

Not Reported in F Supp 2d
(Cite as: 2002 WL 1203836 (S.D.N.Y.))



Only the Westlaw citation is currently available

United States District Court, S D New York

RUTGERSWERKE AG and FRENDOS p A ,
Plaintiffs,

v

ABEX CORPORATION, Pneumo Abex
Corporation and Whitman Corporation, Defendants

No. 93 CIV 2914 JFK.

June 4, 2002

Baker & McKenzie, Chicago, IL, Of Counsel Richard
Franklin, Esq , for the Plaintiffs

Fognani Guibord Homsy & Roberts, LLP, Chicago, IL,
Of Counsel John Roberts, Esq , for Defendants Abex
Corporation and Pneumo Abex Corporation

Butler Rubin Saltarelli & Boyd, Chicago, IL, Of
Counsel Kirk T Hartley, Esq , for Defendant Whitman
Corporation

OPINION and ORDER

KEENAN, District J

*1 Before the Court are the following motions (1) motion for summary judgment by defendants Abex Corporation ("Abex"), Pneumo Abex Corporation ("Pneumo Abex"), and Whitman Corporation ("Whitman") (collectively "Defendants"), (2) Defendants' motion for partial summary judgment on the issue of whether the "dumps" were permanently closed in 1983, (3) Defendants' motion to strike, and (4) motion for summary judgment by plaintiffs, Rutgers AG (formerly known as Rutgerswerke AG and herein referred to as "Rutgers") and Frendo S p A ("Frendo") (collectively "Plaintiffs") The motions are opposed The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332 [FN1] The Court heard oral argument on these motions on May 16, 2002 and thoroughly considered all submissions made in connection with them For the reasons stated herein, the Court grants Defendants' motion for summary judgment, denies Plaintiffs' motion for summary judgment and denies as moot all other pending motions

FN1 Jurisdiction before this Court is predicated upon diversity of citizenship between the parties, *see* 28 U.S.C. § 1332(a)(1), as plaintiff Rutgers is a German stock corporation with its principal place of business in Germany, plaintiff Frendo is an Italian stock corporation with its principal place of business in Italy, defendant Abex was a corporation organized and existing under the laws of Delaware with its principal place of business in New York, defendant Pneumo Abex is a corporation organized under the laws of Delaware with its principal place of business in New Hampshire, and defendant Whitman is a holding corporation organized under the laws of Delaware with its principal place of business in Illinois and the amount in controversy exceeds the applicable jurisdictional minimum *See Rutgerswerke AG v Abex Corp.*, No. 93 Civ. 2914, 1995 WL 625701, *1 (S.D.N.Y. Oct. 25, 1995)

Background

This lawsuit involves a dispute over who should bear financial responsibility for a landfill removal project at a brake manufacturing plant in Orzinuovi, Italy, a town located in the northern part of the country in an area known as the Lombardy Region On January 23, 1970, the Mayor of Orzinuovi, upon consultation with the Hygienic Building Commission, granted authorization to construct the Orzinuovi plant *See* Defs' 56 l Statement ¶ 6, Roberts Aff, ¶ 18, Ex Q From April of 1978 till the end of 1983, plaintiff Rutgers and defendant Abex, through wholly-owned subsidiaries, participated in a joint venture that owned and operated the Orzinuovi plant *See id* ¶ 7, Roberts Aff, ¶ 5, Ex D During this time period, Hans Bethke, the Rutgers official responsible for reducing the waste stream at the plant, visited and toured the facility about twice a year *See id* ¶¶ 8-9, Roberts Aff ¶ 5, Ex D, pp 21, 34, 43 & 46 This tour included the backyard area of the plant where the underground landfills were located *See id* ¶¶ 8-9, Roberts Aff ¶ 5, Ex D, pp 34, 43 At his deposition, Mr Bethke testified that on these occasions he saw above-ground waste piles, but no underground landfills *See* Roberts Aff ¶ 5, Ex D, pp 43-45

On or about September 22, 1980, the Region of Lombardy received a request for authorization to operate a waste disposal facility from Frendo, [FN2]

pursuant to Lombardy Regional Law 94/1980 By this request, Frendo sought approval for the closure of two landfills and the opening of another landfill located at the Orzinuovi plant *See id* ¶ 6, Ex E, pp 41-54, Roberts Aff ¶ 14, Ex M In response to that request, on March 17, 1982, the Lombardy Region sent a notice asking for supplemental documentation *See Pls' Resp to Defs' 56 1* ("Pls' Resp") ¶ 11, Pls' Ex E, ¶¶ 6(c)-(e) Because of the failure to supply the requested information, on November 8, 1982, the Region informed Frendo officials that a denial of authorization was being processed *See id* By letter dated May 31, 1983, Frendo withdrew the September 1980 application for authorization to open the other landfill and submitted a request for authorization to temporarily store waste within the Orzinuovi plant *See Defs' 56 1 Statement* ¶ 12, Roberts Aff, ¶ 15, Ex N In response to this subsequent request, on October 25, 1983, the Lombardy Region rendered Deliberation No III/32537, a statement officially acknowledging "the closing of the landfill disposal facility located" at the Orzinuovi plant *Id* ¶ 13, Roberts Aff ¶ 13, Ex L The Deliberation directed Frendo to submit, within three months, a proposed environmental restoration plan prepared in cooperation with the Provincial Administration of Brescia, the local authority responsible for verifying implementation of the plan *See id* Shortly thereafter, on December 21, 1983, the Province of Brescia acknowledged receipt of the Deliberation confirming the closing of the landfill disposal facility at the plant and requested that Frendo forward documentation illustrating its proposed environmental restoration plan for the site *See id* ¶ 14, Roberts Aff ¶ 16, Ex O Following an April 19, 1984 on-site inspection of the Orzinuovi plant, on April 30, 1984, the Province issued an official acknowledgment verifying compliance with the regulatory program *See id* ¶ 15, Roberts Aff ¶ 3, Ex B, pp 117-119, Roberts Aff ¶ 12, Ex K, Roberts Aff ¶ 17, Ex P On September 8, 1993, the Province of Brescia's Waste Control Office prepared a chronology of events regarding the landfill situation at the Orzinuovi plant *See Roberts Aff* ¶ 3, Ex B, p 55, Ex H This report states that, "after DPR 915/82 went into effect, Frendo permanently closed the landfill as evidenced by deliberation no 32537 of the Lombardy Region dated October 25, 1983 " *Id* Ex H, p 3 Italian officials have never advised Frendo of a deficiency in any of its notifications or approvals *See Roberts Aff* ¶ 3, Ex B, pp 93-94

FN2 "Frendo" hereinafter refers to the entity that owned and operated the Orzinuovi plant at any given time, unless otherwise specified

1988 Share Purchase Agreement

*2 Sometime after the conclusion of the joint venture, on April 28, 1988, defendant Whitman Corporation (then known as IC Industries, Inc.) and defendant Pneumo Abex (then known as PA Holdings Corporation) executed a stock purchase agreement (the "1988 Purchase Agreement"), under which Whitman agreed to sell to Pneumo Abex certain subsidiaries including defendant Abex Corporation ("Abex"), an entity that, in turn, owned 99.99% of the shares of Abex S.p.A., an Italian stock company *See First Am Compl Ex C*, § 1(a)(ii) & § 3(d), Pls' 56 1, ¶ 12 At that time Abex S.p.A. owned and operated the Orzinuovi plant *See id*

Thereafter, a dispute arose between Whitman and Pneumo Abex concerning certain provisions of the 1988 Purchase Agreement *See First Am Compl*, Ex G, p 1 To resolve the dispute, on September 23, 1991, Whitman and Pneumo Abex entered into a settlement agreement (the "Settlement Agreement") providing, among other things, that Whitman and Pneumo Abex would amend the 1988 Purchase Agreement by executing a document entitled "Second Amendment to Stock Purchase Agreement dated April 28, 1988" (the "Second Amendment") *See id*, Ex G, p 2 That same day, September 23, 1991, Whitman and Pneumo Abex executed the Second Amendment, which the parties dated August 29, 1988 *See id*, Ex H Section 2 of the Second Amendment amended Section 12(b)(vi) of the 1988 Purchase Agreement to read

Seller hereby agrees to indemnify Buyer and its affiliates (including the Sold Subsidiaries) against and to hold them harmless from, any loss, liability, claim, damage or expense (including reasonable legal fees and expenses) suffered or incurred by Buyer or its affiliates for or on account of or arising from or in connection with

(a) any noncompliance or failure to comply with, violation of, or breach of any Applicable Environmental Law ,

