Motion Ex. 13

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.	)	
	)	
FLINT HILLS RESOURCES LLC,	)	
	)	
Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
BP CORPORATION NORTH AMERICA INC.,	)	
	)	
Defendant.	)	
	)	

PARTIAL SUMMARY JUDGMENT REPLY: DAMAGES

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 "DAMAGES" CLAIMS

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INTRODUCTION

FHR's Brief in Opposition ("FHRB") confirms that the damages FHR seeks are not legally recoverable under the terms of the PSA and Illinois law. BP Amoco and BPCNA thus reply as follows:

I. FHR'S RESPONSE CONFIRMS THAT FHR DOES NOT HAVE THE REQUIRED EVIDENCE OF DIMINUTION IN FAIR MARKET VALUE.

BP Amoco's opening memorandum explained that the legal measure of recoverable damages for fixtures to real property for commercial purposes is the lesser of: (1) the diminution in fair market value ("FMV"); or (2) the cost of repairing or replacing the property. (Open Br. at 4-5 and cases cited therein.) FHR acknowledges this principle of Illinois law (FHRB at 6), which applies to both contract and tort claims.[1] *E.g.*, *First Nat'l Bank of Elgin v. Dusold*, 180 Ill. App. 3d 714, 718-19, 536 N.E.2d 100, 102-03 (Ill. App. Ct. 1989); *see also Normand v. Orkin Exterminating Co.*, 193 F.3d 909, 911 (7th Cir. 1999). But FHR has no competent evidence of diminution in FMV, and thus its damages claims should fail as a matter of law. (Open Br. at 5); *Dusold*, 180 Ill. App. 3d at 719, 536 N.E.2d at 103; *Witty v. C. Casey Homes, Inc.*, 102 Ill. App. 3d 619, 623, 430 N.E.2d 191, 194 (Ill. App. Ct. 1981).

A. The PSA Does Not Replace, But Instead Incorporates, The Requirement Of Proportionality For FHR's Alleged Damages.

FHR implies that Section 13.2, the indemnity provision of the PSA, somehow removes common law limitations on its damages. To the contrary, FHR agreed in various clauses in the PSA – such as Sections 7.3, 13.2 and 13.6 – to *restrict* the damages it could seek. (SOF ¶¶ 8-9; SOAF Resp. ¶¶ 1-2) Moreover, FHR does not cite to anything in the PSA that purports to relieve FHR of the legal obligation to prove that its repair costs are proportional. (FHRB at 4-5) Thus, such common law principles are deemed incorporated into the contract. *E.g.*, *Brandt v. Time Ins. Co.*, 302 Ill. App. 3d 159, 169-70, 704 N.E.2d 843, 850 (Ill. App. Ct. 1998).

FHR argues that because "the PSA includes Cost of Repair as the exclusive remedy for breach of Section 7.1, any common law damages limitations do not apply." (FHRB at 1-2)

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[1] FHR appears to contend that this rule applies only where the repair costs are "grossly disproportionate" to the repair costs. (FHRB at 6) The cases FHR cites, however, do not support this assertion. *See Meade v. Kubinski*, 277 Ill. App. 3d 1014, 1022, 661 N.E.2d 1178, 1184 (Ill. App. Ct. 1996) (applying rule "[w]here the expense of restoration exceeds the diminution in the market value of the property"); *Witty v. C. Casey Homes, Inc.*, 102 Ill. App. 3d 619, 625, 430 N.E.2d 191, 196 (Ill. App. Ct. 1981) (applying rule "[w]here, however, application of that measure of damages [cost of reasonable repairs] … would incur costs disproportionate to the results obtained").

There are two problems with this argument. *First*, FHR cannot point to any PSA contract language which changes the common law rule and removes the proportionality check on cost-of-repair damages. *Second*, the PSA does address this issue by providing, contrary to FHR's argument, that the indemnity provision is explicitly subject to the "Law," which includes Illinois' "principle[s] of common law." (SOAF Resp. ¶ 2) Thus, far from relieving FHR of its obligations under Illinois law, the PSA explicitly subjects FHR's indemnity claims to Illinois' common law principles. For these reasons, *NRC Corp. v. Amoco Oil Co.*, 205 F.3d 1007, 1011 (7th Cir. 2000), which was decided under Indiana law, is inapposite. There, the defendant waived any challenge to the trial court's use of the contract to redefine the proper measure of damages. In addition, in *NRC* the parties bargained to replace the typical measure of damages under Indiana law with a different measure, such that the otherwise applicable common law rule for calculating damages would not apply. By contrast, the PSA explicitly states that FHR's indemnity claims are subject to Illinois law. (SOAF Resp. ¶ 2)

