

EVIDENCE OF FRAUD FOR STATEMENTS IN CATEGORY 2

Category 2. Liberty Mutual Falsely Represented That It Did A Diligent Company-Wide Search For Information

A. Representations from Exhibit A

Paragraph 5: On April 27, 1999, after learning that Liberty Mutual's Phase II search had not yet commenced, Mr. Merchant nonetheless assured DRM that Liberty Mutual's search for "any information or policies that may have been issued to Scotts or entities of Scotts by Liberty Mutual" was "continuing"—further misleading Scotts and DRM into believing that Liberty Mutual had been actively searching for secondary evidence all along. April 27, 1999 Merchant letter at LMIC 004868 (Ex. A-12).

Paragraph 6: In a June 11, 1999 letter, Mr. Merchant stated: "As recently as our March 5, 1999 meeting both you and Scotts provided additional information regarding its list of potential named insureds, thus expanding our search criteria. This information was confirmed by your letter dated March 19, 1999. Upon receipt of this information, Liberty Mutual continued its diligent, company-wide search of its records to find any information relating to Scotts [sic] policies." June 11, 1999 Merchant letter at DRM 3183 (Ex. A-23). *See also* Butler Sept. 26, 2007 Depo. at 473:4–22.

Paragraph 7: In a June 28, 1999 letter, Mr. Merchant repeated his earlier representation that "Liberty Mutual continued its diligent, company-wide search of its records to find any information relating to Scotts policies." June 28, 1999 Merchant letter at OMS 0299–301 (Ex. A-24).

Paragraph 9: In her August 27, 1999 letter to DRM, Ms. Yahia stated that Liberty Mutual conducted an "internal search for any and all documents relating to OM Scotts and other entities for which OM Scotts indicated it may be seeking coverage." Aug. 27, 1999 Yahia letter at DRM 3271 (Francisco Decl. Ex. U) (Doc. No. 167).

Paragraph 14: In her October 28, 1999 letter to Ms. Archangeli, Ms. Yahia stated that Liberty Mutual "performed a company-wide search for lost policy information." Oct. 28, 1999 Yahia letter at DRM 0082 (Ex. A-25).

Paragraph 16: On December 6, 1999, Mr. Merchant sent a letter stating that Liberty Mutual "initiated and completed an internal

search of its records for all policies that were issued or may have been issued to O. M. Scotts.” Dec. 6, 1999 Merchant letter at LMIC 002918 (Ex. A-21).

Paragraph 32: During the 1998–2000 negotiations, Liberty Mutual indicated both in writing and in their discussions that they were conducting a company-wide search for either policies or secondary evidence of policies. *See* Butler Sept. 26, 2007 Depo. at 472:16–22; *see also* Armstrong Aff. (Ex. A-8); Feb. 7, 2008 Armstrong Aff. (Ex. A-26).

As set forth above, Liberty Mutual represented on numerous occasions that it conducted a diligent, company-wide search for any policies and any secondary evidence of policies in response to Scotts’ requests for any insurance information. On August 14, 1998, Scotts’ Joyce Armstrong wrote to Liberty Mutual and forwarded secondary information that Scotts had located regarding auto claims—information that suggested that Liberty Mutual had insured Scotts in the 1960’s. *See* Aug. 14, 1998 Armstrong letter, LYBTY–03137–03146 (O.A. Tab 1; Jan. 15, 2008 Francisco Decl. Ex. J (Doc. No. 167)). In that letter, Scotts asked 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.” *Id.* at LYBTY–03137 (emphasis added).

On October 5, 1998, DRM’s Diane Archangeli (who is now Diane Butler) forwarded additional insurance information to Liberty Mutual that Scotts and DRM had located regarding Scotts’ historic coverage with Liberty Mutual. *See* Oct. 5, 1998 Archangeli letter, LYBTY-03152–54 (O.A. Tab. 2; Feb. 8, 2008 Barnhart Decl. Ex. A-4 (Doc. No. 200)). In that correspondence, DRM again asked Liberty Mutual to “review [its] records and provide us with copies of and/or any evidence of policies that Liberty Mutual may have issued to the O.M. Scotts Company from 1950 to the present time.” *Id.* at LYBTY-03152 (emphasis added).

On December 28, 1998, Ms. Armstrong sent another letter to Liberty Mutual tendering Scotts' environmental claims to Liberty Mutual. *See* Dec. 28, 1998 Armstrong letter, LMIC 005474–76 (O.A. Tab 3; Jan. 15, 2008 Francisco Decl. Ex. M) (Doc. No. 167)). Ms. Armstrong once again requested that Liberty Mutual undertake a comprehensive search of its records for any information relating to Scotts' historic insurance policies. The letter specifically stated:

We request that you review all records, including specifically records retained by your claim, underwriting, legal and reinsurance departments as well as the brokers and agents that you may have used to place insurance for the Company, its affiliates and subsidiaries . . . Please include in your research, a full review of each department's databases, and provide to the Company a full summary of the results of your research, not just the results of your policy search for the two policies referenced above. *Upon receipt of this correspondence, 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. Please also provide copies of secondary evidence and reinsurance information related to any incomplete or missing policies.*

Id. at LMIC 005476 (emphasis in original).

