

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

EASTMAN CHEMICAL COMPANY,
Plaintiff,

v.

PLASTIPURE, INC. and
CERTICHEM, INC.,
Defendants.

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CIVIL ACTION NO. 12-CV-57-SS

**EASTMAN CHEMICAL COMPANY'S TRIAL BRIEF
REGARDING ADMISSIBILITY OF CUSTOMER
COMMUNICATIONS REGARDING CONFUSION**

Plaintiff Eastman Chemical Company ("Eastman") hereby files the following Trial Brief to address the admissibility of certain third-party customer communications to prove customer confusion in support of Eastman's false advertising claim. Eastman would respectfully show the Court as follows:

I. INTRODUCTION

1. Eastman seeks to introduce key communications, namely various e-mails, received from third party customers and potential customers to prove that such customers were deceived by Defendants' false statements regarding the alleged EA content and safety of Tritan. See attached Plaintiff Exhibit 314, 273, and 50 as examples. As explained below, Courts have repeatedly held that such evidence is expressly covered by the "state of mind exception" to the hearsay rule under Federal Rule of Evidence 803(3) and thus properly admissible. Eastman urges the admission of this important evidence in support of its false advertising claims.

II. ARGUMENT AND AUTHORITIES

2. There is a long line of authority establishing the admissibility of statements from customers - under the hearsay exception for a declarant's "then existing state of mind" - to prove confusion in Lanham Act cases. *See Armco, Inc. v. Armco Burglar Alarm Co., Inc.*, 693 F.2d 1155, 1160 (5th Cir. 1982) ("The testimony about phone calls and conversations was not being offered to show that [Plaintiff] and [Defendant] were the same business, but to show that people thought they were."); *Quantum Fitness Corp. v. Quantum Lifestyle Ctrs. L.L.C.*, 83 F. Supp. 2d 810, 829-30 (S.D. Tex. 1999) (same); *Freddie Fuddruckers, Inc. v. Ridgeline, Inc.*, 589 F. Supp. 72, 76 (N.D. Tex. 1984) ("Hearsay letters and statements of customers are admissible in evidence under Fed. R. Evid. Rule 803(3) where they reveal the then existing state of mind of the writers and speakers and their state of mind is relevant to the case.").

3. Indeed, the majority of circuit courts, including the Fifth Circuit, have rejected the argument that customers' statements expressing confusion constitute inadmissible hearsay. *See Conversive, Inc. v. Conversagent, Inc.*, 433 F. Supp. 2d 1079, 1091 (C.D. Cal. 2006) (noting that the "majority of circuit courts that have considered this issue have . . . found that such evidence is admissible"). *See also Innovation Ventures, LLC v. N. V.E., Inc.*, 694 F.3d 723, 738 (6th Cir. 2012) (discussing weight of phone calls as evidence of actual confusion and rejecting the district court's conclusion that the evidence constituted hearsay because "the phone calls were not relied on to show the content of the conversations, but rather were introduced merely to show that the conversations occurred and the state of mind of the declarants"); *Fun-Damental Too, Ltd. v. Gemmy Industries Corp.*, 111 F.3d 993 1003-04 (2d Cir. 1997) (holding that the district court properly admitted testimony regarding statements from consumers because they were not offered to show the truth of the matter asserted and were offered to show the state of mind of the

declarant); *Armco, Inc. v. Armco Burglar Alarm Co., Inc.*, 693 F.2d 1155, 1160 n.10 (5th Cir.1982) (same); *Citizens Financial Group, Inc. v. Citizens Nat. Bank of Evans City*, 383 F.3d 110, 133 (3d Cir. 2004) (same); *Lyons Partnership, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 804 (4th Cir. 2001) (same).