B. There Is No Exception To The Proportionality Rule For The Sale Of Industrial Real Property Such As The Joliet Plant.

FHR also seeks to avoid Illinois' common-law proportionality requirement by relying on cases decided under Article 2 of the UCC, which does not apply to real property fixtures such as the Joliet Plant. UCC Article 2 applies to transactions in goods, which are defined primarily as things "which are movable at the time of identification to the contract for sale." 810 ILCS § 5/2-105, 107. Items which have "by their physical annexation to real estate [] become, in legal contemplation, part of the real estate, [] are no longer goods within the meaning of the UCC." *Weiss v. MI Home Prods., Inc.*, 376 Ill. App. 3d 1001, 1005, 877 N.E.2d 442, 445-46 (Ill. App. Ct. 2007); *see also White v. Peabody Constr. Co.*, 434 N.E.2d 1015, 1021-22 (Mass. 1982) ("contracts for the sale of structures attached to realty" are not within the scope of UCC Article 2); *Keck v. Dryvit Sys., Inc.*, 830 So. 2d 1, 8-9 (Ala. 2002); *Morris v. Osmose Wood Preserving*, 667 A.2d 624, 637 (Md. 1995).

Seventh Circuit case law holds that the "maximum award of compensatory damages is the cost of repair or restoration, or the difference between the original appraised value and the post-[breach] value, whichever is less" for attachments to real property such as the Joliet Plant. *Normand*, 193 F.3d at 911. In contrast, FHR cites *Continental Sand & Gravel, Inc. v. K & K Sand & Gravel, Inc.*, 755 F.2d 87, 91 (7th Cir. 1985) and *IMI Norgren Inc. v. D & D Tooling & Mfg., Inc.*, 247 F. Supp. 2d 966, 971 (N.D. Ill. 2002), both of which rely on Section 2-714(2) of

the Illinois Uniform Commercial Code. These cases dealt with movable goods: cranes, a truck and a tractor in *Continental Sand*; and lever arms used in truck transmissions in *IMI*. Neither involved a structure physically annexed to realty, and thus do not apply here.

FHR also cites *Kangas v. Trust*, 110 Ill. App. 3d 876, 441 N.E.2d 1271 (Ill. App. Ct. 1982), which likewise is inapposite. *Kangas* involved a residential home where, among other issues, the plaintiffs had specified a certain height for the ceiling but the developer had sold them the home with indisputable knowledge that the ceiling was too low. FHR cites *Kangas* for the proposition that "where there is a willful breach of contract, a plaintiff is entitled to its cost of repair damages" (FHRB at 6), but this does not square with what *Kangas* says. *Kangas* said that "[w]e, however, *do not* conclude that every willful breach requires that the cost of repair be automatically used as the measured of damages." *Id.* at 883, 441 N.E.2d at 1276 (emphasis added). Instead, the *Kangas* case focused on the property being for residential use and the specification at issue being of "special value" to the homeowner, instead of an industrial business like the chemical plant at Joliet: "It has also been recognized that awarding damages equal to the amount required to reconstruct the dwelling so as to make it conform to the specifications is proper when the contract is one to construct a dwelling for the owner who plans to live in it as distinguished from a commercial structure where the aesthetic taste of the owner is not so deeply involved." *Id.*

Finally, more recent cases on disproportionality under Illinois law, such as *Normand*, *Meade*, and *Dusold*, have not drawn any distinction regarding willful contract breaches. *E.g.*, *Normand*, 193 F.3d at 909, 911 (holding that the maximum award of compensatory damages is the lesser of repair costs or FMV diminution even though plaintiff alleged that the defendant acted "willfully, wantonly, and maliciously").

C. FHR's Cost Of Repair Damages Are Disproportionate To The Values Allocated Under The PSA.

FHR's brief is silent about PSA § 5.6. Under Section 5.6, FHR was required to "prepare and deliver to Seller an allocation of the Purchase Price among the Assets." (SOF ¶ 10) The parties agreed that they "shall 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*." (*Id.* (emphasis added)) FHR has admitted that the document attached at Tab 4 of BP Amoco's exhibits is FHR's final purchase price allocation. (FHR Resp. to SOF ¶ 11) FHR's objections to use of this allocation – which FHR itself drafted – lack merit.

First, FHR argues that these values were done for accounting and tax purposes. (FHRB at 11) This is irrelevant under the plain language of the PSA to which the parties agreed. Section 5.6 explicitly states that the parties are bound by the allocation "*for all purposes*" and shall not take any contrary position "in any Tax Return, *or otherwise*." (Emphasis added)

Second, FHR claims that there were no negotiations over the components of the PCBU (FHRB at 8), but this claim is contrary to the PSA and to undisputed facts. The PSA, which was heavily negotiated, explicitly provides for certain allocations in its text, such as $60 million for European Assets and $20 million for a non-compete agreement. (SOAF Resp. ¶ 58)

Third, to the extent FHR claims that it breached the PSA by failing to provide and agree with BP Amoco on an allocation of the purchase price as required by Section 5.6 (*e.g.*, FHR Resp. to SOF ¶ 10), this is no excuse. PSA § 5.6 specifically requires that the "Buyer [FHR] shall prepare and deliver to Seller an allocation of the Purchase Price … ." (SOF ¶ 11) FHR cannot avoid its own allocations by claiming that it failed to comply with its contract obligations.

