BP Amoco Chemical Company v. Flint Hills Resources, LLC

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Motion Ex. 2

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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 CHEMICAL COMPANY'S MEMORANDUM IN SUPPORT OF MOTIONS FOR JUDGMENT AS A MATTER OF LAW UNDER FRCP 50(a) ON FLINT HILLS RESOURCES LLC'S ESTIMATED FUTURE DAMAGES FOR CERTAIN CLAIMS, INCLUDING CLAIMS 21, 56, AND 77, AND FLINT HILLS RESOURCES LLC'S CLAIM FOR PRODUCTION CAPACITY BREACH-OF-CONTRACT AND FRAUD WITH RESPECT TO THE WASTEWATER FEED TANKS

Flint Hills has owned the Joliet Plant for five-and-a-half-years. But over half of the damages it seeks at trial, approximately $56 million, are for future estimated costs that it has not yet spent. Indeed, many of the projects for which it seeks damages have not even had initial scoping analyses prepared or funding authorized, and there is no planned date for these projects to begin or end.

Before trial, the Court specifically explained the elements and standards that Flint Hills would have to meet and prove in order to justify sending its estimated future damages claims to the jury, including black letter law such as proving that such costs were reasonably certain to be incurred and that their amounts could be proven with reasonable certainty. Now that Flint Hills has closed its case, the witness testimony and other record evidence demonstrate that Flint Hills

has failed to meet the Court's standards for many of its estimated future damages claims. Accordingly, judgment as a matter of law should be granted in favor of BP Amoco and against Flint Hills' future estimated damages claims for four specific Claims—Nos. 9, 21, 56, and 77.

Moreover, the record also establishes that Flint Hills cannot prove its alleged production capacity claim for the EF-501 and EF-511 wastewater feed tanks. There is no competent evidence that the tanks constrain production, and Flint Hills knew about the condition of the tanks before the sale. Therefore, judgment as a matter of law should be granted dismissing the portions of Flint Hills' production capacity claim (Claim 21) for breach-of-contract and fraud related to the wastewater feed tanks.

ARGUMENT

A motion for judgment as a matter of law should be granted when "a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a). "If reasonable persons could not find that the evidence justifies a decision for a party on an essential element of its claim, the court should grant judgment as a matter of law." *Waubanascum v. Shawano County*, 416 F.3d 658, 664 (7th Cir. 2005). "[T]o avoid a directed verdict or a JNOV, a plaintiff must do more than merely argue that the jury might have chosen to disbelieve all of the defendant's evidence. A plaintiff must offer substantial evidence to support the argument." *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1181 (7th Cir. 2002) (ellipsis and internal quotation marks removed); *see also Perfetti v. First Nat'l Bank*, 950 F.2d 449, 456 (7th Cir. 1991). "A mere scintilla of evidence, however, will not suffice" to avoid judgment as a matter of law. *Hall v. Forest River, Inc.*, 536 F.3d 615, 619 (7th Cir. 2008).

To prove its estimated future damages claims, Flint Hills must establish each of the following: (i) that the future estimated costs Flint Hills seeks to recover are "reasonably certain to occur," and (ii) that the future estimated costs "can be calculated with reasonable certainty." (Dkt. 767 at 2, citing Dkt. 437 at 20; *see also* Dkt. 831, Breach of Contract No. 5) The Court held that while Flint Hills may seek to use various types of evidence such as documents and witness testimony to prove such damages, whatever type of evidence is used must be sufficient to support an award of future estimated damages. Specifically, the Court held that for documents such as third-party cost estimates, Flint Hills must show that: (i) the third-party estimates were integrated into Flint Hills' records; (ii) it relied upon the third-party estimates; and (iii) the documents are accompanied by sufficient indicia of reliability. (Dkt. 767 at 3) Similarly, the

Court held that Flint Hills could have employee-witnesses provide testimony regarding the estimated amount of Flint Hills' future repair costs, but only if they satisfied the requirements of FRE 702. (*Id.* at 5) For internal cost estimates, "Flint Hills must establish that these documents are business records and that the documents upon which they rely (third-party estimate or pre-sale BP Amoco estimates) are admissible (as business records or party admissions, respectively)." (Dkt. 767 at 5)

Flint Hills' own evidence demonstrates that it has failed to satisfy these requirements for four of its future estimated damages claims—Nos. 9, 21, 56 and 77.

I. FLINT HILLS HAS NOT PROVEN THAT THE FUTURE DAMAGES COSTS FOR THE SPECIFIED CLAIMS ARE REASONABLY CERTAIN TO OCCUR.

Flint Hills has failed to meet its burden of satisfying the first requirement—that future damages were reasonably certain to occur—by failing to introduce evidence of specific facts showing that the projects at issue in the four claims would be completed in the future. Instead, the evidence put forth for most claims was simply the conclusory statement of witnesses agreeing with Flint Hills' counsel's questions that the projects are "reasonably certain to occur" or "reasonably likely to occur" but without any supporting facts, factual basis for the conclusory statement, or evidence. The Seventh Circuit "repeatedly ha[s] held that conclusory statements, not grounded in specific facts, are not sufficient to avoid summary judgment." *Lucas v. Chicago Transit Auth.*, 367 F.3d 714, 726 (7th Cir. 2004); *see also Keri v. Bd. of Trs. of Purdue Univ.*, 458 F.3d 620, 628 (7th Cir. 2006); *Laborers' Pension Fund v. RES Envtl. Servs., Inc.*, 377 F.3d 735, 739 (7th Cir. 2004). "And the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986)). Given that the standard for granting summary judgment is the same as that for judgment as a matter of law, if conclusory statements are insufficient to survive summary judgment, they are equally insufficient to survive judgment as a matter of law.

Indeed, despite its conclusory and unsupported statements, the specific facts in evidence show there is no basis for the jury to conclude that it is reasonably certain that the estimated futures damages will ever be spent. For the four specific claims subject to this motion, Flint Hills does not know when the costs will be spent. Indeed, in some cases, Flint Hills has not spent a single penny of the alleged future costs it seeks—even though it has owned the Joliet

Plant for five-and-a-half years and this suit began four years ago. Moreover, Flint Hills has not even authorized any of the funding at issue. And for some of the projects, Flint Hills has not decided whether to proceed with the project at all, or it has not decided what type of repair or replacement to make.

