

Motion Ex. 21

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BP AMOCO CHEMICAL COMPANY,)	
)	
Plaintiff/Counter-Defendant,)	
)	Consolidated Case No. 05 C 5661
v.)	
)	Judge Amy J. St. Eve
FLINT HILLS RESOURCES LLC,)	
)	
Defendant/Counter-Plaintiff.)	
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FLINT HILLS RESOURCES LLC,)	
)	
Third-Party Plaintiff,)	
)	
v.)	
)	
BP CORPORATION NORTH AMERICA INC.,)	
)	
Defendant.)	
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REPLY IN SUPPORT OF *DAUBERT* MOTION NO. 1:
FHR'S PRINCIPAL DAMAGES EXPERTS

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

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INTRODUCTION

FHR's proposed damages experts do not apply reliable methodologies, and indeed often apply no methodology at all. Instead, they rely upon speculative and unsupported non-expert assumptions. In fact, FHR's response is an admission that:

- Bettius makes adjustments that decrease the value of the PCBU in its allegedly "as-sold" condition even though these are based on factors wholly independent of and unrelated to FHR's claims. Thus, the supposed diminution in value that Bettius calculates is not limited to decreases caused by the alleged contract breaches or fraud, as required under Seventh Circuit precedent. Indeed, Bettius' testimony previously has been excluded for having made this same basic error.

- Bettius has no methodology to explain the amounts of the adjustments and discounts she chose. All Bettius and FHR can say is that she considered various factors, and then picked a number. The essential missing element is a methodology connecting the factors she considered to the number she used. Thus, her opinions amount to a bottom line without support.

- Baliban has no basis for using FHR's own internal rate of return ("IRR") for discounting cash flows to determine alleged damages. Neither Baliban nor FHR cite any authority to support the use of a company's own project-specific IRR to discount cash flows to value a business as a reliable, accepted methodology.

- Most illustrative of Baliban's lack of any accepted methodology is his assumption that FHR had a 50% probability of completing a deal with Eastman. This 50% assumption is a central component of Baliban's damages. If one asks what expertise Baliban has and what methodology he uses to come up with that estimate, the answer is none. It is pure guesswork unrelated to any expert analysis. Indeed, FHR's own financial model did not include these Eastman cash flows in its base-case scenario. For this reason alone, Baliban's opinions should be excluded.

I. BALIBAN'S AND BETTIUS' OPINIONS SHOULD BE EXCLUDED BECAUSE NEITHER HAS APPLIED A RELIABLE METHODOLOGY.

A. Baliban And Bettius Have Failed To Calculate The Joliet Plant's Fair Market Value In An "As-Represented" Condition On The Date Of Closing.

All of the valuation experts in this case agree that the proper method for determining FMV is to determine the price at which property would change hands between a hypothetical willing seller and a hypothetical willing buyer. (Ex. 3, Bettius Rep. at 2; FHR Ex. 5, Baliban Dep. at 77:20-23; Ex. 4, Elson Rebuttal Rep. at 5; Ex. 11, Bergmark Rebuttal Rep. at 6; *see also*

BP Amoco Memo. at 4-5). Despite this, neither Baliban nor Bettius calculated the FMV for the Joliet Plant in its “as-represented” state on the date of closing. Nor is there any evidence that they attempted to establish, much less confirm, that the particular price at which FHR and BP Amoco closed the Joliet Plant transaction was the same as an objective measure of value between a hypothetical buyer and seller. *See In re Rosewell*, 120 Ill. App. 3d 369, 373, 458 N.E.2d 121, 125 (Ill. App. Ct. 1983) (the standard for FMV is “an objective one ... being set by the forces of the marketplace at a given place and time”). By failing to calculate the FMV of the Joliet Plant in its “as-represented” condition, Baliban and Bettius have failed to use the proper diminution-in-value methodology. *E.g., Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

FHR does not deny that Baliban and Bettius failed to determine the FMV of the Joliet Plant in its “as-represented” condition. (FHR Resp. at 2-3) Neither Baliban nor Bettius disclosed in their reports any opinions about the purchase price necessarily being the FMV in the “as-represented” condition – let alone disclosing the bases for any such opinions or any verifiable methodology used to develop such opinions. Instead, FHR simply asserts that the transactional purchase price is automatically the FMV for purposes of a diminution-in-value analysis. (*Id.* at 3) But FHR bears the burden of establishing that Baliban’s and Bettius’ opinions are admissible, and neither expert has done the work necessary to establish that the transactional price for the Joliet Plant equaled the FMV of the Plant. *See Euroholdings Capital & Inv. Corp. v. Harris Trust & Sav. Bank*, 2009 WL 650373, at *4 (N.D. Ill. Mar. 11, 2009).