4. Here, the emails and other statements that Eastman seeks to introduce, like the phone calls in *Armco*, are admissible to show confusion. See *Mary Kay, Inc. v. Weber*, 601 F. Supp. 2d 839, 847 (N.D. Tex. 2009) (“Here, the e-mails are not offered to demonstrate that the customer received the wrong product from touchofpinkcosmetics.com, but to demonstrate confusion. Even if the court views the e-mails as the equivalent of the statement, “I believe Mary Kay and touchofpinkcosmetics.com are the same company,” -- in which case the e-mails would be offered for the truth of the matter asserted -- such a statement is admissible under Federal Rule of Evidence 803(3), the state of mind exception.”); *US Risk of Va., LLC v. Lighthouse Programs LLC*, 2008 U.S. Dist. LEXIS 74189, at *8-9 (N.D. Tex. Sept. 26, 2008) (denying motion to strike emails from confused customers presented in support of Lanham Act claim as not offered for the truth but to show confusion); *Dodart v. Young Again Prods., Inc.*, 2006 U.S. Dist. LEXIS 72122 (D. Utah Sept. 29, 2006) (emails from customers admissible as circumstantial evidence of confusion).

III. CONCLUSION

For the reasons stated above, Eastman respectfully requests that the Court permit the introduction of third party customer communications to Eastman concerning questions about Tritan (and other similar communications) under the state of mind exception to the hearsay rule to support the customer confusion element of Eastman’s false advertising claim.

Respectfully submitted,

FRITZ, BYRNE, HEAD & HARRISON, PLLC
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Austin, Texas 78701
Telephone: (512) 476-2020
Telecopy: (512) 477-5267

By: /s/ Rick Harrison
Rick Harrison
Texas State Bar No. 09120000
Kevin W. Brown
Texas State Bar No. 24045222

**ATTORNEYS FOR PLAINTIFF EASTMAN CHEMICAL
COMPANY**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document has on this the 15th day of July, 2013, been forwarded to the undersigned counsel of record via electronic filing and email.

George Butts
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Westech 2, Suite 2120
Austin, TX 78759

and

Rob Hargrove
Hays & Owens
807 Brazos Street, Suite 500
Austin, Texas 78701
Attorneys for Defendant PlastiPure, Inc.

Stephen McConnico
Scott, Douglass & McConnico
600 Congress, Suite 1500
Austin, Texas 78701
Attorney for Defendant CertiChem

/s/ Rick Harrison
Rick Harrison/Kevin W. Brown

From: Griffin, Alice W
Sent: Friday, October 15, 2010 5:18 PM
To: Colhoun, Fred; Smith, Kieran J.
Cc: Volk, Vince
Subject: FW: [I] Estrogen in Tritan
Attachments: PlastiPure-EA-Free-brochure.pdf

Fred, FYI. Vince we are working on a response to this and I think Fred is your best source. Thanks.

From: Volk, Vince
Sent: Friday, October 15, 2010 6:15 PM
To: Griffin, Alice W; Reed, Darrell L; Allen, Dawn S.
Subject: FW: [I] Estrogen in Tritan

FYI

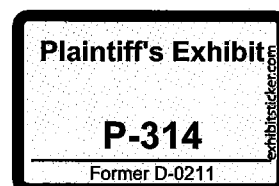
From: Marvin Lane [<mailto:marvin.lane@thermos.com>]
Sent: Friday, October 15, 2010 4:08 PM
To: Smith, Vasilios; Volk, Vince
Subject: [I] Estrogen in Tritan

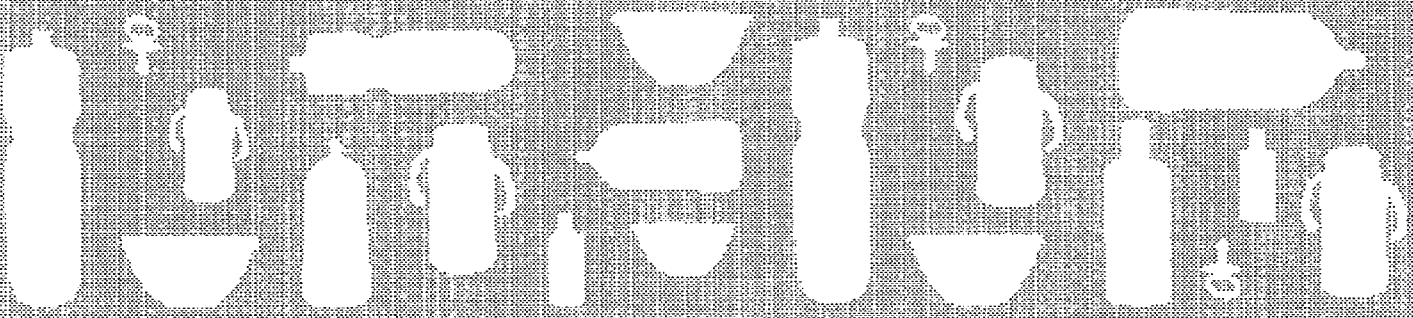
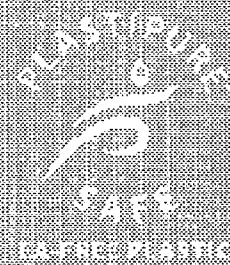
Hey Guys

Hope all is well. Do you have anything to rebut this from Plastipure?

