

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,