FHR cites only two cases in its argument. Neither helps its cause. One of the cases concerns the issue of whether proper notice was given before the sale of collateral in a bankruptcy case and whether that sale was commercially reasonable. *In re Excello Press, Inc.*, 890 F.2d 896, 900, 907 (7th Cir. 1989). The other, *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725, 728-29 (1997), involves the question of whether a regulatory takings claim was ripe. Neither case addresses the issue at hand here, which is whether to establish FMV an expert must do the work commonly done, or can simply assume that the transactional price equals the FMV. FHR does not cite any cases holding that, for purposes of diminution-in-value damages, an expert can simply assume the “as-represented” FMV is identical to a particular purchase price. Nor has FHR cited any literature or other authorities to support its assertion.

BP Amoco has cited authorities holding that various techniques, including appraisals, can be used to determine FMV more accurately than a purchase price. (BP Memo. at 4) FHR’s own

citation to *Suitum* reinforces this point, as that case notes that “determinations of market value are routinely made in judicial proceedings without the benefit of a market transaction in the subject property.” 520 U.S. at 742. Because FHR has failed to provide any support in the economic or appraisal disciplines for assuming that a specific price between two particular purchasers establishes a FMV, Baliban’s and Bettius’ opinions should be excluded.

This is particularly true in this case because, in addition to making the unwarranted non-expert assumption that the transactional price equals the Joliet Plant’s FMV, Baliban and Bettius used the wrong value for the Joliet Plant. FHR’s two experts mistakenly assumed that the Plant was worth \$300 million (the price for the PCBU as a whole), even though the parties agreed that the Plant’s value was \$139 million. (Dkt. No. 352 at 3-4) The Court already has addressed this point in its April 17, 2009 damages opinion, and it confirms the starting flaw in the damages calculations of Bettius and Baliban. (Dkt. No. 437 at 16-17) Even if they were correct that the transactional value in May 2004 equaled the value of the Plant, they used the wrong (and inflated) transactional value of \$300 million, rather than the actual Joliet Plant sale price of \$139 million--a figure that is 54% less than the number they used.

B. FHR Admits That Bettius Uses An Improper Methodology That Would Award Damages For Factors Independent Of Any Alleged Breach Or Fraud.

Bettius decreased the value of the PCBU in its allegedly “as-sold” state by using several discounts and adjustments, which increase the diminution-in-value damages she calculates. But the problem is that the bases for these discounts are not limited to factors over which FHR sues and blames BP Amoco, but instead include the PCBU’s size, growth trends, profitability, liquidity, and other factors completely independent of any breach and claims. (BP Amoco Memo. at 5-6) FHR does not deny that “Bettius ‘admits’ that certain factors she takes into account would apply ‘regardless of whether there was any breach.’” (FHR Memo at. 4) The problem is that this means that Bettius’ opinion, if admitted, would tell the jury that it can award FHR damages based on these independent factors not caused by or related to FHR’s claims against BP Amoco. Expert opinions that include claimed losses that are not caused by the defendant’s alleged wrongful conduct must be excluded. *Kempner Mobile Elecs., Inc. v. Sw. Bell Mobile Sys.*, 428 F.3d 706, 712-13 (7th Cir. 2006); *see also* additional authorities cited in BP Amoco Memo. at 6.

FHR’s arguments in opposition miss the point. FHR’s first argument appears to be that Bettius did not use the purchase price of the PCBU to estimate the allegedly “as-sold” value, but

this is not a response. (FHR Memo. at 4) The question is whether Bettius' calculation of \$100 million in diminution in value includes differences in value resulting from factors other than FHR's claims. The answer is undisputedly "yes," and thus her opinion should be excluded.

FHR next attempts to distinguish BP Amoco's cases, but in doing so makes distinctions without a difference. These cases hold that all damages are limited to conduct that is fairly traceable to the defendant's allegedly wrongful conduct. *TAS Distrib. Co. v. Cummins Engine Co.*, 491 F.3d 625, 632-33 (7th Cir. 2007); *Doe v. Oberweis Dairy*, 456 F.3d 704, 715 (7th Cir. 2006). The particular form of damages is irrelevant.

