standard test specifically designed to evaluate the odor elimination efficacy of diaper pails, right? A. Not that I’m aware of. Q. So if you wanted to make such an evaluation, you would need to design your own test, correct? A. If there is no industrial standard, you have to design your own test.”). Even Dr. Rousso’s declaration, which Playtex notes lists the components of diaper odor, does not list the percentages of each compound in the formula. *See* Rousso Decl. ¶ 4.

Accordingly, the Court finds that Playtex has failed to demonstrate a likelihood of success in demonstrating the literal falsity of Munchkin’s test based on Munchkin’s use of ammonia as the sole odorant.

**b. Manufacturer’s Instructions**

Playtex argues Munchkin’s superiority claim is literally false because, in the tests it used the products not “in accordance with manufacturer’s instructions,” as stated in the express language of the claim. Rousso Decl. ¶¶ 24; 28. That language reads, in rather minuscule type: “Proven #1 in odor control when tested in 2010 against Diaper Genie, Diaper Genie II Elite . . . *when used according to manufacturer’s instructions* by an independent accredited laboratory.” *See* FAC, Exh. E (emphasis added).

**i. Methodology**

The test itself consisted of the following five-step process:

Step 1: Measuring odor released from closed pail by using ammonia solution.

Assigned volume of ammonia solution is placed in the beaker and the beaker is being put into the pail. Place the pail into the chamber with the lid closed and the ammonia level is measured for after 30 minutes.

Step 2: Measuring odor released from open pail by using ammonia solution.

Open the lip [sic] of the pail from Step 1. Measure the ammonia after 10

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minutes.

Step 3: Measuring odor released from open pail after ammonia soaked diaper is added.

Assigned volume ammonia solution is added to the diaper and put the diaper into the pail. Place the pail into the chamber with the lid opened. Measure the ammonia level after 10 minutes.

Step 4: Measuring odor released from closed pail after ammonia soaked diaper is added

Close the lip [sic] of the pail from Step 3. Measure the ammonia level after 30 minutes.

Step 5: Measure odor released from open pail after removing bag and diaper.

Remove the plastic bag of the pail from Step 4 and the lip [sic] remaining open. Measure the ammonia after 30 minutes.

Rousso Decl., Exh. G. The measurements obtained were as follows:

| Product                       | Ammonia concentration (ppm) |        |        |        |        |
|-------------------------------|-----------------------------|--------|--------|--------|--------|
|                               | Step 1                      | Step 2 | Step 3 | Step 4 | Step 5 |
|                               | Closed                      | Open   | Open   | Closed | Open   |
| Munchkin A&H Diaper Pail      | 4                           | 15     | 2      | 1      | 0.5    |
| Playtex Diaper Genie II Elite | 14                          | 40     | 15     | 6      | 3      |
| Playtex Diaper Genie II       | 10                          | 24     | 8      | 4      | 2      |

*Id.* The test also included in its instructions the following: “In all steps where the lid is open, any twist mechanism of the bags or other mechanical features is still be [sic] activated, though the lid is up.” *Id.*

ii. Analysis

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Playtex argues that Munchkin failed to conform to the manufacturer's instructions when it left the diaper pails open for ten- or thirty-minute intervals during the testing. Playtex Supp. Br., at 7. Specifically, Playtex notes the manufacturer's instructions "instruct immediate lid closure." *Id.* See Playtex Supp. Br., Exh. CC (Diaper Genie II Elite - "How to Use" - Step 2: "Drop rolled diaper into opening. Release pedal to close lid."); Exh. DD (Munchkin Arm & Hammer Diaper Pail - "Instruction Manual" - "How to Use" - "Close the lid. Bag will automatically seal as lid closes."). Playtex also adds that keeping the Diaper Genie II Elite lid open is contrary to the manufacturer's instructions because the "lid can remain open only if artificially propped or if someone remains standing on the pedal" and "the Diaper Genie odor control feature activated upon lid closure [and] could not operate as the test was set up, skewing the results." Playtex Supp. Br., at 7.

Munchkin's response is two-fold: (1) its test was consistent with actual use; and (2) any deviations from the manufacturer's instructions were necessary for purposes of scientific testing. Munchkin Supp. Br., at 7. To support its argument that its test was consistent with actual use, Munchkin proffers the deposition testimony of Drs. Heber and Ennis, who agree that diaper pails are not continuously closed in use, and are rather opened and closed repeatedly so that an open-pail reading is a valid measurement. See Heber Tr. at 50:22-51:2; Ennis Tr., 140:9-25; 141-1-13 (Dr. Ennis notes "there are times, again, when the pail will be opened . . . there will be times when the pail is closed," but expresses his objection to "the specific length of time that they were open."). As for the length of time for which the pails were kept open during the test, Munchkin notes that the ammonia analyzer (the instrument used to measure the ppm of ammonia) and the conditions inside the testing chamber "need time to settle out after a change in condition in order to ascertain a good ammonia reading." Mot., at 8. Dr. Heber explained this in his deposition testimony:

- A. We were waiting for ammonia to settle out and equilibrate [**sic**] so we could get a good reliable measurement . . . . That was waiting for the ammonia concentration to quit changing under a new condition. And in this case, you're changing from pail being open to pail being closed. Or pail being closed to opening pail. . . . And I think that if they had not waited for ten minutes, they would have been measuring the ammonia during a time when it's

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changing rapidly from the previous condition [closed] to the new condition [open].

