# Motion Ex. 22

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

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| BP AMOCO CHEMICAL COMPANY,<br><br>Plaintiff/Counter–Defendant,<br><br>v.<br><br>FLINT HILLS RESOURCES LLC,<br><br>Defendant/Counter–Plaintiff. | Consolidated Case No. 05 C 5661<br><br>Judge Amy J. St. Eve |
| FLINT HILLS RESOURCES LLC,<br><br>Third-Party Plaintiff,<br><br>v.<br><br>BP CORPORATION NORTH AMERICA INC.,<br><br>Defendant. | |

**BP AMOCO CHEMICAL COMPANY'S RENEWED MOTION TO EXCLUDE THE OPINIONS OF JEFFREY BALIBAN**

BP Amoco previously moved to exclude the opinions of FHR's damages expert, Jeffrey Baliban, for various reasons. (Dkt. Nos. 378, 383) The Court denied BP Amoco's motion (Dkt. No. 561), but noted in doing so that the Advisory Committee Notes to the Federal Rules of Evidence "suggest additional criteria for gauging expert reliability, including whether: … 'the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion'; [] 'the expert has adequately accounted for obvious alternative explanations'; … and 'the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.'" (Dkt. No. 561 at 2; citing *Fuesting v. Zimmer, Inc.*, 421 F.3d 528, 535 (7th Cir. 2005), *vacated in part on other grounds*, 448 F.3d 936 (7th Cir. 2006))

Mr. Baliban has now testified at trial, and his testimony – far from providing the jury with a basis to credit his opinion – only reinforces that his opinions violate FRE 702 and should be excluded. Therefore, BP Amoco incorporates its prior briefing regarding Mr. Baliban (Dkt. Nos. 378, 383, 498) and renews its motion to exclude Mr. Baliban's opinions for the

reasons stated in that briefing and for the following additional reasons demonstrated by his trial testimony -- and as outlined in open court yesterday.

***First***, Mr. Baliban's damages model (which is not in evidence) incorporates cash flows relating to speculative "upside opportunities." While he had difficulty even recalling what these opportunities were, more problematically he inexplicably concluded that all of these "upside opportunities" -- none of which was incorporated into any of the cases that Flint Hills' financial model analyzed and that were presented to its Board when it approved the deal -- were best represented in the aggregate by assigning a 50% probability to a prospective deal with Eastman Chemical Company for the supply of 38 kmt of PIA per year. (9/23/09 Tr. at 2279:2-2280:10, 2315:24-2316:7; copy attached as Ex. 1) Incorporating this Eastman opportunity had the effect of increasing the internal rate of return that Mr. Baliban (wrongly) employed to discount to net present value the projected cashflows of the PCBU with its allegedly as-sold capacities, and thus increased the damages calculated by Mr. Baliban. (*Id.* at 2334:21-2335:1, 2306:14-2307:4)

During trial, however, Mr. Baliban admitted the truth of the 50% probability he assigned to the Eastman cash flows. He picked 50% because it was an indeterminate probability -- the mid-point between 0% and 100%, the same as flipping a coin:

> Q. Other than your judgment, which allowed you, according to you, to rely upon what Flint Hills told you, is there any treatise or methodology you can point us to where some other expert could replicate your 50 percent probability assessment?
>
> A. Well, again, the specific factor of 50 percent?
>
> Q. Yes.
>
> A. Is -- is nothing more than a mean between zero percent and 100 percent, and the selection of that is based on the fact that that would be the most probable number, given that it could be less, it could be higher, but without being able to measure any more closely how much less or how much higher, the mean is the central tendency point, and so that was to me the most reasonable approach.
>
> One had to apply a value, and that was the most reasonable approach.
>
> Q. It could have been 100 percent, it could have been zero, equal probabilities, right, and so you chose 50?
>
> A. If 100 percent and zero are equal probabilities, there are any number of statistics books that will tell you that in that case, you have to apply 50. It's like the flip of a coin.
>
> Q. Is that what you did?
>
> A. That is what I did.

