IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE SCOTTS COMPANY LLC,

Plaintiff,

v.

LIBERTY MUTUAL INSURANCE COMPANY,

Defendant.

Case No. 2:06 CV 899

Judge: Graham

Magistrate: King

PLAINTIFF THE SCOTTS COMPANY LLC'S SUPPLEMENTAL BRIEF IN OPPOSITION TO SUMMARY JUDGMENT PER COURT'S ORDER

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SUMMARY OF EVIDENCE AND ATTACHMENTS SUPPORTING ELEMENTS OF FRAUD

Pursuant to the Court's order, Scotts has identified the evidence supporting each element of fraud for the false and misleading statements identified in Exhibit A of Scotts' Feb. 8, 2008 Memorandum Contra Liberty Mutual's Motion for Summary Judgment (Doc. No. 199). Some of the false and misleading statements contain the same or similar representations. Accordingly, in an effort to minimize unnecessary duplication for the Court and present the evidence as concisely as practicable, Scotts has categorized the false and misleading statements into 13 categories. For each category, Scotts has separately identified the evidence by element. The evidence for each element of each false and misleading statement from Exhibit A is set forth in Tabs 1 through 13. This memo simply provides an overview of the evidence described under Tabs 1 through 13.

As set forth under Tabs 1 through 13, the categories of false and misleading statements identified on Exhibit A demonstrate that Liberty Mutual:

1) lied or misled Scotts about whether it had found any secondary evidence of policies;

2) lied or misled Scotts about the nature of the search to convince Scotts that it had looked everywhere for any policy information;

3) lied or misled Scotts about the meaning of the "P" code embodied in the claim numbers, which, as it turns out, established that the claims were made under general liability policies issued to Scotts;

4) lied or misled Scotts about whether it could reconstruct the terms and conditions of policies using specimen policies available to Liberty Mutual;

5) lied or misled Scotts about the evidence contained within the codes that made up the policy numbers provided to Liberty Mutual;

6) lied or misled Scotts about the determinations it had made internally regarding the insurance policies that had been issued to Scotts;

7) lied or misled Scotts about the meaning and significance of the limited material it had produced to DRM;

8) lied or misled Scotts about whether contacting former Liberty Mutual personnel was permissible;

9) lied or misled Scotts about the recollection of former Liberty Mutual personnel who recalled providing insurance to Scotts;

10) lied or misled Scotts about the accuracy and completeness of the Umbrella Excess Liability policy as evidence of coverage;

11) lied or misled Scotts about the terms of the policies and defenses in its December 19, 1999 letter to Scotts denying coverage;

12) lied or misled Scotts about policies and coverage even after the settlement; and

13) lied or misled Scotts about whether the claim numbers attached to the Umbrella Excess Liability policy were Liberty Mutual claim numbers (although, as previously noted in correspondence and oral argument, that claim is directed primarily to Scotts' bad faith claim, not its fraud claim).

As the evidence set forth under each tab demonstrates, Liberty Mutual sat across the table from Scotts and lied to Scotts at the last meeting held before Scotts decided to settle. At that May 25, 2000 meeting, Liberty Mutual told Scotts, among other things, that Liberty Mutual's own search for policies and secondary evidence of policies had come up empty and that because there was insufficient evidence of primary policies, Liberty Mutual would not provide coverage for Scotts' environmental claims. *See* Ex. A to Scotts' Memorandum Contra Summary Judgment at ¶¶ 24, 25, 28 (May 2, 2008 Oral Argument "O.A." Tab 14; Doc. No. 199). That was all false. In fact, just two weeks earlier, Liberty Mutual held a high level internal meeting with Mr. Merchant, Mr. Schlemmer, Mr. Kostecki, and Ms. Yahia. *See* Kostecki Depo. at 83:18–84:4 (O.A. Tab 87; Doc. No. 183). At that meeting, Liberty Mutual personnel agreed that Liberty Mutual had insured Scotts, that Liberty Mutual had provided general liability insurance to Scotts, and that the policies covered certain years. *See id*.; *see also id*. at 42:8–24, 66:8–12, 84:22–85:22 (Doc. No. 183). Mr. Kostecki testified that he went into the May 25 meeting with Scotts with an *understanding of the limits of the general liability policies as well*. *See id*. at

