

Motion Ex. 24

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,)	No. 05 C 5661
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)	
FLINT HILLS RESOURCES, LLC.,)	Judge James B. Moran
)	
Third-Party Plaintiff,)	
)	
v.)	
)	
BP CORPORATION NORTH AMERICA INC.,)	
)	
Third-Party Defendant.)	
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MOTION OF BP AMOCO CHEMICAL COMPANY AND BP CORPORATION NORTH AMERICA INC. FOR SANCTIONS AGAINST FLINT HILLS RESOURCES, LLC FOR THE SPOILIATION AND DESTRUCTION OF MATERIAL EVIDENCE

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and BP Corporation North America Inc.*

BP Amoco Chemical Company (“BP Amoco”) and BP Corporation North America Inc. (“BPCNA”) move the Court for sanctions against Flint Hills Resources, LLC (“FHR”) due to FHR’s intentional spoliation and destruction of evidence central to the issues in this case. The spoliation and destruction of core evidence at issue in this case was not accidental; it was not minor or immaterial; and it involved both physical evidence as well as masses of electronic evidence. FHR itself has belatedly acknowledged and admitted that its destruction of emails was not appropriate, and was contrary to its own policies and procedures.

FHR also has admitted that it spoliated physical evidence at the heart of 12 of its individual claims in this case. In some cases FHR completely destroyed the equipment, and in other cases it preserved only FHR-selected samples of what was replaced or repaired.

As the Court is aware from prior motion practice and hearings, this case involves claims by FHR that BP Amoco committed fraud and breached the parties’ Asset Purchase and Sale Agreement (“PSA”) when it sold FHR an allegedly damaged and mechanically deficient chemical plant located in Joliet, Illinois. Specifically, FHR alleges that the condition of the plant at the time of the sale, in May 2004, did not meet various contractual representations and warranties made by BP Amoco. Thus, the obvious, crucial issues in this case revolve around: (i) the negotiations between the parties and the parties’ internal discussions relating to the representations and warranties in the PSA; and (ii) the condition of the allegedly defective equipment at the time the plant was sold. FHR’s own claims and the discovery in this case have confirmed the centrality of these issues.

Incredibly, and only after persistent questioning, BP Amoco and BPCNA learned during discovery that FHR failed to preserve critical pieces of evidence at the plant. Instead, FHR destroyed, permanently altered, and failed to preserve equipment that is the very subject of its claims. For example, in Claim 48, FHR seeks \$1.6 million for repairs and/or replacement of the MD-801(2), a titanium-lined vessel at the Joliet plant. Yet, after allegedly having made the repairs and replacement, FHR destroyed the original vessel, precluding BP Amoco from examining it to determine whether any repairs or replacement were needed, and if they were, why they were needed (*i.e.*, causation).

In addition, FHR’s most senior executive, its then-President and Chief Executive Officer, David Robertson, deliberately and knowingly deleted well in excess of at least 1,500 emails regarding the Joliet plant. What is most disturbing is that FHR destroyed much of this evidence

after Mr. Robertson personally instructed BP Amoco—in writing—about the need to preserve evidence relating to the Joliet plant. Moreover, and setting aside Mr. Robertson’s own document preservation instructions to BP Amoco, FHR destroyed physical evidence at the Joliet plant even after this lawsuit was filed, and even after counsel for BP Amoco specifically reminded FHR’s counsel about the obligation to preserve the physical evidence upon which FHR bases its claims, but then destroyed.

FHR’s destruction of key evidence has seriously and irrevocably prejudiced BP Amoco and BPCNA. For example, as a result of FHR’s actions, BP Amoco and BPCNA are forever precluded from examining, testing, using or relying upon the spoliated evidence to defend against FHR’s counterclaims. Nor will BP Amoco or BPCNA, or the jury, ever know the contents of all of the emails destroyed by Mr. Robertson. As a result, BP Amoco and BPCNA respectfully request that the Court dismiss FHR’s counterclaims, strike FHR’s answer to BP Amoco’s declaratory judgment complaint, and award attorneys’ fees and costs to BP Amoco and BPCNA in light of FHR’s conduct. In the alternative, BP Amoco and BPCNA respectfully request that the Court: (1) dismiss the 12 individual FHR claims that are most directly affected by FHR’s spoliation of evidence; (2) award BP Amoco and BPCNA their attorneys’ fees, costs, and expenses associated with defending those 12 claims¹; (3) dismiss FHR’s fraud claim as a result of its unclean hands; (4) order that an adverse inference be given to the jury to the effect that the destroyed emails and physical evidence would have been unfavorable to FHR; and (5) take this adverse inference into account when ruling on summary judgment motions.