(*Id.* at 2312:24-2313:20) Because Mr. Baliban was not "able to measure any more closely how much less or how much higher" the probability of the Eastman cash flows were, he simply picked the mean between 0% and 100%. Mr. Baliban was not able to describe any other methodology or basis for the number -- let alone demonstrate that he justifiably extrapolated from an accepted premise to a well-founded conclusion, or accounted for the obvious alternative explanation for why the Eastman deal never happened (*i.e.*, because the price Flint Hills was offering was too high, because Eastman was never that interested, etc.).[1] (*Id.* at 2311:6-17)

In short, the probability Mr. Baliban assigned to the Eastman cash flows was based on his admitted inability to assign any determinate probability to the Eastman transaction or other upside opportunities, and it should be excluded for that reason. *E.g.*, *Ammons v. Aramark Unif. Servs., Inc.*, 368 F.3d 809, 816 (7th Cir. 2004) (holding that in applying Federal Rule of Evidence 702, a court must "reject any 'subjective belief or speculation'"); *Richmond Med. Ctr. for Women v. Herring*, 527 F.3d 128, 134 n.1 (4th Cir. 2008) ("[E]xpert testimony must be both relevant and reliable. To satisfy these requirements, the testimony must be based on 'more than subjective belief or unsupported speculation.' Furthermore, a proffered expert's professional qualifications are insufficient to support his testimony; he must also have 'sufficient specialized knowledge to assist the jurors in deciding the particular issues in the case.'").

In other words, Mr. Baliban testified that whenever it is the case that something either may happen or may not happen, and one cannot determine which is more likely, then it is proper to assign it a 50% probability for purposes of calculating damages. But such a flip-of-the-coin methodology fails to satisfy Flint Hills' burden to prove by a preponderance of the evidence that its contract claim damages are reasonably certain, and it plainly fails to satisfy FHR's burden to prove by clear and convincing evidence that its fraud claim damages are reasonably certain. *See, e.g.*, *Heritage Commons Partners v. Village of Summit*, 935 F.2d 1489, 1493 (7th Cir. 1991) (breach of contract); *Trade Fin. Partners, LLC v. AAR Corp.*, 573 F.3d 401, 413 (7th Cir. 2009) (fraud); *In re Catt*, 368 F.3d 789, 793 (7th Cir. 2004) ("The district court must instead conduct an inquiry in order to ascertain the amount of damages with reasonable certainty."); *Ouwenga v. Nu-Way AG, Inc.*, 239 Ill. App. 3d 518, 526, 604 N.E.2d 1085, 1091 (Ill. App. Ct. 1992) (reversing plaintiffs' damages in a breach of warranty case where "plaintiffs failed to prove the amount of their damages with reasonable certainty").

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[1] *See* Ex. 2, Trial Exhibit 5492; Ex. 3, Trial Exhibit 7890; Ex. 4, Trial Exhibit 5466.

Nor has Mr. Baliban provided any other valid basis for using a coin flip to determine the probability of the Eastman cash flows. While he claims to have relied on his judgment, expert testimony must be excluded where it is based merely on conclusory invocations of the expert's "judgment," "training" or "experience." *See Zenith Elec. Corp. v. WH-TV Broad. Corp.*, 395 F.3d 416, 418 (7th Cir. 2005); *Clark v. Takata Corp.*, 192 F.3d 750, 758 (7th Cir. 1999). "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

While Mr. Baliban further claims to have relied on undocumented hearsay conversations with Steve Sanders and Anthony Sementelli, he admittedly never spoke to Eastman or any third party about the potential upside opportunities, and he has provided no basis for the Court or jury to conclude that such self-serving conversations -- contrary to sworn testimony and contemporaneous documents now in evidence -- are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Fed. R. Evid. 703. Indeed, under oath Mr. Sanders testified that he could not recall whether he had even spoken with Eastman until after the sale of the PCBU to Flint Hills closed. (9/22/09 Tr. at 2090:2-9; copy attached as Exhibit 5)

***Second***, Mr. Baliban did not provide any opinion to the jury about what Flint Hills' damages would be without inclusion of the speculative Eastman cash flows. Thus, he has no opinion to present to the jury if these speculative cashflows are excluded, as they should be.

