Motion Ex. 12

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 James B. Moran
FHR RESOURCES LLC, **Third-Party Plaintiff,** **v.** **BP CORPORATION NORTH AMERICA INC.,** **Defendant.**	

PARTIAL SUMMARY JUDGMENT: DAMAGES

BP AMOCO CHEMICAL COMPANY AND BP CORPORATION NORTH AMERICA INC.'S MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT ON FLINT HILLS RESOURCES, LLC'S ALLEGED "DAMAGES" CLAIMS

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INTRODUCTION

In May 2004, Flint Hills Resources, LLC ("FHR") purchased from BP Amoco Chemical Company ("BP Amoco") its Performance Chemicals Business Unit and related assets, including a chemical plant in Joliet, Illinois. The parties agreed that no more than $137 million of the purchase price was allocable to the property, plant and equipment comprising the Joliet Plant. FHR now brings 59 separate claims against BP Amoco relating to the Joliet Plant, seeking compensatory damages for alleged plant deficiencies of $180 million, plus punitive damages. The gross disproportionality between what FHR paid for the plant ($137 million) and the damages that it now seeks ($180 million) demonstrates the central problem with FHR's claims. FHR does not seek damages to make BP Amoco comply with the parties' agreement (which BP Amoco has not breached in any event), but rather to force BP Amoco to pay for a new, upgraded, and expanded plant instead of the 50-year-old facility FHR purchased.

BP Amoco previously has filed two partial summary judgment motions demonstrating that the undisputed facts confirm that FHR cannot establish liability on various claims. This motion, in contrast, focuses on FHR's alleged damages, and explains why summary judgment should be granted against FHR's "damages" claims:

First, the parties' Asset Purchase and Sale Agreement ("PSA") prohibits FHR from recovering damages based on diminished value or lost profits. FHR, however, seeks to recover for purported diminution in the value of the Joliet Plant based on projected profits FHR allegedly has lost. FHR's damages claims are thus barred under the PSA.

Second, under Illinois law, damages for fixtures to real property generally are the *lesser* of repair/replacement costs or diminution in fair market value. If a plaintiff fails to provide competent evidence of both measures, then it cannot demonstrate the propriety of its preferred measure of damages. FHR has failed to provide any evidence of the diminution in value for specific equipment at issue in its claims. Instead, FHR has submitted only aggregated estimates of diminution that depend on flawed assumptions. Moreover, the repair/replacement costs FHR now seeks are often far greater than the entire amount that FHR paid for the equipment.

Third, FHR's alleged damages would put FHR in a better position than provided for by the language of the PSA. FHR knew full well that it was buying a half-century-old chemical plant that would require ongoing maintenance and capital expenditures. Thus, the proper measure of repair – if there were a breach – is what would be necessary to return the equipment

to the as-warranted, used state with normal wear and tear. But instead, FHR seeks to replace older, working equipment with completely new equipment, often with upgraded capabilities.

Fourth, FHR has inflated its alleged damages by using speculative estimates for many of the repairs it claims are needed to restore the equipment to the as-warranted condition. These estimates suffer from a variety of basic defects. In fact, in many cases, FHR has not even decided what repairs it intends to perform, making its claimed damages wholly unreliable.

Fifth, for many claims FHR has failed to prove that any alleged breach *proximately caused* the claimed damages. Instead, these alleged damages are nothing more than routine and ongoing maintenance and capital costs associated with running a complex and aging chemical plant, or they are for problems that FHR itself caused.

Last, FHR's request for punitive damages is barred by the plain language of the PSA. Moreover, FHR cannot satisfy the stringent requirements for being awarded punitive damages in this case, which is, at bottom, a commercial dispute between two sophisticated corporations.

BACKGROUND

The undisputed facts supporting this motion are set forth in BP Amoco's Local Rule 56.1 Statement ("SOF") and its Motion for Partial Summary Judgment. In overview, FHR alleges three alternative damages theories. *First*, FHR demands repair or replacement costs for 59 separate claims seeking approximately $180 million in damages. (Tab[1] 5, 6/9/08 Claim Chart) *Second*, for its production capacity claim alone, FHR seeks $44 or $62 million as the alleged difference between the purchase price of the Joliet Plant and its purported value to FHR under FHR's interpretation of the capacity representation, according to the opinion of its putative expert Jeffrey Baliban. (Tab 6, Baliban Report) *Third*, FHR relies on the opinion of another putative expert, Sharon Bettius, in seeking an alleged $100 million difference between the purchase price and the appraised value of the business allegedly as conveyed -- assuming the PSA's representations and warranties are construed in the manner that FHR urges and that BP Amoco is found liable for each and every one of FHR's 59 claims. (Tab 7, Bettius Report) Each of FHR's three damages theories is legally unsound.

