***UNITED STATES DISTRICT COURT***

***DISTRICT OF MAINE***

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| ***UNICOMP, INC., et al.,*** | ***)*** | |
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| ***Plaintiffs*** | ***)*** | |
| | ***)*** | |
| | ***)*** | |
| ***v.*** | ***)*** | ***Civil No. 97-55-P-H*** |
| | ***)*** | |
| ***ELEMENTIS PIGMENTS, INC.,*** | ***)*** | |
| | ***)*** | |
| ***Defendant*** | ***)*** | |

## *RECOMMENDED DECISION[1] ON PLAINTIFF'S MOTION TO AMEND COMPLAINT*

Dexter Shoe Company ("Dexter") intervened in the instant action in April 1998 asserting claims against defendants Elementis Pigments, Inc. ("Elementis") and Walsh & Associates, Inc. ("Walsh") as well as cross-claims against co-plaintiff Unicomp, Inc. ("Unicomp"). Dexter now seeks to amend its complaint to add a cross-claim against remaining co-plaintiff Unico, Inc. ("Unico").[2] Dexter Shoe Company's Motion to Amend Cross-Claim to Join Unico, Inc. as a Party

[1]The pending motion is a dispositive pretrial matter within the meaning of 28 U.S.C. § 636(b)(1)(B), and thus a recommended decision is an appropriate exercise of my authority. *See Allendale Mut. Ins. Co. v. Rutherford*, 178 F.R.D. 1, 2 & n.2 (D. Me. 1998).

[2]Elementis formerly was called Harcros Pigments, Inc. Affidavit of Dennis M. Valentino, attached as Exh. A to Elementis's Statement of Material Facts (Docket No. 54), ¶ 4. The parties stipulated to Walsh's dismissal with prejudice in all of its capacities. Stipulation of Dismissal (Docket No. 83). Walsh's counterclaim against Elementis also has been dismissed. Endorsement to Stipulation (Docket No. 57).

Defendant to Dexter's Cross-Claim ("Dexter's Motion") (Docket No. 58); *see also* Complaint, Cross-Claim and Demand for Jury Trial (Docket No. 41). Elementis and Unico object.[3] Defendants' Joint Opposition to Plaintiff Dexter Shoe Company's Motion to Amend Cross-Claim, etc. ("Elementis's Opposition") (Docket No. 69); Opposition of Plaintiff Unico, Inc. to Dexter Shoe Company's Motion to Amend the Complaint ("Unico's Opposition") (Docket No. 72). For the reasons that follow I recommend the denial of Dexter's motion to amend.

## I. Applicable Legal Standards

Pursuant to Fed. R. Civ. P. 15(a) a party must seek leave of the court to amend a pleading if either the deadline to amend has expired or the party already has amended its pleading once within the time allotted by the rule. Such leave "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Leave to amend should be granted in the absence of reasons "such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. . . . ." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Although Rule 15(a) "evinces a definite bias in favor of granting leave to amend," it nevertheless "frowns upon undue delay in the amendment of pleadings, particularly if no legitimate justification for the delay is forthcoming." *Rodriguez v. Doral Mortgage Corp.*, 57 F.3d 1168, 1178 n.11 (1st Cir. 1995) (citations omitted); *see also Tiernan v. Blyth, Eastman, Dillon & Co.*, 719 F.2d 1, 4 (1st Cir. 1983) (though court may not deny amendment without consideration of prejudice to the opposing party, "it is clear that 'undue delay' can be a basis for denial") (citation omitted).

[3]Walsh joined Elementis in opposing the motion to amend; however, inasmuch as Walsh no longer is a party, I shall consider the joint objection to be that of Elementis only.

## II. Discussion

In this complex products-liability case, Dexter marshals two excuses why it did not earlier seek to cross-claim against Unico, which along with Unicomp initiated this litigation on February 21, 1997.[4] *See* Complaint (Docket No. 1) at 1. These are:

(i) its discovery that the formulas for the rubber compounds at issue were developed by Unico, which chose to use a burnt-umber rather than a synthetic pigment despite risks of which it arguably was or should have been aware. Dexter's Motion at 2-3.

(ii) its discovery that Unico may have manufactured some of the defective rubber compound from which Dexter fashioned shoe soles that subsequently degraded. *Id*. at 3-4 & Exhs. B-D thereto.

Elementis and Unico counter that the proposed amendment should be barred on grounds of undue delay, prejudice and futility. Elementis's Opposition at 1; Unico's Opposition at 1. Because I find the first two grounds in opposition persuasive and sufficient in themselves to counsel denial of Dexter's motion, I need not reach the third. *See, e.g., Kay v. New Hampshire Democratic Party*, 821 F.2d 31, 34 (1st Cir. 1987) (three-month delay in moving to amend, in circumstances of case, justifiable basis for denial).

