Motion Ex. 19

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.**	

DAUBERT MOTION NO. 1: FHR'S PRINCIPAL DAMAGES EXPERTS, RELEVANT AUTHORITY AND OVERVIEW OF OTHER _DAUBERT_ MOTIONS

BP AMOCO CHEMICAL COMPANY AND BP CORPORATION NORTH AMERICA INC.'S MOTION TO EXCLUDE THE OPINIONS OF SHARON MOORE BETTIUS AND JEFFREY BALIBAN

Flint Hills Resources, LLC ("FHR") relies on nine proposed expert witnesses whose opinions are not based on the facts of this case, who are not qualified to render the opinions they seek to offer, who have applied an improper methodology or no methodology at all, and/or who otherwise do not satisfy the requirements for expert testimony under the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993).

Rather than filing a separate motion relating to each of these nine experts, BP Amoco Chemical Company ("BP Amoco") and BP Corporation North America Inc. ("BPCNA") have grouped FHR's nine experts into four categories, according to the subject matter of their testimony, as follows: (i) two experts who testify on damages issues – *Daubert* Motion No. 1; (ii) three experts who testify on engineering issues – *Daubert* Motion No. 2; (iii) one expert who

testifies on production capacity issues – *Daubert* Motion No. 3; and (iv) three experts who testify on environmental issues – *Daubert* Motion No. 4. In addition, consistent with Court's guidance that the parties err on the side of caution in deciding whether to raise a challenge relating to expert testimony now or later (in a pretrial motion *in limine*), BP Amoco also has filed a motion challenging the ability of FHR's environmental experts to rely on certain emissions stack tests conducted by FHR at the Joliet Plant after the sale – *Daubert* Motion No. 5.

This motion, which is designated as *Daubert* Motion No. 1, addresses FHR's principal damages experts, Jeffrey Baliban and Sharon Moore Bettius, and provides background relating to their opinions and the grounds for this motion. In addition, this initial motion provides an overview of the four other motions BP Amoco and BPCNA are filing relating to FHR's experts. Each of BP Amoco and BPCNA's five motions is supported by a separate Memorandum of Law. To avoid repetition, this motion cites applicable case law that is common to all five motions and memoranda.

In further support of their motion, BP Amoco and BPCNA state as follows:

1. Each of BP Amoco and BPCNA's motions is based on Federal Rule of Evidence 702 as well as *Daubert* and its progeny. Under these authorities, FHR bears the burden of proving that their experts' opinions satisfy Rule 702's admissibility requirements. *Euroholdings Capital & Inv. Corp. v. Harris Trust & Savs. Bank*, 2009 WL 650373, at *4 (N.D. Ill. Mar. 11, 2009); *Dukes v. Illinois Cent. R.R. Co.*, 934 F. Supp. 939, 946-47 (N.D. Ill. 1996); *see also United States v. Williams*, 95 F.3d 723, 729 (8th Cir. 1996). Before admitting an expert's opinion, this Court must exercise its "gatekeeping role" to determine whether an expert's reasoning and methodology are sufficiently reliable. *Daubert*, 509 U.S. at 597. Expert testimony is admissible only "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." Fed. R. Evid. 702. *Daubert* and Rule 702 demand that the district court ensure that an expert employs the same intellectual rigor in the courtroom as in the relevant field. *Petersen v. Cordes*, 2003 WL 2253364, at *1 (N.D. Ill. Nov. 6, 2003) (St. Eve, J.) (quoting *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999)). This applies to all expert testimony, regardless of whether it is based on "scientific," "technical," or other "specialized" knowledge. *Kuhmo Tire Co.*, 526 U.S. at 141. Put another way, "a district judge asked to admit scientific evidence must determine whether the evidence is genuinely

scientific, as distinct from being unscientific speculation offered by a genuine scientist." *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 318 (7th Cir. 1996).

