

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

<i>UNICOMP, INC., et al.,</i>)	
)	
<i>Plaintiffs</i>)	
)	
)	
v.)	<i>Civil No. 97-55-P-H</i>
)	
<i>ELEMENTIS PIGMENTS, INC.,</i>)	
)	
<i>Defendant</i>)	

**MEMORANDUM DECISION ON DEFENDANT’S MOTION TO STRIKE
AND RECOMMENDED DECISION ON
DEFENDANT’S MOTIONS FOR SUMMARY JUDGMENT**

Invoking the court’s diversity jurisdiction, Unicom, Inc. (“Unicom”) and Unico, Inc. (“Unico”) bring claims against Elementis Pigments, Inc.¹ (“Elementis”) for breach of express and implied warranty and negligence in connection with their purchase of an allegedly defective burnt umber pigment for use in making rubber compound, shoe soles and other rubber products.²

¹Elementis formerly was called Harcros Pigments, Inc. Affidavit of Dennis M. Valentino (“Valentino Aff.”), attached as Exh. A to Elementis’s Statement of Material Facts (“Elementis’s SMF”) (Docket No. 54), ¶ 4.

²The parties stipulated to the dismissal with prejudice, in all of its capacities, of defendant Walsh & Associates, Inc. (“Walsh”). Stipulation of Dismissal (Docket No. 83). Walsh’s counterclaim against Elementis also has been dismissed. Endorsement to Stipulation (Docket No. 57).

Complaint (Docket No. 1). Intervenor plaintiff Dexter Shoe Company (“Dexter”) sues Elementis and cross-claims against Unicom for breach of express and implied warranty and negligence as the result of “the total loss in value of tens of thousands of shoes” bearing defective soles manufactured from Unicom rubber compound.³ Complaint, Cross-Claim and Demand for Jury Trial (Docket No. 41).

Elementis now moves for summary judgment against Unicom, Unico and Dexter on all claims, and for partial summary judgment against all three on damages.⁴ Defendant Elementis Pigments, Inc.’s Memorandum of Law and Motion for Summary Judgment Against Unicom, Inc. (“Elementis’s Unicom Motion”) (Docket No. 52); Defendant Elementis Pigments, Inc.’s Memorandum of Law and Motion for Summary Judgment Against Unico, Inc. and Dexter Shoe Company (“Elementis’s Unico/Dexter Motion”) (Docket No. 53). Elementis moves, in addition, to strike the expert witness designation and preclude the testimony of Robert DeLuca, Ph.D. Defendant Elementis Pigments, Inc.’s Motion to Strike Expert Witness Designation and Preclude Testimony of Dr. Robert DeLuca (“Elementis’s Motion to Strike”) (Docket No. 84). For the reasons that follow, I grant in part and deny in part Elementis’s Motion to Strike and recommend that its Unico/Dexter Motion be granted as to all claims and that its Unicom Motion be granted in part and denied in part.

³A motion by Dexter to amend its complaint to add a cross-claim against Unico is pending. Dexter Shoe Company’s Motion to Amend Cross-Claim to Join Unico, Inc. as a Party Defendant to Dexter’s Cross-Claim (Docket No. 58).

⁴I understand Elementis’s claim of entitlement to partial summary judgment against Unicom, Unico and Dexter on damages to be pled in the alternative; that is, if the court should deny its motion for summary judgment against any of the three on all claims.

I. Summary Judgment Standards

Summary judgment is appropriate only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997).

II. Motion to Exclude Testimony

As a preliminary matter I turn my attention to Elementis’s Motion to Strike, which impacts the scope of the summary-judgment record.⁵ Pursuant to Fed. R. Civ. P. 37(c)(1), “[a] party that without substantial justification fails to disclose information required by Rule 26(a) . . . shall not, unless such failure is harmless, be permitted to use as evidence at a trial . . . or on a motion any witness or information not so disclosed.” Fed. R. Civ. P. 26(a)(2)(C), in turn, requires that

⁵Elementis first requested that the DeLuca testimony be stricken in response to Dexter and Unico’s opposition to its summary-judgment motions. Defendant Elementis Pigments, Inc.’s Reply Memorandum in Support of Its Motion for Summary Judgment Against Plaintiffs Unico, Inc. and Dexter Shoe Company (“Elementis’s Unico/Dexter Reply”) (Docket No. 76) at 6-7.

disclosures of expert testimony “be made at the times and in the sequence directed by the court,” setting forth a default schedule should the court omit to prescribe such times and sequences.⁶ Elementis seeks an order striking the designation of Robert DeLuca, Ph.D., a previously undisclosed witness offering an opinion in a field of science new to this case, on grounds that his testimony is both untimely and prejudicial. Elementis’s Motion to Strike at 1. Dr. DeLuca, a specialist in physical metallurgy, would testify that a change in Elementis’s burnt-umber milling process increased the number of small particles in its burnt-umber pigment, BU 5250-F (the “Pigment”), that this could have precipitated the undesirable reactions of which the plaintiffs complain, and that Elementis should have tested the Pigment following the change. *See generally* Affidavit of Robert D. DeLuca, attached as Exh. B to Dexter Shoe Company’s Statement of Material Facts, etc. (“Dexter’s SMF”) (Docket No. 71).

A. Context

On April 10, 1998 the plaintiffs proposed a scheduling order in this case pursuant to which they were to designate their expert witnesses by May 19, 1998. Joint Proposed Second Amended Scheduling Order of Plaintiffs, attached as Exh. A to Elementis’s Motion to Strike. Elementis pressed for additional time, suggesting a schedule under which, *inter alia*, Unico/Unicom would have had until July 31, 1998 and Dexter August 31, 1998 to designate experts. Letter from Peter J. Rubin dated April 10, 1998 and accompanying proposed order, attached as Exh. B to Elementis’s Motion to Strike. The plaintiffs prevailed, and the tighter schedule was adopted. Report of

⁶Inasmuch as, in the District of Maine, the issuance of a controlling scheduling order is contemplated in each case, recourse to the default rule pertaining to expert disclosures would not be necessary. *See* Local Rule 26(d) (“parties are not obligated to make disclosures in the manner and sequence prescribed by Fed. R. Civ. P. 26(a)(1-4). Disclosures shall be made as required by these Local Rules and by the scheduling order and final pretrial order issued by the court in each case.”)

Scheduling Conference and Revised Scheduling Order [Standard Track] (“Scheduling Order”), attached as Exh. C to Elementis’s Motion to Strike.

On April 27, 1998, in response to an interrogatory propounded by Unicom asking it to “describe the process you use to produce BU 5250,” Elementis stated:

Objection. Elementis objects to Interrogatory No. 5 on grounds that the word “process” is vague and ambiguous.

Subject to, and without waiver of the foregoing general and specific objections, Elementis answers as follows:

The procedures used to produce BU 5250-F during the relevant period were as follows:

The color of the umber crudes was instrumentally-analyzed and a blend ratio was determined.

The correct weight of each constituent ingredient was fed into the feed hopper.

The material was rough-sized.

The material was transported in the elevator.

The material was mixed in the mixer.

The material was steam-jet milled to a fine consistency.

The steam was separated from the material in the cyclone separator.

The material was cooled in a tumbling cooler and temporarily stored in the packer bin.

The product was dispensed into 50 pound bags, stacked on pallets, and stored in the warehouse for shipment.

Responses of Defendant Elementis Pigments, Inc. to the First Set of Interrogatories of Plaintiff Unicom, Inc., Attach. 1 to Dexter Shoe Company’s Objection to Defendant Elementis’ Motion to

Strike, etc. (“Dexter’s Strike Opposition”) (Docket No. 85), at No. 5.

Elementis then stated, in response to a question whether “the process you use to produce BU 5250 changed in any way over the course of the relevant period”:

Objection. Elementis objects to Interrogatory No. 7 on grounds that the word “process” is vague and ambiguous.

Subject to, and without waiver of the foregoing general and specific objections, Elementis answers as follows:

During the relevant period, Elementis did not change the procedures as identified in response to Interrogatory No. 5, above.

Id. at No. 7.

Two weeks prior to giving the above answers, Elementis employees met with counsel and two retained experts, Charles E. Hoover, Jr. and G. Fred Willard, Ph.D., and discussed, *inter alia*, a change made in the steam-recovery system used in processing the Pigment. Deposition of Charles E. Hoover, Jr. (“Hoover Dep.”) at 74-75, 82-84; Deposition of G. Fred Willard, Ph.D. (“Willard Dep.”) at 374-76; Defendant Elementis Pigments, Inc.’s Reply in Support of Its Motion to Strike, etc. (“Elementis’s Strike Reply”) (Docket No. 86) at 3 n.6. The change, which entailed moving from a cooling to a dust-collection system, was significant enough that Hoover and Willard considered testing samples of the Pigment from the dust-collection system. Hoover Dep. at 83, 200-02; Willard Dep. at 482-83. At his deposition in September 1998 Willard deciphered handwritten notes from the April meeting including, “[c]urrent particle size and sample from collector,” explaining that he considered testing such a sample because of “the process change.”⁷ Willard Dep. at 482-83.

⁷At another point during his deposition, however, when asked whether “it [would] be fair to say that your recollection of your discussion with [Elementis personnel] on this subject is that [Elementis] made a change in the equipment to comply with EPA standards, and that, in their view, (continued...) ”

On April 27, 1998 Elementis also stated that it had no documents responsive to Unicom's request for "any and all documents related to your procedures for processing BU 5250 during the relevant period." Responses of Defendant Elementis Pigments, Inc. to the First Request for Production of Documents of Plaintiff Unicom, Inc., Attach. 5 to Dexter's Strike Opposition, at No. 2. On May 7, 1998 Unicom questioned the completeness of this response, whereupon Elementis agreed to initiate an additional search for documents. Letter from Peter W. Culley to Robert A. Prentice dated May 7, 1998, Attach. 6 to Dexter's Strike Opposition; Letter from Robert A. Prentice to Peter W. Culley dated May 12, 1998, Attach. 7 to Dexter's Strike Opposition. On May 21, 1998 Elementis mailed a box containing more than 400 pages of documents to Unicom, within which were four pages referring to a modification of the plant's milling system. Letter from H. Bruce Hanson to Peter W. Culley dated May 21, 1998, with Bates-stamped documents E1502-05, Attach. 8 to Dexter's Strike Opposition. Elementis thereafter took the position that it had produced all documents relevant to Unicom's first document request. Letter from Geraldine G. Sanchez to H. Bruce Hanson dated June 9, 1998, Attach. 9 to Dexter's Strike Opposition.