### A. Undue Delay

As Elementis and/or Unico point out, Dexter possessed much of the information cited in support of its motion well prior to filing it. Documents attached as Exhibits A and B to Dexter's motion, bearing its "D" Bates-stamp series, have been in its possession at all times. *See* Elementis's

[4]The facts of this case, as developed for the purpose of Elementis's summary-judgment motions, are set forth in my Memorandum Decision on Defendant's Motion to Strike and Recommended Decision on Defendant's Motions for Summary Judgment ("Memorandum Decision") (Docket No. 87).

Opposition at 6; Unico's Opposition at 5. Testimony of Peter J. Goguen, upon which Dexter relies, was taken at an August 13, 1998 deposition. *See* Unico's Opposition at 5; 30(b)(6) Deposition of Unicomp and Unico through their designee Peter J. Goguen at 223-25. It is unclear when materials attached as Exhibits C and D to Dexter's Motion were produced and hence it is possible that Dexter could have obtained them as late as the close of discovery on October 8, 1998.[5] Elementis asserts that these materials, in any event, "prove nothing." Elementis's Opposition at 6. With respect to Exhibit C, I agree. As Dexter itself points out, this exhibit demonstrates that Unicomp paid Unico for labor involved in compounding rubber. *See* Dexter's Motion at 3-4 & Exh. C thereto. Such a payment, however, does not prove that Unico manufactured the rubber compound at issue. Rather, it evidences the opposite — that Unicomp paid a third party (Unico) for the provision of a constituent element (labor) in the production of Unicomp's rubber compound.

Although Dexter possessed the majority of the relevant information no later than August 13, 1998, it nonetheless delayed filing its motion for an additional two and a half months, until October 27, 1998. Elementis speculates that Dexter's late filing actually was catalyzed by its discovery at a September 21, 1998 deposition of Irving Quimby, a Unico/Unicomp principal, that Unicomp was penniless while Unico still had roughly $300,000 in its bank account that would not necessarily be available to satisfy Unicomp's liabilities. Elementis's Opposition at 9-10; *see also* Deposition of Irving Quimby at 174-75. Revelation that a party is judgment-proof, Elementis asserts, is not the type of information that justifies amending a complaint to name a less impecunious party. Elementis's Opposition at 10.

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[5]The discovery deadline was reset to October 8, 1998 during a July 17, 1998 discovery-dispute hearing in this case. Transcript of Hearing on Discovery Dispute Before United States Magistrate Judge David M. Cohen (Docket No. 49) at 90.

In its reply, Dexter acknowledges that the Quimby information did indeed factor prominently in its decision to seek to claim against Unico. Dexter Shoe Company's Reply Memorandum in Support of Its Motion to Amend Complaint ("Dexter's Reply") (Docket No. 81) at 3-5. Dexter suggests, however, that it was justified in seeking late amendment on this basis, as well, inasmuch as it previously had been misled into believing that the assets of both Unico and Unicomp would be available to satisfy its claims. *Id*. at 4-5. As Dexter itself implicitly recognized in not originally offering this justification, however, it is not particularly compelling. The focus in considering whether late-acquired information justifies belated amendment of a complaint is on whether that information buttresses the causes of action the proponent seeks to add. *See, e.g., Grant v. News Group Boston, Inc.*, 55 F.3d 1, 6 (1st Cir. 1995) ("Grant was aware, or should have been aware, of information tending to support each of the new claims well before July 1994"). Dexter is not seeking to add a cause of action against Unico based upon the alleged deception. The Quimby disclosures simply are immaterial to the causes of action for breach of warranty and negligence that it does seek to assert.

**B. Prejudice**

Dexter takes the position that its amendment would require no extra discovery — no additional exhibits or witnesses — in that Unico is no stranger to this action. Dexter's Motion at 4. Elementis and Unico vigorously disagree. Elementis's Opposition at 5; Unico's Opposition at 7-8.

The First Circuit has observed that "[t]he further along a case is toward trial, the greater the threat of prejudice and delay when new claims are belatedly added." *Executive Leasing Corp. v. Banco Popular de Puerto Rico*, 48 F.3d 66, 71 (1st Cir. 1995) (citation and internal quotation marks omitted). The contours of prejudice become particularly apparent in cases, such as this, in which a

motion to amend comes after discovery has closed and summary-judgment motions have been filed. *See, e.g., Torres-Rios v. LPS Lab., Inc.*, 152 F.3d 11, 16 (1st Cir. 1998); *Grant*, 55 F.3d at 6; *Carter v. Supermarkets Gen. Corp.*, 684 F.2d 187, 192 (1st Cir. 1982). The deadline to amend pleadings in this case was May 19, 1998. Report of Scheduling Conference and Revised Scheduling Order [Standard Track] (Docket No. 43) at 2. Discovery closed October 8, 1998, with motions due by October 15, 1998. Letter from Susan L. Hall, Case Manager, to All Counsel of Record dated July 20, 1998. Dexter's filing thus comes more than five months after the deadline to amend pleadings, nearly three weeks after the close of discovery and nearly two weeks after the deadline for filing dispositive motions in this case.