(b) statutory liability arising out of any releasing, spilling, dumping, burying, placing, storing or disposing of any substance classified, defined, identified or designated as hazardous or toxic at any time prior to August 29, 1990, pursuant to Applicable Environmental Law or within the meaning given to the term hazardous or toxic under any Applicable Environmental Law , or

(d) any investigation, proceeding, claim or allegation relating to any matter indemnifiable under (a) or (b) above

Id

Section 12(b)(vi), as amended, defines "Applicable Environmental Law" as "any federal, state, local and foreign statute, code, act, ordinance, regulation, requirement, or administrative rule and any permit, license, authorization, consent, notice, order, writ, subpoena or decree issued pursuant thereto relating to or as applied to pollution control, environmental contamination or protection of the environment, in each case limited to the extent and scope of recovery available at any time on or prior to August 29, 1990." *Id.* ¶ 12(b). Paragraph 3 of the Second Amendment provides "The parties acknowledge that the environmental matters listed on Schedule 12(b)(vi) [thereto] are included within [Whitman's] indemnification obligations under Section 12(b)(vi) as amended." *Id.* ¶ 36. Schedule 12(b)(vi), in turn, lists "Italian Environmental (Frendo)." *Id.* ¶ 37. The term "Italian Environmental (Frendo)" on Schedule 12(b)(vi) includes the landfills at the Orzinuovi plant. *See* Abex/Pneumo Abex Admission No. 56, Whitman Admission No. 40.

1989 Share Purchase Agreement

*3 On January 2, 1989, plaintiff Rutgers and defendant Abex entered into a stock purchase agreement (the "1989 Purchase Agreement"), under which a subsidiary of Rutgers, Frendo S r l, purchased the capital stock in Abex S r l (formerly Abex S p A), which owned and operated the Orzinuovi plant. *See* First Am Compl., Ex. A. [FN3] Abex represented and warranted to Purchaser (Frendo S r l) and Parent (Rutgers) under section 3.1.7 of the 1989 Purchase Agreement that the Orzinuovi plant was not being conducted in violation of any applicable law, other than violations that did not have a material and adverse affect on the business or finances of the sold subsidiary, Abex S r l. [FN4] *See id.* § 3.1.7. Section 7.3(a) of the agreement provides that, subject to section 7.1, Abex "will indemnify, defend and hold harmless," Rutgers and Frendo S r l with respect to "any and all claims, demands or suits (by any person or entity, including without limitation any Governmental Agency), losses or liabilities relating to, resulting from or arising out of any material breach by [Abex] of any of the representations, warranties or covenants of [Abex]" contained in the agreement. *Id.* § 7.3(a). Section 7.1(a), in turn, contains a one-year limitation on Rutgers's (and Frendo's) ability to assert a breach of warranty claim and provides that "any claim for an alleged breach of representation or warranty which is not asserted by written notice given as herein provided which describes the basis for such claim with specificity may not be pursued." *Id.* ¶ 7.1(a). [FN5]

[FN3] In May 1989, Frendo S r l merged with Abex S r l and assumed the name Frendo S p A, a plaintiff in this action. *See* First Am Compl. ¶ 12.

[FN4] Section 3.1.7 provides in pertinent part: Compliance with Laws. [T]he business of the Sold Subsidiaries is not being conducted, and neither of the Sold Subsidiaries is, in violation of any applicable Law, other than violations which do not, and, insofar as reasonably can be foreseen, in the future will not, either individually or in the aggregate, have a material adverse affect on the business, financial condition or results of operations of the Sold Subsidiaries. First Am Compl., Ex. A, § 3.1.7.

[FN5] Section 7.1(a) provides in relevant part: Each of the representations and warranties will survive the Closing and remain in full force and effect until the expiration of one year after the Closing Date or, if earlier, January 31, 1990, with the result that any claim for an alleged breach of a representation or warranty which is not asserted by written notice given as herein provided which describes the basis for such claim with specificity may not be pursued. First Am Compl., Ex. A, ¶ 7.1(a).

Plant Expansion Investigation and Discovery of Landfills

In September 1989, two Rutgers officials, Mr. Bethke and Mr. Bayer, began investigating the possibility of expanding the Orzinuovi facility by building in the area behind the plant. *See* Roberts Aff. ¶ 5, Ex. D, pp. 96-99. During the course of this investigation, on September 28, 1989, these officials allegedly discovered the landfills. *See id.* Upon discovery, Mr. Bethke immediately questioned Frendo officials regarding the status of the landfills. *See id.* Ex. D, pp. 103-05. On October 6, 1989, in response to the inquiry regarding the waste situation, Mr. Colli, a Frendo manager, advised Mr. Bethke that the "dump inside the plant" was used "up to the second half of 1983" and that, "we presented on April 17, 1984 the land reclamation project of the interested area and we obtained the approval from 'Provincia' on April 30, 1984." Roberts Aff. ¶ 11, Ex. J.

Shortly before expiration of the one-year limitation

period, on October 23, 1989, Plaintiffs notified defendant Abex, in writing, of Plaintiffs' belief that underground landfills at the Orzinuovi plant might expose them to liability, thereby constituting a material breach by Defendants of representations and warranties under the 1989 purchase agreement. *See* Defs' Supplemental 56.1 Statement, Ex. 1. In the letter, Plaintiffs stated "While such waste disposal may or may not be partially covered by some official permit, it appears that at least a significant portion of the waste disposal on the Orzinuovi premises is not covered by any license or permit whatsoever." *Id.* The letter also explained "We are currently in the process of investigating and inspecting the nature and scope of the waste disposal site as well as its legality." *Id.*

*4 Plaintiff Frendo first notified Italian authorities about the landfills in an October 2, 1991 letter proposing a landfill removal project as part of a plan to modernize and expand the Orzinuovi plant and to comply with the dictates of an environmental policy recently prepared by Frendo's new management. *See* Roberts Aff., ¶ 9, Ex. H. This letter made no reference to a violation of law as the reason for the project and came more than two years after the indemnity demand asserted against Defendants. All of Frendo's subsequent correspondence with Italian authorities likewise contained no mention of a violation of law as the impetus for the removal project. *See id.* Ex. H. On January 23, 1993, the Mayor of Orzinuovi issued an order relating to the removal of the landfills at the Frendo plant. *See* Coccia Decl., Tab. R.

Discussion

I Summary Judgment Standards

This Court may grant summary judgment only if the moving party is entitled to judgment as a matter of law because there is no genuine dispute as to any material fact. *See Silver v. City Univ. of New York*, 947 F.2d 1021, 1022 (2d Cir. 1991), *Montana v. First Fed. Sav. & Loan Ass'n*, 869 F.2d 100, 103 (2d Cir. 1989), *Knight v. U.S. Fire Insur. Co.*, 804 F.2d 9, 11 (2d Cir. 1986). The role of the Court on such a motion "is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." *Knight*, 804 F.2d at 11, *see also First Fed. Sav. & Loan Ass'n*, 869 F.2d at 103 (stating that to resolve a summary judgment motion properly, a court must conclude that there are no genuine issues of material fact, and that all inferences must be drawn in favor of the non-moving party).

The movant bears the initial burden of informing the Court of the basis for its motion and identifying those

portions of the "pleadings, depositions, answers to interrogatories, and admissions to file, together with affidavits, if any," that show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). If the movant meets this initial burden, the party opposing the motion must then demonstrate that there exists a genuine dispute as to the material facts. *See id.*, *Silver*, 947 F.2d at 1022.

The opposing party may not solely rely on its pleadings, on conclusory factual allegations, or on conjecture as to the facts that discovery might disclose. *See Gray v. Darien*, 927 F.2d 69, 74 (2d Cir. 1991). Rather, the opposing party must present specific evidence supporting its contention that there is a genuine material issue of fact. *See Celotex Corp.*, 477 U.S. at 324, *Twin Lab. Inc. v. Weider Health & Fitness*, 900 F.2d 566, 568 (2d Cir. 1990).

To show such a "genuine dispute," the opposing party must come forward with enough evidence to allow a reasonable jury to return a verdict in its favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986), *Cinema North Corp. v. Plaza at Latham Assocs.*, 867 F.2d 135, 138 (2d Cir. 1989). If "the party opposing summary judgment propounds a reasonable conflicting interpretation of a material disputed fact," then summary judgment must be denied. *Schering Corp. v. Home Ins. Co.*, 712 F.2d 4, 9-10 (2d Cir. 1983). The Court will analyze the summary judgment motions in accordance with these principles.

II Plaintiffs' Motion For Summary Judgment

*5 In May 1993, Plaintiffs brought this diversity action asserting contractual indemnification claims against Defendants for the cost of the landfill removal project at the Orzinuovi plant. [FN6] Plaintiffs move for summary judgment on their indemnity claims, arguing that no genuine issues of material fact exist. Specifically, Plaintiffs contend that they deserve summary judgment against Defendants because the remaining material facts in this case have been significantly narrowed as a result of Defendants' alleged failure to defend against claims potentially within the scope of the duty to indemnify.

