BP Amoco Chemical Company v. Flint Hills Resources, LLC
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Motion Ex. 16

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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.	)	Consolidated Case No. 05 C 5661 Judge Amy J. St. Eve
FLINT HILLS RESOURCES LLC, Third-Party Plaintiff, v. BP CORPORATION NORTH AMERICA INC., Defendant.	)	

BP AMOCO MOTION *IN LIMINE* NO. 5

BP AMOCO CHEMICAL COMPANY AND BP CORPORATION NORTH AMERICA INC.'S MOTION *IN LIMINE* TO EXCLUDE FLINT HILLS RESOURCES LLC'S UNSUPPORTED RULE 1006 SUMMARIES AND RELATED TESTIMONY

FHR has fundamental proof problems with respect to its damages claims for the costs it has incurred and/or in the future allegedly will be required to incur to redress alleged breaches of PSA representations and warranties (hereafter, the "Repair Cost Damage Amounts"). FHR's proposed solution is an attempt to prove Repair Cost Damage Amounts in a "summary" manner that violates basic rules of evidence. Under black letter law, a purported summary under FRE 1006 can be used only if each of the documents underlying the summary is independently admissible. Competent witnesses with personal knowledge must first establish that the underlying documents are in fact admissible and that they are in fact expenditures for Repair Cost Damage Amounts. In other words, a summary of FHR's Repair Cost Damage Amounts cannot be used as a substitute for admissible and competent evidence that there has been a material breach of the relevant PSA representation and warranty, that the Repair Cost Damage

Amounts were proximately caused by the alleged breach, that the Repair Cost Damage Amounts were incurred or will be incurred consistent with FHR's contractual obligations to use commercially reasonable efforts to mitigate its losses, that award of the Repair Cost Damage Amounts will not result in an impermissible betterment or windfall for FHR, or other elements of FHR's claims.

BP Amoco understands that FHR intends to call Matthew Daugherty, an accountant, as a witness to put in various "damages" summaries. But Mr. Daugherty has no personal knowledge of the claims at issue in this case, and he lacks the knowledge necessary to testify about and lay the foundation for the underlying documents on which the summaries are purportedly based—*e.g.*, invoices, work orders, purchase orders and other such materials. BP Amoco objects to the admissibility of any such summary evidence and/or testimony by Mr. Daugherty or any other similar "summary" witness unless and until FHR first has established each element of its claims by competent and admissible evidence. The bases for BP Amoco's objections are as follows:

First, FHR is attempting to avoid having to meet its affirmative burden of proof on its damages claims through the use of unsupported "summary" exhibits and witnesses. *Second,* the purported summaries and any testimony based thereon are inadmissible because they do not satisfy the foundational requirements of Federal Rules of Evidence 1006 and 806(3), and the underlying documents on which they are purportedly based are not themselves admissible (or at least cannot be admitted into evidence based on the testimony of Mr. Daugherty or a similar witness). *Third*, the summaries and their underlying documents are at least in some instances inadmissible because they were prepared in anticipation of litigation, when FHR had an incentive to maximize its damages and to incorporate costs that are not recoverable damages, and should be excluded from evidence under the rule in *Palmer v. Hoffman*, 318 U.S. 109, 114 (1943)—a rule followed still today in this and in other Circuits.

Accordingly, for these and the additional reasons discussed below, FHR's purported damages summaries, as well as the witness testimony based upon or related to them, should be barred and excluded from evidence at trial.[1] At the very least, FHR should not be permitted to

[1] The summaries that BP Amoco has been able to identify thus far are listed on Exhibit 1. The summary witness that FHR has used thus far is Matt Daugherty. By this motion, BP Amoco seeks to exclude and bar Mr. Daugherty's testimony, as well as that of any other summary witness. In addition, BP Amoco seeks to bar and exclude from admission any of FHR's summaries, including those identified above.

offer such summaries unless and until it first has established the admissibility of each of the underlying documents on which these summaries purportedly are based, and has produced all competent and admissible evidence on the elements of its claims.[2]

I. FHR CANNOT SATISFY ITS AFFIRMATIVE BURDEN OF PROVING DAMAGES THROUGH ITS PROPOSED RULE 1006 SUMMARIES AND SUMMARY WITNESSES.

