Motion Ex. 14

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

BP AMOCO CHEMICAL COMPANY, Plaintiff/Counter–Defendant, v. FLINT HILLS RESOURCES, LLC, Defendant/Counter–Plaintiff.	Case No. 05 C 5661 Judge Amy J. St. Eve
FLINT HILLS RESOURCES, LLC, Plaintiff, v. BP CORPORATION NORTH AMERICA INC., Defendant.	

NOTICE OF FILING

TO: See Attached Service List

Please take notice that on July 27, 2009, there was filed with the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, **Flint Hills' Second Amended Tab 7 to the Final Pretrial Order**, a copy of which is attached and hereby served upon you.

Dated: July 27, 2009

Respectfully Submitted,

FLINT HILLS RESOURCES, LLC

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BP Amoco's Objection to FHR's Proposed Breach of Warranty Instruction No. 7A[1]

First, FHR's instruction misstates the facts because its claims should be described as "Breach of Contract" rather than "Breach of Warranty." FHR's Complaint explicitly alleges "breach of contract" rather than breach of warranty. (FHR Compl. against BP Amoco ¶¶ 1, 169-79) Moreover, in substance FHR's claims are for breach of contract, specifically for the alleged breaches of the provisions in the PSA, which is the parties' contract. FHR is not bringing a claim for breach of warranty, such as a claim under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq*. Therefore, this instruction discussing breach of warranty is irrelevant. *United States v. Choiniere*, 517 F.3d 967, 972 (7th Cir. 2008) (affirming rejection of instruction that did not match the theories and allegations made in the case).

Second, FHR's instruction misstates the law when it claims that the "usual measure" of damages is cost of repair. Instead, 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; or (2) the cost of repairing or replacing the property. The Seventh Circuit has held, in a case involving alleged damages to a house caused by termites, that "[t]he maximum award of compensatory damages is the cost of repair or restoration, or the difference between the original appraised value and the post-termite value, whichever is less." *Normand v. Orkin Exterminating Co.*, 193 F.3d 908, 911 (7th Cir. 1999); *see also Gvillo v. Stutz*, 306 Ill. App. 3d 766, 771-72, 715 N.E.2d 285, 289-90 (Ill. App. Ct. 1999) ("Where the interest is purely financial, as where the land was purchased as a business investment with an eye toward speculation or where it is held solely for the production of income, allowing the plaintiff to recover the lesser of the cost of repair or the diminution of value may be appropriate.") *Meade v. Kubinski*, 277 Ill. App. 3d 1014, 1022, 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 v. C. Casey Homes, Inc.*, 102 Ill. App. 3d 619, 625-26, 430 N.E.2d 191, 196 (Ill. App. Ct. 1981) (same). Thus, the

[1] BP Amoco also objects that FHR provided a revised version of this instruction on the night of July 21, 2009 at 9:45 p.m. FHR then sent further revisions on July 22, 2009 at 2:35 p.m. BP Amoco reserves its right to assert additional objections against this instruction because of FHR's untimely revisions to this instruction.

jury should be instructed that it can award only the lesser of cost-of-repair or diminution-in-value damages.

Third, jury instructions should be a short and plain statement of the law, but FHR's proposed instruction is unnecessarily lengthy, argumentative, and biased. In particular, the second sentence of the first paragraph purports to discuss the principles of cost of repair, the third sentence of the third paragraph gives a lengthy and needless hypothetical example regarding elevator inspections that have nothing to do with this case, and the fourth paragraph gives hypothetical examples regarding a farm tractor that are unnecessary and irrelevant. Moreover, each of these example is intended to bias the jury in favor of awarding damages against BP Amoco. Indeed, FHR has submitted an alternative instruction 7B that removes much (but not all) of this unnecessary language, tacitly admitting that this instruction 7A does not satisfy legal requirements. Thus, the instruction is improper. *See* 1 Fed. Jury Prac. & Instr. § 7.3 (6th ed. 2006) ("The court may properly refuse to give requested instructions which are … prolix, argumentative, confusing, or misleading."); *United States v. Menting*, 166 F.3d 923, 928 (7th Cir. 1999) (affirming rejections of instructions that were "argumentative and likely to confuse the jury"); *United States v. Hach*, 162 F.3d 937, 946 (7th Cir. 1998) ("The district court was not compelled to give the jury [an] inaccurate, redundant and combative instruction.").

