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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SHARPER IMAGE CORPORATION, a
Delaware corporation,

Plaintiff,

v.

CONSUMERS UNION OF UNITED STATES,
INC., a New York corporation,

Defendant

No. 03-4094 MMC

**ORDER GRANTING CONSUMERS
UNION'S SPECIAL MOTION TO STRIKE
AMENDED COMPLAINT**

(Docket Nos. 54, 83, 208)

Before the Court is Consumers Union of United States, Inc.'s ("Consumers Union")
"Special Motion to Strike Amended Complaint Pursuant to California Code of Civil Procedure
Section 426.16."¹

On January 23, 2004, Consumers Union filed the instant motion, to which plaintiff
Sharper Image Corporation ("Sharper Image") responded by filing substantive opposition, as
well as a request for a continuance to allow Sharper Image to engage in further discovery. By
order filed February 23, 2004, the Court denied the motion in part, and made the following

¹Sharper Image argues that the instant motion is, as a matter of procedure,
"inappropriate and unfair" because Consumers Union's special motion to strike the initial
complaint is "still pending." (See Pl.s' Response to Def.'s Special Motion to Strike Amended
Complaint, filed February 6, 2004, at 1:6-10.) As Consumers Union points out, however, the
instant motion is directed at "the only version of the complaint that is at issue," the Amended
Complaint. (See Def.'s Reply, filed February 17, 2004.) Under the circumstances, the Court
finds no procedural impropriety in the filing of the instant motion.

1 findings: (1) Consumers Union met its burden to show that Sharper Image's claims against
2 Consumers Union arise from acts in furtherance of free speech in connection with a public
3 issue and, accordingly, under § 425.16(b), Sharper Image must show a "reasonable
4 probability" it will prevail on its claims; (2) Sharper Image, in the Amended Complaint ("AC"),
5 sufficiently pleaded that it has incurred pecuniary loss, and demonstrated a reasonable
6 probability of establishing that it, in fact, has incurred such loss; (3) Consumers Union's
7 statements do not constitute nonactionable subjective comment; and (4) with respect to the
8 elements of falsity and malice, Sharper Image demonstrated the propriety of Sharper Image's
9 conducting further discovery. (See Order Denying in Part and Continuing in Part Def.'s Mot. to
10 Strike, filed February 23, 2004, at 1:24-2:19.) Accordingly, the Court denied Consumers
11 Union's motion to the extent it was based on grounds other than lack of falsity and malice, and,
12 with respect to those two elements, continued the hearing on the motion and set a further
13 briefing schedule.

14 On May 21, 2004, Sharper Image, in conformity with the Court's order of February 23,
15 2004, filed a "Renewed Opposition" to Consumers Union's motion, to which Consumers Union
16 responded by filing, on June 4, 2004, a "Closing Memorandum." Thereafter, on June 14,
17 2004, Sharper Image filed a "Sur-Reply," to which Consumers Union responded by filing, on
18 July 2, 2004, a "Response to Sur-Reply."²

19 The matter came on regularly for hearing on July 30, 2004. e. robert wallach of the Law
20 Offices of e. robert wallach, P.C., and Alan L. Barry of Bell, Boyd & Lloyd LLC appeared on
21 behalf of Sharper Image. Steven N. Williams of Cotchett, Pitre, Simon & McCarthy appeared
22 on behalf of Consumers Union. Having considered the papers submitted in support and in
23 opposition to the motion, and the arguments of counsel, the Court rules as follows.

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25 //

27 ²By order filed June 15, 2004, the Court granted Sharper Image leave to file a sur-reply
28 and afforded Consumers Union the opportunity to file a response to the sur-reply. (See Order
Granting Pl.'s Mot. for Leave to File Sur-Reply, filed June 15, 2004.)

1 **BACKGROUND**

2 Sharper Image alleges that it is “a nationally and internationally renowned specialty
3 retailer of innovative and high quality consumer products,” and that “its leading proprietary
4 product” is the “Ionic Breeze Quadra Air Purifier” (“IBQ”). (See AC ¶ 1.) The IBQ, according
5 to Sharper Image, is a “fanless, low-velocity, energy-saving, electrostatic room air purifier
6 designed to clean the air continuously over a long period of time.” (See AC ¶ 5.)

7 Sharper Image alleges that Consumers Union, which publishes Consumer Reports
8 magazine, made false statements concerning the IBQ in the February 2002 and October 2003
9 issues of Consumer Reports, (see AC ¶¶ 3-4, 6-7), and that Consumers Union “knew its
10 statements were false and misleading, or it acted with a reckless disregard for whether its
11 statements in its reports were true or false,” (see AC ¶ 55). According to Sharper Image,
12 although Consumers Union knew the “IBQ’s electrostatic technology does not rely upon a
13 mechanical fan to effectively move air,” Consumers Union used test criteria that were
14 “inaccurate, unreliable, misleading, and entirely dependent on the existence of a mechanical
15 fan.” (See AC ¶ 8.) Moreover, Sharper Image alleges, Consumers Union “failed to conduct
16 [the test employed] properly.” (See AC ¶¶ 23-24.) As a result of the allegedly “false and
17 disparaging statements,” Sharper Image claims it “lost . . . product sales it would have made,”
18 (see AC ¶ 11), and “experienced an overall increase in customer returns of Ionic Breeze
19 products,” (see AC ¶ 12).

20 Based on these allegations, Sharper Image asserts four causes of action, all arising
21 under California law:³ (1) Product Disparagement; (2) Unfair Competition under § 17200 of
22 the California Business & Professions Code; (3) Tortious Interference with Prospective
23 Economic Advantage; and (4) Negligence.

24 **LEGAL STANDARD**

25 Under California law, “[a] cause of action against a person arising from any act of that
26 person in furtherance of the person’s right of petition or free speech under the United States or

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³The Court’s jurisdiction over the instant action is based on diversity.

1 California Constitution in connection with a public issue shall be subject to a special motion to
2 strike, unless the court determines that the plaintiff has established that there is a probability
3 that the plaintiff will prevail on the claim.” See Cal. Code Civ. Proc. § 425.16(b)(1).

4 “Once it is determined that an act in furtherance of protected expression is being
5 challenged, the plaintiff must show a reasonable probability of prevailing in its claims for those
6 claims to survive dismissal.” Metabolife Int’l, Inc. v. Wornick, 264 F. 3d 832, 840 (9th Cir.
7 2001) (internal quotation and citations omitted). “To do this, the plaintiff must demonstrate that
8 the complaint is legally sufficient and supported by a prima facie showing of facts to sustain a
9 favorable judgment if the evidence submitted by the plaintiff is credited.” Id. (internal quotation
10 and citation omitted). “This burden is much like that used in determining a motion for nonsuit
11 or directed verdict, which mandates dismissal when no reasonable jury could find for the
12 plaintiff.” Id. (internal quotation and citation omitted). The court “accepts as true all evidence
13 favorable to the plaintiff.” See Consumer Justice Center v. Trimedica Int’l, Inc., 107 Cal. App.
14 4th 595, 605 (2003). If the defendant offers “opposing affidavits, the court cannot weigh them
15 against the plaintiff’s affidavits, but must only decide whether the defendant’s affidavits, as a
16 matter of law, defeat the plaintiff’s supporting evidence.” See Paul for Council v. Hanyecz, 85
17 Cal. App. 4th 1356, 1365 (2001) (emphasis in original), disapproved on other grounds,
18 Equilon Enterprises v. Consumer Cause, Inc., 29 Cal. 4th 53, 68 n.5 (2002). “Thus, a
19 defendant’s anti-SLAPP⁴ motion should be granted when a plaintiff presents an insufficient
20 legal basis for the claims or when no evidence of sufficient substantiality exists to support a
21 judgment for the plaintiff.” Metabolife Int’l., 264 F. 3d at 840 (internal quotation and citation
22 omitted).

23 DISCUSSION

24 “The First Amendment presupposes that the freedom to speak one’s mind is not only
25 an aspect of individual liberty – and thus a good unto itself – but also is essential to the

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27 ⁴Section 425.15 is an “anti-SLAPP” statute. See Metabolife, 264 F. 3d at 837. “Anti-
28 SLAPP” is an acronym for “Anti-Strategic Lawsuit Against Public Participation.” See id. at
837 n. 7. “The purpose of the statute is to protect individuals from meritless, harassing
lawsuits whose purpose is to chill protected expression.” Id.