FHR claims that BP Amoco breached contractual representations and warranties in, and fraudulently induced FHR to enter into, the PSA. FHR has the burden of proof on each of its claims; it must satisfy every element to recover any damages. Rule 1006 document summaries (and witnesses sponsoring and interpreting such summaries) are no substitute for individual and specific proof for each element of FHR's claims. Indeed, FHR's summaries and accompanying testimony are inadmissible and should be barred.

A. FHR Has The Affirmative Burden To Prove The *Prima Facie* Elements Of Its Damages Case.

Whether based in contract or fraud, to recover the Repair Cost Damages Amounts it has summarized for a particular claim, FHR must not only prove liability for that claim, but recoverable damages. Thus, for each of its indemnity claims, FHR must first prove the following elements by a preponderance of the evidence: (i) that the asset at issue was not in the condition as represented on the date of the PSA or the date of closing, *Ass'n Benefit Servs., Inc. v. Caremark Rx, Inc.*, 493 F.3d 841, 849 (7th Cir. 2007); *Priebe v. Autobarn, Ltd.*, 240 F.3d 584, 587 (7th Cir. 2001); (ii) that the condition of the asset was a material breach of the representation at issue, *Prima Tek II, L.L.C. v. Klerk's Plastic Indus., B.V.*, 525 F.3d 533, 538-39 (7th Cir. 2008); *Golden v. McDermott, Will & Emery*, 299 Ill. App. 3d 982, 990, 702 N.E.2d 581, 587 (Ill. App. Ct. 1998); (iii) that FHR either already has or is required to perform the repairs or replacements necessary to put the asset at issue in the condition represented in the PSA, *TAS Distrib. Co. 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); (iv) that the asserted breach was the cause-in-fact and proximate cause of any costs FHR incurred or will incur to repair or replace the asset, *Tages, M.D. v. Univision Television Group*, 2005 WL 2736997, at *2 (N.D. Ill. Oct. 20, 2005); *Key v.*

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[2] On June 12, 2009, counsel for BP Amoco (Scott Fowkes and Carrie Karis) met and conferred with counsel for FHR (James Figliulo and Marc Porter) about the subject of this motion *in limine*. FHR confirmed that it intended to offer summary evidence at trial, and BP Amoco informed FHR that BP Amoco would be filing this motion.

Jewel Cos., 176 Ill. App. 3d 91, 95-96, 530 N.E.2d 1061, 1063, (Ill. App. Ct. 1988); (v) that the repairs or replacements were necessary and that FHR's expenses to perform them were reasonable and proportionate to, and at a minimum not greater than, the increased value from performing the repairs (Dkt. No. 437 at pp. 15-17[3]; Illinois Pattern Jury Instruction 30.17); (vi) that an award of any Repair Cost Damage Amounts will not result in an impermissible windfall to FHR or betterment, *Platinum Tech., Inc. v. Fed. Ins. Co.*, 282 F.3d 927, 932 (7th Cir. 2002); *Kohlmeier v. Shelter Ins. Co.*, 170 Ill. App. 3d 643, 654-55, 525 N.E. 2d 94, 102-03 (Ill. App. Ct. 1988); and (vii) that the Repair Cost Damages Amounts were, in fact, expended (or will have to be expended) to repair the precise alleged deficiency that predated the signing of the PSA or closing of the sale, *TAS*, 491 F.3d at 635; *Roboserve*, 78 F.3d at 274.

For its fraud claims, FHR must prove the foregoing damages elements by clear and convincing evidence. In addition, FHR must also prove that: (i) FHR reasonably relied on the represented condition of the particular asset at issue in deciding to enter into the PSA, *Davis v. G.N. Mortgage Corp.*, 396 F.3d 869, 882 (7th Cir. 2005); *Teamsters Local 282 Pension Trust Fund v. Angelos*, 649 F. Supp. 1242, 1249 (N.D. Ill. 1986); (ii) FHR did not know the facts or could not have known the facts regarding the deficiency of any asset at issue, *Davis*, 396 F.3d at 882; *Elipas Enters., Inc. v. Silverstein*, 243 Ill. App. 3d 230, 236, 612 N.E.2d 9, 13 (Ill. App. Ct. 1993); (iii) BP Amoco knew or believed the representation was false with respect to the asset in question, *Tricontinental Indus., Ltd. v. PricewaterhouseCoopers LLP,* 475 F.3d 824, 841 (7th Cir. 2007); and (iv) BP Amoco made the representation as to that asset with the intent to induce FHR to enter into the PSA, *id*.

