# Motion Ex. 1

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

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| BP AMOCO CHEMICAL COMPANY,<br><br>Plaintiff/Counter–Defendant,<br><br>v.<br><br>FLINT HILLS RESOURCES LLC,<br><br>Defendant/Counter–Plaintiff. | Consolidated Case No. 05 C 5661<br><br>Judge Amy J. St. Eve |
| FLINT HILLS RESOURCES LLC,<br><br>Third-Party Plaintiff,<br><br>v.<br><br>BP CORPORATION NORTH AMERICA INC.,<br><br>Defendant. | |

**BP AMOCO CHEMICAL COMPANY'S MOTION FOR JUDGMENT AS A MATTER OF LAW UNDER FRCP 50(a) ON FLINT HILLS RESOURCES LLC'S ESTIMATED FUTURE DAMAGES FOR CERTAIN CLAIMS, INCLUDING CLAIMS 21, 56, AND 77**

1. Prior to trial, the Court denied BP Amoco's Motion *In Limine* To Bar And Preclude Flint Hills Resources LLC's Evidence of Estimated Future Damages (Dkt. 594) without prejudice, deciding to wait until trial to determine whether Flint Hills could establish a proper foundation to support that evidence and damages. (Dkt. 767) In its order, the Court specifically explained the standards that Flint Hills would have to meet to establish foundation for its estimated future damages claims. Now that Flint Hills has closed its case, the witness testimony and other record evidence demonstrate that Flint Hills has failed to meet the Court's standards. Accordingly, for the reasons set forth in this motion and in the accompanying memorandum in support, judgment as a matter of law should be granted in favor of BP Amoco and against Flint Hills as to all or a portion of Flint Hills' estimated future damages for certain claims.

2. Pursuant to Federal Rule of Civil Procedure 50(a), if "reasonable persons could not find that the evidence justifies a decision for a party on an essential element of its claim, the court should grant judgment as a matter of law." *Waubanascum v. Shawano County*, 416 F.3d 658, 664 (7th Cir. 2005). "[T]o avoid a directed verdict or a JNOV, a plaintiff must do more than merely argue that the jury might have chosen to disbelieve all of the defendant's evidence. A plaintiff must offer substantial evidence to support the argument." *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1181 (7th Cir. 2002) (ellipsis and internal quotation marks removed); *see also Perfetti v. First Nat'l Bank*, 950 F.2d 449, 456 (7th Cir. 1991).

3. To prove its estimated future damages claims, Flint Hills must establish each of the following: (i) the future estimated costs Flint Hills seeks to recover are "reasonably certain to occur," and (ii) the future estimated costs "can be calculated with reasonable certainty." (Dkt. 767 at 2, citing Dkt. 437 at 20; *see also* Dkt. 831, Breach of Contract No. 5) The Court held that while Flint Hills may seek to use various types of evidence such as documents and witness testimony to prove such damages, Flint Hills had the burden of demonstrating certain facts in order for that evidence to be admissible and be used to establish estimated future damages. Specifically, the Court held that for documents such as third party cost estimates, Flint Hills must show that: (i) the third party estimates were integrated into Flint Hills' records; (ii) it relied upon the third party estimates; and (iii) the documents are accompanied by sufficient indicia of reliability. (Dkt. No. 767 at 3) Similarly, the Court held that Flint Hills could have employee-witnesses provide testimony regarding the estimated amount of Flint Hills' future repair costs, but only if they satisfied the requirements of FRE 702. (*Id.* at 5) Flint Hills' own evidence demonstrates that it has failed to satisfy these requirements and thus cannot prove its future estimated damages claims.

4. ***First***, Flint Hills has failed to prove that the estimated future damages it seeks for certain claims, including portions of Claim 21, Claim 56, and Claim 77 are reasonably certain to occur. Instead, the evidence put forth was simply the conclusory statement of witnesses agreeing with Flint Hills' counsel's questions, such as that certain projects are "reasonably certain to occur," without any supporting basis or evidence. The Seventh Circuit "repeatedly ha[s] held that conclusory statements, not grounded in specific facts, are not sufficient to avoid summary judgment." *Lucas v. Chicago Transit Auth.*, 367 F.3d 714, 726 (7th Cir. 2004); *see also Keri v. Bd. of Trs. of Purdue Univ.*, 458 F.3d 620, 628 (7th Cir. 2006); *Laborers' Pension Fund v. RES*

*Envtl. Servs., Inc.*, 377 F.3d 735, 739 (7th Cir. 2004). "And the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986)). Given that the standard for granting summary judgment is the same as that for judgment as a matter of law, if conclusory statements are insufficient to survive summary judgment, they are equally insufficient to survive judgment as a matter of law. Indeed, despite its conclusory and unsupported statements, for certain of the future projects at issue in these claims, Flint Hills was unable to provide any time frame whatsoever for when the project would be completed. Whether and when these projects will be completed is simply unknown.

5. For example, Flint Hills seeks future estimated damages of $17.2 million for a fourth TMA reactor as part of Claim 21. (Ex. 1, 2/13/09 Claim Chart at 5) Although Flint Hills' former plant manager for Joliet, Timothy Nicol, testified that these costs are "reasonably certain to occur", he provided no support for that assertion. (Ex. 2, 10/14/09 Tr. at 5136:20-24) All Flint Hills offered to support its claim was Mr. Nicol's bare conclusion. When asked about specific facts, he provided no evidence that the addition of a fourth TMA reactor was reasonably certain to occur. For example, when asked whether he knew of a date by when Flint Hills plans to install a fourth TMA reactor, Mr. Nicol replied that "I would only be speculating." (*Id.* at 5247:3-6) Mr. Nicol also was not aware of Flint Hills receiving a single estimate or vendor quote for a new reactor, and was unaware of any contracts signed with vendors to purchase the reactor—even though more than five years have passed since Flint Hills bought the Joliet Plant. (*Id.* at 5242:8-14, 5243:2-12) Moreover, Mr. Nicol admitted that this project is not even in Phase 0 of Flint Hills' AFE project.[1] (*Id.* at 5246:14-15)