On May 21, 1998 Dexter designated Stephen McCarthy, Ph.D., a professor in the Department of Plastics Engineering at the University of Massachusetts, as its only liability expert.⁸ Plaintiff Dexter Shoe Company's Designation of Experts, attached as Exh. R to Elementis's SMF. Dexter served its first discovery request on June 5, 1998. Notices of deposition, attached as Exh. D to

⁷(...continued)

this did not change anything about the production process," Willard responded, "[t]hat's a fair statement, yes." Willard Dep. at 376-77.

⁸When deposed on August 5, 1998 McCarthy acknowledged that he received a sample of the Pigment that was sent to him on May 8, 1998 but was not asked to and did not test the sample. Deposition of Stephen McCarthy, Ph.D. at 88-91.

Elementis's Motion to Strike. At that time, in addition to requesting "any and all documents related to your procedures for processing burnt umber pigment during the period 1991-present," Dexter asked that Elementis be prepared to testify, and that it produce any documents, regarding the "manufacturing process, procedures, ingredients, mixing, machinery, and finishing used in the manufacture of burnt umber pigment for the period 1991-96." Notice of Deposition Pursuant to F.R.Civ.P. 30(b)(6), attached as Exh. D to Elementis's Motion to Strike, at 2 & Exh. A thereto at 1.

On July 6, 1998 Elementis listed, in response to Dexter's Rule 30 request for "any and all documents related to your procedures for processing burnt umber pigment during the period 1991-present," a process monograph (E1461-71), DER documents (E1310-1460 & E1472-73) and plant schedules (E1474-1853). Responses of Defendant Elementis Pigments, Inc. to Plaintiff Dexter Shoe Company's Rule 30 Requests for Production of Documents ("Rule 30 Response"), Attach. 12 to Dexter's Strike Opposition, at No. 2.⁹

On July 17, 1998 I held a discovery hearing in which I ordered Elementis to produce certain requested information (apart from that at issue here) by August 7, 1998.¹⁰ Transcript of Hearing on Discovery Dispute Before United States Magistrate Judge David M. Cohen (Docket No. 49) at 88, 91. In response to concerns from Elementis's counsel, I stated: "The extent to which, after the

⁹The certificate of service accompanying the Rule 30 Response states that it was mailed on June 6, 1998. However, the date of July 6, set forth as the date on which the document was signed, is more likely accurate in view of the fact that Dexter had served its request on June 5.

¹⁰Dexter contends that certain additional detailed information concerning the new dust-collection system, contained in Bates-stamped documents E5610-88, was not produced until August 10, 1998 in response to my July 17, 1998 order (even though the order did not encompass that particular information). Dexter's Strike Opposition at 5. Although Dexter appends the documents in question to its opposition, *see* Attach. 12 to Dexter's Strike Opposition, it adduces no evidence as to the timing of the documents' production.

deadline date for designating witnesses and providing this required information, Dexter furnishes you with supplemental designations or information relating to their designations, that reflect activities that you can establish could just as well have taken place before the designations were due, then I don't have to tell you that you have an argument available to you." *Id.* at 19-20. At the hearing Elementis sought and received an extension to August 28, 1998 of its deadline to designate experts. *Id.* at 90. The discovery deadline was extended to October 8, 1998. *Id.*

As a result of the parties' discovery dispute several depositions (including that of Raymond Mahaney) were postponed from mid-July to late August/early September. Letter from Robert A. Prentice to Peter W. Culley *et al.* dated June 25, 1998; Letter from Charles Harvey to Robert A. Prentice dated July 10, 1998; Letter from H. Bruce Hanson to Charles Harvey dated August 18, 1998, Attach. 10 to Dexter's Strike Opposition. On August 31, 1998 the plaintiffs deposed Mahaney, who was designated pursuant to Fed. R. Civ. P. 30(b)(6) as Elementis's spokesman on the manufacturing process and machinery used in the processing of burnt umber. Deposition of Raymond L. Mahaney ("Mahaney Dep.") at 11-12. Mahaney explained that the change to the dust-collection system entailed alteration in the mechanism through which burnt umber was pulled through the jet mill. *Id.* at 104. Mahaney testified that he did not know the impact of the machinery change on the measurements of pressure in the jet mill, stating that Thomas Kemler, the project engineer, would have such knowledge. *Id.* at 107-09.

Following the Mahaney deposition, Dexter immediately searched for an expert who could interpret the significance of the manufacturing process changes on the reactivity of the Pigment and on the jet-milling process. Dexter's Strike Opposition at 6. Dexter also scheduled the deposition of Kemler for October 6-7, 1998. *Id.*

On October 14, 1998, the day before Elementis's summary-judgment motions were due, Dexter designated DeLuca as an expert witness, attributing the delay to unspecified discovery violations by Elementis. Plaintiff Dexter Shoe Company's Designation of Experts, attached as Exh. F to Elementis's Motion to Strike; Letter from Susan L. Hall dated July 20, 1998, Attach. 11 to Dexter's Strike Opposition. Elementis objected. Letter from Robert A. Prentice to Robert S. Frank dated October 20, 1998, attached as Exh. G to Elementis's Motion to Strike. Elementis deposed DeLuca on October 28, 1998. Deposition of Robert D. DeLuca, Ph.D., at 1.

B. Analysis

Pursuant to Fed. R. Civ. P. 26(a)(2)(C), disclosure of expert testimony "shall be made at the times and in the sequence directed by the court." A party may not use expert testimony proffered in violation of this rule in support of a motion or at trial without "substantial justification." Fed. R. Civ. P. 37(c)(1). The First Circuit in *United States v. Roberts*, 978 F.2d 17 (1st Cir. 1992), enumerates several factors pertinent to consideration of whether "substantial justification" has been shown.¹¹

1. *The Nature of the Case.* This is a civil products liability case. *Roberts*, a drug-trafficking case, was "a criminal case involving serious accusations." *Id.* at 22. The *Roberts* court noted "a strong public interest in adjudicating felony cases on the merits." *Id.* While the public has less of an interest in the adjudication of private civil disputes on the merits, its interest in doing so is nevertheless substantial.

2. *Degree of Tardiness.* The court adopted a scheduling order pursuant to which — at

¹¹*Roberts*, of course, arose in much different circumstances. I find it useful, however, to take the kind of "panoramic view" employed by the *Roberts* court in evaluating the "substantial justification" issue before the court here.

Dexter's behest — its deadline for designating expert witnesses was May 19, 1998. Dexter did not designate DeLuca until October 14, 1998, nearly five months after the deadline and only one day before Elementis's motions for summary judgment were due. Dexter never sought leave of the court to extend its deadline for designating expert witnesses, even though Elementis, at the July 14 discovery hearing, sought and received such an extension. The degree of tardiness hence is significant.

3. *Reasons for Tardiness.* Dexter seeks to excuse its tardiness in offering the DeLuca testimony primarily on the basis that during discovery Elementis failed to disclose the existence of a significant change in its burnt-umber jet-milling process. Dexter's Strike Opposition at 2-7. This explanation has merit. When Unicom initially queried whether "the process you use to produce BU 5250 changed in any way over the course of the relevant period," Elementis should fairly have understood the question, in this manufacturing context, to encompass any change to the machinery used to mill the Pigment — not simply to the steps entailed in its production.¹² Elementis next inaccurately stated that it possessed no documents relevant to the burnt-umber processing procedures during the relevant period. Unicom immediately challenged this response, whereupon Elementis initiated a new search; however, no further documents were forthcoming until May 21. Even then, Elementis provided only four pages, enclosed with several hundred others, alluding to a manufacturing change. Inasmuch as appears, Elementis did not provide further documents containing any meaningful detail about the change until July 6 and possibly as late as August 10.

¹²Elementis points out that its answer is on its face accurate, that it qualified its response, noting that the word "process" was vague, and that none of the plaintiffs challenged its response, as they had a right to do. Elementis's Strike Reply at 2-3. The plaintiffs should not have had to work that hard to obtain information that should fairly have been provided in response to the initial question.

Dexter thus was deprived of critical information prior to its deadline for designating experts and for some weeks thereafter.¹³

On the other side of the equation, Dexter should have understood, at least as of the time of its receipt of the July 6 discovery materials, that an issue had been generated in this case regarding the possible significance of a machinery change.¹⁴ Dexter need not have waited to seek a process-engineering expert until Raymond Mahaney described in detail, at his delayed August 31 deposition, the newer method by which the burnt umber was milled. And Dexter certainly should not have waited until October 14, which it knew was the eve of Elementis's deadline to file what were sure to be complicated summary-judgment motions in this very complicated case, to spring the designation of its new expert upon Elementis and the court.

4. *Character of the Omission.* I cannot say, on the evidence presented here, that Dexter acted willfully or with any lack of good faith in failing to designate its new expert in a timely manner. This factor thus is negligible.

5. *Prejudice.* Elementis asserts that allowance of the DeLuca testimony would be prejudicial in that, in reliance on the plaintiffs' previous expert designations, Elementis did not obtain a process-engineering expert, rendering it unable to meet the force of the DeLuca testimony in a battle-of-the-experts arena or to cross-examine Dr. DeLuca effectively. Elementis's Strike Motion at 7. Dexter counters that Elementis fails to demonstrate that either claimed difficulty would

¹³Elementis points out that Dexter itself filed no discovery requests prior to June 5, 1998, after its deadline for designating experts had passed. Elementis's Strike Motion at 5 n.2. Dexter, however, was entitled to rely on sworn discovery elicited by other parties to the case.

¹⁴This is particularly so in view of the fact that the plaintiffs' experts suspected that something in the manufacturing process had changed. *See* Dexter's Strike Opposition at 4.

come to pass. Dexter's Strike Opposition at 7. Dexter further argues that any unfair prejudice should be addressed directly, rather than by excluding new expert witness testimony. *Id.*

Elementis clearly would be prejudiced by the allowance of the DeLuca testimony in the context of the instant summary-judgment motions. Elementis was not informed of the designation until October 14, one day before its motions were due. Although Elementis promptly scheduled DeLuca's deposition for October 28, it was deprived of adequate opportunity to digest and respond to the DeLuca testimony for purposes of its summary-judgment motions.