B. An Unsupported Rule 1006 Summary, And Related Testimony By A Summary Witness Having No Personal Knowledge, Is Inadmissible And Is No Substitute For Affirmative Proof Of Liability, Damages Causation, Damages, And Other Such Merits Issues.

Rather than offer the requisite specific proof of damages by a witness with knowledge and who can lay the necessary foundation for the business records exception to the hearsay rule, FHR instead intends to offer summaries purportedly under Federal Rule of Evidence 1006, as

[3] BP Amoco preserves its argument that the correct measure of damages is the lesser of (i) the diminution in value to the asset in question proximately caused by the alleged breach or (ii) the cost expected to remedy the alleged breach. *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 908, 911 (7th Cir. 1999).

well as testimony interpreting these "summaries." Thus, FHR apparently seeks to use summary evidence and witnesses to prove it has been damaged and the amount of that damage. This proposed use is improper.

1. Testimony By Matthew Daugherty Or Others Without Personal Knowledge Cannot Meet FHR's Affirmative Burden Of Proof.

The Court should preclude from admission at trial the damages testimony of FHR's purported summary witness, Mr. Daugherty, or any other summary witness, who lacks personal knowledge about FHR's claimed damages. "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602; *see also Kaczmarek v. Allied Chem. Corp.,* 836 F.2d 1055, 1060-61 (7th Cir. 1987) (noting that a witness must testify from his or her *own* personal knowledge; a witness cannot offer contents of a hearsay statement as his/her own personal knowledge); *Schultz v. Thomas,* 832 F.2d 108, 111 (7th Cir. 1987) (excluding testimony for lack of personal knowledge because declarant "was not a witness to the events in question and therefore could not properly comment…"); *see also Alston v. King,* 231 F.3d 383, 387-88 (7th Cir. 2000) (excluding testimony of witness for lack of foundation, speculation, and improper narrative); *JamSports & Entmt., LLC v. Paradama Prods., Inc.,* 2004 WL 2966947, at *3 (N.D. Ill. Nov. 24, 2004) (excluding testimony for lack of foundation).

Furthermore, if a witness intends to introduce into evidence a Rule 1006 summary, the witness must have personal knowledge not only concerning the preparation of the summary, but also personal knowledge of the underlying documents being summarized, their preparation, and the events described therein unless another witness has already testified to such matters and established the admissibility of and an appropriate evidentiary foundation for each of the underlying documents. *See In re S.N.A. Nut Co.*, 210 B.R. 140, 145-46 (Bankr. N.D. Ill. 1997) (summary exhibit was inadmissible where proponent of summary "had no personal knowledge as to the accuracy of any of the figures contained in" the summary and had no "actual knowledge of the data preparation"; *Auto Indus. Supplier Employee Stock Ownership Plan (ESOP) v. Snapp Sys., Inc.*, 2008 WL 5383372, at *5-6 (E.D. Mich. Dec. 23, 2008) (excluding a summary witness who had no knowledge of the information contained in the summaries and underlying documents, noting that the "summary witness must also be able to 'identify the source of all of the information on the chart' and 'explain how all of the dollar figures were derived'" (citing *United States v. Lemire*, 720 F.2d 1327, 1349 (D.C. Cir. 1983)); *see also Peat, Inc. v. Vanguard*

Research, Inc., 378 F.3d 1154, 1160 (11th Cir. 2004) (noting that summaries containing the unsworn testimony of out-of-court witnesses are inadmissible (citing *United States v. Goss*, 650 F.2d 1336, 1344 n.5 (5th Cir. 1981)); *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1260 (9th Cir. 1984) (Rule 1006 summary cannot be based on sources not available for cross examination); *Architectural Iron Workers v. United Contractors, Inc.*, 46 F. Supp. 2d 769, 772-73 (N.D. Ill. 1999) (barring use of summary charts where proponent failed to lay proper foundation).