In response to these requests, Liberty Mutual repeatedly assured Scotts and DRM, both in writing and in discussions, that it had undertaken or was conducting a “diligent, company-wide search of its records to find *any* information relating to Scotts policies.” June 11, 1999 Merchant letter, DRM 3183–84 (O.A. Tab. 6; Feb. 8, 2008 Barnhart Decl. Ex. A-23 (Doc. No. 200)). (emphasis added); *see also* Butler Depo. at 472:16–22 (O.A. Tab 83; Doc. No. 178–79) (“Q. Did Liberty Mutual indicate to you both in writing and in their discussions that they were conducting a company-wide search for information responsive to Liberty Mutual either policies or secondary evidence of policies? MR. WOLKOFF: Objection. Leading. THE WITNESS: Yes.”).

B. Falsity

Contrary to Liberty Mutual's representations, Liberty Mutual never conducted a diligent or company-wide search for policy information prior to the settlement in July, 2000. As set forth below, the evidence indicates that, prior to the settlement agreement, Liberty Mutual never searched multiple additional electronic databases available to the company in 1999, failed to search designated databases by claim number, failed to search multiple databases by name, never properly searched for specific historic files (that would contain, among other things, evidence of claims made by Scotts, premiums received, and checks written), never searched microfilm or microfiche records maintained at Liberty Mutual, never properly searched files previously stored in branch offices where claims were made, failed to search the accounting department by invoice number, never forwarded the available claims information to the claims department to search its records, never made a request on Liberty Mutual's electronic databases for auto, worker's compensation, aircraft, cargo, or advertising coverage issued to Scotts, and failed to carry out numerous other rudimentary steps to locate secondary evidence of coverage—steps that would be required for any truly “diligent” search for such information. *See, e.g.*, Oct. 29, 2007 Hendy Report at ¶¶ 263–271 (O.A. Tabs 12 & 52; Jan. 15, 2008 Barnhart Decl. Ex. B-14 (Doc. No. 171)); Prouty Depo. at 26:19–27:17, 32:22–33:8, 54:20–55:8 (O.A. Tab 93; Doc. No. 189), Chartrand Depo. at 109:18–110:5, 158:17–159:10 (O.A. Tab 84; Doc. No. 180); O'Brien Depo. at 39:8–42:6, 43:17–20 (O.A. Tab 91; Doc. No. 187). Notably, with respect to many of the searches that Liberty Mutual claimed to have done, Liberty Mutual's witnesses also gave numerous conflicting accounts over what was done and by whom.

Scotts' experts have testified that Liberty Mutual's search was designed to fail because Liberty Mutual avoided looking in the places that would contain relevant information, choosing instead to merely “paper” the file to make it look like a search had been made. *See* Oct. 29, 2007

Hendy Report at ¶¶ 263–271 (O.A. Tabs 12 & 52; Jan. 15, 2008 Barnhart Decl. Ex. B-14) (Doc. No. 171); Jan. 18, 2008 Amoruso Report at 10–13 (O.A. Tab 11; Feb. 8, 2008 Barnhart Decl. Ex. A-33 (Doc. No. 200)). One expert who previously worked at Liberty Mutual found that Liberty Mutual never conducted a “reasonable or good faith” search for insurance information relating to Scotts. *See* Jan. 18, 2008 Amoruso Report at 10 (O.A. Tab 11; Feb. 8, 2008 Barnhart Decl. Ex. A-33 (Doc. No. 200)). Additionally, as set forth elsewhere, Liberty Mutual has produced other documents during the course of discovery in this case that were available to Liberty Mutual during the 1998–2000 period but that Liberty Mutual withheld from Scotts and DRM. *See* Category 1. That subsequent production also belies any claim that Liberty Mutual conducted any “diligent” or “company-wide” searches. The evidence includes¹:

- **Liberty Mutual failed to search multiple databases by name of insured:** Liberty Mutual’s own manual confirmed that a search on the AR system could be run using the name of the insured, as did various Liberty Mutual witnesses, including Ms. Chartrand. *See* AR Instruction at LMIC 9595 (O.A. Tab 34; Feb. 8,

¹ As an initial matter, Liberty Mutual did not commence its search for secondary evidence of historic policies until several months after Liberty Mutual represented to Scotts and DRM that such a search had begun. *See* Scotts’ Memo in Opposition to Liberty Mutual’s Motion for Summary Judgment, at 8–9 (Doc. No. 198). Although there are several suggestions that a Phase II search had been assigned earlier, it did not actually begin until April 1999—nearly seven months after Scotts had requested that Liberty Mutual find and provide all evidence of coverage. *See* March/April 1999 e-mail chain at LYBTY-03418 (Feb. 8, 2008 Barnhart Decl. Ex. A-11 (Doc. No. 200)) (indicating that paralegal identified to perform the Phase II search can “begin the phase II today [April 1, 1999]”); Chartrand Depo. at 72:4-73:15 (O.A. Tab 84; Doc. No. 180). Notably, in internal e-mails, Mr. Merchant asked whether Ms. Archangeli’s understanding that Liberty Mutual had searched for secondary evidence was accurate, and he found out that it was not. On April 1, 1999, Mr. Merchant sent an internal e-mail to Ms. Yahia quoting from Ms. Archangeli’s March 19, 1999 letter and asking Ms. Yahia, “Is this statement true? Because their withdrawal [of claims] is based on this statement.” *See* March/April 1999 e-mail chain at LYBTY-03418 (Feb. 8, 2008 Barnhart Decl. Ex. A-11 (Doc. No. 200)) (emphasis added). In response, Ms. Yahia indicated that Liberty Mutual had not, in fact, even started its Phase II search for secondary evidence of policies. Instead, Ms. Yahia stated that Liberty Mutual could “begin the phase II today.” *Id.* Nobody informed Scotts or DRM that the formal search for secondary evidence had not yet even begun. To the contrary, after learning that the Phase II search had not yet commenced, Mr. Merchant nonetheless assured DRM that “Liberty Mutual’s search for any information or policies that may have been issued to Scotts or entities of Scotts by Liberty Mutual” was “continuing”—further misleading both Scotts and DRM into believing that Liberty Mutual had been actively searching all along. Apr. 27, 1999 Merchant letter at LMIC 004868 (O.A. Tab 8; Feb. 8, 2008 Barnhart Decl. Ex. A-12 (Doc. No. 200)).

