GEORGIA-PACIFIC CORPORATION, Plaintiff, - against - GAF ROOFING MANUFACTURING CORPORATION and G-I HOLDINGS, INC., Defendants.

93 Civ. 5125 (RPP)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1996 U.S. Dist. LEXIS 12811; 43 ERC (BNA) 1323

September 3, 1996, Decided
September 4, 1996, FILED

DISPOSITION: [*1] Plaintiff's motion for summary judgment dismissing defendants' counterclaim alleging fraudulent misrepresentation granted.

CASE SUMMARY

1996 U.S. Dist. LEXIS 12811, *1; 43 ERC (BNA) 1323

PROCEDURAL POSTURE: Plaintiff company filed a motion for summary judgment pursuant Fed. R. Civ. P. 56 for an order granting it partial summary judgment dismissing the counterclaim of defendants, roofing corporation and its subsidiary (collectively, roofing corporation). The counterclaim alleged that the company fraudulently induced the roofing corporation to enter in an Asset Purchase Agreement by failing to disclose and misrepresenting key environmental risks.

OVERVIEW: The company and the roofing corporation entered into an Asset Purchase Agreement (agreement) for the sale to the roofing corporation of the assets and liabilities of the company's roofing business. Pursuant to the agreement, the company placed a report regarding contamination at the site sought to be sold on the disclosure schedule. The roofing corporation terminated the contract and the company sued for breach of contract. The roofing corporation counterclaimed against the company for fraudulent misrepresentation and the company filed a motion for partial summary judgment. The court held that the roofing corporation had to prove that (1) company made a material false representation, (2) company intended to defraud the roofing corporation, (3) the roofing corporation reasonably relied on the representation, and the corporation suffered damage as a result of such reliance. The court held that the company's failure to give accurate environmental information to the roofing corporation could have been harmful to its breach of contract claim, but there was
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insufficient evidence of intent to commit fraud in the inducement to permit the corporation's counterclaim to go to the jury.

OUTCOME: The court granted the company's motion for summary judgment dismissing the roofing corporation's counterclaim alleging fraudulent misrepresentation.

CORE TERMS: contamination, environmental, audit, memo, deposition, site, plant, solid waste, roofing, seller, consultant, detected, update, groundwater, waste, diligence, nearby, summary judgment, water quality, final report, community-wide, counterclaim, contaminant, heading, bidder, clear and convincing

evidence, intent to defraud, drinking water, draft report, aquifer

CORE CONCEPTS - <=17> hide concepts

<=18> Civil Procedure: Summary Judgment: Burdens of Production & Proof
<=19> Civil Procedure: Summary Judgment: Summary Judgment Standard
<=20> Pursuant to Fed. R. Civ. P. 56, a party is entitled to summary judgement if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Materiality is identified through an examination of the substantive law. Only disputes over facts that might affect the outcome

of the suit under the governing law will properly preclude the entry of summary judgment. The party seeking summary judgment bears the burden of demonstrating the absence of any genuine issue of material fact.

<=21> Civil Procedure: Summary Judgment: Burdens of Production & Proof
<=22> Summary judgment is not appropriate where the evidence is such that a reasonable jury could return a verdict for the nonmoving party. The court must view the facts in the light most favorable to the non-moving party. If, however, the evidence presented by the nonmoving party is merely colorable, or is not significantly probative, summary judgment may be granted.

<=23> Torts: Business & Employment Torts: Deceit & Fraud
<=24> Under New York law, a plaintiff claiming fraudulent misrepresentation must prove that (1) defendant made a material false representation, (2) defendant intended to defraud plaintiff thereby, (3) plaintiff reasonably relied on the representation, and (4) plaintiff suffered damage as a result of such reliance. Each of these elements must be established by clear and convincing evidence.

COUNSEL: APPEARANCES:

Counsel for Plaintiff: Shearman & Sterling, New York, NY, By: Dennis P. Orr,

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Esq., Alan S. Goudiss, Esq.

Counsel for Defendants: Weil, Gotshal & Manges LLP, New York, NY, By: Joseph Allerhand, Esq., Otto Obermaier, Esq. GAF Corporation, Wayne, NJ, By: Allan Dinkoff, Esq.

JUDGES: ROBERT P. PATTERSON, JR., U.S.D.J.

OPINIONBY: ROBERT P. PATTERSON, JR.

OPINION: OPINION AND ORDER

ROBERT P. PATTERSON, JR., U.S.D.J.

Plaintiff, Georgia-Pacific Corporation ("G-P") moves pursuant to Rule 56 of the Federal Rules of Civil Procedure (Fed. R. Civ. P.) for an order granting it partial summary judgment dismissing the counterclaim of defendants, GAF Roofing Manufacturing Corporation and G-I Holdings, Inc. (collectively, "GAF"), which alleges that G-P fraudulently induced GAF to enter in the Asset Purchase

Agreement which is the subject of this dispute by failing to disclose and misrepresenting key environmental risks. n1 For the following reasons, plaintiff's motion is granted.

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n1 Although GAF also alleged that G-P misrepresented the financial performance of its roofing business, GAF seeks damages only for G-P's alleged misrepresentations about environmental matters prior to the execution of the Agreement and in the Agreement itself. (GAF's Rule 3(g) Statement P19.)

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1. The Parties

Plaintiff, G-P, is a corporation incorporated and existing under the laws of Georgia with its principal place of business in Georgia. (Joint Pretrial Order ("JPO"), Ex. 1 P1.) At all relevant times, G-P owned and operated a roofing business (the "Business"), which included six manufacturing facilities located in Ardmore, Oklahoma; Daingerfield, Texas; Franklin, Ohio (one roofing plant and one felt mill); Hampton, Georgia; and Quakertown, Pennsylvania. The Business served a variety of geographic markets and produced a number of roofing products. (Id., Ex. 1 P3.)

Defendant, GAF Roofing Manufacturing Corporation, is a newly incorporated wholly-owned direct subsidiary of G.I. Holdings Inc. ("G-I"), both of which are corporations organized and existing under the laws of Delaware with their principal places of business in New Jersey. (Id., Ex. 1 P2; Asset Purchase Agreement dated March 19, 1993 (the "Agreement") @ 4.5.)

2. The Asset Purchase Agreement

On March 20, 1993, G-P and GAF entered into an Asset Purchase Agreement dated March 19, 1993, (the "Agreement"), for the sale to GAF of the assets and liabilities of G-P's Business. The Agreement[*3] contained detailed descriptions, deeds and other documentation of the real properties GAF agreed to purchase. n2 (Agreement @ 1.49; @ 1.57, @ 3.5(a), Table 10, Schedule E, Schedule F, Schedule G; Plaintiff's Memorandum of Law in Support of its Motion for Partial Summary Judgment ("Pl.'s Mem. Supp.") at 9.) GAF agreed to pay $ 62 million, plus or minus an amount equal to the "adjusted working capital." G-I was party to the Agreement as guarantor of certain obligations of GAF. (JPO, Ex. 1 P4.)

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n2 Despite several requests, the Court has not been provided with copies of

all the attachments to the Agreement, and therefore, their contents have not been reviewed.

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Instead of setting forth a specific closing date, the Agreement provided that if the closing had not occurred by July 31, 1993, either party could terminate the Agreement, unless the failure to close was the result of the terminating party's failure to fulfill any undertaking or commitment in the Agreement. (Id., Ex. 1 P5; Agreement @ 8.1(b).) [*4]

Under the Agreement, G-P's representations and warranties specifically excluded all matters listed in a Disclosure Schedule attached to the Agreement. (Id., Ex. 1 P6; Agreement Art. 3.) G-P's warranties and representations made in the body of the Agreement included:

(a) There is no pending proceeding, investigation or inquiry by any governmental entity nor, to the best knowledge of Seller, any threatened or unasserted claim by any governmental authority or third party arising under any Environmental Law relating to the Purchased Assets;

. . .

(d) To the best of Seller's knowledge n3 . . . there is no Environmental Matter that has a reasonable likelihood of giving rise to any liability which . . . would have a Material Adverse Effect on any of the parcels of Real Property, except as disclosed by Seller's Environmental Audit. Except for Seller's Environmental Audit and any Seller's Environmental Audit Update, since March 1, 1991, there has been no written report generated by any independent consultant retained by Seller to assess Environmental Matters relating to the Purchased Assets.