1 common quest for truth and the vitality of society as a whole.” Bose Corp. v. Consumers
2 Union of United States, Inc., 466 U.S. 485, 503-04 (1984). The First Amendment also
3 “presupposes that right conclusions are more likely to be gathered out of a multitude of
4 tongues, than through any kind of authoritative selection.” See New York Times Co. v.
5 Sullivan, 376 U.S. 254, 270 (1964) (internal quotation and citation omitted). As the Supreme
6 Court has noted, “debate on public issues should be uninhibited, robust, and wide-open, and [
7] it may well include vehement, caustic, and sometimes unpleasantly sharp attacks” See
8 id. Indeed, the Supreme Court has recognized that “erroneous statement is inevitable in free
9 debate, and that it must be protected if the freedoms of expression are to have the breathing
10 space that they need to survive.” See id. (internal quotation and alteration omitted). As the
11 Supreme Court has further observed, “[w]hatever is added to the field of libel is taken from the
12 field of free debate.” See id. at 722 (internal quotation and citation omitted). Accordingly,
13 “significant constitutional protections [are] warranted in this area.” Milkovich v. Lorain Journal
14 Co., 497 U.S. 1, 15 (1990).

15 Among the constitutional protections available in an action challenging speech is a
16 requirement that a plaintiff who challenges a statement on a matter of “public concern” bear
17 the burden of proving the statement is false. See id. at 16 (citing Philadelphia Newspapers,
18 Inc. v. Hepps, 475 U.S. 767, 776 (1986)). Consumer reporting, the subject of the instant
19 action, implicates matters of public concern. “[T]he public has a well-recognized interest in
20 knowing about the quality and contents of consumer goods.” Melaleuca, Inc. v. Clark, 66 Cal.
21 App. 4th 1344, 1363 (1998). Additionally, as the Ninth Circuit has noted, “protection of
22 statements about product effectiveness will ensure that debate on public issues will be
23 ‘uninhibited, robust and wide-open.’” See Unelko Corp. v. Rooney, 912 F. 2d 1049, 1056 (9th
24 Cir. 1990) (quoting New York Times v. Sullivan, 376 U.S. at 270). As the Third Circuit has
25 explained:

26 Consumer reporting enables citizens to make better informed purchasing
27 decisions. Regardless whether particular statements made by consumer
28 reporters are precisely accurate, it is necessary to insulate them from the
vicissitudes of ordinary civil litigation in order to foster the First Amendment
goals mentioned above. As the Supreme Court recognized in New York Times,

1 “would-be critics . . . may be deterred from voicing their criticism, even though it
2 is believed to be true and even though it is in fact true, because of doubt whether
3 this occurs, consumers would be less informed, less able to make effective use
of their purchasing power, and generally less satisfied in their choice of goods.

4 See Steaks Unlimited, Inc. v. Deaner, 623 F. 2d 264, 280 (3rd Cir. 1980) (alteration in original;
5 quoting New York Times Co. v. Sullivan, 376 U.S. at 279.)

6 Moreover, “[t]hose who, by reason of the notoriety of their achievements or the vigor
7 and success with which they seek the public’s attention, are properly classed as public figures
8 . . . may recover for injury to reputation only on clear and convincing proof that the defamatory
9 falsehood was made with knowledge of its falsity or with reckless disregard for the truth,” see
10 Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974), i.e., with “actual malice,” see New York
11 Times Co. v. Sullivan, 376 U.S. at 279-80.

12 With these principles in mind, the Court turns to the issues of whether Sharper Image,
13 which is a public figure⁵ and which challenges statements made on issues of public concern,
14 has demonstrated it has a reasonable probability of proving any of the challenged statements
15 are false and, if so, whether Consumers Union made such statements with knowledge of the
16 falsity thereof or with reckless disregard for the truth.

17 **A. Allegedly False Statements at Issue**

18 Consumers Union describes itself as a “non-profit, independent organization providing
19 consumers with information on goods, services, health, and personal finance,” (see Heim
20 Decl., filed January 23, 2004, Ex. A at 4), and which has “performed product testing and
21 reported the results of its testing since 1936,” (see id. ¶ 3). The statements Sharper Image
22 challenges arise from Consumers Union’s reporting the results of its testing of certain portable
23 air cleaners, including the IBQ.⁶

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25 ⁵At the hearing conducted on July 30, 2004, Sharper Image indicated it did not contest,
26 for the purposes of the instant motion, that it was a public figure. (See Transcript of
Proceedings, July 30, 2004, at 43:18-22.)

27 ⁶The Consumer Reports articles that are the subject of the instant action contain many
28 statements. Sharper Image has identified in its AC and/or in its papers submitted in
opposition to Consumers Union’s motion certain of those statements as being the allegedly
false statements at issue, which statements the Court has set forth, infra. Accordingly, the

1 **1. February 2002 Issue of Consumer Reports**

2 The February 2002 issue of Consumer Reports contains a two-page article titled
3 “Portable room air cleaners,” in which Consumers Union includes its “overall ratings, in
4 performance order,” of 16 models of air cleaners, including the IBQ. (See Heim Decl., filed
5 January 23, 2004, Ex. A at 46-47.) In the article, Consumers Union states that it “focused on
6 models with moderate-to-high ‘clean air delivery rates,’ the industry yardstick that gauges how
7 quickly an air cleaner reduces pollutants such as dust and tobacco-smoke particles,” and that
8 it “tested how well each air cleaner cleared measured amounts of fine road dust and even
9 finer cigarette-smoke particles from the air in [Consumers Union’s] sealed 200-square-foot
10 test room.” (See id. Ex. A at 46.) The second page of the article includes a graph depicting
11 Consumers Union’s ratings for the 16 tested models. (See id. Ex. A at 47.) The IBQ was
12 rated last of the 16 tested models and received from Consumers Union an “overall score” of
13 “P,” or “poor.” (See id.) The graph indicates that Consumers Union gave the IBQ a rating of
14 “excellent” for the categories “noise” at “high speed” and “noise” at “low speed,” a rating of
15 “good” for the category “ease of use,” and a rating of “poor” for the categories “dust” at “high
16 speed,” “dust” at “low speed,” “smoke” at “high speed,” and “smoke” at “low speed.” (See id.)
17 The graph also includes figures for the “annual cost” of running each model and discloses that
18 the IBQ has, at \$4, the lowest annual “energy” cost and, at \$0, the lowest annual “filter” cost.
19 (See id.)

20 In the AC, Sharper Image alleges that certain statements in the February 2002 article
21 are false. Those statements, as alleged by Sharper Image, are: (1) “Sharper Image SI1637
22 Ionic Breeze IBQ Silent Air Purifier (\$350) worked barely at all, producing almost no

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27 Court has considered whether Sharper Image has made, with respect to the identified
28 statements, “a prima facie showing of facts to sustain a favorable judgment if the evidence
submitted by the plaintiff is credited,” see Metabolife, 264 F. 3d at 840, and has not attempted
to determine whether there may exist in the articles any other statements that could be
considered false.

1 measurable reduction in airborne particles.”;⁷ (2) “The other electronic-precipitator model
2 Sharper Image SI637 Ionic Breeze IBQ Silent Air Purifier, proved unimpressive in our tests.”;⁸
3 (3) “In comparing the IBQ (which does not use a fan) to the Friedrich⁹ air cleaner (which does
4 use a fan), Consumers Union stated, ‘both use similar technology.’”; (4) “In a further
5 comparison of the IBQ to the Friedrich air cleaner, Consumers Union stated ‘One Works, One
6 Doesn’t.’”; and (5) “. . . the Sharper Image [unit] removed very few particles” (alteration in AC).
7 (See AC ¶ 51.)

8 **2. October 2003 Issue of Consumer Reports**

9 The October 2003 issue of Consumer Reports contains a four-page article titled “Air
10 Cleaners” and subtitled “Behind the hype,” which includes Consumers Union’s ratings for 18
11 models of room air cleaners, including the IBQ. (See Heim Decl., filed January 23, 2004, Ex.
12 B at 26-29.)¹⁰ One page of the article, a “closeup” titled “In-Depth Tests: Sharper Image Ionic
13 Breeze, Honeywell Environizer,” states that Sharper Image had “complained” to Consumers
14 Union about the test Consumers Union employed when it published its February 2002 article,
15 and that Consumers Union, having had its “test procedures” reviewed by an “independent
16 expert,” “continue[s] to stand behind [the February 2002] report.” (See id. Ex. B at 27.) The
17 “closeup” portion of the article further states that, in response to Sharper Image’s claim that
18 the IBQ would “fare better in a longer test,” Consumers Union ran its “regular tests” on the IBQ,
19 as well as “additional long-term tests.”¹¹ (See id.) The last page of the article includes a

21 ⁷Contrary to the AC, this statement, as purportedly quoted, does not appear in the
22 February 2002 article. The article does include the statement that Consumers Union “found
no measurable reduction in airborne particles” in testing the “Sharper Image S1637 Ionic
Breeze Quadra Silent Air Purifier.” (See Heim Decl., filed January 23, 2004, Ex. A at 46-47.)