Q. But if the condition is not a condition that occurs in the home, why are you testing it?

A. Well, the condition is a condition that occurs in the home. Pail being closed; pail being open.

Q. But if the pail is only open for a short period of time, then how does testing it being open for ten minutes or more test the conditions in the home?

A. Well, I think that's one of the – we might call a compromise in a test in order to get good measurements. That happens all the time in my research where you have to balance the accuracy and reliability of the test, which requires some deviation from the actual dynamics of the operation.

Q. . . . You said that you need to let the compound settle out. But if you leave a diaper pail open with compound inside, aren't other molecules potentially being released during that time as well?

A. They are being released, but the concentration inside the chamber or however big that chamber was, it's the chamber surrounding the diaper pail, it will take time for the molecules to disperse. And obeying the ideal gas law, that gas will disperse and the concentration in various points in that chamber will start to increase if the diaper pail is open. We assume that it would increase, now. So it takes some time, several minutes, for the concentration inside the chamber to increase to a steady value. And until you get a steady value, then you're going to introduce too much variation in the measurement.

Heber Tr., 51-53.

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Here, Playtex has the burden of proof, and that burden is significant. Playtex must prove a likelihood of success in “demonstrat[ing] that [Munchkin’s] test[] [is] not sufficiently reliable to permit one to conclude with reasonable certainty that [it] established the claim made.” *Southland Sod*, 108 F.3d at 1139. Playtex has not met this burden.

First, the test itself is comprised of what were essentially five separate tests, and is not a one-step, black-or-white test as Playtex would have this Court believe. In each of those five steps, whether the pail lid was open or closed, Munchkin’s product released less ppm of ammonia into the chamber than did both of Playtex’s products. In fact, each of those tests was done to “yield[] a higher confidence in the results.” Heber Tr., at 62. Munchkin is not relying only on these open pail measurements; rather, Munchkin relies both on the open and closed measurements to demonstrate its superiority. As Dr. Heber noted,

If I would only see Step 1 and I’d see that Arm and Hammer only had 4 PPM of ammonia and Playtex Diaper Genie Elite II had 14, I’d have less confidence in those results if I didn’t also have Step 4 that shows this time just a slight change in the source in that now there’s only 1 PPM Arm and Hammer and 6 PPM Playtex Diaper Genie Elite II. That gives me confidence that . . . the variability is consistent like I said in my report.

Heber Tr., 62:7-17. Further, Munchkin, through Dr. Heber’s testimony, emphasizes that the open pails were necessary for a more accurate reading from the analyzer equipment. The pail was also opened to account for the opening and closing of the pail at home, not necessarily to imply that parents keep their diaper pails open for ten to thirty minutes at a time. Given the significant burden imposed on parties seeking a preliminary injunction, and Munchkin’s explanations for its methodology, at this point, the Court does not find that Playtex has made the showing required for a preliminary injunction.

**c. Real World Usage**

Playtex argues that Munchkin was required to “replicate real world conditions to support its claim.” Mot., at 11.

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Playtex relies primarily on *Church & Dwight Co., Inc. v. S.C. Johnson & Son, Inc.*, 873 F. Supp. 893 (D.N.J. 1994) to support its argument. In *Church & Dwight*, the parties both made carpet deodorizing products. Defendant S.C. Johnson’s products included Glade Carpet Deodorizers (Regular Glade and Wet’n Dry Glade Formulations), and Church & Dwight’s product was its Arm & Hammer Carpet Deodorizer, which used baking soda as one of its main ingredients. *Id.* at 895-96. Defendant S.C. Johnson’s claim was that its deodorizing product “absorbs odors five times better than baking soda.” *Id.* at 905. Plaintiff Church & Dwight challenged that statement as literally false under the Lanham Act. *Id.* at 903. The court stated that “[s]ince defendant S.C. Johnson fail[ed] to notify consumers that its superiority claim is derived solely from laboratory tests,” the role of the Court was to “review the evidence presented to determine whether this claim can be replicated in normal consumer usage.” *Id.* at 904. “[T]hat defendant’s claimed superiority is true in a laboratory setting, does not rescue it from literal falsity should this Court conclude that the laboratory claim has no practical equivalent in the real world.” *Id.*

The district court granted a permanent injunction in favor of Church & Dwight after a hearing, finding that “[w]hen viewing the advertisements, a consumer can reasonably perceive that defendant S.C. Johnson’s ‘five times better’ assertion is actually an *in vivo* claim—namely, something that can be replicated in the real world.” *Id.* at 905. The Court found that consumers could easily be misled because of the nature of the testing of the product: “While defendant S.C. Johnson successfully demonstrated a five-fold superiority in laboratory testing, its various advertisements merely claim that it ‘absorbs odors five times better than baking soda’ and do not inform consumers that this claimed superiority is based solely on laboratory testing.” *Id.* at 904. The court also found that S.C. Johnson’s laboratory test had “no practical equivalent in the real world.”