(Agreement @ 3.4(a)(d).)

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n3 Seller's knowledge was limited to the "actual knowledge of those persons in Seller's employ set forth in Exhibit 1.38." (Agreement @ 1.38.) Exhibit 1.38 was not made part of the record before this Court.

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Another provision in the Agreement stated in part: "it is the explicit intent of each party hereto that neither Buyer nor Seller is making any representation or warranty whatsoever, express or implied, beyond those expressly given in this Agreement." (Id. @ 5.8.)

The Agreement also required G-P to update or amend the Disclosure Schedule prior to the closing date to reflect any material changes, or any material inaccuracies, in the Disclosure Schedule. (Id. @ 5.16.) G-P could, but was not obligated to, update or amend the Disclosure Schedule to reflect any non-material changes. (JPO, Ex. 1 P7; Agreement @ 5.16.) If the information in any update or amendment to the Disclosure Schedule materially and adversely affected the assets GAF was purchasing, the liabilities GAF was assuming, or GAF's relative rights and obligations, (when compared with the matters set forth

in the Disclosure Schedule immediately prior to such update or amendment), GAF had the right to terminate the Agreement. If GAF did not terminate the Agreement within ten business days of an update or amendment by G-P to the Disclosure Schedule, the update or amendment was deemed accepted by GAF. (JPO, Ex. 1 P8; [*6]Agreement @ 5.16.)

Attached to the Agreement was an Environmental Remediation and Indemnification Agreement (the "Environmental Agreement") pursuant to which G-P provided GAF with a proposed Schedule 1 listing the existing environmental

conditions identified as a result of G-P's Environmental Audit. Within sixty-five days of the date of the Agreement, GAF was to propose any additions to G-P's proposed Schedule 1 based on GAF's Environmental Audit or G-P's Environmental Audit Update. The placement of an item on Schedule 1 meant that G-P had to rectify the condition prior to closing, indemnify GAF for subsequent damage, or place the issue on the Disclosure Schedule. (Agreement @@ 5.15(c).)

The Agreement provided that the G-P retained liability and agreed to indemnify GAF for all

claims of Environmental Liability against Seller under any Environmental Laws relating to or arising from actual or asserted Releases of Hazardous Substances by the Business at any location other than the Real Property occurring prior to Closing (other than the migration of Hazardous Substances from or to the Real Property to or from other locations). . . .

(Agreement @ 2.4(f); see also[*7] Deposition of Michael D. Scott ("Scott Dep.") at 964; Reply Affidavit of Alan S. Goudiss dated February 20, 1996 ("Goudiss Reply Aff."), Ex. 6.)

The Environmental Agreement was negotiated by Michael Scott ("Scott"), GAF's in-house environmental counsel; Ronald Allen ("Allen"), G-P's in-house

counsel; and Kathy Rhyne ("Rhyne"), an environmental partner at King & Spaulding who served as outside counsel for G-P.

On June 23, 1993 G-P placed an environmental assessment report, the CH2M Hill Report, on the Disclosure Schedule. After several extensions of the ten day termination period, GAF terminated the Agreement on July 19, 1993. G-P promptly sued for breach of contract on July 23, 1993.

GAF answered the complaint and for almost a year the parties engaged in document discovery and settlement efforts.

By order of June 22, 1995, the Court permitted GAF to file an amended answer and counterclaim alleging fraud in the inducement of the Agreement. Accordingly, the amended answer, filed on August 4, 1995 set forth a counterclaim based on the activities of G-P employees during the period from October 1992 to March 20, 1993, when the Agreement was executed.

The evidence of fraud in the inducement[*8] being pressed by GAF at the time of this motion relates to: (1) G-P's failure to disclose the fact that City Well No. 8 was the well located next to the Franklin Felt Mill and that TCE had been detected in the water of that well; (2) G-P's representation that the well next to the Franklin Roofing Plant, rather than the Franklin Felt Mill, tested

positive for TCE; and (3) G-P's representation that it knew of no threatened action by the Ohio Environmental Protection Agency (the "Ohio EPA").

After extensive review of the numerous transcripts and documents provided by the parties, G-P's motion for partial summary judgment dismissing GAF's counterclaim which was presented at the close of discovery on January 19, 1996 is granted.

BACKGROUND

In preparation for G-P's announcement that the Business was for sale, G-P had retained Law Environmental, Inc. ("Law Environmental") to complete Environmental Compliance Audits of G-P's Roofing Plant in Hampton, Georgia; Felt Mill in Franklin, Ohio; Roofing Plant in Franklin, Ohio; Roofing Plant in Ardmore, Oklahoma; Roofing Plant in Quakertown, Pennsylvania; and Roofing Plant in Daingerfield, Texas. Law Environmental compiled these audits[*9] into a final report dated October 2, 1992 (the "Audit"). (Exhibits cited in GAF's Memorandum of Law in Opposition ("Defs.' Ex.") 13.) n4

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n4 Law Environmental's audit consisted of a compilation of six individual

draft audit reports, one for each facility, which were prepared and submitted to G-P for review and comment. It contained environmental findings and recommended actions. (Defs.' Ex. 13 at 061509.)

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The Audit identified approximately 125 to 129 items which G-P was either advised or required to correct. (Deposition of Ronald T. Allen ("Allen Dep.") at 54.) The Audit was furnished to prospective buyers of the Business, who had reached a certain stage in the bidding process. After reviewing the Audit, prospective buyers had the right to complete their own assessments. (Id.) Although G-P's data room for prospective buyers contained status reports of open environmental issues from the Audit being addressed at the various plants (Id. at 129), the Audit itself was not contained in the data room ([*10] id. at 128-129; Defs.' Ex. 8).

In the Audit's report on the Felt Mill in Franklin, Ohio which bears the date September 2-3, 1992, under the heading "Solid Waste Management," three sub-issues are listed:

1a. Evidence of soil staining from oil exists along the eastern side of the garage.

1b. Some on-site landfilling of mill-generated waste (e.g., diapers, scrap felt) has occurred. G-P is in the process of retaining a consultant to assess the areas of landfilling. n5

1c. Waste pulp and wind-blown trash are present in several locations on the property.

(Defs.' Ex. 13 at 061532.)

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n5 The Audit suggested recommended action on each sub-issue. The consultant referred to in Item 1b apparently was the consultant who ultimately prepared the CH2M Hill Report. (Defs.' Ex. 3.)

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Using the Audit as a guide, Ernst Borstel ("Borstel"), a senior environmental engineer at G-P headquarters (Deposition of Ernst Borstel ("Borstel Dep.") at 22-23), prepared a status report entitled "Report of Environmental[*11] Status" dated February 19, 1993 which tracked the present status of items raised in

the Audit. (Defs.' Ex. 34.) Section V(F)(1b) (referring to the retention of a consultant to assess on-site landfilling of mill-generated waste) under the heading "Franklin Felt Mill" and the subheading "solid waste" states: "Done." (Id.)

Thereafter, as a part of his process of monitoring the status of various items in the Audit and providing information to bidders, Allen prepared a "Report of Environmental Status" dated February 24, 1993 which also was numbered so as to correspond to issues raised in the Audit. (Deposition of Katherine L. Rhyne ("Rhyne Dep.") at 28; Defs.' Ex. 14.) In Allen's report under the heading "solid waste," section 1b reads: "Done (Get Assessment Report)." (Defs.' Ex. 14.) Allen testified that although he was aware of the existence of such a report and ordered the report, he did not receive it until March 26, 1993 when he gave it to GAF personnel and mailed it to Scott. (Allen Dep. at 171-172; 177-178; 185-188.)

4. Background of the CH2M Hill Report

In 1992, Borstel's responsibilities consisted primarily of assisting the plant manager in each facility with environmental[*12] issues such as permit requirements, remedial action, and selection of consultants, as well as assisting plant managers on interaction with the environmental authorities

such as the relevant state or county agencies. (Borstel Dep. at 22-23.) Margarete Vest ("Vest"), also an environmental engineer at G-P headquarters in Atlanta, worked under Borstel during the relevant times. (Deposition of Margarete Vest ("Vest Dep.") at 8-9.)