As regards trial, however, Dexter's position is far more compelling. Inasmuch as no trial date has been set in this case, there still is time to remedy any otherwise resultant prejudice to Elementis through a limited reopening of discovery that affords Elementis a chance to obtain its own process-engineering expert, whom the plaintiffs would have the opportunity to depose.

6. *Institutional Interests.* "The court, too, has a significant interest in the punctilious observation and strict enforcement of its procedural rules, including temporal requirements." *Roberts*, 978 F.2d at 23. A scheduling order "is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril." *Gestetner Corp. v. Case Equip. Co.*, 108 F.R.D. 138, 141 (D. Me. 1985). Rule 26(a)(2)'s disclosure requirements ensure that "opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses." Fed. R. Civ. P. 26(a)(2) advisory committee's note (1993 amendment). By significantly transgressing the May 19, 1998 deadline, Dexter impaired Elementis's ability to prepare its summary-judgment motions and respond to the plaintiffs' opposition thereto. Measures can, however, be taken to mitigate the impact of Dexter's default and achieve the goals of Rule 26 in the context of trial.

7. *Utility of the Proposed Testimony.* In this case, permitting DeLuca’s testimony on the cause of the defect in Unicom’s rubber compounds would certainly be more than “an empty exercise,” *Roberts*, 978 F.2d at 22, although, for reasons discussed below I find that its exclusion does not alter the outcome of the instant summary-judgment motions. Even were it outcome-determinative, however, if the importance of the proposed testimony could outweigh all other factors, excluding testimony would never be an option where a party failed to make Rule 26(a)(2) disclosures on a critical issue. Such a reading would nullify the “substantial justification” requirement of Rule 37(c)(1).

Based primarily on the extremity of Dexter’s tardiness and the resultant irretrievable prejudice to Elementis in the context of its summary-judgment motions, I shall exclude DeLuca’s testimony for purposes of those motions. However, in view of the underlying justification for Dexter’s tardiness, the public interest in adjudicating cases on the merits and the court’s ability to mitigate any resultant prejudice to Elementis, I shall allow DeLuca’s designation and testimony for purposes of trial.¹⁵

III. Factual Context for Summary-Judgment Motions

A. Background

In view of the foregoing, the following undisputed facts form the background of this case.

Unico, a Maine corporation with a place of business in Sanford, Maine, manufactured rubber compounds for sale to others and for its own use in molding shoe soles and other rubber products. Deposition of Irving Quimby (“Quimby Dep.”) at 15, 166; Asset Purchase Agreement

¹⁵The clerk’s office, following release of this opinion, shall arrange for a telephone conference with counsel to discuss the scheduling of limited discovery along the lines contemplated herein.

(“Unico/Unicomp Buyout Agreement”), attached as Exh. B to Elementis’s SMF, at U 12552. In approximately 1982 Unico (or its predecessor) began buying the Pigment from Walsh, a distributor, for use in rubber compounds.¹⁶ Answers to Defendant Elementis Pigments, Inc.’s First Set of Interrogatories to Plaintiff Unicomp, Inc. (“First Unicomp Interrog.”), attached as Exh. E to Elementis’s SMF, at 20; 30(b)(6) Deposition of Unicomp and Unico through their designee Peter J. Goguen (“Goguen Dep.”) at 315.

In 1993 the division of Unico that manufactured rubber compounds was incorporated as a separate Maine corporation, Unicomp, with compounding operations in Sanford, Maine.¹⁷ Quimby Dep. at 32-33; State of Maine Articles of Incorporation, attached as Exh. C to Elementis’s SMF. Unicomp, which had no predecessor corporation, commenced operations in January 1994.¹⁸ Quimby Dep. at 33; Answers to Defendant Elementis Pigments, Inc.’s Second Set of Interrogatories to Plaintiff Unicomp, Inc. (“Second Unicomp Interrog.”), attached as Exh. D to Elementis’s SMF, at 8. Unicomp continued to purchase the Pigment from Walsh for use in certain rubber compounds. Goguen Dep. at 315-16. Walsh made all shipments to Unicomp F.O.B. St. Louis, and Unicomp took title to the material at Walsh’s place of business in that city. Walsh Aff. ¶ 10.

All of the Pigment sold to Unicomp by Walsh was manufactured in 1994 and 1995 by

¹⁶Walsh is a Missouri corporation with a place of business in St. Louis. Affidavit of Timothy T. Walsh (“Walsh Aff.”) (Docket No. 14) ¶¶ 1, 3-4. The “F” in BU 5250-F refers to the pigment’s fine particle size. Hoover Dep. at 153.

¹⁷Eighty percent of the outstanding shares of both Unico and Unicomp are owned by Irving Quimby or his children. Quimby Dep. at 162-63, 165-66. Quimby lives in Massachusetts. Deposition of Robert Morin (“Morin Dep.”) at 126.

¹⁸On or about January 11, 1996 both Unico and Unicomp sold their machinery and certain other assets to CSPX/Unico, Inc., a Massachusetts corporation. Unico/Unicomp Buyout Agreement at U 12552-54.

Elementis, an Illinois corporation with a principal place of business in Fairview Heights, Illinois. Affidavit of John Hockman, attached as Exh. PP to Defendant Elementis Pigments, Inc.’s Supplemental Statement of Material Facts (“Elementis’s Supplemental SMF”) (Docket No. 78), ¶ 7; Complaint ¶ 4; Answer to Complaint and Affirmative Defenses of Defendant Elementis Pigments, Inc. (formerly Harcros Pigments, Inc.) (Docket No. 34) ¶ 4. Elementis in 1990 had purchased the natural-iron-oxide pigments business of Pfizer, Inc. (“Pfizer”). Valentino Aff. ¶¶ 5, 8; Asset Purchase Agreement, etc. (“Pfizer Buyout”), attached as Exh. H to Elementis’s SMF, at E10527. As part of that transaction, Pfizer assigned Elementis its distributorship agreement with Walsh, dated July 1, 1977. Pfizer Buyout at E10528 (listing “contracts and contract rights” among assets); Walsh-Pfizer agreement (“Walsh-Pfizer Agreement”), attached as Exh. OO to Elementis’s Supplemental SMF. Paragraph 2(c)(III) of the distributorship agreement provides, *inter alia*, that “PFIZER’S liability for damages shall in no event exceed the purchase price of the particular delivery with respect to which such damages are claimed.” Walsh-Pfizer Agreement at E0220.

Unicomp used the Pigment in more than thirty different color packages and in approximately ten base formulations. Goguen Dep. at 403-04, 420. A color package, such as “8030,” would be blended with a base formulation, such as “FM,” to produce a rubber compound. *Id.* at 407-08. Unicomp then sold the rubber compounds to customers including Unico and Dexter, a Maine corporation with its principal place of business in Dexter, Maine.¹⁹ First Unicomp Interrog. at 20;

¹⁹Dexter is a wholly owned subsidiary of Berkshire Hathaway Inc., a Delaware corporation. Affidavit of John B. Emory (“Emory Aff.”), attached as Exh. D to Dexter’s SMF, ¶ 2; Agreement and Plan of Merger, etc., (“Dexter-Berkshire Agreement”), attached as Exh. F to Elementis’s SMF, at D 4239.

Emory Aff. ¶ 2. Unico and Dexter molded the rubber compound into shoe soles.²⁰ First Unicom Interrog. at 20. Unico in turn sold shoe soles to customers including Tonka.²¹ *Id.*

Among the rubber compounds into which Unicom blended the Pigment were two known as U201-8030 and TM-8030, the former having been developed specifically for sale to Dexter. Goguen Dep. at 224-25, 339; First Unicom Interrog. at 11-14. In early December 1994 Tonka Footwear complained to Unico about cracking and leakage of oil in shoe soles molded from TM-8030. Deposition of Michael Bigelow at 85-86. On or about May 30, 1995 Tonka Footwear instructed Unico to stop molding soles from TM-8030. Memorandum from Mike S. Bigelow to Steve McBride and Bob Morin dated May 30, 1995, attached as Exh. EE to Elementis's SMF; Morin Dep. at 63-64. Neither Unico nor Unicom previously had received a stop-work order from a customer. Morin Dep. at 67.

In the summer of 1995 Dexter began using the TM-8030 compound instead of U201-8030. *Id.* at 74-75. Unicom neither disclosed to Dexter that Tonka Footwear was having problems with the TM-8030 compound nor suggested that Dexter test shoe soles molded from TM-8030 before beginning production. *Id.* at 76. In or about August 1995 Unicom contacted Mark Loudenslager of Elementis. Goguen Dep. at 63. By letter dated August 23, 1995 Loudenslager informed Unicom that manganese dioxide and manganese oxide, typically found in burnt umber, "are reactive materials in a number of different polymeric systems." Letter from Mark D. Loudenslager to Peter Goguen dated August 23, 1995 ("Loudenslager Letter"), attached as Exh. T to Elementis's SMF, at E0117-

²⁰Dexter molded shoe soles in Maine; Unico in Maine and New Hampshire. Morin Dep. at 93; Quimby Dep. at 15, 17; Goguen Dep. at 467.

²¹In discovery materials, Tonka is referred to interchangeably as "Tonka," "Tonka Footwear" and "Minnetonka."

18. Loudenslager, who was Elementis's technical service manager, further noted: "I believe the combination of these reactive materials and exposure to the required environmental conditions led to the surface cracking and degradation problems seen in your product." *Id.* at E0118. Loudenslager recommended that Unicom cease using the Pigment in rubber compounds. *Id.* Unicom stopped using the Pigment in its 8030 compounds in October 1995. Goguen Dep. at 427.

In November 1995 Dexter notified Unicom that it had discovered that a number of shoe soles molded from TM-8030 were cracking and that oil was migrating to the surface. Morin Dep. at 89-91; Memorandum from Leo H. Famolare dated November 6, 1995, attached as Exh. GG to Elementis's SMF. At a meeting that month Unicom did not advise Dexter to stop using shoe soles molded from the compound. Morin Dep. at 94-95.