Finally, FHR's description of *Calgon Carbon Corp. v. Potomatic Capital Investment Corp.*, CA No. 98-0072, (W.D. Pa. Jan. 14, 2003) (Magistrate Judge's Report and Recommendation), is not accurate. FHR argues that Bettius' testimony was excluded in that case because she used "post-transaction cash flows in the valuation" (FHR Memo. at 5), but *Calgon* specifically held that this was *not* a reason for exclusion. Bettius explained her use of post-transaction cash flows, and the *Calgon* court held that "[a]lthough the credibility of [Bettius'] explanation may be disputed, the fact finder rather than the court must make that determination." (Ex. 9, *Calgon Op.* at 29-30) Instead, *Calgon* held that "because Andersen's DCF valuation failed to isolate company specific factors from market risk, it is not a reliable measure of damages and must be excluded by the court." (*Id.* at 36; *see also id.* at 30, 37)

Calgon's result is compelled by Seventh Circuit authorities holding that damages must be limited to factors attributable to the defendant's wrongful conduct. In *Calgon*, Bettius' opinion was excluded because it did not separate decreases in value caused by independent factors such as market events from decreases caused by the defendant's alleged fraud. Bettius has made the same mistake here by including differences in size, growth, profitability, and liquidity as "damages," and her opinion should again be excluded. *E.g.*, *Kempner*, 428 F.3d at 712-13 (affirming exclusion of expert testimony that failed to separate allegedly lost profits attributable to defendant's conduct from other lost profits).

C. FHR's Response Confirms That Bettius Has No Methodology To Determine The Amounts Of Her Adjustments And Discounts.

BP Amoco's opening memo explained that: (1) no methodology was employed by or supports Bettius changing the comparative discount, removing normalization adjustments, decreasing profits, or increasing capital expenditures as a result of FHR's claims; and (2) Bettius provides no methodology for how she determined the particular amount of those adjustments.

(BP Amoco Memo. at 8-9) FHR's response does not answer these arguments. For example, neither Bettius nor FHR cite any appraisal standards, peer reviewed publications, or other authorities indicating, explaining or justifying that changing the comparative discount or removing normalization adjustments is an appropriate and accepted methodology for calculating diminution-in-value damages. The failure to show that a proposed expert's testimony "has a reliable basis in the knowledge and experience of the relevant discipline" requires its exclusion. *Kumho Tire*, 526 U.S. at 149-50. Similarly, FHR's response fails to provide any testable explanation of how Bettius determined the amount of these adjustments, which again demonstrates a lack of methodology and requires exclusion. *F:A J Kikson v. Underwriters Labs., Inc.*, 492 F.3d 794, 802 (7th Cir. 2007); *Zenith Elecs. Corp. v. WH-TV Broad. Corp.*, 395 F.3d 416, 419 (7th Cir. 2005).

FHR responds by asserting that Bettius' assumptions are based on "consideration of a number of factors." (FHR Memo. at 5-6) From that consideration, she then assigned a number for these discounts. But the missing element – essential for any proposed expert – is support in the relevant discipline for either *why* those discounts and assumptions were made, *why* and on *what basis* they were chosen, and *how* those factors result in a particular number to use for the discount. *Kumho Tire*, 526 U.S. at 149-50. FHR and Bettius fail to provide any methodology and any support for why these adjustments were chosen to reflect the alleged state of the Joliet Plant; nor do they offer any methodology explaining how she reached the particular amounts for those adjustments.¹ For example, Bettius does not cite any appraisal standard or treatise stating that the comparative discount should be changed when a business is allegedly in worse condition than a purchaser believed. Nor does she provide any methodology for why she chose a 40% comparative discount as opposed to a 50%, 30%, or 20% discount—not to mention the failure of not separating out how much of this discount is attributable to FHR's claims versus independent factors.

The point is not that BP Amoco quarrels with Bettius' conclusion (FHR Memo. at 6), but rather that Bettius fails to provide any analysis or methodology that would support the conclusions she claims to have reached. An expert must not only be qualified, but also must

¹ FHR's assertion that BP Amoco "does not set forth what methodology it believes should be used in choosing a comparability discount" is a red herring. (FHR Memo. at 6) FHR has the burden of showing that its proposed experts' opinions use a reliable methodology, not BP Amoco.

(i) offer and employ a reliable and recognized methodology, (ii) based upon record facts, (iii) that is not speculative, and (iv) which takes into account and does not include causes having nothing to do with the defendant. Bettius fails on all four of these counts. *E.g., Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1056-57 (8th Cir. 2000) (holding that “expert opinion should not have been admitted ... because it did not separate lawful from unlawful conduct”).

Similarly, FHR’s defense of Bettius’ removal of normalization factors misses the point. Bettius asserts that she did not use normalized numbers because non-normalized numbers are “a more reasonable expectation of performance given the condition of the plant and under the assumption of the absence of express representations and warranties referenced above.” (Bettius Rep. at 17) But she cites no authority in the valuation field which supports her view that removing normalization adjustments is proper when an industrial plant is in a certain condition or when particular representations or warranties are absent.