2. A putative expert must be "qualified as an expert by knowledge, skill, experience, training, or education" to testify about the subject on which he or she is proffered. Fed. R. Evid. 702. Generalized knowledge about a field does not necessarily qualify an expert to testify as to a specific subset of that general field. *See, e.g., Martinez v. Sakurai Graphics Sys. Corp*., 2007 WL 2570362, at *2 (N.D. Ill. Aug. 30, 2008). Rather, "[w]hether a witness is qualified as an expert can only be determined by comparing the area in which the witness has superior knowledge, skill, experience, or education with the subject matter of the witness's testimony." *Jones v. Lincoln Elec. Co.*, 188 F. 3d 709, 723 (7th Cir. 1999) (quoting *Carroll v. Otis Elevator Co.*, 896 F.2d 210, 212 (7th Cir. 1990)). If the expert is not properly qualified for the field about which he is testifying, then that expert's opinion should be excluded. *Ancho v. Pentek Corp.*, 157 F. 3d 512, 518-19 (7th Cir. 1998); *Vigortone AG Prods., Inc. v. PM AG Prods, Inc.*, 2004 WL 783075, at *1 (N.D. Ill. Jan. 15, 2004) ("if a witness lacks the requisite qualifications, his testimony cannot assist the trier of fact and such testimony should be barred"); *Van Houten-Maynard v. ANR Pipeline Co.*, 1995 WL 311367, at *4 (N.D. Ill. May 19, 1995) (granting motion to bar portions of expert testimony where expert lacked the specialized knowledge in areas of proposed testimony).

3. Experts must outline a reliable methodology—they cannot simply rely on "expertise" or intuition. *See Zenith Elecs. Corp. v. WH-TV Broad. Corp.*, 395 F. 3d 416, 418-20 (7th Cir. 2005) (affirming exclusion of expert testimony where it did not rest on reliable principles, methods or analysis and instead rested on "expertise"); *R.J. Reynolds Tobacco Co. v. Premium Tobacco Stores, Inc.*, 2004 WL 1613563, at *8-9 (N.D. Ill. July 19, 2004) (striking report where "…only foundation he provides for his basic premises is his firm belief, based on his vast experience, that they are true and accurate. While we do not doubt the depth of his conviction, the chasm between his opinion and the ascertainable facts of the case remains. The jury would be in precisely the same position after hearing his opinion as they were before, and it will not put them any closer to resolution of the issues of the case.").

4. *Daubert* and Rule 702 require exclusion of opinion testimony that is based on unreliable assumptions or speculation. *See, e.g., Ammons v. Aramark Unif. Servs., Inc.*, 368 F.3d 809, 816 (7th Cir. 2004) ("A court is expected to reject any subjective belief[s] or speculation");

Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1055-57 (8th Cir. 2000) (reversing trial court's admission of speculative damages model); *Target Mkt. Publ'g, Inc. v. ADVO, Inc.*, 136 F.3d 1139, 1143-45 (7th Cir. 1998) (*Daubert* and the Federal Rules of Evidence require exclusion of speculative expert testimony). "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997); *see also Beachler v. Amoco Oil Co.*, 112 F.3d 902, 909 n.6 (7th Cir. 1997) (affirming exclusion of opinion that was speculative and not supported by any factual foundation). "An expert must 'substantiate his opinion; providing only an ultimate conclusion with no analysis is meaningless.'" *Clark v. Takata Corp.*, 192 F. 3d 750, 757 (7th Cir. 1999); *see also Elkins v. Ocwen Fed. Savs. Bank*, 2007 WL 4125747, at *3-5 (N.D. Ill. Nov. 13, 2007) (striking a number of opinions, including damages opinions, where expert did not back up conclusions with specific evidence).

5. An expert must consider all relevant and available evidence, including evidence that is contradictory or inconsistent with the expert's view. *SEC. v. Lipson*, 46 F. Supp. 2d 758, 764 (N.D. Ill. 1998). The failure to consider such evidence renders the opinion unreliable, as it has been "carefully tailored to support [a] position." *Id.*; *United States EEOC v. Rockwell Int'l Corp.*, 60 F. Supp. 2d 791, 797 (N.D. Ill. 1999) (expert's report and testimony held inadmissible under Rule 702 where, *inter alia*, expert "relied on materials, reports, and summaries given to him by counsel, and failed to verify the information from reliable, independent sources.")

6. *Daubert* also requires trial courts to evaluate the relevance of any expert opinions. *Ammons*, 368 F.3d at 816. To satisfy the relevance requirement, an expert's testimony must help "in determining a fact in issue. That is, the suggested … testimony must 'fit' the issue to which the expert is testifying." *Deimer v. Cincinnati Sub-Zero Prods.*, 58 F.3d 341, 344 (7th Cir. 1995) (expert excluded where there was no "fit" because expert could not relate his causation theory to factual situation of the case). Opinion testimony is not admissible unless the court is convinced it "speaks clearly and directly to an issue in dispute in the case." *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1321 n.17 (9th Cir. 1995).