FN6. Plaintiffs claim damages for the cost of the investigation and remediation of landfills at the Orzinuovi plant in the amount of the U.S. dollar equivalent of approximately DM 3,850,743.52 and Lira 21,268,488,677. *See* Pls' Notice of Mot. at 3.

Plaintiffs argue that they are relieved of any responsibility of proving actual liability arising from the landfills at the Orzinuovi plant because Defendants breached their duty to defend against the claims made by Italian authorities. Plaintiffs base their argument on a line of New York cases involving breach of the duty to defend in which courts have held that where an indemnitor declines to defend, the indemnitor will be bound by any reasonable settlement reached by the indemnitee. In making this argument, Plaintiffs principally rely upon the following passage in ELRAC, Inc v Cruz, 699 N.Y.S.2d 647 (N.Y. Civ. Ct. Queens Co. 1999):

If, however, the indemnitor is given notice of the claim or proceeding against the indemnitee and declines to defend, then the indemnitor is conclusively bound by any reasonable good faith settlement the indemnitee may make or any litigated judgment that may be rendered against him. Under these circumstances, an indemnitee may recover based on its "potential liability", and need not demonstrate "actual liability" by providing the elements of the underlying claim against it. In other words, if sufficient notice was given, an [indemnitee] will have to show (1) only "potential liability, to wit that the indemnitee could have been found liable at the trial of the underlying action, and (2) that the underlying settlement was reasonable and made in good faith.

Id. at 649 (internal citations omitted)

In light of ELRAC, Plaintiffs maintain that they need establish only that "(i) they could have been found potentially liable to the Italian Authorities, and (ii) that the underlying settlement with the Italian Authorities was reasonable and made in good faith." Pls.' Br. at 10. But the ELRAC string of cases is inapposite. As Defendants point out, unlike in this case, each of those cases involved a situation in which a third party brought a suit against the indemnitee that plainly fell within the given indemnity provision's coverage, thereby triggering the indemnitor's duty to defend, whereas here no third party ever instituted a lawsuit triggering Defendants' defense obligations. Neither Plaintiffs' October 23, 1989 letter expressing the belief that the landfills might expose them to potential liability, nor the Mayor's January 23, 1993 order triggered any defense obligations under the indemnification provisions because neither situation presented Defendants with anything to defend. [FN7] Contrary to Plaintiffs' assertion, Defendants never declined to defend the claims of Italian authorities for the simple reason that there were no formal claims to defend against, or, at the very least, there was insufficient

notice of any such claim. [FN8] See Atlantic Richfield Co. v. Interstate Oil Transport Co., 784 F.2d 106, 113 (2d Cir. 1986) ("Notice sufficient to give the indemnitor a meaningful opportunity to defend is the indispensable element to be proven by the party seeking indemnity. Where notice--which includes a meaningful opportunity to assume the defense--is lacking, a demonstration of actual liability is required"), Carey Transp. v. Greyhound Co., 80 B.R. 646, 652-53 (Bankr. S.D.N.Y. 1987) ("Where an indemnitor is subject to an express duty to defend, and where the indemnitee fails to give adequate notice of the claim or makes a settlement without giving the indemnitor reasonable opportunity to participate, the indemnitee cannot recover indemnity for the settlement without proving actual liability.") This is illuminated by the fact that Plaintiffs point to no evidence indicating that they acted in Defendants' stead in pursuing a defense against any claim made by Italian authorities. Quite the contrary, evidence in this case indicates that Plaintiffs tried to create a "violation of law" to create indemnity claims by drafting the cleanup order ultimately issued by the Mayor of Orzinuovi and by failing to contest the order, despite Plaintiffs' knowledge of its invalidity.

[FN7] In the insurance-coverage context, courts have explained the duty to defend concept as follows: "the duty to defend is measured against the allegations of pleadings but the duty to pay is determined by the actual basis for the insured's liability." Hugo Boss Fashions, Inc. v. Federal Insur., 252 F.3d 608, 627-28 (2d Cir. 2001) (quoting Servidone Constr. Corp. v. Sec. Ins. Co. of Hartford, 64 N.Y.2d 419, 488 N.Y.S.2d 139, 477 N.E.2d 441, 444 (1985)).

[FN8] Plaintiffs' argument for an award of summary judgment in their favor is premised upon a failure to defend theory. But this theory utterly fails against defendant Whitman for the simple reason that the 1988 SPA, as amended, does not contain a duty to defend clause. For this reason alone, then, plaintiff Frendo is not entitled to summary judgment against Defendant Whitman.

*6 Accordingly, the Court denies Plaintiffs' motion for summary judgment against Defendants.

III Defendants' Motion For Summary Judgment

Defendants brought a motion for summary judgment,

arguing that they are entitled to judgment as a matter of law because the indemnity provisions at issue do not cover the cleanup at the Orzinuovi plant. The question presented by this motion is whether the cost of Plaintiffs' landfill-removal project falls within Defendants' indemnification obligations as defined by the 1988 Purchase Agreement, as amended, and the 1989 Purchase Agreement.

This issue is one of New York law because both contracts specify that they are governed by the laws of New York. *See* First Am Compl, Ex A, § 10.9(a), Ex C, § 7.5. To establish a breach of contract claim under New York law, a plaintiff must prove (1) the existence of a contract between the parties, (2) plaintiff's compliance with the terms of the contract, (3) defendant's breach of the contract, and (4) damages as a result of the breach. *See Prince v American Airlines, Inc.*, 1999 WL 796178, No. 97 Civ. 7231, at *7 (S.D.N.Y. Oct. 6, 1999), *see also Terwilliger v Terwilliger*, 206 F.3d 240, 245-46 (2d Cir. 2000). To avoid summary judgment, a nonmovant must present specific evidence to support its position that there is a genuine issue of material fact. *See Banca Commerciale Italiana v Northern Trust Int'l Banking Corp.*, 160 F.3d 90, 93 (2d Cir. 1998), *Marks v New York Univ.*, 61 F.Supp.2d 81, 88-89 (S.D.N.Y. 1999).

Defendants contend that Plaintiffs have failed to create a triable issue of material fact to support one of these essential elements--to wit, that Plaintiffs suffered damages as a result of the alleged breach. Given that the indemnity provision under the 1989 Purchase Agreement differs from the indemnity provision under the 1988 Purchase Agreement, as amended, the Court will discuss them separately.

A. Contractual Indemnification Under 1989 Purchase Agreement

In count I of their amended complaint, Plaintiffs assert a claim against defendants Abex and Pneumo Abex ("Defendants") for indemnification under the 1989 Purchase Agreement for losses incurred on account of removing allegedly unlawful landfills at the Orzinuovi plant. *See* First Am Compl ¶¶ 7-21. Section 7.3(a) of the 1989 Purchase Agreement obligates Defendants to indemnify Plaintiffs in connection with any loss resulting from a material breach of Defendants' representation of Frendo's compliance with applicable law. *See* First Am Compl, Ex A, § 7.3(a), pp. 39-40, § 3.1.7, pp. 15-16. The introductory phrase of section 7.3 makes this indemnity obligation subject to the procedural limits set forth in section 7.1. *See id.*, Ex A, § 7.3, p. 39. Pursuant to section 7.1(a), any notice of claim for indemnification must satisfy both a timeliness

and a specificity requirement. Section 7.1(a), the "survival" provision, provides in relevant part:

*7 Each of the representations and warranties will survive the Closing and remain in full force and effect until the expiration of one year after the Closing Date or, if earlier, January 31, 1990, with the result that any claim for an alleged breach of a representation or warranty which is not asserted by written notice given as herein provided which describes the basis for such claim with specificity may not be pursued.

Id., § 7.1(a), p. 38.

By virtue of section 7.1(a), the time period in which Plaintiffs could make an indemnity demand expired on January 31, 1990, the one-year anniversary of the closing date. *See* First Am Compl ¶ 9 (alleging that "[t]he purchase and sale provided for in the 1989 Stock Purchase Agreement was closed on or about January 31, 1989 (the '1989 Closing Date')"). Based on section 7.1(a)'s specificity provision, written notice of a claim predicated on the compliance representation should identify specific liability under the law. Defendants argue that Plaintiffs cannot pursue an indemnity claim because they did not give proper notice of their claim within the one-year period allowed for in the 1989 Purchase Agreement. Plaintiffs contend that their October 23, 1989 letter to Defendant Abex--advising of Plaintiffs' belief of a possible breach under the 1989 Purchase Agreement--satisfies section 7.1(a).