23 ⁸With the exception of the substitution of “IBQ” for “Quadra,” the AC has accurately
24 quoted this statement. (See Heim Decl., filed January 23, 2004, Ex. A at 46.)

25 ⁹“Friedrich” is a reference to the Friedrich C-90A air cleaner. (See Heim Decl., filed
January 23, 2004, Ex. A at 46.)

26 ¹⁰The article also includes ratings for 18 models of whole-house air cleaners; (see id.);
27 that portion of the article is not implicated by the instant action.

28 ¹¹Consumers Union also ran the “additional term-long tests” on three other models.
(See id.)

1 graph depicting Consumers Union’s overall ratings for the 18 tested models. (See id. Ex. B at
2 29.) Of the 18 models tested, Consumers Union ranked the IBQ next to last and, again, gave
3 the IBQ an “overall score” of “P,” or “poor.” (See id.) Consumers Union gave the IBQ the
4 same ratings as it had in the February 2002 article, specifically, ratings of “excellent” in the two
5 “noise” categories, a rating of “good” in the “ease of use” category, and ratings of “poor” in the
6 two “dust” categories and the two “smoke” categories, (see id.), and also again showed that
7 the IBQ had the lowest annual “energy” cost and no annual “filter” cost. (See id.)

8 In the AC, Sharper Image alleges that certain statements in the October 2003 article
9 are false. Those statements, as alleged by Sharper Image, are: (1) “Our tests show [the IBQ
10 is] not effective.” (alteration in AC); (2) “In evaluating Sharper Image’s independent testing of
11 the IBQ’s effectiveness, Consumers Union states ‘some of those studies were irrelevant to the
12 question of whether the Ionic Breeze was an effective air cleaner Other studies used
13 questionable methodology or showed merely that the Sharper Image had little air-cleaning
14 capability.’”; (3) “Ionic Breeze . . . didn’t come close to the performance of the [other tested
15 products] The Ionic Breeze had [a] very slow rate[] of cleaning, which did not improve
16 over time.” (alterations in AC); and (4) “The Ionic Breeze . . . [is] quiet but ineffective”
17 (alteration in AC). (See AC ¶ 54.)

18 Additionally, Sharper Image alleges Consumers Union made a false statement when,
19 in describing the tests on which the results in its February 2002 article had been based,
20 Consumers Union stated its tests were “based on the industry standard for measuring clean-
21 air delivery rate (CADR).” (See AC Ex. B, 6th page.)¹²

22 **3. Republications**

23 Sharper Image alleges that Consumers Union, in addition to making statements about
24 the effectiveness of the IBQ in the two articles referenced above, made false statements that
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26 ¹²This statement is not mentioned in the AC. In its opposition, Sharper Image identifies
27 the statement as one of the statements at issue in the instant action. (See Pl.’s Response to
28 Def.’s Special Motion to Strike, filed February 6, 2004, at 13:24-25.) Consumers Union has
not challenged Sharper Image’s inclusion of the statement as within the scope of the instant
action.

1 were published by third parties. Specifically, in its AC, Sharper Image alleges as follows:
2 (1) "In or around May 2002, a representative of Consumers Union published, communicated,
3 or caused to be published, media reports stating in part, 'The Ionic Breeze in our
4 measurements performed poorly, it was unable to remove measurable amounts of particles
5 from the room air.'"; (2) "On or around May 14, 2002, WNBC in New York broadcast and
6 published Consumers Union's report and thereafter published its broadcast at
7 www.wnbc.com. WNBC's broadcast quoted a representative of Consumers Union stating,
8 'The Ionic Breeze in our measurements performed poorly, it was unable to remove
9 measurable amounts of particles from the room air.'"; (3) "WRAL in North Carolina at
10 www.wral.com, continues to publish an article entitled 'Consumer Reports Shows Which
11 Portable Cleaners Are Best At Clearing The Air - Friedrich Cleaner Earns High Marks.'; and
12 (4) "KCCI in Iowa at www.theiowachannel.com published an article entitled 'Air Purification
13 Systems Put To The Test,' wherein a representative of Consumers Union commented, 'The
14 Ionic Breeze, when we turned it on, it removed very few particles.'" (See AC ¶¶ 52, 53.)

15 **B. Falsity**

16 Sharper Image argues it can demonstrate that Consumers Union's statements are
17 false, and advances several theories in support of this assertion. First, Sharper Image
18 contends that the testing protocol employed by Consumers Union was "inapplicable" to
19 Sharper Image's product, the IBQ. (See Pl.'s Renewed Opp., filed May 21, 2004, at 9:15-16.)
20 Second, Sharper Image contends that even if the protocol employed is applicable to the IBQ,
21 "the protocol was incorrectly applied." (See *id.* at 9:16-17.) Third, Sharper Image contends
22 that Consumers Union's own test results "demonstrate that the IBQ was highly effective in
23 removing airborne particles." (See *id.* at 10:28-11:1.) Finally, Sharper Image argues that the
24 results of Sharper Image's "internal" tests and "independent" tests show that the IBQ is an
25 "effective air cleaner." (See *id.* at 12: 25-28.)

26 For the reasons discussed below, the Court finds Sharper Image has not provided
27 sufficient evidence to support a finding that, under any of these theories, whether alone or in
28 combination, it has a reasonable probability of establishing that any of the challenged

1 statements are false.

2 **1. Applicability of Protocol Employed**

3 The tests employed by Consumers Union “utilized the Clean Air Delivery Rate
4 (‘CADR’) methodology.” (See Connelly Decl., filed January 23, 2004, ¶ 6; see also id. ¶ 13.)
5 Consumers Union, in the February 2002 article, described CADR as “the industry yardstick
6 that gauges how quickly an air cleaner reduces pollutants such as dust and tobacco-smoke
7 particles.” (See Heim Decl., filed January 23, 2004, Ex. A at 46.) The Association of Home
8 Appliance Manufacturers (“AHAM”), a trade organization that certifies air cleaners using a test
9 employing CADR methodology, has described CADR as follows:

10 Clean Air Delivery Rate (CADR) is defined as the measure of the delivery of
11 contaminant free air by a portable household electric cord-connected room air
12 cleaner, expressed in cubic feet per minute. More technically, Clean Air
13 Delivery Rates are the rates of contaminant reduction in the test chamber when
the unit is turned on, minus the rate of natural decay when the unit is not running,
times the volume of the test chamber as measured in cubic feet.

14 (See Parker Decl., filed December 15, 2003, Ex. B at 4.)¹³ Sharper Image, in its opposition,
15 describes the “CADR test” as a “speed test.” (See Pl.’s Response to Pl.’s Mot., filed
16 December 15, 2003, at 19:13-14.)

17 At the outset, the Court observes that CADR is not itself a “test.” Rather, CADR is a
18 “measure of air cleaner performance.” (See Parker Decl., filed December 15, 2004, Ex. B at
19 4.) AHAM has designed one specific test, the ANSI/AHAM AC-1-2002 (“AC-1”), to measure
20 CADR. (See id. Ex. B.) The test designed by Consumers Union to measure CADR is, as
21 discussed below, another such test. In any event, Sharper Image argues that any test
22 measuring CADR is “inappropriate for evaluating the IBQ’s performance, at least when
23 applied in isolation from other factors such as noise, energy consumption and consumer-use
24 patterns.” (See Pl.’s Renewed Opp., filed May 21, 2004, at 9:18-20.) Consumers Union,

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26 ¹³Sharper Image offered the Parker Declaration in response to Consumers Union’s
27 motion to strike Sharper Image’s initial complaint. In its response to the instant motion,
28 Sharper Image has incorporated by reference its response to Consumers Union’s motion to
strike the initial complaint. (See Pl.’s Response to Def.’s Special Mot. to Strike AC, filed
February 6, 2004, at 14:25-26.)