Fourth, FHR attempts to focus on the PCBU as a whole, but that does not help it here. The PCBU includes specific value allocations for various parts of the deal — such as the European Business, a non-compete agreement, and European and U.S. working capital. (SOF ¶ 10; Resp. to SOAF ¶ 58) But FHR's own final purchase price allocation states a specific Joliet Plant value of $139 million, and FHR is suing over the Plant alone, and indeed is suing over only a fraction of the Plant's equipment.[2] (FHR Resp. to SOF ¶ 11; SOAF Resp. ¶ 58)

Fifth, contrary to FHR's arguments, the proper analysis is to look at each piece of equipment individually to determine disproportionality. In *Dusold*, the Illinois Appellate Court specifically considered the diminution in value of particular items, stating that "the correct measure of damages should have been the value of *these items* as warranted, in 1986, less the value of the *items* as delivered." 180 Ill. App. 3d at 719, 536 N.E.2d at 103 (emphasis added). The *Dusold* court then considered the age of various pieces of equipment separately. *Id.* Thus, under *Dusold*, FHR is required to produce evidence of diminution-in-value and cost-of-repair on an item-by-item basis. This conclusion is further supported by the Court's recent summary

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[2] FHR incorrectly cites to an allocation that assigns approximately $164,000,000 to the property, plant & equipment ("PP&E") of the Joliet Plant. (FHRB at 11 n.6) But that allocation completely omits the value of the non-compete agreement (SOAF Resp. ¶ 59), and makes certain other adjustments, thus inflating the PP&E value. PSA Section 5.2(b) explicitly requires $20 million to be allocated to the non-compete agreement, and any allocation that violates the PSA cannot be valid. (*Id.*)

judgment opinion decision, ruling that the condition-of-assets representation refers to each individual tangible asset at the Joliet Plant. (Docket No. 348 at 4) Yet FHR has failed to provide the required item-by-item diminution in the relevant FMVs.[3]

II. THE PURPORTED DAMAGES CALCULATED BY BETTIUS AND BALIBAN ARE EXCLUDED UNDER THE PSA AND FLAWED IN ANY EVENT.

In its opening memorandum, BP Amoco explained how the opinions of FHR's putative experts Bettius and Baliban are barred under the plain language of the PSA. FHR's response provides additional reasons for concluding that Bettius and Baliban's damages are irrelevant and not legally recoverable. To begin with, FHR contends that Cost of Repair is the exclusive remedy for FHR's contractual claims. (FHRB at 1) By their own admissions, however, neither Bettius nor Baliban is calculating a cost of repair damage. (Tab 6, Baliban Rpt. at 1-2; Tab 7, Bettius Rpt. at 1,3) Instead, both experts purport to calculate a difference in value. *Id.* Put simply, the damages as calculated and alleged by Bettius and Baliban cannot be recovered for FHR's breach-of-contract claim. The numerous defects in both calculations also prevent them from being used to support FHR's alleged fraud damages.

A. PSA § 7.3 Bars The "Damages" Sought Under Baliban and Bettius's Theories.

FHR attempts to rely on Section 7.3's language of "[e]xcept for the express representations, warranties and indemnities contained in Sections 3.1, 7.1, and 16.1 and Article 13 …," but this is inapplicable. By its plain language, the exception only applies to "*express* representations, warranties, and indemnities." (SOF ¶ 8) There is no express representation or warranty as to value in Section 7.1 or Article 13, and any implied warranty is excluded by the plain language of Section 7.3. (SOF ¶¶ 7-8) FHR's attempt to recover these alleged damages is simply its attempt to impute a representation of value into the PSA that not only does not exist, but is explicitly disclaimed. *See, e.g., Rayner Covering Sys., Inc. v. Danvers Farmers Elevator*

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[3] Even though FHR reduced its alleged damages after BP Amoco filed this motion, the purchase price allocation confirms that FHR's alleged damages are disproportional. For example, the allocated price that FHR paid for the Plant's electrical distribution system was $3,336,232.00, but FHR seeks $8,133,117.33 in costs -- nearly *three times* what it paid. (SOF ¶ 12; SOAF Resp. ¶ 54) FHR likewise seeks approximately $9,000,000 in costs to wastewater storage tanks, which again is *three times* what FHR paid for those tanks. (*Id.*) The allocated price FHR paid for the entire "waste treatment & filtration" support facility was approximately $5,000,000, but FHR now seeks $23,800,000 for a new waste water treatment facility, in addition to nearly $7.5 million for repairs to the waste water treatment aeration basin tanks. (*Id.*)

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).