71:19–72:2. Liberty Mutual claims privilege over how many years of coverage they determined internally, *see* Yahia Depo. at 108:2–110:22 (O.A. Tab 96; Doc. No. 192–93), but the evidence establishes that their internal determinations go back to at least 1962, *see* Liberty Mutual database screen prints, LMIC 002693 (O.A. Tab 32; Feb. 8, 2008 Barnhart Decl. Ex. A-39 (Doc. No. 200)) (reflecting Mr. Merchant's contemporaneous remarks regarding the events), and their internal spreadsheets show coverage going as far back as 1957, *see* Liberty Mutual spreadsheets, LMIC 001508–09, 001913 (Oral Arg. Tab 36; Feb. 8, 2008 Barnhart Decl. Ex. A-29 (Doc. No. 200)) (identifying the "Date of First Coverage" for Scotts as October 1, 1957, and recording a "Begin Date" and "End Date" for over ten years of coverage issued to Scotts). Mr. Kostecki could not recall the specific years agreed upon, but testified that the loss runs could supply the dates. *See* Kostecki Depo. at 41:12-42: 7 (loss runs can suggest dates determined); 73:2-75:6 (need to consult documentation). The loss runs and other internal documentation show coverage for Scotts during the 50's and 60's. *See* Aug. 2006 loss run at LIBOM00001 (O.A. Tab 31; Feb. 8, 2008 Barnhart Decl. Ex. A-32 (Doc. No. 200)); LMIC 9612–9614 (O.A. Tab 33; Jan. 15, 2008 Barnhart Decl. Ex. B-31 (Doc. No. 171)); LMIC 1508–09, 1913 (O.A. Tab 36; Feb. 8, 2008 Barnhart Decl. Ex. A-29 (Doc. No. 200); LYBTY-02249–52 (O.A. Tab 43; Feb. 8, 2008 Barnhart Decl. Ex. A-14 (Doc. No. 200)). After reaching those internal determinations, Liberty Mutual then sat down and misled to Scotts at its final meeting.

At the hearing on Liberty Mutual's motion for summary judgment, Liberty Mutual argued that Liberty Mutual "conceded" two excess and two general liability policies in the late 1960's. *See* O.A. Tr. at 95:7–96:7. In support of that contention, Liberty Mutual cited an entry in Diane Archangeli's call log. *See* Archangeli call log, DRM 3614 (Feb. 29, 2008 McLaughlin Decl. Ex. B (Doc. No. 206)). That argument, however, demonstrates the true extent of the

material disputed issues of fact in this case. That log refers to a discussion *after* the May 25 meeting. No one "conceded" two years of policies during Liberty Mutual's last key meeting with Scotts personnel on May 25. No one from Scotts was on the telephone call that Liberty Mutual's counsel referenced.

Ms. Armstrong denied that Liberty Mutual recognized the two primary and two excess policies:

> Q. Wasn't it the case that as of the time of the settlement, Liberty had recognized the two primary and two excess policies that had been issued—
> A. No.
> Q. —in the late 1960s?
> A. No.
> Q. So do you know what it is that Diane Archangeli was talking about and wrote down on her call log?
> . . .
> A. No.
> Q. No idea. She never told you that Liberty had, in fact, recognized two primary and two excess policies in the late 1960s?
> A. No.

See Armstrong Depo. at 865:23–866:15 (O.A. Tab 80; Doc. No. 174–75).

Moreover, Ms. Archangeli testified that Liberty Mutual "never" acknowledged proof of policies issued to Scotts:

> Q. Didn't Liberty in the course of—didn't Liberty in the course of settlement negotiations concede coverage for a period of years?
> A. Never. Never. Even when we gave them our policy, the excess policy, they still said that we didn't have proof of the policy because they said it was only a partial policy.

Butler Depo. at 344:19–345:3 (O.A. Tab 83; Doc. No. 178–79) (emphasis added).