Fourth, FHR's instructions discuss damages without ever discussing the requirements and limitations on FHR's damages, both those in the PSA and from common law, and thus is argumentative, incomplete, misleading, biased, and misstates the law and facts. For example, FHR's instructions do not contain the PSA's limitations on consequential damages, lost profits, representations of value, costs that are not incurred or required to be paid, or punitive damages, among others. (PSA § 1 at p. 11, § 7.3 at 72-74, § 13.2 at p. 95, § 13.6 at p. 121) FHR's instructions also omit the requirements that FHR mitigate its damages (PSA § 13.5(b) at pp. 119-20); IPI 700.17; IP 33.02, that FHR not seek a betterment, *Platinum, Inc. v. Fed. Ins. Co.*, 282 F. 3d 927, 932 (7th Cir. 2002); *First Nat'l Bank of Elgin v. Dusold*, 180 Ill.App.3d 714, 719, 536 N.E. 2d 100, 103 (Ill. App. Ct. 1989); or that future costs must be discounted to present value, IPI 34.02. All of these provisions should be included in the instructions to provide the jury with a complete statement of the PSA regarding damages. *See* 1 Fed. Jury Prac. & Instr. § 7.3 (6th ed. 2006); *Menting*, 166 F.3d at 928.

Fifth, FHR's instruction misstates the law when it says that future costs may be recovered if "the amount of those costs are proved at least to a reasonable probability." The amount of such costs must be proven to a reasonable certainty. *In re Catt*, 368 F.3d 789, 792 (7th Cir. 2004) ("The district court must instead conduct an inquiry in order to ascertain the amount of damages with reasonable certainty."); *McKinnis v. United States*, 2008 WL 5220504 (N.D. Ill. Dec. 10, 2008) ("A plaintiff bears the burden to prove with reasonable certainty the amount of all damages alleged."); *Bennett v. United States*, 2006 WL 495968, at *17 (N.D. Ill. Feb. 24, 2006) ("It is the plaintiff's burden to prove with reasonable certainty, the amount of damages alleged."); *Ouwenga v. Nu-Way Ag, Inc.*, 239 Ill.App.3d 518, 526, 604 N.E.2d 1085, 1091 (Ill. App. Ct. 1992) (reversing plaintiffs' damages in a breach of warranty case where "plaintiffs failed to prove the amount of their damages with reasonable certainty"); *Bockman Printing & Services, Inc. v. Baldwin-Gregg, Inc.*, 213 Ill.App.3d 516, 528, 572 N.E.2d 1094, 1103 (Ill. App. Ct. 1991) (affirming denial of damages in a breach of contract case where "plaintiff failed to establish these charges as actual damages and failed to prove their amount with reasonable certainty"); RESTATEMENT (SECOND) OF CONTRACTS § 352 ("Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.").

BP Amoco's Objection to FHR's Proposed Breach of Warranty Instruction No. 7B[2]

First, FHR's instruction misstates the facts because its claims should be described as "Breach of Contract" rather than "Breach of Warranty." FHR's Complaint explicitly alleges "breach of contract" rather than breach of warranty. (FHR Compl. against BP Amoco ¶¶ 1, 169-79) Moreover, in substance FHR's claims are for breach of contract, specifically for the alleged breaches of the provisions in the PSA, which is the parties' contract. FHR is not bringing a claim for breach of warranty, such as a claim under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq*. Therefore, this instruction discussing breach of warranty is irrelevant. *United States v. Choiniere*, 517 F.3d 967, 972 (7th Cir. 2008) (affirming rejection of instruction that did not match the theories and allegations made in the case).

Second, FHR's instruction misstates the law when it claims that the "usual measure" of damages is cost of repair. Instead, 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; or (2) the cost of repairing or replacing the property. The Seventh Circuit has held, in a case involving alleged damages to a house caused by termites, that "[t]he maximum award of compensatory damages is the cost of repair or restoration, or the difference between the original appraised value and the post-termite value, whichever is less." *Normand v. Orkin Exterminating Co.*, 193 F.3d 908, 911 (7th Cir. 1999); *see also Gvillo v. Stutz*, 306 Ill. App. 3d 766, 771-72, 715 N.E.2d 285, 289-90 (Ill. App. Ct. 1999) ("Where the interest is purely financial, as where the land was purchased as a business investment with an eye toward speculation or where it is held solely for the production of income, allowing the plaintiff to recover the lesser of the cost of repair or the diminution of value may be appropriate.") *Meade v. Kubinski*, 277 Ill. App. 3d 1014, 1022, 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 v. C. Casey Homes, Inc.*, 102 Ill. App. 3d 619, 625-26, 430 N.E.2d 191, 196 (Ill. App. Ct. 1981) (same). Thus, the

