## EVIDENCE OF FRAUD FOR STATEMENTS IN CATEGORY 11

**Category 11. Liberty Mutual Made False Representations In Its December 1999 Denial Letter**

**A. Representations from Exhibit A**

Paragraph 18: Mr. Merchant's December 6, 1999 letter stated: "There has been no 'suit' filed against O. M. Scotts and therefore, there is no obligation or duty to defend these claims under the alleged Liberty Mutual policies." Dec. 6, 1999 Merchant letter at LMIC 2919 (Ex. A-21); *see* Hendy Report at ¶ 135 ("overlooks the fact that in 1998 when Scotts provided timely notice of its insurance claims, Scotts had by then received notifications of impending legal action by the EPA") (Jan. 15, 2008 Barnhart Decl. Ex. B-14) (Doc. No. 171).

Paragraph 19: Mr. Merchant's December 6, 1999 letter to DRM stated: "[C]overage may only apply under the [Umbrella Excess Liability] policy, if at all, upon exhaustion of the retained limit of an underlying policy and the UEL policy retention." Dec. 6, 1999 Merchant letter at LMIC 2920 (Ex. A-21); *see* Hendy Report at ¶ 136 ("misrepresents the coverage provided under Scotts' umbrella policies") (Jan. 15, 2008 Barnhart Decl. Ex. B-14) (Doc. No. 171).

Paragraph 20: Mr. Merchant's December 6, 1999 letter to DRM stated: "There is no coverage under the alleged policies for property damage which was expected or intended or which was not otherwise caused by an occurrence, within the meaning of the policies." Dec. 6, 1999 Merchant letter at LMIC 2920 (Ex. A-21); *see* Hendy Report at ¶ 141 ("misrepresents how the issue of fortuitous loss applies under a general liability insurance contract") (Jan. 15, 2008 Barnhart Decl. Ex. B-14) (Doc. No. 171).

Paragraph 21: Mr. Merchant's December 6, 1999 letter to DRM stated: "To the extent that the alleged property damage occurred before or after Liberty Mutual's alleged period of coverage, coverage for these claims may be precluded." Dec. 6, 1999 Merchant letter at LMIC 2920 (Ex. A-21); *see* Hendy Report at ¶¶ 150 & 166 ("mischaracterizes how multiple accidents or occurrences and gradual losses can be ascribed to any particular policy period") (Jan. 15, 2008 Barnhart Decl. Ex. B-14) (Doc. No. 171).

Paragraph 22: Mr. Merchant's December 6, 1999 letter to DRM stated: "To the extent that the alleged damages do not constitute

> property damage, as this term may be defined in the alleged policies, coverage will not apply." Dec. 6, 1999 Merchant letter at LMIC 2920 (Ex. A-21); *see* Hendy Report at ¶¶ 172 & 176 ("mischaracterizes the nature of coverage Liberty Mutual provided to Scotts") (Jan. 15, 2008 Barnhart Decl. Ex. B-14) (Doc. No. 171).
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> Paragraph 23: Mr. Merchant's December 6, 1999 letter to DRM stated: "There is no coverage under any alleged policy or policies for costs or expenses or other obligations voluntarily assumed or incurred by O.M. Scotts without notice to and consent of Liberty Mutual." Dec. 6, 1999 Merchant letter at LMIC 2919 (Ex. A-21); *see* Hendy Report at ¶ 180 ("mischaracterizes the insurance industry custom and practice") (Jan. 15, 2008 Barnhart Decl. Ex. B-14) (Doc. No. 171).

As set forth in these paragraphs, Liberty Mutual misrepresented that certain insurance policy defenses would have been contained in any Liberty Mutual insurance policy issued to Scotts for the relevant time periods in the 1950's and 1960's and misrepresented the content and meaning of such defenses. *See* Dec. 6, 1999 Merchant letter, LMIC 002918–22 (O.A. Tab 9; Feb. 8, 2008 Barnhart Decl. Ex. A-21 (Doc. No. 200)).[1]

**B. Falsity**

As set forth in connection with the discussion of evidence supporting other false statements, Scotts and DRM requested, both in writing and orally, that Liberty Mutual produce specimen policies and other secondary evidence of insurance coverage for the relevant coverage periods during the 1950's and 1960's. *See* August 14, 1998 Armstrong letter at LYBTY-03137

