UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DERMALOGIX PARTNERS, INC., Plaintiff v. CORWOOD LABORATORIES, INC., Defendant	Civil No. 99-149-P-C

GENE CARTER, District Judge

MEMORANDUM OF DECISION AND ORDER

Now before the Court is Defendant's Motion for Partial Summary Judgment on All Counts of the Complaint ("Defendant's Motion") (Docket No. 5). Plaintiff's four-count Complaint (Docket No. 1) alleges breach of contract (Count I), negligence (Count II), and fraudulent misrepresentation (Counts III and IV). The Court will grant Defendant's Motion for Partial Summary Judgment on Counts I and II and deny Defendant's motion on Counts III and IV.

I. FACTS[1]

Corwood Laboratories, Inc., ("Corwood") manufactured a pharmaceutical product known as "Dermazinc" for Dermalogix Partners, Inc., ("Dermalogix"). DSMF ¶ 1; Unsworn Declaration of Irwin Thaler ("Thaler Declaration") ¶ 4 (Docket No. 6).[2] On October 21, 1998, Dermalogix sent purchase order number 10218 to Corwood, ordering 15,000 four-ounce bottles of Dermazinc for $0.70 per bottle. DSMF ¶ 2; Thaler Declaration ¶ 10, Exhibit B. On December 17, 1998, Corwood sent Dermalogix a purchase order acknowledgment form referencing purchase order 10218, acknowledging an order for 15,000 bottles of Dermazinc at $0.70 per bottle. DSMF ¶ 2; Thaler Declaration ¶ 12, Exhibit D. On January 19, 1999, Corwood sent Dermalogix a second purchase order acknowledgment form referencing purchase order 10218. DSMF ¶ 2; Thaler Declaration ¶ 12, Exhibit E. This second purchase order acknowledgment form references an increase in price from $0.70 per bottle to $0.75 per bottle, apparently reflecting a change in the cap Dermalogix wanted placed on the bottles.[3] DSMF ¶ 2; Thaler

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[1] The facts are taken exclusively from Defendant's Statement of Material Facts Not in Dispute in Support of its Motion for Partial Summary Judgment on all Counts of the Complaint ("DSMF") (Docket No. 8). Plaintiff's Statement of Material Facts in Dispute in Support of its Objection to Defendant's Motion for Partial Summary Judgment (Docket No. 12) does not comply with the requirement of Local Rule 56(c) that "[t]he opposing statement shall admit, deny or qualify the facts by reference to each numbered paragraph of the moving party's statement of material facts." Plaintiff's failure to comply with the express language of the rule results in the Court disregarding the statement altogether. In the absence of an appropriate denial of Defendant's stated material facts, those facts shall be deemed admitted so long as they are supported by appropriate record citations. Local Rule 56(e).

[2] Corwood's Statement of Material Facts Not in Dispute is supported by two unsworn declarations. Those declarations have the same force and effect as sworn declarations when, as here, they are executed "under penalty of perjury." 28 U.S.C.A. § 1746.

[3] Specifically, this second purchase order acknowledgment form states, under what appears to be a "CHANGE" stamp, "INCREASE PRICE TO ADD INSERT & YORKER CAP."

Declaration ¶ 12, Exhibit E. On January 27, 1999, Dermalogix faxed purchase order 00126B to Corwood, ordering 10,000 bottles with the "yorker cap" and 5,000 "blank" bottles, without a reference to price. DSMF ¶ 2; Thaler Declaration ¶ 10, Exhibit C. On January 27, 1999, Corwood sent two purchase order acknowledgment forms to Dermalogix. DSMF ¶ 2; Thaler Declaration ¶ 12, Exhibits F, G. The first referenced purchase order 000126A and was for 5,000 bottles with "no label, no box, no sprayer," at a price of $0.63 per bottle. DSMF ¶ 2; Thaler Declaration ¶ 12, Exhibit F. The second purchase order acknowledgment form referenced purchase order 00126B, and was for 10,000 bottles at $0.75 per bottle. DSMF ¶ 2; Thaler Declaration ¶ 12, Exhibit G.