1 however, rated each tested model in the category “noise” and included, as to each model, the
2 annual energy cost. Thus, contrary to Sharper Image’s argument, Consumers Union expressly
3 tested, and disclosed its results on, the factors of noise and energy consumption.

4 With respect to Consumers Union’s use of CADR methodology as part of its testing,
5 the Court initially notes that Sharper Image has not offered any evidence to support a finding
6 that CADR methodology is, per se, inapplicable to the IBQ.¹⁴ Indeed, the evidence offered by
7 Sharper Image is to the contrary, specifically, an AHAM publication indicating CADR
8 methodology is applicable to air cleaners that, *inter alia*, “operate with an electrical source of
9 power and contain a motor and fan for drawing air through a filter(s),” and also those that, like
10 the IBQ, “incorporate an ion generator only.”¹⁵ (See Parker Decl., filed December 15, 2003,
11 Ex. B at 1-2.) Rather, Sharper Image offers evidence that CADR methodology has been, in
12 Sharper Image’s words, “criticized.” (See Pl.’s Response to Def.’s Mot., filed December 15,
13 2003, at 6:14-16.)

14 The “criticism” offered by Sharper Image consists of the following statements:

15 (1) In two articles, one found on the website www.hb2000.org and the other in the
16 September 1999 newsletter of the International Society of Indoor Air Quality and Climate, the
17 writers, who in both instances are unidentified, purport to recount discussions that occurred at
18 a “workshop in August 1999 held at the Indoor Air ’99 conference in Edinburgh.” (See Burke
19 Decl., filed May 21, 2004, Ex. 27, first two unnumbered pages; *see also id.* Ex. 28 at 4-5.)
20 According to the article on the above-referenced website, participants at the workshop
21 discussed “drawbacks of only reporting a CADR on a product sold to the public,” for example,

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23 ¹⁴Sharper Image does offer evidence that AHAM has not “certified” the IBQ, (see
24 Parker Decl., filed December 15, 2003, Ex. A), a fact Consumers Union disclosed in the
25 February 2002 article, (see Heim Decl., filed January 23, 2004, Ex. A at 47). AHAM,
26 however, only “certifies,” *i.e.*, measures CADR for a particular air cleaner, when the
27 manufacturer agrees to “voluntarily participate in the AHAM certification program.” (See
Parker Decl., filed December 15, 2003, Ex. A, third unnumbered page.) Thus, the fact that
AHAM has not “certified” the IBQ does not support an inference that the CADR measurement
is inapplicable to the IBQ, only that Sharper Image has not agreed to have the CADR of the
IBQ measured and/or reported by AHAM.

28 ¹⁵The IBQ “uses patented ionic technology to move and purify air.” (See Parker Decl.,
filed December 15, 2003, ¶ 4.) The IBQ does not have a fan. (See *id.* ¶ 6.)

1 that an “average consumer” does not understand “the concept of CADR.”¹⁶ (See Burke Decl.,
2 filed May 21, 2004, Ex. 27, second unnumbered page.) According to the article in the above-
3 referenced newsletter, participants discussed that “[i]n the USA, the AHAM standard is the
4 current accepted method by which portable air cleaners are tested and rated for comparable
5 performance on particulate reduction,” and that “there is no consensus in other countries as to
6 a uniform set of criteria by which portable air cleaners can be rated.” (See *id.* Ex. 28 at 5.)
7 Both articles indicate that one topic of discussion was that a number of “important
8 considerations should be factored into an internationally accepted test method to compare air
9 cleaners,” and that the “AHAM standard, in the USA, does not include all of [those]
10 considerations.”¹⁷ (See *id.* Ex. 27, third unnumbered page; *id.* Ex. 28 at 5.)

11 (2) In an article authored by William W. Nazaroff (“Nazaroff”), of the Civil and
12 Environmental Engineering Department at the University of California, Berkeley, which
13 Sharper Image states was “published in relation” to a scientific conference in 2000, Nazaroff
14 states the “CADR is becoming commonly used as a performance measure of air cleaning
15 devices” and that “air-cleaning effectiveness depends on more than the CADR.” (See *id.*
16 ¶ 30, Ex. 29 at 1, 5.) In his article, Nazaroff proposes an “air quality model” to measure

17
18 ¹⁶The other stated “drawbacks” were (1) “CADR by itself does not inform the consumer
19 of the room volume for which the device is appropriate”; (2) “CADR only applies to particles in
20 the current test procedures,” which are “dust, pollen, and cigarette smoke”; and (3) “CADR
21 values are typically reported for the air cleaner when operated on high air flow,” while
22 “consumers often set the unit at a lower air flow rate which will afford significantly lower CADR
23 values.” (See *id.*, second unnumbered page.) The last of these “drawbacks” is not implicated
24 by Consumers Union’s statements because Consumers Union’s articles included test results
25 for the removal of dust and smoke particles at both “high speed” and at “low speed” operation.
26 (See Heim Decl., filed January 23, 2004, Ex. A at 47, Ex. B at 29.)

27 ¹⁷According to the website article, the “important considerations that should be
28 factored” are: (1) “Initial performance ratings”; (2) “Extended performance ratings”; (3)
“Maintenance and upkeep requirements”; (4) “Noise level ratings”; (5) Potential for secondary
emissions of contaminants”; (6) “Rating information that would be simple for consumers to
understand”; (7) “Size of room for which an 80% reduction of contaminant is feasible”; and (8)
“A proposed effectiveness factor accounting for competing processes afforded by ventilation
and deposition. The magnitude of reduction in contaminant (provided by an air cleaner)
depends on the air cleaner’s removal rate compared to removal by all other processes.” (See
id. Ex. 27, third unnumbered page.) The author(s) of the article in the newsletter mention only
the first six of the above-noted considerations. (See *id.* Ex. 28 at 5.) Neither article indicates
which of the above considerations are included in the AHAM standard and which are not.

1 “steady-state air-cleaning effectiveness” where the “effectiveness is the ratio of the device’s
2 clean-air delivery-rate (CADR) to the total removal rate by all processes.” (See id. Ex. 29 at
3 5.) Specifically, Nazaroff proposes using an “equation” to measure “effectiveness,” where the
4 CADR measurement for an air cleaner is considered along with other variables, such as the
5 “volume flow rate.” (See id. Ex. 29 at 2.)

6 (3) In an article written by Bruce McDonald (“McDonald”) of Donaldson Company, Inc.,
7 which Sharper Image states was published in the “October 1999 Proceedings of the
8 American Filtration and Separation Society,” McDonald states “there has been a substantial
9 amount of action in air filter test standards and practices over the past several years.” (See
10 id. Ex. 30 at 1; Ex. 31, second unnumbered page.) Among the examples of “action in air filter
11 test standards and practices” that McDonald discusses are two, new, multi-part “cleanroom
12 standards,” (see id. Ex. 30 at 1-2), and a “draft international standard” for “cabin air filters for
13 automobiles,” (see id. Ex. 30 at 2). McDonald’s article, however, makes no reference to any
14 standards and/or practices applicable to portable air cleaners.

15 (4) Katherine Hammond, PhD (“Dr. Hammond”), an environmental scientist retained by
16 Consumers Union in June 2003 to “review and evaluate test protocols employed by
17 [Consumers Union] in evaluating household air cleaners,” (see Hammond Decl., filed January
18 23, 2004, ¶ 1), stated in a handwritten note: “[I]t is a good measurement, but it has its
19 limitations ← CADR ← the concepts are standard[;] takes into account flow rate,” (see Burke
20 Decl., filed May 21, 2004, Ex. 25).

21 (5) During an interview of Robert A. Wood, M.D. (“Dr. Wood”), Director of the Pediatric
22 Allergy Clinic at Johns Hopkins Hospital, conducted by a member of Consumers Union’s staff,
23 Dr. Wood stated: “I think [the AHAM/CADR standard is] certainly a measure of function of the
24 unit, but there, I think, could be additional measures that would help the consumer to really
25 compare one unit to another.” (See id. Ex. 26 at CU 0011680.) When next asked, “What’s
26 missing?,” Dr. Wood replied: “What’s really missing is good studies on health benefits of air
27 cleaners and good studies where different units are truly compared in real-world settings for
28 their ability to remove particulates from the air and improve health. And how to design the test

1 methods to equal that and provide that information is I think the hard part and something that
2 there's certainly smart enough people out there from engineering backgrounds to be able to
3 do that." (See id.)