Dexter had used TM-8030 and U201-8030 to mold "Eve"-style shoe soles in a color known as "raw sugar" or "nicotine." 30(b)(6) Deposition of Dexter through its designee Timothy S. Hagelin ("Hagelin Dep.") at 32-33, 96; Second Unicom Interrog. at 3-5. Dexter then shipped the shoe soles to its affiliate, Pan Am Shoe Company ("Pan Am"), a Delaware corporation with a place of business in Puerto Rico, for assembly into shoes. 30(b)(6) Deposition of Dexter through its designee Laurier G. Lauze ("Lauze Dep.") at 10-12; Dexter-Berkshire Agreement at D4245. Pan Am sold the finished shoes primarily to Dexter. Lauze Dep. at 83-85.

From June 1994 through February 1996 Dexter produced 585,021 pairs of women's handsewn shoes with Eve-style nicotine soles. Affidavit of Laurier Lauze ("Lauze Aff."), attached as Exh. E to Dexter's SMF, ¶¶ 5-6. In late October 1995 Dexter began receiving customer complaints regarding, and returns of, shoes with Eve-style nicotine soles that were embrittled and/or exuding oil. Affidavit of Robert Cooley ("Cooley Aff."), attached as Exh. A to Dexter's SMF, ¶ 2;

Deposition of Leo Famolare, attached as Exh. H to Dexter's SMF, at 27, 110. By July 24, 1998 Dexter had received returns of 59,747 pairs of shoes with Eve-style nicotine soles and had issued credits to customers for those shoes in the amount of \$1,584,359.²² Lauze Aff. ¶ 7. Dexter also removed from inventory 11,051 pairs of shoes with Eve-style nicotine soles, with an average total wholesale value of \$307,659, because of oiling and cracking problems. *Id.* ¶ 8. Most of the shoes made with Eve-style nicotine soles in which the soles were found to be embrittled and/or exuding oil have been sent to Unico/Unicomp for inspection and destruction. *Id.* ¶ 9. Dexter attempted to salvage materials from the shoe but was unable to do so. Morin Dep. at 175-76. Dexter has received four damage claims from customers, including two claims for personal injury, allegedly suffered as a result of Eve-style nicotine soles that were embrittled and/or exuding oil.²³ Emory Aff. ¶ 6.

Dexter discontinued some styles from what had been a popular line of shoes because of adverse customer experience with the shoes with soles that were embrittled and/or exuding oil. Affidavit of Daniel A. Miller, attached as Exh. F to Dexter's SMF, ¶ 3. Dexter expects to lose sales in the future as a direct result of the oiling and cracking problems with nicotine-colored Eve soles.²⁴

²²Returns were processed in Maine. Cooley Aff. ¶¶ 1, 3.

²³Elementis points out that Dexter has asserted claims for more than \$2.1 million for alleged actual returns and other expenses and has stated that it would incur more than \$8 million in actual damages if only 75 percent of the "defective period shoes" are returned. Plaintiff Dexter Shoe Company's Designation of Experts, attached as Exh. KK to Elementis's SMF, at 3; Plaintiff Dexter Shoe Company's Supplemental Designation of Experts, attached as Exh. LL to Elementis's SMF, at 2. In the opinion of Elementis's economic expert, Mary A. Woodford, Dexter's damages due to pairs of shoes returned because of sole degradation are no greater than \$1,059,066 prior to mitigation. Defendant Elementis Pigment [sic], Inc.'s Expert Designation of Mary A. Woodford ("Woodford Designation"), attached as Exh. NN to Elementis's SMF, ¶ 8.

²⁴Dexter, Elementis notes, asserts claims for more than \$2.9 million in future lost profits. Letter from Harold M. Goldstein, Ph.D., to Charles Harvey, Esq., dated May 17, 1998, attached as (continued...)

Deposition of Harold M. Goldstein at 54-55.

Prior to 1994 Unico and Unicom used the Pigment in various compounds with no indication of resultant degradation. Affidavit of Peter Goguen (“Goguen Aff.”), attached as Exh. A to Statement of Material Facts for Which There Exist Genuine Issues To Be Tried of Plaintiffs Unico, Inc. and Unicom, Inc. (Docket No. 75), ¶ 8; Hagelin Dep. at 115. During the period that Dexter was manufacturing Eve-style soles with TM-8030 compound, it also manufactured Eve-style soles in other colors from compounds that did not contain the Pigment. Hagelin Dep. at 32-33, 77; Cooley Aff. ¶ 4. These shoe soles did not embrittle or exude oil. Cooley Aff. ¶ 4.

Against this backdrop, the parties offer clashing theories as to what went wrong with rubber compounds containing the Pigment. The plaintiffs focus on a 1993 change in Elementis’s burnt-umber milling process; Elementis on alterations to the mix of stabilizers in Unicom’s base formulas. The parties, in addition, dispute the relevance of a disclaimer on the back of invoices for Unicom’s compounds.

B. Change in Milling Process

The Pigment is a natural iron oxide. Deposition of George Padolsky (“Padolsky Dep.”) at 58. To manufacture the Pigment, Elementis purchased umbers from an independent mining company in Cyprus. Hoover Dep. at 48-49, 57. The umbers were blended and jet-milled to a fine size. *Id.* at 48-49. UMBER pigments contain various naturally occurring compounds of manganese. 1993 Annual Book of ASTM Standards, attached as Exh. Q to Elementis’s SMF, at E7082.

²⁴(...continued)

Exh. MM to Elementis’s SMF, at D 1729. Elementis challenges this projection on grounds that Dexter’s economic expert, Dr. Goldstein, is unable to explain the basis for the calculation. Woodford Designation ¶¶ 24-33.

According to the plaintiffs:

Elementis knew that the Pigment contained manganese, that manganese potentially is reactive, and that the reactivity of manganese can have undesirable effects on rubber, including accelerating the aging process. Deposition of Mark D. Loudenslager (“Loudenslager Dep.”) at 90, 104-07; Padolsky Dep. at 59. Producers of burnt umber also know that their pigment is used in the rubber and plastics industry. Padolsky Dep. at 58; Hoover Dep. at 13, 64-65, 262-63. Elementis, specifically, knew that the Pigment was used in rubber applications. Loudenslager Dep. at 210-11. It also knew that Unicom was purchasing the Pigment from Walsh. *Id.* at 24.

In 1993 Elementis changed its burnt-umber milling process, installing a fan and dust collector system. Deposition of Thomas Kemler (“Kemler Dep.”) at 15, 19, 22-24, 75-77; Mahaney Dep. at 100-01. Elementis did not test its product after the change to determine whether smaller particles had been introduced. Kemler Dep. at 94; Deposition of John E. Hochman (“Hochman Dep.”) at 31. In the opinion of Keith W. Flohr, a chemist and expert witness for Unico/Unicom, smaller particle size can cause absorption of plasticizing oils, preventing the oils from maintaining the elasticity of the rubber. Plaintiffs Unicom, Inc.’s and Unico, Inc.’s Expert Designation, attached as Exh. O to Elementis’s SMF, at 1; Deposition of Keith W. Flohr (“Flohr Dep.”) at 102. Oil can appear in cracks in the rubber. Flohr Dep. at 103.

Users of pigments assume that they are inert, *i.e.*, not chemically reactive. Goguen Dep. at 318; Willard Dep. at 234-35, 369-70. Indeed, the bag in which Elementis packed the Pigment and sold it to customers stated that its contents had zero reactivity. Mahaney Dep. at 64-66; copy of bag label, attached as Exh. HH to Dexter’s SMF. Elementis published materials such as color charts and brochures intended to inform users about the properties of its pigments, including the potential

reactivity of manganese in burnt umber, but generally provided them only to its direct customers. Loudenslager Dep. at 30-35, 82-83. Customers of distributors typically were given such materials only upon request. *Id.* at 32. Unicom did not become aware that there was manganese and/or manganese dioxide in the Pigment until late July or early August 1995. Goguen Dep. at 65. Had Unicom known that the Pigment had qualities that could cause it to degrade thermoplastic rubber, it would not have used it in its formulations. Goguen Aff. ¶ 5. Had it known, moreover, that Elementis had changed its manufacturing process in a manner that could have affected the reactivity of the Pigment, it would have tested the compounds at that juncture to ensure that the Pigment would not degrade the compounds or cause other problems to its customers. Goguen Aff. ¶ 6.

According to Elementis:

Unicom expert Flohr did not measure the granular sizes of samples of lots of the Pigment. Flohr Dep. at 92-93. Rather, he measured particle size of the Pigment as formulated into shoe soles. *Id.* In the opinion of G. Fred Willard, Ph.D., based upon his experience working in the polymer industry and upon surface area studies, the surface area of the Pigment purchased by Unicom fell within the expected range of lot-to-lot variability. Defendant Elementis Pigment [sic], Inc.'s Expert Designation of G. Fred Willard, Ph.D., attached as Exh. P to Elementis's SMF, ¶¶ 1, 30.

The Pigment was manufactured pursuant to published product specifications that establish parameters for masstone, tint, strength and mesh retention. Specifications for BU5250F, attached as Exh. J. to Elementis's SMF. Elementis's quality assurance department tests each production lot of the Pigment to ensure compliance with specifications. Hochman Dep. at 227. In the opinion of Charles E. Hoover, Jr., an expert witness experienced in the pigment industry, the Pigment delivered to Unicom complied with Elementis's specifications. Defendant Elementis Pigment [sic], Inc.'s

Expert Designation of Charles Hoover, Jr. (“Hoover Designation”), attached as Exh. L to Elementis’s SMF, ¶¶ 1, 8. *See also* data attached as Exh. K to Elementis’s SMF. In Hoover’s opinion, a pigment is considered merchantable if it complies with its specifications. Hoover Dep. at 139.

Pigment purchasers are solely responsible for determining the suitability of pigments for use in their applications. Hoover Designation ¶9. Elementis’s specifications are available to customers upon request. Hochman Dep. at 228-29. Although Unico and Unicom were familiar with the practice of obtaining specifications from suppliers, they did not request specifications for the Pigment. Goguen Dep. at 177-79, 311-12. Elementis also will manufacture pigments to customers’ specifications. Loudenslager Dep. at 212-13. Neither Unico nor Unicom, however, asked Elementis or Walsh to select pigments for use in their compounds. Goguen Dep. at 310-11. Unicom did not contact Elementis regarding the Pigment until in or about August 1995. *Id.* at 62-63.

Because the Pigment was a production material, Unicom did not request samples of it until defects in the compound had become manifest, as part of its investigation into the problem. *Id.* at 308. Unicom typically does not disclose its compound formulations to its suppliers unless it has specific reason to do so. *Id.* at 586. Unicom conducted its own research and development when designing formulations for its rubber compounds. Second Unicom Interrog. at 9. Unicom advertised its expertise in manufacturing compounds and occasionally visited customer locations to run compound through customers’ machinery. Quimby Dep. at 147, 150; Goguen Dep. at 321.