B. Bettius and Baliban's Opinions Seek Lost Profit Damages.

FHR attempts to draw artificial distinctions between diminution in value and lost profits. Its attempted distinction is contrary to the authorities. In this regard, diminution in value is based on lost profits, as explained by the 10th Circuit in *Eateries, Inc. v. J.R. Simplot Co.*, 346 F.3d 1225 (10th Cir. 2003):

> A court calculates diminution in value damages by comparing the fair market value of a company before a breach with the fair market value of the company after the breach. As previously noted, fair market value is "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's length transaction." Market value "is said to be the present value of a projected profit stream." *Therefore, fair market value "necessarily incorporate[s] expected future profits."*

Id. at 1236 (citations omitted); (Open Br. at 3-4 & n.2). Thus, both as a matter of law and basic economics, FHR is incorrect when it argues that lost profits and diminution-in-value are distinct ways of calculating damages because a diminution-in-value measurement "necessarily incorporate[s] expected future profits." *Eateries*, 346 F.3d at 1236; *see also Protectors Ins. Service, Inc. v. U.S. Fidelity & Guar. Co.*, 132 F.3d 612, 617 (10th Cir. 1998); *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 508 (4th Cir. 1986); *Albrecht v. Herald Co.*, 452 F.2d 124, 131 (8th Cir. 1971); *Knauf Fiber Glass. GmbH v. Stein*, 615 N.E.2d 115, 128 (Ind. Ct. App. 1993), *vacated in part on other grounds*, 622 N.E.2d 163 (Ind. 1993).

FHR does not deny that Baliban and Bettius premise their opinions on projected future cash flows, that is, profit streams. By definition, their analyses are based on lost profits and thus prohibited under PSA § 13.6. (SOF ¶ 9) In response, FHR cites a single Court of Claims eminent domain case, *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394 (1989). FHR's argument based on *Whitney* is contrary to the various court of appeals cases rejecting its position and explaining the basic economic fact that measuring value necessarily depends on lost profits. Moreover, while *Whitney* discusses using a discounted cash flow analysis, what the plaintiff was attempting to measure using this analysis is never explained. But the opinion does repeatedly note that it does not involve the valuation of an ongoing, income-producing business, but rather the value of coal reserves that were still in the ground. *Id.* at 409. By contrast, FHR is seeking to value an ongoing business, and is using discounted cash flows to project and recover future

profits, which is precisely what Section 13.6 of PSA prohibits. Finally, unlike in *Whitney*, the PSA here explicitly bars claims for "ANY LOSS OF PROFIT." (SOF ¶ 9)

Similarly, FHR misunderstands the opinions of BP Amoco's damages expert Elson in asserting that Elson supports FHR's position that a lost profits claim can only be based on post-transaction lost profits, and not projected lost profits. Nothing in Elson's testimony says that the only way to calculate lost profits is by relying on post-transaction events. (SOAF Resp. ¶ 57) Moreover, FHR is legally incorrect that a lost profits analysis necessarily depends on post-transaction actual experience. (FHRB at 4) Courts have allowed lost profits based solely on evidence that predates the transaction. *E.g., Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 247-49, 856 N.E.2d 389, 406-07 (Ill. 2006). Projecting future lost profits is what Bettius and Baliban have done here, and that is prohibited by the PSA.

C. FHR's Response Confirms That The Calculations of Bettius And Baliban Are Unreliable And Impermissibly Flawed.

FHR's response provides additional reasons why its putative experts do not have valid damages calculations. *First*, FHR does not address PSA Section 5.6 in relation to Bettius' opinion. The PSA requires that "Buyer and Seller shall be bound by such agreed Purchase Price allocation for all purposes" and no party "shall take any contrary position … in any Tax Return, or otherwise." (SOF ¶ 10) Under FHR's final purchase price allocation, the value of the Joliet Plant is $139 million, less than half the value that Bettius assumes. (FHR Resp. to SOF ¶ 11; SOAF Resp. ¶ 58)

Second, Bettius' opinion relies on FHR's fifth supplemental response to BP Amoco's interrogatories, which assumed that the condition of the equipment at the time of the sale was as alleged in FHR's claims seeking approximately $180 million. (BP Tab 7, Bettius Rpt. at 63) Bettius used this information in assuming that the Joliet Plant would require additional capital expenditures to correct the alleged conditions on which FHR bases its claims. (*Id.* at 30) But FHR now has dropped over $60 million from its claims, and alleges $120 million in repair and replacement damages. (SOAF Resp. ¶ 54) Despite FHR dropping one-third of its requested damages, Bettius' opinion on diminution-of-value damages has not changed at all, further confirming that her opinion is not based on the facts of this case or the claims FHR is making. *E.g., Children's Broadcasting Corp. v. Walt Disney Co.*, 245 F.2d 1008, 1018 (8th Cir. 2001).

Third, FHR now says that cost of repair is the exclusive remedy for its contractual claims. (FHRB at 1) If so, Bettius' opinion has no relevance to FHR's contractual claims, but only its

fraud claims at most. FHR does not deny that Bettius' opinion is based on all of FHR's claims being true. But the majority of FHR's claims allege solely breach of contract, not fraud. Indeed, only 14 of FHR's approximately 50 remaining claims allege fraud. Thus, Bettius' opinion is based on non-fraud claims that should not have been included in her purported analysis. *See Kempner Mobile Elecs., Inc. v. S.W. Bell Mobile Sys.*, 428 F.3d 706, 712-13 (7th Cir. 2006) (affirming exclusion of alleged expert's theory of damages where it failed to distinguish between losses caused by alleged fraud and losses caused by non-actionable conduct).