The use of Eastman cash flows had two effects on Mr. Baliban's model. First, it increased the discount rate he used from 16.54% to 17.15%. (9/23/09 Tr. at 2334:21-2335:1; copy attached as Ex. 1) Second, the Eastman cash flows also increased the cash flows used in Mr. Baliban's assumptions regarding the value of the Joliet Plant in its as-represented state. (*Id.* at 2306:14-2307:4) If those Eastman cash flows are removed, then both the discount rate and as-represented cash flows would change, thereby impacting and changing the amount of damages calculated by Mr. Baliban. But Mr. Baliban could not (or would not) testify as to what the damages would be without the speculative Eastman cash flows. (*Id.* at 2306:14-2307:4, 2334:5-17) Thus, no opinion of Mr. Baliban's concerning damages without the Eastman cash flows is in evidence. Therefore, if the Court finds the Eastman cash flows to be speculative and unsupportable for the reasons described above and in Court, Mr. Baliban's entire opinion should

be stricken because Flint Hills cannot show what portion of the damages that Mr. Baliban has calculated does not rely on these speculative Eastman cashflows.

***Third***, Mr. Baliban's opinion suffers from a complete failure of proof as to the methodological and numeric bases for his opinion. To be admissible, Mr. Baliban must both pass through the gatekeeping function of the Court before trial as well as explain the factual and methodological bases for his opinions to the fact finder during trial. Fed. R. Evid. 702. The Seventh Circuit recently observed this rule in a different fact pattern in *United States v. Noel*, ___ F.3d ___, 2009 WL 2835428 (7th Cir. Sept. 4, 2009), where it held that expert testimony that was presented at trial should have been excluded because the putative expert failed to explain her methodology and factual basis to the jury, provided instead only an ultimate opinion:

> "An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process." *Mid-State Fertilizer Co. v. Exch. Nat'l Bank of Chi.*, 877 F.2d 1333, 1339 (7th Cir. 1989). We have therefore described an expert's opinion that lacks proper substantiation as "worthless." *Minasian v. Standard Chartered Bank*, 109 F.3d 1212, 1216 (7th Cir. 1997). Thus, even though expert witnesses may opine on ultimate issues of the case, under Rule 702 their opinions may not be divorced from the expert bases that qualified them as witnesses in the first place. *United States v. Hall*, 93 F.3d 1337, 1344 (7th Cir. 1996).

*Id.* at *5. Thus, the Seventh Circuit found that such methodologically unsupported expert opinions are not helpful to the jury because they do nothing to assist them in understanding why the expert had reached the opinions at issue.[2] *Id.* at *5 - *6.

During his testimony before the jury, the bases of Mr. Baliban's opinion -- including his damages model -- were not put into evidence or otherwise placed before the jury. There was no explanation of how he used cumulative net cash flows, calculated FHR's internal rate of return ("IRR") for use as a discount rate, or applied and used an IRR to discount the reduced cumulative cash flows for the Joliet Plant's allegedly as-sold condition. The "sufficient facts or data" and "reliable principles and methods" that allegedly formed the basis of Mr. Baliban's opinion pre-trial have not been put into evidence at trial. Fed. R. Evid. 702. Without explaining the factual or methodological basis of his opinion to the jury, Mr. Baliban provided only a bottom line and thus "supplie[d] nothing of value to the judicial process." *Noel*, 2009 WL 2835428, at *5. His opinion should therefore be excluded for this additional reason.

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[2] However, because the criminal defendant in *Noel* did not object to the admissibility of the government's expert's unsupported and unexplained opinions, the Court found that the admission of this evidence was not plain error warranting a reversal of the conviction. *See id.*, 2009 WL 2835428, at *6.