[2] BP Amoco also objects that FHR provided a revised version of this instruction on the night of July 21, 2009 at 9:45 p.m. FHR then sent further revisions on July 22, 2009 at 2:35 p.m. BP Amoco reserves its right to assert additional objections against this instruction because of FHR's untimely revisions to this instruction.

jury should be instructed that it can award only the lesser of cost-of-repair or diminution-in-value damages.

Third, jury instructions should be a short and plain statement of the law, but FHR's proposed instruction is unnecessarily lengthy, argumentative, and biased. In particular, the second sentence of the first paragraph purports to discuss the principles of cost of repair, which are unnecessary to understanding the law the jury is to apply. Thus, the instruction is improper. *See* 1 Fed. Jury Prac. & Instr. § 7.3 (6th ed. 2006) ("The court may properly refuse to give requested instructions which are … prolix, argumentative, confusing, or misleading."); *United States v. Menting*, 166 F.3d 923, 928 (7th Cir. 1999) (affirming rejections of instructions that were "argumentative and likely to confuse the jury"); *United States v. Hach*, 162 F.3d 937, 946 (7th Cir. 1998) ("The district court was not compelled to give the jury [an] inaccurate, redundant and combative instruction.").

Fourth, FHR's instructions discuss damages without ever discussing the requirements and limitations on FHR's damages, both those in the PSA and from common law, and thus is argumentative, incomplete, misleading, biased, and misstates the law and facts. For example, FHR's instructions do not contain the PSA's limitations on consequential damages, lost profits, representations of value, costs that are not incurred or required to be paid, or punitive damages, among others. (PSA § 1 at p. 11, § 7.3 at 72-74, § 13.2 at p. 95, § 13.6 at p. 121) FHR's instructions also omit the requirements that FHR mitigate its damages (PSA § 13.5(b) at pp. 119-20); IPI 700.17; IP 33.02, that FHR not seek a betterment, *Platinum, Inc. v. Fed. Ins. Co.*, 282 F. 3d 927, 932 (7th Cir. 2002); *First Nat'l Bank of Elgin v. Dusold*, 180 Ill.App.3d 714, 719, 536 N.E. 2d 100, 103 (Ill. App. Ct. 1989); or that future costs must be discounted to present value, IPI 34.02. All of these provisions should be included in the instructions to provide the jury with a complete statement of the PSA regarding damages. *See* 1 Fed. Jury Prac. & Instr. § 7.3 (6th ed. 2006); *Menting*, 166 F.3d at 928.

Fifth, FHR's instruction misstates the law when it says that future costs may be recovered if "the amount of those costs are proved at least to a reasonable probability." The amount of such costs must be proven to a reasonable certainty. *In re Catt*, 368 F.3d 789, 792 (7th Cir. 2004) ("The district court must instead conduct an inquiry in order to ascertain the amount of damages with reasonable certainty."); *McKinnis v. United States*, 2008 WL 5220504 (N.D. Ill. Dec. 10, 2008) ("A plaintiff bears the burden to prove with reasonable certainty the amount of all

damages alleged."); *Bennett v. United States*, 2006 WL 495968, at *17 (N.D. Ill. Feb. 24, 2006) ("It is the plaintiff's burden to prove with reasonable certainty, the amount of damages alleged."); *Ouwenga v. Nu-Way Ag, Inc.*, 239 Ill.App.3d 518, 526, 604 N.E.2d 1085, 1091 (Ill. App. Ct. 1992) (reversing plaintiffs' damages in a breach of warranty case where "plaintiffs failed to prove the amount of their damages with reasonable certainty"); *Bockman Printing & Services, Inc. v. Baldwin-Gregg, Inc.*, 213 Ill.App.3d 516, 528, 572 N.E.2d 1094, 1103 (Ill. App. Ct. 1991) (affirming denial of damages in a breach of contract case where "plaintiff failed to establish these charges as actual damages and failed to prove their amount with reasonable certainty"); RESTATEMENT (SECOND) OF CONTRACTS § 352 ("Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.").