Each purchase order acknowledgment form sent from Corwood to Dermalogix included, on the back side, the following language:

> 6. No claims, damages or liability, of any kind, whether as to products delivered or for non-delivery of products shall be greater in amount than the purchase price of the products in respect of which such damages are claimed; no charges or expenses incident to any claim will be allowed unless approved in writing by an authorized representative of Seller.

DSMF ¶ 3; Thaler Declaration ¶ 6, Exhibit A; Unsworn Declaration of Todd Holbrook ("Holbrook Declaration") ¶ 4, Exhibits J, K. In response to every order placed by Dermalogix, before Corwood began to work on the products, it sent Dermalogix an acknowledgment form containing the same damage cap provision. DSMF ¶ 4; Thaler Declaration ¶¶ 7-9; Holbrook Declaration ¶ 4 & Exhibits J, K, M-Q. The purchase orders sent from Dermalogix to Corwood contained no language contrary to the damage limitation provision in the Corwood purchase order acknowledgment forms, nor did Dermalogix otherwise raise an objection to the damage

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DSMF ¶ 2; Thaler Declaration ¶ 10, Exhibit E.

limitation provision. DSMF ¶ 5; Thaler Declaration ¶¶ 10-11, 13, Exhibits B, C; Holbrook Declaration ¶ 4, Exhibit L.

Corwood apparently shipped Dermazinc to Dermalogix pursuant to purchase order 00126B. DSMF ¶¶ 7, 9-10; Thaler Declaration ¶ 15. Dermalogix complained about the quality of the Dermazinc it had received. DSMF ¶ 10; Thaler Declaration ¶¶ 15-16. In response to the complaint, Corwood recalled the goods, reworked the product, and reshipped the product to Dermalogix. DSMF ¶ 9, Thaler Declaration ¶ 15. Dermalogix never paid Corwood for the original shipment of Dermazinc, or for the reshipped batch of Dermazinc. DSMF ¶ 9; Thaler Declaration ¶ 15; Deposition of L. Lee Harrington at 65-66 (attached as Exhibit I to the Holbrook Declaration). The shipment of Dermazinc from Corwood to Dermalogix pursuant to Dermalogix purchase order 00126B is the only shipment of Dermazinc about which Dermalogix has complained to Corwood. DSMF ¶¶ 10, 12; Thaler Declaration ¶¶ 10, 16.

II. DISCUSSION

A. Breach of Contract (Count I)

The forms exchanged by the parties do not indicate a choice of law. Since this is a diversity case, the Court must apply the choice-of-law rules of the state in which it sits. *McAllaster v. Bruton*, 655 F. Supp. 1371 (D. Me. 1987) (citing *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)). The Maine Law Court applies the local law of the state which "has the most significant relationship to the transaction and the parties" when a choice-of-law issue arises in a contract dispute. *Baybutt Const. Corp. v. Commercial Union Ins. Co.*, 455 A.2d 914, 918 (Me. 1983) (relying on *Restatement (Second) of Conflict of Laws* § 188 (1971)), overruled on other grounds, *Peerless*

Insurance Co. v. Brennon, 564 A.2d 383 (Me. 1989). The potential state laws to be applied here are Maine and New York.[4] Because both Maine and New York have adopted the applicable portions of the Uniform Commercial Code's article on sales, 11 M.R.S.A. § 2-201 *et seq*. and N.Y. Uniform Commercial Code § 2-201 *et seq*. (McKinney), the Court will bypass the choice-of-law issue.[5] *See Fashion House, Inc. v. K mart Corp.*, 892 F.2d 1076, 1094 (1st Cir. 1989).