Fran Wolfe ("Wolfe"), the plant manager at the Franklin Felt Mill during the relevant time, sent a memo dated May 15, 1992 to Vest concerning possible contamination from a waste area behind the plant and requested that someone from G-P's environmental engineering department make an assessment regarding the possible contamination. (Defs.' Ex. 2; Borstel Dep. at 43-45.) Borstel was a "cc" on the memo. (Defs.' Ex. 2.) As a result of the request from Wolfe, on July 1, 1992, Vest sent a request for a proposal to CH2M Hill, among others, for ". . . an analysis of the possible effects a refuse area has on a city supply well in Franklin, Ohio." (Vest Dep. at 24-26; Defs.' Ex. 4.) Ultimately in September 1992, CH2M Hill was retained to perform an "initial hydrogeologic[*13] analysis at the Franklin, Ohio Felt Mill. The purpose of the analysis was to determine

whether releases from past material handling and waste management practices could have degraded groundwater beneath the site and whether the site groundwater is in hydraulic connection with City Well 8 . . . ." (Defs.' Ex. 6.)

Two weeks after the Environmental Audit, CH2M Hill produced a draft report dated October 15, 1992 (id.) and subsequently a final report dated November 9,

1992 (id. 3). After reviewing geological and hydrological information about the area, CH2M Hill attempted to locate core drilling geological data from the well itself, the closest known geological data point in close proximity to the Franklin Felt Mill. The final report states: n6

Research and Review of Well Construction Logs

The scope of Task 2 was to gather well construction details and the drilling soil log for city Well 8, which is the only know [sic] geological data point in close proximity to the site. CH2M Hill contacted the City of Franklin, Ohio Department of Natural Resources (ODNR), and Ohio Environmental Protection Agency (Ohio EPA) for these logs with no success. The well has changed[*14] ownership and the drilling logs were possibly not registered at ODNR. As discussed in the Site-Specific Geology and Hydrology section, the absence of this data prevents development of a site specific conceptual model. As a result any capture zone analysis that is performed to determine if Georgia-Pacific's waste areas fall within an estimated City well capture area may result in false predictions. This situation was related to Georgia Pacific in a telephone conversation between Margarete Vest and Kathy Arnett on October 5. (Id. at 82377.)

Based on a review of the chemical analyses of the well water, the final CH2M Hill report states:

Review of Franklin's Past Well Water Analysis Groundwater Quality Data Review

As part of Task 3, water quality data was gathered for City Well 8 and known background (ambient) water quality. Limited water quality data are available on City Well 8 from Ohio EPA. The available data set includes chemical analysis of the raw well water from December 13, 1989 to June 5, 1992 . . . .

Because only organic (and no inorganic) data are available on City Well 8, a comparative analysis of water quality cannot be performed . . . [*15] .

The water quality analyses data set from Well 8 indicates that trichloroethylene (TCE) has been consistently present at concentrations ranging from 0.58 and 0.65 [mu]g/L. These levels are below the maximum contaminant level (MCLs) of 5 [mu]g/L (the enforceable drinking water quality standard developed under the Federal Safe Drinking Water Act). TCE has become a common organic contaminant observed in the Great Miami Buried Valley Aquifer because of the highly industrialized land developments overlying this sensitive aquifer . . . .

(Id.) The final CH2M Hill report concluded:

Presently, the contamination at City Well 8 does not appear to be originating

from the three waste areas. The presence of TCE in City Well 8 indicates that a

potential source of contamination may be nearby . . . . TCE levels in City Well 8 are below the MCLs as of June 5, 1992. It is recommended that Georgia-Pacific request copies of future water quality data from City Well 8 to monitor changes in the contaminant levels.

(Id. at 82381 (emphasis added).)

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n6 In quoted sections, differences between the draft and report and the final report are insignificant.

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[*16]

The final CH2M Hill report also included a map, Figure 1, which depicted the waste areas on the Franklin Felt Mill property and indicated that the Franklin City Well No. 8 was just within G-P's fence line. (Id. at 82371.)

Borstel testified that he saw a report prepared by CH2M Hill dated prior to the date of the final report, November 9, 1992. (Borstel Dep. at 71-72.)

Borstel also testified that this draft report probably came to him from Vest, but that he did not recall anything that Vest said to him in connection with the draft report prepared by CH2M Hill. (Id. at 72-73.) Borstel testified that he read the draft report, and based on the report's conclusion which indicated to him that any potential contamination of the groundwater and/or the well water was ". . . way below the allowable water standards for drinking water and groundwater," he put the report out of his mind. (Id. at 73-75.)

According to Borstel's deposition testimony, he saw the final CH2M Hill report for the first time sometime in early 1993, after Allen orally requested the report from Borstel. (Id. at 88-89.) Borstel testified that Allen had made the request of him and that because he did not[*17] have a copy of the final CH2M Hill report in his files, he called Jim Anderson at CH2M Hill and asked him to send a final copy of the report. (Id. at 88-89, 91.) Borstel testified that could not recall the exact date when he received the final report from CH2M Hill and that he could not say whether he had a copy of the final CH2M Hill report in his possession before or after March 19, 1993, the day before the closing. (Id. at 92-93.)

5. March 2, 1993 Meeting between Representatives of G-P and Owens-Corning Fiberglass

On March 2, 1993, Allen and Rhyne met with representatives of Owens-Corning Fiberglass ("OCF") including David Schlaudecker ("Schlaudecker") and David Crowle ("Crowle"). (Allen Dep. at 218; Deposition of David Schlaudecker ("Schlaudecker Dep.") at 31; Rhyne Dep. at 22-23.) In the roofing business, OCF and GAF's affiliates are competitors. (Schlaudecker Dep. at 10.) OCF was the first of the final bidders which entered into negotiations to acquire G-P's Business. The primary purpose of the March 2, 1993 meeting between OCF and G-P was to review the Audit which had been provided to OCF by G-P. (Id. at 31-32; Rhyne Dep. at 23-24.)

Schlaudecker, the[*18] senior environmental officer at OCF, had been involved in the due diligence process with respect to the G-P plants, conducted in preparation for OCF's possible agreement to purchase G-P's roofing business. (Id. at 14-15.) As a part of this due diligence, members of Schlaudecker's staff met in January with the Ohio EPA and reviewed records concerning the sites in Franklin, Ohio. While examining these records, OCF found a reference to the presence of TCE in the groundwater at Franklin, Ohio in a memo prepared by the Ohio EPA (the "Ohio EPA memo"). (Id. at 25-26.) The memo, an interoffice communication within the Ohio EPA, is dated January 8, 1993. (Affidavit of Alan S. Goudiss dated January 19, 1996 ("Goudiss Affidavit"), Ex. 6.)

At deposition Schlaudecker testified that at the March 2, 1993 meeting he told Rhyne and Allen, not about the internal memo, but about a draft letter from the Ohio EPA to G-P concerning TCE at Franklin, and asked for indemnification with respect to any potential liability arising out of the TCE contamination. (Schlaudecker Dep. at 33-34.) Both Rhyne and Allen testified that the March 2, 1993 meeting was the first time they had heard about TCE in connection[*19] with the sites in Franklin, Ohio. (Rhyne Dep. at 42; Allen Dep. at 220.) Schlaudecker testified that Allen and Rhyne acted surprised. (Schlaudecker Dep. at 41.)

At his deposition, Allen was asked "Isn't it a fact that at that meeting Mr. Schlaudecker said in very clear and understandable words that he believed that TCE was a significant issue?" (Allen Dep. at 577.) Allen responded, "You are talking about a meeting almost three years ago, I don't specifically recall him saying that." (Id.) At Rhyne's deposition, she testified that she did not recall Schlaudecker making this statement. (Rhyne Dep. at 44.)