2008 Barnhart Decl. Ex. A-43 (Doc. No. 200)) (“To complete the loss run in A.R. you can use the insured name, policy number, serial number, or account number. It is at your discretion.”); Olson May 22, 2007 Depo. at 58:18–20 (O.A. Tab 92; Doc. No. 188); Chartrand Depo. at 52:6–9 (O.A. Tab 84; Doc. No. 180) (“Q. Do you know whether it was possible to access a loss run based on the name of the insured? A. I believe it was possible. I don’t remember ever remember doing it in my Phase II.”); Schlemmer Depo. at 191:5–9 (O.A. Tab 94; Doc. No. 190) (“Q. Can Liberty Mutual search for secondary evidence by way of policyholder name? A. There’s a variety of ways you can search for secondary evidence. Policyholder name could be one of those. I mean—potentially, yeah.”). Notwithstanding that capability, Ms. Chartrand testified that she never did a search on the AR database, and never undertook a search on the AR database using the name of the insured. *See* Chartrand Depo. at 51:23–52:9; 71:7–11 (O.A. Tab 84; Doc. No. 180). That database had significant loss run data on Scotts dating back to 1959. *See, e.g.*, Feb. 6, 2007 Liberty Mutual Loss Detail Report and Loss Summary Report, LMIC 009612–009614 (O.A. Tab 33; Jan. 15, 2008 Barnhart Decl. Ex. B-31 (Doc. No. 171))

- **Liberty Mutual failed to search designated databases by claim number:** Several Liberty Mutual witnesses testified that it was possible to search for secondary evidence of insurance policies by claim number, but that no such search was conducted in connection with the Scotts’ matter. Mr. Schlemmer testified, for example, that Liberty Mutual could search for secondary evidence of insurance by way of claim number:

Q. Can Liberty Mutual search for evidence of second—
secondary evidence of insurance coverage by way of a
claim number?
A. It could if you could identify and find the claim.

Schlemmer Depo. at 192:3–7 (O.A. Tab 94; Doc. No. 190).

Similarly, Ms. Flanders testified:

Q. Do you know if there’s a system at Liberty Mutual in
which you could submit a claim number and have it cross-
reference to a policy number?
A. Yes.
Q. What system is that?
A. ACES.
* * * * *
Q. Is ACES limited to workers’ comp?
A. No.
Q. So if you had a general liability claim number, could you
submit that claim number into the ACES system and it
would identify the policy number?

A. That's correct.

Flanders Depo. at 27:10–15; 29:12–17 (O.A. Tab 86; Doc. No. 182); *see also* Chartrand Depo. at 53:1–5 (O.A. Tab 84; Doc. No. 180) (Q. “If you had a claim number but you didn’t have a policy number, what databases could you utilize to cross-reference to the policy number? A. I—if I used the full claim number, ACES was the claims database.”).

Notwithstanding that capability, Ms. Flanders testified that she does not recall conducting any searches on ACES in connection with the Scotts matter. *See* Flanders Depo. at 58:17–59:2 (O.A. Tab. 86; Doc. No. 182). Although Ms. Chartrand testified that an ACES inquiry would have been run because that was part of the “standard procedure,” she could not testify as to the results of that search. *See* Chartrand Depo. at 69:18–70:2 (O.A. Tab. 84; Doc. No. 180). Furthermore, Ms. Chartrand testified that she personally never ran an ACES search, and that to initiate such a search, the ECS, Brian Merchant, would have asked someone in the Dover office to conduct the search:

Q. Did you ever have occasion to run an ACES search?

A. No.

Q. If you wanted to run an ACES search, how would you initiate that?

A. I would ask the person in Dover; usually, the ECS, the Environmental Claims Specialist would talk to someone in the Dover office about running those for them.

Q. But you typically, as part of your job responsibilities, would not be responsible for initiating a search of the ACES database?

A. I never—not typically, no, they would do it for us.

Chartrand Depo. at 53:16–54:5, 87:24–88:4 (O.A. Tab. 84; Doc. No. 180) (emphasis added).

Yet, Mr. Merchant testified that he never directed anyone to conduct such a search:

Q. All right. In connection with the Scotts matter, do you know whether anyone searched claim numbers electronically?

A. No.

...

A. No.

Q. All right. And you don’t recall having ever directed anyone to do that specific search, correct?

...

A. Correct.

Merchant Depo. at 43:11–23 (O.A. Tab 89; Doc. No. 185) (emphasis added).