Fourth, FHR claims that Bettius did not need to calculate an "as-represented" value because the $300 million purchase price for the PCBU as a whole (which includes numerous assets besides the property, plant, and equipment of the Joliet Plant) should serve as that value. (FHRB at 8-9) To begin with, FHR's argument contradicts the plain language of Section 5.6 of the PSA. (SOF ¶ 10) FHR is not suing over the PCBU as a whole, but rather the property, plant and equipment of the Joliet Plant, which has an allocated, binding value under PSA Section 5.6 of $139 million. Moreover, Bettius' opinion still presents an "apples to oranges" comparison because she did not calculate an "as-represented" value using the same arbitrary assumptions and discounts she applies to the "as-sold" value. (*E.g.*, BP Tab 7, Bettius Rpt. at 15-17, 24, 25, 28, 30)

Finally, FHR's claim that Baliban's analysis establishes a difference in both "fair market value" to a hypothetical purchaser and the "investment value" to FHR is contrary to undisputed facts. (FHRB at 10) In this regard, Baliban admits "there are certainly aspects of value that may be unique to Flint Hills." (SOAF Resp. ¶ 55) He relied on FHR's own financial model, incorporating assumptions unique to FHR, as well as business opportunities that were available only to FHR. (BP Tab 6, Baliban Rpt. at 22-23, 25-26, 29-31) For example, Baliban incorporated a probability that FHR would become the exclusive supplier to Eastman Chemical Company based on FHR's existing relationship with Eastman. (*Id.* at 25) In short, Baliban's analysis is based on the unique investment value of the Joliet Plant *to FHR*, not the FMV. (Open Br. at 7-8)

III. FHR CANNOT DENY THAT ITS CLAIMED DAMAGES CONSTITUTE A BETTERMENT.

Illinois law prohibits a plaintiff from recovering compensatory damages that put the non-breaching party in a better position than it would have been in had the contract not been breached. FHR does not contest this basic principle. Nor does FHR deny that its alleged

damages would put FHR in a better position than without any breach. Although FHR suggests that Section 13.2 allows it to avoid Illinois law, Section 13.2 explicitly states that the indemnity provision is subject to the "Law," which includes "principle[s] of common law." (SOAF Resp. ¶ 2) And Section 16.4 provides that Illinois law governs. (*Id.*)

FHR also argues that its planned repairs are "cost-effective and efficient." (FHRB at 12-13) This is neither correct nor, more fundamentally, relevant. FHR does not cite any case that creates an exception to the anti-betterment principle, and the two cases it cites have nothing to do with betterment. *Toledo Peoria & Western Ry. v. Metro Waste Sys., Inc.*, 59 F.3d 637 (7th Cir 1995), dealt with whether costs for reasonable but unsuccessful efforts to mitigate are recoverable; it says nothing about betterment. *Id.* at 641-42. *Continental Sand* is a UCC Article 2 case that does not apply to real property fixtures such as the Joliet Plant, and in any event likewise does not mention or analyze the betterment issue. 755 F.2d at 91-92.

BP Amoco's opening brief included a number of examples where FHR seeks betterment. For example, FHR seeks a brand new anaerobic reactor, which FHR does not deny would process water faster than the current, older reactor. (FHR Resp. to SOF ¶ 19) Similarly, the undisputed evidence is that adding a reactor to the TMA unit would increase production beyond the PSA rates. At a minimum, it would increase capacity by at least 10 kmt per year–and possibly up to 20 kmt–whereas FHR contends that the current production rate is 65 kmt. (SOF ¶¶ 22-23; SOAF Resp. ¶¶ 13-14; BP Tab 6, Baliban Rpt. at 2 n.3) The resulting 75 kmt to 85 kmt would exceed by as much as 19% the 71 kmt AMDSP representation in PSA § 7.1(d)(ii). Similarly, FHR does not deny that it seeks to replace the Plant's electrical system with a new and improved dual radial feed system and a new substation. (FHR Resp. to SOF ¶ 33) FHR likewise admits that the new well it installed adds more capacity than it alleges to have lost from the old well. (SOAF Resp. ¶ 8)[4] FHR has no valid response to these arguments. It is undisputed that FHR has calculated damages based upon a betterment approach—"damages" which the law does not permit.

IV. FHR'S REPLY CONFIRMS THAT ITS CLAIMED DAMAGES ARE SPECULATIVE AND THAT IT CANNOT PROVE CAUSATION.

FHR would rewrite the PSA in asserting that damages "claims may be asserted and

[4] Appendix B to BP Amoco's opening brief and BP Amoco's response to FHR's SOAF ¶¶ 8-18, 23, 27-29, 33-37 list claims for which FHR seeks damages that constitute a betterment.

resolved based on a 'reasonable, good faith estimate.'" (FHRB at 14) That language is contained in a portion of the PSA titled "Notice of Claims." (SOAF Resp. ¶ 2) Under the PSA, a party seeking indemnification must give an estimate of its losses if the amounts of the alleged losses are not known. (*Id.*) This Section imposes a duty; neither it nor any other part of the PSA provides a right to recover damages based only on a "reasonable, good faith estimate." (*Id.*)

