Motion Ex. 10

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

BP AMOCO CHEMICAL COMPANY, **Plaintiff/Counter-Defendant,** **v.** **FHR RESOURCES LLC,** **Defendant/Counter-Plaintiff.**	**Consolidated Case No. 05 C 5661** Judge Amy J. St. Eve
FHR RESOURCES LLC, **Third-Party Plaintiff,** **v.** **BP CORPORATION NORTH AMERICA INC.,** **Defendant.**	

PARTIAL SUMMARY JUDGMENT REPLY:
"CONDITION OF ASSETS" AND "SPENDING" CLAIMS

BP AMOCO CHEMICAL COMPANY AND BP CORPORATION NORTH AMERICA INC.'S REPLY IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO FLINT HILLS RESOURCES, LLC'S CONDITION OF ASSETS AND SPENDING CLAIMS

William L. Patberg (admitted *pro hac vice*)
SHUMAKER, LOOP & KENDRICK, LLP
1000 Jackson Street
Toledo, Ohio 43624
(419) 321-1434

Richard C. Godfrey, P.C. (ARDC #3124358)
Scott W. Fowkes, P.C. (ARDC #6199265)
Travis J. Quick (ARDC #6280905)
KIRKLAND & ELLIS LLP
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

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Attorneys For BP Amoco Chemical Company and BP Corporation North America Inc.

I. FHR'S RESPONSE CONFIRMS THAT BP AMOCO DID NOT BREACH THE PSA'S UNAMBIGUOUS LANGUAGE.

A. FHR's Contract Claims Depend Upon Rewriting The Unambiguous Terms Of The Parties' Agreement, Which the Law Does Not Allow. (Opening Brief ("Op. Br.") at 3-10)

Unable to provide a reasonable interpretation of the PSA that would support its claims, FHR attempts to avoid summary judgment by arguing that the condition-of-assets and spending representations are ambiguous and that the case is "heavily fact intensive." (Resp. at 4) But whether a contract is ambiguous is a question of law for the Court, *Commonwealth Ins. Co. v. Titan Tire Corp.*, 398 F.3d 879, 884 (7th Cir. 2004), and where, as here, the contract is integrated, ambiguity may not be established by extrinsic facts. *See Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 464-65, 706 N.E.2d 882, 885-86 (Ill. 1999); *see also Camico Mut. Ins. Co. v. Citizens Bank*, 474 F.3d 989, 993 (7th Cir. 2007). The plain language of the contract is unambiguous and defeats FHR's claims as a matter of law.

1. As a matter of law, the contract's condition-of-assets representation unambiguously applies to all Joliet Plant Assets as a whole.

The plain, straightforward meaning of "all" in the context of the parties' agreement refers to "all tangible Assets" collectively–as a whole–and not to each individual component. (Op. Br. at 4-5) In its Response, FHR asserts that "all" is consistently defined as "each" or "every" when used with a plural noun and, in any event, is ambiguous. (Resp. at 5, 11) FHR's suggested interpretation, however, depends not only on rewriting the representation to substitute "each and every" for "all," but on a selective reading of the dictionary definitions, a mischaracterization of the relevant cases, and a misunderstanding of BP Amoco's argument.

FHR contends that the collective sense of "all" applies only when the word is used with "a singular noun or pronoun" and, because the phrase "all tangible Assets" is plural, BP Amoco's definitions are inapposite. (Resp. at 8) The sources quoted by BP Amoco as defining "all," however, refer to "all" when used as an adjective modifying (with one exception) ***plural nouns***. (Op. Br. at 5) This usage and meaning is demonstrated by the following dictionary examples: collective as applied to "all the guests" (Webster's II New College Dictionary 35 (3rd ed. 2005)); "[a]ll the windows" (Am. Heritage College Dictionary (4th ed. 2007) & Am. Heritage Dictionary (4th ed. 2006)); "all men" (Webster's Encyclopedia Unabridged Dictionary of the English Language (1989)). The remaining definition, which

supplies examples with singular nouns, also contradicts FHR's interpretation that "all" means "each" or "every." *See* Oxford Am. Dictionary (1980) ("waited all day; beyond all doubt").

