

## **Motion Ex. 17**

**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.	)	
<hr/>		
FLINT HILLS RESOURCES LLC,	)	
	)	
Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
BP CORPORATION NORTH AMERICA INC.,	)	
	)	
Defendant.	)	
<hr/>		

**BP AMOCO’S RESPONSE TO FHR’S MOTION *IN LIMINE* NO. 6**

**BP AMOCO CHEMICAL COMPANY AND BP CORPORATION NORTH AMERICA INC.’S RESPONSE TO FHR’S MOTION REGARDING ADMISSIBILITY OF SPENDING SPREADSHEETS**

FHR’s motion simply asks the Court to enforce the Federal Rules of Evidence, while highlighting the reasons why FHR’s damages spreadsheets and other summary evidence is inadmissible. FHR seeks an order finding that its damages spreadsheets are “admissible into evidence under Federal Rule of Evidence 1006, *subject to Flint Hills laying a proper foundation at trial.*” (FHR Mot. at 1 (emphasis added); *see also id.* at 6) But whether FHR can lay a proper foundation for its damages spreadsheets is the question at issue. For the reasons discussed in BP Amoco’s Motion *in Limine* No. 5, FHR has not and cannot establish the foundational prerequisites to have the damages spreadsheets entered into evidence. (Dkt. No. 603) Indeed, FHR’s motion only confirms that the spreadsheets are based on documents that are hearsay and are otherwise inadmissible, and therefore the spreadsheets are likewise inadmissible.

FHR's motion should be denied for the following reasons, which also are additional reasons to grant BP Amoco's Motion *in Limine* No. 5 seeking to exclude FHR's spreadsheets and other summary evidence (Dkt. No. 603):

**First**, FHR's motion violates the purpose of a motion *in limine*, which is to allow the trial court to rule the admissibility of evidence before trial. FHR's motion does not allow the Court to decide on the admissibility of any evidence, but instead reserves the question of whether FHR can lay a proper foundation for trial. Because the affirmative question of whether to admit evidence must be determined during trial based upon foundational and other requirements, FHR's motion is not a proper motion *in limine* and should be denied.

**Second**, FHR's motion confirms that it cannot set a proper evidentiary foundation for the damages spreadsheets. A party must be able to lay foundation for each document that is summarized in a Rule 1006 summary in order for the summary to be admissible. FHR's motion confirms that the one witness FHR identifies, Matthew Daugherty, does not have the knowledge to lay this foundation. Moreover, both FHR and Mr. Daugherty admit that the summaries are based on hearsay documents such as invoices (or repair summaries) from third parties, among other inadmissible documents. Because these underlying documents are inadmissible, the summaries are inadmissible as well.

**I. FHR'S MOTION IS IMPROPER BECAUSE IT DOES NOT RESOLVE THE ADMISSIBILITY OF ANY EVIDENCE.**

"The purpose of a motion *in limine* is to allow the trial court to rule on the relevance and admissibility of evidence before it is offered at trial." *Moore v. Ill. Dep't of Corrections*, 2009 WL 1754630, at \*1 (S.D. Ill. June 19, 2009); *see also Wilson v. Williams*, 182 F.3d 562, 566 (7th Cir. 1999) ("Motions *in limine* are designed to avoid the delay and occasional prejudice caused by objections and offers of proof at trial; they are more useful if they can serve these purposes, which they do only if objections (and offers of proof) can be foregone safely."). FHR's motion violates this basic purpose, and should be denied for that reason.

FHR's motion would not determine the relevance or admissibility of any evidence prior to trial. Instead, FHR expressly seeks an advisory, conditional ruling by the Court that is "subject to Flint Hills laying a proper foundation at trial." (FHR Mot. at 1 (emphasis added); *see also id.* at 6) FHR states that its counsel conferred with counsel for BP Amoco about the summaries and that BP Amoco "confirmed that it intended to object to the introduction of the Spending Spreadsheets into evidence at trial." (FHR Mot. at 6) But FHR omits one of the

grounds for BP Amoco's objection: lack of foundation. As described in detail in BP Amoco Motion *in Limine* No. 5 and also discussed below, a key problem with FHR's damages spreadsheets is a lack of foundation. Among other problems, FHR cannot establish that each of the underlying documents such as "work orders, vendors invoices, cancelled checks, bank statements and purchase orders" are admissible (FHR Mot. at 4), and therefore FHR cannot establish that the summaries of those documents are admissible. See *Needham v. White Labs., Inc.*, 639 F.2d 394, 403 (7th Cir. 1981) (proponent of summary must establish admissibility of all underlying documents); *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 a 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'").

Thus, FHR's motion would not provide any of the benefits of a motion *in limine*. It would not allow FHR to avoid presenting evidence about the underlying documents. It would not obviate FHR's need to have witnesses establish foundation at trial. It would not alleviate the need for BP Amoco to object to the summaries and underlying documents and for the parties to argue over the admissibility of the summaries and those documents during trial. Instead, the parties will need to introduce the same evidence, make the same arguments, and have the Court rule on the same issues even if the relief requested in FHR's motion were granted. There are no efficiencies to be gained from FHR's motion — FHR will still need to prove all of the critical prerequisites for Rule 1006 summaries during trial.