FHR incorrectly claims that BP Amoco has conceded certain of FHR's alleged damages. (FHRB at 13) FHR does not cite to any statement by any BP Amoco witness or expert conceding that any portions of FHR's damages are justified or supported. (SOAF Resp. ¶ 54) Indeed, BP Amoco's damages expert (Elson) explicitly disclaimed any such concessions, explaining that for certain claims FHR had not provided adequate documentation to determine whether costs were appropriately quantified as damages. (*Id.*)[5]

V. PUNITIVE DAMAGES ARE BARRED UNDER ENFORCEABLE PROVISIONS OF THE PSA, AND CANNOT BE RECOVERED IN ANY EVENT.

A. Parties Can Agree To Contractually Limit Punitive Damages.

While FHR attempts to use PSA Section 13.2 to override Illinois law (even though that clause is explicitly subject to Illinois law), when it comes to Section 13.6, FHR claims that Illinois law overrides the PSA's limitation on punitive damages. This is legally incorrect. The Seventh Circuit and district courts have upheld disclaimers on punitive damages. *See Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994) ("parties to adjudication have considerable power to vary the normal procedures, and surely can stipulate that punitive damages will not be awarded") (citations omitted); *Willmott v. Federal Street Advisors, Inc.*, 2006 WL 3743716, at *7-8 (N.D. Ill. Dec. 19, 2006) (upholding exculpatory clause in a contract stating that punitive damages could not be recovered); *Harper v. United Healthcare Corp.*, 1998 WL

[5] In reply to FHR's other arguments on this issue, BP Amoco relies on evidentiary objections noted in its opening brief, Appendices C and D to that brief, and its Response to FHR's SOAF ¶¶ 3-37. As explained in those pleadings, FHR has not produced proper evidence of damages or causation. *See, e.g., Juarez v. Menard, Inc.*, 366 F.3d 479, 484 n.4 (7th Cir. 2004) (a litigant must have evidence that is admissible in content to oppose summary judgment); *Payne v. Pauley*, 337 F.3d 767, 775 n.3 (7th Cir. 2003) (same); *Dillard v. Chicago Transit Auth.*, 2003 WL 22136309, at *2 n.1 (N.D. Ill. Sept. 16, 2003) (a party's own interrogatory answers that are not based on personal knowledge, but rather are hearsay, are not admissible to oppose summary judgment); *Henderson v. Handy*, 1996 WL 148040, at *4 (N.D. Ill. Mar. 29, 1996) (same). BP Amoco recognizes that the Court ruled last week that these types of evidentiary objections cannot be resolved at the summary judgment stage. (Docket No. 348 at n.3) BP Amoco, therefore, will further address these issues in motions in limine and/or motions to exclude FHR's experts.

673822, at *4 (N.D. Ill. Sept. 23, 1998) ("parties can agree by contract to limit punitive damages in arbitration").[6]

The statements to the contrary upon which FHR relies are both dicta and easily distinguishable. For example, FHR itself admits that *Normand v. Orkin Exterminating Co.*, 193 F.3d 908 (7th Cir. 1999), says that a claim for fraud "might conceivably" support a judgment notwithstanding a limitation of liability. *Id.* at 911. This language plainly shows that the statement in *Normand* was not a holding, but rather dicta. In fact, the issue in *Normand* was whether diversity jurisdiction existed. Likewise, the cases FHR cites are those where the defendant sought to use a contractual limitation that restricted damages to a return of the price of a good or service to preclude a fraud claim entirely. None involved a specific bar on punitive damages, like PSA § 13.6. (SOF ¶ 9) For example, *Normand* involved a contract that disclaimed "liability for any claim for damages to the structure or its contents occasioned by an infestation of [termites], or otherwise caused by ORKIN's negligence or breach of any other obligation arising under the terms of the Agreement." 193 F.3d at 909. Similarly, in *Popovich v. McDonald's Corp.*, 189 F. Supp. 2d 772, 777-78 (N.D. Ill. 2002), the defendant argued that a contractual limitation capped damages to the cost of food at the defendant's restaurants. *Zimmerman v. Northfield Real Estate, Inc.*, 156 Ill. App. 3d 154, 165, 510 N.E.2d 409, 415 (Ill. App. Ct. 1986) and *Time Warner Sports Merchandising v. Chicagoland Processing Corp.*, 974 F. Supp. 1163, 1174-75 (N.D. Ill. 1997), do not discuss punitive damages, but rather involve a defendant trying to use an exculpatory clause as a complete shield from any fraud liability. These cases are reconciled with *Baravati* by recognizing that exculpatory clauses cannot completely bar fraud claims but can limit the recovery for certain elements of damages for fraud -- including punitive damages. *See, e.g.*, *Baravati*, 28 F.3d at 709; *Willmott*, 2006 WL 3743716, at *7-8; *Harper*, 1998 WL 673822, at *4.