Moreover, the record indicates that when Liberty Mutual searched its IWE electronic database, that *search did not include a search by claim number*. See Apr. 27, 1999 PRISM Request Form, LMIC 017142 (O.A. Tab 13) (requesting the query to include *only* “Market, division, territory, and serial number equals LE1-181-010660-097 & LP1-181-010660-077”); see also Yahia Depo. at 221:4-221:12 (O.A. Tab 96; Doc. No. 192-193) (admitting that the PRISM Request Form did not include any claim numbers and that she was unaware of any other PRISM requests to search by claim numbers). In fact, Ms. Chartrand testified that it was not possible for Liberty Mutual to search the IWE by claim number. See Chartrand Depo. at 58:8–16 (O.A. Tab. 84; Doc. No. 180).

Significantly, Ms. Chartrand also testified that it was possible to “unarchive” claim information from the ACES database and that the archives on this database went back to the early 1950’s, but that she did not attempt to unarchive older claims in connection with the Phase 2 search for Scotts:

- Q. Do you know whether it was possible to un purge claim information from the ACES database?
- A. I do know that—if by purge, if you’re referring—if you’re meaning archiving, there were there was claim information that was archived because it was older claim information. And it could be, the word was, unarchived based upon it being older; and it was pulled out of the archive portion of ACES.
- Q. Do you know how far back the archives in the ACES system went?
- A. I believe it went pretty far back. I think it was to the 1950’s, so I think it was the early 1950’s.
- Q. Did you ever have occasion to unarchive older claims back to the 1950’s off the ACES system?
- A. I did, but not in reference to Phase II searches. The only time that we would do that is when we were trying to determine the nature of a claim and what the claim was about; and we would go back into the—and unarchive them.

Chartrand Depo. at 59:5–23 (O.A. Tab. 84; Doc. No. 180).

- **Liberty Mutual failed to search for historic evidence stored on microfiche or microfilm:** Based on Liberty Mutual’s own internal records and the testimony of Liberty Mutual witnesses, Liberty Mutual failed to search for historic evidence on microfiche and microfilm prior to the settlement with Scotts.

The Policy Request directives dated April 4, 2007 for Request Reconstruct/ History of Coverage indicates that “[a]ll policies expiring in 1996 and prior are on Microfilm.” *See* Oct. 29, 2007 Hendy Report at ¶ 267 (O.A. Tab 12; Jan. 15, 2008 Barnhart Decl. Ex. B-14 (Doc. No. 171)) (quoting Request Reconstruct/ History of Coverage, LMIC 010235). This same document indicates that any searches should be conducted for all lines: “(X)WC (X)GL (X)UMB (X) PROP (X) AUTO.” *Id.* Mr. Brigada testified that Liberty Mutual used microfiche to store various records, including copies of checks and claim payment information. *See* Brigada Depo. at 57:7–20, 108:22–109:23 (O.A. Tab 82; Doc. No. 177); *see also* Flanders Depo. at 67:17–69:19 (O.A. Tab 86; Doc. No. 182) (testifying that she recently requested information concerning workers’ compensation and liability policies stored on microfiche in connection with other matters).

Yet, contradicting Liberty Mutual’s own records and other testimony from Liberty Mutual’s own witnesses, Ms. Yahia claimed that no one at Liberty Mutual looked for policies or evidence relating to Scotts on microfiche or microfilm because, according to her, Liberty Mutual does not store any information on microfiche:

Q. Do you have any personal knowledge as to which individuals looked for microfiche or microfilm at Scotts— at Liberty Mutual in connection with the Scotts matter?

A. I do have personal knowledge that we did not look at microfilm because we don’t have microfilm—microfiche.

Q. Who undertook to determine whether there was microfiche or microfilm in connection with the Scotts matter?

A. There was no undertaking in the Scotts matter because I know that we don’t have microfilm at Liberty Mutual that stores any information.

See Yahia Depo. at 380:20–382:5 (O.A. Tab 96; Doc. No. 192–93).

Other Liberty Mutual witnesses, including Ms. Chartrand, also testified that they were not aware of anyone searching microfiche or microfilm in connection with the Scotts matter. *See* O’Brien Depo. at 98:21–99:2 (O.A. Tab 91; Doc. No. 187) (“Q. I take it from your testimony that you don’t recall ever undertaking any inquiries to determine what exists in microfiche or microfilm for purposes of the Scotts matter. Is that correct? A. That’s correct.”); Prouty Depo. at 55:5–8 (O.A. Tab 93; Doc. No. 189) (“Q. Do you know whether anyone at Liberty Mutual actually looked at microfiche or microfilm in connection with the Scotts matter? A. Not that I recall, no.”); Chartrand Depo. at 109:4–12 (O.A. Tab 84; Doc. No. 180) (“Q. Do you know whether or not Liberty Mutual maintains or has access to any microfiche or microfilm of historic policy information? A. I don’t know the answer to that. Q. Do you know whether or not anyone from Liberty Mutual searched any type of microfiche or microfilm in connection with the search for Scotts-related materials as part of the Phase II search? A. I don’t.”).

Two of Scotts' experts opined that Liberty Mutual's failure to search microfiche or microfilm was a serious omission. Paul Amoruso opined that "financial microfiche would yield an endless source of data on policy information if reviewed." Amoruso Report at 7 (O.A. Tab 11; Feb. 8, 2008 Barnhart Decl. Ex. A-33 (Doc. No. 200)). Similarly, Ronald Hendy opined that "[t]he fact that this evidence supports the probability that some old micro fiche records were being stored, but that Liberty Mutual's response of its in-house counsel indicates no one searched for such records indicates a serious omission that could have produced copies of potentially valuable evidence of Scotts' insurance program." Oct. 29, 2007 Hendy Report at ¶ 267 (O.A. Tab 12; Jan. 15, 2008 Barnhart Decl. Ex. B-14 (Doc. No. 171)).