[1] The false representations made by Liberty Mutual in its December 6, 1999 denial letter as set forth in this section arguably consists of two types of misrepresentations: (1) misrepresentations of fact, in that they are misrepresentations as to the contents of the insurance policies issued by Liberty Mutual to Scotts for the applicable coverage periods during the 1950's and 1960's; and (2) combined representations of fact and law in that they include representations as to Liberty Mutual's internal policies with respect to such defenses and falsely represent that certain insurance policy defenses would have precluded insurance coverage to Scotts. To the extent any of the false representations made by Liberty Mutual within its December 6, 1999 denial letter are construed as misrepresentations of law and not fact, Ohio law provides that such misrepresentations of law are actionable and can form the basis of a fraud claim where, as here, there exists a fiduciary relationship between the parties. *Lynch v. Dial Finance Co. of Ohio No. 1, Inc.*, 656 N.E.2d 714 (Ohio 1995).

(O.A. Tab 1; Jan. 15, 2008 Francisco Decl. Ex. J (Doc. No. 167)); Dec. 28, 1998 Armstrong letter, LMIC 005474–76 (O.A. Tab 3; Jan. 15, 2008 Francisco Decl. Ex. M (Doc. No. 167)); Butler Depo. at 301:7–302:7 (O.A. Tab 83; Doc. No. 178–79).

During discovery in this case, Liberty Mutual produced multiple Liberty Mutual specimen insurance policies for the coverage periods at issue. *See* Liberty Mutual's 9-3-63 specimen Umbrella Excess Liability Policy form number GPO 2682, LMIC 8216–20 (O.A. Tab 50; Jan. 15, 2008 Barnhart Decl. Ex. B-18 (Doc. No. 171)); Liberty Mutual's specimen Comprehensive General Liability Policy, form GPO 2120 R4 (10-1-58), LMIC 8194–99 (O.A. Tab 51; Jan. 15, 2008 Barnhart Decl. Ex. B-30 (Doc. No. 171)); Liberty Mutual's specimen Comprehensive General Liability Policy, form GPO 2120 R5 (6-1-62), LMIC 8200–05 (Jan. 15, 2008 Barnhart Decl. Ex. B-34 (Doc. No. 171)). Liberty Mutual's corporate designee, Mr. McCullough testified as to the authenticity of these specimen policies. *See* McCullough Depo. at 88:6–16, 148:19–150:17 (O.A. Tab 88; Doc. No. 184). Yet, Liberty Mutual concealed its own specimen policies and instead purported to represent other defenses that would bar coverage. *See* Dec. 6, 1999 Merchant letter, LMIC 002918–22 (O.A. Tab 9; Feb. 8, 2008 Barnhart Decl. Ex. A-21 (Doc. No. 200)).

Scotts could not test Liberty Mutual's representations regarding what defenses would apply because Liberty Mutual concealed the actual terms and conditions of the policies from both Scotts and DRM. As it turns out, Liberty Mutual's representations regarding "other" defenses were false or misleading:

- Liberty Mutual represented that "[t]here is no coverage under the alleged policies for property damage which was expected or intended or which was not otherwise caused by an occurrence, within the meaning of the policies." Dec. 6, 1999 Merchant letter at LMIC 002920 (O.A. Tab 9; Feb. 8, 2008 Barnhart Decl. Ex. A-21 (Doc. No. 200)). Yet, the Liberty Mutual comprehensive general liability specimen policies do not contain

"expected or intended injury" exclusions. *See* Liberty Mutual's specimen Comprehensive General Liability Policy, form GPO 2120 R4 (10-1-58), LMIC 8194–99 (O.A. Tab 51; Jan. 15, 2008 Barnhart Decl. Ex. B-30 (Doc. No. 171)); Liberty Mutual's specimen Comprehensive General Liability Policy, form GPO 2120 R5 (6-1-62), LMIC 8200–05 (Jan. 15, 2008 Barnhart Decl. Ex. B-34 (Doc. No. 171)). Moreover, Liberty Mutual's assertion that an "expected or intended injury" exclusion or, alternatively, the lack of an "occurrence" would preclude coverage for Scotts' claim was misleading because the release or dispersal of hazardous waste materials constitutes an "occurrence," including the continuous or repeated exposure to conditions resulting in property damage neither expected nor intended from the standpoint of the insured. *See* Hendy Report at ¶ 141 (O.A. Tab 53; Jan. 15, 2008 Barnhart Decl. Ex. B-14 (Doc. No. 171)); *Morton Int'l, Inc. v. Harbor Ins. Co.*, 79 Ohio App. 3d 183 (Ohio Ct. App. 1992); *Kipin Industries, Inc. v. American Universal Ins. Co.*, 41 Ohio App.3d 228, 231 (Ohio Ct. App. 1987); *Buckeye Union Ins. Co. v. Liberty Solvents & Chemicals Co.*, 17 Ohio App.3d 127 (Ohio Ct. App. 1984), *abrogated on other grounds*.