Schlaudecker testified further that during the course of OCF's interaction with the Ohio EPA, employees of the agency had shown OCF representatives the draft letter that would be sent out to G-P regarding TCE at Franklin and that the Ohio EPA had provided OCF a copy of that draft letter. (Schlaudecker Dep. at 34.) Schlaudecker testified that he told Allen and Rhyne about the existence of the draft letter from the Ohio EPA and indicated that OCF would provide G-P

with a copy of that draft letter. (Id. at 34-35.) On March 4, 1992, Allen received a copy of the Ohio EPA memo, [*20] from Crowle. (Allen Dep. at 172; Goudiss Aff., Ex. 6.) Neither GAF, nor G-P, nor OCF have produced a copy of any draft letter from the Ohio EPA.

At the March 2, 1993 meeting, Rhyne had a copy of the Report of Environmental Status dated February 24, 1993, which had been prepared by Allen. (Rhyne Dep. at 28.) Rhyne testified that she took notes at the March 2, 1993 meeting which covered both follow-up items requested by OCF and other comments that were made at the meeting. (Id. at 29.) At her deposition Rhyne was presented with a copy of the Report of Environmental Status upon which handwritten notes were added, stating in part: "Dave says Ohio is writing us a letter re TCE in grdwtr will get us memo (unclear which site)." (Id. at 25; Defs.' Ex. 11.) Rhyne identified this handwriting as her own (Rhyne Dep. at 25), but testified she only recollects discussions of an Ohio EPA internal memo. (Id. at 38-39.)

Allen testified that at the meeting on March 2, 1993, he asked the OCF representatives to fax him a copy of the Ohio EPA internal memo and that on March 4, 1990 he received a copy. (Goudiss Aff., Ex. 6; Allen Dep. at 358,

581-582.) The Ohio EPA memo states in pertinent[*21] part:

Introduction

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The Division of Drinking and Ground Waters, Ground Water Program, was requested by DWPC to perform a preliminary site evaluation of the infiltration pond at the Georgia Pacific Oxford Roofing Plant located in Warren County . . . Wastewater samples were collected during a site inspection on 1/7/93 to determine the nature of the wastewater discharge and to assist in our review.

Hydrogeologic Setting

The facility is located on the west side of the Great Miami River along Oxford Road in Franklin, Ohio (see Figure 1) . . . .

The ground water resources of this area are obtained from thick deposits of sand and gravel associated with the Great Miami Buried Valley Aquifer System. This aquifer system is designated as a sole source aquifer and is capable of yielding more than 1,000 gallons per minute. Georgia Pacific obtains its water supply from the city of Franklin. Recently traces of Trichloroethylene have been detected in Franklin's well # 8 which is located adjacent to Georgia Pacific's property (see Figure 1) n7 . . . .

Conclusion

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The Georgia Pacific facility discharges wastewater to an on-site infiltration [*22]pond n8 which recharges the Great Miami Buried Valley Aquifer. This aquifer is used as a municipal water supply for the city of Franklin which has (2) water supply wells adjacent to the facility. Significant potential sources of contamination are present at the facility around the asphalt storage tanks and the drum holding area . . . .

(Goudiss Aff., Ex. 6 (emphasis added).) n9

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n7 Allen testified that as of March 12, 1993, G-P did not have a copy of figure 1. (Allen Dep. at 351-352.)

n8 Allen testified that at the time of the meeting he thought Well No. 8 was connected to the roofing plant because the Ohio EPA Memo referred to an infiltration pond which he knew was located at the roofing plant. (Allen Dep. at 351-352.) The Franklin Felt Mill is not located on Oxford Road, but on North River Street and Van Horne Street. It is has no infiltration pond. (Defs.' Ex. 3. at 82371.)

n9 At some point after the March 2, 1993 meeting, OCF decided not to go

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forward with their efforts to acquire G-P's Business. Schlaudecker testified at deposition that he believed that the TCE detected in the groundwater and G-P's unwillingness to indemnify OCF on this issue were major considerations in OCF's determination not to go forward with the acquisition. Schlaudecker, however, was

not involved in OCF's decision. (Schlaudecker Dep. at 39-40.)

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[*23]

Allen testified that after OCF told him about the TCE contamination, he asked someone (he believes it was Borstel, but did not recall specifically) about G-P's use of TCE near or at Franklin. The response he received was that TCE had not been used by G-P. (Allen Dep. at 358.)

6. The Meeting on March 12, 1993 between Ron Allen and Kathy Rhyne, counsel for G-P, and Michael Scott, counsel for GAF

At all relevant times, Scott was associate general counsel, environmental, with GAF. n10 (Scott Dep. at 5.) Scott first became involved in the G-P/GAF transaction in early 1993, when he was asked by Barry Kirschner, who acting as co-general counsel of GAF at the time (id. at 8), to review a proposed asset purchase agreement and related documents that had been provided to GAF by G-P

and to provide comments on the environmental issues raised by those documents (id. at 41).

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n10 In this position he was responsible for all legal matters relating to environmental law and other regulatory programs that are usually characterized as environmental. (Scott Dep. at 9.) Scott testified that he "handled litigation, administrative matters, and advised the companies on commercial matters relating to general corporate housekeeping as well as mergers, acquisitions and the like." (Id.) Scott left GAF in July of 1994 and joined Great Lakes Chemical Corporation, West Lafayette, Indiana, as senior environmental counsel. (Id. at 5.)

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[*24]

Fred Bright ("Bright"), manager of environmental affairs for Building Materials Corporation at GAF, was assigned in early 1993 to work with Scott on collecting the technical information necessary for the consummation of the G-P/GAF transaction, primarily the information that Scott needed to advise GAF on environmental aspects of the transaction, including working with any

environmental consultants Scott may have retained, making site visits to the G-P facilities, and gathering public documents to obtain information about the facilities. (Id. at 50, 52-53.)

According to Scott, on March 11, 1993, a copy of the Law Environmental Audit was faxed to him by Allen. (Id. at 81.) n11 Upon receiving the Audit, Scott sent it or a copy of it to Bright by facsimile transmission. Both reviewed and discussed the contents of this document. (Id. at 82.) Scott and Bright met on March 11, 1993, to prepare for a meeting with G-P representatives scheduled for March 12, 1993. Scott testified that at the March 11, 1993 meeting he went through his standard materials, including a checklist that he used for prospective acquisitions to insure that he covered all the bases in his first due diligence[*25] meeting, and pulled out an appropriate list of questions that

he wanted to ask Allen at the meeting on March 12, 1993. (Id. at 102-104.)

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n11 Since the Audit was not contained in the data room (Allen Dep. at 128), this was the first time GAF representatives had seen the Audit.

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On March 12, 1993, Scott, Allen, and Rhyne met. Scott testified that at this meeting he went through the Audit covering each of the facilities and asked Allen and Rhyne questions from his checklist, got their responses to each of those items, and in certain cases had follow-up conversations on specific items. (Id. at 109.) Scott took notes which corresponded to his checklist of questions. (Defs.' Ex. 16.)

Scott testified that although not disclosed in the Audit, Allen and Rhyne told him that an earlier bidder had identified the issue of TCE contamination in a City drinking water well nearby the Franklin Roofing plant in the course of due diligence (Scott Dep. at 119-120) and the issue had just come to the attention of Allen[*26] and Rhyne (id. at 117). Additionally, " . . . in the course of telling [Scott] about the well that was across the road from the roofing plant, [Allen and Rhyne] explained that there was another well on the property of the felt mill, and they explained how that came to be, how the well was installed during a period of time that the city owned the property and then the city conveyed the parcel to . . . Georgia-Pacific's predecessor, and, therefore, the city came to own a well that was on the site of the felt mill." (Id. at 286-287.)

Scott was also told that the State was aware of the TCE because it ". . . had been detected in the course of the analytical testing that the city was

required to do, and that there had been no response from the state as of that date as to what action, if any, it would take." (Id. at 120.) n12 Scott also testified that at this meeting, Allen and Rhyne told him that TCE had been found to be a regional contaminant in the Franklin Area (id. at 490-491, 780-781, 834, 889, 891-893) and showed him and probably gave him a map of the Roofing Plant in Franklin, Ohio showing a well across the road from the Roofing Plant which they referred to this[*27] well as "Well No. 8." (Id. at 117-118.) Allen testified that he did not recall showing any map to Scott at the March 12, 1993 meeting. (Allen Dep. at 364-365.)