- **Liberty Mutual never searched the Claims Department for relevant information:** Although different witnesses claimed that Liberty Mutual looked "everywhere," Ms. Chartrand, the paralegal assigned to Scotts' Phase 2 search, testified that the Claims Department was not searched for secondary evidence of historic policies. *See, e.g.*, Chartrand Depo. at 83:1–5, 85:7–21 (O.A. Tab 84; Doc. No. 180); Merchant Depo. at 217:18–218:8 (O.A. Tab 89; Tab 185) (stating that he never asked to obtain any claim files or other historic records maintained by the claim department because that was "not part of [his] investigation"). As she testified:

Q. Do you know whether the Claims Department was queried in connection with the O.M. Scott Phase II search?

A. The Claims Department was not queried in connection with Phase II searches.

* * * * *

Q. My question, Miss Chartrand: Is doing a database inquiry through the ACES system, the same as a document request made to the Claims Department?

...

A. No, it's not the same as a document request made to the Claims Department.

Q. And it's your understanding that the Claims Department was not queried in connection with the O.M. Scott matter at any time?

...

A. The Claims Department was not queried in connection with Phase II searches; and so it would not have been queried in connection with a Phase II search request in the O.M. Scott matter.

Chartrand Depo. at 83:1–5, 85:7–21 (O.A. Tab 84; Doc. No. 180).

- **Liberty Mutual did not conduct a "diligent" search for evidence of other types of insurance policies:** Because Scotts was trying to reconstruct *all*

evidence of *any* insurance coverage, regardless of type, Scotts requested *all* policies and evidence of policies from the 1950's and 1960's—including property, automobile, and business, as well as general liability, umbrella, and excess. *See* Dec. 28, 1998 Armstrong letter at LMIC 005476 (O.A. Tab. 3; Jan. 15, 2008 Barnhart Decl. Ex. B-14) (Doc. No. 171). As Scotts' experts have testified, finding one type of policy can be important to identifying information that can then be used to find other types of policies. *See* Hendy Report at ¶¶ 40, 264 (O.A. Tab 52; Jan. 15, 2008 Barnhart Decl. Ex. B-14 (Doc. No. 171)).

Yet, Liberty Mutual did not search for other policies. The Policy Request Form that Ms. Flanders sent to the Dover librarian only requested “Liability Policies.” *See* Dec. 3, 1998 Policy Request Form, LMIC 001768 (Flanders Depo. Ex. 6 (Doc. No. 182)). Ms. Flanders did not request other types of policies, such as automobile or workers' compensation, despite the fact that the Form contained a separate line that could be checked to include a search for such policies. *See id.* Likewise, the Document Production Request Form that Ms. Chartrand sent out identified the relevant lines of coverage as “Comprehensive General Liability and Umbrella Excess Liability.” *See* Apr. 22, 1999 Document Production Request Form at LYBTY-03411 (Chartrand Depo. Ex. 3 (Doc. No. 180)); June 21, 2000 Document Production Request Form at LYBTY-03028 (Chartrand Depo. Ex. 19 (Doc. No. 180)) . Similarly, the PRISM Request Form that Ms. Chartrand sent to Kathleen McInnis to solicit aggregate loss run data using Liberty Mutual's IS (also known as IWE) electronic database was restricted to only general liability policies. *See* Apr. 27, 1999 PRISM Request Form at LMIC 017142 (O.A. Tab 13) (identifying “Line of Business Requested” as only “GL”); *see also* Yahia Depo. at 220:2-221:3 (O.A. Tab 96; Doc. No. 192-193) (admitting that the PRISM Request Form only requested information relating to general liability policies and that she was unaware of any other PRISM requests to search for other types of policies); Chartrand Depo. at 50:12-23 (stating that “IS” and “IWE” refer to the same electronic database and that the PRISM Form is a search tool to access the information).

Scotts' insurance expert, Ronald Hendy, opined that Liberty Mutual's failure to search for evidence of policies other than general liability and umbrella insurance was a “serious omission” because evidence of other policies often lead to evidence of general liability and umbrella insurance:

This was a serious omission given that it is common knowledge that automobile and workers compensation policies are typically the subject of frequent claims that generate a paper trail for future secondary evidence. Liberty Mutual also offered liability insurance combined with automobile insurance of a single policy form (Brigada Exhibits 22 & 23). It was also important for Liberty Mutual to have searched for all insurance classes of policy records because it used the same account number as part of

the policy number coding for all classes of insurance for any one policyholder.

Hendy Report at ¶ 264 (O.A. Tab 52; Jan. 15, 2008 Barnhart Decl. Ex. B-14 (Doc. No. 171)).

Liberty Mutual's own witness conceded that evidence of other policies may be important in locating additional evidence of general liability policies as well. For example, Ms. Chartrand testified that she had looked to other types of policies in other cases to help locate additional information regarding general liability policies:

- Q. Did you ever have occasion to look to other types of policies, aircraft policies, auto policies, worker's comp. policies, when you couldn't find the general liability policies, and see whether you could backtrack through those policies into the general liability policies?
- A. Yes.

Chartrand Depo. at 31:2-8 (O.A. Tab 84; Doc. No. 180).