Had it known that it was the target of a claim by Dexter, Unico argues, it would have explored a number of additional avenues in discovery, *inter alia* the bases for the new claims. Unico's Opposition at 7. In addition, it notes, it would have moved for summary judgment against Dexter on the new claims on statute-of-limitations and other grounds. *Id.* Dexter counters that, if Unicomp's and Unico's behavior in this litigation to date is any indication, Unico would have done nothing of the kind. Dexter's Reply at 4-5. Unicomp has neither conducted aggressive discovery nor moved for summary judgment against Dexter, and Unico has relied on other parties' pleadings. *Id*. Unicomp's liability has, however, been on the table in this case since the beginning. I find it entirely plausible that had Unico — a separate corporation — known of Dexter's claim it would have pursued discovery along the lines it suggests and would have moved for summary judgment on what appear to be colorable grounds, including its statute-of-limitations defense.[6]

[6]Unico further argues that the proposed claims potentially would place Unico and Unicomp in an adverse position for the first time, forcing the parties to obtain separate counsel or to decide, (continued...)

Elementis, for its parts, asserts prejudice of a different order.[7] Allowance of the amendment, it asserts, would strike a blow at the heart of its defense, which has been predicated on discovery from Dexter indicating that the earliest date upon which Dexter received defective compound was early June 1994.[8] Elementis's Opposition at 3-4. Elementis had planned to offer evidence that in May 1994 Unicomp deleted a key stabilizer in a rubber compound sold to Dexter. *Id*. at 4. Unicomp made additional changes to the stabilizer mix in its rubber compounds in spring 1995. *Id*. at 3. Thus, Elementis would argue, defects in the rubber compounds were caused by Unicomp's own reformulations of its stabilizer mix. *Id*. at 2. Dexter, in seeking at the eleventh hour to roll back the date of its receipt of defective compound to March 1994, undermines the basis for this theory, Elementis complains. *Id*. at 4-5. Elementis articulates legitimate concerns. Its trial strategy and tactics would be impacted by allowance of the amendment. *See Tiernan*, 719 F.2d at 4 (noting that three additional claims "may well have affected defendants' planned trial strategy and tactics").

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[6](...continued)
under great time and monetary pressure, whether to consent to joint representation. Unico's Opposition at 8. Dexter counters that Unico and Unicomp have always been in an adverse position but that Unico simply has chosen not to assert its potential claims against Unicomp. Dexter's Reply at 5. Regardless, I need not factor in this type of asserted prejudice to reach the conclusion that, overall, the prejudice to both Unico and Elementis of permitting the proposed amendment would be significant.

[7]Dexter asserts as a threshold matter that Elementis has no interest in the proposed amendment. Dexter's Reply at 1-2. An amendment to assert claims against one party may, however, indirectly affect other parties to the case, as Elementis demonstrates.

[8]Dexter stated during discovery, and repeats in its Motion to Amend, that the earliest known date of manufacture of finished shoes with defective soles is July 21, 1994. *See* Exh. D to Elementis's Opposition; Dexter's Motion at 3. During discovery, however, Dexter also stated that "[r]easonably accurate correlations can be made by comparing a shoe's manufacturing date with compound lots received in the 6 weeks prior to manufacture[.]" *See* Exh. E to Elementis's Opposition at 7. Dexter does not explain how, in seeming contradiction to this discovery response, compound received in March 1994 could have been linked to shoes manufactured as late as July.

Dexter suggests, finally, that any alleged prejudice can be ameliorated, and the greater burden to all of having to bring its claim against Unico in state court avoided, by placing Unico and Dexter on a short discovery and motion schedule. Dexter's Reply at 4-5. Such a solution, Unico protests, would in itself inflict pain in a case that already has proven "exorbitantly expensive." Unico's Opposition at 7. Unico, again, has the better of the argument. The reopening of discovery to allow exploration of the basis of new claims against a party, and extension of the motion deadline to allow further filing of dispositive motions, exceeds the scope of limited discovery that I have been willing to countenance in the context of Elementis's motion to strike one of Dexter's expert witnesses. *See* Memorandum Decision at 13; *see also Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 139 (1st Cir. 1985) ("[a]n addition of a new claim close to trial when discovery is essentially complete and trial strategy already planned invariably delays the resolution of a case, and delay itself may be considered prejudicial . . .") (citation omitted).

## III. Conclusion

For the foregoing reasons, I recommend that Dexter's motion for leave to amend be **DENIED.**

***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 16th day of February, 1999.***

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***David M. Cohen***
***United States Magistrate Judge***