Plaintiffs sent the demand letter more than three months prior to expiration of the one-year period. But to fulfill the conditions of section 7.1(a), the October 23, 1989 notice must satisfy the specificity requirement as well. Based on the contractual language, section 7.1(a)'s two requirements go hand-in-hand, thus, a bare assertion of a claim for indemnity within the one-year window is meaningless without accompanying details regarding the basis for the claim. Any other interpretation of section 7.1(a) would eviscerate its specificity clause, a result contrary to the rules of contract construction. This is so because under New York law, the governing law specified in the 1989 Purchase Agreement, a court must interpret a contract so as to give effect to all of its clauses and to avoid an interpretation that leaves part of a contract meaningless. *See Insurance Co. of North America v ABB Power Generation, Inc.*, 925 F.Supp. 1053, 1058-59 (S.D.N.Y. 1996). Moreover, New York courts apply the canon of strict construction with particular force to indemnity provisions to avoid reading into an agreement a duty not anticipated by the parties. *See TD Waterhouse Investor Svcs, Inc. v Integrated Fund Svcs, Inc.*, No. 01 Civ. 8986, 2002 WL 441123, at *2.

(S.D.N.Y. Mar. 21, 2002) With all of this in mind, the Court turns to an analysis of whether Plaintiffs gave proper notice of their claim within the one-year time period as required by section 7 1(a)

The October 23, 1989 letter asserts a right to indemnity on account of a possible breach of the "compliance with law" representation. In that letter, Plaintiffs express, in a general fashion, the opinion that landfills at the Orzinuovi plant might not comply with Italian law "[w]hile such waste disposal may or may not be partially covered by some official permit, it appears that at least a significant portion of the waste disposal on the Orzinuovi premises is not covered by any license or permit whatsoever." First Am. Compl., Ex. B. The letter does not indicate the basis for this impression, nor does it specify which Italian law, if any, the existence of the landfills possibly violated. The letter advises that an investigation into the legality of the landfills was still ongoing. *See id.*

*8 For starters, the mere presence of landfills at a manufacturing plant was not *per se* unlawful under Italian law because government officials issued permits authorizing such activity (as was the case here). *See, e.g., Roberts Aff.* ¶ 17, Ex. P, *see also* Defs.' Ex. 52, pp. 5-6 ("[U]ntil 1976, no specific legislation (whether national or regional) existed in Italy dealing specifically with wastes disposal and/or water pollution.") In that sense, Plaintiffs could not properly make a claim for indemnity simply based upon the discovery of landfills. Plaintiffs' letter intimates as much given the acknowledgments that at least some of the waste disposal might be officially authorized and that the situation called for further investigation. Meanwhile, despite Plaintiffs' implication to the contrary, at this point in their investigation, they had no reason to conclude that landfills at the Orzinuovi plant created any illegality. In fact, on October 6, 1989, in response to Plaintiffs' inquiry regarding the legal status of the landfills, Frendo management advised Plaintiffs that the "dump inside the plant" was used "up to the second half of 1983" and that, "we presented on April 17, 1984 the land reclamation project of the interested area and we obtained the approval from 'Provincia' on April 30, 1984." Defs.' 56 1 ¶ 19, Ex. J. In light of this, when Plaintiffs made their indemnity demand they had information indicating *official approval* of the waste disposal at the Orzinuovi plant.

Moreover, Plaintiffs engaged in a questionable course of conduct after making their indemnity demand. This behavior included ignoring Abex's requests for more information regarding the basis for Plaintiffs' claim. For instance, after receipt of the October 23rd demand, Abex responded on October 31, 1989 by requesting

proof to support Plaintiffs' claim and asking for access to Frendo employees with knowledge of the relevant facts. *See* Defs.' 56 1 ¶ 62, Tab 2. That October 31 letter notified Plaintiffs of the lack of specificity in their notice: "the letter of October 23, 1989 does not give us enough facts to conclude one way or the other whether there was a material breach of any representations, warranties or covenants under the Stock Purchase Agreement or whether there is a duty to indemnify." *Id.* On at least two separate occasions, Abex requested more specific information concerning the basis for Plaintiffs' indemnity demand, each time giving Plaintiffs an opportunity to specify their claim within the one-year limitation period. *See, e.g.,* Defs.' 56 1 ¶¶ 63-64, Tabs 3 & 4. These numerous requests, however, went unheeded. [FN9] Plaintiffs also neglected to conduct a timely inquiry into the permit history of landfills at the plant, a seemingly obvious step in an investigation of this type. In this regard, Plaintiffs' representative who was primarily responsible for gathering facts concerning the landfills and for dealing with Italian authorities with respect to the landfill situation testified that he made no attempt to ascertain any information regarding permit authorization for the landfills, a telling admission. *See Roberts Aff.* ¶ 3, Ex. B, pp. 89-90. Additionally, the record reflects that Plaintiffs waited almost one and one-half years after the October 23rd indemnity demand to retain Italian counsel to analyze Italian environmental requirements as they relate to potential claims against Abex with respect to the Orzinuovi plant. *See* Defs.' 56 1 ¶ 81, Tab 8. This factor implies that as of October 23, 1989 Plaintiffs knew of no legal ground on which to base their claim for indemnity, which explains (but hardly absolves) the failure to specify potential liability under the law in their notice of claim. Furthermore, Plaintiffs waited nearly two years after giving notice to Defendants before informing Italian authorities, on October 2, 1991, of the presence of landfills at the Orzinuovi plant. *See* Defs.' Exs., Tab 16. Their October 2nd notification mentions nothing about a violation of law as the reason for Plaintiffs' proposed landfill removal project, even though Plaintiffs took care to draft the letter in such a way as to avoid damaging "our litigation in the United States." *See* Defs. Exs., Tab 12. Despite this goal, at no time during their discussions with Italian authorities did Plaintiffs state that the reason for their proposed removal project was due to concerns about the legality of the landfills.

[FN9] Plaintiffs sent Abex a letter on November 23, 1989, but this communication failed to illuminate the basis for Plaintiffs' claim with respect to the landfills, as Plaintiffs' own position reflects. "The December 21,

1989 letter responds to plaintiffs' November 23, 1989 letter, which deals exclusively with matters other than the Orzinuovi Dumps. These letters are completely irrelevant to matters in controversy in this litigation." Pls' Resp to Defs' Suppl 56 1 ¶ 63

*9 Moreover, Plaintiffs' improper conduct included a covert campaign to generate grounds for their indemnity demands against Defendants. Despite Defendants' request that the parties work together in dealing with government officials, Plaintiffs pursued a campaign of secrecy and concealment regarding their dealings with Italian authorities. *See* Defs' Supplemental 56 1 ¶ 91, Tab 12. For example, during one of Plaintiffs' private meetings with the Mayor of Orzinuovi about the landfills, Plaintiffs' representative asked the Mayor whether "it is possible to have from him a mandatory request to proceed" with Plaintiffs' already proposed remediation project. *See id* ¶ 100, Tab 26. Plaintiffs' campaign also involved coaxing the Mayor to issue the January 23, 1993 order requiring plaintiff Frendo to undertake a landfill cleanup project, an order that Plaintiffs' counsel secretly drafted and requested. *See id* ¶ 109, Tabs 56, 57. In addition to this, after informing Plaintiffs that the order was invalid and without legal effect, Plaintiffs' lawyer then stated, "I assume these developments should not be disclosed to Abex." Roberts Aff ¶ 20, Ex. S. In pressing their indemnity rights here, Plaintiffs make much of this order, classifying it as a "claim" asserted against them by Italian authorities. But given the dubious pedigree of the order, this so-called "claim" is little more than a claim of Plaintiffs' own creation.

The Court concludes that Plaintiffs' October 23rd indemnity demand fails to specifically particularize the basis for their claim as required by section 7 1(a). Because of Plaintiffs' lack of compliance with the notice of claim requirements set forth in section 7 1(a), namely, the failure to identify specific liability under the law on account of the landfills, they cannot pursue a claim for indemnification under the 1989 Purchase Agreement. Therefore, the Court grants defendants Abex and Pneumo Abex summary judgment as to count I of Plaintiffs' amended complaint.

