Motion Ex. 18

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'S REPLY IN SUPPORT OF ITS MOTION *IN LIMINE* NO. 5

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

FHR's response confirms that it intends to circumvent the Rules of Evidence in an attempt to prove its Repair Cost Damage Amounts. Nothing in FHR's response brief establishes that it can lay the required foundation for its purported damages summaries. To the contrary, FHR's response brief shows that it intends to rely on hearsay documents and an individual who lacks the required personal knowledge in an effort to have the summaries admitted. In doing so, FHR seeks to assume away rather than prove critical elements of its damages case, such as that the amounts listed on the spreadsheets are attributable to an alleged breach, that the costs were proximately caused by the alleged breach, that the costs were actually incurred to address the alleged breach in the amount of the summarized costs, that FHR has mitigated its damages and is

not seeking a betterment, or the other prerequisites of FHR's damages claims. Based upon FHR's response brief, this motion should be granted for the following reasons:

First, FHR has not shown that either Mr. Daugherty or other unnamed witnesses can lay the proper foundation for the summaries. Mr. Daugherty lacks knowledge of FHR's claims as well as the underlying documents. For example, he does not know why any specific payment was associated with a particular claim. And he was not even at FHR for half of the time period at issue. Similarly, FHR does not make any effort to show that its unnamed employees can provide the required foundation for the damages summaries—*i.e.*, that they have personal knowledge, that the documents satisfy the business records requirements, that they are not inadmissible hearsay, and the other foundational requirements.

Second, for a summary to be admissible, each underlying document must be admissible. The summaries here depend on third-party invoices and other documents which are inadmissible hearsay and, in various cases, multiple hearsay. FHR attempts to fit these documents into the business records exception, but has not shown (and cannot show) that the documents satisfy the Seventh Circuit's precise requirements for a third-party document to fall under an exception to the hearsay rule.

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. Indeed, FHR set up particular "cost collectors" for each of its claims, to which it could add costs. Other courts within this district have excluded similar summaries from evidence under the rule in *Palmer v. Hoffman*, 318 U.S. 109, 113-14 (1943).

FHR has the burden of establishing the admissibility of its summaries. It cannot do so, and its response brief confirms that it does not intend to do so. Because FHR's damages summaries are inadmissible multiple hearsay documents, they should not be admitted at trial.

I. FHR'S WITNESSES CANNOT LAY THE NECESSARY FOUNDATION TO ADMIT THE PURPORTED COST SPREADSHEETS.

FHR does not dispute that the proponent of a summary must establish the admissibility of each underlying document. *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," 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'"). "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); *Schultz v. Thomas*, 832 F.2d 108, 111 (7th Cir. 1987).

Accordingly, 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 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).[1]

FHR attempts to narrowly describe and limit the scope of Mr. Daugherty's anticipated trial testimony, but FHR cannot escape that it intends to have Mr. Daugherty testify about subjects that are outside of his personal knowledge. Indeed, that is precisely how FHR used Mr. Daugherty in opposition to BP Amoco's summary judgment motions (to which BP Amoco objected at that time). (Dkt. No. 267, *e.g.* Ex. 79, 256, 272, 280, 291, 298, Daugherty Verifications; Dkt. No. 322, Ex. 13, Daugherty Affidavit; Dkt No. 297, BP Amoco's Response to

[1] *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); *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's Statement of Additional Facts regarding Condition of Assets Partial Summary Judgment Motion *e.g.* ¶¶ 16, 20, 30, 32, 38, 40 (objecting to Mr. Daugherty's affidavit for lack of personal knowledge and lack of a showing that the summarized materials were authentic and admissible); Dkt No. 353, BP Amoco's Response to FHR's Statement of Additional Facts regarding Damages Partial Summary Judgment Motion ¶¶ 54 (same)) Moreover, while FHR claims Mr. Daugherty will not testify about liability, but "only to establish the amount of its Cost of Repair Expenditures for each claim" (FHR Resp. at 6), that does not solve the problem. Why? Because for FHR through Mr. Daugherty to "establish the amount of its Cost of Repair Expenditures for each claim" requires knowledge of, among other things, whether the costs were associated with a particular claim, whether those costs were proximately caused by a breach, whether the costs were actually incurred for the fixing or repairing of the equipment to cure the alleged breach, whether FHR properly mitigated its claims and is not seeking a betterment, and the other required elements. (BP Amoco Mot. at 3-4)