- **Liberty Mutual failed to properly search for various other historical records that may have provided helpful secondary evidence of policies:** Although Liberty Mutual witnesses claimed they looked "everywhere," the evidence indicates that Liberty Mutual failed to search for historical records that would contain helpful secondary evidence of policies. Paul Amoruso, one of Scotts' experts and a former employee of Liberty Mutual, testified that based upon his review of Liberty Mutual's retention policies and his personal knowledge of Liberty Mutual records, many of the following types of documents "would likely have assisted Liberty in determining that coverage was available for Scotts." Amoruso Report at 7-9 (O.A. Tab 11; Feb. 8, 2008 Barnhart Decl. Ex. A-33 (Doc. No. 200)).
- **Financial Ledger Cards:** As both Ms. Chartrand and Ms. Flanders testified, ledger cards contain premium and payment information; essentially, they are proof of payment from the insured pertaining to their policies. *See* Flanders Depo. at 70:7-71:3 (O.A. Tab 86; Doc. No. 182); Chartrand Depo. at 101:7-102:2 (O.A. Tab 84; Doc. No. 180). According to Ms. Chartrand, these cards often cross-reference the policy to which the premium related. *See* Chartrand Depo. at 101:7-102:2 (O.A. Tab 84; Doc. No. 180). Ms. Flanders testified that she searched for evidence of coverage issued to insureds from the 1960's on ledger cards in other cases and that they are stored in the Dover customer accounting department. *See* Flanders Depo. at 70:7-71:3 (O.A. Tab 86; Doc. No. 182). When asked whether Liberty Mutual searched the ledger cards in connection with the Scotts matter, Ms. Flanders testified that Ms. Chartrand would have conducted a search of the ledger cards because she was the paralegal

who conducted the larger document request. *See* Flanders Depo. at 70:7–71:3 (O.A. Tab 86; Doc. No. 182). However, Ms. Chartrand testified that she did not know whether she obtained this information in connection with the search for Scotts. *See* Chartrand Depo. at 101:7–102:2 (O.A. Tab 84; Doc. No. 180).

- Premium Registers: Ms. Chartrand testified that she does not know what a premium register is or whether any of the recipients of the document request form would have reviewed it for evidence of insurance issued to Scotts. *See* Chartrand Depo. at 102:20–103:2 (O.A. Tab 84; Doc. No. 180).
- OTC Detail Registers: Ms. Chartrand testified that she has never heard of an OTC detail register and does not know whether those detailed registers were searched as part of the Scotts Phase II search. *See* Chartrand Depo. at 110:1–5 (O.A. Tab 84; Doc. No. 180). Ms. Yahia testified that, while she has heard of such records, she did not know what they were or where they were maintained. *See* Yahia Depo. at 386:16–387:14 (O.A. Tab 96; Doc. No. 192–193).
- Home Office Claim Registers: Mr. Prouty testified that he did not recall directing anyone to search, or anyone actually searching, the home office claim registers. *See* Prouty Depo. at 173:6–7 (O.A. Tab 93; Doc. No. 189). Ms. Chartrand testified that she has never heard of a home office claim register and does not know whether any of the recipients would have reviewed these as part of the search. *See* Chartrand Depo. at 103:3–18 (O.A. Tab 84; Doc. No. 180).
- Public Liability Registers: Mr. Prouty testified that he did not recall directing anyone to search or anyone actually searching the public liability registers. *See* Prouty Depo. at 172:13–14 (O.A. Tab 93; Doc. No. 189). When Ms. Chartrand was asked if she could identify anyone who was responsible for checking public liability registers, she testified that she did not know what they were. *See* Chartrand Depo. at 98:13–99:12 (O.A. Tab 84; Doc. No. 180). Likewise, Ms. Yahia also testified that she did not know what public liability registers were. *See* Yahia Depo. at 382:6–7 (O.A. Tab 96; Doc. No. 192–193).
- Public Liability Monthly Detail Registers: Mr. Prouty testified that he did not recall directing anyone to search, or anyone actually searching the public liability monthly detail registers. *See* Prouty Depo. at 172:24–173:1 (O.A. Tab 93; Doc. No. 189). When asked whether anyone searched the public liability losses, public liability monthly detail registers or public liability year-end tabulations, Ms. Chartrand testified that she did not know what those documents were. *See* Chartrand Depo. at 100:16–101:2 (O.A. Tab 84; Doc. No. 180).

- **Liberty Mutual did not properly search for relevant information in various branch offices to which claims had been made:** Ms. Chartrand testified that she did not contact any branch offices other than those specifically identified on the Phase II document request that affirmatively responded that they had relevant documents:

- Q. As part of your investigation into evidence of coverage issued to Scotts, did you contact any branch office of Liberty Mutual to which any claims had been submitted?
- A. I wouldn't know. You know, I only contacted branch offices that said yes in the response sheet to determine the volume of what they had and what they had, just to have those discussions.
- Q. But those would be only the branch offices that were indicated on the Phase II document requests, right?
- A. That's correct.
- Q. So if the branch office wasn't indicated on the Phase II document request but the loss run indicated that the claims were made out of the different offices, you didn't call any of those offices to see if they had any claims information?
- A. No.

Chartrand Depo at 158:17–159:10 (O.A. Tab 84; Doc. No. 180).