Regarding the argument that Liberty Mutual "conceded" two years of coverage, Ms. Archangeli explained that, although she used that term, Liberty Mutual never acknowledged that Liberty Mutual actually wrote policies to Scotts:

Q. On the second page, towards I guess two-thirds of the way down the page on the left, there's a bracket and it says LM. LM stands for Liberty Mutual; right?
A. Yes.
Q. And it says LM, "Liberty Mutual conceded two years." Isn't that what it says?
A. Right. I don't think they—
Q. And then—I'm sorry.
A. I think in my mind they conceded. I don't think anywhere did anyone ever say we wrote the policies.

Id. at 346:7–21 (emphasis added).

Even Ms. Yahia's own testimony is inconsistent with Liberty Mutual's current position. Far from conceding coverage, Ms. Yahia claimed that she could not agree that general liability policies had, in fact, been issued:

Q. So as you sit here today, you can't tell us that Scotts was an insured of Liberty Mutual under any general liability policy for any given year?
A. I can tell you Scotts may have been an insured for various years under general liability policies, and I think that this excess form is certainly evidence that there may have been this type of excess coverage, but this is a very thin form, which does not necessarily represent a full policy.

Yahia Depo. at 97:14–23 (O.A. Tab 96; Doc. No. 192–93). She continued:

Q. Are you willing to agree that Scotts was, in fact—not may have, but was, in fact—an insured of Liberty Mutual under a general liability policy?
. . .
A. I think—and this is why I think our discussions with Scotts is relevant. I think, as we discussed with them, it was likely that there were certain years of coverage, and that was the basis for our whole settlement with Scotts.
Q. I'm not asking about your discussions again, Miss Yahia. I'm asking about your determinations. My question is—if you could answer this question and not discussions with Scotts. My question is, did you—are you willing to state that Scotts did—was an insured of Liberty Mutual under general liability policies in the '50s and '60s—
. . .
Q. —or is your testimony at most that they may have been?

A. They may have been an insured under various years, and I would say the likelihood whether they were an insured is determined by what information you're looking at for each year, which is different for each year.
Q. And that's the most you can say?
A. I think that's the most anyone can say without seeing an actual policy.

Id. at 99:18–100:23.

Moreover, Liberty Mutual's argument ignores one critical fact that is central to this case. The *number* of years of coverage, the *type* of coverage, and the *terms* of coverage were also critical issues for Scotts. One key question was, "When did Scotts first become an insured, under what types of coverage, and under what terms?" Liberty Mutual knew that Scotts had far more than "two years" of coverage, as it now tries to claim it "conceded." Liberty Mutual's own internal records show that it knew the first date of coverage went back to at least 1962 and most likely back to 1957. In fact, the evidence available to Liberty Mutual at the time of the parties' negotiations in 1998 to 2000 showed that Scotts had *ten years* of general liability coverage and *three years* of excess liability coverage in addition to numerous other lines of coverage dating back to the 50's and 60's, all of which Liberty Mutual knew or should have known based on its own internal codes. Even under the "best case" defense for Liberty Mutual, Liberty Mutual at most acknowledged only "two" years of policies. Even if true, that version of events would only further support fraud, since Liberty Mutual misled Scotts as to the other eight years of general liability coverage, another year of excess liability coverage, and multiple other lines of coverage that would have told Scotts that the secondary evidence of policies was completely different than what it had been told.

Scotts relied on Liberty Mutual's representations regarding what they had, what it meant, and where they looked. As Joyce Armstrong testified:

Scotts tried to determine any prior insurance coverage, assess the scope of that coverage, analyze the quantity and strength of any evidence regarding such coverage, and solicit Liberty Mutual's assessment of the insurance coverage and evidence regarding such insurance coverage because that information was very important to Scotts. Scotts sought such information because its decisions regarding what to demand, what to agree upon, and, if necessary, whether to litigate the issue of insurance coverage with Liberty Mutual was based on Liberty Mutual's representations regarding such matters.