Knowledge of these issues is particularly important here because, as explained by BP Amoco's damages expert Craig Elson, the documents underlying FHR's cost spreadsheets frequently do not support the damages FHR now claims. (BP Amoco Mot. at 6-7; Ex. 4, Elson Expert Report, Apps. A-R) Moreover, FHR's statement regarding Mr. Elson's opinion is incorrect. (FHR Resp. at 7-8) Mr. Elson challenges the accuracy of the spreadsheets, and in particular how FHR is relying on unsupported costs, costs that are not associated with the claims, and costs for improvements or routine maintenance activities. Thus, Mr. Elson plainly challenges "the reliability of the Spending Spreadsheets." (*Id.* at 7-8) Indeed, Mr. Elson's testimony about the inaccuracies and errors in the underlying documents the spreadsheets at issue purport to summarize stands unrebutted, and alone establishes that FHR cannot satisfy the requirements of Rule 1006. Significantly, FHR has no witness who did what Mr. Elson did (examine the underlying documents), and who can testify that the summaries are accurate. These facts alone should end the discussion about the admissibility of the summaries regardless of the lack of foundation and hearsay problems. Mr. Daugherty does not have knowledge of these crucial issues that would need to be established for FHR's Repair Cost Damage Amounts.

Mr. Daugherty has admitted repeatedly that other employees — not him — are the persons who decided whether any particular third-party invoice or other underlying document should be associated with a claim, that the costs were reasonable and necessary, that the costs

were proximately caused by a contract breach, and the other facts needed to establish the elements of a damages claim. (Ex. 3, 2/18/09 Affidavit of M. Daugherty ("2/18/09 Daugherty Aff.") ¶¶ 6-8; Ex. 6, 7/1/09 Affidavit of M. Daugherty ("7/1/09 Daugherty Aff.") ¶¶ 6, 8, 10; FHR Resp. Ex. 2 ¶¶ 6, 8, 10; Ex. 5, 30(b)(6) Deposition of Daugherty ("Daugherty Dep.") at 73:1-74:18, 82:24-83:18; 90:18-91:14) For example, Mr. Daugherty does not know why a specific cost was associated with a particular claim, whether that cost was reasonable and necessary, and the other requirements for establishing damages. Thus, he cannot "establish the amount of its Cost of Repair Expenditures for each claim" or the amount of damages FHR seeks for each claim.

FHR also makes sweeping, unsupported statements about Mr. Daugherty's knowledge. In particular, FHR asserts that Mr. Daugherty has "personal knowledge regarding the documents being summarized … and personal knowledge regarding the manner in which the spending amounts were derived," citing to Mr. Daugherty's July 9, 2009 affidavit. (FHR Resp. at 6-7) While Mr. Daugherty in this new affidavit does purport to have additional knowledge—knowledge that was not set forth in his February 18, 2009 affidavit or even the July 1, 2009 affidavit Mr. Daugherty submitted just a couple of weeks ago—the affidavit does not support either of FHR's assertions. Mr. Daugherty does not claim to have any personal knowledge of the documents being summarized or knowledge regarding the manner in which the spending amounts were derived. (FHR Resp. Ex. 2) Instead, consistent with his prior affidavits, Mr. Daugherty states that other individuals at the Joliet Plant dealt with the invoices and other documents and decided whether to associate a particular document with a particular claim. (*Id.* ¶¶ 6, 8, 10) Similarly, Mr. Daugherty testified in his deposition that other individuals at the Plant were responsible for handling invoices, works orders, or purchase orders: "Each work order and project is tied to a cost center as well, or each work order is tied to a cost center as well. … But the cost center is defined typically by the individuals at the plant with knowledge that are requesting that material or service." (Ex. 5, Daugherty Dep. at 73:1-74:18, *see also id.* at 82:24-83:18; 90:18-91:14) And, of course, Mr. Daugherty could not possibly have personal knowledge of documents and events before January, 2006, when he took his job—even though the damages summaries start with documents allegedly from 2005 and 2004. (Ex. 7, 9/23/08 Personal Deposition of Matthew Daugherty at 11:2-20)

