

## **EVIDENCE OF FRAUD FOR STATEMENTS IN CATEGORY 12**

### **Category 12. Liberty Mutual Continued To Falsely Represent Policies/Coverage After Settlement**

#### **A. Representations from Exhibit A**

Paragraph 38: In 2003, Scotts again directed inquiries to Liberty Mutual regarding Scotts' insurance coverage. *See, e.g.*, Feb. 18, 2003 Armstrong letter at LMIC 001161 (Ex. A-37). In a letter dated February 24, 2003, Liberty Mutual falsely represented that it had "conducted a policy search to determine if [it] issued any general liability policies" to Scotts, but that "[t]he policy search has not revealed any general liability policies issued to these companies by Liberty Mutual." Feb. 24, 2003 DiSisto letter, OMS 0236 (Ex. A-38).

Paragraph 39: On November 21, 2006, Scotts' personnel met with Liberty Mutual representatives, including Liberty Mutual's in-house attorney Michael O'Malley. Supp. Meyer Aff. at ¶¶ 2–3 (Ex. A-35). During a presentation by Scotts of documents indicating that Liberty Mutual had insured Scotts for multiple years before 1968, Mr. Aronowitz, General Counsel for Scotts, intervened and asked Mr. O'Malley if he was denying that Liberty Mutual had insured Scotts prior to 1968. July 20, 2007 Declaration of Ivan Smith at ¶ 4 (Ex. A-40); July 20, 2007 Declaration of David M. Aronowitz at ¶ 4 (Ex. A-41). Even after reviewing all the voluminous additional evidence presented by Scotts, Mr. O'Malley replied that "we just don't know" whether Scotts was an insured. *Id.*

Paragraph 40: During many of the depositions taken in this action, Liberty Mutual representatives questioned or disputed the evidence that Liberty Mutual insured Scotts, that Liberty Mutual had issued ten years of general liability and three years of excess liability insurance to Scotts, and that Liberty Mutual had issued other forms of coverage to Scotts. *See, e.g.*, Schlemmer Depo. at 68:16–69:20, 163:1–18; Merchant Depo. at 206:15–208:16; Prouty Depo. at 104:2–10, 147:1–149:17.

Liberty Mutual continued to repeat many of the same false or misleading statements even after the settlement with Scotts. Three years after the settlement, when Scotts inquired again into insurance coverage, Liberty Mutual again represented that its search for evidence had come up empty. *See* Feb. 18, 2003 Armstrong letter at LMIC 001161 (Feb. 8, 2008 Barnhart Decl. Ex.

A-37 (Doc. No. 200)); Feb. 24, 2003 DiSisto letter, OMS 0236 (O.A. Tab 65; Feb. 8, 2008 Barnhart Decl. Ex. A-38 (Doc. No. 200)) (“We have also conducted a policy search to determine if we issued any general liability policies to The O.M. Scott & Sons company, Hyponex Corp., Old Fort, Grace Sierra Horticultural Products Company & or Miracle Gro. The policy search has not revealed any general liability policies issued to these companies by Liberty Mutual.”).

Even after additional evidence was produced in 2006 under the force of subpoena in California litigation, Mr. O’Malley from Liberty Mutual still claimed “we don’t know” as to whether Liberty Mutual insured Scotts prior to 1968. As Mr. Smith testified:

During this meeting, Mr. Meyer walked through a series of documents with Liberty Mutual to demonstrate that Liberty Mutual had insured Scotts before 1968. After Mr. O’Malley commented on one of the documents, Mr. Aronowitz interrupted the exchange and asked Mr. O’Malley if he was denying that Liberty Mutual had insured Scotts back to the 1950’s. Mr. O’Malley responded that he was not going to engage in a discussion about lost policies because of the existence of the parties’ release. Mr. Aronowitz then again asked Mr. O’Malley if he was denying, as he sat there that day, that Liberty Mutual had insured Scotts back to the 1950’s. Mr. O’Malley answered, “we don’t know” whether Liberty Mutual was Scotts’ carrier back then and restated his prior position. Mr. Aronowitz then indicated that he wished to terminate that portion of the meeting. The parties’ respective trial counsel then engaged in a Rule 26 meeting.