- Specifically, as part of **Claim 21**, Flint Hills seeks $23,350,000 for estimated future damages for a long-term waste water treatment plant ("WWTP") project, which supposedly consists of replacing the current waste water treatment reactor with a new twin UASB reactor. Flint Hills' former plant manager Timothy Nicol responded "yes" when asked by Flint Hills counsel if such costs were "reasonably likely" to be incurred (Ex. 1, 10/13/09 Tr. at 5109:18-20), and later answered "yes" again when asked if such costs were "reasonably certain" to be incurred (Ex. 2, 10/14/09 Tr. at 5285:19-21). But Mr. Nicol is not the current plant manager; and he provided no specific facts or factual basis to support these bare conclusory assertions. He did not, for example, provide a date by when the reactor would be replaced, testify that Flint Hills had authorized funding for the project, or testify that Flint Hills had signed a contract with a vendor to purchase and install the reactor.

Instead, the specific facts required under Seventh Circuit precedent establish that whether the costs Flint Hills seeks will ever be incurred is highly uncertain. Not only has this reactor not been built, but Flint Hills' management currently is reviewing the project and has not yet decided whether to proceed—as Mr. Roman admitted: "My understanding is that management is reviewing the UASB twin reactor system and a decision is pending." (Ex. 3, 10/8/09 Tr. (Roman) at 4662:5-10, Ex. 4, 10/9/09 Tr. (Roman) at 4700:15-23) What that decision will be is unknown. When that decision will be made is also unknown. In fact, Mr. Kelly testified that Flint Hills was in the process of educating its new plant manager about the options. (Ex. 5, 9/17/09 Tr. at 1201:18-1202:4 (stating that the process design is "undergoing review " and "my process design is being reviewed, and we're trying to get the plant manager and the process supervisor to a point where they understand what it is that we're recommending")) Given that Flint Hills has not decided whether to proceed with the reactor project, it cannot be said to be reasonably certain. Supporting this uncertainty is the fact that Flint Hills has not even authorized funding for the new anaerobic reactor. (Ex. 2, 10/14/09 Tr. (Nicol) at 5233:23-5234:6) One final point—no witness with decision making authority, who can actually authorize the WWTP project or spending the $23.35 million ever took the stand to testify that a decision has been

made to proceed or to spend the claimed damages, that the project will be done as outlined, or other facts necessary to establish that these costs are reasonably certain to be incurred. There is, in short, a complete absence of proof on this point.

- Another part of **Claim 21** seeks $17.2 million to add a fourth TMA reactor to the Joliet Plant. While Mr. Nicol offered up the unsupported conclusion that Flint Hills is "reasonably certain to incur the costs for adding a fourth reactor" (Ex. 2, 10/14/09 Tr. (Nicol) at 5136:22-24), he did not testify to any specific facts to support this conclusory statement. To the contrary, when asked whether he knew when the reactor would be installed, Mr. Nicol acknowledged "I would only be speculating." (*Id.* at 5247:3-6) In fact, there is not even a Phase 0 AFE for this project. (Ex. 2, 10/14/09 Tr. (Nicol) at 5246:14-15) In other words, the project is in a stage before the phase "where a conceptual idea is developed." (Ex. 3, 10/8/09 Tr. (Roman) at 4620:7-10) Moreover, Mr. Nicol is no longer the Joliet Plant manager, and is no longer in charge of the Plant. No witness with authority over the Plant, or its expenditures took the stand and testified that this fourth reactor would be added, or what its cost would be, or when it would be added, or any of the other necessary facts to show that the costs Flint Hills seeks are reasonably certain to be incurred.

In addition, Flint Hills does not have a contract with any vendor to purchase a fourth reactor, and does not even have a contract for a vendor to perform design work for the alleged reactor. (Ex. 2, 10/14/09 Tr. (Nicol) at 5243:5-7, 13-18) In fact, Flint Hills has not received any estimates, quotes, or budgetary estimates from third-party vendors for a fourth TMA reactor. (*Id.* at 5242:4-13) In sum, Flint Hills has not authorized spending one penny in connection with a fourth TMA reactor.[1] (*Id.* at 5246:16-18) Having failed to do any work over the last five years to advance the fourth TMA reactor project, Flint Hills cannot prove now that it is reasonably certain to occur. This is particularly true given that no person with decision making authority with respect to the fourth TMA reactor testified, and there are no other facts in the record which establish the who, the what, the when, the how, and a reasonably certain amount that would be spent for a fourth reactor.

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[1] Further compounding this uncertainty is that there is no evidence that Flint Hills has a commercial need for a fourth reactor. Under BP Amoco's ownership, the Joliet Plant produced 59.1 kmt of TMA in 2000 using three reactors. (Ex. 20, Trial Ex. 5091 at BPACC0796915) Flint Hills has sold significantly less TMA in every year it has owned the Plant, with its best year coming in 2006 when it sold 54.1 kmt. (Ex. 1, 10/13/09 Tr. (Daugherty) at 4940:5-7, 4945:14-16, 4947:19-21, 4949:11-13, 4952:10-12)