B Contractual Indemnification Under 1988 Purchase Agreement

In count II of their amended complaint, plaintiff Frendo ("Plaintiff") asserts a claim against defendant Whitman ("Defendant") for indemnification under the 1988 Purchase Agreement for losses associated with the landfill removal project at the Orzinuovi plant. *See* First

Am Compl ¶¶ 30-41. Whitman represented and warranted under section 5(i) of the 1988 Purchase Agreement that the Orzinuovi plant was not being conducted in violation of any applicable law, other than violations that did not have a material and adverse effect on the business or finances of Frendo. *See id* § 5(i). Section 12(b)(i) obligated Defendant to indemnify the buyer in connection with any loss resulting from a breach of any representation provided by Defendant in section 5. *See id* § 12(b)(i). Section 12(b)(i)'s broad indemnification provision expressly excludes environmental matters, for which indemnification provisions are set forth separately in section 12(b)(vi). *See id*. Section 12(b)(vi) of the 1988 Purchase Agreement, as amended by section 2 of the Second Amendment, obligates Defendant to indemnify the buyer from any liability incurred by the buyer on account of (a) any noncompliance with any Applicable Environmental Law, (b) statutory liability arising out of any dumping of a substance classified as hazardous or toxic under any Applicable Environmental Law, or (d) any investigation, proceeding, claim or allegation relating to any matter indemnifiable under (a) or (b). *See id*, Ex. H, § 2. Based on this contractual provision, to obtain indemnity, Plaintiff must prove not only the Orzinuovi plant operator's non-compliance with applicable law or statutory liability because of the landfills, but must also establish that Plaintiff suffered losses because of the non-compliance or because of a claim or allegation of non-compliance. The Court rejects the notion that the Mayor's January 23rd order meets this requirement. Plaintiffs, however, also argue that under Italian law, the Orzinuovi plant operator had an affirmative duty to remove the landfills regardless of a governmental directive to do so. Because of this, the Court will analyze the Italian regulations that Plaintiffs claim Frendo, as plant operator, was out of compliance with as of the closing dates of the 1988 Purchase Agreement and the 1989 Purchase Agreement.

1 Time Frame of Landfill Usage

*10 Before analyzing whether the landfills violated any of the Italian regulations cited by Plaintiffs, the Court will consider an issue raised by Defendants in their motion for partial summary judgment, namely, the time frame in which Frendo utilized landfills at the Orzinuovi plant, insofar as this issue impacts the violation of law analysis.

In their amended complaint, Plaintiffs allege that landfill usage at the plant occurred from approximately 1971 to approximately 1986. *See* First Am Compl ¶ 13. Defendants argue that the evidence in this case fails to support this allegation for a variety of reasons. First, Defendants argue that because plaintiff Frendo's

predecessor company represented in written submissions to Italian regulatory authorities that landfills located at the Orzinuovi plant were permanently closed in 1983 and reclaimed in 1984, the doctrine of regulatory estoppel precludes Plaintiffs from asserting a position contrary to this representation, namely, that landfills at the Orzinuovi plant were used until 1986. See First Am Compl, count I, ¶ 13. Defendants cite Tozzi v Long Island Railroad Co., 651 N.Y.S.2d 270, 274-75 (N.Y. Sup 1996), as support for the availability of regulatory estoppel. In *Tozzi*, the court relied upon principles underlying the doctrine of judicial estoppel to conclude that, in an appropriate situation, a court may invoke the concept of regulatory estoppel "to estop a party in a litigation from making a factual assertion contrary to a factual assertion made in the course of an administrative proceeding." *Id.* at 275. But application of this theory is not appropriate where, as here, the initial factual representations were not made during the course of a formal regulatory proceeding. See *id.* The *Tozzi* court declined to apply regulatory estoppel in that case because "[i]n the instant action, the subject endorsement was adopted in the State of New York by a single letter request setting forth the proposed amendment. No hearings were conducted. No regulatory proceedings of any nature were conducted requiring the insurer's presence. The insurer did not submit a sworn written statement or make any factual representations under oath." *Id.* Like in *Tozzi*, the factual assertions at issue here were not made in the course of an administrative proceeding, nor were they made under oath. Based on the reasoning in *Tozzi*, in particular, that absent a prior regulatory proceeding analogous to a judicial prosecution of an action, utilizing the concept of regulatory estoppel against a litigant is improper, the Court declines to apply regulatory estoppel in this case.

According to evidence in this case, in October 1983, regulatory authorities issued a statement officially acknowledging the closure of the landfill disposal facility at the Orzinuovi plant. Moreover, after conducting an on-site inspection of the plant in April 1984, regulatory officials acknowledged Frendo's compliance with the program for reclamation of the site. Defendants argue that this official confirmation of closure, among other things, conclusively establishes that Frendo ceased on-site usage of landfills in 1983, or, at the very least, as of April 1984 when regulators conducted the on-site inspection.

*11 In support of their allegation of post-inspection dumping, Plaintiffs hope to rely upon the testimony of two Frendo plant employees, Messrs Pizzamiglio and Vianelli, at least one of whom has sworn that landfills at the Orzinuovi plant were used as late as 1986. These

statements, however, are gravely suspect. Specifically, Defendants argue that Plaintiffs cannot use any testimony from these witnesses to prove post-inspection dumping because Plaintiffs deliberately destroyed prior sworn affidavits by the same two men. See Defs' 56.1 Statement ¶ 47. Back in 1992, Plaintiffs began compiling evidence regarding the history of the landfills in order to convince Defendants to pay the "maximum amount" toward the cleanup costs. See Roberts Aff ¶ 23, Ex. V. To do so, Plaintiffs enlisted Mr. Colli, the Orzinuovi plant manager and a Managing Director of plaintiff Frendo, to obtain the affidavits of Messrs Pizzamiglio and Vianelli. At his deposition, Mr. Colli testified that after obtaining these sworn statements he deliberately destroyed them sometime after June 1992. See Roberts Aff ¶ 3, Ex. B, p. 111. He also testified that Messrs Pizzamiglio and Vianelli signed the affidavits, but "Before sending the affidavits, I was in contact with our lawyers, and I said, 'If we go this way, we are going to sign that we did something illegal. I want to be sure that our people are not going to have a problem of that.'" *Id.* at 110, see *id.* ("Because the people signed the paper, Pizzamiglio and Vianelli, but we didn't deliver to anybody these papers.") Later in the deposition, Mr. Colli was asked whether he provided a copy of those affidavits to anyone else, to which he responded in the negative. See *id.* at 112.

In the course of discovery, Plaintiffs produced copies of unsigned affidavits, one each from Messrs Pizzamiglio and Vianelli, stating that landfill usage at the Orzinuovi plant occurred between 1974 and 1982. See Defs' 56.1 Statement ¶ 49, Roberts Aff ¶ 26, Ex. Y. Defendants point out that the information contained in these unsigned affidavits therefore contradicts Plaintiffs' allegations of post-inspection use of landfills at the Orzinuovi plant. Notwithstanding the contents of the unsigned affidavits, Plaintiffs have elicited testimony from Mr. Vianelli to the effect that dumping of small amounts of scrap material at the plant occurred as late as 1986. See *id.*, Roberts Aff Ex. W, pp. 110-11.

In response, Plaintiffs now explain that their counsel prepared draft affidavits of Messrs Pizzamiglio and Vianelli sometime in late 1992 (specifically, sometime between November of 1992 and December 17, 1992) as part of settlement negotiations with Whitman and Abex. See Pls' Resp. to Defs' 56.1 ¶ 43, Hackett Decl ¶¶ 4-6. In particular, Plaintiffs submit the declaration of David P. Hackett, Esq. (the lead counsel for Rutgers and Frendo in connection with these negotiations), which states that sometime after November of 1992, he prepared draft affidavits of Messrs Pizzamiglio and Vianelli, and, on December 17, 1992, he sent the drafts to these two gentlemen as well as Mr. Marcoaldi,

Plaintiffs' environmental expert, for their review *See* Hackett Decl ¶¶ 3-6 Mr Hackett then swears that, on December 18, 1992, Mr Colli returned to him the unsigned affidavits that Hackett had prepared for Messrs Pizzamiglio and Vianelli and that these are the unsigned affidavits produced to Defendants during the discovery phase of this case *See id* ¶ 6

*12 Even still, a July 10, 1992 communication between Plaintiffs' lawyers (which included Mr Hackett) seems to establish their knowledge of some form of affidavit from both Messrs Pizzamiglio and Vianelli to the effect that landfill usage at the Orzinuovi plant ceased in 1982 This July 10, 1992 facsimile message, addressed to Mr Hackett, among others, states

At the meeting of July 1st, 1992, in Frankfurt (attending Mr Buttner, Mr Streit, Mr Colli and Mr Marcoaldi), Mr Buttner stressed that the wording used in the affidavits of Messrs Pizzamiglio and Vianelli should be further discussed with you *The present wording*, in fact, contains no specific indication as to the location of the waste disposals after 1982 (see my fax of July 1st, 1992) This conflicts with the audit prepared by PAR eighteen months ago (presently held by Whitman) where the location of the waste disposals after 1982 is indicated Mr Buttner is concerned that Whitman could point out the contradiction "