FHR's summaries are supposedly based on work orders, project orders, purchase orders, and vouchers. One example of such a summary is attached as Exhibit 2. The summaries list identifying numbers for these documents, and a total dollar figure for expenses incurred with each vendor, but nothing more. (*Id.*) Mr. Daugherty has previously submitted an affidavit claiming that FHR sought to track spending through "cost collectors" that were assigned to track spending. Mr. Daugherty did not determine whether any particular invoice or transaction was associated with a particular claim. (Ex. 3, 2/18/09 Affidavit of Matt Daugherty ("Daugherty Aff.") ¶ 8) Instead, *other* unknown employees purportedly decided based upon unknown reasons and criteria whether to associate any particular cost with an FHR claim: "The vendor invoices, labor and warehouse transactions that are reflected in the spending spreadsheets *for each claim were assigned a cost collector by Flint Hills employees involved in the work* at the plant and entered into the Flint Hills accounting system based on those assignments." (*Id.* (emphasis added)) Mr. Daugherty did not independently verify these decisions, but simply created spreadsheets purporting to summarize the financial consequences of decisions made by others upon bases and for reasons unknown. (*Id.* ¶¶ 6-7)

Moreover, BP Amoco's damages expert, Mr. Craig Elson and his team, examined many of these underlying invoices and other documents and found that they frequently did *not* support the damages claimed in the summaries. (Ex. 4, Elson Expert Report, App. A-R) To give a handful of examples, FHR seeks to recover:

- Almost $270,000 under a work order supposedly related to Claim 50 that references "Upgrades" to the wastewater feed tanks (*id.* App. D at 8);
- Almost $500,000 for invoices supposedly related to Claim 50 that are too vague to allow a determination as to whether the services were for remedial activities (*id.* at 9);
- Almost $800,000 under invoices supposedly related to Claim 50 that incorporate routine maintenance activities (*id.* at 9-10);

- Almost $1,000,000 under a work order supposedly related to Claim 70 that reflects preparations of a wastewater aeration basin for a routine inspection (*id.* App. E at 2);
- Amounts allocated to each claim based on FHR warehouse materials, FHR direct materials, internal maintenance, or internal journal entries, for which FHR has not provided sufficient detail to allow a determination as to whether these costs are properly allocated to FHR's claims (*e.g.*, *id.* App. C at 4,6; App. D at 7, 12 App. E at 6, 8).

That so many of the underlying documents do not accurately support the summaries prepared by FHR confirms that the underlying evidence is not only inaccurate, but that BP Amoco is entitled to cross-examine witnesses with personal knowledge about the underlying invoices, work orders, and purchase orders to establish that they are not recoverable damages.

But Mr. Daugherty, who relied on the decisions of other FHR personnel, does not have that first-hand personal knowledge. As a result, Mr. Daugherty cannot testify as to whether the amounts being summarized relate to the claims in this case, whether those amounts were attributable to a breach of the PSA's representation, or whether the claimed expenses are reasonable and necessary and incurred (or required to be incurred) consistent with FHR's contractual obligations to use commercially reasonable efforts to mitigate indemnifiable losses (PSA § 13.5(b) at pp. 119-20). He has no personal knowledge of the claims or claims documents at issue. *See Kaczmarek,* 836 F.2d at 1060-61. For example, Mr. Daugherty does not have any personal knowledge of, and thus cannot testify about, what work was actually performed (as opposed to invoiced) by each vendor, whether that work was related to an asset not being in the represented condition on the relevant date, whether that work was necessary to bring the asset into conformity with the PSA's representations, or whether the costs of that work were reasonable. Nor can he testify about whether the expense of repairs was proportionate to, and at a minimum not greater than, the increased value from performing the repairs; similarly, he has no idea whether the repairs or replacements constituted a betterment. Much less can he testify about whether the asset not being in the represented condition was either the cause-in-fact or proximate cause of any repair or replacement of the asset.

Instead, Mr. Daugherty's "knowledge" related to the summary exhibits is based wholly on hearsay. And the summary exhibits themselves are simply aggregations of multiple hearsay. Thus, Mr. Daugherty knows only that some other unidentified FHR employee for unknown reasons based upon unknown criteria decided to associate a particular cost with a particular claim, without knowing why or having any basis to verify whether that association was accurate. Mr. Daugherty's testimony offers nothing helpful or admissible to the trier of fact on FHR's

damages claim. His testimony, or the testimony of any similar summary witness, should therefore be excluded.