In further support of this Motion, BP Amoco and BPCNA refer to their accompanying Memorandum of Law and provide the following summary of the facts:

FHR’S DUTY TO PRESERVE EVIDENCE

1. BP Amoco sold the Joliet plant to FHR pursuant to the parties’ PSA, which was executed on March 29, 2004. The closing and transfer of the plant took place on May 28, 2004.

2. In overview, the evidence on this motion will establish the following undisputed facts: (i) prior to the filing of this litigation, Robertson, FHR’s then-CEO, instructed BP Amoco in writing about the legal obligation and need to preserve all relevant evidence; (ii) when BP

¹ The fees and costs awarded under this alternative should be determined by taking BP Amoco’s and BPCNA’s total fees and costs to date and multiplying that amount by the percent of FHR’s claims affected by the spoliation, *i.e.*, 12 affected claims ÷ 59 total claims = 20%.

Amoco specifically reminded FHR that the obligation to preserve evidence ran both ways, FHR incredibly disputed that it had any such obligation; (iii) FHR nevertheless assured BP Amoco that it had taken steps to preserve evidence relating to its claims; (iv) FHR, in fact, did not preserve the physical evidence for many of its claims, at least 12 of them, but instead destroyed or otherwise compromised the evidence; (v) FHR throughout discovery continually represented to the Court that it was done with its document production; (vi) FHR's representations about the status of its document production were not accurate; (vii) during discovery, BP Amoco reminded FHR on several occasions that FHR had not produced any emails from its most senior executive (Mr. Robertson), the person in charge of the transaction and who personally asserted FHR's post-sale claims against BP Amoco; (viii) FHR finally produced a handful of emails from Robertson's files only a few weeks before his deposition and more than two years after the beginning of fact discovery; and (ix) only at Mr. Robertson's deposition was it finally revealed that he had destroyed his emails. In short, the evidence establishes that FHR knew what its duties were and nevertheless violated those duties en masse by destroying electronic evidence relating to the entire transaction at issue and physical evidence relating to at least 12 of its individual claims.

3. On December 21, 2004, seven months after the closing and transfer of the Joliet plant, Mr. Robertson sent BP Amoco a letter—which he signed—claiming that BP Amoco had defrauded FHR and breached certain representations and warranties in the PSA regarding the condition of the plant. According to FHR and Mr. Robertson, BP Amoco had not adequately maintained the Joliet plant and, as a result, FHR would have to repair and replace different parts of the plant and its equipment. In his letter, Mr. Robertson stated that:

Flint Hills Resources has discovered information which indicates that representations and warranties made by BP Amoco in the Asset Purchase and Sale Agreement are not true and accurate in all material respects . . . and that covenants of BP Amoco have been materially breached The basis of [FHR's] Claim, and estimates of the losses (to the extent they have been incurred or can now be estimated), are included in the attached schedule. We expect that there may be other breaches that FHR has not yet discovered.

(See 12/21/04 Ltr from D. Robertson to M. Wrenn, attached as Ex. A.)

4. The schedule attached to Mr. Robertson's letter contained a list of specific equipment at the Joliet plant. (*Id.*) FHR claimed that, at the time of the sale, the condition of the

specified equipment did not meet BP Amoco's representations and warranties as set forth in the PSA. (*Id.*) The individual pieces of equipment listed in FHR's letter now form the basis for the bulk of FHR's counterclaims. (*Id.*)

5. On April 25, 2005, Mr. Robertson sent BP Amoco another letter, detailing what documents should be preserved for use in the parties' dispute:

We assume that BP has preserved, and will continue to hold all records (electronic and hard copy) that are relevant to this dispute. We want to remind BP specifically of the back-up tapes being stored at Iron Mountain, and ask that those be preserved.

(*See* 04/25/05 Ltr from D. Robertson to M. Wrenn, attached as Ex. B (emphasis added).) Ironically, Robertson ignored his own instructions.

6. BP Amoco initiated this declaratory judgment action on September 30, 2005, seeking a declaration from this Court that it had not breached the PSA. On October 17, 2005, FHR filed its answer and counterclaims. A few months later, in January 2006, BP Amoco reminded FHR in writing of FHR's continuing obligation to preserve evidence relating to its claims and notified FHR that BP Amoco would need to inspect the relevant physical evidence at the Joliet plant. (*See* 01/25/06 Ltr from D. Peel to R. Stiles, attached as Ex. C.)