From 1988 until sometime in 1994-95, Peter Goguen was responsible for selecting ingredients, including pigment, for use in Unico’s and Unicom’s compounds. Morin Dep. at 26,

29-30. He was the person at Unicom most knowledgeable about the formulation of rubber compounds. Goguen Dep. at 280. He also developed the formulas for the TM-8030 and U201-8030 compounds. *Id.* at 224-25. Goguen knew that the Pigment was a natural pigment. *Id.* at 210-11. He also knew that natural pigments are mined from deposits and that there are variations in such pigments “because of the conditions under which [they are] mine[d] and manufactured.” *Id.* Goguen preferred synthetic pigments because they are more tightly controlled and could be more consistent over time than natural pigments. *Id.* at 219-20. During the 1993-96 time period, Goguen also knew that manganese dioxide is a catalyst for oxidation reactions. Morin Dep. at 162. Files at Unicom contained promotional materials from Pfizer disclosing the presence of manganese dioxide in the Pigment. Goguen Dep. at 92-95; Pfizer brochure, attached as Exh. S to Elementis’s SMF, at U 03048.

According to Unicom expert Flohr, “The only place where, in my experience, natural pigments were still being used was the ceramic industry, brick manufacturing, some other large use bulk uses where precise properties were not that important and it was not going to cause a degradation of the fired product.” Flohr Dep. at 227. In Flohr’s opinion, it is “generalized knowledge” and “obvious” that “a natural material will be variable.” *Id.* at 176. “The fact that the catalytic reaction occurs,” according to Flohr, “indicates that the pigments are not adequate and proper for their intended application.” Letter from Keith W. Flohr to Geraldine G. Sanchez dated August 6, 1996, attached as Exh. O to Elementis’s SMF, at 5.

C. Change in Base Formulation

Elementis offers the following in support of its theory that Unicom’s own tinkering with its base formulas caused its problems:

Prior to spring 1995 Unicom was using a stabilizer package in its compounds consisting of three elements: AM 340, Bennox 1010 and DLTDP. Goguen Dep. at 477, 480-81. Bennox 1010 is a phenolic anti-oxidant that helps to protect polymers against oxidation. *Id.* at 161. In the spring of 1995 Unicom decreased the percentage of Bennox 1010 in its compounds from 0.25 percent to 0.15 percent. *Id.* at 478, 481. DLTDP is used synergistically with Bennox 1010 to enhance the performance of the Bennox. *Id.* at 163. Unicom deleted DLTDP from its stabilizer package shortly after it decreased the percentage of Bennox 1010 in the spring of 1995.²⁵ *Id.* at 480-81.

Unicom did not advise any of its customers that it had made changes in the stabilizer package. *Id.* at 489. Nor did Unicom conduct age tests on the reformulated TM-8030 or U201-8030 compounds until the end of December 1995. *Id.* at 269. Unicom at all relevant times had access to a lab oven. *Id.* at 105. When Goguen performed accelerated age testing using the lab oven, he was able to detect defects. *Id.* at 541-45. Unicom has not identified a single non-defective production lot of the TM-8030 and U201-8030 compounds produced after the stabilizer components were changed in the spring of 1995. Responses to Defendant Elementis Pigments, Inc.'s First Request for Production of Documents and Things to Plaintiff Unicom, Inc., attached as Exh. W to Elementis's SMF, at 5; Letter from Geraldine G. Sanchez to H. Bruce Hanson, Esq. dated June 26, 1998, attached as Exh. X to Elementis's SMF, at 4-5. Only one of Unicom's other rubber compounds, TH-2046, contained as much of the Pigment as either TM-8030 or U201-8030. Goguen Dep. at 424.

²⁵Elementis also claims that a winders batch sheet shows that DLTDP was deleted from Lot 743 of U201-8030 that was manufactured on May 17, 1994. Elementis's SMF ¶¶ 140-41. The batch sheet itself, however, offers no clue as to its lot number or date, and Elementis points to no other evidence linking the batch sheet to that lot. Accordingly, I will disregard the batch sheet for purposes of these motions.

The total stabilizer package in a thermoplastic rubber compound is an important ingredient in preventing cracking. Flohr Dep. at 45-46. Enichem, manufacturer of synthetic thermoplastic rubbers known as Europrene SOL T, advises its customers that “[t]he unsaturated nature of Europrene SOL T makes it necessary to use suitable stabilizing agents to counteract the radical reaction which is responsible for oxidation” Enichem brochure, attached as Exh. V to Elementis’s SMF, at EA-Elementis 54, 60. Enichem recommends the use of dilauryldithiopropionate, among other stabilizers.²⁶ *Id.* at 60. Krishna C. Baranwal, Ph.D., a polymer scientist and expert for Walsh, would testify that a proper balance among all components of rubber compound, including but not limited to the stabilization package and pigment package, is critical to the production of good compound. Walsh & Associates, Inc.’s Expert Designation, attached as Exh. Y to Elementis’s SMF, at 1, 3. Without an adequate stabilizer package, rubber will degrade. *Id.* at 3. Testing, including age tests, should be performed any time a change is made to the composition, amounts of ingredients or processing conditions of rubber compounds. *Id.* at 4.

On June 6, 1996 Dexter sent Unicomp two shoe soles molded from a “new” compound that were exuding oil or otherwise appeared defective. Memorandum from Mike DiSotto to Bob Morin dated June 6, 1996, attached as Exh. HH to Elementis’s SMF. Dexter continues to send Unicomp oily shoe soles molded from compounds that contained no Pigment. Deposition of Michael DiSotto dated September 17, 1998 at 54-55.

The plaintiffs counter with the following:

Many thermoplastic rubber compounds used the same formula as TM-8030 with a color

²⁶Dilauryldithiopropionate, according to Elementis, is “DLTDP.” Elementis’s SMF ¶ 120. Goguen is recorded as having described DLTDP in his deposition as “dilorelthiodepropilate,” most likely an error in transcription. Goguen Dep. at 163.

package that did not contain the Pigment. Goguen Aff. ¶ 7. When an adjustment or substitution of a component was made in TM-8030, the adjustment or change was usually made in those other compounds as well. *Id.* None of those compounds ever demonstrated the cracking and degrading evidenced by the TM-8030 or the U201-8030 compounds. *Id.*

After Unicom began manufacturing TM-8030 with synthetic pigment, neither Dexter nor Unico experienced the same oiling and cracking problems as manifested themselves in shoe soles manufactured with compound containing the Pigment. Morin Dep. at 170-73. Problems in soles made from the new compound were caused by the use of regrind from the older compound containing the Pigment. Deposition of Michael D. DiSotto dated September 16, 1998 at 60-61.

D. Unicom's Limitation of Liability

Unicom's invoices for sales of rubber compounds to its customers contain a disclaimer on the back. Quimby Dep. at 141. The disclaimer, titled "Terms of Sale for TPE Compounds," provides in relevant part:

2. Remedy. . . . Repair or replacement is the sole remedy for warranty breaches.

6. Limitation of Liability. Under no circumstances shall UNICOMP be liable for any incidental or consequential damages arising out of a defect or alleged defect in any compound sold by UNICOMP In particular, our customers are responsible for determining the suitability of UNICOMP-manufactured compounds for the formation and assembly of any end product, and UNICOMP shall not be responsible for any loss, cost, damage or expense arising out of any alleged lack of fitness or suitability of UNICOMP compounds in any end product.

All sales are subject to the foregoing terms and conditions and our acceptance of your order expressly confirms our acceptance of these terms... Your acceptance of goods shipped by us confirms your acceptance of the foregoing terms and conditions.

Unicom, Inc. Terms of Sale for TPE Compounds, attached as Exh. II to Elementis's SMF. Dexter

generally received Unicomps' invoices after the compound had arrived at Dexter's warehouse. Affidavit of Michael DiSotto, attached as Exh. C to Dexter's SMF, ¶ 6.

The parties differ as to the effect of this disclaimer.

Elementis notes that Unicomps, as a general business matter, insists upon the limitations and protections contained in the terms of sale. Quimby Dep. at 142. According to the plaintiffs, both Dexter and Unicomps personnel who dealt with each other in the purchase and sale of rubber compound were unaware of the disclaimer provisions. Deposition of Leo Famolare, attached as Exh. H to Dexter's SMF, at 42-43; Goguen Dep. at 580-81; Deposition of Peter Lunder ("Lunder Dep.") at 116-18; Morin Dep. at 178-79. Unico and Unicomps advised Dexter that, to the extent they were at fault, they would be responsible for the problems created by the defective compound. Lunder Dep. at 67, 75-76; Quimby Dep. at 187-89. Unico and Unicomps typically address customer complaints regarding quality by replacing bad materials; however, they rarely had confronted a situation in which a problem with a compound did not manifest itself until already incorporated into finished shoes. Morin Dep. at 179-81.

IV. Discussion

A. Choice of Law

In a diversity action such as this, a federal court must apply the choice-of-law rules of the state in which it sits. *City of Old Town v. American Employers Ins. Co.*, 858 F. Supp. 264, 266 (D. Me. 1994). The Law Court has embraced the "most significant contacts and relationship" test of the Restatement (Second) of Conflict of Laws. *Priestman v. Canadian Pac. Ltd.*, 782 F. Supp. 681, 685 (D. Me. 1992); *Adams v. Buffalo Forge Co.*, 443 A.2d 932, 934 (Me. 1982). These principles, Elementis contends, lead to application of Missouri law. Elementis's Unicomps Motion at 4-5 n.1,

14 n.6; Elementis’s Unico/Dexter Reply at 1; Defendant Elementis Pigments, Inc.’s Reply Memorandum in Support of Its Motion for Summary Judgment Against Plaintiff Unicom, Inc. (“Elementis’s Unicom Reply”) (Docket No. 77) at 2-3. The plaintiffs, on the other hand, perceive Maine as the state with the most significant relationship to this case. Dexter Shoe Company’s Memorandum in Response to Elementis Pigment’s [sic] and Walsh & Associates’ Motions for Summary Judgment (“Dexter’s Opposition”) (Docket No. 70) at 4-7.²⁷

Turning first to the plaintiffs’ cause of action sounding in negligence, I have little difficulty concluding that Maine law controls. Section 147 of the Restatement (Second) of Conflict of Laws, pertaining to the tort of injuries to tangible things, provides in its entirety that:

In an action for an injury to land or other tangible thing, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence, the thing and the parties, in which event the local law of the other state will be applied.

