

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 effect 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 effect 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