Best regards

Marvin Lane
R&D Manager
Thermos LLC





EA-Free Plastic Products: Beyond BPA-Free

The New Safety Standard in Packaging: Plastipure's Safe EA-Free

Consumers have begun to learn about the potential health and environmental hazards associated with synthetic chemicals having Estrogenic Activity (EA) used in many plastic products. Many well-publicized reports have shown that BPA, phthalates, and parabens have easily detectable levels of EA.

But few consumers understand yet that these widely publicized chemicals are only a few of the hundreds of chemicals associated with having EA. At least several hundred of these chemicals are used in various combinations in manufacturing plastic. Many more chemicals having EA are commonly used in materials and components such as silicones, latex, elastomers, colorants, inks, additives, and processing aids. When products are made from or processed using these materials, they frequently leach chemicals having EA into food, water, beverages, infant care products, and other consumer goods, and are continuously ingested or inhaled. When these products are thrown away, they leach these same chemicals into our water supplies and soil, impacting wildlife and our environment.

The current publicity-driven approach to removing chemicals with EA one at a time, as with BPA, has produced a false sense of security for consumers and retailers, surrounding plastic with certain recycling numbers or safety advisories as BPA-free items, not address the underlying health issues. Most "BPA-free" products on the market leach other chemicals having EA. Leaching can greatly increase when the products are subjected to common-use stresses like sunlight, dishwashing, or microwaving. BPA-free replacement products often leach chemicals whose total EA is equal to or greater than the original BPA-containing polycarbonate-based product.



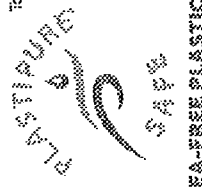
In a recent market survey, Plastipure tested samples of 15 premium-brand BPA-free baby bottles. The results were disturbing: all 15 baby bottles showed easily detectable EA. In almost all cases, both the bottle and nipple leached chemicals having EA, and in more than half, EA levels were equal to or greater than polycarbonate bottles with BPA. Consumers should be aware that BPA-free certainly does not mean EA-free.

In testing thousands of plastic products, Plastipure has found a surprising number – 92 percent – leached chemicals having significant levels of EA. A systematic program for EA detection, remediation, and certification is needed to ensure that consumers are provided with products certified to be EA-free by accurate, sensitive, and verifiable tests.

Long before the widespread lawsuits well publicized, Plastipure worked with its partners to develop techniques to prevent, detect, measure and eliminate the use of chemicals having EA. Supported by more than 10 grants from the National Institutes of Health and the National Science Foundation and collaborating with internationally known polymer scientists, chemists, biologists, and toxicologists, Plastipure and its key partners have spent the past decade developing physics-chemical models, robotized bioassays, and production methods.

Today, Plastipure uses its unique, innovative, and patented technologies to help its partners make safer products that do not release chemicals having detectable EA. Plastipure knows consumers trust these products, meet its highest standards by choosing the Plastipure Safe EA-Free level of consumer product and packaging.

Plastipure works with companies in multiple industries including infant feeding, beverage, personal care, medical supplies and devices, and food packaging. Our current partners with commercial products available in 2013 and early 2014 include Afta, Water Geeks, ReliaDose, Hydrapak, ReliaBreed, ReliaBrew, and TOPAS Advanced Polymers.



OXFORD Watermaker

ReliaDose

ReliaBrew

ReliaBreed

Water Geeks

Hydrapak

The Industry-Standard Solution: Manufacturing with Plastipure's EA-Free Products

Plastipure uses its patented methods to work with customers throughout the process of product design, manufacturing, and delivery to ensure that a safety, non-toxic product arrives to the EA-free with minimal EA-free throughout its life cycle. Because the final product contains many chemicals added during many production steps, EA-free materials and protocols are implemented at each stage of the manufacturing process. These EA-free materials and protocols typically add little to the cost of the final product.