Corwood's argument presupposes that it breached the contract for sale of Dermazinc and the undisputed facts support this finding. Thaler Declaration ¶ 15. With respect to contract damages, Corwood does not make a comprehensive argument on the facts of this case. Instead, it relies on the recent First Circuit case of *JOM, Inc. v. Adell Plastics, Inc.*, 193 F.3d 47 (1st Cir. 1999), to provide the Court with all necessary legal analysis. The Court finds that implicit in Corwood's reliance on *JOM* is the assertion that the contract between the parties is controlled by the Uniform Commercial Code ("UCC") § 2-207[6] which authorizes the use of a damages

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[4] Dermalogix is a Maine corporation with its principal place of business in Scarborough, Maine. Corwood is a New York corporation with its principal place of business in Hauppauge, New York.

[5] For the sake of convenience, citations are to the Maine version of the code.

[6] The Maine Uniform Commercial Code § 2-207, discussing the circumstances under which additional terms in acceptance or confirmation become part of the contract, provides:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> (a) The offer expressly limits acceptance to the terms of the offer;

limitation clause, like the one printed on the back of Corwood's purchase order acknowledgment form, in the commercial context. Dermalogix responds by arguing that Article 2 of the UCC does not apply to this case. Alternatively, Dermalogix argues that even if Article 2 does apply, the applicable section is 2-206 rather than 2-207. Finally, Dermalogix argues that even if the Court finds that § 2-207 does apply, the term damage limitation incorporated in the purchase order acknowledgment "materially alters" the parties bargain or "fails of its essential purpose," preventing that provision from becoming part of the contract. The Court will address only Dermalogix's last two arguments because its first two arguments are based on facts not contained in the undisputed record before the Court.

In *JOM*, a case factually analogous to the instant one, the plaintiff purchased chemicals from the defendant for use in the manufacture of casino chips. *JOM*, 193 F.3d. at 49. Each shipment resulted in a purchase order from the plaintiff which "contained no language relating to warranties or remedies in the event of breach" and an invoice from the defendant which contained a damages-limitation clause stating "[n]o claim of any kind . . . shall be greater in amount than the purchase price of the materials in respect of which damages are claimed. " *Id*.

> (b) They materially alter it; or
>
> (c) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
>
> (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Title.

11 M.R.S.A. § 2-207.

The district court granted summary judgment establishing the resin purchase price as the cap on the plaintiff's damages; but prior to trial the Magistrate Judge ruled, based on what was seen as a change in the law, that evidence of damage in excess of the cap was admissible. *Id*. After the jury rendered its verdict for an amount far in excess of the purchase price of the resin, the defendant appealed. In reversing the decision of the Magistrate Judge and reinstating the decision of the District Judge, the Court of Appeals held that "the UCC provisions require that the 'silent' buyer establish that it would have rejected a damages-limitation clause as a 'material alteration,' within the meaning of § 2-207(2)(b)." *Id.* at 58. The *JOM* court remanded the case for a determination of whether the plaintiff could show that the damages limitation clause was a "material alteration."

The operable facts of this case are the same as those in *JOM*. The purchase order sent by Dermalogix was silent as to remedies in the event of a breach. The purchase order acknowledgment form sent from Corwood to Dermalogix included the following language:

> No claims, damages or liability, of any kind, whether as to products delivered or for non-delivery of products shall be greater in amount than the purchase price of the products in respect of which such damages are claimed; no charges or expenses incident to any claim will be allowed unless approved in writing by an authorized representative of Seller.

DSMF ¶ 3; Thaler Declaration ¶ 6, Exhibit A; Holbrook Declaration ¶ 4, Exhibits J, K. The purchase orders sent from Dermalogix to Corwood contained no language contrary to the damage limitation provision in the Corwood purchase order acknowledgment forms, nor did Dermalogix otherwise raise an objection to the damage limitation provision. DSMF ¶ 5; Thaler Declaration ¶¶ 10-11, 13, Exhibits B, C; Holbrook Declaration ¶ 4, Exhibit L. Under these circumstances, the damage limitation clause would be disregarded only if Dermalogix shows that the damage

limitation clause effected a "material alteration" to the contract, 11 M.R.S.A § 2-207(2)(b), "fail[ed] of its essential purpose," 11 M.R.S.A. § 2-719(2), or was "unconscionable," 11 M.R.S.A. § 2-719(3).[7] *See JOM,* 193 F.3d at 59. The undisputed factual record does not raise a trialworthy issue on any of the above avenues to get around the damage provision in Corwood's purchase order acknowledgment.