Defs ' Exs , Tab 39 (emphasis supplied)

This message no doubt could refer to other affidavits of Messrs Pizzamiglio and Vianelli, perhaps the *signed* affidavits entrusted to Mr Colli One thing is certain, though, this fax communication highlights Plaintiffs' deep concern with avoiding "conflicts" and "contradictions "

Based on these circumstances, Defendants ask the Court to exclude any testimony from Messrs Pizzamiglio and Vianelli contradictory to the two unsigned affidavits produced during discovery Defendants rely on the spoliation of evidence theory (also referred to as "spoliation") to support their position This doctrine refers to a party's intentional or negligent destruction of evidence that impairs another party's ability to prove or defend a civil action *See West v Goodyear Tire & Rubber Co.*, 167 F 3d 776, 778 (2d Cir 1999) ("Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation ") When a party's intentional conduct causes the destruction of evidence, a district court has considerable discretion to impose a wide range of sanctions for purposes of leveling the evidentiary playing field and punishing the improper conduct *See Shamus v Ambassador Factors*

Corp., 34 F Supp 2d 879, 888 (S D N Y 1999) ("It is well settled that the Court has the power to sanction a party that destroys relevant and discoverable evidence [based on, among other things,] a court's inherent power to regulate litigation, preserve and protect the integrity of the proceedings before it, and sanction parties for abusive practices ") Such sanctions include ordering dismissal of the culpable party's suit, granting summary judgment in favor of the prejudiced party, precluding the culpable party from giving testimony regarding the destroyed evidence, or giving an adverse inference instruction to the jury against the culpable party *See Trigon Insur Co v United States*, 204 F R D 277, 285 (E D Va 2001)

*13 In considering whether to impose sanctions for spoliation of evidence, a court must initially determine whether the party against whom sanctions are sought had an obligation to preserve evidence *See Indemnity Insur Co of North Amer v Liebert Corp.*, No 96 Civ 6675, 1998 WL 363834, at *3 (S D N Y June 29, 1998) The duty to preserve evidence arises even prior to the filing of a complaint "where a party is on notice that litigation is likely to be commenced " *Id* at *3 In such a situation, the party is obligated to preserve "what it knows, or reasonably should know, will be relevant in the action " *Turner v Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (S D N Y 1991), *see also Kudatzky v Galbreath Co.*, No 96 Civ 2693, 1997 WL 598586 (S D N Y Sept 23, 1997) ("The threshold question with respect to imposing sanctions for document spoliation based on the court's inherent powers is whether the party knew or should know that the destroyed evidence was relevant to pending, imminent or reasonably foreseeable litigation " (internal quotation marks omitted))

Here, Plaintiffs had notice that litigation could likely commence with respect to the waste disposal situation For example, Plaintiffs specifically obtained the affidavits in response to advice from their lawyers that information regarding the timing of the waste disposal was important to resolving claims between the parties *See Roberts Aff* ¶ 3, Ex B, pp 108-09 Moreover, Plaintiffs now argue that these affidavits are immune from allegations of spoliation based on the confidentiality of compromise negotiations under Federal Rule of Evidence 408 because they were prepared in the course of settlement discussions Rule 408 forbids the admission of statements made during settlement talks to prove liability or the lack of liability [FN10] The Rule, however, provides no support for Plaintiffs' deliberate destruction of this evidence That is so because the Court finds that the affidavits constitute otherwise discoverable evidence, explicitly made admissible by the terms of Rule 408, since, from

all indications, they contained only historical factual information otherwise discoverable as deposition testimony *See Fed R Evid 408* ("This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations ")

FN10 Rule 408 provides, in pertinent part Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount Evidence of conduct or statements made in compromise negotiations is likewise not admissible

Fed R Evid 408

In light of this, Plaintiffs reliance on *Kleen Laundry & Dry Cleaning Services, Inc v Total Waste Management Corp.*, 817 F Supp 225, 229 (D NH 1993), is misplaced, for that case involved a situation where the court disallowed an affidavit that incorporated statements made during settlement negotiations Unlike in *Kleen Laundry*, the affidavits here included statements of historical facts pertinent to this lawsuit As such, these affidavits were "otherwise discoverable" and thus were not subject to exclusion under Rule 408 The Court therefore concludes that Plaintiffs deliberately destroyed the affidavits after the obligation to preserve them arose and after Plaintiffs had clear notice of this obligation

*14 Once a court determines that a party had a duty to preserve evidence, the court must then consider (1) the degree of fault of the party who destroyed the evidence, (2) the degree of prejudice suffered by the opposing party, and (3) the appropriate sanction *See Indemnity Insur.*, 1998 WL 363834, at *3 The evidence before the Court provides a sufficient basis for finding that Plaintiffs intentionally destroyed the affidavits to prevent their use in future litigation For one thing, Plaintiffs and their counsel apparently were concerned that the contents of similar affidavits would undermine Plaintiffs' position on issues important in this case Moreover, the destruction of this evidence was not accidental or inadvertent Quite the contrary, Mr Colli, a high-ranking official of plaintiff Frendo, admitted that he purposely destroyed the affidavits sometime after June 1992, apparently after deciding that the contents of the affidavits might establish that Frendo employees engaged in illegal activities with respect to waste

disposal *See Roberts Aff ¶3, Ex B*, p 110 The Court rejects Plaintiffs' argument that the record does not establish that Mr Colli acted within the scope of his employment at the time that he destroyed the affidavits In this respect, Mr Colli collected the affidavits on behalf of his employer and then contacted Plaintiffs' lawyers, whom he referred to as "our lawyers," allegedly to discuss whether the affidavits suggested that Frendo employees had acted wrongfully It was after this conversation that Mr Colli apparently destroyed the evidence

Based on the foregoing, the Court finds Plaintiffs highly culpable for the destruction of this evidence The Court also finds that Defendants are significantly prejudiced by the loss of this evidence because now Defendants cannot use these prior sworn statements as admissions regarding the time period of landfill usage, nor can Defendants use the statements to impeach the new and contradictory testimony given by Messrs Pizzamiglio and Vianelli Moreover, although Defendants deposed these two gentlemen, they provided only sketchy testimony regarding the contents of the destroyed affidavits Also, Defendants have provided inferential evidence (the unsigned affidavits) as to the possible contents of the missing materials, which indicates that such materials would have been harmful to Plaintiffs' case *See Skeete v McKinsey & Co., Inc.*, No 91 Civ 8093, 1993 WL 256659, at *7 (S D N Y July 7, 1993)

Pursuant to the spoliation doctrine, Defendants ask the Court to sanction Plaintiffs by precluding them from giving testimony from Messrs Pizzamiglio and Vianelli contradictory to their two unsigned affidavits Given the record in this case, such a sanction is appropriate Mindful of the serious nature of this sanction, the Court nonetheless finds such a penalty fitting given the deliberate destruction of evidence and Plaintiffs' overall bad behavior in their pursuit of indemnification

*15 Besides the deposition testimony from these two gentlemen that dumping of small amounts of scrap material at the Orzinuovi plant occurred as late as 1986, Plaintiffs offer virtually nothing else to suggest post-inspection landfill usage Regarding this issue, Plaintiffs' environmental expert, Mr Marcoaldi, identifies other things that allegedly establish post-inspection usage, including (1) "pieces of production specific to the period '78/'79 were found during excavation," (2) accounting documents dated 1976 were found during the removal project that "in principle should be kept for ten years," (3) some worker (whom the report fails to name) remembers that excavations were made in the backyard area of the plant, and (4) "one purchase order and relevant invoice

confirm use of bulldozer and excavator in that area at [the] beginning of January 1988 " Pls ' Exs , Tab V, tbl 3 2

These items cannot support a finding of post-inspection landfill usage insofar as a conclusion predicated on them would amount to mere guesswork or conjecture. Not every issue of fact or conflicting inference presents a genuine issue of material fact. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986) ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (internal citations omitted)). The evidence here is not significantly probative on the issue of post-inspection landfill usage so as to create a genuine issue of material fact requiring denial of summary judgment.

Therefore, in terms of the violation of law analysis, this Court will proceed on the basis of no post-inspection landfill usage, *i.e.*, that no on-site dumping occurred after regulators confirmed closure of the landfills at the Orzinuovi plant in April of 1984.