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[1] "Tab" references are to the exhibits in the Appendix of Exhibits which includes records and other materials submitted in support of this motion.

ARGUMENT

FHR's legal theories of fraud and breach of contract both require proof of damages *and* that the defendant's breach or misrepresentation caused those damages. *E.g., Ass'n Benefit Servs., Inc. v. Caremark Rx, Inc.*, 493 F.3d 841, 849, 852 (7th Cir. 2007); *Ollivier v. Alden*, 634 N.E.2d 418, 422 (Ill. App. Ct. 1994); *Valenti v. Mitsubishi Motor Sales of Am., Inc.*, 773 N.E.2d 1199, 1203 (Ill. App. Ct. 2002). Thus, where a plaintiff fails to introduce competent evidence of its losses according to the proper measure of damages, judgment must be entered for the defendant. *E.g., TAS Distrib. Co. v. Cummings Engine Co.*, 491 F.3d 625, 635-37 (7th Cir. 2007); *Harbor House Condo. Ass'n v. Mass. Bay Ins. Co.*, 915 F.2d 316, 320 (7th Cir. 1990). For the reasons which follow, FHR cannot satisfy the legal standards with respect to its claimed damages.

I. THE PSA PROHIBITS FHR FROM RECOVERING THE DAMAGES CALCULATED BY EITHER BETTIUS OR BALIBAN.

In the PSA, the parties expressly agreed that: "**SELLER AND THE OTHER MEMBERS OF THE BP GROUP MAKE NO, AND EXPRESSLY DISCLAIM ANY IMPLIED WARRANTIES, INCLUDING … *ANY REPRESENTATION OR WARRANTY AS TO VALUE*.**" (PSA § 7.3, SOF ¶ 8 (italics added)) The PSA further provides that **"SELLER WILL NOT BE LIABLE TO BUYER FOR ANY LOSS OF PROFIT, LOSS OF USE, SPECIAL, INDIRECT, INCIDENTAL, OR CONSEQUENTIAL DAMAGES SUFFERED BY BUYER, HOWSOEVER ARISING UNDER THIS AGREEMENT… ."** (PSA § 13.6, SOF ¶ 9 (bold added))

FHR's claimed damages violate both provisions. FHR's proposed expert Baliban describes his assignment as determining "the difference, if any, *in value* of the Joliet plant" associated with alleged overstatements of production capacity and concludes that "the value of the plant was at least $44 million to $62 million lower." (Tab 6, Baliban Report at 1-2) Similarly, Bettius states that her assignment was "to determine my opinion of the fair market value of the enterprise" and states her conclusion as a difference in the "Fair Market Value of PCBU." (Tab 7, Bettius Report at 1, 3) Such alleged damages are barred by the plain language of the PSA, which expressly provides that BP Amoco did not make any representation as to value.

Similarly, both proposed experts rely on discounting projected future cash flows, which courts have held are economically equivalent to claims for lost profits. *E.g., Knauf Fiber Glass*

v. Stein, 615 N.E.2d 115, 128 (Ind. Ct. App. 1993) ("the value of a business includes future earnings and thus a plaintiff cannot receive both the fair market value of its business plus damages for loss of future profit" and reversing a jury instruction that could have been interpreted so that "lost profits may be awarded along with the company's diminished value"), *affirmed in relevant part, reversed on other grounds by* 622 N.E.2d 163 (Ind. 1993).[2] Indeed, Baliban's analysis relies on expected future cash flows that include "projected income from the operations of an investment for a discrete period of time," and "projected proceeds from the sale of the investment at some reversionary (or terminal) period," both of which are types of net profits. (Tab 6, Baliban Report at 16) Baliban also relies on models that forecast expected future cash flows -- that is, net profits -- and then discounts them to present value. (*Id.* at 17-18) FHR's other damages expert, Sharon Bettius, likewise relies on a discounted cash flow method. (Tab 7, Bettius Report at 21) The parties agreed in the PSA that BP Amoco would not be liable for "any loss of profit," which includes projected or future lost profits. (SOF ¶ 9) Thus, FHR's attempts to obtain damages based on either Bettius or Baliban's opinion violates the PSA's prohibition on the recovery of lost profits and consequential damages.