Declaration of Ivan Smith at ¶ 4 (O.A. Tab 67; Feb. 8, 2008 Barnhart Decl. Ex. A-40 (Doc. No. 200)). Mr. Aronowitz confirmed the same:

During this meeting, I explained to Liberty Mutual the newly discovered information that had prompted Scotts to file the present lawsuit. Then, Mr. Meyer presented a series of documents to Liberty Mutual, many of which had only recently been discovered by Scotts, to demonstrate that Liberty Mutual had insured Scotts prior to 1968. Liberty Mutual’s lawyers repeatedly interrupted Mr. Meyer during his presentation off the documents in such a hostile manner that I stopped Mr. Meyer’s presentation to pose a question to Mr. O’Malley. I asked Mr. O’Malley whether or not, based on the documentary evidence uncovered during the preceding weeks and other documents previously available, Liberty Mutual was

now willing to acknowledge that it was an insurer of Scotts from the late 1950's to the late 1960's. Mr. O'Malley responded by saying, among other things, that "we just don't know" whether Liberty Mutual insured Scotts during that time period. Upon hearing Mr. O'Malley's answer, I determined that further discussion with Liberty Mutual would not be productive, and ended that portion of the meeting. The parties' counsel then engaged in a Rule 26 meeting.

Declaration of David M. Aronowitz at ¶ 4 (O.A. Tab 68; Feb. 8, 2008 Barnhart Decl. Ex.

Ex. A-41 (Doc. No. 200)).

Even during this very litigation, Liberty Mutual personnel continued to dispute the evidence that Liberty Mutual insured Scotts, had issued ten years of general liability and three years of excess liability insurance to Scotts, and had issued other forms of insurance to Scotts as well. For example, in its answer to Scotts' complaint, Liberty Mutual refers to "alleged" policies and denies that it issued any "alleged" policies for lack of knowledge or information. *See* Answer to FAC at ¶¶ 34–35 (O.A. Tab 66; Doc. No. 21). Likewise, in her deposition, Ms. Yahia still would not acknowledge that the claim numbers attached to the Umbrella Excess Liability policy were Liberty Mutual numbers:

- Q. At some point in the process, you learned, did you not, that the claim numbers attached to the umbrella excess policy are, in fact, Liberty Mutual claim numbers, correct?
- A. I can't exactly say that's true because I still—I don't know anything about—anything further about some of the numbers because there's no data on any of those numbers.
- Q. At some point in time, you learned that some of the claim numbers attached to the umbrella excess policy are Liberty Mutual claim numbers, correct?
- A. Well, I think what I said, I still would say, is they all could be, I can't say one way or the other if they are or are not numbers. Again, if you have a loss data that would match a number, missing zeros, something like that, then that would be cumulative information that would tell you a little bit more about the numbers.

Yahia Depo at 203:1–19 (O.A. Tab 96; Doc. No. 192–93) (emphasis added).

Likewise, Mr. Prouty was still unable to conclude that Scotts was ever insured under a general liability policy:

- Q. Based on the evidence that you do recall, did you conclude that Liberty Mutual had, in fact, issued a general liability policy to Scotts in the 50's or 60's?
- ...
- A. When I was there, I never made that conclusion.
- Q. As you sit here today, have you ever made that conclusion?
- A. No.
- Q. So is it your position today that you're still not sure whether Scotts was ever an insured under a general liability policy from Liberty Mutual in the 50's or 60's?
- ...
- A. Yeah, I've never seen, you know, evidence that would make me feel comfortable with that assertion.