2. "Summary" evidence charts cannot meet FHR's affirmative burden of proof.

The Court also should bar admission at trial of FHR's purported summary exhibits. Missing from the summaries or their underlying documentation—which is inadmissible hearsay unless a proper foundation is established as described below—is support for the elements of FHR's damages case or the reasonableness thereof. All the summaries provide are lists of information, such as FHR's internal identifying numbers for work orders, project orders, purchase orders, and vouchers, as well as a total for each vendor. (*E.g.*, Ex. 2) The summaries do not provide any evidence that these alleged costs are related to each claim, that these alleged costs result from the equipment not being as represented in the PSA, that the alleged PSA breaches are the cause-in-fact and proximate cause of the costs, that the costs were either reasonable or necessary to repair or replace the equipment, or any of the other elements that FHR must establish.

For the elements of its damages claim, FHR must offer individual and specific admissible evidence, not attempt to avoid these requirements by relying on mere summaries. Admitting these summaries in place of the required evidence would violate the Federal Rules of Evidence and deprive BP Amoco of its due process right of cross examination. *United States v. Radseck*, 718 F.2d 233, 237 (7th Cir. 1983) (holding that a competent and knowledgeable witness must be available for cross examination and to proffer summary); *Paddack*, 745 F.2d at 1260 (noting that an audit report should not have been admitted under Rule 1006 because it was based on information derived from sources not subject to cross examination); *Peat, Inc.*, 378 F.3d at 1160-61 (noting that where summaries contain the testimony of out-of-court witnesses not subject to cross examination they are inadmissible). BP Amoco is entitled to explore—through FHR witnesses with personal knowledge about the underlying documents—whether the requirements for each document's admissibility have been satisfied, and whether and how any costs relate to an alleged PSA breach, why those costs are necessary, whether the costs are reasonable, and each of the other elements FHR must prove in order to recover damages.

In a typical case, for example involving a damaged or broken piece of equipment, the plaintiff would present witnesses who had personal knowledge and could testify: (i) that the defendant caused the damaged or broken equipment; (ii) that the witness personally authorized

and/or supervised the repairs; (iii) that the repairs were actually done, and were necessary to restore (but not better) the damaged equipment; (iv) that the repairs cost "x" dollars; and (v) that the witness or party actually paid for the repairs in the amount of "x" dollars. But the problem here, in a nutshell, is that FHR does not have competent admissible evidence to prove each of the foregoing items for each claim. Instead, FHR seeks to prove its damages by having Mr. Daughtery (or a similar summary witness) take the stand to testify about a putative Rule 1006 document that purports to summarize underlying documents the witness has no knowledge of, about equipment and repairs the witness has no knowledge of, and which documents in turn are hearsay for which no knowledgeable witness will appear and lay the necessary foundations. That is simply not a proper evidence summary, and not a substitute for the necessary proof of damages at trial. *See Needham v. White Laboratories, Inc.,* 639 F.2d 394, 403 (7th Cir. 1981) (proponent of summary must establish admissibility of all underlying documents); *Radseck,* 718 F.2d at 237 (competent and knowledgeable witness must be available for cross examination and to proffer summary); *In re S.N.A. Nut Co.,* 210 B.R. at 145-46 (summary exhibit was inadmissible where proponent of summary "had no personal knowledge as to the accuracy of any of the figures contained in" the summary and had no "actual knowledge of the data preparation"; *see also United States v. Given*, 164 F.3d 389, 394 (7th Cir. 1999) (district court's admission of invoices under business records exception was an abuse of discretion because the invoices were inadmissible hearsay and lacked foundation and the witness was unfamiliar with the preparation of the invoices and so could not provide adequate foundation); *Lomax Transp. Co. v. United States,* 183 F.2d 331, 334 (9th Cir. 1950) (noting that a claim certificate is legally incompetent proof to establish damages; aside from hearsay problems, an "ex parte statement of claim" is not itself "evidence" of damage).