Plastipure uses its patented molecular models, more than 10 years of testing experience, and its comprehensive database to quickly formulate new materials or remediate existing materials.

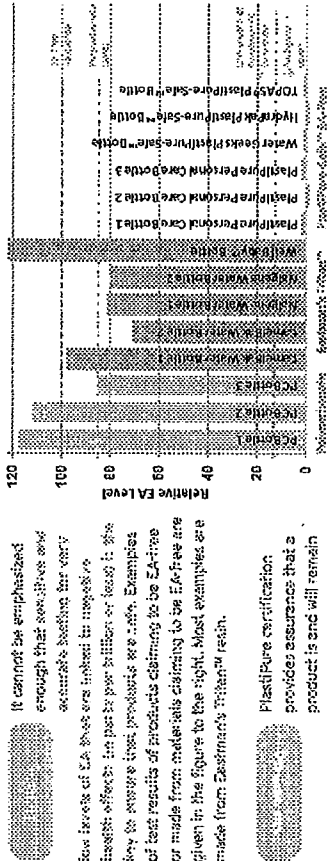
Plastipure uses its QSAR predictive models and database of hundreds of monomers, polymers, and additives to source or specify base-resins, colorants, and additives to manufacture EA-free products.

Plastipure collaborates with compounds to develop specialty materials and additive concentrates when off-the-shelf materials are insufficient and to improve productivity, part yield, and reliability.

Plastipure works with molten, extruders, and injectors to adapt procedures to avoid introducing chemicals with EA in clean-out and processing.

Plastipure focuses on decreasing methods and materials, screen printing, in-mold decorating, offset, hot-top, and bar printing to achieve a final product that is verifiably EA-free.

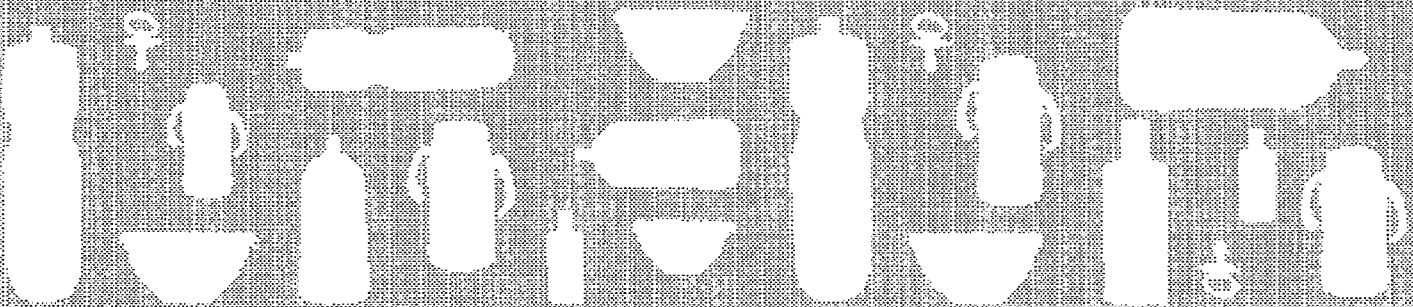
As part of its EA-Free certification process, Plastipure implements a comprehensive test program during product development cycles, pilot manufacturing, and scale-up. Once a product is released, Plastipure and the customer implement a sampling and test procedure for ongoing quality assurance to maintain Plastipure-Safe EA-Free certification.



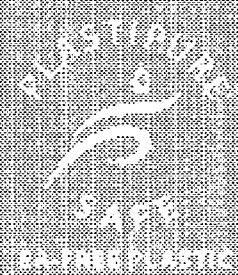
It cannot be emphasized enough that these and other factors of EA levels are inherent in materials health effects. In parts per billion or less, it is key to aware that products are EA-free. Examples of test results of products claiming to be EA-free or made from materials claiming to be EA-free are given in the figure to the right. Most examples are made from Eastman's Tritan® resin.