Prouty Depo at 10:4–20 (O.A. Tab 93; Doc. No. 189).

Again, Mr. Schlemmer would not concede coverage or policies despite printouts with Liberty Mutual policy numbers:

- Q. According to this report, Liberty Mutual issued public liability insurance policies to Scotts for 1959, 1962, 1963, and 1964, correct?
- ...
- A. I would not say that's correct. I think what the report is saying is that there are some claims out there that the historical data indicates may or may not be against these policies. This is really a claim record.
- Q. I'm not asking about the claims in my question.
- A. But, again, I'm answering your question. You asked me if this confirms or verifies that we issued policies. My answer to that is no, I don't think this report does. I think this report recognizes—picks up data that indicates there are claims.
- Q. Well, we will agree that the columns on the left are policy numbers for Liberty Mutual policies, correct?
- ...
- A. They're certainly policy numbers in the format Liberty uses.
- Q. Right. And we will agree that effective date means the effective date for the policies, right?
- ...

- A. I think our difference here is I don't know where this data comes from, and so I'm not going to tell you that this confirms there are policies there. I'm just not going to do that because that would be total speculation on my part, which would be inappropriate. You asked me to be honest with you. I raised my right hand and said I would. I'm going to be.
- Q. So this printout with policy numbers for 1962, 1963, 1964, 1959 from Liberty Mutual's system is not enough for you to conclude there was any insurance coverage provided to Scotts in the 50's and 60's; is that correct?
- ...
- A. That would be my opinion, yes.

Schlemmer Depo. at 123:1–124:21 (O.A. Tab 94; Doc. No. 190).

### **B. Falsity**

As set forth elsewhere in this filing, the statements made after the settlement are false or misleading. Liberty Mutual knew, and certainly now knows, that Scotts was an insured, that Scotts has been an insured since 1957, and that Scotts had general liability insurance since 1957. Indeed, the evidence establishes that Liberty Mutual insured Scotts under primary layer general liability coverage from 1957 to 1968 and excess liability insurance for three years as well. *See also, e.g.*, Scotts' Motion for Partial Summary Judgment at 7–17 (Doc. No. 170); Liberty Mutual spreadsheets, LMIC 1508–09, 1913 (O.A. Tab 36; Feb. 8, 2008 Barnhart Decl. Ex. A-29 (Doc. No. 200)); Unit report, OMS 0121 (Jan. 15, 2008 Barnhart Decl. Ex. B-8 (Doc. No. 171)); Unit report, OMS 0133 (Jan. 15, 2008 Barnhart Decl. Ex. B-28 (Doc. No. 171)); Policy form, LMIC 8200-05 (Jan. 15, 2008 Barnhart Decl. Ex. B-34 (Doc. No. 171)).

### **C. Materiality**

By its continuing pattern of fraudulent statements, Liberty Mutual prevented Scotts from discovering the fraud and filing this action sooner. Instead, Scotts learned of Liberty Mutual's fraud in the Fall of 2006 when Liberty Mutual produced for the first time voluminous records under the compulsion of a subpoena in litigation in California. Smith Depo. at 244:5–245:4

(O.A. Tab 95; Doc. No. 191); Feb. 8, 2008 Smith Aff. at ¶ 3 (O.A. Tab 97; Barnhart Decl. Ex. A-31 (Doc. No. 200)). This new “constellation” of documents, *see* Aronowitz Depo. at 183:19–184:14 (O.A. Tab 81; Doc. No. 176), led Scotts to discover that Liberty Mutual had misled Scotts regarding insurance coverage in the 1950’s and 1960’s:

Based on the records produced by Liberty Mutual from Liberty Mutual’s files in September and October, 2006, the depositions of the Liberty Mutual witnesses taken in October 2006, and the information provided to Mr. Aronowitz and me at his deposition in October 2006, Scotts discovered that Liberty Mutual had misled Scotts and withheld material information from Scotts regarding the amount, type, terms, and evidence of insurance coverage that Liberty Mutual had issued to Scotts in the 1950’s and 1960’s. Scotts discovered information from Liberty Mutual’s files regarding insurance coverage issued to Scotts that had never before been disclosed to Scotts. The information included new loss runs and other records regarding coverage provided to Scotts as well as testimony from Liberty Mutual witnesses regarding the meaning and import of the information provided. Based on Scotts’ inquiries, Scotts also determined that, in deciding to enter into the July 2000 settlement agreement, Scotts had relied on Liberty Mutual’s omissions and representations to Scotts during the 1999-2000 negotiations. Scotts promptly authorized and directed its outside counsel to prepare and file a complaint against Liberty Mutual. Scotts filed the complaint that initiated this action approximately two weeks after Scotts discovered what it determined to be fraud and breach of fiduciary duties, among other improper conduct, by Liberty Mutual based on the newly discovered information.

Feb. 8, 2008 Smith Aff. at ¶ 3 (O.A. Tab 97; Barnhart Decl. Ex. A-31 (Doc. No. 200)).

Liberty Mutual’s repeated false or misleading statements long after the settlement with Scotts delayed the discovery of Liberty Mutual’s fraud. Moreover, Liberty Mutual’s repeated false statements after producing additional documents in the California litigation, and even during this very litigation, are also important evidence as to the credibility of Liberty Mutual’s other false statements before and after settlement. *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**

Based on the evidence set forth elsewhere in Scotts' Supplement Brief and attachments, Liberty Mutual's statements were made with the same knowledge of falsity or disregard for the truth as when they were made before settlement. That evidence is detailed in the other sections in this filing. *See also, e.g.*, Liberty Mutual spreadsheets, LMIC 1508-09, 1913 (O.A. Tab 36; Feb. 8, 2008 Barnhart Decl. Ex. A-29 (Doc. No. 200)); Unit report, OMS 0121 (Jan. 15, 2008 Barnhart Decl. Ex. B-8 (Doc. No. 171)); Unit report, OMS 0133 (Jan. 15, 2008 Barnhart Decl. Ex. B-28 (Doc. No. 171)); Policy form, LMIC 8200-05 (Jan. 15, 2008 Barnhart Decl. Ex. B-34 (Doc. No. 171)); Scotts' Motion for Partial Summary Judgment at 7-17 (Doc. No. 170).

#### **E. Intent**

Liberty Mutual's February 2003 response shows that Liberty Mutual knew that Scotts continued to request evidence of coverage, even after the settlement. *See* Feb. 24, 2003 DiSisto letter, OMS 0236 (O.A. Tab 65; Feb. 8, 2008 Barnhart Decl. Ex. A-38 (Doc. No. 200)) (quoted *supra* § A). Moreover, Liberty Mutual knew that disclosing its evidence of coverage after the settlement would threaten the validity of the settlement and potentially subject Liberty Mutual to expensive litigation. Indeed, after Liberty Mutual disclosed its records under threat of subpoena in 2006, Liberty Mutual still continued to deny or dispute what it had produced.

As set forth previously, Liberty Mutual knew that Scotts was relying on all of 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 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**

When Liberty Mutual represented again three years after Scotts’ settlement that its searches had not “revealed any general liability policies issued” to Scotts, Liberty Mutual continued the same pattern of misrepresentations that had it made earlier. Scotts could not know what evidence Liberty Mutual had, what searches had been undertaken, or what determinations



had been made. Scotts reasonably relied on Liberty Mutual's representation regarding such matters. *See* Feb. 7, 2008 Armstrong Aff. at ¶¶ 3, 5–6 (O.A. Tab 23; Feb. 8, 2008 Barnhart Decl. Ex. A-26 (Doc. No. 200)); Butler Depo. at 491:19–492:7, 493:11–18 (O.A. Tab 83; Doc. No. 178–79).

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