II. FHR'S PURPORTED SUMMARY EXHIBITS AND WITNESSES DO NOT SATISFY THE REQUIREMENTS FOR ADMISSIBILITY UNDER FRE 1006

The summaries FHR intends to introduce into evidence are inadmissible. Rule 1006 requires *first*, that all documents underlying the summary be independently admissible, accurate, and made available to the opponent. *See Needham,* 639 F.2d at 403. S*econd,* the person who prepared the summary or some other person competent to testify about it should be made available for cross examination. *See Radseck,* 718 F.2d at 237-38. FHR fails to meet these foundational requirements of Rule 1006.

A. FHR's Summaries Are Inadmissible Because The Documents Underlying The Summaries Are Inadmissible Hearsay And Multiple Hearsay.

Hearsay is inadmissible unless it qualifies for admission under an exception to the rule against hearsay. Fed. R. Evid. 802. The documents underlying FHR's purported summaries contain multiple, inadmissible hearsay. For example, one level of hearsay is the documents themselves, which are statements made outside of court that FHR seeks to have admitted to prove the truth of the matter asserted, namely that FHR actually spent the amounts on the repairs listed in the document. Fed. R. Evid. 801(c). Another level of hearsay is the decision by "Flint Hills employees involved in the work at the plant" (Ex. 3, Daugherty Aff. ¶ 8) that a particular invoice or order should be associated with a claim—that is, that the document and expenditure were caused by the need to bring the damaged asset into the condition as represented by the PSA. Yet another level of hearsay is that the documents are based on information from third parties, such as vendors who will not testify in Court. The FHR document "summaries" are built upon consolidations of multiple, inadmissible hearsay.

FHR presumably will assert that the documents underlying its purported "summaries" are admissible business records pursuant to FRE 803(6). But without proper foundation, invoices from third parties, work orders, purchase orders, or similar documents do not qualify as business records and should be excluded as hearsay. *See Nohcra Commc'ns, Inc. v. AM Commc'ns, Inc.*, 909 F.2d 1007, 1011-12 (7th Cir. 1990) (court vacated damages judgment insofar as it was based upon invoices and work reports that were not approved by the party against whom damages were sought, and thus were inadmissible hearsay); *United States v. Price*, 516 F.3d 597, 605 (7th Cir. 2008) (holding that the district court erred in admitting a car dealer's purchase orders, which were insufficiently trustworthy to qualify as business records); *Given*, 164 F.3d at 394 (district court's admission of invoices under business records exception was an abuse of discretion where the invoices could not qualify as business records because the sponsoring witness was unfamiliar with the preparation of the invoices); *Begler v. Maxwell*, 2008 WL 345610, at *7 (N.D. Ill. Feb. 5, 2008) (upholding exclusion of invoices and pay stubs as lacking sufficient foundation to constitute business records); *FM Indus., Inc. v. Citicorp Credit Serv's, Inc.*, 2008 WL 717792, at *6 (N.D. Ill. Mar. 17, 2008) (invoices submitted for proof of damages are inadmissible hearsay without proper foundation).

FHR has the burden of actually proving that each of the underlying documents falls within the business records exception to the hearsay rule. *See Needham,* 639 F.2d at 403; *Peat,*

Inc., 378 F.3d at 1160-61; *Paddack,* 745 F.2d at 1260. For the documents underlying the purported summaries to qualify for admission under 803(6), FHR must—through a witness with personal knowledge—affirmatively prove that *each* document was: (i) created contemporaneously with the event described therein, (ii) prepared by someone with personal knowledge of the events described in the document, and having the duty to regularly prepare such a document, (iii) prepared in the course of a regularly conducted business activity, and (iv) that it was the regular practice of the business to create such a document. Fed. R. Evid. 803(6); *see also Datamatic Servs., Inc. v. United States*, 909 F.2d 1029 (7th Cir. 1990); *State Farm Mut. Auto. Ins. Co. v. Abrams*, 2000 WL 574466, at *3 (N.D. Ill. May 11, 2000); *Sportmart, Inc. v. Spirit Mfg., Inc.*, 2000 WL 343467, at *3 (N.D. Ill. Mar. 30, 2000). A *single* inadmissible underlying document precludes admission of the entire summary. *See Judson Atkinson Candies, Inc., v. Latini-Hohberger Dhimantec,* 529 F.3d 371, 382 (7th Cir. 2008) (excluding 1006 summary because proponent did not "establish the admissibility of the records on which the summaries were allegedly based or authenticate the summaries in any way," noting that "[t]he admission of summary under Fed. R. Evid. 1006 requires 'a proper foundation as to the admissibility of the material that is summarized and…[a showing] that the summary is accurate'") (citing *United States v. Briscoe,* 896 F.2d 1476, 1495 (7th Cir. 1990)); *Needham,* 639 F.2d at 403 (holding that a summary was inadmissible because the proponent failed to show that all of the underlying materials were admissible).