THIS MOTION: *DAUBERT* MOTION NO. 1

7. FHR's proposed damages experts, Jeffrey Baliban and Sharon Moore Bettius, both purport to calculate damages based upon an alleged difference in the value of the Performance Chemical Business Unit ("PCBU") purchased by FHR in its allegedly "as-represented" and "as-sold" conditions.

8. **Sharon Moore Bettius:** Ms. Bettius is an appraiser who purports to provide a diminution-in-value measure of damages for the PCBU, as an alternative to FHR's cost-of-repair damages. (Ex. 3, Bettius Rep. at 3) Bettius compares the purported fair market value ("FMV") of the PCBU in its allegedly "as-sold" condition to the "as-represented" condition. (*Id.*)

9. Despite attempting to provide a diminution-in-value measure of damages, Bettius does not calculate an "as-represented" value of the PCBU. (Ex. 3, Bettius Rep. at 3) Instead, Bettius assumed that the FMV of the PCBU "as-represented" was approximately $300 million, based on the purchase price of the PCBU between FHR and BP Amoco, without evaluating the FMV using her own methods. (*Id.*) Moreover, the only "as-represented" value she provides is for the PCBU as a whole; she does not attempt to provide an appraisal of any portion or individual asset of the PCBU, such as the Joliet Plant. (*Id.*) Instead, she determined only that the alleged value of the PCBU in its supposedly "as-sold" condition was $200 million. (*Id.*)

10. Bettius' opinion is based on a series of assumptions provided to her by FHR's counsel, including alleged production capacity limitations, alleged environmental violations, and alleged problems with the physical condition of the plant's assets. (*Id.* at 2) She also assumes that the representations and warranties in Section 7 of the PSA are completely absent, contrary to FHR's allegations that the representations were breached as to only a select and limited number of assets at the Joliet Plant. (*Id.* at 3; Ex. 8, Bettius Dep. at 137:9-12) As a result, there can be no causal connection between FHR's allegations and Bettius' alleged damages, and her opinions are not relevant.

11. Bettius relies on two methods to estimate the allegedly "as sold" FMV of the PCBU. The first she calls a "market approach," which consists of two components. The first component ("guideline publicly traded company method") purports to determine a value for the PCBU based on multiples of prices paid for minority shares in publicly traded companies. (Ex. 3, Bettius Rep. at 18-19) The second component ("guideline merged and acquired company method") attempts to determine a value for the PCBU from multiples of prices paid for minority

or controlling interests in public or private companies. Bettius applies a number of different assumptions to reduce the allegedly "as-sold" value of the PCBU under her market approach. For example, in comparing the PCBU to the value of publicly traded companies, she applied a 40% "comparative discount" to multiples of those companies to take into account that the PCBU was allegedly smaller, had lower growth, and was less profitable than those companies, as well as the alleged condition of the Joliet Plant. (*Id*. at 24) In comparing the sale of the PCBU to other mergers and acquisitions, she applied a 20% "comparative discount" to the value of those other transactions for the same reasons. (*Id.* at 27-28) She also applied a "liquidity discount" of 15% to the value of the PCBU because it is a non-public company and thus more difficult to sell than shares in a publicly traded company. (*Id.* at 25) Bettius admits that she cannot quantify how much of these discounts, if any, are the result of FHR's allegations about the condition of the Joliet Plant. (Ex. 8, Bettius Dep. at 275:3-10; 279:11-23) Indeed, Bettius testified that some of the discounts would be the same regardless of any alleged breaches. (*Id.*)

12. Bettius' second method is an "income approach," where she primarily relies on a discounted cash flow analysis. (Ex. 3, Bettius Rep. at 20) For this method, she assumes increased capital expenditures and decreased profitability for the PCBU because of the conditions at the Joliet Plant alleged by FHR. (*Id.* at 29-30) Nevertheless, Bettius admits that that the amounts of the adjustments to capital expenditures or profitability are not tied to the amount of FHR's claims. (Ex. 8, Bettius Dep. at 94:9-95:15)