B. FHR Attempts To Rewrite PSA Section 13.6 To Add A Fraud Exception Where The Contract Provides For None.

Section 13.6 consists of three separate paragraphs. As FHR notes, the first two paragraphs contain an exception for fraud at the start of each paragraph. The third paragraph

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[6] *Baravati* and *Harper* are both arbitration cases. Arbitration is "simply matter of contract between the parties," *Employers Ins. of Wausau v. Banco De Seguros Del Estado*, 199 F.3d 937, 942 (7th Cir. 1999), and if the parties can choose to waive punitive damages in contracts that include arbitration clauses they should be able to waive punitive damages in any contract.

contains the bar on punitive damages and *has no fraud exclusion*. (SOF ¶ 9; SOAF Resp. ¶ 2) Thus, there is no fraud exclusion for the parties' agreed-upon limitation on punitive damages.[7]

FHR cannot rewrite Section 13.6 by adding a fraud exception to the third paragraph. Limitations in a different part of the PSA cannot be used to constrict the clear language waving "any and all rights" to punitive damages. *See, e.g., Blue Cross & Blue Shield Ass'n v. Am. Exp. Co.*, 467 F.3d 634, 639 (7th Cir. 2006) (applying contractual restriction on the use of the word "blue" without allowing that restriction to be limited by other paragraphs in the agreement); *see also Berryman Transfer & Storage Co. v. New Prime, Inc.*, 345 Ill. App. 3d 859, 863, 802 N.E.2d 1285, 1288 (Ill. App. Ct. 2004); *Klemp v. Hergott Group, Inc.*, 267 Ill. App. 3d 574, 581, 641 N.E.2d 957, 962 (Ill. App. Ct. 1994). Indeed, the fact that both of the first two paragraphs of Section 13.6 include fraud exceptions, but the third paragraph proscribing recovery of punitive or exemplary damages does not, only confirms that the exceptions are limited to the paragraphs in which they appear. If the fraud exception in the first paragraph were meant to apply to all three paragraphs, the exception in the second paragraph would be surplusage, contradicting the requirement that each word or phrase in a contract be given meaning. *Premcor USA, Inc. v. American Home Assurance Co.*, 400 F.3d 523, 527 (7th Cir. 2005); *Miniat v. Ed Miniat, Inc.*, 315 F.3d 712, 715 (7th Cir. 2002).

C. FHR Cannot Meet The Standard To Allow A Jury To Decide Punitive Damages.

The threshold for imposing punitive damages is high. "[S]imple fraud" is not sufficient; instead punitive damages require proof of "extraordinary or exceptional circumstances clearly showing malice and willfulness." (Open Br. at 13) *Roboserve, Inc. v. Kato Kagaku Co.*, 78 F.3d 266 (7th Cir. 1996), is the case most similar to this one. Both involve two sophisticated corporations litigating over fraud claims based on a contract. *Roboserve* has never been overturned or abrogated. Instead, other cases have explicitly followed *Roboserve* and used its holding to reject punitive damages claims. *E.g., Doe v. Templeton*, 2004 WL 1882436, at *5 (N.D. Ill. Aug. 6, 2004) (citing *Roboserve*). *Roboserve* also is consistent with numerous other

[7] Separately, FHR ignores the limitation on the definition of "Losses." PSA Section 13.2, the indemnity provision on which FHR relies, limits any recovery to "Losses." The definition of "Losses" explicitly "exclude[s] any liability relating to punitive damages to the extent such punitive damages relate to a Direct Claim." (SOAF Resp. ¶ 2) Moreover, there is no fraud exclusion contained in the definition of "Losses." (*Id.*) Thus, the definition of "Losses" likewise prohibits FHR from recovering punitive damages.

cases decided by the Seventh Circuit and district courts. *E.g.*, *Medcom Holding Co. v. Baxter Travenol Labs., Inc.*, 106 F.3d 1388, 1402 (7th Cir. 1997) ("Case law in Illinois makes clear that punitive damages should not be awarded absent a finding of culpability that exceeds bad faith. As we have noted, 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"); *see also Baghdady v. Robbins Futures, Inc.*, 2007 WL 2409548, at *4 (N.D. Ill. Aug. 22, 2007).[8] In these circumstances, the standard set forth by *Roboserve* controls.

Moreover, none of the alleged evidence FHR cites is sufficient to find that punitive damages are allowable here. For example, the internal BP Amoco email FHR cites simply discusses the negotiations over the language. (FHRB at 19) The potential contract language cited in the email is not even what ended up in the final PSA. (SOAF Resp. ¶ 53) Moreover, the same person that FHR quotes also states, in reference to the capacity representation in PSA § 7.1(d)(ii), that "We have data that shows what was demonstrated, so that's no problem." (*Id.*) Thus, far from supporting punitive damages, this email establishes that BP Amoco did not have the state of mind that could support punitive damages, as BP Amoco believed its representations were true and supported.