7. Notwithstanding the earlier letter from FHR's own CEO concerning the duty to preserve all evidence, FHR in response to BP Amoco's January 2006 letter disputed that it had any obligation to preserve evidence prior to the filing of BP Amoco's declaratory judgment action, and incorrectly asserted that only BP Amoco had a duty to preserve evidence before the litigation commenced. (*See* 04/18/06 Ltr from M. Porter to D. Peel, attached as Ex. D; *see also* Ex. B, April 2005 letter from FHR instructing BP Amoco to preserve all electronic and physical evidence.) Despite its inconsistent positions, FHR nevertheless represented that "mechanisms [had] been placed into effect . . . to preserve all relevant evidence in support of [FHR's] claims." (*Id.*) BP Amoco responded to FHR's letter by informing FHR that its duty to preserve evidence arose when it first contemplated litigation, even if no lawsuit had yet been filed. (*See* 06/13/06 Ltr from D. Peel to M. Porter, attached as Ex. E.) That same day, BP Amoco served a Rule 34 notice requesting a physical inspection of the plant. (*Id.*)

8. FHR continued to dispute that it had any duty to preserve evidence before the filing of this lawsuit in September 2005, but stated that it would allow BP Amoco to physically inspect the Joliet plant if BP Amoco described the equipment it wished to inspect and provided

FHR with a list of the individuals who would be conducting the inspection. (*See* 07/24/06 Ltr from M. Porter to D. Peel, attached as Ex. F.) After BP Amoco provided FHR with the requested information, however, FHR asserted that BP Amoco's retained experts at Packer Engineering had a conflict of interest. (*See* 08/09/06 Ltr from J. Figliulo to Dr. K. Packer, attached as Ex. G.) Although Packer Engineering disputed that a conflict existed, FHR refused to allow Packer Engineering to participate in the plant inspection. As a result, BP Amoco was forced to file a motion to compel asking this Court to resolve the conflict issue. After full briefing, the Court ruled in favor of BP Amoco and rejected FHR's disqualification arguments.

9. Because of the delay caused by FHR's challenge to BP Amoco's retained experts, followed by the hospitalization of one of the key persons planning to attend the inspection (John Dueker, the former plant manager of the plant), BP Amoco conducted its physical inspection of the plant in early September 2007. As a result, BP Amoco's inspection occurred a year and a half after FHR already had spoliated and permanently altered much of the relevant equipment.

FHR'S SPOILIATION OF EQUIPMENT AT THE JOLIET PLANT

10. During the course of discovery, BP Amoco and BPCNA have learned, through deposition testimony and discovery responses, that FHR has not preserved much of the equipment over which it is seeking damages (for repair/replacement costs) in its counterclaims. Although BP Amoco first asked questions relating to spoliation in an interrogatory served on February 2, 2007, FHR's initial response was vague, incomplete and did not state that equipment had been destroyed and/or not preserved. After BP Amoco notified FHR that its response was deficient in this respect, FHR initially refused to supplement its interrogatory response. (*See* 5/18/07 letter from S. Fowkes to R. Stiles, attached as Ex. P; 3/18/08 letter from R. Stiles to S. Fowkes, attached as Ex. Q.) FHR eventually served a supplemental response providing limited additional information, but still failing to provide all of the facts relating to its spoliation of evidence at the plant. (*See* FHR Supp. Resp. Interr. 15 dated July 14, 2008, attached as Ex. H.) BP Amoco was thus required to take a Rule 30(b)(6) deposition of FHR on the subject of evidence preservation. Richard Morris testified on FHR's behalf on July 18, 2008. Thus, only after serving an interrogatory relating to spoliation, requesting that FHR supplement its response to that interrogatory, receiving yet another deficient response, and then taking a Rule 30(b)(6) deposition was BP Amoco able to confirm the facts surrounding FHR's spoliation of evidence.

11. It is not surprising that FHR was not forthcoming with the facts relating to its spoliation of evidence. Indeed, the discovery taken by BP Amoco confirms that much of the equipment at issue in FHR's counterclaims has been removed and was *not preserved*. Moreover, the evidence discovered by BP Amoco has confirmed that this equipment was destroyed after FHR's December 2004 claim letter and before BP Amoco's physical inspection of the plant.