6. Similarly, Flint Hills seeks $250,000 under Claim 21 to refurbish the HT-505 dehydration tower. Mr. Nicol agreed with Flint Hill's counsel that "Flint Hills [was] reasonably likely to incur the costs associated with this project." (Ex. 3, 10/13/09 Tr. at 5113:25-5114:3) Not only is "reasonably likely" the incorrect standard—as Flint Hills must prove that the costs are reasonably *certain* to occur—but Mr. Nicol offered no specific facts to support his

[1] "Phase 0 is the first phase of the project where you sort of evaluate the issues and try to determine the core of the problem or opportunity and then sort of go forward and decide do you have a need for a project." (Ex. 4, 3/17/09 Deposition of Scott Goffinet at 78:12-79:21)

conclusion. He admitted that Flint Hills had not scheduled any date for this alleged project nor is there any evidence that Flint Hills has received any third party estimates for this project or issued any AFEs for this project. (Ex. 2, 10/14/09 Tr. at 5240:9-24) These are but a few illustrative examples.

7. ***Second***, Flint Hills has not demonstrated that its estimates are reliable, as required for its future damages to be calculated with reasonable certainty. Instead, many of the cost estimates on which Flint Hills relies are subject to wide margins of error, and Flint Hills has often done limited work to estimate the cost of repair or replacement. Flint Hills' estimates also typically are preliminary and admittedly have a high degree of inaccuracy and unreliability, at times plus or minus 100 percent or plus or minus 50 percent. Flint Hills itself admitted that these estimates may change significantly over the course of the project, if Flint Hill actually spends any money on the project at all. Certain estimates are based on equipment that is dissimilar from what Flint Hills claims it will install.

8. For example, Claim 77 is for a utility boiler. Flint Hills seeks over $3.6 million in future estimated damages based upon a cost estimate performed by George Roman. One part of Mr. Roman's estimate is subject to an error range of minus 10% to plus 15% while another part is subject to a plus or minus 50% error range. (Ex. 5, 10/9/09 Tr. at 4690:2-18) This estimate for the boiler is a phase 1 estimate (*id.* at 4690:19-4691:1), and Mr. Roman agreed that a phase 1 estimate is a preliminary cost estimate and the first part of Flint Hills' process (*id.* at 4697:23-4698:1). Moreover, Mr. Roman had never previously prepared an estimate for a boiler such as the one at issue. (*Id.* at 4688:4-8)

9. As another example, Flint Hills estimate of $17.2 million for a fourth TMA reactor is several years old and based on a reactor that was going to be built in Malaysia before it was cancelled. (Ex. 6, 9/15/09 Tr. (Kelly) at 1083:6-1084:6) But Flint Hills failed to put into the record evidence of when this estimate was made, the size of the reactor to be built in Malaysia, the capability of the reactor to be built in Malaysia, costs differences for reactors between Malaysia and the United States, or numerous other factors necessary to show the Malaysia estimate could reliably be used to estimate the costs of a fourth TMA reactor for the Joliet Plant to a reasonable certainty.

10. ***Third***, Flint Hills often failed to produce any evidence that it integrated third party estimates into its own estimates, as required by the Court's order. Moreover, for most claims

there is no evidence that Flint Hills has relied on these third party estimates or other documents. In particular, for most of its estimated future damages claims Flint Hills has not authorized that any money be spent or funded in the amount of damages that it seeks. For example, Mr. Roman admitted that Flint Hills has not authorized full funding for the $23,350,000 long-term waste water treatment project that is part of Claim 21. (Ex. 5, 10/9/09 Tr. at 4699:7-9; *see also* Ex. 2, 10/14/09 Tr. (Nicol) at 5234:3-6) Similarly, Mr. Nicol admitted that he was not aware of one penny being authorized in connection with Flint Hills' alleged claim for $17.2 million for a fourth TMA reactor. (Ex. 2, 10/14/09 Tr. at 5246:14-18)

11. ***Fourth***, Flint Hills has failed to prove its "evidence" of estimate future damages is accompanied by sufficient indicia of reliability, not least of all because its witnesses have shown that they lack the qualifications necessary to provide proper expert testimony on these future costs. For example, Mr. Roman testified about future estimated costs for the utility boiler at issue in Claim 77, but admitted that he had never previously prepared an estimate for a similar boiler. (Ex. 5, 10/9/09 Tr. at 4688:4-8) Similarly, Mr. Roman prepared estimates for the installation of an UASB anaerobic reactor that is the long-term waste water project portion of Claim 21 on which Flint Hills now relies as support for its damages. (*Id.* at 4695:23-25) But Mr. Roman had never previously had any involvement with an anaerobic reactor replacement project, had never previously performed any cost estimates for such a project, had never previously contacted any vendor to obtain estimates for the purposes of replacing an anaerobic reactor, and had never previously obtained any estimates for any UASB reactor from any vendors. (*Id.* at 4696:1-16)

WHEREFORE, for the reasons set forth above and also in BP Amoco's supporting memorandum, BP Amoco respectfully requests that the Court grant BP Amoco judgment as a matter of law on Flint Hills' estimated future damages for certain claims, including Claims 21, 56, and 77.

Dated: October 19, 2009

Respectfully submitted,

By: /s/ Richard C. Godfrey

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**CERTIFICATE OF SERVICE**

I hereby certify that October 19, 2009, I caused a true and correct copy of the foregoing to be served electronically via the CM/ECF system on the following:

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