- For the dryer seals portion of **Claim 21**, Mr. Nicol concurred with counsel's conclusions that Flint Hills was "reasonably likely" to incur those costs (Ex. 1, 10/13/09 Tr. (Nicol) at 5114:16-20), and then later that such costs were "reasonably certain" (Ex. 2, 10/14/09 Tr. (Nicol) at 5285:13-15). These conclusory statements without specific factual bases are not sufficient. *Lucas*, 367 F.3d at 726; *see also Keri*, 458 F.3d at 628; *RES*, 377 F.3d at 739. Flint Hills has not replaced the dryer seals in the five-plus years it has owned the Plant. (Ex. 2, 10/14/09 Tr. (Nicol) at 5177:3-5) Indeed, Mr. Nicol is not aware of Flint Hills spending even one penny to replace the dryer seals. (*Id.* at 5177:6-14) Nor is Mr. Nicol aware of any contracts with vendors to spend money in the future. (*Id.* at 5178:14-17) Moreover, there is no target date for completion of the project. (*Id.* at 5177:16-18) In fact, the dryer seals project has not even reached Phase 0 of Flint Hills' seven project phases. (*Id.* at 5178:3-5) And again, no person with decision making authority to spend the funds took the stand to provide the factual basis of the when, the what, or a reasonably certain amount that would be spent on this project.
- Another part of **Claim 21** involves overhauling the HC-2101 air compressor. (Ex. 6, 10/7/09 Tr. (Morris) at 4206:21-4207:10, 4213:3-7) Mr. Nicol testified there was no date certain for when Flint Hills planned to overhaul the air compressor. (Ex. 2, 10/14/09 Tr. (Nicol) at 5279:16-19) In fact, from June 2006 through June 2009, Nicol was not aware of any activity in connection with overhauling the HC-2101 air compressor. (*Id.* at 5280:6-9)
- Yet an additional portion of **Claim 21** concerns refurbishing the HT-505 dehydration tower. (Ex. 1, 10/13/09 Tr. (Nicol) at 5111:11-13) As with the other projects, Flint Hills has not scheduled the refurbishment of the HT-505 tower (Ex. 2, 10/14/09 Tr. (Nicol) at 5240:13-16), and thus there is no evidence as to when this project might be started much less completed. Indeed, Flint Hills does not even have a Phase 0 estimate for the project. (*Id.* at 5240:17-19) Recall that Phase 0 means that the project is not yet even on the drawing board, but is "where a conceptual idea is developed." (Ex. 3, 10/8/09 Tr. (Roman) at 4620:7-10)
- **Claim 77** involves a utility boiler, and Flint Hills' witness Rick Morris agreed with counsel's conclusion that the work was "reasonably certain" to occur, but again without providing any specific factual support such as a date by when the costs would be spent. (Ex. 6, 10/7/09 Tr. (Morris) at 4203:8-18) In fact, the question of whether to repair or replace the utility boiler is still under management review, and a final decision has not yet been made. (Ex. 3, 10/8/09 Tr. (Roman) at 4637:9-17; Ex. 4, 10/9/09 Tr. (Roman) at 4692:25-4693:7) Moreover, this project is

still in phase 1, of a total of seven phases. (Ex. 4, 10/9/09 Tr. (Roman) at 4690:19-4691:1) Phase 1, like Phase 0, is "where a conceptual idea is developed" (Ex. 3, 10/8/09 Tr. (Roman) at 4620:7-10), and such phase 1 estimates can have an error range of up to plus or minus *50 percent*. (Ex. 8, 10/8/09 (Morris) at 4390:20-23) Costs for a project in the conceptual development stage and currently under management review—five-and-a-half years after Flint Hills bought the Plant—are not reasonably certain to be incurred. Finally, as with Claim 21, no person with the authority—no actual decision maker—took the stand to put in the necessary and required proof. Again, there is a gap in the evidence and failure of proof.

- **For Claim 9**, Flint Hills seeks almost $3 million to install new heating ventilation and air condition ("HVAC") systems in motor control center buildings. As with the other claims, Mr. Morris concurred with the conclusion that the costs for such repairs are "reasonably certain" to occur in the future (Ex. 6, 10/7/09 Tr. (Morris) at 4175:3-6), but again, he failed to provide any specific facts such as a date by which those costs will be spent, whether Flint Hills had authorized funding for the new HVAC systems, or whether Flint Hills had signed any contracts with vendors to install those systems. Again, no person with decision making authority took the stand to provide the requisite proof—and there is no evidence of a date for starting the project, much less completing it; no evidence of contracts signed for the project; no admitted exhibit showing authorization for the damages at issue to be spent; or other specific facts that could support the project being reasonably certain to occur.

- **For Claim 56**, Flint Hills seeks $6 million in estimated future damages to replace electrical substation A. Mr. Morris asserted that this work is supposed to be done "in the next one to two years," but he offered no support or basis for his assertion (Ex. 6, 10/7/09 Tr. (Morris) at 4239:14-17, 4361:12-17) In fact, the specific evidence shows that no authorization for expenditure has been approved to fund the project, and only $100,000 dollars—or 1.7% of the damages Flint Hills is seeking—has been authorized to be spent. (*Id.* at 4353:19-4354:2, 4358:11-13) That $100,000 was authorized supposedly to develop the other phases of the project. (*Id.* at 4360:21-25) Again, five years after the sale, no person with decision making authority took the stand to testify that: (i) the project will actually be done; (ii) it will be started at a date certain; (iii) it will be completed by an approximate date certain; (iv) it will cost the amount at issue; (v) that there are contracts that have been signed; and (vi) that the funding has been authorized. There is a complete failure of proof and a gap in the evidence—other than Mr.

Morris' assertion—an assertion for which he has no factual basis regarding a decision that he does not have authority to make.

II. FLINT HILLS HAS NOT PROVEN THE AMOUNT OF ESTIMATED FUTURE DAMAGES TO A REASONABLE CERTAINTY.

In addition to failing to prove that the costs are reasonably certain to be incurred, for many of its future estimated damages Flint Hills has failed to prove that the amount of such costs can be calculated with reasonable certainty. Flint Hills' witnesses explained that it has a phased approach to completing projects. "[B]asically we like to start out what's called a phase zero or Phase 1. That's where a conceptual idea is developed." (Ex. 3, 10/8/09 Tr. (Roman) at 4620:7-10) A phase 1 estimate is a preliminary cost estimate and the first part of Flint Hills' process. (Ex. 4, 10/9/09 Tr. (Roman) at 4697:23-4698:1) Such phase 1 estimates can have an error range of up to plus or minus *50 percent*. (Ex. 3, 10/8/09 (Morris) at 4390:20-23) Flint Hills does not typically fully fund a project based on a Phase 1 estimate. (Ex. 4, 10/9/09 Tr. (Roman) at 4697:8-11) Phase 2 is Flint Hills' "process design phase." (Ex. 3, 10/8/09 Tr. (Roman) at 4620:20-21) As with Phase 1, Flint Hills does not typically authorize full funding for a project based on a phase 2 estimate. (Ex. 4, 10/9/09 Tr. (Roman) at 4698:5-8)