12. For example, in Claim No. 48, FHR claims that MD-801(2), a titanium-lined vessel with a carbon steel shell, was corroded and that the titanium liner had bulged and buckled before the sale. (*See* June 9, 2008 FHR Claim Chart, attached as Ex. Y at 8.) FHR seeks over \$1.6 million in damages to repair and replace this vessel. In the fall of 2005, many months after FHR first notified BP Amoco of its claims, FHR removed this vessel, but failed to preserve it as evidence. As a result, neither BP Amoco nor its experts had an opportunity to examine MD-801(2) after the sale and before its destruction by FHR. (Ex. H at 9, Rule 30(b)(6) Dep. Trans. of Richard Morris, at 647-48, attached in part as Ex. I; Dep. Trans. of Scott Retzlaff at pp. 159-60, attached in part as Ex. J; Dep. Trans. of Tim Nicol at 504, attached in part as Ex. K.) FHR's corporate representative on this subject, Mr. Morris, confirmed under oath that this vessel was "not retained" by FHR, in violation of FHR's own "legal hold" notice:

Q. Claim No. 48, we talked about this yesterday. This is MD-801(2). You would agree with me that at least by the fall of 2005 the legal hold had been put in place, correct?

Mr. Warman: Objection. Form. Again I'll—I will instruct the witness not to answer regarding the substance of any legal hold matter other than to say that substance involved legal hold.

A. To answer your question, legal hold was in place in December 2004.

Q. Okay. This vessel was removed by Flint Hills after the legal hold was put in place, is that correct?

Mr. Warman: Objection. Form.

A. It's correct that this vessel was not retained in 2005.

Q. And it was not retained after the legal hold had been put in place, correct?

Mr. Warman: Objection to form.

A. That is correct.

(Ex. I at 647-48.)

13. FHR's Claim No. 53 alleges that the roof and sides of HF-1404, the IPA Acetic Acid Storage Tank, buckled before the sale of the plant. (See Ex. Y at 9.) FHR alleges that it first learned of this problem in October 2005, over a year after taking ownership of the plant. FHR demands almost \$280,000 in damages to repair the tank. In the fall of 2005, FHR removed this tank and did not preserve it as evidence, despite the fact that neither BP Amoco nor its experts had examined the tank. (Ex. H at 10; Ex. I at 650-51; Dep. Trans. of Gary Brennwald at 322-24, attached in part as Ex. L.) Again, FHR's corporate representative Mr. Morris admitted under oath that this key piece of evidence "was not retained" by FHR:

Q. Claim No. 53. This involves the acetic acid tank HF-1404. Flint Hills Resources has replaced the upper shell course of this tank, correct?

A. That is correct.

Q. Where is the upper shell course of HF-[1404] that Flint Hills replaced, that is, the old one?

* * * * *

A. I can not answer definitively where the steel is for that item other than it was not retained during the fall turnaround.

(Ex. I at 650-51.) Although Mr. Morris euphemistically refers to FHR's failure to "retain" various pieces of equipment such as the top of this tank, another FHR employee has provided more detail and testified that, in October 2005, FHR cut off the top of the tank, replaced it, and sold the original top to a scrap metal dealer:

Q. Do you know if any portion of the old HF-1404 has been thrown away?

* * * * *

A. I know portions of it, take it back, were put in scrap. I don't know if anything still remains of it.

Q. What do you mean put in scrap?

A. When the tank was--the top portion was cut away and a new section put in, the old shell section was cut up and put in scrap. I don't know if anything was retained from that section that was removed.

Q. When something goes to scrap, is it disposed of?

Mr. Stiles: Objection. Foundation.

A. It goes to a scrap dealer.

* * * * *

Q. And a scrap dealer sells scrap?

A. Purchases scrap.

Q. So it was sold?

Mr. Stiles: Objection. Foundation.

A. I believe it was.

(Ex. L at 323-24.)

14. In its Claim No. 51, FHR alleges that volatile organic material emissions from MB-1050, the TMA Unit Regenerative Thermal Oxidizer (“REECO”), exceeded permitted limits. (See Ex. Y at 9.) According to FHR, it discovered the alleged problem in August 2005. FHR is seeking \$125,749.63 in damages to repair the REECO’s valves. In the fall of 2005, FHR removed the original valves and did not preserve them, despite the fact that neither BP Amoco nor its experts had examined the original valves after the sale. (Ex. H at 10 (FHR interrogatory response admitting that valves were removed from the REECO in Fall 2005); Ex. I at 669 (confirming that the removed valves had not been retained even though legal hold was in place)).

15. FHR also destroyed key components of the plant’s fire-water system, which is the subject of its Claims 3 and 57. Specifically, FHR alleges that the plant’s fire-water pumps needed repair before the sale, and demands over \$2.5 million in damages to repair the pumps, install isolation valves, and flow test the system. (See Ex. Y at 1, 10.) In the summer of 2006, however, FHR removed the original isolation valves and did not preserve them, despite the fact that neither BP Amoco nor its experts had an opportunity to inspect the equipment prior to its destruction. (Ex. H at 4 (FHR interrogatory response admitting that valves were removed in the summer of 2006); Ex. I at 693 (confirming that all of the removed valves were not retained)).