Instead of a scientific methodology that calls for and supports the discounts and adjustments Bettius has made, all she offers is her “judgment” and “best assessment.” But the only connections between Bettius’ “consideration of a number of factors” and the results she has reached are her *ipse dixit*, not a recognizable, testable methodology. Her opinion thus cannot be “the product of reliable principles and methods” and, therefore, should be excluded. Fed. R. Evid. 702; *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997); *Zenith*, 395 F.3d at 418-19; *Clark v. Takata Corp.*, 192 F.3d 750, 758 (7th Cir. 1999).

D. FHR’s Response Confirms That Baliban Calculated An Investment Value, Not The Legally Required FMV.

Baliban did not calculate an FMV (an objective value determined by the marketplace) for the PCBU, much less the Joliet Plant, as required under the law for a diminution-in-value analysis. (BP Amoco Memo. at 7-8) Instead, he determined the PCBU’s investment value to FHR, using factors unique to FHR. Baliban based his analysis on FHR’s own internal financial model, which reflects FHR’s particular subjective expectations about the PCBU. The Seventh Circuit and other authorities hold that a party’s subjective measure of damages – such as what would be calculated by using the party’s own internal projections – is improper. *E.g., Zenith*, 395 F.3d at 420; *Target Market Publ’g, Inc. v. ADVO, Inc.*, 136 F.3d 1139, 1145 (7th Cir. 1998).

In response, FHR does not seriously challenge these arguments. FHR does not cite any authority holding that its own subjective beliefs about what the PCBU might produce, embodied in its own internal financial model, are sufficient to prove damages. Nor does FHR try to

distinguish *Zenith* and *Target Market*, which hold that internal projections such as those in FHR's financial model are not legally sufficient to prove damages. *E.g.*, *Zenith*, 395 F.3d at 420; *Target Market*, 136 F.3d at 1145.

Instead of addressing BP Amoco's arguments, FHR argues that Baliban "conducted a detailed analysis" of the FHR model and "confirmed the reasonableness of the assumptions." (FHR Memo. at 9) But Baliban's report and testimony prove otherwise. Baliban's "detailed analysis" of FHR's model was limited to comparing it to BP Amoco's internal retention model. (Ex. 2, Baliban Rep. at 20-23; FHR Ex. 5, Baliban Dep. at 222:6-223:11) Baliban did not perform any independent analysis, such as building his own model or using other external checks, to test the reasonableness of FHR's model. (*E.g.*, FHR Ex. 5, Baliban Dep. at 222:6-223:11) Baliban did not use a methodologically accepted or approved model or approach. Instead, he analyzed the wrong question. The question is not whether he thought FHR's model was reasonable for FHR's own internal projections. Instead, the question is what methodology Baliban should have used to determine whether there are any diminution-in-value damages, and had he used that methodology, what would it show?

FHR's claim that the comparison of the two models somehow "confirmed the reasonableness of the assumptions" again addresses the wrong question. And the assertion also is unsupported. Baliban admits that the two models have different forecasts for chemical quantities, realization rates, contributions margins, costs, EBITDA, and other assumptions. (Ex. 2, Baliban Rep. at 22) The models also differ significantly on the key question of production amounts for the chemicals. (*Id.* at 21, 24)

FHR claims there is no support for BP Amoco's argument that FHR planned to have a different business model for the PCBU after the sale, but contradicts itself by trying to explain away the testimony of Tony Sementelli, FHR's Chief Financial Officer. (FHR Memo. at 9) That testimony shows that FHR planned to (and has) moved the PCBU to a different business model. This is also proven by the volumes FHR planned to produce compared to historical volumes. (*Compare* Ex. 21, Descriptive Memorandum ("CIM") at 7, 12 *with* Ex. 2, Baliban Rep. at 24)

FHR attempts to distinguish BP Amoco's cases by claiming that they apply to lost profits rather than diminution in value, but for this purpose, FHR's distinction is meaningless. Why? Because if the cash flows of a new business model are speculative and too uncertain to support

lost profits damages, they likewise are speculative and too uncertain to support damages for diminution in value which also rely upon projected earnings. 3 Dan B. Dobbs, LAW OF REMEDIES § 12.4(d) at 77 (2d ed. 1993) (“the use of profit evidence to prove value necessitates a longer chain of inference without making anything more certain or simpler.”). One final note: despite bearing the burden of proving its damages, FHR cannot cite a single case where diminution-in-value damages have been awarded for a new business model.