First, with respect to material alteration, the official comments to the UCC advise that a new term proposed by the seller is a "material alteration" where it would "'result in [unreasonable] surprise or hardship [to the buyer] if incorporated without [the buyer's] express awareness.'" *Id.* (quoting 11 M.R.S.A. § 2-207 cmt. 4). Considerations relevant to the issue of surprise include "the parties' prior course of dealing and the number of written confirmations that

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[7] Section 2-719 provides:

> (1) Subject to the provisions of subsections (2) and (3) of this section and of section 2-718 on liquidation and limitation of damages:
>
> > (a) The agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and
> >
> > (b) Resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.
>
> (2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Title.
>
> (3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

11 M.R.SA. § 2-719.

they exchanged, industry custom and the conspicuousness of the term." *LTV Energy Products v. Northern States Contracting*, 162 B.R. 949, 957 (S.D.N.Y. 1994). The undisputed factual record provides little evidence on the issue of surprise. The record contains no evidence of industry custom or practice. From the sparse facts the court can, however, infer that there was a course of dealing between the parties. In response to every order placed by Dermalogix, Corwood sent Dermalogix a one-page acknowledgment form containing the same damage cap provision printed visibly on the back of the form. DSMF ¶ 4; Thaler Declaration ¶¶ 7-9; Holbrook Declaration ¶ 4 & Exhibits J, K, M-Q. In addition, Corwood sent Dermalogix 5 acknowledgments in forming the contract at issue here, *see* Thaler Declaration D, E, F, G and H, and 2 acknowledgment forms from Dermalogix's previous order, *see* Holbrook Declaration Exhibits J and K, all of which include the same damage limitation clause. Despite the absence of any evidence with respect to what Dermalogix actually knew, it should have been aware of the term's existence through the parties established course of dealing. The Court finds that inclusion of the term created no unreasonable surprise to Dermalogix. Dermalogix has failed to come forward with any evidence or argumentation regarding the issue of economic hardship. As the party bearing the burden of proof on § 2-207(2)(b) materiality at trial, Dermalogix is not entitled to a second chance at this issue before the jury. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Accordingly, the Court concludes that the inclusion of the damage limitation clause did not materially alter the instant contract.

Second, Dermalogix argues that the damage limitation clause "fail[s] of its essential purpose" because Corwood understood the problem its breach created for Dermalogix and the need for prompt remedial action, yet it, apparently, failed to replace the product in the time

requested. Although, under some circumstances, the failure to replace goods as promptly as a purchaser requests or desires could make a limited remedy fail of its essential purpose, that conclusion is not justified on this record. *See e.g., Clark v. International Harvester Co.*, 581 P.2d 784 (Idaho 1978)(seller's inability to repair tractor within reasonable time caused limited remedy to fail of its essential purpose). All that is known from the undisputed facts of this case is that Dermalogix claims the product did not conform and Corwood replaced the product. DSMF ¶¶ 9, 10; Thaler Declaration ¶¶ 15-16. Noticeably absent are facts with respect to whether Corwood knew that there was a urgent need for the product to be replaced, why the product was needed immediately, and how long it took to replace the product. Therefore, Dermalogix has not raised a material issue of fact with respect to Corwood's alleged failure to cure the defect in a reasonable time.[8] The provision in this contract limiting damages to the purchase price does not, standing alone, fail of its essential purpose.