At two meetings with Liberty Mutual in March 1999 and May 2000, in correspondence produced in this litigation, and in discussions with Diane Archangeli that were communicated to me, Liberty Mutual made multiple representations regarding the nature and scope of the searches that Liberty Mutual had undertaken, the fact that Liberty Mutual had not located any policies or secondary evidence of policies from the 50s and 60s, the fact that the documents and information supplied by Scotts did not provide sufficient evidence of insurance coverage, and the fact that Liberty Mutual could not determine Scotts' insurance coverage for the 50s and 60s.

Scotts relied on Liberty Mutual's representations and omissions regarding those important matters in deciding to enter into the July 2000 settlement agreement. Scotts wanted to determine, among other things, whether it could prove the insurance coverage that Liberty Mutual had provided to Scotts and, if so, for what years and what types of policies. To my knowledge, before Scotts entered into the July 2000 settlement agreement, Liberty Mutual never produced or disclosed to me or any employee of Scotts to my knowledge any documents, policy information, or secondary evidence of coverage relating to insurance coverage provided to Scotts by Liberty Mutual in the 1950s or 1960s.

Had Scotts known the truth about Liberty Mutual's representations regarding Scotts' insurance coverage for the 1950s and 1960s and had Liberty Mutual provided to Scotts the information withheld from Scotts regarding Scotts' insurance coverage, Scotts would not have entered into the July 2000 settlement agreement on the terms that Scotts agreed to, would not have agreed to a total buy-out of all insurance policies on the terms agreed to, and would not have agreed to discount its settlement demands for "lost policies" on the same terms that Scotts agreed to discount its settlement.

Feb. 7, 2008 Armstrong Aff. at ¶ 3–6 (O.A. Tab 23; Feb. 8, 2008 Barnhart Decl. Ex. A-26 (Doc. No. 200)) (emphasis added). Similarly, Ms. Archangeli testified that she "absolutely" would have recommended a higher settlement if Liberty Mutual had stated that it found evidence and had confirmed that Scotts had general liability insurance. Butler Depo. at 491:19–492:7; 493:11–18 (O.A. Tab 83; Doc. No. 178–79).

Liberty Mutual's representations regarding the search done, the existence of secondary evidence of policies, the quantity of secondary evidence available, and the meaning of secondary evidence (the codes, the years of policies, the type of policies issued) were all critical to Scotts because Scotts was trying to assess the strength of the lost policy defense that Liberty Mutual advanced and the likelihood of prevailing should it decide to pursue litigation. Thus, the existence, quantity, and meaning of the evidence available to Liberty Mutual were all critical. *See, e.g., id*. at 493:3–9 ("We were unable to prove everything we thought we needed to prove in order to shift the burden to Liberty Mutual to disprove coverage, so we were . . . targeting [settlement] based on what we had at the time, which was only some secondary evidence of the early policies.").

Among other things, four critical pieces of information were (1) what years were policies issued; (2) what type of policies were issued; (3) what were the terms of those policies; and (4) what was the overall quantity and strength of the total package of evidence demonstrating that Liberty Mutual had insured Scotts in the 50's and 60's under any policies. That is why Scotts repeatedly sought "all" information in that regard by way of multiple letters directed to Liberty Mutual. *See, e.g.*, Aug. 14, 1998 Armstrong letter, LYBTY-03137 (O.A. Tab 1; Jan. 15, 2008 Francisco Decl. Ex. J (Doc. No. 167)) (asking Liberty Mutual to "[p]lease review your claim files, underwriting files, reinsurance files and any other records which may provide evidence of

policies" issued by Liberty Mutual to Scotts and "provide us with copies of any information that you locate"); Dec. 28, 1998 Armstrong letter, LMIC 005474–76 (O.A. Tab 3; Jan. 15, 2008 Francisco Decl. Ex. M (Doc. No. 167)) (asking Liberty Mutual to "*please furnish certified copies of all policies as well as certified copies of any other potentially responsive property, general liability, umbrella, excess, auto, business and package policies*" and to "*[p]lease also provide copies of secondary evidence and reinsurance information related to any incomplete or missing policies*") (emphasis in original).