E. FHR’s Response Confirms That Using The IRR To Discount Cash Flows Is An Improper Methodology.

BP Amoco has explained that: (i) the weighted average cost of capital (“WACC”) is the appropriate methodology to discount cash flows to value an enterprise; (ii) Baliban did not provide any support for using IRR for that purpose; and (iii) if one used WACC-based discount rates, then Baliban’s model results in zero damages. (BP Amoco Memo. at 9-11) FHR does not contest any of these points. Nor has FHR cited a single authority, treatise, peer-reviewed article, or any other academic or professional work stating that using IRR to discount cash flows is an appropriate method for valuing a business, much less that it is a generally accepted method within the valuation field. *Kumho Tire*, 526 U.S. at 149-50. In short, FHR has not met its burden of showing that using an IRR to discount cash flows in valuing a business is an accepted, appropriate and reliable methodology. Fed. R. Evid. 702; *Kumho Tire*, 526 U.S. at 149-50.

FHR simply reiterates Baliban’s explanation of the IRR. But this does nothing to show that IRR is an accepted, reliable methodology to discount cash flows to value a business. Moreover, FHR’s assertions also are incorrect or unsupported. For example:

- FHR asserts without support that Baliban’s methodology is “supported by the relevant authoritative literature” (FHR Memo. at 10), but neither FHR nor Baliban cite a single authority saying that IRR can be used to discount cash flows to value a business. Instead, the treatises Baliban cites all say that WACC should be used. (BP Amoco Memo. at 10)
- FHR asserts that Baliban calculated an amount by which “any likely, economically rational acquirer” would have overestimated the value of the PCBU (FHR Memo. at 10), but Baliban has not analyzed any other “rational acquirer,” nor built any models independently.
- FHR’s brief asserts that “FHR actually required” the IRR that Baliban used, but there is no support for this assertion in the record. To the contrary, Baliban admitted that the record evidence did not establish what FHR’s “hurdle rate” (the minimum IRR acceptable to FHR) was

for the PCBU. (FHR Ex. 5, Baliban dep. at 240:24-241:10) In particular, there is no evidence that FHR would have required the Eastman cash flows that Baliban uses to increase his estimated damages. Indeed, those speculative cash flows were not included in FHR's "expected case" financial model. (BP Amoco Memo. at 13)

- Finally, the case law rejects FHR's implied assertion that its subjective expectation of future cash flows is a proper measure of damages. *E.g.*, *Zenith*, 395 F.3d at 420; *Target Market*, 136 F.3d at 1145; *see also* 3 Dan B. Dobbs, *LAW OF REMEDIES* § 12.2(1) at 26 (2d ed. 1993).

II. FHR'S RESPONSE CONFIRMS THAT BETTIUS' AND BALIBAN'S OPINIONS DO NOT FIT THE FACTS OF THIS CASE.

A. FHR's Argument That Bettius Did Not Perform A Dollar-For-Dollar Analysis Admits That Bettius Does Not Use A Reliable Methodology.

Bettius' opinion relies on an FHR Claim Chart seeking \$180 million in repair-cost damages. FHR has since reduced its claims by one-third, to \$120 million, and yet Bettius' opinion has not changed at all. In response to this fact, Bettius now has submitted a declaration confirming that her opinion has not changed, and would not change even if FHR reduced its claims by another \$70 million, meaning that her opinion would be a loss of \$100 million in value even if repair costs were only \$50 million. (FHR Ex. 9 ¶¶ 3, 13) This only confirms (and independently proves) that Bettius' opinion is neither based on the record facts nor the application of any methodology to the facts. *Fed. R. Evid.* 702; *see also Children's Broad. Corp. v. Walt Disney Co.*, 245 F.3d 1008, 1018 (8th Cir. 2001).

FHR also argues that Bettius' opinion is not based on any "dollar-for-dollar comparison." (FHR Memo. at 11) But this argument is yet another admission that Bettius' opinion should be excluded. Not only does Bettius not have any dollar-for-dollar comparison, she has no methodology at all explaining how FHR's allegations and the factors she supposedly considered have resulted in the adjustments she has made. Similarly, FHR's argument that "the fact that the cash flows projections are not solely tied to Flint Hills' cost-of-repair damages is actually evidence of the validity of the valuation analysis" (FHR Memo. at 12), is unsupported by any authority and is contrary to legal requirements that an expert use a testable methodology.

FHR's argument that Bettius was constrained to information known or knowable at the time of the transaction is both inaccurate and contradicts what Bettius actually has done. (FHR Memo. at 11) Bettius' report specifically states that she relied on FHR's "Fifth Supplemental Responses," which set forth FHR's alleged repair costs as of June 19, 2008, *four years* after the

transaction. (Ex. 3, Bettius Rep. at 63) If FHR's argument were valid, it would provide yet another reason for excluding Bettius' report and opinions. Bettius' report is devoid of any analysis to support what projected repair costs would have been at the time of the transaction. Moreover, the assertion that Bettius is constrained to information known at the time of the transaction is not correct. In fact, the *Calgon* court refused to exclude her testimony for using post-transaction information. (Ex. 9, *Calgon* Op. at 29-30)

FHR makes one additional argument, stating that Bettius "only modestly increased projected capital expenditures in her analysis." (FHR Memo. at 12) But this assertion both misses the point and strengthens the grounds for excluding Bettius' opinion. Neither Bettius nor FHR cite any methodology as to how Bettius decided to increase capital expenditures by \$50 million, instead of \$20 million, \$120 million, or any other amount. This again demonstrates that Bettius' opinion should be excluded for (i) simply adopting speculative assumptions, and (ii) failing to apply any reliable methodology to reach her conclusions.