Finally, although Dermalogix did not address this issue in its memorandum, the Court finds that in this case the limitation of damages provision between two commercial entities is not "unconscionable." 11 M.R.S.A. § 2-719(3); *see McNally Wellman Co. v. New York State Elec. & Gas Corp.*, 63 F.3d 1188, 1198 (2d Cir. 1995)(determination of unconscionability is legal question for the court).

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[8] In general, damage provisions which limit the remedy to reimbursement of the purchase price will not fail the § 2-719(2) test because contract damages exceed the purchase price of the goods, because it must be presumed that the purchaser was aware of and considered the risks associated with the damage limitation provision at the time of contract formation. *See Canal Electric Co. v. Westinghouse Electric Corp*., 756 F. Supp. 620 (D. Mass. 1990). Moreover, a remedy does not fail of its essential purpose merely because the terms are "'oppressive at their inception,'" but rather the remedy fails if the agreement were applied to novel circumstances not contemplated by the parties. 1 J. White & R. Summers, *Uniform Commercial Code* § 12-10(a), at 660 (4th ed. 1995) (citation omitted).

Accordingly, Corwood's damage limitation language operates to abridge the contract damages in this case to, at most, the purchase price of the product. Because Dermalogix never paid for the original shipment of Dermazinc or the replacement batch, DSMF ¶ 9; Thaler Declaration ¶ 15; Deposition of L. Lee Harrington at 65-66 (attached as Exhibit I to the Holbrook Declaration), the Court will grant summary judgment for Corwood on the breach of contract damages claim in Count I.

B. Negligence (Count II)

Dermalogix also alleges a negligence claim in its Complaint, arguing that Corwood was negligent in "the manufacture, testing, analysis and quality control of the product it undertook to manufacture for Dermalogix." Complaint ¶ 26. As a general rule, if an express or implied contractual duty is negligently performed, causing only economic loss, only a breach of contract action may be maintained; a tort action for negligence is precluded. The fundamental distinction between tort and contract is described as follows:

> Tort obligations are in general obligations that are imposed by law – apart from and independent of promises made and therefore apart from the manifested intention of the parties – to avoid injury to others. By injury here it is meant simply the interference with the individual's interest or an interest of some other legal entity that is deemed worthy of legal protection. . . . . [By contrast,] contract are created to enforce promises which are manifestations not only of a present intention not to do something, but also of a commitment to the future. They are, therefore, obligations based on the manifested intention of the parties to a bargaining transaction.

W. Keeton, D. Dobbs, R. Keeton, D. Owen, *Prosser and Keeton on The Law of Torts*, 655-56 (5th ed. 1984). The essence of this negligence claim is to recover money under a sales contract for goods that did not conform to the contract. In such instances, the UCC governs the expectations and duties of the buyer and seller. Although a ground of liability in tort may coexist

with a liability in contract where, independent of the contract, there is a duty which has been violated, here there is no duty except that created by the contract. Both Maine and New York, the only relevant states in question, have recognized the economic loss doctrine whereby no tort recovery is available when the only damage is to the property purchased under the contract. *See Oceanside at Pine Point Condominium Owners Ass'n v. Peachtree*, 659 A.2d 267, 270-71 (Me. 1995)(economic loss doctrine precludes tort recovery for defective product's damage to itself); *Burnell v. Morning Star Homes, Inc.*, 114 A.D.2d 657, 494 N.Y.S.2d 488 (N.Y. App. Div. 1985)(dismissal of negligence and strict products liability claims was proper where loss alleged was an economic recoverable only as reasonably foreseeable damages flowing from breach of contract). Hence, Dermalogix does not have a cause of action is for negligence and the Court will grant Corwood's motion for summary judgment on Count II.

C. Fraudulent Misrepresentations (Counts III and IV)[9]

Dermalogix alleges that Corwood made two fraudulent misrepresentations in the course of the parties' dealing. First, Dermalogix asserts that

> [t]he certificates of analysis issued by Corwood with respect to Lot E 827 (Exhibits B & C) misrepresented the composition of the product manufactured, tested, and shipped to Dermalogix by Corwood. The misrepresentations made in Exhibits B & C were made with knowledge of their falsity, or in reckless disregard of their truth or falsity.