BP Amoco's Objection to FHR's Proposed Breach of Warranty Instruction No. 8[3]

First, FHR's instruction misstates the facts because its claims should be described as "Breach of Contract" rather than "Breach of Warranty." FHR's Complaint explicitly alleges "breach of contract" rather than breach of warranty. (FHR Compl. against BP Amoco ¶¶ 1, 169-79) Moreover, in substance FHR's claims are for breach of contract, specifically for the alleged breaches of the provisions in the PSA, which is the parties' contract. FHR is not bringing a claim for breach of warranty, such as a claim under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq*. Therefore, this instruction discussing breach of warranty is irrelevant. *United States v. Choiniere*, 517 F.3d 967, 972 (7th Cir. 2008) (affirming rejection of instruction that did not match the theories and allegations made in the case).

Second, FHR's instruction misstates the law when it claims that diminution in value is an "alternative method" to cost of repair or "applies only" in certain circumstances. Instead, 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; or (2) the cost of repairing or replacing the property. The Seventh Circuit has held, in a case involving alleged damages to a house caused by termites, that "[t]he maximum award of compensatory damages is the cost of repair or restoration, or the difference between the original appraised value and the post-termite value, whichever is less." *Normand v. Orkin Exterminating Co.*, 193 F.3d 908, 911 (7th Cir. 1999); *See also Gvillo v. Stutz*, 306 Ill. App. 3d 766, 771-72, 715 N.E.2d 285, 289-90 (Ill. App. Ct. 1999) ("Where the interest is purely financial, as where the land was purchased as a business investment with an eye toward speculation or where it is held solely for the production of income, allowing the plaintiff to recover the lesser of the cost of repair or the diminution of value may be appropriate.") *Meade v. Kubinski*, 277 Ill. App. 3d 1014, 1022, 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 v. C. Casey Homes, Inc.*, 102 Ill. App. 3d

[3] BP Amoco also objects that FHR provided a revised version of this instruction on the night of July 21, 2009 at 9:45 p.m. BP Amoco reserves its right to assert additional objections against this instruction because of FHR's untimely revision to this instruction.

619, 625-26, 430 N.E.2d 191, 196 (Ill. App. Ct. 1981) (same). Thus, the jury should be instructed that it can award only the lesser of cost-of-repair or diminution-in-value damages.

Third, FHR's instruction also misstates the law to the extent it claims that "unreasonable" or "gross" disproportionality is required. Case law provides that cost-of-repair damages are limited by diminution in value whenever the cost-of-repair damages are disproportionate. *See Meade*, 277 Ill. App. 3d at 1022, 661 N.E.2d at 1184**{** TA \l "*Meade v. Kubinski*, 277 Ill.App.3d 1014, 661 N.E.2d 1178 (Ill. App. Ct. 1996)" \s "Meade" \c 1 **}** (applying rule "[w]here the expense of restoration exceeds the diminution in the market value of the property"); *Witty**{*** TA \s "Witty" ***}***, 102 Ill. App. 3d at 625, 430 N.E.2d at 196 (applying rule "[w]here, however, application of that measure of damages [cost of reasonable repairs] … would incur costs disproportionate to the results obtained").

Fourth, BP Amoco acknowledges that the Court has previously held that the disproportionality test compares diminution in value to whether the cost is disproportionate "in relation *to the benefit to the purchaser*." (Dkt No. 437 at p. 16 (emphasis in original)) BP Amoco preserves its argument that the disproportionality test compares cost of repair to the diminution in the value of the property. *See Normand*, 193 F.3d at 911 ("The maximum award of compensatory damages is the cost of repair or restoration, or the difference *between the original appraised value and the post-termite value*, whichever is less.") (emphasis added); *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) (explaining 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"). Therefore, the jury should be instructed that the measure for diminution in value for purposes of proportionality is the diminution from the fair market value ("FMV") of the equipment as warranted to the FMV of the equipment or property as sold.

Fifth, BP Amoco acknowledges that the Court has previously held that the PSA does not bar FHR from recovering diminution-in-value damages. (Dkt No. 437 at pp. 5-12) BP Amoco preserves its argument that the plain language of the PSA precludes recovery of the diminution-in-value damages that FHR seeks. (Dkt. No. 247 at pp. 3-4; Dkt. No. 352 at 5-7) Therefore, the jury should be instructed that FHR's alleged diminution-in-value damages cannot be recovered.