- **Liberty Mutual withheld critical information from the paralegal responsible for conducting the Phase II search:** Although Ms. Archangeli's March 23, 2000 letter to Mr. Merchant enclosed premium invoices containing additional policy information, *see* Chartrand Ex. 16, Ms. Chartrand testified that she does not recall having any discussions about these invoices. *See* Chartrand Depo. at 156:20–157:7 (O.A. Tab 84; Doc. No. 180). Mr. Merchant conceded that he did not direct anyone to do any searches based on the invoices that Scotts provided to Liberty Mutual:

- Q. We can agree, can we not, that you did not do any search—you did not direct any inquiries to Liberty Mutual's accounting department with respect to the records enclosed in Merchant Exhibit 10, correct?
- A. I don't even know how to do that.
- Q. So the answer is no?
- ...
- A. No.
- Q. And you don't recall directing anyone at Liberty Mutual to conduct any specific inquiries of the accounting department at Liberty Mutual using Merchant Exhibit 10, correct?
- ...
- A. I don't have that responsibility.
- Q. So you didn't do it, correct?

...
A. Correct.

Merchant Depo. at 74:5–22 (O.A. Tab 89; Doc. No. 185).

C. Materiality

Liberty Mutual’s representations that it had undertaken a diligent company-wide search was critical to Scotts’ determination to settle and at what amount. *See, e.g.*, Feb. 7, 2008 Armstrong Aff. at ¶ 2 (O.A. Tab 23; Feb. 8, 2008 Barnhart Decl. Ex. A-26 (Doc. No. 200)) (“The representations and omissions made by Liberty Mutual were critical to Scotts’ decision to enter into the July 2000 settlement agreement.”). Scotts repeatedly requested that Liberty Mutual search its records for any and all evidence of policies because “that information was a central topic of the discussions that took place regarding the settlement of the environmental claims submitted to Liberty Mutual and the settlement agreement that Scotts ultimately agreed to execute in July 2000.” *Id.* As Liberty Mutual’s own witnesses testified, Liberty Mutual treated the Scotts’ matter as a “missing” or “lost” policy case and under such circumstances, the “whole package” of secondary evidence was important. *See, e.g.*, Schlemmer Depo. at 211:24–212:7; 56:24–57:3 (O.A. Tab 94; Doc. No. 190) (stating that “a significant part of the case” or perhaps “all of the case” resolved “around lost or missing policies” and that he would want to “look at as much information as [he] could”). As such, the quality and scope of the search, as well as the quantity and strength of the evidence found in response to that search, were critical. Based on Liberty Mutual’s false representations, Scotts believed that Liberty Mutual had looked everywhere for everything and had turned up no secondary evidence to support the existence of insurance coverage for Scotts, *see, e.g.*, Armstrong Feb. 7, 2008 Aff. at ¶¶ 4–5 (O.A. Tab 23; Feb. 8, 2008 Barnhart Decl. Ex. A-26 (Doc. No. 200)), when in reality, Liberty Mutual’s search was neither diligent nor company wide. *See, e.g.*, Oct. 29, 2007 Hendy Report at ¶ 270 (O.A.

Tab 12; Jan. 15, 2008 Barnhart Decl. Ex. B-14 (Doc. No. 171)). *See also*, “Materiality” section in Category 1 § C, which sets forth additional evidence supporting materiality here. (To minimize any duplication, Scotts refers the Court to that section in lieu of reproducing that evidence again here.)

D. Knowledge

Liberty Mutual either knew, or should have known, that its repeated representations regarding a “diligent” and company-wide search” were false. Liberty Mutual knew where it was looking, and, more importantly, where it was not looking. As set forth above, the sources of information that Liberty Mutual ignored were described in their own records retention policies or their own internal manuals. Liberty Mutual knew it had claim numbers, but failed to provide those very claim numbers to the claims department. Liberty Mutual knowingly said it was looking for any policy information in response to Scotts’ requests for *all lines of coverage*, but Liberty Mutual knowingly restricted its search to only one line of policies or, in some cases, two lines of policies. Given the number of places, databases, and types of information that were omitted from its search, a reasonable jury could certainly find that Liberty Mutual knowingly conducted an inadequate search. Indeed, based on his experience in the insurance industry and with claims handling, Scotts’ insurance expert, Ronald Hendy, opined that Liberty Mutual’s search was both “uninformed and deliberately limited” in scope:

[I]t appears that the search team employed by Liberty Mutual was both uninformed and deliberately limited the scope of the possible search options to locate secondary evidence, and that for example the one record source that apparently could have yielded actual copies of or extracts from Scotts’ original policies (the micro fiche storage system) was never searched. I have also seen no evidence that any member of the search team checked Liberty Mutual’s public liability registers to see if information pursuant to Scotts’ policies or claim records were in evidence. The apparent restriction in search terms that were used appear to have been so limited (to the 1967–1968 policy year) that the search exercise

appeared to be fundamentally flawed and potentially rigged for failure from the outset.

Oct. 29, Hendy Report at ¶ 270 (O.A. Tab 12; Jan. 15, 2008 Barnhart Decl. Ex. B-14 (Doc. No. 171)). At a minimum, the evidence demonstrates that Liberty Mutual's representations were made with utter disregard and recklessness as to their truth or falsity.

E. Intent

Liberty Mutual's representations as to the scope and quality of its search for policies and secondary evidence of coverage were an integral part of its plan to convince Scotts that it could not prove it had been insured by Liberty Mutual, and to instead settle for a reduced figure. Liberty Mutual claimed that Liberty Mutual had searched everywhere for everything and could not locate any policies or secondary evidence of policies sufficient to determine coverage. Based on the evidence set forth above, the intent of such representations was to convince Scotts that no additional evidence would be found even if Scotts filed suit seeking coverage.