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n12 Scott's notes from the March 12, 1993 meeting, under the heading Franklin Ohio Roofing, include the following notation:
Just came up Another bidder found
city dw well dg? TCE found
No indication from plant
Adjacent property 1/93
No contact from state
No use of TCE
(Defs.' Ex. 16 at 0200107.)

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Allen testified that he was as certain as he could be that during the March 12, 1993 meeting, Scott was provided with a copy of the Ohio EPA Memo which Schlaudecker's assistant, Crowle, had sent to Allen on or about March 4, 1993. (Id. at 172.) Scott, however, testified that he saw the Ohio EPA Memo for the first time in late March or early April 1993 and that he was sure that Allen and Rhyne did not give him a copy at the March 12, 1993 meeting. (Scott Dep. at 122.) Rhyne's testimony supports Allen's recollection that a copy of the Ohio [*28]EPA Memo was provided to Scott on March 12, 1993. (Rhyne Dep. at 64, 67.)

Bright, who worked with Scott on collecting the environmental information necessary for GAF's due diligence, testified that he had seen the Ohio EPA memo no later than March 12, 1993 and that this memo had been the first source of his knowledge of the TCE issue. (Bright Dep. at 211-212.) Bright stated that he did not know if Scott had seen a copy of the Ohio EPA Memo by March 12, 1993. (Id. at 212.) Bright did not attend the March 12 meeting Scott had with Allen and Rhyne. (Scott Dep. at 101.) Although Bright could not recall who gave him a copy of the Ohio EPA Memo, he believed that he had received a copy of the document from one of his colleagues at GAF. (Bright Dep. at 212.)

Additionally, plaintiff has provided a copy of handwritten notations made by Bright under the entry "March 12, 1993 added" which state in part:

The town of Franklin has a grdwtr. sampling well downgradient from the plant. Sampling results have detected TCE!

Concentration? Suspected Source?

G-P claims they have never used TCE

(Goudiss Aff., Ex. 7 at 21473.) Bright testified that although the actual entries[*29] may have been made on or after March 12, 1993, the information reflected in those handwritten notations was information provided to GAF by G-P at a meeting held on March 12, 1993. (Bright Dep. at 211.)

At the March 12, 1993 meeting, attended by Scott, Allen and Rhyne, the Audit was reviewed, and Scott went through each of the facilities and asked questions which were included in the checklist he had previously prepared. (Scott Dep. at 109.) Allen also had in his possession a copy of his checklist upon which he had written notes during his March 2, 1993 meeting with representatives of OCF and subsequently in preparation for the March 12, 1993 meeting with Scott. (Allen Dep. at 318.) On Allen's copy of the status report, next to item 1b, under the

subheading "solid waste" in reference to the Franklin Felt Mill there is a handwritten notation which reads "nearby well - no contamination." (Id. at 320; Defs.' Ex. 14 at 0131332.) Allen testified that to the best of his recollection he went through the list and his notes and gave Scott as complete an explanation as he could. Thus, he felt sure that he would have shared the information contained in his notes with Scott. (Allen Dep. at[*30] 329.)

As a part of the discussion about the Audit, item 1b, under the area of concern entitled "Solid Waste Management" for the Franklin Felt Mill, was discussed. (Scott Dep. at 141.) In Scott's notes, under the heading "Franklin Ohio Felt", next to number 14, "there is an indication that says 'Yes-will send report." (Id. at 142-143; Defs.' Ex. 16 at 0200107.) Scott's own testimony indicates that he was aware of the existence of a report pertaining to item 1b for the solid waste management for Franklin as it appeared in the Audit. (Scott Dep. at 143.) n13

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n13 The subject of the CH2M Hill Report was possible contamination from three solid waste disposal areas at the Franklin Felt Mill.

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8. March 12, 1993 to March 19, 1993

After the March 12, 1993 meeting, Allen and Rhyne met and made a list of items that Scott wanted. (Allen Dep. at 179.) They also called Connie Brewer or Anita Gifford, corporate lawyers at G-P, to report on what had transpired at the March 12, 1993 meeting with Scott. (Id.[*31]) Allen then directed his paralegal to get the documents which had been requested by Scott at the meeting. (Id. at 179, 193.) Allen contacted Borstel to get the solid waste management report which later became known as the CH2M Hill Report. (Id. at 193.)

Allen testified that Rhyne drafted the original version of the Disclosure Schedule to the Agreement which Allen subsequently approved. (Id. at 359.) In the final version of the Disclosure Schedule under the heading "Franklin (Roofing)", item 4 states: "TCE discovered off-site (not attributable to Seller)." n14 (Defs.' Ex. 18. at 11)

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n14 It is undisputed that the information contained in this Disclosure Schedule was incorrect to the extent that it indicated that TCE had been located at the

Roofing Plant as opposed to the Felt Mill. (See Defs.' Ex. 37.)

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The final version of the Disclosure Schedule differs from the original version in that the final version includes the parenthetical "(not attributable to Seller)" and the original version contained[*32] the parenthetical "(not attributed to Seller)." (Rhyne Dep. at 118-119.) Rhyne testified that she did not recall any discussion with Allen concerning the change from "not attributed to" to "not attributable to." (Id. at 120.) Rhyne testified that she included the parenthetical "(not attributed to seller)" based on Allen's inquiries regarding G-P's use of TCE in Franklin, Ohio. (Id. at 117-118.) Rhyne testified that although she did not recall what Allen's inquiries consisted of, she believed that the conclusion of his inquiries implied that there was no basis on which to attribute the TCE to G-P. (Id. at 118.)

On Friday, March 19, 1993, the final version of the Disclosure Schedule was provided to GAF, along with a list of all reports on the Disclosure Schedule, and in the early hours of March 20, 1993, G-P and GAF executed the Agreement dated March 19, 1993. (JPO Ex. 1 P4.)

9. Events after March 19, 1993

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On Monday, March 22, 1993, Allen sent a cover letter and a package of over 500 pages of documents to Scott. (Allen Dep. at 177.) Scott testified that he did not recall receiving this set of documents. (Scott Dep. at 245-246.) The CH2M Hill Report was not included[*33] in the set of documents which were sent in response to Scott's requests. (Allen Dep. at 177, 190, 193.) Allen testified that he received a copy of the CH2M Hill Report on March 26, and handed it over to GAF representatives at a meeting held in Atlanta on that day. The meeting in Atlanta was attended by Bright and representatives of Arthur Little Associates and perhaps, Neil Kaye and Murray Sherman. (Scott Dep. at 270.) According to Allen, he sent the report to Scott the same day. (Allen Dep. at 181.)

Scott reviewed the report on or around March 26, 1993. (Scott Dep at 272.) He noted that Well No. 8 was within the fence line of the Franklin Felt Mill and recalled that he had been told of the TCE contamination in Well No. 8. (Id. at 275-276.) Allen states that he did not read the CH2M Hill report on March 26, 1993. (Allen Dep. at 185.)

Scott testified that he called Allen close to March 29, 1993 or perhaps early April 1993 (Scott Dep. at 349) and told him that the CH2M Hill report indicated that Well No. 8 was on the Franklin Felt Mill property and contrary to what Allen had told him, was not across the road from the Roofing Plant. (Id. at 350.) According to Scott, upon hearing[*34] this, Allen expressed surprise.

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(Id.) Scott testified that although he did not suggest to Allen that he felt Allen had tricked him, he did feel that GAF had been misled. (Id. at 353-354.) Allen testified that at the time of Scott's telephone call, he had not read the CH2M Hill Report. (Allen Dep. at 185.) Subsequently, he obtained another copy of the CH2M Hill Report from Borstel or Richard Moser ("Moser") and read it. (Id. at 186.)

Allen testified that a week or so after he had received the phone call from Scott and had read a copy of the CH2M Hill Report, he noticed, in a stack of incoming mail that his secretary kept for him, a letter which he had sent to Scott on March 26, 1993. A copy of the CH2M Hill Report was included in this letter. (Id. at 175, 187.) At that point, Allen was concerned that he had received the report on or prior to March 12, 1993, and for that reason he checked all the boxes containing files and documents related to the sale involved in the G-P/GAF transaction. (Id. at 175-176, 189-92.) Allen testified that because the CH2M Hill Report was not in those boxes, he knew that he did not have the CH2M Hill Report in his possession on March[*35] 19, 1993 or before. (Id. at 175-176, 189-190.)