Moreover, despite FHR's efforts to distinguish the cases cited in BP Amoco's motion on this issue, those cases are directly on point. As explained above, Mr. Daugherty does not have knowledge of the underlying documents on which the summaries are based. As in the cases cited by BP Amoco, FHR has not demonstrated that it can place on the stand a proponent who can meet the foundational requirements of Rule 1006, including the foundational requirements as to each of the underlying documents. *See In re S.N.A. Nut Co.*, 210 B.R. at 145-46 (like Mr. Daugherty, purported summary witnesses were not employed by proponent of summary exhibits when many of the underlying documents were created; and purported summary witness could not testify independently as to the accuracy of the data underlying the summary, *notwithstanding* the fact that the witness may have been the person who "extracted the appropriate information from the files and business records" to create the summary); *Snapp Sys.*, 2008 WL 5383372, at *5-8 (like Mr. Daugherty, purported summary witnesses were "not involved in the day-to-day operations" of the proponent when the underlying documents were created; purported summary witness "did not create the underlying documents;" purported witness was "not the custodian of the documents;" and importantly, the documents underlying the summary that allegedly supported the damages claim date back prior to the employment of the witness and "involve issues in which [the witness] had no direct involvement"); *Peat, Inc. v. Vanguard Research, Inc.*, 378 F.3d 1154, 1160 (11th Cir. 2004) (like FHR's purported summaries, foundational requirements of Rule 1006 were not met because underlying documents contained hearsay assertions, self-serving documents prepared after the commencement of the litigation, and all this notwithstanding fact that the proffering witness created the summary); *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1260-61 (9th Cir. 1984) (like Mr. Daugherty, the accountant-witness was familiar with the basic accounting procedures of the company, but "could do no more than recount the general procedures;" "could not indicate what sources were relied upon to determine" each item listed in the summary; and could not "separate the admissible from the inadmissible" documents underlying the summary); *Architectural Iron Workers v. United Contractors*, 46 F. Supp. 2d 769, 772-73 (N.D. Ill. 1999) (like FHR's purported summaries, proponents did not demonstrate sufficient foundation for admission).

Finally, FHR conclusorily asserts that it will "present numerous witnesses to establish liability and the cost collectors applicable to the Cost of Repair Expenditures." (FHR Resp. at 6) Notably, FHR does not state that these unidentified witnesses will establish causation, reasonable

and necessary expenses, mitigation, avoidance of betterment, and the other requirements for legally recovering damages. Nor does FHR identify who each of the witnesses are who will lay the evidentiary foundation for each of the documents being summarized. Moreover, 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. 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. A conclusory assertion that FHR "will produce additional fact witnesses and damages proofs at trial to 'present foundational testimony'" to support the spreadsheets cannot save the purported summaries from being excluded. *See, e.g., Snapp Sys.*, 2008 WL 5383372, at *8.

II. FHR'S SUMMARIES RELY ON INADMISSIBLE, HEARSAY DOCUMENTS, AND THUS THE SUMMARIES THEMSELVES ARE INADMISSIBLE.

As explained above, every document underlying a summary must be admissible for the summary to be admissible. *See, e.g.*, *Needham*, 639 F.2d at 403; *Judson Atkinson*, 529 F.3d at 382. Among other documents, the cost spreadsheets rely on third-party vendor invoices. Mr. Daugherty states that he "created spreadsheets that … provide back-up information for the spending, such as vendor invoices." (FHR Resp. Ex. 2 ¶ 8) But 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); *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 where the invoices could not qualify as business records because the sponsoring witness was unfamiliar with the preparation of the invoices); *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); *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 established 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 having 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).