Ironically, Liberty Mutual's entire defense in this action is internally contradictory. On the one hand, Liberty Mutual tries to argue that Scotts and DRM had ample evidence to determine that Scotts had coverage and the types of coverage that had been issued. On the other hand, Liberty Mutual repeatedly contradicts that very argument by disputing that the secondary evidence had any meaning or significance—*even to this day*. For example, at oral argument, Liberty Mutual's counsel argued that the lone loss run provided to DRM, which only identifies just three years of policies (from 1965–1967), was obviously a loss run for General Liability policies because it had "GL" on face of the document. See O.A. Tr. at 85:16–17 (O.A. Tab 90) ("Everybody knows what GL stands for."). Yet, Liberty Mutual has repeatedly *contradicted* that very argument in this litigation. Liberty Mutual itself argued that *no one* could possibly determine the type of insurance issued from the face of the document. Scotts asked Liberty Mutual to "admit that the 1999 Loss Run reflects payments to Scotts under policies issued by Liberty Mutual effective October 1, 1965." Scotts' First Request for Admission at 4 (served on Dec. 8, 2006). In response, Liberty Mutual stated that it "admits that the 1999 Loss Run shows payments made to Scotts pursuant to a policy, *the type of which is indeterminable on the face of the 1999 Loss Run*, listed as having an effective date of October 1, 1965." Liberty Mutual's

Responses to Scotts' First Requests for Admission at 4 (O.A. Tab 76; filed under seal as Aug. 6, 2007 Butler Decl. Ex. A-30 (Doc. No. 120)). Similarly, Scotts asked one of Liberty Mutual's own executives that worked on the Scotts matter what the "GL" meant on the loss run at issue. His response: "Definitively, I don't remember." Schlemmer Depo. at 103:1–3 (O.A. Tab 94; Doc. No. 190). The same is true for many other pieces of evidence as well. Liberty Mutual tries to claim that Scotts should have figured out what everything meant, even though Liberty Mutual lied to Scotts about what it meant or concealed its true meaning from Scotts. Simply stated, Liberty Mutual argues that the existence, meaning, and significance of the secondary evidence was obvious to everyone, except Liberty Mutual. That is untenable.

Liberty Mutual also tries to escape liability for these fraudulent statements and omissions by arguing that it gave some limited documents to DRM. But that argument suffers from five flaws. ***First***, the vast bulk of the critical evidence that Scotts has identified in support of its fraud claims was *concealed from both Scotts and DRM*. The 50's loss run, the policy codes, the internal manual, the specimen policies, the auto loss runs, the MF policy loss runs, the date of first coverage, the meaning of the "P" code, and voluminous other evidence identified under Tabs 1 through 13 below was concealed from both Scotts and DRM. The fraud ensnared both.

Second, Liberty Mutual's argument ignores the fact that, under Scotts' allegations and supporting evidence, Liberty Mutual *lied to Scotts directly*. The question is what did Scotts know. When Scotts signed the settlement agreement, it had nothing from Liberty Mutual. Scotts directed follow-up inquiries to both Liberty Mutual and DRM and was told that no secondary evidence had been found or nothing "useful" had been found. Scotts had every right to rely on those representations.

Third, the information provided to DRM was extremely limited. DRM produced documents that, according to Liberty Mutual itself, did not contain "anything useful." Armstrong Depo. at 853:6–9 (O.A. Tab 80; Doc. No. 174–75). Liberty Mutual makes much of the fact that it produced a single loss run to DRM, but that loss run, at most, only contained *three* years of information—from 1965–1968. Yet, Liberty Mutual knew that Scotts had purchased *ten years* of insurance dating back to 1957, knew that the policies included general liability policies, knew that Scotts had purchased three years of excess liability insurance, and knew that Scotts had purchased many other lines of insurance in the 50's and 60's from Liberty Mutual. Try as it may, Liberty Mutual cannot use a partial and highly misleading "disclosure" about 1965 to cure fraudulent conduct with regard to critical information dating back to 1957.