Thereafter, the parties attempted to resolve a variety of issues (id. at 231) including whether the contract should be amended to provide liability to G-P for the migration of hazardous substances to or from the properties. (See, e.g.,

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Scott Dep. at 933-936.) Finally, on June 23, 1993, G-P provided GAF with update

3 to the Disclosure Schedule n15, which included the CH2M Hill Report among the new items added to the Disclosure Schedule. Under @ 5.16 of the Agreement, if the information in any update or amendment to the Disclosure Schedule materially and adversely affected the purchased assets, the assumed liabilities, or the relative rights and obligations of GAF, GAF had 10 days after receiving the update within which it could terminate the Agreement by notice to G-P. (Agreement @ 5.16.) This ten day period was extended three times as the parties continued to negotiate. (Transcript of Argument held on February 22-23, 1996 ("Tr.") at 33.)

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n15 Update No. 3 was not made part of the record before this Court. See Transcript of Argument held on February 22-23, 1996 ("Tr.") pp. 37-38.

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[*36]

On July 19, 1993 Carl Eckardt ("Eckardt"), GAF's Executive Vice President and chief negotiator in connection with the sale of the Business, and James Van Meter ("Van Meter"), G-P's Senior Vice President and Chief Financial Officer,

met in Washington, D.C. Eckardt requested an additional extension of the ten day period provided under @ 5.16 of the Agreement, and Van Meter refused. (Deposition of Carl R. Eckardt ("Eckardt Dep.") at 262, 376-377.) Van Meter also refused to indemnify GAF for the TCE issue. (Id.) At his deposition Eckardt testified that after G-P had refused these requests, he proposed a reduced purchase price, "as a last means to settle the issue between the parties and to bring the closing to culmination." (Id. at 262.) When the reduced purchase price was not accepted by G-P, Eckardt handed Van Meter a termination letter. n16 (Id. at 380.) Thus, the Agreement was terminated by GAF on July 19, 1993.

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n16 Eckardt also had a draft extension letter with him at the July 19, 1993 meeting. (Eckardt Dep. at 380.)

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[*37]

DISCUSSION

I. Standard for Summary Judgment

<=25> Pursuant to Rule 56 of the Fed. R. Civ. P., a party is entitled to summary judgement if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Materiality is identified through an examination of the substantive law. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." <=1> Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). The party seeking summary judgment bears the burden of demonstrating the absence of any genuine issue of material

fact. <=2> Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

<=26> Summary judgment is not appropriate where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." <=3> Anderson, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). The Court must view the facts in the light most[*38] favorable to the non-moving party. See <=4> U.S. v. Diebold, Inc., 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962). If, however, the evidence presented by the nonmoving party "is merely colorable, or is not significantly probative, summary judgment may be granted." <=5> Anderson, 477 U.S. at 249-250 (internal citations omitted); see also <=6> Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S.

574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) ("Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' . . . It follows from these settled principles that if the factual context renders respondents' claim implausible . . . respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary").

II. New York Law on Fraudulent Misrepresentation

<=27> Under New York law, "a plaintiff claiming fraudulent misrepresentation must prove that (1) defendant made a material false representation, (2) defendant intended to defraud plaintiff thereby, (3) plaintiff reasonably relied on the representation, and (4) plaintiff suffered damage as[*39] a result of such reliance." <=7> Keywell Corp. v. Weinstein, 33 F.3d 159, 163 (2d Cir. 1994); <=8> Katara v. D. E. Jones Commodities, Inc., 835 F.2d 966, 970-71 (2d Cir. 1987); <=9> New York University v. Continental Ins. Co., 87 N.Y.2d 308, 639 N.Y.S.2d 283, 662 N.E.2d 763 (N.Y. 1995). Each of these elements must be established by clear and convincing evidence. See, e.g., <=10> Simcuski v. Saeli, 44 N.Y.2d 442, 452-453, 406 N.Y.S.2d 259, 377 N.E.2d 713 (N.Y. 1978); <=11> Varda, Inc. v. Insurance Co. of North America, 45 F.3d 634, 639 (2d Cir. 1995); <=12> Apex Oil Co. v. Belcher Co. of New York, Inc., 855 F.2d 997, 1008 (2d Cir. 1988); <=13> Ajax Hardware Manufacturing Corp.

v. Industrial Plants Corp., 569 F.2d 181, 186 (2d Cir. 1977); <=14> Cresswell v. Sullivan & Cromwell, 704 F. Supp. 392, 405 (S.D.N.Y. 1989); <=15> Lester v. Pickwick Intern., Inc., 528 F. Supp. 1011, 1013 (E.D.N.Y. 1981); <=16> In re Thomson McKinnon Securities Inc., 139 Bankr. 267 (S.D.N.Y. 1992).

III. G-P's Alleged Fraudulent Misrepresentations

GAF contends that G-P made a number of significant misstatements concerning environmental issues in the course of negotiations between Scott, the environmental negotiator-lawyer[*40] of GAF, and Allen, the environmental negotiator lawyer of G-P, and Rhyne, an environmental partner of King & Spaulding which represented G-P. GAF argues that as a result of the following misstatements, G-P misrepresented the TCE problem and defrauded GAF.

1. TCE discovered in a well off site of the Franklin Roofing Plant.

2. No reports by environmental consultants other than those listed on the disclosure schedule to the contract.

3. TCE was "not attributable" to GP.

4. "Nearby well - no contamination" at the Franklin Felt Mill.
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5. "No contact from state."

6. TCE contamination is a community-wide problem in Franklin area, not linked to any particular source

(GAF's Memorandum of Law in Opposition ("GAF's Mem. Oppn.") pp. 17-18.)

This opinion will examine each alleged representation to determine whether the evidence submitted demonstrates that G-P intended to defraud GAF by making the representation.

Before undertaking this examination, however, it should be noted that the thrust of GAF's allegations, namely, that Allen and Rhyne knew of and attempted to hide the TCE contamination at the Franklin Felt Mill is contradicted by their other actions. [*41] Although the evidence may show that G-P breached the Agreement by failing to disclose the accurate location of City Well No. 8 in which TCE had been detected, the acknowledged conduct of Allen and Rhyne is inconsistent with that of parties who intended to withhold information pertaining to TCE contamination. The evidence demonstrates that Allen and Rhyne first learned of a TCE problem in early March 1993. The Law Environmental Audit dated October 2, 1992, which was prepared by an independent consulting firm
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and provided by G-P to bidders did not mention any TCE problem at all. (Defs.' Ex. 13.) It is undisputed that Allen volunteered information about the detection of TCE in City Well No. 8 at Franklin, Ohio, at his first meeting with Scott on March 12, 1993. At this meeting Allen told Scott that a prior bidder, OCF, had informed him that in the course of its due diligence it had come to OCF's attention that the city of Franklin had found TCE in a city well located across the road from the Franklin Roofing Plant, that the state regulatory agency was aware of the TCE, and that there was no response from the state as to what, if any, action it would take. Scott remembers going over a[*42] map of the Franklin Roofing Plant premises which showed a well. (Scott Dep. at 117, 119-120.) Rhyne and Allen remember furnishing Scott with a copy of the Ohio EPA Memo. (Allen Dep. at 172; Rhyne Dep. at 64, 67.) n17 Bright, an engineer at GAF, testified that he had seen a copy the Ohio EPA memo which Allen had received from OCF no later than March 12, 1993. (Bright Dep. at 211-212.) Allen also disclosed to Scott that a solid waste assessment report for the Franklin Felt Mill had been completed and stated that he would obtain a copy to send to Scott. (Scott Dep. at 143.) The testimony indicates that the CH2M Hill report was furnished to Scott on March 26, 1993, a week after the Agreement was executed on March 19, 1993. (Allen Dep. at 181; Scott Dep. at 272.) An examination of GAF's evidence related to the representations which GAF attributes to Allen and Rhyne and the context in which they were made is inconsistent with the conclusion that G-P acted with an intent to defraud GAF.
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n17 Scott recalls that City Water Well No. 8 was identified as the well with TCE

traces (Scott Dep. at 118), but complains that its location was incorrectly identified by Allen and Rhyne as near the roofing plant (id. at 117-118). The Ohio EPA memo gives the impression that City Well No. 8 is near the roofing plant. (Goudiss Aff., Ex. 6.) See supra pp. 16-17.