4 (6) The Environmental Protection Agency ("EPA"), in a document on its website titled
5 "Indoor Air Facts No. 7 - Residential Air Cleaners," states: "The Federal government has not
6 published guidelines or standards that can be used to determine how well low to medium
7 efficiency air cleaners work." (See Parker Decl., filed December 15, 2003, Ex. E at 5.) The
8 EPA website refers persons who seek "further information on standards for portable air
9 cleaners" to AHAM, and states that AHAM "provides information on air cleaners on their
10 AHAM-certified Clean Air Delivery Rate site at www.cadr.org." (See id.) The EPA website
11 also states that persons wishing to assess "potential performance" of air cleaners should
12 consider four "major factors affecting the performance of the air cleaner, specifically, the
13 "percentage of the particles removed as they go through the device (that is, the efficiency),"
14 the "amount of air handled by the device," the "effective volume of the air to be cleaned," and
15 the "decrease in performance which may occur between maintenance periods and if periodic
16 maintenance is not performed on schedule." (See id. Ex. E at 3.)¹⁸

17 (7) Consumers Union, in an article titled "Household Air Cleaners," published in the
18 October 1992 issue of Consumer Reports, states:

19 There is no universally accepted performance standard for comparing air
20 cleaners. The closest thing to one is the clean air delivery rate (CADR), which
21 expresses the number of cubic feet of clean air a unit delivers each minute. The
22 CADR, developed and certified by [AHAM] is used by some air-cleaner
23 manufacturers on their products. For rooms of various sizes, the CADR is
24 based on both the percentage of particles removed and how quickly they are
25 removed. Tests performed to [AHAM's] specifications provide CADR numbers
26 for dust, smoke, and pollen. We believe the CADR numbers alone don't
27 provide a complete picture of an air cleaner's effectiveness. It's also necessary
28 to know the unit's total air-flow rate to properly assess efficiency. Two cleaners
may have the same CADR, but the one with the lower total air flow will be the

26 ¹⁸The EPA website lists "additional factors to consider," which include that "[g]ases and
27 odors from particles collected by the devices may be redispersed into the air," that "[i]on
28 generators, especially those that do not contain a collector, may cause soiling of walls and
other surfaces," that "[a user] may be bothered by noise from portable air cleaners, even at low
speeds," and that "[m]aintenance costs, such as costs for the replacement of filters, may be
significant." (See id.)

1 more efficient.

2 (See id. Ex. C at 657, 658.)

3 Sharper Image's evidence of "criticism" of the CADR does not support a finding that
4 Consumers Union's statements that the IBQ is ineffective, unimpressive, removed few
5 particles, performed poorly, or statements of a similar nature, are false. Consumers Union's
6 statements concerning the effectiveness, or lack thereof, of the IBQ are based, as Consumers
7 Union states in its articles, on the results of its tests measuring the CADR of the air cleaners.
8 None of the scientists or other parties who have "criticized" the CADR have stated, or even
9 suggested, that a test result based on CADR measurements is scientifically unreliable. Cf.
10 Consumer Justice Center, 107 Cal. App. 4th at 605 (holding where plaintiff offered evidence
11 that defendant's statement that its product was "scientifically proven" to increase breast size
12 was "not supported by any reliable scientific proof," plaintiff's showing was sufficient to
13 "withstand a special motion to strike pursuant to section 425.16"). On the contrary, each of the
14 above-quoted sources has stated that a CADR measurement is, at least in the United States,
15 a common or standard measurement of an air cleaner's performance.¹⁹

16 In short, although Sharper Image's evidence indicates that some scientists and others
17 are of the view that factors in addition to the CADR should be considered in measuring the
18 performance of portable air cleaners, there is no evidence that the CADR is, as a scientific
19 matter or otherwise, an invalid consideration. The fact that some scientists may be attempting
20 to develop other or additional ways of measuring the performance of portable air cleaners
21 does not support a finding that test results based on CADR measurements are false.

22 Sharper Image's argument, that Consumers Union lied by equating effectiveness with
23 the results of Consumers Union's CADR measurements, essentially boils down to a marketing
24 dispute, or, as Sharper Image put it at the hearing on the motion to strike, a "merchandising
25 competitive battle," (see Transcript of Proceedings, July 30, 2004, at 47-49), i.e., whether
26 consumers considering a purchase of a portable air cleaner would prefer a device that

27 _____
28 ¹⁹The only exception is McDonald, whose article does not refer to CADR, and does not
discuss measuring the performance of portable air cleaners.

1 purports to clean air faster, but with potentially higher usage costs and noise, or would prefer a
2 device that purports to clean air more slowly, but with potentially lower usage costs and no
3 noise. Consumers Union, however, fully disclosed in its articles the potential benefits of the
4 IBQ, specifically, very low annual energy costs, no filter costs, and lack of noise. Consumers
5 Union also stated that it did not find such benefits to be advantageous in light of the fact that
6 the IBQ, as Sharper Image concedes, does not clean the air quickly.

7 Consumers Union's statements that the IBQ is ineffective are predicated on its
8 determination that the speed at which portable air cleaning devices remove dust and smoke
9 particles from the air is of concern to its readers and, accordingly, it gave the IBQ a "poor"
10 rating in both articles. Sharper Image has not shown any probability, let alone a reasonable
11 probability, that Consumers Union's statements in that respect are false by reason of
12 Consumers Union's reliance, in forming such opinions, on the results of a test measuring
13 CADR.

14 Additionally, with respect to Consumers Union's statement that its tests were "based on
15 the industry standard for measuring clean-air delivery rate (CADR)," Sharper Image has not
16 shown such statement is false, given that Sharper Image's own evidence shows that CADR is
17 a common or standard measurement of an air cleaner's performance.

18 **2. Application of Protocol Employed**

19 Sharper Image argues that to the extent Consumers Union's statements are based on
20 the results of Consumers Union's tests measuring CADR, such statements are false because
21 Consumers Union did not employ the CADR "test" properly. (See Pl.'s Renewed Opp., filed
22 May 21, 2004, at 10:7.)²⁰ Specifically, Sharper Image argues that the test protocol employed
23 by Consumers Union to measure CADR involved "deviations" from the AC-1 test protocol, the
24 specific test designed by AHAM to measure CADR. (See id. at 10:8-19.)

25 In particular, Sharper Image argues that Consumers Union's test deviated from
26

27 ²⁰The Court again observes that CADR is not a "test" and, accordingly, Sharper Image
28 lacks any probability of proving that Consumers Union did not perform the CADR "test"
properly, there being no such "test."

1 AHAM's AC-1 test protocol in the following ways: (1) Consumers Union did not test for pollen
2 removal, (see Parker Decl., filed December 15, 2003, Ex. B at 2 (stating AC-1 "test
3 particulate matter" is cigarette smoke, road dust, and pollen); Wallace Dep. at 43-44²¹
4 (testifying Consumers Union tested for removal of cigarette smoke and road dust, but not
5 pollen)); (2) Consumers Union's test chamber was larger than that identified in the AC-1 test
6 protocol, (see Parker Decl., filed December 15, 2003, Ex. B, Appendix A (stating AC-1 test
7 chamber should be 1008 cubic feet, or "10 ½ ft. x 12 ft. x 8 ft"); Wallace Dep. at 76 (testifying
8 Consumers Union's test chambers was 1700 cubic feet); Nanni Dep. at 62-63²² (testifying
9 dimensions of Consumers Union's test chamber "roughly like 12 by 17 or 12 by 18"));
10 (3) Consumers Union did not use a continuous fan, (see Parker Decl., filed December 15,
11 2003, Ex. B at 5 (stating, for AC-1, "recirculation fan is to be operated throughout all tests");
12 Wallace Dep. at 99 (testifying Consumers Union did not run continuous fan during its testing));
13 and (4) Consumers Union turned on the air cleaners manually, rather than remotely, (see
14 Parker Decl., filed December 15, 2003, Ex. B at 7-8 (stating, for AC-1, air cleaners should be
15 "turn[ed] on" after "chamber valve" is closed); Wallace Dep. 182 (testifying Consumers Union's
16 staff manually turned on air cleaners by "dash[ing] in and dash[ing] out" of test chamber)).²³

17 Consumers Union did not represent, in either of the two subject articles or in any

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19 ²¹Excerpts from the Wallace deposition are attached as Exhibit 10 to the Declaration
20 of Thomas J. Welling, filed May 21, 2004. The entirety of the deposition testimony is attached
21 as Exhibit T to the Declaration of Steven N. Williams, filed June 4, 2004.