Restatement (Second) of Conflict of Laws § 147. In this case, the injury occurred in Maine, where (i) Unicom mixed the rubber compounds, (ii) Unico and Dexter molded shoe soles from the compound and (iii) Dexter processed credits for the return of shoes with the defective soles. Maine’s interest in this matter is heightened, moreover, by the fact that all of the plaintiffs are Maine corporations that conducted business in Maine.²⁸ The Pigment was manufactured by an Illinois

²⁷Unicom and Unico rely on Dexter’s discussion of choice-of-law issues. Plaintiff Unicom, Inc.’s Opposition to the Motion for Summary Judgment of Elementis Pigments, Inc. (“Unicom’s Opposition”) (Docket No. 73) at 1; Opposition of Unico, Inc. to Summary Judgment Motion of Elementis Pigments, Inc. (“Unico’s Opposition”) (Docket No. 74).

²⁸Elementis (which incorporates Walsh’s choice-of-law discussion) asserts that Maine’s interest is attenuated inasmuch as (i) Unico and Unicom no longer are operational and are, in any event, controlled by Massachusetts principals, (ii) Dexter is a wholly-owned subsidiary of a
(continued...)

corporation and shipped from Missouri; however, neither of these contacts is sufficiently weighty to dislodge the choice of Maine law. *See, e.g.*, Restatement (Second) of Conflict of Laws § 147 cmt. e (when conduct and resulting injury occurred in different states, local law of the state where injury occurred usually controls).

Turning next to the plaintiffs' claims of breach of express and implied warranty, I find it unnecessary to choose between Maine and Missouri law for purposes of deciding the instant motions. Applicable provisions of the Uniform Commercial Code (the "UCC") are virtually identical in both states, as is caselaw construing those provisions to the extent any exists.²⁹

²⁸(...continued)

Delaware conglomerate, (iii) Dexter sent the affected shoe soles to an offshore manufacturer for assembly into completed shoes, (iv) Dexter was not a party to the pigment transactions upon which choice-of-law analysis turns, and (v) the rubber in the vast majority of affected shoes degraded outside Maine, and thus the injury occurred outside of Maine. Elementis's Unicom Motion at 14 n.6; Defendant Walsh & Associates, Inc.'s Motion and Memorandum in Support of Motion for a Summary Judgment Against Unicom, Unico, and Dexter ("Walsh's Motion") (Docket No. 55) at 8-10; Elementis's Unicom Reply at 3. That the plaintiff corporations are owned by outside interests, and that Unico and Unicom have ceased operations, is irrelevant; they are nonetheless Maine corporations that, at relevant times, conducted business in Maine. That Dexter sent the soles to an affiliated corporation in Puerto Rico for assembly into finished shoes likewise is immaterial. The record shows that Dexter purchased the finished shoes from the affiliate; Dexter thus was injured when customers began to reject the shoes. Whether Dexter was a party to the pigment transactions is irrelevant in the context of choice-of-law analysis; what matters is that Dexter, a Maine corporation, asserts that it was injured in Maine as a result of those pigment transactions. With respect to the final point, Elementis adduces no evidence that the majority of the shoes degraded outside of Maine. The record reveals, instead, that Dexter processed credits in Maine for the return of the defective shoes.

²⁹Maine law diverges from that of Missouri on the question whether a remote supplier of an unbranded component part may be held liable for breach of an implied warranty. *Compare, e.g.*, 11 M.R.S.A. § 2-318 (lack of privity no defense "if the plaintiff was a person whom the manufacturer . . . might reasonably have expected to use, consume or be affected by the goods") with Mo. Rev. Stat. § 400.2-318 (silent on issue) and *In re General Motors Corp. Anti-Lock Brake Prods. Liab. Litig.*, 966 F. Supp. 1525, 1529 n.1, 1533-34 (E.D. Mo. 1997) (holding that interested states (which included Missouri) likely would follow reasoning of *Hininger v. Case Corp.*, 23 F.3d 124 (5th Cir. (continued...))

B. Breach of Express Warranty

In response to Elementis's motions for summary judgment, the plaintiffs elucidate two potential bases for a finding of breach of express warranty pursuant to section 2-313 of the UCC.³⁰ Unicom's Opposition at 5-7.³¹ Both arise from a prior course of dealing between Elementis and Unicom or its predecessor in the rubber-compounding business, Unico. *Id.*

Section 2-313 provides in relevant part:

(1) Express warranties by the seller are created as follows:

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description. . . .

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the sample or model.

11 M.R.S.A. § 2-313(1); *see also* Mo. Rev. Stat. § 400.2-313(1) (substantively identical). A "description," moreover, "need not be by words." UCC § 2-313 cmt. 5, *reprinted in id.* "Past deliveries may set the description of quality, either expressly or impliedly by course of dealing." *Id.*

A jury, the plaintiffs assert, could discern that Elementis's prior deliveries of Pigment to Unico and Unicom constituted either a description or sample of the Pigment. Unicom's

²⁹(...continued)

1994), pursuant to which a remote purchaser may not hold the maker of an anonymous component part liable for breach of implied warranty). I do not, however, reach the privity question in analyzing the plaintiffs' implied-warranty claims.

³⁰The plaintiffs do not press arguments, anticipated by Elementis in its summary-judgment motions, of express warranty premised upon Pfizer or Elementis brochures or any other written materials. *See* Elementis's Unicom Motion at 21-29.

³¹Unico and Dexter incorporate Unicom's express-warranty arguments. Unico's Opposition; Dexter's Opposition at 17-18 n.21.

Opposition at 6-7. Because Unicom ordered subsequent shipments in reliance on this description or sample, Elementis breached its express warranty upon delivery of nonconforming Pigment, Unicom concludes. *Id.* Elementis counters, as a threshold matter, that its past deliveries to Unicom do not qualify as a matter of law as either a description or sample of the Pigment. Elementis’s Unicom Motion at 29-30; Elementis’s Unicom Reply at 6-7. With respect to the sample argument, I agree.

A “sample,” for purposes of section 2-313, is “actually drawn from the bulk of goods which is the subject matter of the sale.” UCC § 2-313 cmt. 6, *reprinted in* 11 M.R.S.A. § 2-313; Mo. Rev. Stat. § 400.2-313. This comports with the common definition of a “sample” as “a representative portion of a whole: a small segment or quantity taken as evidence of the quality or character of the entire group or lot.” Webster’s Third New International Dictionary of the English Language Unabridged 2008 (1981). A “sample” of production material cannot, by definition, be equivalent to the “whole” of the production material itself. Nor, as Elementis points out, can past shipments constitute “samples” for UCC purposes inasmuch as they are not drawn from the bulk of goods that is the subject matter of a pending sale. Elementis’s Unicom Motion at 29. Rather, they were the subject matter of previously concluded sales. *Id.*

Tellingly, Unico/Unicom designee Peter Goguen testified that during his term of employment with Unico and Unicom (dating from 1988) there was no need for either company to request a sample of the Pigment because the Pigment already was a production material. No sample was requested until problems with the rubber compounds already were manifest, and then only for the purpose of testing for defects. Caselaw confirms what Goguen understood — that “samples,” for purposes of section 2-313 of the UCC, are portions of a material that are examined to determine

whether to order quantities of that material. *See, e.g., Bradford Mills, Inc. v. Vic-Genie Mfg. Co.*, 430 S.W.2d 597, 601 (Mo. Ct. App. 1968) (parties contracted with reference to sweater sample viewed during course of negotiations). There is no evidence that any *bona fide* sample formed the basis of a bargain between Unico/Unicomp and Elementis.

The plaintiffs' argument that past deliveries could have constituted a "description" is not so easily dismissed. Official UCC commentary makes clear that past deliveries may impliedly create an express warranty.³² Such commentaries, while not entitled to as much weight as ordinary legislative history, "have been relied upon to explain the meaning intended by the drafters of article 2 and are useful indicators of the drafters' reasoning." *Guess v. Lorenz*, 612 S.W.2d 831, 833 n.2 (Mo. Ct. App. 1981) (citations omitted). *See also McNally v. Nicholson Mfg. Co.*, 313 A.2d 913, 918 (Me. 1973) (UCC commentary regarded as "official source of guidance in the interpretation of the Code"). The parties dredge up only one case squarely addressing the question whether past deliveries may suffice to create an express warranty, and my own research has unearthed no others.³³ Unicomp's Opposition at 6. In that case, the court recognized that nonconformance to past deliveries may create a cause of action for breach of express warranty pursuant to section 2-313 of the UCC. *Duffin v. Idaho Crop Improvement Ass'n*, 895 P.2d 1195, 1203-04 (Idaho 1995) (triable issue

³²In its moving papers, Elementis conceptualized this anticipated cause of action as a breach of an implied warranty of product invariability. Elementis's Unicomp Motion at 30-32. In its reply, Elementis acknowledges the plaintiffs' characterization of this claim as breach of an express warranty. Elementis's Unicomp Reply at 6-7.

³³The plaintiffs cite a second case for the proposition that past deliveries may create an express warranty. Unicomp's Opposition at 6. That case, however, turned on the "sample" theory of breach of warranty. *Rock Creek Ginger Ale Co. v. Thermice Corp.*, 352 F. Supp. 522, 526-27 (D.D.C. 1971) (carbon-dioxide distributor had tested sample from brewer, to which past deliveries had conformed).

whether past dealings created warranty of quality of seed potatoes). There is no reason to suppose that a court in either Maine or Missouri, if confronted with this question, would decline to follow official UCC commentary.

As the plaintiffs recognize, Unicomp's Opposition at 7, a description or sample "creates an obligation of conforming tender only if the parties intended to contract with reference to the specific description or sample." *Empire Gas Corp. v. American Bakeries Co.*, 840 F.2d 1333, 1335-36 (7th Cir. 1988). The parties' agreement, however, need not have been express; it can be discerned from both course of dealing and usage of trade. 11 M.R.S.A. § 1-205(3); Mo. Rev. Stat. § 400.1-205(3). On this point, Elementis counters that Unicomp cannot piggyback upon Unico's prior course of dealings in purchasing the Pigment. Elementis's Unicomp Motion at 30-31. To take such dealings into consideration, Elementis argues, would permit Unicomp to pierce its own corporate veil for its own benefit. *Id.* at 15 n.7; Elementis's Unicomp Reply at 6 n.5. Once the Unico dealings are set aside, Elementis notes, there are virtually no past "conforming" shipments. Elementis's Unicomp Motion at 31.