FHR's own definitions likewise contradict its premise that the collective meaning applies only when "all" is used to modify singular nouns. In an attempt to support its argument, FHR selectively quotes portions of definitions, omitting those applying "all" to plural nouns. (*See* Resp. at 6, omitting from its quotations the following: Webster's Third New Int'l Dictionary (1993) ("***the whole number or sum of–used collectively with a plural noun or pronoun to mean that a statement is true of the sum of the individuals considered***"; Webster's Ninth New Collegiate Dictionary 70-71 (1989) ("the whole number or sum of ([all] the angles of a triangle . . .")); Merriam-Webster Online Dictionary (http://www.merriam-webster.com/-dictionary/all[1]) (same); Black's Law Dictionary 74 (unabr. 6th ed. 1990) ("The whole number or sum of–***used collectively, with a plural noun*** or pronoun ***expressing an aggregate***. . . . ***'All' refers rather to the aggregate under which the individuals are subsumed than to the individuals themselves***."); Black's Law Dictionary 48 (abr. 6th ed. 1991) (same)).[1]

Moreover, none of FHR's cases involve the relevant question of whether "all" means collectively (*i.e.* "as a whole") rather than "each" or "every." Instead, FHR's cases concern whether a particular, discrete subset was or was not included in a defined group. *See, e.g., Wilder v. Bernstein*, 153 F.R.D. 524, 530 (S.D.N.Y. 1994) (foster children placed within their own extended families were not outside the phrase "all foster children"); *Hudgeons v. Tenneco Oil Co.*, 796 P.2d 21, 23 (Colo. Ct. App. 1990) (carbon dioxide gas rights were not outside "all oil, and gas rights").[2] The holdings of these cases–that "all" was inclusive and comprehensive–

[1] The entire definition in Black's was withdrawn 10 years ago and is omitted from the 7th (1999) and 8th (2004) editions. FHR's "Wiktionary" definition (http://en.wiktionary.org/wiki/all), contains no citation or source and is therefore unhelpful. *See Campbell v. Sec'y of Health & Human Servs.*, 69 Fed. Cl. 775, 781 (Fed. Cl. 2006) ("'any given Wikipedia article 'may be, at any given moment, . . . in the middle of a large edit or it could have been recently vandalized'").

[2] *See also Colo. Dep't of Rev. v. Woodmen of the World*, 919 P.2d 806, 814-15 (Colo. 1996) (fraternal benefit society was not exempt from tax applied to "all sales"); *In re Nice Systems, Ltd. Sec. Litig.*, 135 F. Supp. 2d 551, 569 (D.N.J. 2001) (no facts can be withheld when statute required pleading "all facts" upon which "information and belief" is formed); *In re Party City Sec. Litig.*, 147 F. Supp. 2d 282, 302-03 (D. N.J. 2001) (same); *Rash v. McKinstry Co.*, 20 P.3d 197, 201 (Or. 2001) (lien rights not excluded from "all matters"); *Consol. Freightways Corp. v. Nicholas*, 137 N.W.2d 900, 904 (Iowa 1965) (certain states not excluded from "all states").

would be the same whether "all" meant "as a whole" or "each and every." This distinction is made clear in the only breach-of-contract case cited by FHR:

> "'Every' and 'each' are synonyms of 'all' and agree in inclusiveness but differ in stress. 'All' collects, 'every' divides, 'each' distributes. ***'All' refers rather to the aggregate under which the individuals are assumed than to the individuals themselves***, as all men are mortal. 'Every' refers to the individuals, but never denotes the separate individual as, every man must die. 'Each' refers to the separate individual but never denotes this or that one in particular as, each must meet death alone." *Knox Jewelry Co. v. Cincinnati Ins. Co.*, 203 S.E.2d 739, 740-41 (Ga. Ct. App. 1974) (holding that risk of burglary was not excluded from "all risks") (emphasis added).

Thus, a conclusion that "all" is comprehensive and does not exclude any subset of the defined group is not inconsistent with the fact that it refers to the group "as a whole."

When the question of whether "all" is collective, or instead applies individually, was before another court in this District, the court held that the term was unambiguously ***collective***. In *Price v. Code-Alarm, Inc.*, a settlement agreement entitled plaintiff to "35% of all monetary recovery" in certain patent infringement litigation initiated by defendant. 2002 WL 1870041, at *7 (N.D. Ill. Aug. 13, 2002). Plaintiff asserted that this provision applied individually, and hence that he was entitled to 35% of the amount recovered in each of the individual suits (without regard to losses in other cases). *Id.* at *6. The court rejected this argument, noting that the provision referred to "***all*** recovery" and did not contain the word "each," and held that that "[t]he plain and ordinary meaning of this provision is that [plaintiff] is entitled to 35% of the ***aggregate*** monetary recovery related to the prosecution or defense of the . . . Patent, not 35% of the individual monetary recoveries." *Id.* at *7 (emphasis added).