In the face of and in an attempt to avoid compliance with these requirements, FHR asserts that "vendor invoices received by a company in the ordinary course of business, integrated into the company's records and relied upon the company in its day-to-day operations qualify as business records under FRE 803(6)." (FHR Resp. at 9) To begin with, FHR's proposition contradicts the plain requirements of FRE 803(6), which sets forth specific requirements that go well beyond integration and reliance. *See* Fed. R. Evid. 803(6).

Moreover, FHR does not cite a single case from the Seventh Circuit to support its proposed "exception" to the business records exception to the hearsay rule. Under Seventh Circuit law, the business records exception in FRE 803(6) "does not encompass statements contained within a business record that are made by third parties." *Alexander v. CIT Tech. Fin. Servs.*, 217 F. Supp. 2d 867, 880 (N.D. Ill. 2002) (citing *Woods v. City of Chicago*, 234 F.3d 979, 986 (7th Cir. 2000); *see also United States v. Christ*, 513 F.3d 762, 769 (7th Cir. 2008) ("[S]tatements made by third parties in an otherwise admissible business record cannot properly be admitted for their truth unless they can be shown independently to fall within a recognized hearsay exception."); *Datamatic*, 909 F.2d at 1033 ("If the source of the information is an

outsider, Rule 803(6) does not, by itself, permit the admission of the business record.") (internal quotation marks and brackets omitted); *Cook v. Hoppin*, 783 F.2d 684, 689-90 (7th Cir. 1986) (holding that statements of an outsider to the party cannot be admitted without a showing that the outsider transmitted the statements as "part of a 'business routine' in which he is individually a regular participant"); *United States v. Ismoila*, 100 F.3d 380, 392 (5th Cir. 1996) ("[I]f the source of the information [in a business record] is an outsider, Rule 803(6) does not, by itself, permit the admission of the business record.").[2]

"The fact that statements made by strangers to the business become a part of its records … does not make them business records unless they are verified by the business and thus adopted and become the business's own statements." *United States v. Santos*, 201 F.3d 953, 963 (7th Cir. 2000); *see also Datamatic*, 909 F.2d at 1033 & n.2 (excluding letter where even though the witness "may have been acting within the regular course of his business in preparing the letter" where "the sources he used were outsiders (albeit clients) with respect to the business"); *Alexander*, 217 F. Supp. 2d at 880-81; *Jamsports Entm't, LLC v. Paradama Prods., Inc.*, 2005 WL 14917, at *13 (N.D. Ill. Jan. 3, 2005) ("The fact that statements made by strangers to the business become a part of its records ... does not make [those statements] business records unless

[2] *See also Higdon v. Entenmann's Sales Co.*, 2002 WL 1285862, at *1 (N.D. Ill. June 11, 2002) ("[Federal Rule of Evidence] 803(6) does not encompass third party statements contained in [a] business record."); *Medina v. City of Chicago*, 2002 WL 31027965, at *2 (N.D. Ill. Sept. 10, 2002) (declining to consider documents containing third-party statements because such "statements, which are inadmissible hearsay, will not be considered"); *State Farm Mut. Auto. Ins. Co. v. Abrams*, 2000 WL 574466, at *3-4 (N.D. Ill. May 11, 2000) (files prepared in the normal course of business may still be inadmissible if "they were not prepared by one with personal knowledge of the events, nor by an informant having personal knowledge of the events and a business duty to transmit the information to the entrant; nor were they all made at or near the time the events occurred."); *Jones v. Bd. of Trustees of Cmty. Coll. Dist. No. 508*, 75 F.Supp.2d 885, 889 (N.D. Ill. 1999) (business records "based on outsider testimony [] cannot be admitted under Rule 803(6)"); *Berberena v. Pasquino*, 2006 WL 3253340, at *2 (S.D. Ill. Nov. 9, 2006) (refusing to admit reports that were written by third parties or contained summaries of third-party statements, as "double hearsay" which cannot properly be admitted unless shown to independently fall within a recognized hearsay exception); *Johnson v. Herman*, 132 F. Supp. 2d 1130, 1133 (N.D. Ind. 2001) ("Under Rule 803(6), records kept in the course of regularly conducted business activity are admissible. However, this exception does not encompass statements contained within the business record that are made by third parties.") (citations omitted); *Ketelsen v. Smith*, 2008 WL 2941259, at *7 (C.D. Ill. July 25, 2008) (holding exhibits with double hearsay, which "exists when a business record is prepared by an employee with information supplied by another person" are not admissible when the source of the information is an outsider to the business) (citations omitted).