With respect to the Claims at issue on this Motion, Flint Hills' projects are in the early stages of Flint Hills' phased process, and thus they have estimates that are subject to wide variances. Indeed, some of these projects are pre-Phase 0, meaning Flint Hills has done no work on or analysis of them at all after owning the Plant for five-and-a-half years. Flint Hills also uses figures based on several-year-old documents that provide no support or explanation for how the figure was calculated. Other estimates are for equipment that is dissimilar from what Flint Hills plans to install. Because of these facts, Flint Hills has not shown that its damages can be calculated with reasonable certainty.

- As part of its production capacity, **Claim 21**, Flint Hills seeks $17.2 million for a fourth TMA reactor. But Flint Hills does not have a contract with a vendor to purchase a fourth reactor. (Ex. 2, 10/14/09 Tr. (Nicol) at 5243:8-11) In fact, Flint Hills does not even have a contract for design work for a fourth reactor. (*Id.* at 5243:15-18) Nor does Flint Hills have any third-party documents about what such a reactor would cost. For example, Flint Hills has not received any estimates from any vendors for the purchase of a fourth reactor. (*Id.* at 5242:10-13) Nor does Flint Hills have any vendor quotes for a fourth reactor. (*Id.* at 5243:2-4) Indeed, Flint Hills has not done any work with vendors to get even a budgetary estimate for a fourth reactor. (*Id.* at

5243:5-7) In sum, in the four years this case has been pending, Flint Hills has never gotten a single estimate from a vendor for a fourth TMA reactor. (*Id.* at 5245:23-5246:2)

In fact, there is not even a Phase 0 AFE for this project. (Ex. 2, 10/14/09 Tr. (Nicol) at 5246:14-15) In other words, the project is in a stage before the phase "where a conceptual idea is developed." Predictably given that the project has not even entered Flint Hills' phase process, Flint Hills has not authorized spending one penny in connection with a fourth TMA reactor. (*Id.* at 5246:16-18)

Instead, Flint Hills bases the amount of damages for this alleged project solely on a handful of lines that appear in documents created more than six years ago in 2003. (Ex. 2, 10/14/09 Tr. (Nicol) 5137:12-24; Ex. 7, Trial Ex. 36 at FHR-00188325; Ex. 8, Trial Ex. 1037 at FHR-00188279) These documents list figures for certain equipment, but provide no explanation of the basis for those figures. Flint Hills elicited testimony that the figure was based on a reactor that was going to be built in Malaysia before it was cancelled. (Ex. 9, 9/15/09 Tr. (Kelly) at 1083:6-1084:6) But Flint Hills failed to put into the record evidence of when this estimate was made, the costs of the equipment for the Malaysian reactor, whether the same equipment would be needed as for the Malaysian reactor, the size of the reactor to be built in Malaysia, the capability of the reactor to be built in Malaysia, costs differences for reactors between Malaysia and the United States, or numerous other facts necessary to show the Malaysia estimate reliably could be used to estimate the costs of a fourth TMA reactor for the Joliet Plant. Mr. Nicol admitted he used this estimate even though he did not know whether BP Amoco had done any design work in connection with the project. (Ex. 2, 10/14/09 Tr. at 5244:3-10)

Moreover, Mr. Nicol claimed he used the 2003 document because it was co-authored by Daniel Kelly. (Ex. 2, 10/14/09 Tr. (Nicol) at 5244:3-10) But Mr. Nicol never asked Mr. Kelly if he did any design work in connection with that figure, does not know if he contacted any vendors, and does not know the basis Mr. Kelly used to come up with the number. (*Id.* at 5244:14-23) Mr. Nicol does not know whether Mr. Kelly had worked on any projects involving a reactor similar to the one Flint Hills seeks damages for. (*Id.* at 5245:3-11) Nor does Mr. Nicol know if Mr. Kelly worked with outside vendors in connection with any TMA reactor projects or replacement projects, and he never discussed with Mr. Kelly whether he consulted an outside vendor. (*Id.* at 5245:12-19, 5246:10-13) A 6-year old document that was not a bid, quote or contract and which provides no explanation of how the cost figure was calculated cannot alone

prove damages to a reasonable certainty. *See*, *e.g.*, *Mister v. N.E. Ill. Commuter R.R.*, 571 F.3d 696, 699 (7th Cir. 2009) (holding that even though a document was a party admission, it was properly excluded under FRE 403 where the document was based on hearsay and had other foundational problems). This is particularly true where no one in authority at Flint Hills testified that this cost estimate was the basis for the project, that the project had been approved, that the project had a start and completion date, that contracts had been signed or bid out, or that funding had been authorized. Again, all of the necessary evidence is completely lacking.

- For the long-term WWTP project portion of **Claim 21**, Flint Hills is still in the early stages of the project, and is at the end of Phase 2. (Ex. 4, 10/9/09 Tr. (Roman) at 4699:19-22) Moreover, Flint Hills has not internally authorized spending for the $23.35 million sought. (*Id.* at 4699:23-4700:2) In other words, Flint Hills has not yet determined that the amount of estimated future damages it seeks from BP Amoco for this claim is reasonably certain enough for Flint Hills to commit its own money.