2 Alleged Violations of Italian Law

Each side offers the opinion of a foreign legal expert concerning issues of Italian law relevant to the case. With respect to their violation of law contentions, Plaintiffs submit the report of their Italian law expert, Gianfranco Amendola. In his report, Professor Amendola renders an opinion on the extent to which the landfills at the Orzinuovi plant violated Italian law as of the closing dates of the 1988 Purchase Agreement and the 1989 Purchase Agreement. Professor Amendola concludes that these landfills may have been out of compliance with the following Italian regulations: (1) Articles 216 and 217 of the Consolidated Health Act of July 27, 1934, (2) Articles 674, 440, 452 and 635 of the Italian Penal Code ("Penal Code"), (3) Lombardy Regional Law no. 94 of June 7, 1980 ("LRL"), and (4) DPR no. 915 of September 10, 1982 ("DPR"). In response, Defendants offer the opinion of their Italian legal expert, Gian Luigi Tosato. Professor Tosato's report concludes that the Orzinuovi plant did not, at any time, violate the Italian regulations cited by Plaintiffs with respect to the landfills located at that facility.

a Determinations of Italian Law

*16 Federal Rule of Civil Procedure 44.1 controls determinations of foreign law in federal court. Rule 44.1 gives a district court wide latitude in resolving issues of foreign law. "The court in determining foreign

law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law." Fed.R.Civ.P. 44.1. Because of this latitude, a court may reject even uncontradicted expert testimony and reach its own decisions on the basis of independent examination of foreign legal authorities. See Curtis v. Beatrice Foods Co., 481 F.Supp. 1275, 1285 (S.D.N.Y.), *aff'd*, 633 F.2d 203 (2d Cir.1980). Moreover, disagreement among legal experts on content, applicability, or interpretation of foreign law, as here, does not create genuine issues of material fact for summary judgment purposes. See Banco de Credito Indus. S.A. v. Tesoreria General, 990 F.2d 827, 838 (5th Cir.1993), *see also* Bassis v. Universal Line, S.A., 436 F.2d 64, 68 (2d Cir.1970), Kashfi v. Phibro-Salomon, Inc., 628 F.Supp. 727, 737 (S.D.N.Y.1986).

Each side submitted a report by an expert in Italian environmental law to support its position and the parties provided the Court with English translations of relevant Italian law. Based on the foregoing guidelines, the Court intends to determine whether the landfills violated applicable Italian law as of the closing dates of the agreements by consulting the expert opinions and by conducting independent analysis of Italian regulations and authorities.

b Consolidated Health Act of July 27, 1934

First, Professor Amendola concludes that the presence of landfills at the Orzinuovi plant violated articles 216 and 217 of the Consolidated Health Act of July 27, 1934 ("CHA"), which, although passed during the Fascist era, is apparently still in effect. Article 216 classifies manufacturing facilities into two categories, *i.e.*, the first category and the second category. See Declaration of Massimo Coccia ("Coccia Decl."), Tab 12 (English translation of article 216). For purposes of this dispute, the experts agree that manufacturing plants that use or produce asbestos, like the Orzinuovi plant, fall within the first category. See Pls' Ex U, Amendola Rpt., p. 9, Pls' Ex W, Tosato Rpt., p. 6. Article 216 imposes two requirements on an operator of a manufacturing plant within the first category, namely, a notice requirement and a location requirement. Under article 216's notice requirement, plant officials must give written notice to the Mayor prior to the commencement of operations at the facility. See Coccia Decl., Tab 12. With respect to this requirement, on January 23, 1970, based upon an application filed by Frendo officials, the Mayor of Orzinuovi granted authority to construct and operate the Orzinuovi plant. See Roberts Aff ¶ 18, Ex Q. In light of this, the Court

finds that this application satisfies the notice requirement under article 216 of the CHA

*17 Article 216's location requirement provides that a manufacturing facility must be located in the countryside and removed from any housing, or, if located in an inhabited area, the facility must not create a public health risk *See* Coccia Decl, Tab 12 With regard to this requirement, the Court observes that, given the evidence in this case, including pictures of the Orzinuovi plant, the facility appears to be situated in an uninhabited area, which means that article 216 imposes no further obligation on the operator of this facility *See, e.g.,* Pls' Summary Judgmt Br, Ex A Moreover, Plaintiffs fail to point to evidence that suggests otherwise But even assuming that the Orzinuovi plant is located within an inhabited area, the facility was not out of compliance with the CHA This is true on account of the pronouncement in the Mayor's January 23, 1993 order, issued pursuant to the CHA, stating that the Orzinuovi plant posed no public health risk [FN11] Other factors lend support to this conclusion, including the opinion of Plaintiffs' own environmental consultant, who advised Plaintiffs' lawyers that any pollution caused by the landfills appeared to be contained within the plant and that the conditions in the surrounding area were acceptable *See* Defs' Ex 52, p 5

FN11 For this reason, article 217 of the CHA was not violated either, since the Mayor has authority to act under this article only when operation of a given facility creates a specific danger for public health *See* Pls' Ex. W, Tosato Rpt, p 7

Based on the foregoing, the Court finds that operation of the Orzinuovi plant was not in violation of the CHA during the relevant time periods Apart from this, and assuming *arguendo* that the Orzinuovi plant was in violation of the CHA, the Court notes that any such non-compliance would not have had a material and adverse affect on Frendo's business (finances or operations), and thus, under the terms of the 1989 Purchase Agreement, no breach of warranty would have occurred This is so given that operating a facility in violation of the CHA carries a maximum fine of only \$250 *See* Coccia Decl, Tab 12 ("Any offence is subject to a penalty ranging from [\$25 to \$250]"), *see also* Pls' Ex W, Tosato Rpt, p 6 In fact, Plaintiffs' own Italian lawyers opined as much in a May 1991 memorandum regarding the legality of the landfills, advising the negligible amount of sanctions provided in that article [of the CHA], as well as the fact that the obligation to notify is practically never observed by

Italian enterprises (without any reaction by the authorities) make the risks deriving from this violation quite low " Defs' Ex 52, p 13 Furthermore, based on its language, the 1988 Purchase Agreement limits recovery for any alleged violation of applicable environmental law to the extent available under the given statutory provision--*i.e.*, \$25 to \$250 in the case of a CHA violation *See* First Am Compl, Ex H, § 12(b)

Based on the record in this case, the Court concludes that operation of the Orzinuovi plant was not in violation of the CHA at the time of the closings In any event, given that the sanction for a violation of this statute carries only a fine ranging from \$25 to \$250, the Court notes that such a violation would not have constituted a material adverse situation as required under the 1989 Purchase Agreement

c Italian Penal Code Violations

1 Article 674

*18 Next, Professor Amendola concludes that the presence of the landfills at the Orzinuovi plant violated article 674 of the Italian Penal Code Article 674, entitled "Dangerous Throwing of Things," punishes "whoever throws or pours in a place of public transit or in a private place of public or of other persons' use things that may offend, dirty or annoy other people " Coccia Decl, Tab 16 (English translation of article 674), *see also* Pls' Ex W, Tosato Rpt, p 10 Because article 674, by its terms, applies only if the so-called "dangerous throwing" occurred in a place of public passage (which was not so here), this penal provision is inapposite Interestingly, Plaintiffs' own Italian lawyers reached a similar conclusion back in May of 1991 in advising that "it does not seem that any violation of article 674 may be alleged This article applies only if the deteriorating substance or matter is poured or thrown in a place of public thoroughfare or in a private place used jointly and the PAR report indicated pollution effects only within the Frendo area " Defs' Ex 52, p 15 Even Professor Amendola tacitly admits as much in his expert report, opining "the broad wording of [article 674] as to the places where it applies makes the provision applicable to almost any place, *except for those places where there is exclusive use by the party disposing of the waste* " Pls' Ex U, Amendola Rpt, p 12 (emphasis supplied) The situation in this case presents the quintessential exception because the landfills were located in the backyard area of the Orzinuovi plant far removed from the public Notwithstanding this, without any citation of legal authority, Professor Amendola advances the position that "the crime is committed not only when the

offence, the dirtying or the nuisance results from direct throwing or discharging, but also when such effect occurs indirectly, *e g* due to the place where the waste was disposed of, as in the case of contamination of underground aquifers " *Id* at 12 The Professor fails to cite any evidence indicating that contamination of the water supply occurred here Besides a lack of legal and factual support, his argument fails in light of the conclusion in the PAR report [FN12] that "the water quality is acceptable" and on account of the September 8, 1993 statement by the Province in its official chronology that the analyses done on September 7, 1992 by the Local Health Units show no contamination of the water inside the Orzinuovi plant See Pls ' Ex W, Tosato Rpt , p 9

FN12 The "PAR report" refers to the report prepared by PAR Srl, the consulting firm hired by Rutgers to conduct environmental inspections at the Orzinuovi plant See Defs ' Ex 52, p 3

Based on the record in this case, the Court concludes that Frendo was not in violation of article 674 of the Italian Penal Code during the relevant time periods [FN13]