they are verified by the business and thus adopted and become the business's own statements…."). The party must verify the substance of the facts contained within the third-party documents, not simply the form or origin of the documents. *Alexander*, 217 F. Supp. 2d at 881. Moreover, the party must show that its "standard practice was to verify the information." *Id.*; *see also United States v. Mitchell*, 49 F.3d 769, 778 (D.C. Cir. 1995), *cited with approval by Santos*, 201 F.3d at 963; *see also United States v. Vigneau*, 187 F.3d 70, 75-77 (1st Cir. 1999).

FHR cites cases that it claims support its position, but these cannot save the documents from being hearsay. As a first and fundamental point, to the extent any of these cases are inconsistent with Seventh Circuit decisions, Seventh Circuit precedent of course controls. Moreover, the cases FHR cites are distinguishable for reasons including that in most of them the invoices were offered for reasons other than to prove damages. (FHR Resp. at 9-10); *Black Sea & Baltic Gen. Ins. Co. v. S.S. Hellenic Destiny*, 575 F. Supp. 685, 690-91 (S.D.N.Y. Dec 13, 1983) (excluding many commercial invoices because "the commercial invoices presented here were not generated by the companies of the authenticating witnesses but were only received by them," and requiring individual testimony that invoices satisfied FRE 803(6) for those that were admitted); *United States v. Pfeiffer*, 539 F.2d 668, 671 (8th Cir. 1976) (admitting records that were prepared on the party's own forms and where the party had a regular business process of verifying the accuracy of each document); *Falco v. Alpha Affiliates, Inc.*, 2000 WL 727116, *15-16 (D. Del. Feb. 9, 2000) (holding that the party "witness must be able to vouch for the accuracy of the third party records," which is precisely what FHR has not shown that it can do here); *United States v. Doe*, 960 F.2d 221, 223 (1st Cir. 1992) (admitting an invoice for a gun where the shop owner "kept a gun 'acquisition and disposition book' as federal law requires"); *In re King Enters., Inc.*, 678 F.2d 73, 77 (8th Cir. 1982) (finding that it "was within the trial judge's discretion to admit the evidence if he found it to be sufficiently trustworthy" without further explanation); *Boesl v. Suburban Trust & Sav. Bank*, 642 F. Supp. 1503, 1508 (N.D. Ill. 1986) (admitting medical bills with minimal explanation; case is no longer good law to the extent it is inconsistent with *Santos*, *Datamatic*, and similar Seventh Circuit cases); *Silver-Krieger, Ltd. v. Nicon Warehouse*, 1986 WL 4311, at *3-4 (D. N.J. Apr. 2, 1986) (admitting documents as business records where both plaintiff and defendants had relied upon them and integrated them into their businesses; BP Amoco has not relied or incorporated any of the documents underlying FHR's damages spreadsheets); *United States v. Ullrich*, 580 F.2d 765, 771-72 (5th Cir. 1978)

(admitting an inventory schedule where the party had a regular practice of verifying the schedule by checking its inventory); *United States v. Sokolow*, 91 F.3d 396, 403-04 (3d Cir. 1996) (admitting documents based on outsider proofs of claims where outsiders were subject to criminal penalties if proofs were inaccurate, and the party had an extensive verification process for the proofs of claim to ensure they were accurate: "the claims audit performed here was unique"); *Jones v. Bd. of Trustees of Cmty. Coll. Dist. No. 508*, 75 F. Supp. 2d 885, 889 (N.D. Ill. 1999) (excluding letters for external auditors, and not applying the proposition for which FHR cites the case); *United States v. Carranco*, 551 F.2d 1197, 1200 (10th Cir. 1977) (admitting freight bill that is unique because a "freight bill is not meant to be a static document nor is it used as such. As testified to by those familiar with the shipping business, a freight bill is used by many different people and it is their job to make notations on the freight bill so it will continue to be an accurate description of the shipment.").