Nor can the Brown & Caldwell estimates that Flint Hills cites establish the amount of damages for the new anaerobic reactor to a reasonable certainty. To begin with, Flint Hills used a series of estimates from Brown & Caldwell that were repeatedly revised, resulting in significant differences to the estimated costs. For example, the estimates Flint Hills introduced began at $17.6 million—almost $6 million *less* than what Flint Hills seeks in damages—and then moved to $18.65 million, then to $22.3 million, and then to $24.95 million, with the last of these being *more* than what Flint Hills seeks in damages. (Ex. 3, 10/8/09 Tr. (Roman) at 4643:13-15, 4648:2-9 ($17.6 million), 4649:7-9 ($18.65 million), 4658:2-9 ($22.3 million), 4660:12-14 ($24.95 million)) The fact that the estimates introduced by Flint Hills have varied by over 40 percent demonstrates the uncertainty of these supposed costs. Moreover, the first three estimates introduced by Flint Hills are *less* than its claimed damages, and thus cannot support its assertion that it will incur $23.35 million in damages with reasonable certainty. Finally, these estimates are each subject to significant contingencies. For example, of the $24.95 million estimate, $5.684 million—over 22% of the supposed "costs"— is for a "construction contingency," which is money that is not budgeted for any specific item and may never be spent even if Flint Hills were to build a new anaerobic reactor.[2] (Ex. 18, Trial Ex. 2460 at 28; *see also* Ex. 19, Trial Ex.

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[2] This estimate also contains other contingencies, including an "engineering contingency" of $85,000. (Ex. 18, Trial Ex. 2460 at 23)

2459 at 26 (listing a $5.022 million "construction contingency" for the $22.3 million estimate)) That these estimates contain such large contingencies further establishes that the estimated future costs for the new anaerobic reactor are uncertain, and could be several million dollars less than the damages Flint Hills seeks from BP Amoco.

- Similar to its alleged damages for a fourth TMA reactor, Flint Hills' damages for the purification dryer seals portion of **Claim 21** is based on a several-year-old estimate that Flint Hills has done nothing to verify. Flint Hills' sole basis for the $440,000 amount it seeks is a document prepared in March 2002 when BP Amoco owned the Joliet Plant (Ex. 2, 10/14/09 Tr. (Nicol) at 5179:17-22; Ex. 10, Trial Ex. 974) To begin with, the March 2002 estimate was not even for the same system that is at issue in Claim 21. (Ex. 2, 10/14/09 Tr. (Nicol) at 5182:7-9) Moreover, in April 2003 a document (which was distributed to the authors of the document Flint Hills cites for its damages amount) was drafted with a lower figure of $350,000 for the purification dryer seals that are at issue in this claim. (Ex. 2, 10/14/09 5182:10-5183:18; Ex. 11, Trial Ex. 34 at BPACC0006258)

Moreover, Flint Hills has not obtained any vendor estimates for this project, and never obtained its own estimate for this project. (Ex. 2, 10/14/09 Tr. (Nicol) at 5179:20-22, 5184:1-3) Indeed, the project has not yet even reached Phase 0 of Flint Hills' approach. (*Id.* at 5178:3-5) Finally, Mr. Nicol, the sponsor of these damages, had no understanding of their basis. Mr. Nicol never discussed what the basis for the $440,000 estimate is with the authors of Trial Exhibit 974, and does not know from where the authors got the $440,000 figure. (*Id.* at 5180:12-20) A document with a bottom line number where Flint Hills has not offered any support for that figure cannot prove damages to a reasonable certainty, especially where that number was for a different system. *See*, *e.g.*, *Mister*, 571 F.3d at 699.

- Flint Hills' alleged future damages for the HT-505 dehydration tower portion of **Claim 21** follow the same pattern. Flint Hills' only support for the $250,000 it seeks is a single sentence in a six-and-a-half-year-old documents that reads "estimate of $250k provided by John D'Andrea, PIA Reliability Supervisor." (Ex. 11, Trial Ex. 34 at BPACC0006258) Mr. Nicol, who sponsored the damages for this claim as well, does not know how Mr. D'Andrea came up with the $250,000 figure. (Ex. 2, 10/14/09 Tr. (Nicol) at 5240:5-8) Moreover, Mr. Nicol does not know whether Flint Hills had done *anything* to verify the basis for the $250,000 estimate. (*Id.* at 5240:21-24) Flint Hills has not, for example, received any third-party estimates or put together

any of its own estimates. (*Id.* at 5240:9-12) Indeed, Flint Hills does not even have a phase 0 estimate for the project. (*Id.* at 5240:17-20) A completely unverified, six-and-a-half-year-old estimate derived from unknown sources for unknown reasons cannot support the amount of future damages to a reasonable certainty. *See*, *e.g.*, *Mister*, 571 F.3d at 699.

- For **Claim 56**, Flint Hills has no competent evidence of the $6 million it seeks to replace electrical substation A, and thus cannot prove its future estimated damages to a reasonable certainty. Flint Hills originally attempted to support these damages through Trial Exhibit 1705, but the Court struck this exhibit from the record and instructed the jury to disregard the testimony it heard regarding that exhibit. (Ex. 3, 10/8/09 Tr. at 4541:16-19) As a substitute, Flint Hills offered Exhibit 12, Trial Exhibit 5589, which is an internal Flint Hills "spending plan decision-making framework document." (Ex. 3, 10/8/09 Tr. (Morris) at 4542:16-20) But this number provides no support or explanation for the alleged $6 million for a new substation A and interrelated improvements. (Ex. 12, Trial Ex. 5589) Moreover, the Court has held that for internal cost estimates, "Flint Hills must establish that these documents are business records and that the documents upon which they rely (third-party estimate or pre-sale BP Amoco estimates) are admissible (as business records or party admissions, respectively)." (Dkt. 767 at 5) There has been no showing here that any third-party documents on which Exhibit 5589 relied are admissible; indeed, the supporting third-party document was presumably Trial Exhibit 1705 which the Court has stricken. Thus, the figures in Exhibit 5589 have no foundation, and they cannot be used to prove the amount of damages to a reasonable certainty.

Moreover, Exhibit 5589 expressly states that the project is in "Phase 1" of Flint Hills' system. (Ex. 12, Trial Ex. 5589 at FHR-00638109) Phase 1 estimates can have an error range of up to plus or minus 50 percent. (Ex. 3, 10/8/09 (Morris) at 4390:20-23) Such a wide variance cannot prove estimated damages to a reasonable certainty. This is particularly true where no authorization to spend money has been given; where no date has been set for the project; where no person with decision making authority has explained that the project will be done; and where no contracts have been signed or bid out, among other missing evidence.