***Fourth***, Mr. Baliban provided no methodological basis or support for his use of an internal rate of return of 17.15% to discount cash flows to determine the value of the PCBU in its claimed "as-sold" condition. Neither FHR nor Mr. Baliban has ever provided any explanation or authority that an IRR is the proper ***type*** of discount rate to employ in valuing a business.[3] Indeed, as BP Amoco previously explained, all of the corporate finance authorities cited by Mr. Baliban state that a different ***type*** of discount rate -- a weighted average cost of capital ("WACC") rate -- should be used to determine the fair market value of projected cash flows. (Dkt No. 383 at p. 10, Exs. 26-29) Therefore, Mr. Baliban did not establish before the jury the required scientific basis for his opinion and his testimony should be stricken. *See Deimer v. Cincinnati Sub-Zero Prods., Inc.*, 58 F.3d 341, 344-45 (7th Cir. 1995) (affirming motion to strike expert witness who "did not establish a proper scientific basis for his opinion"); *Cummins v. Lyle Indus.*, 93 F.3d 362, 368-69 (7th Cir. 1996).

Furthermore, Mr. Baliban provided ***no*** basis for using a 17.15% rate when both FHR and BP Amoco, as well as their valuation experts, use significantly lower discount rates. For example, Mr. Baliban acknowledged that the Flint Hills model on which he relies uses an 8 or 9 percent discount rate. (9/23/09 Tr. at 2338:7-14; copy attached as Ex. 1) Mr. Baliban also testified that he believed BP Amoco's model use a 9 or 10% discount rate, and that Lehman Brothers used a similar discount rate. (*Id.* at 2336:1-10) Similarly, Mr. Baliban likewise knows that Ms. Bettius – FHR's own valuation expert – uses a 13.5% discount rate in her own opinion of diminution-in-value damages. (*Id.* at 2337:22-2338:6) By contrast, Mr. Baliban used a different type of discount rate (IRR) that was substantially higher, which had the effect of increasing the damages he calculated by decreasing the net present value of the cash flows for the PCBU in its supposedly as-sold condition. Besides reverse engineering to reach a particular

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[3] While BP Amoco does not dispute that differences of opinion regarding the ***amount*** or size of a particular type of discount rate (WACC) to employ for valuation purposes would not afford a basis for excluding Mr. Baliban's opinions, *see, e.g., Swierczynski v. Arnold Foods Co.*, 265 F. Supp. 2d 802, 809-10 (E.D. Mich. 2003), BP Amoco is aware of no authority holding that use of the wrong ***type*** of discount rate in valuing a business is a methodological error that goes to the weight and not the admissibility of a valuation opinion. *See id.*, 265 F. Supp. 2d at 809-10 (noting dispute over amount of same type of discount rate); *cf. United Air Lines, Inc. v. Reg'l Airports Improvement Corp.*, 564 F.3d 873, 879 (7th Cir. 2009) ("In a discounted-cash-flow analysis, the discount rate has a powerful effect on the present value."). Thus, while it is true that IRR is a type of discount rate, there is no evidence or authority suggesting that an IRR discount rate or all types of discount rate -- *e.g.*, prime rate, T-Bill rate, etc. -- can be appropriately employed in a discounted cash flow analysis being used for purposes of determining the fair market value of a business.

result, Mr. Baliban has not justified his use of the wrong type of discount rate that is nearly double the discount rates used contemporaneously by Flint Hills and BP Amoco and that is substantially higher than the discount rate used by Ms. Bettius in her putative fair market value appraisal.