In sum, the damages calculated by FHR's experts Baliban and Bettius are, under the law, damages for lost profits. Yet, the PSA -- the parties' contract -- expressly bars such lost profits claims.

II. FHR CANNOT RECOVER REPAIR OR REPLACEMENT COSTS BECAUSE IT HAS FAILED TO PROVIDE THE LEGALLY REQUIRED EVIDENCE OF DIMINUTION IN FAIR MARKET VALUE.

Under Illinois law, the proper measure of damages for breach of a warranty relating to fixtures on real property used for commercial purposes is generally ***the lesser of***: (1) the

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[2] *See also Protectors Ins. Service, Inc. v. U.S. Fidelity & Guar. Co.*, 132 F.3d 612, 617 (10th Cir. 1998) (holding that award of both decrease in going concern value and lost profits damages "was an improper double recovery" since both standards measure the same thing); *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 508 (4th Cir. 1986) ("Nevertheless, the two methods of calculation -- present value of all future earnings or market value of the business -- are simply alternative methods of measuring the extent of the same injury. That is why courts allow a plaintiff to recover either the present value of lost future earnings or the market value of the lost business, but not both."); *Albrecht v. Herald Co.*, 452 F.2d 124, 131 (8th Cir. 1971) (holding that awarding both going concern and lost profits "is duplicitous" because the "prospect of future earnings is considered in arriving at the fair market value of a given business").

diminution from the fair market value ("FMV") of the equipment as warranted to the FMV of the equipment or property as sold; or (2) the costs of restoring the property or equipment to its warranted condition. *See, e.g., Gvillo v. Stutz*, 715 N.E.2d 285, 288-89 (Ill. App. Ct. 1999); *Witty v. C. Casey Homes, Inc.*, 430 N.E.2d 191, 194 (Ill. App. Ct. 1981); *First Nat'l Bank of Elgin v. Dusold*, 536 N.E.2d 100, 102-03 (Ill. App. Ct. 1989). Thus, a repair-cost measure of damages cannot be used where it exceeds or is disproportionate to the diminution measure of damages. *See, e.g., Meade v. Kubinski*, 661 N.E.2d 1178, 1184 (Ill. App. Ct. 1996) ("Where the expense of restoration exceeds the diminution in the market value of the property caused by the … nonperformance, the diminution in fair market value is the proper measure of damages. The purpose of this rule is to prevent windfall recoveries.") (internal quotation marks and citations omitted); *Witty*, 430 N.E.2d at 196 (same). Indeed, "this concept of impracticability of repair would explain why a court would not compel a defendant to rebuild a barn with a market value of $50 at a replacement cost of $500." *Meade*, 661 N.E.2d at 1184.

Where a plaintiff seeking damages for fixtures fails to produce evidence of diminution in FMV in addition to evidence of reasonable repair or replacement costs, the claim fails as a matter of law. *E.g., Dusold*, 536 N.E.2d at 102-04 ("lack of testimony concerning the condition and fair market value of the property at the time of delivery is fatal to any action to recover for its loss"); *Witty*, 430 N.E.2d at 194-96. Moreover, if the evidence of repair costs consists of general invoices that do not allocate costs among repairs to warranted equipment and repairs to unwarranted equipment, the factfinder is not in a position to allocate such repair costs and cannot award any portion of them as damages. *See, e.g., Dusold*, 536 N.E.2d at 104 ("We find that ceilings, walls, and wallpaper cannot in any sense be considered equipment as the term is used in the warranty. … Since the bill does not itemize what cost was incurred for what work, there is no way to tell what amount was incurred for work that was done because there had been a breach of warranty.").

A. FHR Has Not Produced The Legally Required Evidence Of The Diminution In Fair Market Value For Its Claims.

As explained above, FHR cannot recover the damages set forth in either Bettius or Baliban's opinions because they are barred by the PSA. Nor can either expert's opinion be used as evidence of diminution in FMV to support FHR's claimed repair/replacement damages. In addition, both opinions are premised on a number of other fatal flaws that preclude them from constituting evidence of any diminution in FMV.