- Flint Hills seeks $3.6 million in damages for the utility boiler under **Claim 77** based on a Phase 1 estimate. (Ex. 4, 10/9/09 Tr. (Roman) at 4686:11-17; Ex. 13, Trial Ex. 5584) This

estimate combines information from third-party vendor Hayes Mechanical[3] with George Roman's own estimates. (Ex. 3, 10/8/09 Tr. (Roman) at 4633:15-23) The estimate has an error range of minus 10 to plus 15 percent for the portion from Hayes Mechanical and an error range of *plus or minus 50 percent* for the portion estimated by Mr. Roman. (Ex. 4, 10/9/09 Tr. (Roman) at 4689:15-4690:18; Ex. 13, 5584 at FHR-E00413981-0001) Thus, the costs in this estimate vary from a best case scenario of just over $2.8 million to a worst case of $4.53 million—which is approximately 61% greater than the best case. (Ex. 4, 10/9/09 Tr. (Roman) at 4688:13-21; Ex. 13, 5584 at FHR-E00413981-0001) Future costs that could fall within such a wide variance cannot be described as reasonably certain. Again, there is no approved funding; the date of start and completion, if any, is unknown; and no person with decision making authority came and testified about the key missing facts.

To sum up: one fundamental flaw which runs through each of Flint Hills' future estimates for these claims is that outside of this case Flint Hills would not, as the evidence shows, authorize spending based upon estimates or testimony like that before the Court. In Flint Hills' own system, it goes through 7 phases as part of a design, funding, and funding approval process and system. Flint Hills would not spend a penny of its money that did not follow through on these phases; and thus no jury should be allowed to award damages that Flint Hills itself would not authorize or spend. This is unlike the case where Flint Hills has approved a plan, and approved a budget, and approved the expenditures for a particular amount—assuming that it has or was awarded the money. Instead, this is a case where Flint Hills has no plan, has no budget, has no contract, has no third-party bids, has no authorization to proceed, has no date certain to start, no date certain for completion, or any of the other requirements it would demand outside of the courtroom in contracting for a project. Accordingly, Flint Hills has failed to put into evidence the necessary facts to justify an award of future estimated damages.

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[3] Notably, Flint Hills requested that Hayes Mechanical provide only a "budgetary quote" to "be used for screen economics," rather than a "formal bid package." (Ex. 4, 10/9/09 Tr. (Roman) at 4680:9-14, 4681:18-4682:8; Ex. 14, Trial. Ex. 7904) If Flint Hills had asked for an actual bid, it would expect the vendor's response to be more specific and more detailed, and Flint Hills also would provide additional information to the vendor. (Ex. 4, 10/9/09 Tr. (Roman) at 4683:10-18) Flint Hills has not sought a bid proposal from any vendor for these repairs. (*Id.* at 4683:19-21)

III. FLINT HILLS HAS NOT RELIED UPON THE THIRD-PARTY ESTIMATES OR INTEGRATED THEM INTO ITS RECORDS.

The Court has held that for Flint Hills to be able to use third-party estimates to prove its damages Flint Hills must integrate those documents into its records as well as rely upon the document "in its day-to-day operations." (Dkt. 767 No. at 3) For the claims at issue where Flint Hills has cited third-party documents, there is no evidence that either requirement has been satisfied. Indeed, the evidence affirmatively shows that Flint Hills has not relied on or integrated the documents. In particular, this lack of reliance is shown by Flint Hills' failure to authorize spending funds based on third-party documents. During prior briefing on its estimated future damages, Flint Hills claimed that it integrated and relied on the documents by "integrating the estimates into the development of 'Authorization for Expenditure' ('AFE')" (Dkt. 767 at 4), but there are no AFEs for the following claims.

- For example, Flint Hills' damages for **Claim 77** are based in part on a "budgetary estimate" from Hayes Mechanical (Ex. 4, 10/9/09 Tr. (Roman) at 4680:9-23), but Flint Hills has not relied on that document because the question of whether to repair or replace the utility boiler is under management review, and a final decision has not yet been made. (Ex. 3, 10/8/09 Tr. (Roman) at 4637:9-17; Ex. 4, 10/9/09 Tr. (Roman) at 4692:25-4693:7) Moreover, this project is still in phase 1 (Ex. 4, 10/9/09 Tr. (Roman) at 4690:19-4691:1), which is "where a conceptual idea is developed." (Ex. 3, 10/8/09 Tr. (Roman) at 4620:7-10). Finally, there has been no evidence of an AFE to fully fund the repair of the utility boiler.
- Similarly, for **Claim 56**, not only has Flint Hills' third-party estimate been stricken from the record, but the evidence shows that Flint Hills did not rely on it. No AFE has been approved for the $6 million in estimated future damages that Flint Hills seeks, the project is not fully funded, and less than 2% of the damages Flint Hills seeks has been authorized to be spent. (Ex. 6, 10/7/09 Tr. (Morris) at 4353:19-4354:2, 4358:11-13, 4360:21-25)
- For the long-term WWTP project portion of **Claim 21**, Flint Hills' damages purport to be based on estimates from Brown & Caldwell, but again there is no evidence that Flint Hills actually has relied on these estimates. Instead of relying on the Brown & Caldwell estimates to fund and build a new reactor, Flint Hills has not decided whether it wants to build the new reactor at all: "My understanding is that management is reviewing the UASB twin reactor system and a decision is pending." (Ex. 3, 10/8/09 Tr. (Roman) at 4662:5-10; Ex. 4, 10/9/09 Tr. (Roman) at 4700:15-23) Further supporting that lack of reliance is the fact that Flint Hills has

not authorized full funding for the project based on those Brown & Caldwell estimates. (Ex. 2, 10/14/09 Tr. (Nicol) at 5233:23-5234:6) Moreover, the $23.35 million in damages Flint Hills seeks for this project does not match any of the estimate that it introduced into evidence, further demonstrating a lack of reliance. (Ex. 3, 10/8/09 Tr. (Roman) at 4643:13-15, 4648:2-9 ($17.6 million), 4649:7-9 ($18.65 million), 4658:2-9 ($22.3 million), 4660:12-14 ($24.95 million)) And as explained in Section II, for the other portions of estimated future damages for Claim 21 Flint Hills has no third-party estimates at all.

