

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