13. **Jeffrey Baliban:** FHR seeks to rely on Mr. Baliban's opinions as an alternative measure of damages for its production capacity claim. Baliban opines as to the difference in value between (i) the PCBU with the production capacity allegedly represented in the PSA; and (ii) the PCBU with the capacities he was asked to assume by FHR's attorneys. (Ex. 5, Baliban Dep. at 152:16-153:13)

14. Baliban's opinions are not based on a financial model he has independently created. Instead he uses FHR's financial model as the basis for his opinions. Moreover, Baliban adds cash flows to FHR's financial model by assuming that there was a 50% chance that FHR post-sale would negotiate an agreement with Eastman Chemical Company to become its exclusive supplier of purified isophthalic acid. FHR itself, in evaluating whether to buy the PCBU in 2003, did not incorporate any hypothetical Eastman deal into its "expected case" projections that its financial model used. (Ex. 13, Sanders Dep. at 49:14-18; 199:8-200:7; *see*

also id. at 47:19-48:5) After the sale of the PCBU, Eastman decided not to pursue discussions about FHR becoming its exclusive purified isophthalic acid supplier for reasons unrelated to any alleged breaches of the PSA.

15. Baliban uses FHR's financial model, with increased cash flows from the hypothetical Eastman project, to calculate an internal rate of return ("IRR") for the PCBU. He then purports to estimate "effective capacities" for purified isophthalic acid, MAN, and TMA based on the capacities provided to him by FHR's attorneys that he uses to calculate reduced cash flows. Baliban discounts these cash flows using the IRR to determine the purchase price FHR supposedly would have paid under these reduced cash flows. Baliban claims that this alleged purchase price is either $239 million (assuming 115 kmta capacity for purified isophthalic acid) or $257 million (assuming 140 kmta capacity for purified isophthalic acid). This leads to alleged damages of either $62 or $44 million, respectively, for FHR's production capacity claim in his opinion.

16. As explained in BP Amoco and BPCNA's supporting Memorandum of Law, Bettius and Baliban should be precluded from testifying because: (i) their assumptions and opinions are barred by and contrary to provisions of the PSA, as well as Illinois law; (ii) they rely on improper methodologies or none at all, such as failing to calculate an "as-represented" value, using adjustments that have no relation to FHR's claims in order to decrease the allegedly "as-sold" value of the PCBU, and/or using the wrong method to determine discount rates; and (iii) their opinions are contrary to, and do not fit, the facts of this case, such as failing to provide any explanation of how the assumptions they make relate to FHR's claims, relying on speculative assumptions to increase damages, and using production capacities that are contradicted by FHR's own proposed production capacity expert.

OVERVIEW OF BP AMOCO AND BPCNA'S OTHER MOTIONS: *DAUBERT* MOTIONS NO. 2-5

17. BP Amoco and BPCNA's other four motions are explained in detail in those motions and the separate memorandum supporting each motion. As a preview and in overview, however, those motions relate to the following FHR experts and seek the following relief:

18. ***Daubert* Motion No. 2:** This motion relates to three engineering experts FHR plans to call at trial to testify in support of its mechanical integrity claims: Geoffrey Egan, Eric Sullivan, and Phillip Wheeler. BP Amoco and BPCNA seek an order barring and precluding them from testifying on three discrete topics. *First*, these experts testify that certain equipment

and other assets at the Joliet Plant were not "structurally sound" at the time of the sale. Neither Sullivan, Egan nor Wheeler, however, is qualified to testify on the issue of structural soundness. None is a licensed structural engineer in any state, nor do any of them have a sufficient background in structural engineering to opine on this topic. *Second*, Egan, Sullivan, and Wheeler each offer opinions that BP Amoco failed to maintain plant assets in accordance with "normal industry practices." These experts cite to discretionary recommendations and guidelines, not mandatory or legal standards, that are often inapplicable and irrelevant to the assets at issue. Further, FHR's experts have failed to actually compare BP Amoco's practices to practices at other chemical plants, including FHR's own practices at its plants. *Third*, Egan, Sullivan and Wheeler offer opinions on the "reasonableness" of FHR's alleged damages. All three, however, fail to provide damages analysis grounded on accepted principles or methods. Accordingly, the opinions offered by FHR's engineering experts on these three topics fail to meet the standards for admissibility under *Daubert* and Federal Rule of Evidence 702, and they each should be precluded from testifying on those topics at trial.