IV. FLINT HILLS' EVIDENCE LACKS THE NECESSARY INDICIA OF RELIABILITY TO PROVE ESTIMATED FUTURE DAMAGES.

Flint Hills' third-party estimates also are not "accompanied by sufficient indicia of reliability" to support the damages Flint Hills seeks. (Dkt. No. 767 at 3) For example, the figure Flint Hills requested from Hayes Mechanical for the utility boiler at issue in Claim 77 was explicitly a "budgetary estimate" as opposed to a formal bid. (Ex. 4, 10/9/09 Tr. (Roman) at 4680:9-23, 4682:5-8) A budgetary estimate is less detailed and less specific than a bid proposal, and Flint Hills also would have provided more information to Hayes for a bid proposal. (*Id.* at 4683:10-18) Put differently, Flint Hills—if it was going to proceed on the project—would get a formal bid, not an estimate. A figure based on limited information and minimal detail is not a sufficiently reliable basis on which to award future damages. Moreover, for claims including 77, 56, and the long-term WWTP portion of Claim 21, Flint Hills itself has brought into question the reliability of the third-party estimates. Flint Hills has not authorized funding for the damages it seeks based on any of the third-party estimates for these claims. (Ex. 3, 10/8/09 Tr. (Roman) at 4637:9-17; Ex. 4, 10/9/09 Tr. (Roman) at 4692:25-4693:7; Ex. 6, 10/7/09 Tr. (Morris) at 4353:19-4354:2, 4358:11-13, 4360:21-25; Ex. 2, 10/14/09 Tr. (Nicol) at 5233:23-5234:6) If these estimates are not sufficiently reliable for Flint Hills to authorize full funding during the five-and-a-half-years since it has owned the Joliet Plant, they likewise should not be considered sufficiently reliable to form an adequate basis for future damages.

In addition, the six or seven-year-old documents from when BP Amoco owned the Joliet Plant likewise lack sufficient indicia of reliability to prove Flint Hills' estimated future damages. *See*, *e.g.*, *Mister*, 571 F.3d at 699. As explained in detail in Section II, most of these documents provide nothing besides a single line with a figure, with no explanation or support. For example, Flint Hills' $17.2 million estimate for a fourth TMA reactor is supposedly based on the costs to build a reactor in Malaysia six or more years ago. The document provides no explanation of the

basis for the component that make up the $17.2 million figure. Flint Hills' sponsor for these damages had never talked to the document's author, did not know what experience he had, or what he had done to come up with the figure. (Ex. 2, 10/14/09 Tr. (Nicol) at 5244:3-10, 5244:14-23, 5245:3-10, 5245:12-19, 5246:10-13) Similarly, the $440,000 Flint Hills seeks for the dryer seals portion of Claim 21 is based on a 2003 document. Mr. Nicol never discussed what the basis for the $440,000 estimate is with the authors of Trial Exhibit 974, and he does not know how or from whom the authors got the $440,000 figure. (*Id.* at 5180:12-20) Pulling a single, unsupported figure out of a several-year-old document—without performing any verification—cannot provide a reliable basis for a jury award of future damages.

V. FLINT HILLS' EMPLOYEE-WITNESSES ON DAMAGES ARE NOT EXPERTS UNDER THE STANDARDS OF RULE 702.

Finally, Flint Hills employee-witnesses lack the "knowledge, skill, experience, training, or education" to qualify as expert witnesses under FRE 702. (Dkt. 767 at 5) The record testimony and evidence demonstrates that those witnesses do not have the "specialized knowledge of a matter [that] is sufficient" for them to provide expert testimony. (*Id.*)

In particular, George Roman offered testimony about the appropriate costs to repair the utility boiler at issue in Claim 77, but he admitted that he had never prepared an estimate for a boiler such as CB-704. (Ex. 4, 10/9/09 Tr. (Roman) at 4688:4-8) Similarly, Mr. Roman testified about damages for the WWTP long-term project portion of Claim 21, but admitted that he (i) never had any involvement with an anaerobic reactor replacement project; (ii) never performed any cost estimates for an anaerobic reactor replacement project; (iii) never contacted any vendors to obtain any estimates for purposes of replacing an anaerobic reactor; and (iv) never obtained any estimates for any UASB reactors from any vendors. (*Id.* at 4696:1-16) Again on re-direct, Mr. Roman admitted he had not been involved in estimating a long-term capacity project prior to this case. (*Id.* at 4705:2-6) For that reason he worked with Brown & Caldwell, an outside vendor. (*Id.* at 4705:7-12) But this only reinforces that Mr. Roman could not properly give opinion testimony on the costs of the reactor: he had to work with Brown & Caldwell because he himself lacks the expertise required under FRE 702. *See*, *e.g.*, *Dura Auto. Sys. v. CTS Corp.*, 285 F.3d 609, 614 (7th Cir. 2002) ("A scientist, however well credentialed he may be, is not permitted to be the mouthpiece of a scientist in a different specialty.").

Mr. Nicol's lack of the expertise required by FRE 702 is even more apparent. From 1990 to the time Mr. Nicol came to the Joliet Plant, his positions did not involve inspecting equipment,

recommending repairs for equipment, or monitoring equipment for replacement or repairs. (Ex. 2, 10/14/09 Tr. at 5143:20-5147:23) Mr. Nicol agreed that before arriving at the Joliet Plant, he had spent most of his career on the commercial side of the business, as opposed to the operational side. (*Id.* at 5147:24-5148:2) Indeed, after leaving the Joliet Plant he went back to a position where he has no responsibility for inspecting equipment, recommending repairs, or establishing mechanical integrity programs. (*Id.* at 5151:12-25) There has been no showing that Mr. Nicol has general expertise in recommending repairs to equipment, much less that he has "specialized knowledge" of repair costs related to the equipment for which he sponsors damages. Flint Hills offered no testimony or evidence that Mr. Nicol had sufficient experience to satisfy the requirements of FRE 702.