FHR has not attempted to establish that *each* of the documents underlying its "summaries" was created at or near the time of the event in question, by someone with personal knowledge having the regular responsibility for preparation, and in the ordinary course of a regularly conducted business activity. Absent such a threshold showing, the underlying documents remain inadmissible hearsay, and a summary based on such inadmissible hearsay documents is itself inadmissible under Rule 1006. *See Weir v. Crown Equip. Corp,* 217 F.3d 453, 458-59 (7th Cir. 2000) (excluding documents alleged to be business records as hearsay for failing to lay the proper foundation required by Rule 803(6)); *Collins v. Kibort,* 143 F.3d 331, 337-38 (7th Cir. 1998) (excluding alleged business records for lack of foundation); *Campbell v. Nordco Prods.*, 629 F.2d 1258, 1264 (7th Cir. 1980) (affirming trial court's exclusion of evidence as not within the FRE 803(6) exception for plaintiff's failure to lay proper foundation).

B. FHR's Purported Summary Witnesses Cannot Properly Testify About The Contents Of The Summaries.

As a foundational prerequisite to a Rule 1006 summary, FHR must also be able to present for cross examination a competent witness with personal knowledge of the events described in the purported summaries. *See Radseck,* 718 F.2d at 237-38. Here, Mr. Daugherty has already admitted that he lacks the personal knowledge required for the summaries to be admissible. Unnamed "Flint Hills employees involved in the work at the plant" are the ones who decided whether and on what basis any invoice or other transaction should be associated with a particular claim. (Ex. 3, Daugherty Aff. ¶ 8) Because FHR does not appear to have any intent to put a witness with personal knowledge on the stand who is competent to testify about each of the documents underlying the summaries, the summaries must be excluded. *See Needham,* 639 F.2d at 403; *In re S.N.A. Nut Co.,* 210 B.R. at 145-46.

III. FHR'S SUMMARIES ARE INADMISSIBLE UNDER *PALMER v. HOFFMAN.*

Last, the summaries—which purport to constitute FHR's proof of actually incurred damages—are inadmissible because FHR's interest in maximizing its damages for litigation renders the summaries unreliable. Indeed, as explained above, a review by Mr. Elson and his team found numerous examples where FHR is including in the summaries alleged damages that are not supported by the underlying documents. Such documents, the Supreme Court, this Circuit, and other Courts have held, are inadmissible because they are inherently untrustworthy and unreliable. *See Palmer v. Hoffman,* 318 U.S. 109, 114 (1943) (holding that documents prepared in anticipation of litigation were not business records and lacked trustworthiness); *AMPAT/Midwest, Inc. v. Ill. Tool Works, Inc.,* 896 F.2d 1035, 1044-45 (7th Cir. 1990) (noting that summaries of records that were themselves prepared in anticipation of litigation are inadmissible under FRE 1006 and FRE 803(6) because litigation is not a regularly conducted business activity and the underlying documents prepared for litigation are "dripping with motivations to misrepresent"); *Moffett v. McCauley*, 724 F.2d 581, 584 n.1 (7th Cir. 1984) ("ordinarily, courts refuse to admit reports made in preparation for litigation, holding that they lack sufficient guarantees of trustworthiness to be excepted from the hearsay rule because they are not made in the regular course of business"); *Larson v. DeVilbiss Co.,* 454 F.2d 461, 464 (7th Cir. 1971) (documents prepared two days after events described therein held inherently untrustworthy because of litigation possibility); *Paddack,* 745 F.2d at 1258-59 (audit reports inadmissible because prepared for purposes of litigation).