BP Amoco's Objection to FHR's Proposed Breach of Warranty Instruction No. 9[4]

First, FHR's instruction misstates the facts because its claims should be described as "Breach of Contract" rather than "Breach of Warranty." FHR's Complaint explicitly alleges "breach of contract" rather than breach of warranty. (FHR Compl. against BP Amoco ¶¶ 1, 169-79) Moreover, in substance FHR's claims are for breach of contract, specifically for the alleged breaches of the provisions in the PSA, which is the parties' contract. FHR is not bringing a claim for breach of warranty, such as a claim under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq*. Therefore, this instruction discussing breach of warranty is irrelevant. *United States v. Choiniere*, 517 F.3d 967, 972 (7th Cir. 2008) (affirming rejection of instruction that did not match the theories and allegations made in the case).

Second, FHR's proposed instruction misstates the law regarding when cost-of-repair versus diminution-in-value damages should be awarded by the jury. 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; or (2) the cost of repairing or replacing the property. The Seventh Circuit has held, in a case involving alleged damages to a house caused by termites, that "[t]he maximum award of compensatory damages is the cost of repair or restoration, or the difference between the original appraised value and the post-termite value, whichever is less." *Normand v. Orkin Exterminating Co.*, 193 F.3d 908, 911 (7th Cir. 1999); *See also Gvillo v. Stutz*, 306 Ill. App. 3d 766, 771-72, 715 N.E.2d 285, 289-90 (Ill. App. Ct. 1999) ("Where the interest is purely financial, as where the land was purchased as a business investment with an eye toward speculation or where it is held solely for the production of income, allowing the plaintiff to recover the lesser of the cost of repair or the diminution of value may be appropriate.") *Meade v. Kubinski*, 277 Ill. App. 3d 1014, 1022, 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 v. C. Casey Homes, Inc.*, 102 Ill. App. 3d 619, 625-26, 430 N.E.2d 191, 196 (Ill.

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App. Ct. 1981) (same). Thus, the jury should be instructed that it can award only the lesser of cost-of-repair or diminution-in-value damages.

Third, FHR's instructions discuss damages without ever discussing the requirements and limitations on FHR's damages, both those in the PSA and from common law, and thus is argumentative, incomplete, misleading, biased, and misstates the law and facts. For example, FHR's instructions do not contain the PSA's limitations on consequential damages, lost profits, representations of value, costs that are not incurred or required to be paid, or punitive damages, among others. (PSA § 1 at p. 11, § 7.3 at 72-74, § 13.2 at p. 95, § 13.6 at p. 121) FHR's instructions also omit the requirements that FHR mitigate its damages (PSA § 13.5(b) at pp. 119-20); IPI 700.17; IP 33.02, that FHR not seek a betterment, *Platinum, Inc. v. Fed. Ins. Co.*, 282 F. 3d 927, 932 (7th Cir. 2002); *First Nat'l Bank of Elgin v. Dusold*, 180 Ill.App.3d 714, 719, 536 N.E. 2d 100, 103 (Ill. App. Ct. 1989); or that future costs must be discounted to present value, IPI 34.02. All of these provisions should be included in the instructions to provide the jury with a complete statement of the PSA regarding damages. *See* 1 Fed. Jury Prac. & Instr. § 7.3 (6th ed. 2006); *United States v. Menting*, 166 F.3d 923, 928 (7th Cir. 1999) (affirming rejections of instructions that were "argumentative and likely to confuse the jury").

Fourth, BP Amoco objects to the use of the term "Losses" as defined in the PSA to state the damages that FHR can recover as misstating the law. As this Court has previously held, "BP correctly argues that the limitations and requirements of Illinois law control Flint Hills' potential recovery." (Dkt No. 437 at p. 26) Using "Losses" as the definition of damages will confuse the jury and potentially cause it to ignore the limitations and requirements of Illinois law that control FHR's recovery. *See* 1 Fed. Jury Prac. & Instr. § 7.3 (6th ed. 2006); *Menting*, 166 F.3d at 928.