22 ²²Excerpts from the Nanni deposition are attached as Exhibit 7 to the Declaration of
23 Thomas J. Welling, filed May 21, 2004. The entirety of the deposition testimony is attached as
24 Exhibit R to the Declaration of Steven N. Williams, filed June 4, 2004.

25 ²³Additionally, Sharper Image argues Consumers Union "deviated" from the AC-1 test
26 protocol with respect to the temperature of the test chamber and the requirement that the air
27 pressure in the test chamber be constant. Sharper Image, however, has not supported these
28 assertions with evidence.

The AC-1 test protocol states that the test chamber temperature should remain at "(70
± 5)°F." (See Parker Decl., filed December 15, 2003, Ex. B at 4.) Although Sharper Image
argues that the temperature in Consumers Union's chamber was not constant, the testimony
on which Sharper Image relies does not refer to the temperature in Consumers Union's test
chamber falling below 65°F or above 75°F. (See Wallace Dep. at 178-79).

With respect to air pressure, Sharper Image fails to cite to any provision in the AC-1
test protocol requiring "constant" air pressure or to evidence that supports a finding
Consumers Union's test chamber did not have "constant" air pressure.

1 statement republished by third parties, that the test protocol it employed to measure CADR
2 was the AC-1 test protocol designed by AHAM. Consequently, to the extent Sharper Image
3 argues that Consumers Union's test protocol "deviated" from the AHAM-designed test, such
4 evidence, standing alone, is insufficient to support a finding that any of Consumers Union's
5 statements were false. Rather, the issue presented by evidence of any "deviation" is whether
6 Consumers Union's statements concerning the effectiveness of the IBQ, which were based on
7 the results of tests whose protocol differed from the AC-1, were false because the deviations
8 from the AC-1 test protocol rendered Consumers Union's results unreliable. See, e.g.,
9 Consumer Justice Center, 107 Cal. App. 4th at 605 (holding plaintiff had reasonable
10 probability of proving statements about efficacy of product were false where statements "not
11 supported by any reliable scientific proof").

12 Of all the asserted deviations, the only deviation that Sharper Image has specified as
13 affecting the reliability of the test results is Consumers Union's not having turned on the air
14 cleaners remotely.²⁴ Sharper Image does not contend, however, and there is no evidence to
15 suggest, that Consumers Union's personnel remotely turned on all of the air cleaners except
16 for the IBQ; rather, it is undisputed that Consumers Union did not turn on any air cleaner
17 remotely. (See Wallace Dep. 182:19-20 ("we did the same thing for all the models").) Nor
18 has Sharper Image articulated any basis, let alone pointed to any evidence, to suggest that
19 the IBQ would, as compared to the other tested air cleaners, perform more poorly than the
20 other cleaners as a result of such "deviation." Rather, Sharper Image argues that Dr.
21 Hammond, one of Consumers Union's experts, testified, as characterized by Sharper Image
22 in its opposition, that "in another context, [] she believed such a deviation from the AC-1
23 protocol would 'change things drastically.'" (See Pl.'s Renewed Opp., filed May 21, 2004, at

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27 ²⁴As to the other asserted "deviations," Sharper Image has not pointed to any evidence
28 that any of such circumstances, either separately or in combination, could have caused the
results of Consumers Union's tests to be unreliable. Consequently, the Court will not address
them further.

1 19:16-18 (quoting Hammond Dep. at 155-56)²⁵.)

2 In the portion of the deposition on which Sharper Image relies, Dr. Hammond refers to
3 a memorandum dated June 18, 2003 that she wrote to Consumers Union, in which she
4 commented on a “July 2000 report for Performance Analytical, Inc., on the ‘Comparison of
5 Clearance Allergen-Sized Airborne Particulate by Electrically Powered Household Air
6 Cleaning Devices.’”²⁶ (See Hammond Dep. at 154:9 - 155:5.) At her deposition, Dr.
7 Hammond discusses a “bullet point” in that memorandum, which read: “Why couldn’t the
8 Quadra [IBQ] be turned on remotely? Opening the door would change things drastically!”
9 (See id. at 155:7-10.) Dr. Hammond testified that this comment was a reference to persons
10 entering the test chamber to manually turn on the air cleaner being tested, a circumstance
11 which, in her view, could cause particles to “either enter or leave the chamber.” (See id. at
12 155:11-18.) When asked if she knew “what impact that would have on the experiment’s
13 results,” Dr. Hammond replied, “I think it just undermines the study itself.” (See id. at 156:8-
14 12.)

15 The above-discussed testimony by Dr. Hammond is insufficient to “support a prima
16 facie showing of facts to sustain a favorable judgment if [it] is credited.” See Metabolife, 264
17 F. 3d at 840. First, Sharper Image has not shown that the test discussed in Dr. Hammond’s
18 July 18, 2003 memorandum, specifically, the test described in the “July 2000 report for
19 Performance Analytical, Inc.,” was conducted under conditions similar to those under which
20 Consumers Union’s test was performed. See Unelko Corp., 912 F. 2d at 1056-57 (holding,
21 where plaintiff alleged defendant’s statement that plaintiff’s product “didn’t work” was false and
22 offered evidence that its own tests showed product was effective, plaintiff’s evidence was

24 ²⁵Excerpts from the Hammond deposition are attached as Exhibit 3 to the Declaration
25 of Thomas J. Welling, filed May 21, 2004. The entirety of the deposition testimony is attached
as Exhibit N to the Declaration of Steven N. Williams, filed June 4, 2004.

26 ²⁶The above-referenced report includes the results of tests on the IBQ performed by
27 Performance Analytical Inc. at the request of Sharper Image. (See Asher Decl., filed January
28 23, 2004, Ex. I.) The report was provided by Sharper Image to Consumers Union in January
2003, (see id.), and Consumers Union, in turn, provided Dr. Hammond with a copy of the
report, (see Hammond Decl., filed January 23, 2004, ¶¶ 10, 11.)

1 insufficient to establish falsity in absence of showing that tests performed by plaintiff and
2 defendant occurred “under same conditions”). Second, even assuming the results of a test
3 measuring an air cleaner’s CADR would be unreliable if particles entered or exited the
4 chamber as a result of a person’s entering the test chamber to manually turn on the air
5 cleaner, Consumers Union has offered evidence that its “particle counter showed no effect at
6 all” as a result of its staff entering the chamber to turn on the air cleaners, (see Wallace Dep.
7 at 182:6-18), and Sharper Image has submitted no evidence to contradict Consumers Union’s
8 showing.

9 In sum, Sharper Image has not submitted sufficient evidence to support a finding that
10 Consumers Union’s manual turning on of the air cleaners rendered the results of its tests
11 unreliable, and has offered no evidence to establish that the other “deviations” rendered
12 Consumers Union’s test results unreliable. Under such circumstances, Sharper Image has not
13 shown a reasonable probability of establishing falsity under the theory that Consumers Union,
14 in forming its opinions, relied on the results of a test that deviated from the AC-1 test designed
15 by AHAM to measure CADR.

16 **3. Results of Consumers Union’s Testing**

17 Sharper Image argues that Consumers Union’s statements concerning the
18 effectiveness of the IBQ are false because Consumers Union’s test results actually
19 demonstrated the IBQ is, in Sharper Image’s view, an effective air cleaner. Specifically,
20 Sharper Image points to the results of Consumers Union’s long-term testing of the IBQ, which
21 showed that the IBQ removed more particles than were removed as a result of “natural decay.”
22 (See, e.g., Burke Decl., filed May 21, 2004, Ex. 15 at CU0013164.)²⁷ Sharper Image also
23 relies on evidence Consumers Union considered and decided against including in the
24 October 2003 Consumer Reports article, specifically, graphs that depicted the test results of
25 the IBQ, along with accompanying text, which included a statement that the IBQ was “barely
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27 ²⁷Although Sharper Image argues that Consumers Union’s testing demonstrates the
28 IBQ performed “significantly better” than natural decay, (see Pl.’s Renewed Opp., filed May
21, 2004, at 11:3-5), Sharper Image has offered no expert opinion to that effect.