- Liberty Mutual represented that there was no "suit" against Scotts and, therefore, no obligation or duty to defend on the part of Liberty Mutual. Dec. 6, 1999 Merchant letter at LMIC 002919 (O.A. Tab 9; Feb. 8, 2008 Barnhart Decl. Ex. A-21 (Doc. No. 200)). Yet, under the terms of the specimen policies, there did exist a "suit" in that Scotts had received notice of impending legal action against it from the Ohio Environmental Protection Agency ("OEPA"), including coercive Findings and Orders from the OEPA requiring Scotts to pay civil penalties, perform a RCRA Facility Investigation and Corrective Measures Study, and implement corrective measures selected by the OEPA, among other things. *See* Hendy Report at ¶ 135 (O.A. Tab 53; Jan. 15, 2008 Barnhart Decl. Ex. B-14 (Doc. No. 171)); *see also* Armstrong Depo. at 644:19–23 (O.A. Tab 80; Doc. No. 174–75).

- Liberty Mutual represented that "[t]o the extent that the alleged property damage occurred before or after Liberty Mutual's alleged period of coverage, coverage for these claims may be precluded." Dec. 6, 1999 Merchant letter at LMIC 002920 (O.A. Tab 9; Feb. 8, 2008 Barnhart Decl. Ex. A-21 (Doc. No. 200)). That representation, however, is not accurate. *See* Hendy Report at ¶¶ 150, 166 (O.A. Tab 53; Jan. 15, 2008 Barnhart Decl. Ex. B-14 (Doc. No. 171)). Under the continuous trigger doctrine, applicable insurance policies in existence during the course of the continuous property damage (*i.e.*, during decades of environmental contamination) are triggered. *Id.* at ¶¶ 166–67. In this case, Scotts incurred property damage in the form of environmental contamination at Scotts' Marysville, Ohio facility in the 1950's and 1960's. Thus, Liberty Mutual's insurance policies were triggered.

- Liberty Mutual represented that, "[t]o the extent that the alleged damages do not constitute property damage, as this term may be defined in the alleged policies, coverage will not apply." Dec. 6, 1999 Merchant letter at LMIC 002920 (O.A. Tab 9; Feb. 8, 2008 Barnhart Decl. Ex. A-21 (Doc. No. 200)). That is misleading. *See* Hendy Report at ¶¶ 172–79 (O.A. Tab 53; Jan. 15, 2008 Barnhart Decl. Ex. B-14 (Doc. No. 171)). Under the terms of the specimen policies, "property damage" can include the contamination of water or land, precisely as Scotts alleged. *Id.*; *see also Kipin Industries, Inc. v. American Universal Ins. Co.*, 41 Ohio App.3d 228, 230 (Ohio Ct. App. 1987).