Similar summaries were found to be untrustworthy in *Sportmart, Inc., v. Spirit Mfg., Inc.,* 2000 WL 343467, at *3-4 (N.D.Ill. Mar. 30, 2000). In *Sportmart*, the plaintiffs alleged that the defendant had breached express and implied warranties in a contract because the defendant had delivered defective treadmills to the plaintiff. *Id.* at *1. The court granted summary judgment to the plaintiff on liability, and the plaintiff then moved for summary judgment on damages as well. *Id.* at *2. To support its damages, the plaintiff relied on summaries purporting to show the number of treadmills that plaintiff had ordered from defendant. *Id.* at *2-3.

As Mr. Elson's analysis found here, the court in *Sportmart* found various discrepancies in the summaries. *Id.* at *3. The court in *Sportmart* thus excluded the summaries for a number of different reasons, including "that the summary chart was compiled for purposes of this litigation" and was not prepared as a normal part of plaintiff's business or near the time the costs were incurred. *Id.* at *3. Notably, as FHR does here, the *Sportmart* plaintiff attempted to use one of its accountants to introduce the summary into evidence. The court held that knowledge of the underlying fact was "vital to verifying a claim for an amount of damages;" the accountant's lack of such knowledge further demonstrated that the summaries violated Rule 1006. *Id.* at *4.

These same reasons apply here and confirm that FHR's summaries regarding damages are not admissible. The summaries were prepared in anticipation of litigation and summarize underlying records that appear (at least in part) to have been prepared in anticipation of litigation—when FHR had every incentive to maximize the damages its seeks. Mr. Elson's review found numerous instances where FHR had sought to inflate its damages in the summaries by including as "damages" costs that are not related to its claims. FHR intends to have an accountant with no knowledge of the underlying claims or why particular costs were associated with particular claims testify about these summaries. These summaries fail the requirements of Rule 1006 and *Palmer v. Hoffman*.[4] Therefore, the summaries and any testimony about those summaries should be excluded. *See also In re S.M. Acquisition Co.,* 296 B.R. 452, 473-74 (Bankr. N.D. Ill. 2003) (noting that damages evidence prepared after commencement of litigation and offered through a witness without sufficient knowledge "fails even minimum standards of

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[4] *Sportmart* also explains the result in *AMPAT/Midwest*. 2000 WL 343467, at *4. In *AMPAT/Midwest*, the summaries were admitted because they "were prepared by a witness qualified to testify as an expert under Federal Rule of Evidence 703 and because the summaries only represented one aspect of the damages." *Id.* By contrast, here, as in *Sportmart*, the summaries constitute the bulk of the evidence on damages and the sponsor is a lay witness who is not knowledgeable about the documents underlying the summary. *Id.*

competency”); *Peat, Inc.,* 378 F.3d at 1160-61 (noting inadmissibility and inherent untrustworthiness of Rule 1006 summary where summary and many underlying documents were created after the commencement of the litigation, in connection with the litigation, for use in the litigation, and therefore not in the ordinary course of business); *Noble v. Ala. Dept. of Envtl. Mgmt.,* 872 F.2d 361, 366 (11th Cir. 1989) (noting that documents prepared for use in litigation, as opposed to being produced in the ordinary course, indicate a “lack of trustworthiness”; excluding documents for failure to lay a foundation under 803(6) where witness had no personal knowledge of the circumstances under which the documents were prepared and compiled).

CONCLUSION

The Rule 1006 “summaries” that FHR intends to use at trial are inadmissible multiple hearsay, lack any of the foundational requirements of Rule 602, 803(6), and 1006, are inherently untrustworthy and violate *Palmer v. Hoffman*. FHR’s purported summary witness has no personal knowledge of the documents or events underlying the summaries. FHR has not attempted to lay any foundation for the admission of its purported document summaries or witnesses. Instead, FHR seeks to have admitted a consolidation of unsupported multiple hearsay assertions in an attempt to prove the elements of its damages claims—contrary to the Federal Rules of Evidence.

Wherefore, BP Amoco Chemical Company and BP Corporation North America Inc. respectfully request that this Court exclude all purported summaries of FHR’s alleged damages, as well as any testimony related to those purported summaries, including but not limited to barring the testimony of Mr. Daugherty, as well as excluding the summaries listed in Exhibit No. 1 and any similar damages summaries.

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Respectfully submitted,

By: /s/ R. Chris Heck

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CERTIFICATE OF SERVICE

I hereby certify that July 1, 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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