

Motion Ex. 15

**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.)
_____)

**BP AMOCO CHEMICAL COMPANY AND BP CORPORATION
NORTH AMERICA INC.'S THIRD AMENDED EXHIBIT 8 TO
PROPOSED FINAL PRETRIAL ORDER [DOCKET NO. 696]**

BP Amoco Chemical Company and BP Corporation North America submit the following Third Amended Exhibit 8 to the Proposed Final Pretrial Order. (Dkt. No. 696) This Third Amended Exhibit 8 includes BP Amoco's proposed jury instructions, FHR's objections to those instructions, and BP Amoco's replies setting forth the reasons supporting each proposed instruction to which FHR has objected (as amended).

39. DAMAGES - MEASURE FOR CONTRACT BREACH

If you find in favor of FHR on any issues of liability and against BP Amoco, you must decide how much money, if any, is required to fairly compensate FHR for BP Amoco’s breach of contract and/or fraudulent inducement.

To recover compensatory damages, FHR must prove two measures of damages to a reasonable certainty. First, FHR must prove the reasonable expense of necessary repairs and/or replacements to restore the Joliet Plant’s equipment or property to its condition as warranted in the PSA. Second, FHR must prove the diminution in the fair market value (if any) caused by the asserted breach of the PSA and/or fraud, by comparing the fair market value of the Joliet Plant’s equipment or property in the condition as warranted in the PSA to the fair market value of the Joliet Plant ‘s equipment or property in the condition as sold. The fair market value of the property is the amount a hypothetical willing seller and a hypothetical willing buyer would agree upon for the property if both were fully informed about the property and neither of them was under any particular pressure to buy or sell.

If FHR has proved (i) the reasonable expense of necessary repairs and (ii) the diminution in fair market value, you must then determine the amount of (i) the reasonable expense of necessary repairs and (ii) the diminution in fair market value. You must determine these two measures of damages in accordance with the instructions I will provide you. Once you determine that FHR has proved both measures of damages and the amounts, then you may only award the lesser of (i) the reasonable expense of necessary repairs and (ii) the diminution in fair market value.

Agreed: _____

Disputed: _____

Authority: IPI 700.15 (modified); IPI 30.17 (modified); IPI 30.18 (modified); *Normand v. Orkin Exterminating Co.*, 193 F.3d 909, 911 (7th Cir. 1999); *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. 1991); *Meade v. Kubinski*, 661 N.E. 2d 1178, 1184 (Ill. App. Ct. 1996).

BP Amoco's Replies for Instruction No. 39: Damages - Measure for Contract Breach

Reply to First Objection: FHR's objection misreads the proposed instruction. BP Amoco's instruction states that FHR must prove the correct measure of damages, and those measures are set forth in the following instructions. FHR's objection also misstates the law when it claims that it "is not required to prove two measures of damages to reasonable certainty." 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 jury should be instructed that it can award only the lesser of cost-of-repair or diminution-in-value damages.

FHR's objection also misstates the law when it says "that the amount of damages must be proved at least to reasonable probability." The amount of damages 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.").

Reply to Second Objection: FHR miscites this Court's prior opinion. All of FHR's cites are to pages where the Court considered whether the PSA bars recovery of diminution-in-value damages. Nothing in the Court's opinion contradicts the established case law holding 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; or (2) the cost of repairing or replacing the property. (Dkt. No. 437) 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 jury should be instructed that it can award only the lesser of cost-of-repair or diminution-in-value damages.

Reply to Third Objection: FHR's objections contradicts the facts of this case. FHR is not suing over "all of the Assets sold under the PSA." FHR is not for example, suing over the European assets or the non-competition agreement. Instead, FHR is suing over the equipment

and property of the Joliet Plant, and thus the value of the equipment and property of the Joliet Plant is what is relevant, as stated in the instruction.

Reply to Fourth Objection: FHR's objections contradict the facts and proofs of this case. FHR claims that the "damages are different" for fraudulent inducement and breach of contract, but (besides punitive damages, which are addressed later in the instructions) FHR has not sought different damages under its fraudulent inducement theory as compared to its breach of contract theory. Indeed, FHR's own jury instructions proposed the same measure of damage for breach of contract and fraudulent inducement. (*Compare* FHR's Proposed Instruction Fraud No. 3 *with* FHR's Proposed Instruction Breach of Warranty Nos. 7A, 7B, 8 (both seeking cost-of-repair and diminution in value)) Thus, given the proofs in this case, there is no need to distinguish between damages for fraud and breach of contract.

FHR's statement that contractual limitations do not apply to fraud is irrelevant to BP Amoco's proposed instruction, which does not discuss contractual limitations on FHR's damages.