VI. FLINT HILLS CANNOT RECOVER FOR THE WASTEWATER FEED TANKS UNDER THE PRODUCTION CAPACITY REPRESENTATION

In addition to the evidence at trial showing that Flint Hills has no future damages, Flint Hills also has failed to prove that the wastewater feed tanks at issue in Claim 50 constrained production capacity in any way. Therefore, Flint Hills cannot recover any damages, including damages for fraud, based on an allegation that the condition of wastewater feed tanks breach the production capacity representation of the PSA. (Trial Ex. 1.001 at 56-57 §7.1(d)(ii))

First, as with its estimated future damages claims, Flint Hills has failed to introduce any specific facts that the wastewater feed tanks constrain capacity. The only evidence Flint Hills introduced on this issue was testimony by Mr. Nicol answering "Yes, they do" to the question "Does -- the Issue 50 costs, do they relate to solving the production capacity bottleneck?" (Ex. 1, 10/13/09 Tr. at 5104:2-4) and responding "Yes" to "So, again, did Flint Hills have to repair the wastewater treatment feed tanks and do the prework that was described in Claim 50 for production capacity as well?" (*Id.* at 5105:19-5106:22) "[C]onclusory statements, not grounded in specific facts, are not sufficient to avoid summary judgment." *Lucas*, 367 F.3d at 726; *see also Keri*, 458 F.3d at 628; *RES*, 377 F.3d at 739. Because the inquiry under both summary judgment and judgment as a matter of law is the same, *Reeves*, 530 U.S. at 150, *Anderson*, 477 U.S. at 250-51, if conclusory statements are insufficient to survive summary judgment, they are insufficient to survive judgment as a matter of law.

Here, there were no specific facts to support Mr. Nicol's agreement with counsel's conclusions. For example, there was no suggestion that the tanks were not big enough, or that they could not handle enough waste water, or even that the capability or performance of the

tanks deteriorated at high PIA, TMA, or MAN production rates. Similarly, there is no evidence of what the PIA, TMA, or MAN production rates were before the wastewater feed tank repairs, or what the new production rates are now that the repairs are done. Moreover, Flint Hills' production capacity expert Dr. Russell Ogle did not identify the waste water feed tanks as a production capacity constraint or bottleneck during his testimony.

Second, Flint Hills cannot recover under its fraud count for the wastewater feed tanks in any event. Fraud requires, among other elements, proof by clear and convincing evidence of "plaintiff's reliance upon the truth of the statement." (Dkt 319 at 25); *see Davis v. G.N. Mortgage Corp.*, 396 F.3d 869, 881 (7th Cir. 2005). Under Illinois law, a party claiming fraud cannot prove justifiable reliance where he "close[s] his eyes to a known risk," or "close[s] his eyes to a risk that is obvious, even if he does not himself perceive the risk." *AMPAT/Midwest, Inc. v. Ill. Tool Works Inc.*, 896 F.2d 1035, 1042 (7th Cir. 1990); *see also Schmidt v. Landfield*, 20 Ill. 2d 89, 94, 169 N.E.2d 229, 232 (1960). Similarly, a party cannot prove that any allegedly false statements were material where it was provided with information that either showed the facts or called the representation into question. *See Ryan v. Wersi Elec. GmbH & Co.*, 59 F.3d 52 (7th Cir. 1995); *Mayer v. Spanel Int'l Ltd.*, 51 F.3d 670 (7th Cir. 1995).

Evidence from Flint Hills' own witnesses establishes that Flint Hills was fully aware of the condition of the wastewater feed tanks before the sale. Flint Hills' former chief inspector Mike Wegscheid testified at length to Flint Hills' late October 2003 due diligence findings on the wastewater feed tanks. (See Ex. 15, 9/30/09 Tr. at 3170:11-3188:25, 3194:13-3196:12; Ex. 16, Trial Ex. 5237.019-A; Ex. 17, Trial Ex 1557) Specifically, Mr. Wegscheid testified that he learned about the following before Flint Hills bought the plant:

- Nozzle leaks/clamps: "Q. Flint Hills was also aware that several nozzles that had leaked had been clamped, correct? A. Mark and I were aware of that, yes." (Ex. 15, 9/30/09 Tr. 3179:2-4)
- Interior lining: "Q. You were aware of the coating integrity issues prior to Flint Hills purchasing the facility, correct? A. Yes." (*Id.* at 3175:12-14)
- Overall condition of tanks: "Q. At the time of the visit, did you have an opinion that these tanks were not in substantially good operating condition and repair? [Objection overruled.] A. . . . I don't believe I considered them as being in substantially good operating

condition because of the coating failures and the leak on the nozzle and clamps that had been installed." (*Id.* at 3188:11-23)

Given the undisputed fact that Flint Hills knew of the tanks' condition, Flint Hills cannot prove the essential element of justifiable reliance for Claim 50, and thus cannot recover for fraud based on the wastewater feed tanks.

CONCLUSION

Before trial, the Court explained the tests Flint Hills' evidence would have to pass to prove its estimated future damages claims. The record establishes that, with respect to the four specific claims at issue, Flint Hills has failed the tests set forth by this Court prior to the trial of this case. There is no evidence that Flint Hills is reasonably certain to incur those costs, the amounts are not reasonably certain, and the evidence to which Flint Hills cites is not sufficiently reliable to prove such damages. Therefore, BP Amoco respectfully requests that the Court grant BP Amoco judgment as a matter of law on Flint Hills' estimated future damages for Claims 9, 21, 56, and 77.

Nor has Flint Hills introduced evidence to show that the wastewater feed tanks constrain capacity, and in any case Flint Hills was aware of those tanks' condition before sale. Therefore, BP Amoco respectfully requests that the Court grant BP Amoco judgment as a matter of law dismissing the portions of Flint Hills' Claim No. 21 for breach-of-contract and fraud claims related to the wastewater feed tanks.

Dated: October 26, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that October 26, 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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