In sum, FHR's motion amounts to nothing more than an advisory opinion request that *if* it complies with the Federal Rules of Evidence, *then* it be allowed to introduce the damages spreadsheets into evidence. Such motions are improper because they do not resolve the admissibility of evidence. See *Berardi v. Vill. of Sauget*, 2007 WL 433542, at \*1 (S.D. Ill. Feb. 6, 2007) ("If the Federal Rules of Evidence supply the answer for admissibility or non-admissibility of a particular piece of evidence, then a motion *in limine* regarding the same piece of evidence is redundant and unnecessary. The Court frequently is confronted with motions *in limine* which are nothing more than the Federal Rules of Evidence in disguise--sometimes thinly veiled or not veiled at all."). Therefore, FHR's Motion should be denied.

**II. FHR’S MOTION CONFIRMS THAT THE DAMAGES SPREADSHEETS ARE BASED ON INADMISSIBLE DOCUMENTS AND SHOULD BE EXCLUDED.**

BP Amoco explained in some detail why FHR’s damages spreadsheets should be excluded for lack of foundation in its Motion *in Limine* No. 5.<sup>1</sup> (Dkt. No. 603) An unsupported Rule 1006 summary and related testimony is not admissible and cannot be used to affirmatively prove FHR’s damages; FHR’s summary is inadmissible because it is based on documents containing multiple levels of hearsay; and FHR’s summaries violate the rule set forth by the Supreme Court in *Palmer v. Hoffman*, 318 U.S. 109, 114 (1943). Instead of establishing a basis for admitting the damages spreadsheets, FHR’s motion further confirms that the spreadsheets are unsupported and inadmissible.

**A. FHR Misstates Its Recoverable Damages.**

As an initial matter, FHR incorrectly claims that its diminution-in-value damages are not a “lesser of” limit to the cost of repair damages.” (FHR Mot. at 2) This Court has previously stated that under “Illinois law, cost-of-repair damages cannot be recovered when they are unreasonably disproportionate to the benefit of the repaired assets received by the non-breaching party.” (Dkt. No. 437 at 15-17) Moreover, the proper measure of damages for breach of a warranty relating to fixtures on real property used for commercial purposes is generally the lesser of: (1) the diminution in fair market value; or (2) the costs of restoring the property or equipment to its warranted condition. The Seventh Circuit has held, in a case involved 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)<sup>2</sup> Thus, if FHR proves its case, it only should be able to recover the lesser of diminution in value or costs of repairs.

---

<sup>1</sup> This issue also was discussed briefly with the Court during one of the *Daubert* hearings earlier this week—such as when Mr. Godfrey gave the example of what foundation would be necessary to prove repair costs for an allegedly damaged pipe.

<sup>2</sup> 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  
(Continued...)

**B. FHR's Witnesses Cannot Lay The Necessary Foundation To Admit The Damages Spreadsheets.**

FHR has yet to explain how its damages spreadsheets are admissible evidence of cost-of-repair damages. As BP Amoco explained in its Motion *in Limine* No. 5 (Dkt. 603 at 8-9), FHR must establish the admissibility of each document underlying the summary. *See Needham*, 639 F.2d at 403; *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). In addition, the sponsor of a Rule 1006 summary must have 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)).<sup>3</sup>

---

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).

<sup>3</sup> *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 Local No. 63 Welfare Fund 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 intends to have Matthew Daugherty, a controller who created the spreadsheets, attempt to enter them into evidence (FHR Mot. at 3, 5), but Mr. Daugherty lacks the personal knowledge to lay a proper foundation for the summaries. While Mr. Daugherty claims to have personal knowledge of Koch Industries' and FHR's accounting systems (*id.* Ex. 2 ¶ 5), he does not contend that he has personal knowledge of the underlying documents or FHR's claims. Therefore, he cannot establish the admissibility of the underlying documents, which is essential for the damages spreadsheets to be admitted.

Moreover, Mr. Daugherty does not claim to have knowledge of why any particular invoice, work order, or other document is associated with a particular claim in this case. (*Id.* Ex. 2) Indeed, Mr. Daugherty repeatedly has admitted that the decision as to whether a particular invoice, work order, or other document is associated with a particular claim was made by others "at the plant involved in the repair of the equipment and other assets at the Joliet Plant." (*Id.* Ex. 2 ¶ 6; *see also id.* Ex. 2 ¶¶ 8, 10) Thus, not only is Mr. Daugherty unable to lay the foundation to admit the underlying documents, but he cannot testify as to why any particular document is associated with a particular claim.