***Fifth***, the effective capacity numbers used by Mr. Baliban to calculate cash flows for the Joliet Plant in its allegedly as-sold condition have no support in the evidence. FHR's counsel instructed Baliban to assume annualized maximum demonstrated sustainable production of 140 kmta for PIA, 65 kmta for TMA, and 48 kmta for MAN (9/23/09 Tr. at 2346:10-14; 2357:12-20; copy attached as Ex. 1) Mr. Baliban then applied factors to convert the capacities to supposed "effective capacities," which his model (which is not in evidence) then uses to calculate damages. The effective capacities Mr. Baliban used are 131.8 kmta for PIA, 56.8 kmta for TMA, and 45.2 kmta for MAN. (*Id.* at 2347:24-2348:9)

But these capacity numbers are untethered to the record evidence. Not a single witness has testified to any of the "effective capacity" numbers used by Mr. Baliban to calculate damages. FHR's capacity expert, Dr. Ogle, testified that he did not calculate any effective capacity numbers. (9/21/09 Tr. at 1726:15-20; copy attached as Ex. 6) Tom Stephan, an FHR engineer, testified that he did not believe there was even a clear definition of the term "effective capacity" and that its meaning varies among users of that term. (9/15/09 Tr. at 940:23-941:13; copy attached as Ex. 7) Mr. Stephan was not aware of FHR doing any studies to determine the effective capacity of any of the units. (*Id.* at 964:3-965:2) Similarly, FHR engineer Daniel Kelly admitted that different engineers have different understandings of the phrase "effective capacity" and that he had not calculated the effective capacity of any of the units at the Joliet Plant. (9/17/09 Tr. at 1141:22-24, 1157:12-19, 1158:5-12, 1158:22-1159:10; copy attached as Ex. 8) Another former Joliet Plant engineer, Kim Dray, testified that she was not familiar with the term "effective capacity," did not use that term in her day-to-day duties, and had not seen a textbook definition of that term anywhere. (9/18/09 Tr. at 1401:4-16, 1402:7-9; copy attached as Ex. 9)

Finally, Mr. Baliban's assumed effective capacity of 56.8 kmta for TMA -- based on his unsupported assumptions regarding the constant ratio between nameplate and effective capacities set forth in the CIM (assumptions belied by the TMA studies Messrs. Kelly & Snyder prepared) -- are demonstrably erroneous, as they are materially ***lower*** than the actual production of the TMA unit in 2000 (59.1 kmt). (9/23/09 Tr. at 2170:7-23; copy attached as Ex. 1) Again, Mr.

Baliban has "unjustifiably extrapolated from an accepted premise to an unfounded conclusion," and he has ***not*** "adequately accounted for obvious alternative explanations" -- *i.e.*, that the ratio between nameplate and effective capacity differs at different nameplate capacity levels and depending on whether a nameplate definition is used that already takes into account planned and unplanned down time.

In sum, from reviewing the record, FHR's witnesses either do not know or have varying and contradictory opinions about what "effective capacity" means. And it is undisputed that neither FHR nor its capacity expert claim to have determined the effective capacity of any unit. One will *not* find any evidence in the record that supports the effective capacity numbers Mr. Baliban used in his damages model. Therefore, his opinion is not "based upon sufficient facts or data" and he has not "applied the principles and methods reliably to the facts of the case." Fed. R. Evid. 702.[4]

For the reasons described above and in BP Amoco's prior briefing (Dkt. Nos. 378, 383, 498), Mr. Baliban's opinions as presented to the jury do not satisfy the requirements of FRE 702 and should be stricken from the record, and the jury should be instructed to disregard Mr. Baliban's opinions.

Dated: September 25, 2009

Respectfully submitted,

By: /s/ Drew G.A. Peel

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[4] While BP Amoco does not dispute that "[t]he ***soundness*** of the factual underpinnings of an expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact," *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000) (emphasis added), where there is ***no*** factual underpinning to begin with, then the expert's opinions are properly excluded because they cannot be "based upon sufficient facts or data." Fed. R. Evid. 702.

**CERTIFICATE OF SERVICE**

I hereby certify that September 25, 2009, I caused a true and correct copy of the foregoing to be served by hand and electronically via the CM/ECF system on the following:

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