First, Bettius's opinion ignores what FHR actually paid for the Joliet Plant. Bettius relies on a $300 million purchase price for the entire PCBU (Tab 7, Bettius Report at 1), but that total amount includes other amounts in addition to the plant -- such as working capital valued by the parties at approximately $75 million, a non-compete agreement valued at $20 million, and an ancillary agreement valued at $60 million that allows FHR to use additional PIA production capacity at a facility in Europe -- in addition to the $137 million amount paid for the Joliet Plant itself (SOF ¶ 10-11) In the PSA, the parties agreed to allocate the total purchase price and that they would "be bound by such agreed Purchase Price allocation *for all purposes*, and neither party shall take *any contrary position* regarding such allocation in any Tax Return, *or otherwise*." (PSA § 5.6, SOF ¶ 10 (emphasis added))

The final purchase price allocation agreed to by FHR and BP Amoco allocated $137 million for all of the property, plant and equipment at the Joliet Plant. (SOF ¶ 11) "Absent an independent appraisal of the individual assets at the time the agreement was entered into, the best evidence of their market value is an allocation of the purchase price which is agreed to by the purchaser and seller." *Covey v. Davlin*, 2001 WL 34076375, at *14 (Bankr. C.D. Ill. Sept. 10, 2001). Accordingly, the proper way to compute claimed FMV diminution damages here would be to compare (i) the $137 million paid for the Joliet Plant in the condition that FHR believes it was warranted to be, to (ii) the FMV of the Joliet Plant in the condition that FHR asserts it was actually in at the time of closing. But FHR's appraiser, Bettius, has not done this. As a result, her damages opinions are legally deficient and unreliable. *See, e.g.*, *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 794, 806-10 (N.D. Ill. 2005) (excluding appraiser's computation of damages where appraiser simply assumed facts provided by party and performed no expert analysis of the same).

Second, Bettius is not comparing the appraised FMV of the PCBU in the claimed "as-warranted" condition to its FMV in the claimed "as-sold" condition. Indeed, she has ***no*** opinions as to the FMV of the business in the condition that FHR contends was warranted. Instead, she purports to calculate the value for the current condition of the PCBU according to FHR's assumptions and simply compares that value to the purchase price of the entire PCBU. (Tab 7, Bettius Report at 3) This apples-to-oranges comparison is not legally competent evidence of FMV diminution damages. *See, e.g.*, *Dusold*, 536 N.E.2d at 103; *Loeffel Steel*, 387 F. Supp. 2d at 800-06.

Third, FHR brings 59 separate claims, and the diminution in FMV should be calculated for each of those 59 claims, individually, just as FHR has purported to estimate repair and replacement costs for each of the 59 claims. *See, e.g.*, *Dusold*, 536 N.E.2d at 104 (reversing award of damages for repair costs where invoice did not allocate costs between costs of repairing warranted equipment and costs of repairing unwarranted fixtures and features). However, Bettius's alleged $100 million diminution in FMV is simply one lump sum; it is ***not*** apportioned among FHR's 59 claims. (Tab 7, Bettius Report at 3, 31-33) Nor does she identify any method of allocating the damages that she has calculated if FHR does not prevail on each of its 59 claims. *See, e.g.*, *Dusold*, 536 N.E.2d at 103 (reversing award of replacement cost damages where plaintiffs introduced no competent evidence of the FMV of the equipment in the as-warranted condition); *Loeffel Steel*, 387 F. Supp. 2d at 800-06 (excluding appraiser's opinions where appraiser failed to utilize proper definition of economic losses).

The opinion of FHR's other putative damages expert, Jeffrey Baliban, is similarly flawed. To begin with, Baliban has not done any calculation of FMV, which measures what a hypothetical buyer would pay a hypothetical seller in the marketplace. *E.g., Chrysler Corp. v. State Prop. Tax Appeal Bd.*, 387 N.E.2d 351, 355 (Ill. App. Ct. 1979) ("Fair cash value is normally associated with fair market value: what property would bring at a voluntary sale where the owner is ready, willing and able to sell but not compelled to do so and the buyer is likewise ready, willing and able to buy, but not forced to do so. This is theoretically an objective standard of valuation; the value of the particular property is set by the forces of the marketplace at a given place and time."). Instead, Baliban calculates an investment value based on FHR's own financial model and includes opportunities available only to FHR and not to other buyers in the marketplace, thereby improperly calculating (and inflating) the alleged damages (*e.g.* Tab 6, Baliban Report at 22-23, 25-26, 29-31). *See, e.g.*, *Perez v. Z Frank Oldsmobile, Inc.*, 223 F.3d 617, 620 (7th Cir. 2000) (noting purchaser's damages for fraud claim should not include purchaser's financing costs but only the difference between FMV as represented and FMV as conveyed); *Chrysler Corp.*, 387 N.E.2d at 355 ("[Fair market value] is theoretically an objective standard of valuation; the value of the particular property is set by the forces of the marketplace at a given place and time."); *cf. Bodine Sewer, Inc. v. Eastern Ill. Precast, Inc.*, 493 N.E.2d 705, 713 (Ill. App. Ct. 1986) ("[T]he buyer's subjective belief as to the reduced value of goods tendered is of no significance" in determining adequacy of efforts to cure breach by tender of

equally valuable replacement). Moreover, Baliban's opinion is limited to alleged capacity damages; he does not purport to provide an opinion for any of FHR's others claims.