1 better than no cleaner at all.” (See Heim Dep. at 111:23 - 113:2²⁸; Burke Decl., filed May 21,
2 2004, Ex. 24 at CU 0002300.)²⁹

3 As discussed above, the results of the long-term testing were disclosed in Consumers
4 Union’s October 2003 article. Consumers Union, in describing the results of the long-term
5 testing, stated: (1) “Sharper Image, Honeywell, and Hoover precipitators are quiet and cost
6 little to run. However, our tests show that they are not effective.”; (2) “The Ionic Breeze and the
7 Environizer³⁰ are quiet but ineffective.”; (3) “The Ionic Breeze and the Environizer didn’t come
8 close to the performance of the others.”³¹; and (4) “The Ionic Breeze and Environizer had very
9 slow rates of cleaning, which did not improve over time” (See Heim Decl., filed January
10 23, 2004, Ex. B at 26, 27.) Sharper Image alleges that each of the above-statements is false.
11 (See AC ¶ 54.)

12 To determine whether a statement is false, a court must examine the “context in which
13 the statement was made.” See Monterey Plaza Hotel v. Hotel Employees & Restaurant
14 Employees, 69 Cal. App. 4th 1057, 1064 (1999). Specifically, a court must “look at the nature
15 and full context of the communication and to the knowledge and understanding of the audience
16 to whom the publication was directed.” See id. Here, Consumers Union plainly and succinctly
17 disclosed what Consumers Union meant by an “effective” air cleaner. Specifically,
18 Consumers Union explained that, in its view, if an air cleaner slowly removes particles from the
19 air, “then running [it] for 24 hours is not going to make it an effective air cleaner when infiltration

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21 ²⁸Excerpts from the Heim deposition are attached as Exhibit 4 to the Declaration of
22 Thomas J. Welling, filed May 21, 2004. The entirety of the deposition testimony is attached as
23 Exhibit O to the Declaration of Steven N. Williams, filed June 4, 2004.

24 ²⁹Sharper Image also relies on Dr. Hammond’s declaration, in which she opined that
25 Consumers Union’s “test scores for dusts in [the] larger size range” were consistent with data
26 obtained in one of Sharper Image’s studies, which data, in Dr. Hammond’s view, suggests the
27 IBQ had a “somewhat marginal capacity to reduce the concentration of allergenic particles,
28 which have diameters in the range of 1 to 5 micrometers.” (See Hammond Decl., filed
January 23, 2004, ¶ 11.)

29 ³⁰The “Environizer” is the “Honeywell” air cleaner that Consumers Union tested. (See
Heim Decl., filed January 23, 2004, Ex. B at 29.)

30 ³¹“Others” is a reference to the Whirlpool AP45030H0 and the Friedrich. (See Heim
Decl., filed January 23, 2004, Ex. B at 27, 29.)

1 of air containing particles into a room continues.” (See Heim Decl., filed January 23, 2004,
2 Ex. B at 27.) In the “bottom line” section of the portion of the article discussing Consumers
3 Union’s long-term testing of air cleaners, Consumers Union, again disclosing its view that air
4 cleaners are not effective if they clean air very slowly, stated that the IBQ was “ineffective” and
5 that “considering how slowly [the IBQ] worked,” advised against its purchase. (See *id.*)
6 Because Consumers Union disclosed that the IBQ did remove some particles from the air,
7 albeit “slowly,” a reader would not understand Consumers Union to be claiming that the IBQ
8 performed no better than “natural decay,” *i.e.*, where no air cleaner was used.

9 Accordingly, Sharper Image has not shown a reasonable probability of proving any of
10 the challenged statements are false by reason of the results of Consumers Union’s own
11 testing.

12 **4. Results of Sharper Image’s Testing**

13 Sharper Image argues that testing performed on its behalf demonstrates the IBQ is
14 “effective,” specifically, that the IBQ is “effective at removing a significant percentage of
15 particles, particularly pollen and allergens.” (See Pl.’s Renewed Opp., filed May 21, 2004, at
16 12:10-11.) In support of this argument, Sharper Image offers copies of studies and/or reports
17 authored by (1) Thomas A. E. Platts-Mills, M.D., Ph.D. (“Dr. Platts-Mills”), a professor with the
18 University of Virginia School of Medicine, (see Platts-Mills Decl., filed December 15, 2003,
19 ¶¶ 1, 5, Ex. B), (2) Jeannette Campbell (“Campbell”), Project Manager with Columbia
20 Analytical, Inc., a commercial environmental testing laboratory, (see Campbell Decl., filed
21 December 15, 2003, ¶¶ 1, 7, Exs B, C; Burke Decl., filed May 21, 2004, Exs. 17, 18), and
22 (3) Harriet A. Burge, Ph.D. (“Dr. Burge”), a professor at the Harvard School of Public Health
23 and a consultant for Sharper Image, (see Burge Decl., filed December 15, 2003, ¶¶ 1, 5, Ex.
24 B).³² Some of these studies and reports, or versions thereof, were provided by Sharper
25 Image and/or Dr. Burge to Consumers Union after Consumers Union published the February

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27 ³²Some of the studies and reports on which Sharper Image relies are titled by the
28 author(s) as “draft” and/or “preliminary” in nature. (See Platts-Mills Decl., filed December 15,
2003, ¶ 5; Campbell Decl., filed December 15, 2003, Exs. B, C; Burke Decl., filed December
15, 2003, Exs. 17, 18.)

1 2002 article and before Consumers Union published the October 2003 article. (See Asher
2 Decl., filed January 23, 2004, Exs. E, I; Burge Decl., filed December 15, 2003, ¶ 5.)

3 Sharper Image does not contend, and there is no evidence, that any of the studies and
4 reports on which it relies disclose the results of tests conducted under conditions similar to
5 those performed by Consumers Union. Rather, Sharper Image's evidence supports a finding
6 that there exist divergent views as to what factors or criteria should be considered in
7 determining whether a portable air cleaner is "effective." As noted, Consumers Union
8 disclosed in its articles the criteria on which it based its opinion as to effectiveness,
9 specifically, how quickly each tested device could remove dust and tobacco smoke from the
10 air. The experts on which Sharper Image relies have chosen to focus on other criteria, such
11 as "odor intensity." (See Campbell Decl., filed December 15, 2003, ¶¶ 13-15). Further, none
12 of the experts on which Sharper Image relies has, at least in the studies and reports provided
13 by Sharper Image, compared the IBQ to any other portable air cleaner. Thus, the fact that
14 some researchers are of the opinion that the IBQ is "effective" does not create a triable issue
15 of fact as to whether Consumers Union's statements as to the effectiveness of the IBQ, which
16 were based on the results of Consumers Union's CADR measurements, are false.

17 Sharper Image also argues that certain of Consumers Union's statements in the
18 October 2003 Consumer Reports, addressing the studies and reports Sharper Image
19 submitted to Consumers Union, were false. Consumers Union, in addressing those studies
20 and reports, stated:

21 We hired both Prof. Lippmann³³ and S. Katherine Hammond . . . to evaluate the
22 results of several studies that Sharper Image sent us to demonstrate the Ionic
23 Breeze's effectiveness. According to our two experts, some of those studies
24 were irrelevant to the question of whether the Ionic Breeze was an effective air
cleaner." For example, one Virginia study used the Ionic Breeze only as a
particle sampler, not an air cleaner. Other studies used questionable

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26 ³³"Prof. Lippmann" is a reference to Morton Lippmann, Ph.D., the Director of the
27 Human Exposure and Health Effects Program for the Nelson Institute of Environmental
28 Medicine, at the New York University School of Medicine. (See Lippmann Decl., filed January
23, 2004, ¶ 1.) Prof. Lippmann was retained by Consumers Union to "review and evaluate
test protocols employed by [Consumers Union] in evaluating household air cleaners." (See
id.)

1 methodology or showed merely that the Sharper Image had little air-cleaning
2 capability.

3 (See Heim Decl., filed January 23, 2004, Ex. B at 27.) Sharper Image alleges that the
4 statements “some of those studies were irrelevant to the question of whether the Ionic Breeze
5 was an effective air cleaner” and “[o]ther studies used questionable methodology or showed
6 merely that the Sharper Image had little air-cleaning capability” are false. (See AC ¶ 54.)
7 Sharper Image fails, however, to offer sufficient evidence to demonstrate that it has a
8 reasonable probability of proving either such statement is false.