FHR's interpretation of these cases also would contradict the purpose of the business records exception. As the First Circuit has explained, "the very rationale" of the business records exception is that when "a clerk records the receipt of an order over the telephone, the regularity of the procedure, coupled with business incentives to keep accurate records, provide reasonable assurance that the record thus made reflects the clerk's original entry." *Vigneau*, 187 F.3d at 75. "But no such safeguards of regularity or business checks automatically assure the truth of a statement to the business by a stranger to it." *Id.* at 75-76; *see also Wilson v. Zapata Off-Shore Co.*, 939 F.2d 260, 271 (5th Cir. 1991) (An "outsider's statement [in a business record] must fall within another hearsay exception to be admissible because it does not have the presumption of accuracy that statements made during the regular course of business have."). Simply incorporating and relying on information cannot, as FHR contends, provide sufficient safeguards to assure the truth of the statement. Instead, the party must have a regular practice of verifying the substantive information in such third-party documents, as the Seventh Circuit requires.

FHR has not produced competent evidence establishing that it can satisfy the verification requirements required by Seventh Circuit law. Neither Mr. Daugherty's February 18, 2009 affidavit nor his July 1, 2009 affidavit allege that any verification procedure existed at FHR. (Ex. 3, 2/18/09 Daugherty Aff.; Ex. 6, 7/1/09 Daugherty Aff.) While Mr. Daugherty's most recent affidavit now asserts FHR has a process for addressing third-party invoices, he lacks the

personal knowledge and foundation to provide this testimony. As an initial matter, Mr. Daugherty states that the alleged process for the vendor invoices was performed by others, such as unnamed "individuals with monetary authority" and "managers and supervisors" and "project managers." (FHR Resp. Ex. 2 ¶ 10) Moreover, Mr. Daugherty specifically testified at his deposition that he and the accounting department in which he works do not review the decisions or process for spending under the invoices:

> If you're asking me whether or not accounting reviews specific cost center owners, cost centers and holds them accountable, or if accounting reviews specific projects and holds those project managers accountable, no. We compile the information and it's up to those cost center managers and their supervisor to hold themselves accountable for their spending.

(Ex. 5, Daugherty Dep. at 90:18-91:14) Mr. Daugherty's deposition testimony must be credited over any later, contrary affidavit. *Gates v. Caterpillar, Inc.*, 513 F.3d 680, 688 n.5 (7th Cir. 2008) (collecting cases).

Similarly, Mr. Daugherty's affidavit states—in a purely conclusory fashion—that the other underlying documents are business records, but he does not have the personal knowledge or foundation to provide such testimony. As explained above, the accounting department of which Mr. Daugherty is an employee does not review the work of managers and supervisors who linked the underlying documents with particular litigation claims. (Ex. 5, Daugherty Dep. at 90:18-91:14) In fact, Mr. Daugherty has admitted repeatedly that other employees are the ones who decided whether any particular third-party invoice or other underlying document should be associated with a claim, that the costs were reasonable and necessary, that the costs were proximately caused by a contract breach, and the other elements of a damages claim. (Ex. 3, 2/18/09 Daugherty Aff. ¶¶ 6-8 ; Ex. 6, 7/1/09 Daugherty Aff. ¶¶ 6, 8, 10; FHR Resp. Ex. 2 ¶¶ 6, 8, 10; Ex. 5, Daugherty Dep. at 73:1-74:18, 82:24-83:18)

Moreover, Mr. Daugherty testified that FHR does not track and report on expenditures for equipment repairs and modification in the ordinary course of business:

> Q. Okay. Now, I'd like to turn to another topic in the accounting issues notice relating to Flint Hills' accounting system for tracking expenditures at the Joliet plant relating to maintenance, capital spending, equipment repairs and modification, environmental compliance.
>
> A. Sure.
>
> Q. In general, what systems does Flint Hills have in place for tracking such expenditures at the Joliet plant?