Plastipure certification provides assurance that a product is and will remain EA-Free throughout its lifetime. Our customers and partners get the benefit of competitive material and product data, up-to-date knowledge of testing practices, and state-of-the-art processing methods.





Plastipure, Inc.
11212 Madril Blvd Ste 600
Austin, Texas 78758
512.677.4300
www.plastipure.com



From: Smith, Vasilios <vasili@eastman.com>
Sent: Monday, October 18, 2010 7:06 PM
To: Marvin Lane <marvin.lane@thermos.com>
Subject: RE: [I] RE: is there Estrogen in Tritan??

Thanks Marvin.
I'm not working -- I'm shopping on line for a DSLR (Nikon)

From: marvin.lane [mailto:marvin.lane@thermos.com]
Sent: Monday, October 18, 2010 6:58 PM
To: Smith, Vasilios
Cc: Volk, Vince
Subject: [I] RE: is there Estrogen in Tritan??

Thanks Vasilios

First I want to say that we at Thermos have the upmost confidence in Tritan being a safe substance and that all of the testing and research that goes into it is accurate and reliable. I am just basically looking for as much info as I can get so that when someone brings this type of information to us, we have a qualified answer. I will pass this information and the "non comments" to the interested parties. I will let you know if any further discussion is required.

Best regards

Marvin Lane
R&D Manager

From: Smith, Vasilios [mailto:vasili@eastman.com]
Sent: Monday, October 18, 2010 4:48 PM
To: Marvin Lane
Cc: Volk, Vince; Smith, Vasilios
Subject: is there Estrogen in Tritan??

Hi Marvin.

We are very confident about the third party testing that has been conducted on Tritan from three different parties:

1. Dr. William Welsh, professor, Department of Pharmacology, University of Medicine and Dentistry of New Jersey-Robert Wood Johnson Medical School, Piscataway, N.J.
2. The Center for Environmental Biotechnology, University of Tennessee, Knoxville, Tenn., and
3. WIL Research Laboratories, LLC, Ashland, Ohio.

Eastman made a press release on BPA & EA on May 13, 2010 and the full content of the press release can be found on the Tritan Website

http://www.eastman.com/Company/News_Center/2010/Pages/New_Third_Party_Test_Results_Confirm_EASTMAN_TRITAN_Copolyester_Is_Free_of_Bisphenol_A_and_Estrogenic_Activity.aspx

We will not be commenting on testing or claims by anyone outside of Eastman at this time.

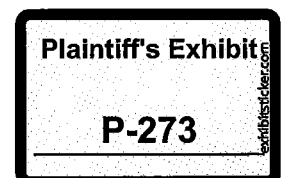
If you or anyone at Thermos would like to have further discussions about this with our management team, please let me know. We can arrange a time for this to happen.

Vasili

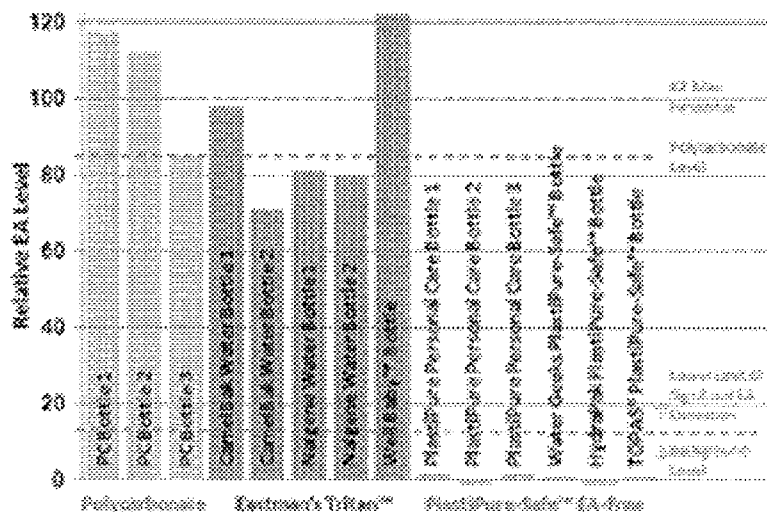
From: Marvin Lane [mailto:marvin.lane@thermos.com]
Sent: Monday, October 18, 2010 4:09 PM
To: Smith, Vasilios; Volk, Vince
Subject: RE: [I] Estrogen in Tritan

Hey Guys

I suppose what I am looking for is something saying "those guys are lying". Are their clams regarding Tritan True or False?