Unable to distinguish *Price* and BP Amoco's other cases, FHR takes statements out of context and mischaracterizes the holdings. (*See* Resp. at 8) Contrary to FHR's assertions, the courts in each of these cases defined "all" collectively and did not state or hold that "all" meant "individually" or "each and every." For example, in *Ariz. v. Atchison, Topeka & Santa Fe R.R. Co.*, 656 F.2d 398, 404 (9th Cir. 1981), the Ninth Circuit agreed with the district court's holding that "all" in a statute meant "in the aggregate" rather than "each and every." The amended statute, however, omitted the word "all," and hence the Ninth Circuit observed (in the only portion quoted by FHR) that, if the amended version applied, the (discredited) "each and every" argument could not even have been made. *See also Yturria v. Kerr-McGee Oil & Gas Onshore,*

LP, 2006 WL 3227326, at *9 (S.D. Tex. Nov. 6, 2006) (royalties to be paid on "all plant products or revenue" were to be calculated from the gross proceeds, without deductions).[3]

Nevertheless, FHR asserts that BP Amoco's interpretation is somehow inconsistent with § 2.1 of the PSA. (*See* Resp. at 7) According to FHR, § 2.1, which provides that the seller will transfer "all right, title and interest" in the identified assets, "clearly would not be satisfied if some of the Seller's rights to contracts, records and systems were not transferred." (*Id*. at 7) This assertion misapprehends BP Amoco's argument, which is ***not*** that interpreting "all" to mean "as a whole" ***excludes*** some subset of assets; rather, it is that a representation like the one in § 7.1(d)(ii) is made with respect to the assets as a whole. As in *Price*, this conclusion is not inconsistent with the conclusion that "all" is comprehensive and inclusive.[4]

Finally, FHR's attempt to create an ambiguity by relying on statements contained in earlier drafts of the PSA is improper and barred by the contract's integration clause. *Air Safety, Inc.*, 185 Ill. 2d at 464-65, 706 N.E.2d at 888-86; *see also Camico*, 474 F.3d at 993. In any event, nothing can be inferred about the parties' intent with respect to the meaning of "all" in § 7.1(d)(ii) from purported references to (and later deletion of) the phrase "as a whole" in entirely *unrelated* sections of an earlier draft.[5] Furthermore, the final, executed PSA rebuts

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[3] *See also Centimark Corp. v. Vill. Manor Assocs*., 2007 WL 2081276, at *14, *31 (Conn. Super. Ct. June 21, 2007) (contractor could not subcontract out work under contract specifying that "all items" would be completed by contractor); *Stewart Title Co. v. Herbert*, 85 Cal. Rptr. 654 (Cal Ct. App. 1970) (plaintiff could not execute an option to buy "all outstanding shares" by purchasing the shares in separate blocks); *Hollinger Inc. v. Hollinger Int'l, Inc.*, 858 A.2d 342, 377 (Del. Ch. 2004) (the plain meaning of "all, when used before a plural noun such as 'assets,' means '[t]he entire or unabated amount or quantity of; the whole extent, substance, or compass of").

[4] Interpreting the § 7.1(d)(ii) representation as collective rather than individual is likewise consistent with the $75,000 "threshold" in PSA § 13.4. According to FHR, "BP [Amoco's] argument implies that there is some 'percentage of tangible Assets' claims threshold." Not so. The § 7.1(d)(ii) representation is not breached unless the tangible assets "as a whole" were not, for example, "in substantially good operating condition." This is not a "claims threshold" because the plant could be rendered incapable of safe operation by a defective critical component, regardless of cost. (There is no dispute, however, that the plant was capable of operating, and indeed continuously operated, during the four years since the sale. (SOF ¶ 5)) Furthermore, the $75,000 threshold in § 13.4 applies to a wide variety of representations – including (for example) representations regarding Seller's corporate organization, permits, and intellectual property–having nothing to do with the meaning and proper interpretation of the condition-of-assets representation in § 7.1(d)(ii). (*See* PSA §§ 7.1(a), (i) & (k)).