Unicomp does not, however, seek to pierce its own corporate veil. It simply asserts that the transactions of a separate corporation are relevant for purposes of the UCC concept of "course of dealing." This can in fact be the case. *See, e.g., International Therapeutics, Inc. v. McGraw-Edison Co.*, 721 F.2d 488, 492 (5th Cir. 1983) (for five-year period, plaintiff enjoyed course of dealing with defendant and its predecessor that entitled plaintiff to buy shipments of percussors on demand); *Chase Resorts, Inc. v. Johns-Manville Corp.*, 476 F. Supp. 633, 637-38 (E.D. Mo. 1979), *aff'd*, 620 F.2d 203 (8th Cir. 1980) (defendant and its predecessors did not breach warranties). Unicomp, Elementis points out, concedes that it has no "predecessor corporation." Elementis's Unicomp

Motion at 15 n.7. In substance, however, Unicom took over Unico's rubber-compounding business. Unicom, a "sister" corporation, continued to order Pigment from the same sources that Unico had. Unicom thus built upon and continued the previous course of dealing by Unico.

Turning to the merits, Elementis first asserts that the plaintiffs cannot prevail inasmuch as Unicom actually knew that the Pigment was subject to lot-to-lot variability, that the usage in the trade is to allow for such variability, and that Unicom never requested a "super-specification" product — in essence, that Unicom could not have relied upon any such warranty. Elementis's Unicom Motion at 31-32. I find, however, that on this record the plaintiffs raise triable issues whether (i) users of pigment in general expect that it will be inert (Goguen and Willard testimony), (ii) Unicom and Elementis, specifically, expected that the Pigment would be inert (Goguen testimony; labelling on container indicating that Pigment possessed "zero" reactivity), and (iii) Unicom relied on the Pigment's past non-reactivity in placing subsequent orders (Goguen testimony).

Elementis next argues that, regardless, the plaintiffs adduce insufficient scientific evidence to implicate the Pigment in the spoilage of the rubber compound. Elementis's Unicom Reply at 4-5. The plaintiffs' case is weakened — but not imploded — by exclusion of the DeLuca testimony. While DeLuca purports to provide the "smoking gun" linking the failure of the rubber compound to a change in the Pigment manufacturing process, there is sufficient evidence in the absence of the DeLuca opinion from which a trier of fact could infer that the Pigment's composition changed. There is uncontroverted evidence, for example, that the Pigment was shipped to end users in bags proclaiming that it had "zero" reactivity. There is further expert and other evidence (*e.g.*, the Loudenslager Letter and Flohr testimony) that (i) manganese dioxide within the Pigment could be

reactive, (ii) such reactivity could have spoiled the rubber compounds, (iii) the milling process was changed in 1993, (iv) particles in the defective compounds were smaller, and (v) smaller particles increase the reactive potential of the Pigment. In view of the fact that batches of TM-8030 and U201-8030 previously had been produced using the Pigment without incident, a fact-finder could infer that the decomposition of the rubber compound resulted from a change in the reactivity of the Pigment. While Elementis offers evidence that Unicom caused the failure of the compound by tinkering with the stabilizers in its base formulas, a fact-finder could reject this theory in view of evidence that those changes were not made until spring 1995 and, in any event, other formulas altered by Unicom did not fail.

Elementis finally argues that it extended no warranties — express or implied — to the downstream buyers, Unico and Dexter. Elementis’s Unico/Dexter Motion at 20. Lack of privity does not, in itself, foreclose assertion of a claim of breach of express warranty against a remote manufacturer. 11 M.R.S.A. § 2-318; *Whitman v. Consolidated Aluminum Corp.*, 637 S.W.2d 405, 407 (Mo. Ct. App. 1982). The remote purchaser generally must, however, have relied upon the express warranty.³⁴ *See, e.g., Williams v. Inverness Corp.*, 664 A.2d 1244, 1249 (Me. 1995) (Rudman, J., dissenting); *Whitman*, 637 S.W.2d at 407; *Burke v. Hamilton Beach Div.*, 424 A.2d 145, 149-50 n.7 (Me. 1981), *overruled on other grounds by Adams v. Buffalo Forge Co.*, 443 A.2d 932 (Me. 1982). Inasmuch as Dexter and Unico adduce no evidence that, when deciding whether to

³⁴The need for a plaintiff to show reliance has been obviated in certain cases, such as that in which a surgeon relies upon a manufacturer’s express warranties in choosing a medical device for implantation into a plaintiff. *See, e.g., Holdridge v. Heyer-Schulte Corp.*, 440 F. Supp. 1088, 1104 n.9 (N.D.N.Y. 1977); *Putensen v. Clay Adams, Inc.*, 12 Cal.App.3d 1062, 1079 (Cal. Ct. App. 1970). The surgeon, in such a case, acts as an agent for the plaintiff in selecting the medical device for use on or within the plaintiff’s person. *Id.* In this case, Unicom did not select pigments for Dexter or Unico’s direct use or as their purchasing agent.

purchase Unicom's rubber compound, they focused on the qualities, characteristics or nature of its constituent ingredients (including the Pigment), they cannot maintain independent express-warranty claims against Elementis.

Elementis accordingly is entitled to summary judgment as against Dexter and Unico on all express-warranty claims, and as against Unicom on all express-warranty claims except that based upon Unicom's "description" theory.

C. Breach of Implied Warranty

The plaintiffs claim that Elementis breached an implied warranty of merchantability inasmuch as the Pigment was not "fit for the ordinary purposes for which such goods are used" and that Elementis failed to warn users of its propensity to degrade rubber, in contravention of section 2-314 of the UCC.³⁵ Unicom's Opposition at 1-2; Dexter's Opposition at 23; *see also* 11 M.R.S.A. § 2-314(2)(c); Mo. Rev. Stat. § 400.2-314(2)(c).³⁶ Elementis rejoins that neither theory of unmerchantability is sustainable on the facts of record. Elementis's Unicom Reply at 4-5; Elementis's Unico/Dexter Reply at 5-6 (discussing warning theory); *see also* Elementis's Unicom Motion at 16-20. I concur.

Elementis asserts, as a threshold matter, that Unicom has adduced no evidence concerning the "ordinary purposes" to which the Pigment is put or that it is in fact unfit for its "ordinary purposes." Elementis's Unicom Motion at 18. Unicom, Elementis notes, merely complains that the Pigment failed in a specialized application — its use in two of the ten base rubber compounds

³⁵Elementis had anticipated that the plaintiffs would also claim breach of the implied warranty of fitness for a particular purpose. Elementis's Unicom Motion at 15-16; Elementis's Unico/Dexter Motion at 22. They do not.

³⁶Unico relies on Dexter's and Unicom's implied-warranty arguments. Unico's Opposition.

into which Unicomps infused it. *Id.* at 20. Such evidence, Elementis concludes, is insufficient as a matter of law to establish that a product is generally unmerchantable in the trade. *Id.* I agree. While the plaintiffs supply evidence that natural pigments such as burnt umber are used in the rubber and thermoplastics industry (and hence, arguably, such is an “ordinary” usage), the record is barren of any evidence of the Pigment’s unsuitability in any application (whether in the rubber industry or elsewhere) other than its usage in two of ten Unicomps base compounds. In the absence of such evidence, there is no basis upon which a rational fact-finder could conclude that the Pigment was unfit for its ordinary purposes. *See, e.g., Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 107 (3d Cir. 1991) (evidence that computer terminals incompatible with plaintiff’s software programs did not establish that terminals unfit for ordinary purposes); *Bethlehem Steel Corp. v. Chicago E. Corp.*, 863 F.2d 508, 514-15 (7th Cir. 1988) (evidence that steel unsuitable for use as wall sheets in grain storage bins insufficient to establish unmerchantability). The plaintiffs attempt to distinguish these cases on grounds that, in this case, the Pigment failed after years of successful use. Unicomps Opposition at 3. However, this demonstrates at most that the Pigment became unfit for two specialized applications, not that it became unfit for ordinary purposes.

The plaintiffs next contend that a product can be unmerchantable for purposes of section 2-314 of the UCC if a manufacturer fails to provide adequate instructions or warnings. Dexter’s Opposition at 23. Inasmuch as appears, neither Maine nor Missouri has considered whether section 2-314 should be construed to incorporate a duty to warn. Courts that have done so generally have construed the duty as coextensive with that set forth under the rubric of strict liability in tort. *See, e.g., Bly v. Otis Elevator Co.*, 713 F.2d 1040, 1044 (4th Cir. 1983); *Wasylow v. Glock, Inc.*, 975 F. Supp. 370, 377 (D. Mass. 1996). A duty arises in strict liability upon certain preconditions, chiefly

that a product be unreasonably dangerous to persons or property. *See, e.g., Wasylow*, 975 F. Supp. at 377 n.8 (quoting Restatement (Second) of Torts § 402A). Here, the plaintiffs neither bring a strict-liability claim nor allege that the Pigment was unreasonably dangerous. Finally, even assuming *arguendo* that Maine or Missouri would construe section 2-314 as coextensive with a duty to warn sounding in negligence (instead of strict liability), such a claim fails on the merits for the reasons discussed below.

Elementis hence is entitled to summary judgment as against all plaintiffs on claims of breach of implied warranty.

D. Negligence

The plaintiffs ground their cause of action in negligence upon an alleged duty to warn. Dexter's Opposition at 17.³⁷ In Maine, the framework for analysis of a failure-to-warn claim is "basically the same" regardless whether the claim sounds in strict liability or (as in this case) common-law negligence. *Pottle v. Up-Right, Inc.*, 628 A.2d 672, 675 (Me. 1993) (citation and internal quotation marks omitted). In general, "the supplier of a product is liable to expected users for harm that results from foreseeable uses of the product if the supplier has reason to know that the product is dangerous and fails to exercise reasonable care to so inform the user." *Id.* (citation and internal quotation marks omitted). In analyzing failure to warn, a court must undertake a three-part analysis:

- (1) whether the defendant held a duty to warn the plaintiff;
- (2) whether the actual warning on the product, if any, was inadequate; and
- (3) whether the inadequate warning proximately caused the plaintiff's injury.