Complaint ¶¶ 29, 30. The undisputed record does not include any facts with respect to the representations of the physical composition (i.e. color, odor, specific gravity) of the product like those included on the certificates of analysis. Therefore, the Court will deny Corwood's motion

[9] Despite requesting summary judgment on all claims, Corwood does not address either fraudulent misrepresentation claim in its brief.

for summary judgment on Count III.

In its second fraudulent misrepresentation claim, Dermalogix asserts that "Corwood promised that it would take the remedial action required to salvage the relationships between Dermalogix and its customers, when Corwood promised to supply Dermazinc for distribution to its prospective customers at the convention, it did not have a good faith, actual intention of fulfilling those commitments." Complaint ¶ 34. Corwood asserts that it never agreed to replace the allegedly defective product in time for a trade show. See Defendant's Reply Statement of Material Facts Not in Dispute (Docket No. 14) ¶ 2 citing Thaler Deposition at 27-28, 39-40, 84. None of Corwood's record citations support this statement. Here again, because the record does not include any facts with respect to the representations made in the course of the replacement of the product, the Court will deny Corwood's motion for summary judgment on Count IV.

The Court notes that it sees the question of whether the economic loss doctrine applies to these fraudulent misrepresentation claims as an open one. *See e.g. Arthur D. Little, Inc. v. Dooyang,* 928 F.Supp. 1189, 1205 (D. Mass. 1996)(applying Massachusetts law, the court states that "the economic loss rule does not apply to harm caused by intentional misrepresentations"); *see also* Steven C. Tourek, Thomas H. Boyd & Charles J. Schoenwetter, *Bucking the "Trend": The Uniform Commercial Code, the Economic Loss Doctrine, and Common Law Causes of Action for Fraud and Misrepresentation*, 84 Iowa L.Rev. 875 (1999). The parties do not address the issue in their briefs.

Accordingly, it is **ORDERED** that Corwood's Motion for Partial Summary Judgment be, and it is hereby, **GRANTED** as to the claims for breach of contract damages (Count I) and

negligence (Count II). The motion is **DENIED** as to the claims for fraudulent misrepresentation (Counts III and IV).

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GENE CARTER
District Judge

Dated at Portland, Maine this 14th day of March, 2000.

TRIAL STNDRD
U.S. District Court District of Maine (Portland)
CIVIL DOCKET FOR CASE #: 99-CV-149
DERMALOGIX PARTNERS v. CORWOOD LABORATORIES
Filed: 05/04/99
Assigned to: MAG. JUDGE DAVID M. COHEN
Jury demand:
PlaintiffDemand: $0,000
Nature of Suit: 190
Lead Docket: None
Jurisdiction: Diversity
Dkt# in other court: None
Cause: 28:1332 Diversity-Breach of Contract

DERMALOGIX PARTNERS, INC., DERMALOGIX PARTNERS, INC. plaintiff	CHRISTOPHER C. TAINTOR, ESQ. [COR LD NTC] NORMAN, HANSON & DETROY 415 CONGRESS STREET P. O. BOX 4600 DTS PORTLAND, ME 04112 774-7000
v	
.CORWOOD LABORATORIES, INC. defendant	TODD S. HOLBROOK, ESQ. [COR LD NTC] BERNSTEIN, SHUR, SAWYER, & NELSON 100 MIDDLE STREET P.O. BOX 9729 PORTLAND, ME 04104-5029 207-774-1200

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CORWOOD LABORATORIES, INC. counter-claimant	TODD S. HOLBROOK, ESQ. [COR LD NTC] BERNSTEIN, SHUR, SAWYER, & NELSON 100 MIDDLE STREET P.O. BOX 9729 PORTLAND, ME 04104-5029 207-774-1200
v.	
DERMALOGIX PARTNERS, INC.	CHRISTOPHER C. TAINTOR, ESQ.