Moreover, increases to capital expenditures were only one of the adjustments she made supposedly to account for the conditions alleged by FHR. She also adjusted the comparative discount, removed normalization, decreased profitability, and increased the discount rate, all of which had the effect of decreasing the PCBU's value in its allegedly "as-sold" condition. Yet a \$60 million decrease in FHR's alleged cost-of-repair damages did not change any of these assumptions either, again confirming that Bettius has not applied any methodology reliably to the facts of this case.

B. Bettius' Assumption Of No Representations And Warranties At All Is Inconsistent With FHR's Own Allegations.

FHR's core allegations in this case are that certain specific pieces of equipment at the Joliet Plant do not conform to the warranties of the PSA. But Bettius ignores this and, in contrast, assumes that the PSA's representations and warranties do not exist at all, for any of the thousands of pieces of equipment at the plant. Thus, Bettius is calculating damages based on a set of assumptions that FHR is not alleging, namely, the complete absence of Section 7.1's representations and warranties. (BP Amoco Memo. at 12)

FHR's response misstates Bettius' opinion. Bettius does not say she assumed "that there were no warranties or representations with respect to the matters on which Flint Hills had asserted claims." (FHR Memo. at 12) Instead, she wrote in her report that she assumed "that the transaction did not include the express representations and warranties contained in Section

7.1(d)(ii).” (Ex. 3, Bettius Report at 1; FHR Ex. 2, Bettius Dep. at 137:9-12) Similarly, her opinion is phrased in terms of the value of the PCBU “without the benefit of the express representations and warranties in Section 7 and in the condition as referenced above.” (Ex. 3, Bettius Report at 3) FHR, in its own briefs, has stated that “Bettius opined as to the value the PCBU would have had ... had the PSA not included the representations and warranties contained in section 7.1, and had the condition of the Plant been as alleged by Flint Hills.” (Dkt. No. 408 at 2) These statements show that Bettius in reaching her opinions assumed both the conditions alleged by FHR, as well as the absence of all representations and warranties in Section 7.1, which FHR has not alleged and for which there is no factual basis.

FHR’s argument that “whether there were warranties and representations as to equipment that is not subject to claims in this litigation is simply not relevant to Ms. Bettius’ analysis” also is incorrect. (FHR Resp. at 12) Assuming both the complete absence of such representations and warranties as well as the conditions alleged by FHR would result in a lower “as-sold” value for the PCBU than simply the alleged conditions alone. That Bettius’ opinion is not based on FHR’s actual allegations confirms that her opinion should be excluded.

C. Baliban’s Use Of Speculative Cash Flows Renders His Opinion Inadmissible.

Baliban’s damages opinion turns upon his assessment that the Eastman deal was 50% probable. But he has no expertise to make that probabilistic assessment. He is not an expert in estimating the likelihood of business transactions closing and he has not employed any recognized or known methodology to reach that 50% conclusion – it is pure speculation. In addition, Baliban provides no factual support for assigning a 50% probability to the Eastman deal given the evidence in the record, all of which demonstrates that an Eastman deal was highly uncertain as of closing and in fact was never completed. (BP Amoco Memo. at 12-14)

In response, FHR provides no factual basis or reasoned explanation for how Baliban reached this 50% figure. Indeed, FHR admits that at the date of the sale it was engaged only in “*preliminary negotiations* with Eastman about the *possibility* of a entering into an agreement.” (FHR Memo. at 13) Preliminary negotiations over a possibility do not equal a 50% probability, even if Baliban were qualified to render such an opinion, which he is not. Baliban simply picked this number without any factual basis, methodology or qualifications to do so, and his damages opinions should be excluded for this reason.

Missing the point that the 50% number comes out of thin air with no factual or

methodological basis, FHR argues that “Baliban’s opinion properly considers only the information available as of the date of the sale.” But this is both untrue and would only further undermine FHR’s position if it were. Baliban claims “there is significant evidence to demonstrate the extent to which Flint Hills nearly completed an agreement with Eastman.” (Ex. 2, Baliban Report at. 29-30) What does Baliban cite to support this proposition? A Board of Directors presentation and e-mail from *December 2004*, seven months *after* the sale of the PCBU closed in May 2004. (*Id.* at 30 n. 122) Because Baliban is using post-transaction information in an attempt to justify assigning a 50% probability to the Eastman deal, FHR can provide no legitimate explanation for ignoring the ultimate post-transaction fact that Eastman decided not to complete the deal, for reasons that had nothing to do with any alleged breach.