Liberty Mutual knew that Scotts was relying on Liberty Mutual's misrepresentations and omissions, and Liberty Mutual made its misrepresentations and omissions with the intent that Scotts would rely on them. That evidence is set forth in detail in the discussion of false statements under Category 1. To avoid unnecessary duplication, Scotts refers the Court to the evidence described in greater detail under "Intent" in Category 1 § E. All of that evidence supports Liberty Mutual's intent to mislead here as well.

In sum, that evidence demonstrates that Liberty Mutual assigned a "lost policy" discount to the settlement negotiations, precisely because Liberty Mutual representatives claimed that Liberty Mutual could not find policies or evidence of policies sufficient to determine coverage, and Liberty Mutual *told Scotts* that Scotts should *discount* its settlement demands as a result of the "lost policy" defense. *See Merchant Depo.* at 79:12–17 (O.A. Tab 89; Doc. No. 185);

Schlemmer Depo. at 211:24–212:7 (O.A. Tab 94; Doc. No. 190); Prouty Depo. at 152:3–6 (O.A. Tab 93; Doc. No. 189); Butler Depo. at 492:9–16 (O.A. Tab 83; Doc. No. 178–79). Liberty Mutual knew that Scotts and DRM were seeking any and all information about any Scotts’ policies to determine Scotts’ settlement position. *See* O’Brien Depo. at 72:19–23 (O.A. Tab 91; Doc. No. 187); Prouty Depo. at 189:19–190:3 (O.A. Tab 93; Doc. No. 189). If Liberty Mutual failed to convince Scotts to settle its claims inexpensively, Liberty Mutual knew it faced the risk of expensive litigation and significant exposure. *See, e.g.*, Schlemmer Depo. at 74:11–75:4 (O.A. Tab 94; Doc. No. 190); Merchant Depo. at 86:19–87:9; 295:16–296:2 (O.A. Tab 89; Doc. No. 185). Liberty Mutual wanted to eliminate that risk and “avoid . . . getting involved in expensive declaratory judgment litigation.” Merchant Depo. at 299:2–16 (O.A. Tab 89; Doc. No. 185); *see also* Schlemmer Depo. at 27:12–29:7 (O.A. Tab 94; Doc. No. 190). That is why Liberty Mutual made the representations that it made.

F. Justifiable Reliance

Scotts relied on Liberty Mutual’s representations that it had undertaken a “diligent, company-wide search” for any information relating to Scotts’ historic policies with Liberty Mutual. As Ms. Armstrong stated in her sworn affidavit of February 8, 2008, Scotts relied on Liberty Mutual’s “multiple representations regarding the nature and scope of the searches that Liberty Mutual had undertaken.” *See* Feb. 7, 2008 Armstrong Aff. at ¶¶ 4–5 (O.A. Tab 23; Feb. 8, 2008 Barnhart Decl. Ex. A-26 (Doc. No. 200)). Scotts’ reliance on Liberty Mutual’s representations regarding the scope and nature of its search was certainly justified. Indeed, neither Scotts nor DRM could possibly know the truth as to where Liberty Mutual was actually looking or what “real” search efforts had been undertaken. Instead, Liberty Mutual sought to allay any concerns that Scotts or DRM might have had by repeatedly assuring both Scotts and DRM that it was looking everywhere for everything. *See, e.g.*, Butler Sept. 26, 2007 Depo. at

472:16–22 (O.A. Tab 83; Doc. No. 178–79); Merchant Depo. at 84:18–85:4 (O.A. Tab 89; Doc. No. 185).

Scotts justifiably relied on all of Liberty Mutual’s representations regarding the results of its searches, as well as the existence, meaning, and significance of the secondary evidence of coverage that it had. *See* Feb. 7, 2008 Armstrong Aff. at ¶¶ 3–6 (O.A. Tab 23; Feb. 8, 2008 Barnhart Decl. Ex. A-26 (Doc. No. 200)). That evidence is set forth in detail in the discussion of false statements under Category 1. To avoid unnecessary duplication, Scotts refers the Court to the evidence described in greater detail under “Justifiable Reliance” for Category 1 § F.

In sum, that evidence demonstrates that Scotts could not determine what other evidence Liberty Mutual had internally, could not determine what searches Liberty Mutual had done internally, and could not know Liberty Mutual’s own determinations regarding such evidence. *Id.* Scotts was at the mercy of Liberty Mutual to disclose the truth regarding those matters. Both Ms. Armstrong and Ms. Archangeli testified that had Liberty Mutual been truthful about the extent, significance, and meaning of the secondary evidence that Liberty Mutual had in its files, Scotts would not have settled under the terms that it did. *See, e.g.*, Feb. 7, 2008 Armstrong Aff. at ¶ 6 (O.A. Tab 23; Feb. 8, 2008 Barnhart Decl. Ex. A-26 (Doc. No. 200)); Butler Depo. at 491:19–492:7; 493:11–19 (O.A. Tab 83; Doc. No. 178–79). Even Liberty Mutual’s own witnesses acknowledged that it was reasonable for Scotts to expect Liberty Mutual to be up front and honest in its dealing with Scotts. *See* Schlemmer Depo. at 79:7–10 (O.A. Tab 94; Doc. No. 190).