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[*43]

1. "TCE discovered in a well off site of the Franklin Roofing Plant."

This representation was contained in the first Disclosure Schedule. It is consistent with the Ohio EPA memo which erroneously suggested Well No. 8 was nearby the Franklin Roofing Plant. (Goudiss Aff., Ex. 6.) There is no suggestion in the Ohio EPA memo that the Franklin Felt Mill was the plant involved. Furthermore, Allen does not deny that he told Scott that Well No. 8 was near the Franklin Roofing Plant. No evidence either direct or circumstantial has been submitted to show that Allen, who was located in Atlanta, Georgia and had received the Ohio EPA memo a week earlier during the course of negotiations

with OCF, knew that in fact Well No. 8 was near the Franklin Felt Mill and not the Franklin Roofing Plant.

In view of this lack of evidence of contrary knowledge by Allen and the incorrect information included in the Ohio EPA memo, Allen and Rhyne's representation as reflected in the Disclosure Schedule that TCE had been discovered in a well off site of the Franklin Roofing Plant, could only be found by a reasonable juror to have been an honest mistake.

2. No reports by environmental consultants other [*44] than those listed on disclosure schedule to the contract.

It is clear that G-P's warranty that it had no reports by environmental consultants other than those listed on the Disclosure Schedule was also incorrect. The CH2M Hill Report constituted such a report and should have been included in the Disclosure Statement. It is also true, however, that GAF had knowledge of the existence of such a report and knew that it was not on the Disclosure Schedule. Scott was aware from the Environmental Audit that an assessment report regarding solid waste disposal practices at the Franklin Felt Mill had been commissioned as of October 2, 1992. Scott acknowledged that he had been made aware of the existence of the report by Allen and that Allen had promised to provide him with a copy. (Scott Dep. at 142-143.) Thus, GAF had

knowledge of the existence of the assessment report, even though it was not listed on the Disclosure Schedule. Allen testified that at the March 12, 1993 meeting, item 1-B of the Audit Section on the Franklin Felt Mill was reviewed and that Scott asked for a copy of whatever assessment report had been generated. After this meeting Allen directed his paralegal to get the documents [*45]requested by Scott. Because Allen did not have the solid waste assessment report, he called Borstel and asked him for a copy. (Allen Dep. at 193.) Rhyne testified that she was unaware of the existence of the CH2M Hill report as of the March 12 meeting with Scott. (Rhyne Dep. at 68-70.) When Allen requested a copy of the report, Borstel was unable to locate the CH2M Hill report in his files and requested a copy from CH2M Hill. (Borstel Dep. at 89-91.) The report was received by Allen on March 26, 1993, and on that day delivered to GAF personnel and mailed to Scott. (Allen Dep. at 171-172; 185-188.)

This evidence is inconsistent with a finding that Allen intended to defraud GAF by failing to include the CH2M Hill Report on the Disclosure Schedule and thereby hiding the contamination of the well near the Franklin Felt Mill. There is no showing that Allen was aware that, in addition to addressing solid waste disposal at the Franklin Felt Mill as stated in the Audit, the CH2M Hill report contained a finding concerning the quality of water in the adjacent well.

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Borstel, the environmental engineer at G-P assigned to the proposed sale of the properties, was aware the CH2M Hill Report mentioned[*46] TCE because he had read the conclusion contained in the draft report, but since the report concluded that the level of TCE detected was far below federal safe drinking water standards and that there was no showing that the TCE had come from one of G-P's waste disposal areas, he did not deem it an important document environmentally. (Borstel Dep. at 73-75.) Since the report stated that tests by the City of Franklin showed TCE was present at concentrations ranging from .58 to .65 [mu] g/L, far below the maximum contaminant level (MCLs) of 5 [mu] g/L, the enforceable drinking water quality standard developed under the Federal Drinking Water Act (Defs.' Ex. 3 at 82377), Borstel's conclusion was not unreasonable. G-P's failure to include the CH2M Hill Report on the Disclosure Schedule, in light of the fact that it had disclosed the existence of the report and delivered a copy to GAF within a week after the signing of the Agreement, does not provide a rational juror with clear and convincing evidence that G-P acted with the intent to defraud.

3. TCE was "not attributable" to G-P.

An additional statement in the Disclosure Schedule which is contested by GAF is the assertion that[*47] the TCE discovered at the Roofing Plant was "not attributable" to G-P. All the evidence shows that this assertion was based on

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an inquiry promptly conducted by Allen after meeting with OCF regarding G-P's use of solvents containing TCE at the Franklin sites. Allen was advised that such solvents had not been used (Allen Dep. at 358) and no evidence which contradicts Allen's statement has been provided.

The selection of the word "attributable" as opposed to "attributed" in the Disclosure Schedule seems appropriate to describe the information gathered by Allen's inquiry, since it concerned G-P's investigation of its prior use of solvents containing TCE, as opposed to suggesting that a determination had been made by the Ohio EPA or by any other governmental agency or consulting firm as to the source of the TCE. n18 During GAF's environmental follow up, Scott made an inquiry about whether the solvent used by G-P, Safety Kleen, contained TCE. He was advised by a third party, Safety Kleen, that the solvents of Safety Kleen used by G-P at Franklin did not contain TCE. (Scott Dep. at 534.) There is no evidence, direct or circumstantial, that this representation in the Disclosure Schedule was[*48] based on anything other than Allen's own investigation, and therefore, from the evidence submitted, no rational juror would reasonably attribute fraudulent intent by Allen and Rhyne.

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n18 Since all parties knew that G-P could not have knowledge of all hazardous

waste actions of, or permitted by, prior owners, the word "attributable" could only relate to operations of G-P and not to any liability which G-P might have as present owner of a property under CERCLA or RCRA.

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4. "Nearby well - no contamination" at the Franklin Felt Mill.

This alleged representation is based on Scott's testimony that on March 12, 1993, Allen and Rhyne "may have told [him] that there was no contamination in what they said was Well 6 on the property of the felt mill" and that he believed that they had told him this, because he had "substantial comfort" that the Franklin Felt Mill was not a problem. (Scott Dep. 288.) The alleged representation is also based on Allen's testimony that he would have mentioned to Scott the substance[*49] of his note on his February 24, 1993 Status Report with respect to item 1(b) under the subtitle "Solid Waste" which read "nearby well - no contamination." (Allen Dep. at 329; Defs.' Ex. 14.) n19

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n19 At his deposition, in response to questions about this notation, Allen testified that he did not recall any more than that sometime after February

24, 1993 and prior to March 12, 1993 someone must have told him that as far as Item 1B was concerned no contamination had been found. (Allen Dep. 321-322.)

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Scott did not testify that Allen stated he had seen a report which found that there was no contamination or that Allen had advised him that any report had reached such a conclusion. It is obvious that Scott understood Allen to be saying that he had no evidence of any contamination of that well. However, even if Allen did make the statement that the well located near the Franklin Felt Mill was not contaminated, the statement does not constitute fraud unless it can be shown that Allen had evidence to the contrary. [*50] Such evidence would have to be based on Allen's knowledge of the findings in the CH2M Hill Report, about well contamination and would have to be sufficient to draw a conclusion of fraud. Allen's mere note on the Status Report does not make such a showing and does not provide evidence of scienter. In light of all the evidence, no rational juror could find that this statement of Allen, if made, was intentionally false.

5. "No contact from state."