[5] For this reason, FHR's reliance on *MJ & Partners Rest. Ltd. P'ship v. Zadikoff*, 995 F. Supp. 929 (N.D. Ill. 1998) and *SPP Hambro & Co. v. Harstone Group PLC*, 1992 WL 84542, at *2 (S.D.N.Y. Apr. 10, 1992) is misplaced. Both cases involved a comparison between different versions of the same (or parallel) provision. (*See* Resp. at 7)

FHR's argument, because the PSA includes the phrase "each and every" in various provisions (*e.g.*, § 8.1(a) ("each and every material item of the Assets"), § 16.16 ("each and every provision")), demonstrating that the parties "knew this term and would have used it in § 7.1(d)(ii) had [they] intended BP [Amoco's] representations and warranties to apply" to each and every individual asset. (*See* Resp. at 7) [6]

Even putting aside these errors, FHR's assertion that "all" is ambiguous must fail. According to the Seventh Circuit, "[t]he existence of multiple dictionary definitions does not compel the conclusion that a term is ambiguous." *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 40 F.3d 146, 152 (7th Cir. 1994) (citing *Trico Indus., Inc. v. Travelers Indemnity Co.*, 853 F. Supp. 1190, 1195 (C.D. Cal. 1994); *Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp.*, 702 F. Supp. 1317, 1324 (E.D. Mich. 1988) ("if merely applying a definition in the dictionary suffices to create ambiguity, no term would be unambiguous"); *see also* Webster's Third New Int'l Dict. at 17(a) ("The best sense is the one that most aptly fits the context of an actual genuine utterance.")). To establish ambiguity, a party must do more than suggest an alternative interpretation–that interpretation must be reasonable:

> "The touchstone in determining whether ambiguity exists . . . is whether the relevant portion is subject to more than one reasonable interpretation . . . not whether creative possibilities can be suggested. ***Reasonableness is the key.***"

Bruder v. Country Mut. Ins. Co., 156 Ill. 2d 179, 193, 620 N.E.2d 355, 362 (Ill. 1993) (emphasis added); *see also Lapham-Hickey Steel Corp. v. Protection Mut. Ins. Co.*, 166 Ill. 2d 520, 529, 655 N.E.2d 842, 846 (Ill. 1995); *Paul B. Episcope, Ltd. v. Law Offices of Campbell & Di Vincenzo*, 373 Ill. App. 3d 384, 391, 869 N.E.2d 784, 790 (Ill. App. Ct 2007) ("The interpretation of the party contending for ambiguity needs to be equally plausible to the construction of the party arguing the contract is unambiguous.").

FHR's suggested "interpretation" is unreasonable; it is nothing more than a post-contract-signing rewrite. Given the scope of the transaction–concerning a massive, complex facility spanning over 200 acres and containing thousands of different pieces of machinery and equipment (SOF ¶ 6)–as well as the Plant's age and the inherently challenging environment of a chemical plant, it would make little economic sense for the seller to extend (and the buyer to pay

[6] *See also, e.g.*, PSA § 7.1(i) ("Seller is in compliance with ***each*** of the Environmental Permits. . . ."); 11.1 ("Seller is obligated to close . . . subject to the satisfaction . . . of ***each*** of the following conditions").

for) a warranty about the present and future condition of each and every nut, screw, and bolt, which is what FHR's claims require. *See Dispatch Automation, Inc. v. Richards*, 280 F.3d 1116, 1119 (7th Cir. 2002) ("When a contractual interpretation makes no economic sense, that's an admissible and . . . a compelling reason for rejecting it."); *McElroy v. B.F. Goodrich Co.*, 73 F.3d 722, 727 (7th Cir. 1996); *see also Omnitrus Merging Corp. v. Ill. Tool Works, Inc.*, 256 Ill. App. 3d 31, 37, 628 N.E.2d 1165, 1170 (Ill. App. Ct. 1994) ("a court will not place an illogical and ridiculous construction upon the language").