In sum, because FHR has no legally competent evidence of diminution in FMV for each of its claims, FHR cannot satisfy the legal standard for proving its damages. Nor can it establish that its alleged repair or replacement damages for each of its claims are not disproportionate to the alleged diminution in FMV for each claim.

B. The Repair And Replacement Costs FHR Seeks Are Grossly Disproportionate To The Values Agreed To By The Parties Or Allocated By FHR.

At the time of the sale, in 2004, the parties contractually agreed that approximately $137 million was the amount paid by FHR for all of the property, plant and equipment at the Joliet Plant. (SOF ¶ 11) Thus, FHR's claimed repair and replacement costs of almost $180 million substantially exceed the amount FHR paid for the plant. (*Compare* Tab 5, 6/9/08 Claim Chart *to* SOF ¶ 11) This fact alone demonstrates that FHR's claimed repair and replacement damages are disproportionate, unreasonable, and cannot be recovered as a matter of law. *See, e.g.*, *Park v. Sohn*, 433 N.E.2d 651, 657 (Ill. 1982) (if repair costs are disproportionate to diminution in FMV occasioned by breach of warranty, then latter is proper measure of damages); *Witty*, 430 N.E.2d at 196 (similar, reversing and directing verdict be entered for defendant where plaintiff failed to introduce competent evidence of diminution in FMV and claimed repair costs, approaching entire amount paid for work, were plainly disproportionate to diminution in FMV).[3]

Many of the individual components of FHR's alleged repair and replacement damages likewise are far above the purchase price allocation values agreed to by BP Amoco and FHR. For example, FHR claims that BP Amoco overstated TMA capacity by 8.5%. (*Compare* Baliban Report at 2 n.3 *to* SOF ¶ 7) FHR's allocation of the purchase price reflects that it paid $30,693,331 for the entire TMA unit. (SOF ¶ 12) But now, FHR seeks a total of $52,797,452 in

[3] *See also Valenti*, 773 N.E.2d at 1203 (affirming award of summary judgment where plaintiff had come forward with no competent evidence of diminution in FMV to support damages claimed for breach of warranty); *D.P. Brian & Son v. H.A. Bom Packers' Supply Co.*, 1917 WL 1840, at *4 (Ill. App. Ct. 1917) (reversing judgment for plaintiff where plaintiff failed to introduce evidence of diminution in value attributable to breach of warranty as to capacity of refrigeration plant); *Dusold*, 536 N.E.2d at 102-03 (reversing award of replacement costs to plaintiff where plaintiff failed to introduce competent evidence that replacement costs were satisfactory measure of diminution in FMV occasioned by breach of warranty as to operating condition of equipment).

damages for redressing alleged TMA capacity constraints -- or 172% percent of the amount that FHR paid for the TMA unit to remedy an alleged 8.5% shortfall in the unit's capacity. (Tab 5, 6/9/08 Claim Chart at 4) Similarly, FHR paid $3,336,232 for the entire "Electrical Distribution System" at the plant (SOF ¶ 12), but now seeks $30 million in damages relating to the electrical system (Tab 5, 6/9/08 Claim Chart at 9-10) -- or *nine times* the allocated amount it paid for the electrical system. Likewise, FHR paid $3,336,232 for the "Waste Water Storage Tank[s]" (SOF ¶ 12), but seeks $9,132,334.02 for repairs to those same tanks, which is nearly *three times* the allocated amount FHR paid for these tanks. (Tab 5, 6/9/08 Claim Chart at 9)

Appendix A lists additional items for which the repair or replacement damages FHR seeks is disproportionate to the item's value and thus cannot be recovered as a matter of law.