FN13 The maximum punishment for violation of article 674 is one month imprisonment or a \$235 fine See Pls ' Ex W, Tosato Rpt , p 10 The Court therefore makes the same observation with respect to article 674 as it did with respect to article 216 of the CHA, namely, that any violation of either article would not have had a material and adverse affect on Frendo's business (finances or operations), and thus, under the terms of the 1989 Purchase Agreement, no breach of warranty would have resulted

2 Articles 440 and 452

Professor Amendola also concludes that the presence of landfills at the Orzinuovi plant violated articles 440 and 452 of the Penal Code as a result of the contamination of the aquifers Article 440, read in conjunction with article 452, relates to the negligent "adulteration or counterfeiting of edibles" and "punishes whomever corrupts water or food designated for consumption in a way that is dangerous for public health " Pls ' Ex W, Tosato Rpt , p 11, *see also* Coccia Decl , Tabs 17, 18 (English translations of articles 440

and 452) For these provisions to apply here, Plaintiffs must prove that because of the Orzinuovi landfills an adulteration of water designated for drinking occurred to such a degree as to be dangerous for public health See Pls ' Ex W, Tosato Rpt , p 11 Professor Amendola, however, fails to provide any factual basis to support his conclusion As discussed in connection with Plaintiffs' article 674 claim, the record reflects that no contamination of drinking water was shown to have occurred as a result of the landfills See Roberts Aff ¶ 3, Ex B, p 152 Trying to dodge this deficiency, Professor Amendola cites a Court of Cassation decision (Criminal Division, Decision no 968, Oct 24, 1991) for the proposition that adulteration of water, pursuant to articles 440 and 452, occurs based on the mere danger of adulteration, even if no actual damage occurs See Pls ' Ex U, Amendola Rpt , p 12 Professor Amendola has misconstrued that decision, as it held that with respect to the crime of adulteration of water, the government need not prove actual damages, provided that there is adequate evidence to establish an actual adulteration of drinkable water and a danger to public health See Pls ' Ex W, Tosato Rpt , p 11

*19 Accordingly, based on the record in this case, the Court concludes that Frendo did not violate article 440 or 452 of the Penal Code

3 Article 635

In his report, Professor Amendola further concludes that the presence of landfills at the Orzinuovi plant violated article 635 of the Penal Code (which makes it a crime to seriously damage property) due to contamination of the aquifers Professor Amendola points out that in construing this article, a Court of Cassation decision advised that "the pollution of deep aquifers constituting public water resources available to anyone through the use of wells constitutes the crime of serious damaging of property in view of the public designation of the water " See Pls ' Ex U, Amendola Rpt , p 13 From this quotation, it seems clear that for article 635 to apply in the public water-supply context, proof of pollution must exist Because article 635 requires proof of contamination of water (*i e* , "deep aquifers"), which is not present in this case, the Court concludes that Frendo did not violate article 635 of the Penal Code based on the evidence in this case

d Lombardy Regional Law

In 1980, the Lombardy Region enacted Regional Law no 94 of June 7, 1980 (the "LRL") to provide a regulatory scheme for waste disposal within the Region See Pls ' Ex U, Amendola Rpt , p 13, Pls ' Ex W, Tosato Rpt , p 12 Professor Amendola alleges that

waste disposal procedures at the Orzinuovi plant conflicted with provisions of the LRL as of its entry into force and all times thereafter. *See* Pls' Ex U, Amendola Rpt, p 13. In making his argument, the Professor cobbles together a compendium of duties for waste producers by selectively picking provisions of the LRL and charges that the Orzinuovi plant operator did not adequately meet these obligations. *See id* at 13-14. He summarizes the obligations as follows: "whomever had disposed in the past of industrial waste by dumping it (or burying it), was under a duty to notify the Region and to indicate the location of the closed dumps. If the person disposing of the waste was managing a waste disposal facility, it was obliged to apply for authorization to continue its activity, subject to the use of appropriate facilities and the adoption of all necessary precautions." *Id* at 14. His report then lists various reasons why Frendo's actions failed to properly comply with the LRL. *See id* at 15-18.

The fatal flaw in the Professor's argument, however, is that on April 30, 1984, regulatory authorities formally recognized the cessation of landfill usage at the Orzinuovi plant and Frendo's compliance with the LRL. As discussed earlier, on October 1, 1980, regional officials received formal notification, pursuant to the LRL, from Frendo regarding waste disposal activities at the plant. After an April 19, 1984 on-site inspection of the plant, on April 30, 1984, the Province issued a decree verifying compliance with the LRL regulatory scheme.

*20 Hobbled by this (*i.e.*, the official confirmation of compliance with the LRL as of April 30, 1984), Professor Amendola (and Plaintiffs' environmental expert, Mr. Marcoaldi) challenges that edict by nit-picking the notification approach taken by Frendo and by charging that Frendo failed to disclose all of the landfills in the notification reports filed in accordance with the LRL. The fact remains that the Italian regulators charged with enforcement of the LRL had the opportunity--and availed themselves of it--to explore the bases for and quality of Frendo's reporting with respect to waste disposal activities at the plant by conducting an on-site inspection. This Court therefore refuses to belatedly second-guess the determinations of a foreign agency exercising its regulatory function. Accordingly, the Court finds that Frendo was in full compliance with the LRL as of April 30, 1984, the date on which the Region issued its official pronouncement. Moreover, because of the lack of a material issue of fact as to post-inspection dumping, the Court concludes that the Orzinuovi plant operator was in full compliance with the LRL as of the closing dates of the 1988 Purchase Agreement and the 1989 Purchase Agreement.

e (Presidential Decree) no 915 of September 10, 1982.

The DPR (Presidential Decree) no 915 of September 10, 1982 (the "DPR") represents the first national statute governing, among other things, toxic and dangerous waste disposal in Italy. *See* Pls' Ex U, Amendola Rpt, p 18, Pls' Ex W, Tosato Rpt, p 17. The DPR requires producers of special waste, including toxic and dangerous waste, to obtain authorization for the operation of any landfill. *See* Pls' Ex U, Amendola Rpt, p 18. Professor Amendola argues that by virtue of the DPR, Frendo had a statutory obligation to remove landfills closed prior to the effective date of the statute. This construction of the DPR, however, conflicts with case law construing the statute and with the prohibition against retroactive rules. *See* Pls' Ex W, Tosato Rpt, pp 18-21.

Based on the language of the statute and the *ex post facto* principle, this regulatory scheme imposes no retroactive obligations with respect to landfills that ceased operation prior to the effective date of the DPR. *See id* at 18. The DPR was approved on September 10, 1982, but according to Italian authorities, this statute only became effective on September 13, 1984, the publication date of the resolution called for under the DPR. *See id* at 23 ("It is clear that until September 13, 1984, date of publication of the resolution named by Article 4, all the administrative and penal rules on the disposal of toxic and dangerous waste were consequently not applicable (quoting Pretura Bassano del Grappa, decision of Nov 15, 1985)). What is more, the Province of Brescia's official chronology confirms that at the time the DPR went into effect, Frendo had permanently closed the landfills. *See* Roberts Aff ¶ 3, Ex H, p 3. Additionally, back in May of 1991, Plaintiffs counsel, in connection with the DPR, concluded that "compliance with this law depends upon the actual behavior of Frendo after April 1984, *i.e.* after the inspection of the site made by the province of Brescia as a consequence of Frendo's decision to abandon their application for authorization." Defs' Exs, Tab 52.

*21 Consequently, because the evidence in this case indicates that Frendo permanently closed the landfills at the Orzinuovi site by April 1984, prior to the DPR's effective date, September 13, 1984, the Court concludes that Frendo was not in violation of the DPR as of the closing date of either the 1988 Purchase Agreement or the 1989 Purchase Agreement, given the lack of evidence of post-inspection dumping.

Based on the foregoing, the Court finds as a matter of law that Plaintiff cannot establish Frendo's non-compliance with applicable environmental law or

statutory liability on account of the landfills as of the closing date of the 1988 Purchase Agreement (or as of the closing date of the 1989 Purchase Agreement), nor can Plaintiff establish that it suffered losses because of any non-compliance or because of a claim or allegation of non-compliance. Consequently, the Court grants defendant Whitman summary judgment as to count II of Plaintiffs' amended complaint.

Conclusion

For the reasons set forth above, the Court grants Defendants' motion for summary judgment and denies Plaintiffs' motion for summary judgment. The Court denies as moot all other pending motions. The Court orders this case closed and directs the Clerk of Court to remove it from the Court's active docket.

SO ORDERED

2002 WL 1203836 (S D N Y)

END OF DOCUMENT