- Liberty Mutual represented that "[t]here is no coverage under any alleged policy or policies for costs or expenses or other obligations voluntarily assumed or incurred by [Scotts] without notice to and consent of Liberty Mutual." Dec. 6, 1999 Merchant letter at LMIC 002919 (O.A. Tab 9; Feb. 8, 2008 Barnhart Decl. Ex. A-21 (Doc. No. 200)). That representation is also misleading. Liberty Mutual denied insurance coverage (*i.e.*, a duty to defend) to Scotts for its claim. Given that Liberty Mutual denied insurance coverage, Scotts was not bound by the "voluntary payment" conditions in the Liberty Mutual specimen policies. After Liberty Mutual denied coverage and the existence of insurance policies altogether, Scotts was free to protect its own interests in any manner it deemed fit, and Liberty Mutual gave up its right to control Scotts' defense. Moreover, payments made by Scotts as required by applicable environmental statutes are not "voluntary" and, therefore, do not require the prior approval of insurers. *See* Hendy Report at ¶¶ 180–81 (O.A. Tab 53; Jan. 15, 2008 Barnhart Decl. Ex. B-14 (Doc. No. 171)); *see also American Employers Ins. Co. v. Metro Regional Transit Authority*, 802 F.Supp. 169, 183 (N.D. Ohio 1992), *reversed on other grounds* (holding that "[t]he purpose of such a [voluntary payment] provision is to prevent collusion and to confer upon the insurer complete control and direction of the defense and/or settlement of claims and suits. Where the insurer refuses to defend and thereby chooses not to exercise its right to control and direct the defense, the clause fails of its essential purpose and the insured has no choice but to undertake the defense itself. . . . Where the insurance company wrongfully denies coverage, in other words, it cannot be permitted to circumvent its contractual obligation to reimburse the insured for defense costs by claiming that the insured incurred such costs without its consent. Where the consent is wrongfully withheld, the costs cannot be said to have been wrongfully incurred") (internal citations omitted).

### C. Materiality

Scotts and DRM sought the terms and conditions of Liberty Mutual's policies precisely because the terms of the policies were important to Scotts and DRM. *See* Butler Depo. at 494:4–

7 (O.A. Tab 83; Doc. No. 178–79) ("We were discussing almost on a daily basis while we were doing the targeting things such as the evidence, what terms and conditions we thought might apply."). Liberty Mutual claimed they were important as well. *See, e.g.*, Merchant Depo. at 179:17–180:10 (O.A. Tab 89; Doc. No. 185). Given Liberty Mutual's concealment of important terms and conditions, Scotts was forced to rely on Liberty Mutual's characterization of their coverage defenses. Liberty Mutual's representations with regard to such defenses were not accurate. *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**

According to McCullough, Liberty Mutual had the specimen policies in its own files and, therefore, had knowledge of the applicable terms and conditions of the policies issued to Scotts during the 1950's and 1960's. *See* McCullough Depo. at 88:6–16, 148:19–150:17 (O.A. Tab 88; Doc. No. 184). Liberty Mutual therefore knew or should have known the actual terms and conditions of Liberty Mutual's policies, and the applicability of its defenses. Yet, Liberty Mutual misrepresented the contents and applicability of such defenses.

**E. Intent**

Liberty Mutual took the position that the terms and conditions of policies were important in the negotiations. *See supra* § C. Scotts' insurance expert testified that Liberty Mutual's representations regarding such defenses mischaracterized the actual contents of the policies or the defenses themselves. Liberty Mutual knew or should have known whether its representations were accurate. Liberty Mutual's combined conduct—disputing its own evidence of policies, concealing the terms of the actual specimen policies, calling the umbrella excess

policy produced nothing more than an "alleged" policy, and mischaracterizing Liberty Mutual's defenses in a manner designed to strengthen its settlement position—taken together establishes intent to mislead.

As set forth previously, Liberty Mutual knew that Scotts was relying on all of Liberty Mutual's misrepresentations and omissions, and there is substantial evidence that 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 their 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**

As of the time of the December 6, 1999 denial letter from Liberty Mutual, Liberty Mutual had produced no evidence or documentation of insurance coverage issued by Liberty Mutual directly to Scotts for the relevant coverage periods during the 1950's and 1960's notwithstanding Scotts' numerous requests for such information. *See* Dec. 6, 1999 Merchant letter, LMIC 002918–22 (O.A. Tab 9; Feb. 8, 2008 Barnhart Decl. Ex. A-21 (Doc. No. 200)). Even though specimen policies existed for the relevant coverage periods according to Liberty Mutual's own Rule 30(B)(6) witness, Liberty Mutual failed to provide the specimen policies in Liberty Mutual's possession to Scotts or DRM. As a result, without the specimen policies or Liberty Mutual's internal standards regarding such defenses, Scotts and DRM were forced to rely on Liberty Mutual's representations regarding such defenses. Although Scotts could argue that a given defense should or should not apply, Scotts had no means of *verifying* the actual contents of the policies with regard to such defenses. Liberty Mutual had that capability.

As set forth previously, Scotts justifiably relied on all of Liberty Mutual's representations regarding the existence, contents, and meaning of policies and secondary evidence of policies. *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).