III. FHR'S DAMAGES WOULD PUT IT IN A FAR BETTER POSITION THAN IF THE CONTRACT HAD NOT ALLEGEDLY BEEN BREACHED.

Under Illinois law, compensatory damages are not intended to put the non-breaching party in a better position than it would have been in had the contract not been breached. *Platinum Tech., Inc. v. Fed. Ins. Co.*, 282 F. 3d 927, 932 (7th Cir. 2002); *Kohlmeier v. Shelter Ins. Co.*, 525 N.E. 2d 94, 102-03 (Ill. App. Ct. 1988); *Hentze v. Unverfehrt*, 604 N.E.2d 536, 541 (Ill. App. Ct. 1992). Contrary to this settled law, however, FHR seeks to require BP Amoco to pay for upgraded equipment at the Joliet Plant, violating the prohibition on betterment. Moreover, for many of its claims, FHR seeks to replace equipment in the 50-year-old plant with brand new equipment, which Illinois courts have long recognized is an impermissible betterment. *See, e.g., Dusold*, 536 N.E.2d at 103 ("As these appliances had already had years of service, their value, even if working as warranted, would have been substantially less than new appliances. To award plaintiffs the cost of new items as replacement cost is to award plaintiffs a windfall and make them more than whole."); *Lanterman v. Edwards*, 689 N.E.2d 1221, 1224 (Ill. App. Ct. 1998) ("[t]o award plaintiffs the cost of a new unit as replacement cost" when all that was warranted was the operating condition of a used unit, "is to award plaintiffs a windfall and make them more than whole"); *Madigan Bros. Inc. v. Melrose Shopping Ctr. Co.*, 556 N.E.2d 730, 735-36 (Ill. App. Ct. 1990) (affirming trial court's refusal to award replacement costs for destroyed carpet where plaintiff introduced no evidence of FMV of used carpet before its destruction).

FHR's claims violate these legal principles by demanding that BP Amoco pay for upgraded equipment or replace older equipment with new. For example, FHR seeks

approximately $21.8 million for a brand new anaerobic reactor with upgraded capabilities in the wastewater treatment plant. (Tab 5, 6/9/08 Master Claim Chart at 4; SOF ¶ 19) Similarly, FHR seeks approximately $17.2 million to add a fourth reactor to the TMA production unit in order to increase production by up to 20 kmt/year, resulting in the TMA production unit's capacity being significantly greater than the allegedly warranted capacity even under FHR's erroneous interpretation of the capacity representation. (Tab 5, 6/9/08 Claim Chart at 4; SOF ¶¶ 22-23) FHR also seeks $29 million to replace the plant's electrical system -- which FHR knew before the sale was a decades old single radial feed system -- with a new and improved dual radial feed system and a new substation. (Tab 5, 6/9/08 Claim Chart at 9-10; SOF ¶¶ 33-35) FHR also demands over $3 million for building a new water well (well #5) designed to have 1000 gallon per minutes ("gpm") of pumping capacity, which is significantly greater than the 500 gpm that FHR alleges it has lost because of the condition of well #4. (Tab 5, 6/9/08 Claim Chart at 3; SOF ¶ 18)

Appendix B lists claims where FHR seeks damages that would constitute betterment. Summary judgment should be granted against each of these claims.

IV. FHR'S DAMAGES ARE BASED ON SPECULATIVE GUESSES, OUTDATED ESTIMATES, OR OTHERWISE ARE NOT REASONABLY CERTAIN.

To be recoverable, damages must be established to a reasonable certainty. *TAS Distributing Co., Inc. v. Cummins Engine Co.*, 491 F.3d 625, 635 (7th Cir. 2007); *Roboserve, Inc. v. Kato Kagaku Co.*, 78 F.3d 266, 274 (7th Cir. 1996); *Kirkpatrick v. Strosberg*, 894 N.E.2d 781, 792-93 (Ill. App. Ct. Aug. 8, 2008). Alleged damages for FHR's claims fall short of this standard. Thus, for many claims, FHR's supposed damages are based on unsupported speculation of future costs. For some claims, FHR arbitrarily picks the highest point of a range of estimated costs. *See, e.g.*, *Lanterman*, 689 N.E.2d at 1224 (reversing determination of damages where only evidence of repair costs was conclusory opinion from expert of range of potential repair costs). Other claims are based on years old guesses of the costs to upgrade the equipment at issue. And for some, FHR has not even decided what repairs or replacements it intends to perform. *See, e.g.*, *Haudrich v. Howmedica, Inc.*, 662 N.E.2d 1248, 1256 (Ill. 1996) (explaining that "[r]emote, contingent, or speculative damages do not fall within this general rule" of recoverable damages); *Illinois Housing Dev. Auth. v. Sjostrom & Sons, Inc.*, 433 N.E.2d 1350, 1359-60 (Ill. App. Ct. 1982) (refusing to compensate for possible future injury or damages that were not reasonably certain to occur); *see also EBWS, LLC v. Britly Corp.*, 928 A.2d 497,

526-27 (Vt. 2007) (reversing an award for consequential damages as "not reasonably certain" where method of repair to real property was not yet determined).