THERM0531



Products exposed to accelerated stress of UV and ammonia to simulate sunlight and disinfecting. In this graph, a level of 100 is the maximum response of Phenol based dimerized hPLD cells to the estrogen 17β-estradiol (known as E2). The polycarbonate bottles (subtracted) which is why they get put in table.

Best regards

Marvin Lane
R&D Manager

From: Smith, Vasilios [mailto:vasili@eastman.com]
Sent: Monday, October 18, 2010 9:46 AM
To: Marvin Lane; Volk, Vince
Subject: RE: [I] Estrogen in Tritan

I sent you a publication

From: Marvin Lane [mailto:marvin.lane@thermos.com]
Sent: Friday, October 15, 2010 4:08 PM
To: Smith, Vasilios; Volk, Vince
Subject: [I] Estrogen in Tritan

Hey Guys

Hope all is well. Do you have anything to rebut this from PlastiPure?

Best regards

Marvin Lane
R&D Manager
Thermos LLC

From: Killian, Chris
Sent: Thursday, November 04, 2010 5:41 PM
To: Perben, Cedric; Garcia, Ignacio; Porter, David; Seppa, Inari
Cc: Pecorini, Tom; Bertolino, Sergio; Bouvignies, Valerie; O'Brien, Emmett; Witthuhn, Thomas; Moore, Dominic
Subject: RE: VERY IMPORTANT: PLASTIPURE campaign claiming TRITAN have high EA activities

We are aware of this and are beginning to take action as a company. Thank you Cedric for making sure KPT was aware of the claims being made by Plastipure.

It would be best to ask questions or discuss this issue by phone or in person if anyone would like to follow-up.

Chris

From: Perben, Cedric
Sent: Thursday, November 04, 2010 9:17 AM
To: Garcia, Ignacio; Porter, David; Killian, Chris; Seppa, Inari
Cc: Pecorini, Tom; Bertolino, Sergio; Bouvignies, Valerie; O'Brien, Emmett; Perben, Cedric; Witthuhn, Thomas; Moore, Dominic
Subject: VERY IMPORTANT: PLASTIPURE campaign claiming TRITAN have high EA activities
Importance: High

Chris, Ignacio, Dave

I have received today below unbelievable attached information from one of our distributor Resinex that claiming that tritan for infant care and water sport bottle have high EA activities.

Information have been largely diffuse in K-show

Here in attachment a brochure telling that how TRITAN is dangerous

Are you aware about this campaign?

Chris, I am sure that some actions have been already taken to kill this rumor.

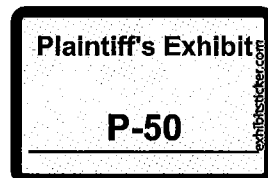
Please keep us informed and providing us some guideline how to respond.

This is hurting our reputation on the market and may impact some project like bulks water.

Cedric

From: Gustavo Marín [<mailto:gustavo.marin@resinex.es>]
Sent: Thursday, November 04, 2010 1:05 PM
To: Witthuhn, Thomas
Cc: Bouvignies, Valerie; Perben, Cedric
Subject: [I] RE: Plastipure

Sorry, I forget the document...



Gustavo Marin
Resinex Spain
Specialities Manager
TEL 659 45 90 97 / 977 84 04 21 (ext 120)
FAX 977 84 28 58

De: Gustavo Marín
Enviado el: jueves, 04 de noviembre de 2010 12:21
Para: Witthuhn, Thomas
CC: 'Bouvignies, Valerie'; 'Perben, Cedric'
Asunto: Plastipure

Dear all,

This people was at the K show saying that Tritan is not apropiate for diswasher and baby bottles and even Tritan is worst than PC regarding estrogen activities in human boby.

Have you heard about this company? www.plastipure.com

Are they crazy/mad? What is the link between Plastipure and Topaz?

Just to know if you are aware... possible you are already in court against them...

Thanks and regards

Gustavo Marin
Resinex Spain
Specialities Manager
TEL 659 45 90 97 / 977 84 04 21 (ext 120)
FAX 977 84 28 58