FHR also argues that Baliban used the Eastman cash flows as a proxy for other upside opportunities (FHR Memo. at 13), but this is yet more speculation. Neither FHR nor Baliban performed any analysis of the likelihood of completing one of these other supposed upside opportunities. Baliban has not applied any reliable methodology to estimate the likelihood of one of these upside opportunities occurring, nor is he qualified to do so. Neither Baliban nor FHR cite to any factual basis for supporting the likelihood of these speculative opportunities. Moreover, FHR’s assertions ignore any downside risk, such as increased competition or decreased demand, which would make any such analysis unreliable.

Finally, nothing in the Management Presentation, Confidential Information Memorandum, or the testimony of BP Amoco’s witnesses discusses any time frame for using unutilized capacity, let alone whether the unutilized capacity could be used in the manner FHR assumes. (FHR Ex. 16 at BPACCE0003726; FHR Ex. 17; FHR Ex. 18; FHR Ex. 4 at 2) In fact, FHR’s base-case financial model assumes that all unutilized capacity at the Plant would eventually be used, even though that base case does not include the Eastman cash flows. (Baliban Rep. at 24) FHR’s decision not to include the Eastman cash flows in its own base-case financial model underscores that they are too speculative and that Baliban has neither a factual basis nor a reliable methodology for using them in his analysis.

D. Baliban’s Production Capacity Assumptions Contradict Another Of FHR’s Proposed Experts.

FHR’s response confuses data based on actual rates with alleged “bottlenecks” that have not in reality constrained production. FHR asserts that Ogle found various supposed capacity “bottlenecks” (FHR Memo. at 14), but using Ogle’s own methodology and actual production

rates the Plant has produced chemicals in excess of those alleged bottlenecks. FHR claims that “shared resources constraints limited TMA production to rates anywhere from zero to 58 kmt/yr,” but the reality is that in 2000 the Joliet Plant’s actual TMA production for the entire year was 59.6 kmt. (Ex. 22, Ogle Rep. at 102; Ex. 21, CIM at 7) FHR asserts that Ogle found that supposed “bottlenecks” limit PIA production to 140 kmt/yr or less (FHR Memo. at 14), but FHR does not deny that if Ogle’s methodology is applied to actual production data from September 2003, then the annualized production rate is 150 kmt/yr. (FHR Memo at 15 n.4; BP Amoco Memo. at 15) In short, actual production rates and Ogle’s methodology result in production levels greater than those assumed by Baliban.

FHR claims the 59.6 kmt of TMA produced in 2000 was achieved by operating the other units at lower volumes. (FHR Memo at 15 n.4) But FHR is wrong, as the actual production data shows that the Joliet Plant produced more PIA and MAN in 2000 than it did in 2001, and the Plant likewise produced more MAN in 2000 than in 2002. (Ex. 21, CIM at 7) Thus, TMA production in 2000 did not come at the expense of other chemicals. FHR also argues that PIA production in September 2003 violated the Plant’s environmental permit, but provides no support for this assertion. (FHR Memo at 15 n.4)

Finally, FHR confuses effective capacity with AMDSP. Effective capacity is what the Plant actually produces in a given time period, including time lost for shutdowns and reliability. AMDSP, as the Court has recognized, is a maximum rate that cannot “be run constantly, but is instead an upper boundary which actual values may fall below” (Dkt. No. 319 at 13 n.6), and which explicitly excludes “planned or unplanned downtime.” (Ex. 1, PSA § 7.1(d)(ii) at 57) For TMA in 2000, the Plant actually produced 59.6 kmt. This is an effective capacity rate by definition, and this actual amount is greater than the 56.8 kmta effective capacity that Baliban assumes. (FHR Memo. at 14-15) The PIA and TMA rates calculated using Ogle’s methodology also are effective capacities because Ogle failed to exclude time lost because of shutdowns. (Dkt. Nos. 395 & 397) But even if these number were considered maximum rates, then Ogle’s method results in a maximum rate of 150 kmta for PIA, which is greater than the 140 kmta maximum rate assumed by Baliban. (BP Amoco Mem. at 14-15)

III. BETTIUS’ AND BALIBAN’S OPINIONS ARE INCONSISTENT WITH THE PSA.

As stated in its recent submission, BP Amoco recognizes that the Court’s April 17, 2009 opinion, issued after BP Amoco had filed this motion, negatively impacts certain of the

arguments it originally made. (Dkt. No. 444) BP Amoco expressly preserves all of the arguments it made in its motion and opening memorandum.² That said, parts of the Court's opinion reinforce why Baliban's and Bettius' opinions are not consistent with the PSA.