Fifth, the first sentence of the second paragraph of FHR's instruction is misleading and confusing. FHR's language that "[i]f you find a breach of warranty, you should assess as damages the entire amount of those Losses …" could lead the jury to believe that if they find BP Amoco liable for any single claim, they must award the entire amount of FHR's alleged repair and replacement costs against BP Amoco, even if the jury finds that BP Amoco has not breached the PSA for other claims. *See* 1 Fed. Jury Prac. & Instr. § 7.3 (6th ed. 2006); *Menting*, 166 F.3d at 928. The jury should be instructed that it may award damages only on those claims for which it finds that BP Amoco has breached the PSA, if any.

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Sixth, BP Amoco acknowledges that the Court has previously held that the disproportionality test compares diminution in value to whether the cost is disproportionate "in relation *to the benefit to the purchaser*." (Dkt No. 437 at p. 16 (emphasis in original)) BP Amoco preserves its argument that the disproportionality test compares cost of repair to the diminution in the value of the property. *See Normand*, 193 F.3d at 911 ("The maximum award of compensatory damages is the cost of repair or restoration, or the difference *between the original appraised value and the post-termite value*, whichever is less.") (emphasis added); *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) (explaining 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"). Therefore, the jury should be instructed that the measure for diminution in value for purposes of proportionality is the diminution from the fair market value ("FMV") of the equipment as warranted to the FMV of the equipment or property as sold.

Seventh, BP Amoco acknowledges that the Court has previously held that the PSA does not bar FHR from recovering diminution-in-value damages. (Dkt No. 437 at pp. 5-12) BP Amoco preserves its argument that the plain language of the PSA precludes recovery of the diminution-in-value damages that FHR seeks. (Dkt. No. 247 at pp. 3-4; Dkt. No. 352 at 5-7) Therefore, the jury should be instructed that FHR's alleged diminution-in-value damages cannot be recovered.

BP Amoco's Objections to FHR's Proposed Fraud Instruction No. 3:

First, FHR's instruction is misleading and incomplete. It ignores requirements and limitations on FHR's damages, both those in the PSA and under the common law. For example, FHR's instruction does not contain the PSA's limitations on consequential damages. (PSA § 13.6 at p. 121) FHR's instructions also omit the requirements that FHR mitigate its damages (PSA § 13.5(b) at pp. 119-20); IPI 700.17; IP 33.02, that FHR may not be awarded compensatory damages that would place it in a better position than if the fraud had not occurred, *Platinum, Inc. v. Fed. Ins. Co.*, 282 F. 3d 927, 932 (7th Cir. 2002); *First Nat'l Bank of Elgin v. Dusold*, 536 N.E. 2d 100, 103 (Ill. App. Ct. 1989); *Kalal v. Goldblatt Bros., Inc.*, 368 N.E. 2d 671, 673-74 (Ill. App. Ct.. 1977), and that the jury must compute the present cash value of future damages. *See* IPI 34.02 (modified).

Second, FHR's instruction misstates the law in describing two measures of compensatory damages as alternatives, without instructing the jury that the correct measure of damages is the *lesser* of two measures: (1) the diminution in fair market value; or (2) the cost of repairing or replacing the property. The Seventh Circuit has held that "[t]he maximum award of compensatory damages is the cost of repair or restoration, or the difference between the original appraised value and the post-termite value, whichever is less." *Normand v. Orkin Exterminating Co.*, 193 F.3d 908, 911 (7th Cir. 1999); *see also Gvillo v. Stutz*, 306 Ill. App. 3d 766, 771-72, 715 N.E.2d 285, 289-90 (Ill. App. Ct. 1999); *Meade v. Kubinski*, 277 Ill. App. 3d 1014, 1022, 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 v. C. Casey Homes, Inc.*, 102 Ill. App. 3d 619, 625-26, 430 N.E.2d 191, 196 (Ill. App. Ct. 1981) (same). Thus, the jury should be instructed that it can award only the lesser of cost-of-repair or diminution-in-value damages.

Third, FHR's proposed instruction is argumentative, cumulative and confusing. The first three paragraphs of the instruction purportedly describe the measure of compensatory damages to which FHR claims it is entitled. It is unnecessary to again instruct the jury — in the fourth paragraph — to assess "the full amount of compensatory damages you determine was caused by [the] representation." FHR cites no authority supporting this part of its proposed instruction.

Furthermore, FHR's discussion of duplicative damages in the fourth paragraph is confusing and argumentative; by unduly emphasizing the connection between the breach of contract representation and fraud claim, the instruction creates a risk that the jury could incorrectly understand that, if it finds a breach of the contract representation, it must also assess damages for fraud.