Similarly, the divestment memorandum FHR cites states that BP Amoco originally put a much higher value on the PCBU, but high raw material prices and business underperformance led to a decrease in the plant's perceived value. (SOAF Resp ¶ 53) Moreover, the memorandum states that the after-tax proceeds from selling to FHR would be less than expected. (*Id.*) Nothing in the memo references "the actual conditions and production capacity of the Joliet Plant," as FHR implies. (FHRB at 19; SOAF Resp ¶ 53)

FHR's other alleged evidence similarly does not satisfy the requisite legal threshold. (FHRB at 20; *see generally* SOAF Resp. ¶¶ 38-53) The FHR employee's story about an alleged verbal reprimand over the capacity numbers is irrelevant because that employee admitted at his deposition to not even knowing "what that term [AMDSP] means." (SOAF Resp. ¶ 44) Similarly, Dueker's email referencing "140 kmt" does not refer or relate to AMDSP capacity

[8] Nearly all of the cases FHR cites deal with suits between an individual and a corporation. The case FHR cites as being between two businesses and concerning a business transaction is a Northern District of Illinois case from 1993. (FHRB at 19) The Seventh Circuit decided *Roboserve* three years later, thus superceding any prior inconsistent District Court opinions.

measurements. (SOAF Resp. ¶ 39) The email was sent in March 2003, when BP Amoco was still analyzing how to describe the production rates in the CIM, and many months before the PSA negotiations began. (*Id.*) Finally, BP Amoco provided documents to FHR pre-sale which told FHR that BP Amoco typically limited purified isophthalic acid production to 140 kmt in order to maintain a comfortable margin for air emissions. (*Id.*) BP Amoco's response to the other materials that FHR claims support punitive damages are addressed in BP Amoco's response to FHR's statement of additional facts.

VI. BP AMOCO HAS APPROPRIATELY MOVED FOR SUMMARY JUDGMENT BASED ON FHR'S LACK OF DAMAGES.

Finally, this motion is procedurally proper. FHR claims that summary judgment can only be granted for claims as a whole. (FHRB at 21) This motion satisfies this standard. Both of FHR's counts, and all of its separate claims, require proof of damages. *Association Benefit Servs., Inc. v. Caremark RX, Inc.*, 493 F.3d 841, 849 (7th Cir. 2007) (contract); *Hoseman v. Weinschneider*, 322 F.3d 468, 476 (7th Cir. 2003) (fraud). The premise of this motion is that FHR is not seeking legally recoverable damages. Thus, if this motion is granted, in whole or in part, it will dispose of all or various of FHR's claims.

Moreover, FHR misunderstands the law. For example, *Biggins v. Oltmer Iron Works*, 154 F.2d 214 (7th Cir. 1946), decided 60 years ago, held that a court could consider partial summary judgment motions and enter interlocutory orders thereon (though not final judgments): "When the court is confronted with such a motion as it was in the instant case, it is authorized only to make an 'order' as to the non-controverted facts, 'including the extent to which the amount of damages or other relief is not in controversy.'" *Id.* at 217. Thus, under *Biggins*, this Court may hear this motion and enter orders disposing of all or part of FHR's damages claims.

Furthermore, *Biggins* was hardly the last word on this issue. The Seventh Circuit has explicitly held that "motions for partial summary judgment are permitted," and allowed parties to bring such motions to dispose of a single issue even if (unlike here) a ruling on that issue could not dispose of the entire case. *American Nurses' Ass'n v. State of Ill.*, 783 F.2d 716 (7th Cir. 1986) (holding in a Title VII case that the defendant could move for summary judgment on a comparable worth theory even if the plaintiff also alleged intentional discrimination). District courts likewise have allowed summary judgments motions limited to particular issues, and in particular have granted partial summary judgment on whether damages are limited by a contract. *See American Bankcard Int'l Inc. v. Schlumberger Techs., Inc.*, 2002 WL 598515, at *1 (N.D.

Ill. Apr. 17, 2002) (granting partial summary judgment motion on issue of whether damages were contractually limited); *Ames v. The Rock Island Boat Club*, 2009 WL 400648, at *2 (C.D. Ill. Feb. 17, 2009) (allowing partial summary judgment motion on choice of law); *Roquet v. Arthur Anderson LLP*, 2003 WL 21251979, at *2 (N.D. Ill. May 27, 2003) (allowing partial summary judgment motion on the issue of whether certain layoffs "constituted a 'mass layoff' as required by the WARN Act"). These decisions are consistent with the plain language of FRCP 56(b), which allows for a summary judgment motion "on all or part of the claim."

CONCLUSION

Although FHR has reduced its damages claims by $60 million since BP Amoco filed this motion, its remaining alleged damages claims are still equal to approximately 87% of the entire allocated value of the Joliet Plant. Or, to put the matter differently, to credit FHR's damages claims, a jury would have to be able to conclude that FHR should have been able to purchase a major chemical plant from BP Amoco for a total of $18 million. FHR, in sum, lacks proper proof of legally recoverable compensatory damages. In addition, its claim for punitive damages is contrary to the PSA it negotiated and signed. Accordingly, BP Amoco and BPCNA respectfully request that summary judgment be entered in their favor against FHR on its alleged damages claims.

Date: March 18, 2009

Respectfully submitted,

/s/ R. Chris Heck
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CERTIFICATE OF SERVICE

I hereby certify that on March 18, 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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