

Motion Ex. 11

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

BP AMOCO CHEMICAL COMPANY,)	
)	
Plaintiff/Counter-Defendant,)	
)	Consolidated Case No. 05 C 5661
v.)	
)	Judge Amy J. St. Eve
FLINT HILLS RESOURCES LLC,)	
)	
Defendant/Counter-Plaintiff.)	
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FLINT HILLS RESOURCES LLC,)	
)	
Third-Party Plaintiff,)	
)	
v.)	
)	
BP CORPORATION NORTH AMERICA INC.,)	
)	
Defendant.)	
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**BP AMOCO CHEMICAL COMPANY’S
SUBMISSION RELATING TO JURY INSTRUCTIONS**

During the course of the trial, the Court has made various rulings on objections to the parties’ proposed jury instructions. Those rulings were then incorporated into revised sets of instructions, which were jointly submitted by the parties to the Court. As previously noted on the record, in submitting those revised instructions, BP Amoco was not waiving any of the objections it had made to any instructions or portions of instructions given by the Court over BP Amoco’s objections. (9/28/09 Tr. at 2862:17-2864:10) When BP Amoco raised this issue during one of the jury instruction conferences, the Court noted that the parties were free to reaffirm their objections at an appropriate time before or when the instructions are given. (*Id.* at 2863:20-25) Accordingly, out of an abundance of caution, BP Amoco files this submission to reaffirm its objections.

Except for those proposed instructions and objections that BP Amoco agreed to withdraw, BP Amoco continues to assert, and expressly preserves and reaffirms, all of its

proposed jury instructions that the Court declined to give and the objections which have been overruled by the Court, including those in the following pleadings:

- Dkt. 696, Exhibit 7, 7/22/09 (Flint Hills' proposed jury instructions and BP Amoco's objections);
- Dkt. 696, Exhibit 8, 7/22/09 (BP Amoco's proposed jury instructions and Flint Hills' objections);
- Dkt. 708, 7/27/09 (Flint Hills' proposed jury instructions, BP Amoco's objections, and Flint Hills' replies);
- Dkt. 726, 7/30/09 (BP Amoco's proposed jury instructions, Flint Hills' objections, and BP Amoco's replies);
- Dkt. 765, 9/1/09 (Joint proposed damages instructions);
- Dkt. 788, 9/5/09 (Joint revised liability instructions);
- Dkt. 789, 9/5/09 (Joint proposed preliminary instructions);
- Dkt. 790, 9/7/09 (Flint Hills' and BP Amoco's alternative instructions relating to contract interpretation); and
- Dkt. 831, 10/7/09 (Joint jury instructions).

BP Amoco specifically asserts, preserves, and reaffirms its objections and proposed instructions regarding the proper statement of the elements for a fraud claim (Dkt. 696, Exhibit 7 at 50-51; Dkt. 696, Exhibit 8 at 76-77; Dkt. 708 at 88-89; Dkt. 726 at 111-12, 114-15; Dkt. 788, at 12-13; Dkt. 789 at 7; Dkt. 831 at 25), as well as its objections and proposed instructions regarding what Flint Hills must prove and may potentially recover in terms of cost-of-repair and diminution-in-value damages (Dkt. 696, Exhibit 7 at 30-32, 34-36, 38-39, 41-43, 54-55; Dkt. 696, Exhibit 8 at 101-02; Dkt. 708 at 53-55, 62-64, 67-68, 72-74, 94-95; Dkt. 726 at 150-51, 154-56; Dkt. 765 at 6, 8, 11, 18-19; Dkt. 831 at 31-32).

In particular, BP Amoco states that it continues to object to the second element of the instruction setting forth the elements of fraud, relating to the knowledge element of a fraud claim. *First*, BP Amoco does not believe that the production capacity representation in the PSA is ambiguous. (*E.g.*, Dkt. 222 at 11-12; Dkt. 292 at 17) Therefore, BP Amoco does not believe that Restatement (Second) of Torts § 527 applies in this case, either factually or legally. *Second*,

¹ All page citations to the jury instruction filings are to the page numbers assigned by the Court's electronic filing system.

in its ruling on BP Amoco's motion for summary judgment on Flint Hills' production capacity claim, the Court held that the production capacity representation is ambiguous. (Dkt. 319 at 26-27) BP Amoco has previously argued that if the production capacity representation is ambiguous then it cannot serve as a basis for fraud under Illinois law. (Dkt. 292 at 16-17; 8/27/09 Tr. at 135:13-136:11, 137:14-138:13) Thus, even if the production capacity representation is deemed to be ambiguous, Section 527 of the Restatement should not apply. *Third*, if Restatement (Second) of Torts § 527 does apply, then BP Amoco believes that Flint Hills should be required at trial to establish each of the elements of Restatement Section 527. That is why BP Amoco's proposed instruction included, on the knowledge element, the language from Section 527 instead of the traditional Illinois Pattern Jury Instructions language on the knowledge element. *See* Ill. Pattern Jury Instr. – Civil § 800.01 (2008 ed.). BP Amoco contends that if an instruction based on the Restatement is given, then only the language from the Restatement should be used. The instruction should not include the alternative language regarding the knowledge element that Flint Hills proposed and that the Court included over BP Amoco's objection in the final jury instruction. (*See also* 8/27/09 Tr. at 135:13-138:13)

Finally, except for those proposed instructions and objections that BP Amoco agreed to withdraw, BP Amoco also continues to assert, and expressly preserves and reaffirms, the proposed jury instructions, jury instruction objections, and arguments it offered at the jury instruction conferences on August 27, 2009, September 28, 2009, October 19, 2009, and October 27, 2009.

Dated: November 3, 2009

Respectfully submitted,

By: _____ /s/ R. Chris Heck
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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 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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