Fourth, the contract between DRM and Scotts expressly provides that "DRL [i.e., the entity known as DRM] shall act as an independent contractor/consultant, and its agents and employees shall not be considered Scotts' agents and/or employees." *See* Contract between DRM and Scotts, IN-ITT000522 (O.A. Tab 63; Jan. 15, 2008 Francisco Decl. Ex. F (Doc. No 167)); *see also id*. at OMS 0419-0425 (DRM "shall have no authority to enter into any agreement or incur any obligation or liability on behalf of the [Scotts] Company or to make any representation, warranty, or commitment binding upon the [Scotts] Company," and that Scotts "shall have the sole and exclusive right and option, to be exercised at its discretion, to accept or reject any and all offers of settlement.").

Moreover, Both Ms. Archangeli and Ms. Armstrong testified that DRM was not Scotts' agent. *See, e.g.*, Butler Depo. at 499:16–20 (O.A. Tab 83; Doc. No. 178–79) ("We explicitly make it clear that we *don't act as their agent* in any way and we promote them having the role of outside counsel review any settlement papers and become active in any settlement discussions.");

Armstrong Depo. at 601:10-14, 666:9-20 (O.A. Tab 80; Doc. No. 174-175).[1] Indeed, Liberty Mutual confirmed in writing Scotts' specific instruction that Liberty Mutual send everything *directly to Scotts* with a copy to DRM. *See* Jan. 28, 1999 Merchant letter, LMIC 003370 (O.A. Tab 64; Feb. 8, 2008 Barnhart Decl. Ex. A-7 (Doc. No. 200)) (acknowledging to Ms. Armstrong that "you requested that any future correspondence be directed to your attention and a copy sent to Diane Archangeli of Dispute Resolution Management, Inc. This includes the need for any additional information."). Thus, Liberty Mutual cannot simply argue that, although it may have misled Scotts, it sent some records to DRM, and is therefore exonerated.

Fifth, Ms. Yahia misrepresented to DRM that nothing in the Liberty Mutual production was of any significance to the matter—a representation that DRM passed along to Scotts. *See* Butler Depo. at 334:19–335:13 (O.A. Tab 83; Doc. No. 178–79); Armstrong Depo. at 852:18–854:15 (O.A. Tab 80; Doc. No. 174–75).

[1] Both Ms. Archangeli and Ms. Armstrong testified that they understood there to be a significant distinction between a consultant and an agent. *See* Armstrong Depo. at 601:10-14, 666:9–20 (O.A. Tab 80; Doc. No. 174-175), *see also* Butler Depo. at 574:19-575:7 (O.A. Tab 83; Doc. No. 178-179) (Q. What's the difference between an agent and a consultant? A. Well, I can give you my definition. We were consulting with The Scotts Company giving them advice. They were using our advice to make decisions about how to pursue their insurance coverage. I think an agent has legal authority to work on behalf of a company. And we certainly didn't have that type of relationship. We were clearly just a consultant."); Armstrong Depo. at 666:9–20 (O.A. Tab 80; Doc. No. 174-175) ("Q. Now, was DRM—how would you characterize DRM's role with regard to Scotts and the dealings with Liberty? A. DRM was our—was Scotts' consultant. Q. Do you have in your mind a distinction between a consultant and an agent? A. A consultant—yes. Q. What is the difference in your mind? A. I believe a consultant provides advice and recommendations and an agent acts on behalf of."). Moreover, Ms. Archangeli explained to Liberty Mutual in correspondence that "[c]ontrary to your assertion that Dispute Resolution Management is coverage counsel for Scotts, we are not a law firm and do not practice law. We are a *consulting firm* that works with clients that want to resolve environmental claims with their historical insurance carriers." Nov. 2, 1999 Archangeli letter at OMS 0290 (Feb. 8, 2008 Barnhart Decl. Ex. A-20 (Doc. No. 200)) (emphasis added). Liberty Mutual also knew from discussions concerning a potential moratorium agreement that DRM had no authority to bind Scotts to that agreement. *See* Yahia Depo. at 68:2–6 (O.A. Tab. 96, Doc. No. 192-193) ("Q. You understood if a moratorium agreement was going to be entered, Joyce Armstrong or some other representative from Scotts would have to sign the agreement, right? A. Yes."). As Scotts' insurance expert has explained, "Mutual insurance companies, like Liberty Mutual make it a practice to deal directly with the insured as a matter of corporate policy." Oct. 29, 2007 Hendy Report at ¶ 294 (O.A. Tab 52, Jan. 15, 2008 Barnhart Decl. Ex. B-14) (Doc. No. 171); *see also generally id.* at ¶¶ 293–96. *See also Wright v. Campbell Soup Co.*, No. 7-04-02, 2004 WL 1770558, at *5 (Ohio App. Ct. Aug. 9, 2004) ("Here, the evidence revealed that the nurse was an independent contractor rather than an employee of Campbell Soup . . . . As such, her knowledge cannot be imputed to Campbell Soup.")