In an effort to fill in these gaps, FHR states that it "intends to call as witnesses at trial certain managers, supervisors and Joliet plant employees." (FHR Mot. at 5-6) But unlike Mr. Daugherty, who submitted an affidavit in support of FHR's Motion, FHR has not attached an affidavit from any of these intended witnesses. And even if such affidavits were attached, BP Amoco would be entitled to cross-examine the witnesses at trial. *See 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 v. Dave Christensen, Inc.*, 745 F.2d 1254, 1260 (9th Cir. 1984) (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. v. Vanguard Research, Inc.*, 378 F.3d 1154, 1160-61 (11th Cir. 2004) (noting that where summaries contain the testimony of out-of-court witnesses not subject to cross examination they are inadmissible).

FHR has done nothing to show that these witnesses have the personal knowledge or other prerequisites to lay a foundation for each of the documents underlying the damages spreadsheets, to explain how each document is connected to a claim, or to satisfy the other requirements necessary for the damages spreadsheets to be admissible. Indeed, FHR does not even identify

these purported witnesses. Because FHR does not attempt to demonstrate that the damages spreadsheets are admissible as Rule 1006 summaries, its motion should be denied.

**C. FHR's Motion Confirms That Its Spreadsheets Rely And Are Based On Hearsay Documents And Thus Are Inadmissible.**

Finally, FHR's motion admits that the spreadsheets rely on inadmissible hearsay documents, and thus the spreadsheets themselves should be excluded. In particular, FHR admits that the documents upon which the summaries are based include third party "vendor invoices." In his affidavit, Mr. Daugherty states under oath that the spreadsheets "provide back-up information for the spending, such as vendor invoices." (FHR Mot. Ex. 2 ¶ 8; *see also* FHR Mot. at 3, 4) While FHR suggests without support that such documents are "business records" (FHR Mot. at 3, 4), the Seventh Circuit and courts in this district repeatedly have held that third-party invoices are not business records and must be excluded as hearsay. *See 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); *Nohera 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); *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).

Moreover, FHR has not explained how it can possibly establish that these documents, created by third parties, satisfy the requirements of the business records exception. 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 Rule 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, 1032 (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).

FHR's witnesses do not have personal knowledge of whether a third party vendor created the document contemporaneously with the event, that someone at the third party vendor with personal knowledge prepared the invoice, or the other requirements of the business records exception, and thus cannot lay the foundation for these documents to be admitted into evidence. Because the damages spreadsheets rely on hearsay documents and FHR cannot establish an exception to the hearsay rule for those documents, the spreadsheets are inadmissible as Rule 1006 summaries.

Finally, FHR has suggested that BP Amoco is imposing an unreasonable burden upon FHR. Not true; the burden is FHR's under the Federal Rules of Evidence. There is a reason for those rules of evidence—which among other things is to prevent untrustworthy evidence from being admitted, and to preserve the right of a party, here BP Amoco, to cross examine a witness having personal knowledge. That FHR, for its own efficiency purposes, would like to simply submit damages spreadsheets with a witness lacking personal knowledge about the contents of the underlying documents cannot relieve FHR from meeting its burdens under the Federal Rules of Evidence. This is particularly true where under FHR's approach, BP Amoco's right to cross examine will be impermissibly infringed, and as a result, untrustworthy evidence would be admitted.

### CONCLUSION

FHR's Motion *in Limine* No. 6 is improper because it does not ask for a determination on the admissibility of the spreadsheets, but instead leaves a key question—whether FHR can lay the proper foundation for the spreadsheets—to be determined at trial. Moreover, the evidence establishes that the spreadsheets rely on hearsay documents, and thus FHR cannot lay an appropriate foundation and the spreadsheets should be excluded. FHR's motion should be denied, and the Court should grant BP Amoco's Motion in Limine No. 5 (Dkt. No. 603) to exclude the damages spreadsheets.

Dated: July 10, 2009

Respectfully submitted,

William L. Patberg (admitted *pro hac vice*)  
SHUMAKER, LOOP, & KENDRICK, LLP  
1000 Jackson Street  
Toledo, OH 43624  
(419) 321-1434

By: /s/ R. Chris Heck  
Richard C. Godfrey, P.C. (ARDC #3124358)  
Scott W. Fowkes, P.C. (ARDC #6199265)  
R. Chris Heck (ARDC #6273695)  
KIRKLAND & ELLIS LLP  
300 North LaSalle Street  
Chicago, IL 60654  
(312) 862-2000

*Attorneys for BP Amoco Chemical Company  
and BP Corporation North America*

**CERTIFICATE OF SERVICE**

I hereby certify that on July 10, 2009, I caused a true and correct copy of the foregoing to be served electronically via the CM/ECF system on the following:

James Figliulo, Esq.  
Ryan P. Stiles, Esq.  
FIGLIULO & SILVERMAN, P.C.  
10 South LaSalle Street, Suite 3600  
Chicago, IL 60603

Susan M. Franzetti, Esq.  
Franzetti Law Firm  
10 South LaSalle Street, Suite 3600  
Chicago, IL 60603

/s/ R. Chris Heck