For example, FHR's repair/replacement damages include approximately $21.8 million for installing a new anaerobic reactor at the wastewater treatment plant, but FHR has acknowledged that it may never incur any or all of these estimated future costs because it may adopt a different option depending on the outcome of this lawsuit. (Tab 5, 6/9/08 Claim Chart at 4; SOF ¶ 19) Similarly, FHR seeks $27 million to replace the decades-old MAN Thermox, but even after over four years of ownership, FHR still has not made any final decisions concerning the replacement of the MAN Thermox, including when it will be replaced, which replacement option will be selected, or how much it will cost. (Tab 5, 6/9/08 Claim Chart at 12; SOF ¶ 43) Indeed, FHR admits that its alleged damages for the MAN Thermox have a margin of error of plus or minus *forty percent*. (SOF ¶ 43) FHR also seeks $3 million for future repairs to underground piping, but admits that it has not unearthed most of these expenditures and does not have a schedule for when this supposed work will be complete. (Tab 5, 6/9/08 Master Claim Chart at 3; SOF ¶¶ 13-14)

Appendix C lists claims where FHR seeks damages that are not reasonably certain. Summary judgment should be granted against each of these claims.

V. FHR HAS FAILED TO SHOW THAT DAMAGES FOR VARIOUS CLAIMS WERE PROXIMATELY CAUSED BY ANY ALLEGED BREACH OR FRAUD.

In addition to having competent proof of damages, a plaintiff must also prove that those damages were proximately caused by the defendant's unlawful acts. *E.g.*, *Classic Bowl, Inc. v. AMF Pinspotters, Inc.*, 403 F.2d 463, 467 (7th Cir. 1968); *Tages v. Univision Television Group*, 2005 WL 2736997, at *2 (N.D. Ill. Oct. 20, 2005); *Serfecz v. Jewel Food Stores, Inc.*, 1997 WL 158332, at *5 (N.D. Ill. Mar. 31, 1997). Proximate causation requires that a party show, among other things, that but for the breach, the damages would not have occurred. *See Vaccuum Indus. Pollution, Inc. v. Union Oil Co. of California*, 764 F. Supp. 507, 512 (N.D. Ill. 1991) ("[t]o recover in contract, as in tort, a plaintiff must show that his damages were proximately caused by the defendant's wrongful conduct" and noting "far-flung injuries" alleged by plaintiff "are precisely the kind of remote damages not recoverable…"). Many of FHR's alleged "damages" are normal maintenance and operating expenditures that are necessary to run a 50-year-old chemical plant. They have no link — proximate or otherwise — to BP Amoco's alleged breach of the representations and warranties.

Examples of claims where FHR seeks to recover "damages" that were not proximately caused by any breach include Claim 72, where FHR seeks to require BP Amoco to pay to replace the MAN Thermox that was installed in 1976 -- 32 years ago. (Tab 5, 6/9/08 Claim Chart at 12; SOF ¶ 42) In 2003, before purchasing the Joliet Plant, FHR learned through its due diligence that the Thermox was expected to be replaced as early as 2008, yet FHR now seeks to recover nearly $27 million in damages from BP Amoco for a new Thermox. (Tab 5, 6/9/08 Claim Chart at 12; SOF ¶¶ 42-43) As part of Claim 21, FHR seeks approximately $6.5 million for new catalyst for the reactors in the MAN production unit. (Tab 5, 6/9/08 Claim Chart at 4) FHR's own records, however, show that this catalyst has a useful life of between four and eight years, and FHR installed half of the new catalyst more than four years after purchasing the plant. (SOF ¶ 24) Similarly, Claim 71 seeks over $3.2 million in repairs for channel heads and shells for TMA exchangers, but the heads of these exchangers have a four-to-five-year life cycle, and all of the exchangers lasted at or beyond their life expectancy. (Tab 5, 6/9/08 Claim Chart at 12; SOF ¶ 41)

Appendix D lists claims where FHR seeks damages that were not proximately caused by an alleged contractual breach or fraud, and against which summary judgment should be granted.