19. ***Daubert* Motion No. 3:** This motion relates to the expert FHR plans to call at trial to testify in support of its production capacity claims: Russell Ogle, Ph.D. BP Amoco and BPCNA seek an order barring and precluding Ogle's opinions and testimony regarding two subjects: First, Ogle's opinion that the Joliet plant could not satisfy the "annualized maximum demonstrated sustainable production" capacities stated in the PSA for the PIA, TMA and MAN units suffers from two basic but significant errors: (1) Ogle's opinions and calculations include planned and unplanned downtime, despite the express language of the PSA as well as the parties' understanding that the represented capacity figures "do not include planned or unplanned downtime," and (2) Ogle's opinions and calculations are based on an interpretation of "planned or unplanned downtime" that contradicts the parties' understanding of this phrase. Witnesses for both BP Amoco and FHR state that this phrase accounts for impediments to production arising from various types of restraints, such as reduced market demand, raw material input restraints, and maintenance and reliability issues that decreased production, even if not to zero for the day. But Ogle substitutes his own definition of "planned and unplanned" downtime and fails to account for various production restraints that do not result in zero downtime for the day, making his opinions unreliable, not relevant and confusing to a jury. Second, Ogle's testimony about damages FHR has or will incur to address alleged production constraints is not based upon any

analysis, methodology, study, evaluation or work, making those opinions inadmissible under Daubert and Federal Rule of Evidence 702.

20. ***Daubert* Motion No. 4:** This motion relates to three experts FHR plans to call at trial to testify in support of its environmental claims: Richard Trzupek, Richard Biondi and Jay Hoover. BP Amoco and BPCNA seek an order barring and precluding them from testifying on four subjects. *First,* portions of Trzupek's opinions in his rebuttal report on the plant's operating conditions at the time of certain post-closing emissions "stack tests" conducted by FHR should be excluded because the information on which those opinions are based should have been disclosed in fact discovery and otherwise does not constitute proper rebuttal evidence because it is based on new tests, as well as new information and data analysis which were not disclosed in his initial reports. *Second,* Trzupek is not qualified to offer opinions on engineering issues or statistics, and is further not qualified to offer opinions on the aspects of the Joliet Plant's operating conditions which might affect air emissions. *Third,* Biondi's opinions are based exclusively on a federal regulation which establishes requirements for federal approval of a state air program, which Biondi admits does not apply to a holder of a Title V Permit, and thus his opinions are irrelevant to assessing BP Amoco's compliance with its Title V Permit obligations. *Fourth,* Hoover is not qualified to offer opinions on whether certain valves at the Joliet Plant complied with applicable regulatory requirements because he has not demonstrated any reliable understanding of the valves that were used at the Joliet Plant during BP Amoco's ownership.

21. **Daubert Motion No. 5:** This motion relates to certain post-sale environmental emissions "stack tests" conducted by FHR and relied upon by its expert witnesses to support their opinions that the Joliet Plant was not in compliance with environmental regulations at the time of the sale. FHR's post-closing emission tests are invalid as a matter of law and irrelevant to the issue of whether BP Amoco was in compliance with its Title V Permit because they were not conducted in accordance with the requirements and methods specified in the Permit. FHR deviated from the test methods required by the Permit in order to "expedite things" and make the tests "cheaper," also making the tests unreliable and lacking mandatory quality control requirements. Furthermore, the tests were conducted under unstable or unrepresentative operating conditions. Thus, the tests do not provide reliable or accurate results, and the tests and any testimony or argument based upon the tests should be excluded under Rule 702 and *Daubert*. Although this motion might alternatively be considered a motion *in limine*, BP Amoco has filed

it now out of an abundance of caution given the Court's pre-trial scheduling order requiring that all *Daubert* motions be filed by April 10, 2009.

CONCLUSION

WHEREFORE, for the reasons stated above and in their supporting Memorandum, BP Amoco and BPCNA request that the Court grant their *Daubert* Motion No. 1 and exclude the opinions of Jeffrey Baliban and Sharon Moore Bettius. The relief requested in BP Amoco and BPCNA's other *Daubert* motions is set forth and explained in those separately filed motions and supporting memoranda.

Date: April 10, 2009

Respectfully submitted,

/s/ R. Chris Heck

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 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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