³⁷Unico and Unicom rely on Dexter's negligence discussion. Unico's Opposition; Unicom's Opposition at 1.

Id. (citation omitted). A duty to warn arises “when the manufacturer knew or should have known of a danger sufficiently serious to require a warning.” *Id.* (citation omitted). A warning, if needed, “must advise the user of the risks associated with [the] product and offer the user specific directions for the product’s safe use.” *Id.* (citation omitted). Finally, “the manufacturer’s failure to provide an adequate warning must be a substantial factor in bringing about the plaintiff’s injury.” *Id.* (citation omitted). A plaintiff need not show, in a cause of action based on failure to warn, that the product is itself defective. *Lorfano v. Dura Stone Steps, Inc.*, 569 A.2d 195, 196 (Me. 1990). A manufacturer is not liable for failure to warn of “a danger that is obvious and apparent.” *Id.* at 197 (citations omitted).

Elementis presses for the application in this case of two related doctrines known as the “bulk raw material supplier” and “sophisticated purchaser” defenses. Elementis’s Unicom Motion at 7-14; Elementis’s Unico/Dexter Motion at 12-14; Elementis’s Unico/Dexter Reply at 5-6. Per the former, a supplier of raw material that is not itself defective or inherently dangerous generally is held to possess no duty to warn of dangers arising from the incorporation of the raw material into machinery or other matter. *See, e.g., In re TMJ Implants Prods. Liab. Litig.*, 872 F. Supp. 1019, 1025 (D. Minn. 1995), *aff’d*, 97 F.3d 1050 (8th Cir. 1996). Per the latter, no duty to warn arises when material is sold to a “sophisticated purchaser,” *i.e.*, one that knew or should have known of the risk involved. *Id.* at 1031. The doctrines merge in the notion that:

[W]hen a sophisticated buyer integrates a component into another product, the component seller owes no duty to warn either the immediate buyer or ultimate consumers of dangers arising because the component is unsuited for the special purpose to which the buyer puts it. To impose a duty to warn in such a circumstances

[sic] would require that component sellers monitor the development of products and systems into which their components are to be integrated.

In re Silicone Gel Breast Implants Prods. Liab. Litig., 996 F. Supp. 1110, 1114 (N.D. Ala. 1997) (citation and internal quotation marks omitted).

The Law Court has not had occasion to consider whether to adopt these doctrines; however, I conclude that were it presented with such an occasion it likely would do so. First, the doctrines constitute a logical extension of the existing Maine rule that a manufacturer has no duty to warn of a danger that is obvious and apparent. Second, they have enjoyed widespread acceptance. *See, e.g., Silicone*, 996 F. Supp. at 1113 (canvassing caselaw).

In this case, the record makes manifest that Unicom was a “sophisticated purchaser.” Rubber compounding was its expertise. It generally did not share its compound formulations with materials suppliers, and sought no advice from Elementis or Walsh on the use of pigment in its compounds. The evidence is uncontroverted that Unicom (through Goguen) did not know until in or about August 1995 that the Pigment contained any form of manganese. However, the evidence likewise is uncontroverted that (1) Goguen knew at relevant times that manganese dioxide is a catalyst for oxidation reactions, and (2) files at Unicom, accessible to Goguen, contained materials disclosing the presence of manganese dioxide in the Pigment. Had Goguen known the Pigment contained manganese dioxide, he would have appreciated the risks entailed in using it; and had Goguen consulted readily accessible materials, he would have known that the Pigment contained manganese dioxide. The dangers accordingly should have been apparent.

For these reasons, summary judgment in favor of Elementis as against all plaintiffs on their negligence causes of action is warranted.

E. Damages

Elementis finally seeks partial summary judgment with respect to the plaintiffs’ damages

claims. Elementis's Unicom Motion at 32-35; Elementis's Unico/Dexter Motion at 23-27. Inasmuch as I have recommended the grant of summary judgment on all claims asserted by Dexter and Unico, I will consider Elementis's arguments in regard to Unicom only. Elementis identifies two potential grounds for the limitation of Unicom's recovery of damages: (i) that the parties never contemplated the recovery of consequential damages and (ii) that damages arising from the collateral manufacturing activities of the downstream buyers, Unico and Dexter, were unforeseeable as a matter of law. Elementis's Unicom Motion at 32-35.

Consequential damages are recoverable, under section 2-715(2) of the UCC, for:

(a) [a]ny loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) [i]njury to person or property proximately resulting from any breach of warranty.

11 M.R.S.A. § 2-715(2); *see also* Mo. Rev. Stat. § 400.2-715(2) (identical). "Particular needs of the buyer must generally be made known to the seller while general needs must rarely be made known to charge the seller with knowledge." UCC § 2-715 cmt. 3, *reprinted in id.*

Elementis first asserts that because Unicom itself did not contemplate the consequential damages now sought, it cannot as a matter of law seek them from Elementis. Elementis's Unicom Motion at 33. Unicom, Elementis points out, admits that it intended the disclaimer on the back of its invoices to control the extent of its liability to purchasers of rubber compounds. *Id.*

Unicom counters that there are triable issues whether it did contemplate such a limitation on its damages and whether the limitation at issue is enforceable as against Dexter. Dexter's

Opposition at 19-23.³⁸ I agree. Despite the admission of Unicom's president, Irving Quimby, that he intended the corporation's liability to be controlled by the disclaimer, there is conflicting evidence from which a trier of fact could conclude that Quimby and Unicom never so intended to limit Dexter, a large and important customer. There is, in addition, evidence of record that would support a finding that the disclaimer was unenforceable against Dexter as a matter of law. Inasmuch as (i) the invoices generally were received after shipment of the product, and (ii) both Unicom and Dexter personnel were unaware of the disclaimer, a fact-finder could determine that the language constituted an "[unreasonable] surprise," materially altering the parties' agreement. *JOM, Inc. v. Adell Plastics, Inc.*, 151 F.3d 15, 26 (1st Cir. 1998) (quoting UCC § 2-207 cmt. 4); *see also Glyptal, Inc. v. Engelhard Corp.*, 801 F. Supp. 887, 893-95 (D. Mass. 1992).

Elementis finally posits that because it did not that know Unico or Dexter existed, let alone that they were using rubber compounds containing the Pigment, damages arising from their activities were unforeseeable as a matter of law. Elementis's Unicom Motion at 34-35. Unicom contends that there is a triable issue whether such damages were foreseeable based on evidence that (i) Elementis knew it was selling to the plastics and rubber industry, (ii) Elementis knew that Unicom was buying the Pigment, (iii) Elementis knew that the manganese in the Pigment was reactive and could degrade rubber products, and (iv) users of pigment assume it to be inert. Dexter's Opposition at 24.

There is no dispute, in this case, that Elementis was unaware at the time of contracting of

³⁸Elementis contends that Unicom has abandoned its claim for damages in excess of its contractual limitation. Elementis's Unicom Reply at 1. Unico and Unicom, however, rely on Dexter's brief on the subject of damages. Unico's Opposition; Unicom's Opposition at 1. Dexter's brief can fairly be read to oppose any such limitation.

Unicomp's, Dexter's or Unico's particular needs. Thus, it can be held liable only for general needs of which it had reason to know. Put another way, Elementis is liable for losses following from the breach "in the ordinary course of events." Restatement (Second) of Contracts § 351(2)(a); *see also Birdsong v. Bydalek*, 953 S.W.2d 103, 116-17 (Mo. Ct. App. 1997) (looking to section 351 for insight on foreseeability); *Williams v. Ubaldo*, 670 A.2d 913, 918 (Me. 1996) (distinguishing "special damages" from those flowing naturally from the breach). Losses are considered to arise "in the ordinary course of events" to the extent that their "occurrence accords with the common experience of ordinary persons." Restatement (Second) of Contracts § 351 cmt. b. The seller of a commodity to a wholesaler, for example, or a machine to a manufacturer, generally has reason to foresee that a delivery delay will cause loss of profits. *Id.*

In this case, there is sufficient evidence from which a fact-finder could determine that Elementis had reason to know that losses such as those arising from Dexter's and Unico's manufacturing activities could occur. Elementis knew that use of the Pigment could degrade rubber and that the Pigment was used in the rubber and plastics industry. It is common knowledge not only that a wholesaler resells wares to retailers or that a manufacturer relies on a functional machine, but also that rubber is fashioned into end products that include shoe soles. Damage to such finished products thus could be found to arise "in the ordinary course of events" from the use of reactive pigment in the rubber industry. Cases cited by Elementis do not compel a different result. Two involved losses flowing from specialized needs that could not be apprehended as a matter of common experience or knowledge. *Hampton v. Federal Express Corp.*, 917 F.2d 1119, 1124 (8th Cir. 1990) (delivery service had no knowledge of sick child or that package contained samples of child's blood); *Birdsong*, 953 S.W.2d at 117 (plaintiffs could not reasonably have contemplated

defendant's expenditure of funds to extend closing date on loan). The third involved losses arising from the plaintiff's "collateral or secondary enterprise" — his claimed loss of profits that would have derived from enterprises in which he would have invested monies lost as a consequence of the breach. *J & J Farms, Inc. v. Cargill, Inc.*, 693 F.2d 830, 836-37 (8th Cir. 1982). Unicom, by contrast, claims damages emanating directly from the subject matter of the contract at issue.

For these reasons, Elementis has fallen short of demonstrating entitlement to partial summary judgment against Unicom on the issue of damages.

V. Conclusion

For the foregoing reasons, I (i) hereby **GRANT** in part and **DENY** in part Elementis's motion to strike the designation and exclude the testimony of Robert D. DeLuca, Ph.D. and recommend that (ii) Elementis's motion for summary judgment against Dexter and Unico on liability be **GRANTED** and (iii) Elementis's motion for summary judgment against Unicom be **GRANTED** as to Unicom's claims for breach of express warranty based on a "sample" theory, breach of implied warranty and negligence, and otherwise **DENIED**. If my recommendations are accepted, the sole claims remaining for trial as against Elementis will be Unicom's claim of breach of express warranty based on a "description" and its damages claim, including consequential damages arising from the activities of Unico and Dexter.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum,

within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 10th day of February, 1999.

*David M. Cohen
United States Magistrate Judge*