VI. FHR CANNOT RECOVER PUNITIVE OR EXEMPLARY DAMAGES.

FHR's claim for punitive damages should be rejected for the following two reasons:

A. The PSA Bars Punitive And Exemplary Damages For Any Claims.

Agreements to waive punitive damages are enforceable under Illinois law. *See, e.g.*, *Rayner Covering Sys., Inc. v. Danvers Farmers Elevator Co.*, 589 N.E.2d 1034, 1037 (Ill. App. Ct. 1992); *Stepan Co. v. Winter Panel Corp.*, 1996 WL 392134, at *4 (N.D. Ill. July 10, 1996). Here, Section 13.6 of the PSA states that "[e]ach party agrees that it will not seek and hereby expressly waives any and all rights to or for punitive or exemplary damages as to any direct claim arising in connection with this Agreement." (SOF ¶ 9) This sentence is unqualified and unequivocal. FHR promised to waive "any and all rights to or for punitive or exemplary damages," and it cannot be allowed to renege on this agreement while simultaneously seeking to hold BP Amoco to other portions of the same agreement.

B. FHR Has No Evidence That Would Satisfy The High Threshold Necessary To Award Punitive Damages.

Even if FHR could overcome the PSA proscription foreclosing recovery of punitive or exemplary damages, FHR's claims for unspecified punitive and/or exemplary damages would

fail as a matter of law on other grounds. In overview, "Illinois courts [] take rather a dim view of punitive damages, and insist that the plaintiff seeking them demonstrate not only simple fraud but gross fraud, breach of trust, or other extraordinary or exceptional circumstances clearly showing malice and willfulness." *AMPAT/Midwest, Inc. v. Illinois Tool Works Inc.*, 896 F.2d 1035, 1043 (7th Cir. 1990); *Roboserve, Inc.*, 78 F.3d at 275-76 (7th Cir. 1996); *Europlast, Ltd. v. Oak Switch Sys., Inc.*, 10 F.3d 1266, 1276 (7th Cir. 1993). "[W]ithout evidence of gross fraud or some exceptional circumstance clearly indicating malice or willfulness -- if the evidence demonstrates only a garden variety fraud -- under Illinois law the question of punitive damages is not even submitted to the jury." *Roboserve*, 78 F.3d at 276. In fraud cases between two corporations over a business relationship, this malice standard requires a plaintiff to "at least put forth some evidence of intent to injure." *Id.* ("To hold otherwise in this context would impermissibly obscure the distinction between fraud and gross fraud, between conduct meriting (ordinary) compensatory damages and conduct meriting (extraordinary) punitive damages").

At bottom, this is nothing more than a simple breach of contract case that FHR seeks to transform into a fraud action. Thus, FHR has ***no*** evidence of deceit, much less evidence of exceptional circumstances of malice or willfulness needed for punitive damages. BP Amoco and FHR agreed to certain representations in the PSA, which the undisputed evidence confirms were well supported. Beyond the lack of evidence of any deceit, there is no evidence that BP Amoco intended to financially injure FHR as required under *Roboserve*, 78 F.3d at 276.

Significantly, FHR's suit presents a far worse candidate for punitive damages than *Roboserve*, 78 F.3d at 277, where the Seventh Circuit affirmed a finding of fraud while reversing a jury award of punitive damages. In *Roboserve*, the plaintiff presented evidence that the defendant had deliberately lied by representing that plaintiff was defendant's preferred provider for a product, even though the defendant had already signed a contract with one of plaintiff's competitors. The defendant misled the plaintiff for years, causing the plaintiff to forego contractual rights that it had, before finally revealing its contract with the competitor. In contrast to *Roboserve*, there was no multi-year cover-up here. BP Amoco freely provided information throughout the due diligence process. Moreover, *Roboserve* involved a clear misrepresentation. Here, the unambiguous contractual language and indisputable facts compel the conclusion that no misrepresentation occurred. To allow punitive damages to be awarded for a commercial dispute over the reasonable meaning of contract language would be improper.

CONCLUSION

Just as FHR's claims fail to establish various liability elements, as set forth in BP Amoco's other pending partial summary judgment motions, FHR also cannot satisfy the law's standards for proving damages. Accordingly, BP Amoco and BPCNA request that they be awarded partial summary judgment on FHR's damages claims.

Date: December 19, 2008

Respectfully submitted,

/s/ R. Chris Heck
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One of the attorneys for BP Amoco Chemical Company and BPCNA

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2008, 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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