A. Baliban's and Bettius' Opinions Violate § 13.6's Bar On Lost Profits.

The Court has recognized that PSA § 13.6 bars claims for lost profits. The Court also requested additional information about the use of discounted future cash flows and lost profits. (Dkt. No. 437 at 13) Both case law and economic analysis confirm that future cash flows are the same as lost profits.

The discounted cash flow ("DCF") analysis that Bettius and Baliban use depends on estimating future cash flows. Future cash flows are determined by estimating future revenues, and then subtracting future estimated costs. Exhibits to Baliban's report lay out how he estimated future revenues by estimating the volume and contribution margins of the various chemicals. (Ex 2, Baliban Rep., Ex. 4) He then subtracted costs, including fixed operating costs, taxes, and capital expenditures. (*Id.*) By subtracting these costs from revenues, he determined the PCBU's estimated net cash flows. (*Id.*) Bettius performed a similar calculation to determine estimated future cash flows, projecting revenues and then subtracting costs. (Ex 3, Bettius Rep. at 50-53) This method of determining cash flows, projecting revenues and then subtracting costs, is the very definition of profit. *Scholes v. Lehmann*, 56 F.3d 750, 757 (7th Cir. 1995); *Durasys, Inc. v. Leyba*, 992 F.2d 1465, 1469 (7th Cir. 1993). Revenues minus costs determine both cash flow and profits; the two concepts are economically equivalent, and for that reason Baliban's and Bettius' opinions violate § 13.6. *See also Eateries, Inc. v. J.R. Simplot Co.*, 346 F.3d 1225 (10th Cir. 2003) ("fair market value necessarily incorporates expected future profits").

B. Baliban and Bettius Ignore The PSA's Binding Purchase Price Allocation.

The Court stated in its Opinion that, pursuant to § 5.6, the "purchase price allocations are binding to the extent provided by the PSA." (Dkt. No. 437 at 17) The Court also stated that the allocation could be considered by the jury in evaluating damages. (*Id.* at 16-17)

Instead of considering the \$139 million Joliet Plant purchase price allocation as required under § 5.6, Bettius and Baliban ignored it. FHR's own allocation, binding under § 5.6, allocated a value of \$139 million to the Plant. (Dkt. No. 352 at 4) Yet Bettius and Baliban use

² FHR's assertion that BP Amoco "has withdrawn some of the arguments" is incorrect. (FHR Resp. at 1 n. 1) There is nothing in Docket No. 444 that withdraws any argument.

the purchase price of the entire PCBU, approximately \$300 million, in their analyses. Thus, Bettius and Baliban provide opinions inconsistent with the PSA and thus not based on “sufficient facts or data.” Fed. R. Evid. 702; *see SEC. v. Lipson*, 46 F. Supp. 2d 758, 764 (N.D. Ill. 1998); *United States EEOC v. Rockwell Int’l Corp.*, 60 F. Supp. 2d 791, 797 (N.D. Ill. 1999).

C. Baliban’s Opinion Fails To Mitigate Damages.

Both PSA § 13.4 and Illinois law require mitigation. (BP Amoco Memo. at 3) Contrary to FHR’s assertion, BP Amoco’s arguments are not based on what it believes FHR’s damages are. (FHR Memo. at 2) Instead, Baliban himself admits that FHR told him that for a \$2.8 million expenditure, FHR could avoid \$18 million in claimed damages. (BP Amoco Memo. at 3) Spending \$2.8 million to avoid \$18 million in claimed damages not only makes sense, it is required. Thus, according to its own expert, FHR’s attempt to seek the full \$62 million (as opposed to the lower alternative value of \$44 million) violates the common law and the PSA, both of which require mitigation. (Ex. 1, PSA § 13.4 at 100)

CONCLUSION

FHR’s response confirms that it cannot establish that the opinions of either Bettius or Baliban are admissible. In fact, FHR’s response contains admissions showing why the opinions should be excluded. Thus, neither expert applies a reliable methodology, and indeed for various of their key assumptions they use no identifiable much less reliable methodology at all. Their opinions also contradict or ignore the facts of this case and FHR’s own allegations, and are inconsistent with the PSA. Consequently, the opinions of both of FHR’s proposed damages experts Jeffrey Baliban and Sharon Moore Bettius should be excluded in their entirety.

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Respectfully submitted,

/s/ R. Chris Heck

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BPCNA