The crux of the Court’s reasoning in *Church & Dwight* was based on S.C. Johnson’s failure to disclose that its results were derived from laboratory testing, leaving consumers confused as to whether “Glade products work ‘five times better’ at absorbing odors *in the real world.*” *Id.* (emphasis added). *See also Spalding Sports Worldwide, supra*, 198 F. Supp. 2d at 68 (denying a preliminary injunction and finding that Wilson’s claim that its golf balls are “perfectly balanced” and more balanced than Spalding’s golf balls was not literally false because “Wilson’s claims do not remotely resemble this [*Church & Dwight*’s] kind of extreme divorce from actual use conditions.”).

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Here, unlike *Church & Dwight*, there is no such confusion between real world testing and laboratory testing, because Munchkin clearly indicates on its sticker, in the superiority claim, that its product was “Proven Better at Odor Control than Diaper Genie II & Diaper Genie II Elite *in a laboratory test.*” FAC ¶ 19 & Exh. 3 (emphasis added). The Court acknowledges that the “fine print” on the Sticker, located below the above claim, could, if standing on its own, possibly lead a consumer to consider Munchkin’s tests as having “real world” applications, especially given the phrase “when used according to manufacturer’s instructions.” However, analyzing the statement in the context of the advertisement as a whole, as the Court is required to do, *see Southland Sod*, 108 F.3d at 1139, the Court finds the Superiority Claim does not create sufficient consumer confusion to warrant the issuance of a preliminary injunction.

Moreover, the Court does not find that Playtex has demonstrated that Munchkin’s test has “no practical equivalent in the real world,” as the court found in *Church & Dwight*. *See* Playtex Supp. Br., at 8 n.3. While Playtex has attempted to demonstrate that the opening of the diaper pail lids, and the use of an ammonia-filled beaker would have no real-world application, Munchkin’s test, coupled with its explanation of the methodology in Dr. Heber’s testimony and declaration, does not rise to the level of impracticality of the 37 one-pound cans of deodorizing product in *Church & Dwight*.

Therefore, the Court finds that Playtex has not met its burden of demonstrating the likelihood of literal falsity sufficient for purposes of a preliminary injunction.

**B. Consumer Deception**

Playtex did not discuss, nor provide any evidence of, consumer deception, because it contended that it had demonstrated the literal falsity of Munchkin’s statement. Mot., at 13-14. Given the Court’s finding that Playtex has not demonstrated a probability of success in proving the literal falsity of Munchkin’s claim, the Court necessarily finds Playtex has not adequately demonstrated a likelihood of success regarding the consumer deception element of the false advertising claim.

**C. Materiality**

Playtex gives two reasons why Munchkin’s Superiority Claim is material to

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consumers and likely to influence their purchasing decisions: (1) consumer research and “sheer logic” establish that odor control is the most important characteristic of these products; (2) odor control is an inherent quality or characteristic of the product, which makes the allegedly false statement plainly material.

Playtex has provided evidence that odor control is the most important characteristic of the product, and therefore the sticker and product claim are material to a consumer’s decision. *See* Sweetbaum Decl. ¶¶ 8, 12, 20, & Exh. –P (results of consumer studies commissioned by Playtex indicating: (1) odor control is the primary attribute purchasers look to in deciding whether to buy a diaper pail; (2) 63% of diaper pail consumers changed their decision after seeing the product on the shelf (importance of in-store marketing); and (3) the average number of diaper pails per household is typically one (limited market share and added importance of marketing)). Playtex has satisfied the “materiality” prong of the *Southland Sod* test.

**IV. CONCLUSION**

Given Playtex’s inadequate showing of the literal falsity of Munchkin’s Superiority claim, the Court finds that Playtex cannot meet the probability of success requirement for a preliminary injunction. The Court therefore does not discuss the remaining elements of the false advertising claim, or the *Winter* preliminary injunction elements of irreparable harm or public interest.

Based on Playtex’s failure to make the requisite showing required for the granting of an injunction, the Court DENIES Playtex’s Motion.<sup>4</sup>

No hearing is required. Fed. R. Civ. P. 78; Local Rule 7-15.

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<sup>4</sup>Dkt. 42.