Pursuant to the Court's instructions, Scotts has identified the elements of its fraud claim as follows:

1) Representations (*See Williams v. Aetna Fin. Co.*, 700 N.E.2d 859, 868 (Ohio 1998) ("A representation or, where there is a duty to disclose, concealment of fact"));

2) Falsity (*see id*. ("made falsely"))

3) Materiality (*see id*. ("material to the transaction at hand"));

4) Knowledge (*see id*. ("made . . . with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred"));

5) Intent (*see id*. ("with intent of misleading another into relying upon it"));

6) Justifiable Reliance (*see id*. ("justifiable reliance upon the representation or concealment")); and

7) Injury (*see id*. ("a resulting injury proximately caused by the reliance)).

With respect to the injury element, Scotts alleges that it settled its insurance claims as a result of the fraud set forth below and has incurred damages as a result. Scotts alleges that it has suffered damages in excess of $18.9 million as a result of past and future remediation costs and monitoring, legal fees incurred in connection with such remediation work and related government inquiries, and legal expenses incurred in defending vermiculite litigation. In addition, Scotts alleges that it has incurred damages in excess of $6.5 million in lost interest. *See* Preliminary and Supplemental Expert Reports of Harvey Rosen (Oct. 29, 2007 & Jan. 29, 2008) (Feb. 8, 2008 Barnhart Decl. Ex. A-18 (Doc. No. 200)). Scotts' damages also continue to accumulate. Scotts also seeks punitive damages against Liberty Mutual in an amount to be determined at trial, attorney's fees and costs, and any other relief permitted by law. Because each fraudulent statement or omission contributed to Scotts' damages, Scotts does not repeat the injury element for each category below.

Apart from the injury element, we have identified below both direct and circumstantial evidence of fraud for each element of the claim, since some elements of fraud may be established through inference. As *Williams* itself found, knowledge of falsity can be established through "such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred." 700 N.E.2d at 868. Knowledge of falsity can be inferred in a representation made by someone "completely careless or indifferent to the consequences or the risk that the representation will cause the person to whom it is made to do or not to do certain things," *see* Ohio Jury Instructions, 3 OJI § 307.03(5), and can be established "[i]f a person has no knowledge of fact[] but asserted it as true when it was false." *Id*. Likewise, intent to mislead "is determined from the way in which the representation is made, the means used and all the facts and circumstances in evidence." *Id*. at § 307.03(7). Similarly, justifiable reliance is determined by considering whether "a person of ordinary care would rely on [a representation] under the same or similar circumstances," *id*. at § 307.03(8), based on "the various circumstances involved," including "the nature of the transaction, the form and materiality of the representation, the relationship of the parties, and their respective knowledge and means of knowledge." *Renner v. Derin Acquisition Corp.*, 676 N.E.2d 151, 161 (Ohio App. Ct. 1996).

CONCLUSION

For the reasons set forth under each category of false statements below, Scotts respectfully requests the Court deny Liberty Mutual's motion for summary judgment.

Respectfully submitted,
s/ Jeffrey J. Jones

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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2008, I filed the foregoing Plaintiff The Scotts Company LLC's Supplemental Brief in Opposition to Summary Judgment Per Court's Order with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following at their e-mail address on file with the Court:

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