Such an illogical arrangement–which separates the party in control of the facility from the party paying for the repairs–means that the two parties would have to reach agreement not only on whether a purported defect existed at the time of the sale, but on the necessity for and the appropriate means of repairing each and every one of the thousands of components. This would require some process for resolving the inevitable disputes, adding unnecessary post-sale costs and making the deal more expensive for both BP Amoco and (because it would be reflected in a higher purchase price) for FHR. *See Dispatch Automation, Inc.*, 280 F.3d at 1119 ("when the senseless interpretation would require indeterminate litigation to implement it, that is another compelling reason for rejecting it.") (citing *Clark Equip. Co. v. Dial Corp.*, 25 F.3d 1384, 1387 (7th Cir. 1994)).

Furthermore, if as FHR contends the representation applied to each and every component of every piece of machinery, the verification process would be prohibitively expensive, if not impossible: by the time the parties reached the end of the process of examining each and every one of the individual components of each of the assets, those examined earlier in the process may no longer be conforming. Reasonable parties would be unlikely, *ex ante*, to agree to such an unworkable scheme. Thus, even if the contract language suggested such a result, that interpretation must be rejected. *See Beanstalk Group, Inc. v. AM Gen. Corp.*, 283 F.3d 856, 860 (7th Cir. 2002) ("a contract will not be interpreted literally if doing so would produce . . . results that the parties, presumed to be rational persons pursuing rational ends, are very unlikely to have agreed to seek"); *see also Koch Bus. Holdings, LLC v. Amoco Pipeline Holding Co.*, –- F.3d –-, 2009 WL 78019, at *4 (11th Cir. Jan. 14, 2009) (same).

Finally, as BP Amoco pointed out in its opening brief, the testimony of Glenn Personey, who oversaw FHR's due diligence efforts, is inconsistent with FHR's position. (Op. Br. at 4) Although FHR attempts to explain away Mr. Personey's testimony (Resp. at 9), FHR does not

dispute that Mr. Personey admitted under oath that the representation applies to "all Joliet plant assets as a whole." (BP Reply SOF ¶ 16)[7] Moreover, when asked at his deposition whether the representation would have been true "if ten to twenty pieces of equipment at the Joliet plant needed repair or replacement work at the time of the sale," Mr. Personey further confirmed BP Amoco's interpretation of the representation by testifying that: "It depends on the pieces of equipment. So, I can't answer that question without more specifics concerning what they are." (Supp. Tab 88) Of course, if the representation applied to "each and every asset," as FHR contends, then the identity and "specifics" of the particular asset would be irrelevant.

In short, the PSA's reference to "all tangible Assets" means the whole, entire, or total collection of Joliet Plant equipment. FHR's attempt to rewrite the parties' agreement, under the guise of interpretation, to have the representation apply singularly to each specific, individual asset and piece of equipment is improper as a matter of law and must fail. For this reason alone, summary judgment should be entered in favor of BP Amoco and BPCNA and against FHR on its breach-of-contract count relating to the condition-of-asset claims.

2. FHR's claims are barred by unambiguous limitations on the representations in § 7.1(d)(i) and § 7.1(d)(v).

Even if the condition-of-assets representation is re-written to apply to "each and every" asset, FHR's claims are independently barred by at least three express contractual limitations. ***First***, on its face, the structurally-sound warranty in Section 7.1(d)(ii) is limited to "Joliet Plant process units and buildings," which unambiguously bars FHR's claims that relate to neither "process units" nor "buildings." (*See* Op. Br. at 7-8 & n.9) FHR asserts that the phrase "process units or buildings" is undefined and ambiguous, but offers no reasonable interpretation that would bring its claims within that representation. Indeed, under FHR's interpretation, the representation would apply to everything at the Joliet Plant–in effect rewriting the representation to delete the phrase "process units and buildings." It is black-letter law that such a meaning must be rejected, as FHR's own cases hold. *E.g.*, *Medcom Holding Co. v. Baxter Travenol Labs., Inc.*, 984 F.2d 223, 227 (7th Cir. 1993) (court must "construe a contract so that each provision or clause is given full force and effect"). (*See* Resp. at 6)

[7] Although Mr. Personey did give a Rule 30(b)(6) deposition in this case, FHR is correct that the testimony cited above is from his individual deposition.

CONCLUSION

FHR cannot avoid summary judgment and create triable issues by rewriting the parties' contract, relying on irrelevant or otherwise inadmissible and immaterial facts and by misstating the law. BP Amoco is thus is entitled to summary judgment on FHR's condition-of-assets and spending claims.

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Respectfully submitted,

s/ Travis J. Quick
One of the Attorneys for BP Amoco Chemical Company and BP Corporation North America Inc.