> A. Well, the first thing to note is that in the ordinary course of business we do not track and regularly report on, as you said, the third and forth item, environmental compliance, it's not a normally tracked expenditure item, or maintenance, repair -- and what did you call it exactly?
>
> Q. Modification.
>
> A. Modification.

(Ex. 5, Daugherty Dep. at 62:18-63:10)

Finally, FHR has suggested that BP Amoco is imposing an unreasonable burden upon FHR. (FHR Resp. at 9) Not true; the burden is FHR's under the Federal Rules of Evidence. There is a reason for the rules of evidence—which among other things are designed 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 voluminous damages spreadsheets—consisting of thousands of individual hearsay and multiple hearsay entries totaling tens of millions of dollars—with a single 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 Due Process right to cross-examine will be impermissibly infringed, and as a result, untrustworthy evidence would be admitted.

III. FHR'S SPENDING SPREADSHEETS ALSO VIOLATE THE RULE OF *PALMER v. HOFFMAN*

FHR does not dispute the basic premise of *Palmer v. Hoffman*, 318 U.S. 109, 113-14 (1943), which is that documents prepared in anticipation of litigation are inadmissible. Instead, FHR asserts that the documents at issue here were not prepared in connection with litigation. (FHR Resp. at 12-13) The facts, however, tell a different story. 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. FHR cannot dispute that almost all of underlying documents it relies on were prepared after the litigation commenced. Moreover, FHR alleges that it set up special "cost collectors" for each litigation claim with which employees could associate costs, giving FHR an easy way to inflate the costs it is seeking to recover. (FHR Resp. Ex. 2 ¶ 6) In fact, BP Amoco's expert Craig Elson has found that many of the costs FHR associated with particular claims are unsupported, related to betterments, are for routine maintenance, or otherwise are not

recoverable as damages. (BP Amoco Mot. at 6-7) Mr. Elson's testimony about the inaccuracies and errors in the underlying documents the spreadsheets at issue purport to summarize stands unrebutted, and alone establishes that FHR cannot satisfy the requirements of Rule 1006. Significantly, FHR has no witness who did what Mr. Elson did (examine the underlying documents), and who can testify that the summaries are accurate. These facts alone should end the discussion about the admissibility of the summaries regardless of the lack of foundation and hearsay problems.

That these underlying documents and their use in the damages spreadsheets was done in anticipation of litigation makes them inadmissible under *Palmer v. Hoffman* and its progeny. By contrast, in the two cases that FHR cites, the court found that the underlying documents were not prepared in anticipation of litigation. *See Diamond Shamrock Corp. v. Lumbermens Mut. Cas. Co.*, 466 F.2d 722, 727 (7th Cir. 1972) ("These records were not kept in anticipation of the present litigation."); *AMPAT/Midwest, Inc. v. Ill. Tool Works Inc.*, 896 F.2d 1035, 1405 (7th Cir. 1990) ("The data themselves were not manufactured for the litigation; they were lifted out of regular business records."). Here, the facts are like those in *Sportmart, Inc., v. Spirit Mfg., Inc.*, 2000 WL 343467 (N.D. Ill. Mar. 30, 2000), where the summaries were developed in anticipation of litigation and the proponent sought to admit them using an accountant who did not have knowledge of the underlying documents. *Id.* at *3-4. Moreover, FHR fails to distinguish the various other cases cited by BP Amoco where summaries fail to meet the requirements of FRE 1006 and *Palmer v. Hoffman*. *See 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 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. Dep't 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

FHR's response confirms that FHR intends to use the summaries to avoid proof of elements of its damages case, that its witnesses do not have the personal knowledge to testify about the summaries, that the summaries are based on hearsay and thus inadmissible, and that the underlying documents and the summaries were prepared in anticipation of litigation and thus are inadmissible under *Palmer v. Hoffman*. Thus, 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, should be excluded and barred.

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Respectfully submitted,

By: /s/ R. Chris Heck

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CERTIFICATE OF SERVICE

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