9 Initially, the Court observes, as Consumers Union has pointed out, that neither of the
10 challenged statements is a statement of Consumers Union, but rather, as is disclosed in the
11 article, both are statements of Dr. Hammond and/or Prof. Lippmann. Sharper Image has
12 offered no evidence that these opinions were not actually conveyed to Consumers Union by
13 Dr. Hammond and/or Prof. Lippmann; Sharper Image thus appears to be asserting that the
14 statements of Dr. Hammond and/or Prof. Lippmann are false and that Consumers Union is
15 liable for republishing such allegedly false statements. Accordingly, the Court next turns to the
16 issue of whether Sharper Image has demonstrated a reasonable probability of establishing
17 that the statements of Dr. Hammond and/or Prof. Lippmann are false.

18 With respect to Consumers Union’s statement that Dr. Hammond and/or Prof.
19 Lippmann had concluded that “some” of the studies provided by Sharper Image were
20 “irrelevant to the question of whether the Ionic Breeze was an effective air cleaner,”
21 Consumers Union has offered evidence that, in fact, some of Sharper Image’s studies were
22 irrelevant to that specified question, and Sharper Image has not shown to the contrary. In the
23 October 2003 article, Consumers Union provided an example of an “irrelevant” study: “For
24 example one Virginia study used the Ionic Breeze only as a particle sampler, not an air
25 cleaner.” (See Heim Decl., filed January 23, 2004, Ex. B at 27.) As both Dr. Hammond and
26 Prof. Lippmann have stated, “measuring or sampling air to determine the quantity of a
27 pollutant in the air is irrelevant to the determination of whether a device is effective in cleaning,
28 or removing, the pollutant from the air.” (See Hammond Decl., filed January 23, 2004, ¶ 11;

1 Lippmann Decl., filed January 23, 2004, ¶ 11.) Although the October 2003 article only
2 included one such example, Consumers Union, in support of the instant motion, offers
3 evidence that two additional studies, authored by professors at the University of Virginia and
4 provided by Sharper Image to Consumers Union, used the IBQ only as a particle sampler, not
5 as an air cleaner. (See Hammond Decl., filed January 23, 2004, ¶ 11; Lippmann Decl., filed
6 January 23, 2004, ¶ 11.) Indeed, each such “Virginia study” itself states that the IBQ was
7 tested as a particle sampler. (See Asher Decl. Ex. I, fourth attachment at 407) (“In conclusion,
8 the results show that [the IBQ] can be used as a simple, quiet, and very sensitive technique for
9 monitoring airborne allergen”)³⁴; (see *id.* Ex. I, fifth attachment at 12) (“In conclusion the results
10 reported here show that the [IBQ] provides a new approach to monitoring airborne allergen.
11 The combination of silence, moderate airflow and ease of sampling makes it suitable for
12 monitoring airborne exposure in homes during normal domestic life.”)

13 With respect to Consumers Union’s statement that Dr. Hammond and/or Prof.
14 Lippmann concluded that “other” studies provided by Sharper Image “used questionable
15 methodology or showed merely that the Sharper Image had little air-cleaning capability,”
16 Consumers Union has offered evidence explaining the basis on which its experts formed such
17 opinions. Specifically, Dr. Hammond advised Consumers Union that, in her opinion, studies
18 conducted by Performance Analytical had “serious limitations,” including having the “cleaned
19 air [] blown at the particle monitors” and having “initial conditions var[ying] greatly from
20 experiment to experiment and between the two chambers [used in the studies].” (See Asher
21 Decl., filed January 23, 2004, Ex. K, third unnumbered page.) Additionally, both Dr.
22 Hammond and Prof. Lippmann have declared that “several” of the studies submitted by
23 Sharper Image to Consumers Union “provide data that are, in fact, consistent with
24 [Consumers Union’s] test results for submicrometer sized particles.” (See Hammond Decl.,
25 filed January 23, 2004, ¶ 11; Lippmann Decl., filed January 23, 2004, ¶ 11.) Sharper Image
26

27 ³⁴When Sharper Image forwarded this study to Consumers Union, Sharper Image
28 referred to it as a “paper [that] grew from Dr. Platts-Mills’s experiments using the [IBQ] as a
sampling device to monitor air quality in homes.” (See *id.* Ex. I, second unnumbered page.)

1 has offered no evidence that the studies conducted by Performance Analytical did not have
2 the limitations identified by Dr. Hammond or that some of the studies it submitted to
3 Consumers Union provided data consistent with Consumers Union's results for
4 submicrometer sized particles.

5 Accordingly, Sharper Image has not shown a reasonable probability of proving any of
6 Consumers Union's challenged statements are false based on the results of Sharper Image's
7 testing.³⁵

8 **5. Other Statements**

9 As noted, among the false statements Sharper Image alleges Consumers Union has
10 made are statements that the Friedrich and the IBQ "both use similar technology," (see AC
11 ¶ 51), and that the Friedrich earned "high marks" from Consumers Union, (see AC ¶ 53).

12 With respect to "both use similar technology," Sharper Image argues the statement is
13 false because the Friedrich, unlike the IBQ, uses a fan. (See Pl.'s Renewed Opp., filed May
14 21, 2004, at 8:14-15.) The February 2002 Consumer Reports article, in which the challenged
15 statement was made, states that Consumers Union had tested two air cleaners that "use an
16 electronic precipitator," the Friedrich and the IBQ. (See Heim Decl., filed January 23, 2004,
17 Ex. A at 46.) Moreover, the article disclosed that the Friedrich uses a fan, while the IBQ does
18 not. (See id.) Thus, contrary to Sharper Image's assertion, the only reasonable understanding
19 of "similar technology," in context, is as a reference to the fact that both the Friedrich and the
20 IBQ use an electronic precipitator, not that both the Friedrich and the IBQ have, or do not have,
21 a fan. See Monterey Plaza Hotel, 69 Cal. App. 4th at 1064 (holding court, in determining
22 falsity, must consider "full context" of statement).

23 With respect to the statement that the Friedrich received "high marks" from Consumers
24
25

26 ³⁵Consumers Union objects to, and has moved to exclude, certain of the studies
27 Sharper Image has offered, as well as certain statements describing the studies, on the
28 ground they are inadmissible under Rule 702 of the Federal Rules of Evidence. In light of the
Court's ruling that such evidence is insufficient to support a finding that Consumers Union's
statements were false, the Court has not ruled on Consumers Union's objections.

1 Union,³⁶ Sharper Image has failed to set forth any theory as to how it can establish the
2 statement is false; consequently, for this reason alone, Sharper Image is not entitled to
3 proceed on claims based on such statement. See Metabolife Int'l, 264 F. 3d at 840 (holding
4 plaintiff has burden to demonstrate its claims are “supported by a prima facie showing of facts
5 to sustain a favorable judgment if the evidence submitted by the plaintiff is credited”). In any
6 event, both of the subject Consumer Reports articles disclose the results of the testing
7 conducted by Consumers Union, which results demonstrate the Friedrich’s ability to quickly
8 remove particles from the air. As noted, Sharper Image has not shown that the test protocol
9 used by Consumers Union was scientifically, or otherwise, invalid, nor does Sharper Image
10 suggest Consumers Union did not actually obtain the results it reported as to the Friedrich.

11 **C. Actual Malice**

12 Because Sharper Image has not demonstrated a reasonable probability that any of the
13 challenged statements were false, the Court does not reach the issue of whether Sharper
14 Image can establish that any false statement was made with actual malice.

15 **CONCLUSION**

16 For the reasons expressed above, Consumers Union’s motion to strike Sharper
17 Image’s Amended Complaint is hereby GRANTED.

18 This order closes Docket Nos. 54, 83, and 208.

19
20 **IT IS SO ORDERED.**

21
22 Dated: November 9, 2004

23 /s/ Maxine M. Chesney
24 MAXINE M. CHESNEY
25 United States District Judge

26 _____
27 ³⁶Neither of the two subject articles uses the phrase “high marks.” The February 2002
28 article refers to the Friedrich as “high-scoring” and “a top choice.” (See Heim Decl., filed
January 23, 2004, Ex. A.) The October 2003 article refers to the Friedrich as “high-scoring,”
as having “very high rates of air-cleaning,” and as being “among the best at removing dust and
smoke.” (See id. Ex. B.) The “high marks” statement, as alleged in the AC, is a republication
on a television station website: “Consumer Reports Shows Which Portable Cleaners Are Best
At Clearing the Air - *Friedrich Cleaner Earns High Marks.*” (See AC ¶ 54 (emphasis in AC).)