This representation is based on Scott's handwritten notes from the March 12, 1993 meeting. (Defs.' Ex. 16 at 0200107.) The evidence submitted to show that

G-P was aware of a threat of regulatory action against G-P by the Ohio EPA, but did not advise GAF of such a threat, is insufficient for a rational juror to find clear and convincing evidence of fraudulent intent. Scott testified that Allen advised him of the nature of the Ohio EPA memo on March 12, 1993 and stated that there had been no response from the state regulatory authority as of March 12, 1993 as to what action, if any, it would take. (Scott Dep. at 120.) Scott testified that on the basis of this information, he concluded that there

had been no response from the State; that[*51] as of March 12, 1993 the State had not required anyone to do anything; and that there was no indication of any impending enforcement action. (Id. at 636.) Scott did not testify that Allen made any definitive statement that the Ohio EPA had determined not to take any action.

The facts as testified to by Schlaudecker, OCF's Vice President for Environmental Affairs and Regulatory Law (Schlaudecker Dep. at 11), and the events thereafter do not support the conclusion that Allen had authoritative information of a threat of Ohio EPA action which he withheld from Scott or Bright. On March 2, 1993, Schlaudecker, his assistant, Crowle, and outside counsel, Rick Squire ("Squire") of Wilmer Cutler and Pickering, had a single meeting with Allen and Rhyne at which the participants reviewed the Law Environmental Audit item by item. (Id. at 31-32, 50-51.) It was Schlaudecker's testimony that in the course of that meeting, Schlaudecker, who had not

personally had any discussions with the Ohio EPA (id. at 50), told Allen and Rhyne that he understood that the Ohio EPA would be writing a letter to G-P about TCE in the groundwater at Franklin (id. at 34, 48-49); that the Ohio EPA had provided[*52] OCF with a copy of such a draft letter (id.); that the copy of the draft letter had been received in January of 1993 (id. at 49); and that Schlaudecker believed that the Ohio EPA was going to follow up and look into the question of TCE contamination in the groundwater at the Franklin facility (id. at 26, 29, 67-68). Schlaudecker stated that he had seen a copy of the letter (id. at 49), and at Allen's request agreed to provide a copy of the letter to G-P (id. at 34). n20

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n20 When presented with the Ohio EPA memo, Schlaudecker testified that he had never seen it before. (Schlaudecker Dep. at 60.) No draft letter from the Ohio EPA, let alone a final letter, has been produced by OCF, the Ohio EPA or either of the parties.

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On March 4, 1993, in response to Allen's request, the Ohio EPA memo, was provided by Crowle to Allen. (Goudiss Aff., Ex. 6.) At his deposition,

Schlaudecker testified that the Ohio EPA memo was not the letter he had seen and received from the Ohio EPA. (Schlaudecker Dep. [*53] at 59.) A review of the Ohio EPA memo which bears a date of January 8, 1993, does not indicate that the Ohio EPA was threatening regulatory or legal action. (Goudiss Aff., Ex. 6.)

Allen did not receive any draft letter threatening regulatory action from Crowle, and by March 12, 1993, almost two months after OCF had learned of "the letter", G-P had not received a letter from the Ohio EPA. Accordingly, it was reasonable for Allen and Rhyne to conclude that OCF did not have a draft letter in its possession and that Schlaudecker's statement that the Ohio EPA planned to follow up and look into TCE in the groundwater at the Franklin Roofing Plant n21 (Schlaudecker Dep. at 67-68), was based on the Ohio EPA Memo and a faulty recollection of that document. In view of the information which Allen admittedly imparted to GAF, no rational juror would find that Allen's representation that G-P knew of "no contact from state" constituted a representation made with the intent to defraud GAF.

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n21 Rhyne does not recall such a statement by Schlaudecker and only remembers Schlaudecker mentioning the Ohio EPA memo, not the draft letter. (Rhyne Dep. at 45, 39.) Her notes of that meeting with OCF describe first a letter and then a

memo.

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[*54]

6. TCE contamination is a community-wide problem in Franklin area not linked to any particular source.

The Court has been unable to find any support for GAF's claim that Allen actually said TCE was a community-wide problem in Franklin. (GAF's Mem. Oppn at 17-18.) Scott testified that Allen said TCE contamination was a "regional problem" (Scott Dep. at 490, 780-781, 834, 889, 891-893.) The parties appear to have equated Allen's description of TCE as a regional problem with a statement that TCE is a community-wide problem. In any case, the statement that TCE is a community-wide problem does not appear to be materially incorrect. The final CH2M Hill Report states that "TCE has become a common organic contaminant in the Great Miami Buried Valley Aquifer because of the highly industrialized land developments overlying this sensitive aquifer." (Defs.' Ex. 3 at 82377.) Accordingly, even if this statement regarding a community-wide problem was made, it is not of a character which constitutes fraud, since it could readily be checked with governmental documents or authorities. n22

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n22 Additionally, defendants have not shown that Scott relied on this statement, which could have been easily verified by calling the Ohio EPA prior to entering the Agreement.

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[*55]

IV. Summary

G-P's representations, when viewed in the context of the actions and disclosures of Allen and Rhyne, do not provide a reasonable juror with clear and convincing evidence of fraud.

At the March 12, 1993 meeting, Allen volunteered to Scott that TCE had been detected in Well No. 8 by the City of Franklin and that the state regulatory agency was aware of the contamination. This information was not included in the Audit or any other reports provided to GAF at the time of this meeting. During the March 12, 1993 meeting, Allen inaccurately told Scott that Well No. 8 was located near the Franklin Roofing Plant instead of near the Franklin Felt Mill. If Allen had knowledge of the findings of the CH2M Hill Report regarding the

TCE contamination of City Well No. 8 near the Franklin Felt Mill and had wanted

to conceal the report in order to hide the CH2M Hill finding from GAF, it would have been foolhardy for him to disclose the Ohio EPA Memo. In view of the information in the Ohio EPA Memo, it would have been normal due diligence for GAF, like OCF, to confirm with the Ohio EPA or with the City of Franklin the extent of each authority's concern about the contamination[*56] of City Well No. 8. Any contact with the Ohio EPA, or a review of the City documents available for inspection, would have disclosed the fact that Well No. 8 was located near the Franklin Felt Mill. The State and City agencies were the sources of information described in the CH2M Hill Report. Upon such inquiry any deception by Allen would have been revealed.

At the same meeting on March 12, 1993, Allen had informed Scott of the existence of a report regarding solid waste management practices at the Franklin Felt Mill. This disclosure and Allen's promise to obtain a copy for Scott contradict the contention that Allen knew of the CH2M Hill Report's contents and intentionally concealed the report because he believed the contents were of such significance that GAF would have the right to terminate. Furthermore, the contention that G-P's failure to include the CH2M Hill Report in the Disclosure Schedule was part of a scheme to defraud GAF is severely undermined by the fact that the CH2M Hill Report was provided to GAF only one week after the Agreement was signed. Its contents clearly identified the location of Well No. 8 as near

the Franklin Felt Mill and the extent of its contamination. [*57]

If Allen had intended to defraud GAF on environmental issues pertaining to TCE, he would not have volunteered information about TCE being detected in Well No. 8 and would have withheld both the CH2M Hill Report and the Ohio EPA Memo. Instead, on March 12, 1993, Allen informed Scott that TCE had been detected, at City Well No. 8, according to an Ohio EPA Memo; supplied a copy of the memo, at least to Bright; told Scott of the existence of the report concerning solid waste disposal at the Franklin Felt Mill; promised to obtain a copy of that report; and on March 26, 1993 sent Scott a copy of the CH2M Hill Report. Allen's and Rhyne's actions are inconsistent with those of persons acting with intent to defraud. There is no evidence sufficient to support a finding by a reasonable juror that either Allen or Rhyne intended to perpetrate a fraud on GAF.

Accordingly, although G-P's failure to give accurate environmental information to GAF may be harmful to its breach of contract claim, there is insufficient evidence of intent to commit fraud in the inducement to permit GAF's counterclaim to go to the jury.

CONCLUSION

Plaintiff's motion for summary judgment dismissing defendants' [*58] counterclaim alleging fraudulent misrepresentation is granted. Plaintiff is entitled judgment as a matter of law because after adequate time for discovery, GAF has failed to make a showing sufficient to establish by clear and convincing evidence that G-P had an intent to defraud, an essential element of a fraudulent misrepresentation claim under New York law.

IT IS SO ORDERED.

Dated: New York, New York

September 3, 1996

Robert P. Patterson, Jr.

U.S.D.J.