16. FHR alleges in its Claim No. 19 that MF-1502, the TMA Dilute Caustic Tank, had holes at the bottom of the tank at the time of the sale. (See Ex. Y at 4.) FHR seeks \$337,065.85 in damages for the replacement of the tank. According to FHR, it learned of this alleged problem in September 2004. Shortly thereafter, in the fall of 2004, FHR removed the tank from the site, but failed to preserve it as evidence for BP Amoco or its experts to inspect. (Ex. H at 6; Ex. I at 645-46.) Richard Morris, whom FHR designated as its Rule 30(b)(6) witness on the subject of evidence preservation, confirmed under oath that FHR failed to preserve this tank:

Q. [W]hat did Flint Hills Resources do with MF-1502 after they removed it from the site in the fall of 2004?

Mr. Warman: Objection. Form. Foundation.

A. I don't know what happened to MF-1502 aside from the fact that it was not retained during the turnaround repair efforts.

(*See* Ex. I at 645-46.)

17. In Claim No. 22, FHR alleges that HE 1404, an Overhead Condenser, did not sufficiently reduce volatile organic material emissions, in alleged violation of environmental regulations. (*See* Ex. Y at 5.) FHR seeks \$1.49 million to replace the condenser and install a scrubber and a mechanical liquid trap on the railcar unloading line. FHR has admitted that it did not retain the HE 1404 overhead condenser that existed at the time of the sale of the plant. (*See* FHR Resp. to Eight Set of Requests to Admit, Request to Admit No. 124, attached as Ex. M; *see also* Rule 30(b)(6) Dep. Trans. of Deborah Preschler at 193, attached in part as Ex. W.)

18. In Claim No. 10, FHR alleges that the Joliet plant had 40 Strahman-Fetterolf ("SF") valves that were open-ended lines and had to be replaced to comply with environmental regulations. (*See* Ex. Y at 2.) FHR seeks \$152,000 in damages for the cost to replace these valves. At a plant inspection, BP Amoco's expert, Gale Hoffnagle, submitted to FHR a list of equipment that he wanted to inspect, including the replaced SF valves. (*See* Decl. of Hoffnagle, attached as Ex. X.) FHR returned the list to Hoffnagle with handwritten notes indicating where certain equipment on the list was located, but there were no notes indicating where the SF valves were located. (*Id.*) Thus, FHR never provided the valves to BP Amoco for inspection. (*Id.*)

19. In addition to completely destroying certain evidence, in other instances FHR preserved only samples of replaced equipment—samples it obviously chose to keep for its own litigation purposes—but not the entire piece of equipment so that BP Amoco could inspect it. This selective retention of samples and destruction of the rest of the equipment was a violation of FHR's legal hold policy, as confirmed by FHR's corporate representative, Mr. Morris, who testified about the topic of document and evidence retention and spoliation:

Q. And the exchanger that was recently replaced, has the entire exchanger been retained rather than samples of that exchanger?

A. Absolutely. I've made explicit instructions that they must save everything.

Q. Not just samples?

A. Just not samples; everything.

Q. And why did you tell them to save everything; not just samples?

A. It's my understanding of the legal hold issue is [sic] that we should save everything.

(Ex. I at 679.)

20. There are numerous claims where FHR destroyed most of the equipment and instead retained only selected samples of the equipment at issue, in violation of its own legal hold requirements. In Claim No. 15, for example, FHR alleges that there were leaks in the plant's underground piping at the time of the sale and demands \$5 million in damages for repair and replacement work. (*See* Ex. Y at 3.) FHR replaced portions of the piping at issue in that claim, but did not preserve all of the replaced piping. Instead, FHR retained only a sample and destroyed the rest. (Ex. H at 5; Ex. I at 635-36.) Similarly, FHR claims in Claim No. 54 that HE 1306-A, the Vent Recuperative Heater, contained leaking tubes that needed to be repaired at the time of the sale. (*See* Ex. Y at 9.) FHR demands \$351,734.01 in damages to replace the tubes. FHR replaced the tubes in March 2006, but destroyed and did not preserve all of the original tubes as evidence. (Ex. H at 10; Ex. I at 709-11.) In Claim No. 58, FHR claims that tubing within PM-600, a PIA dryer, was corroded at the time of the sale. (*See* Ex. Y at 10.) FHR demands \$605,310 in damages for the replacement of the tubes. FHR replaced the tubing in March 2006, but destroyed and did not preserve all of the original tubing as evidence. (Ex. H at 10; Ex. I at 707.) In addition to these claims, in its supplemental interrogatory response FHR admitted that it only saved samples of the tubing replaced in the MAN Tube, NE-300. (*See* Ex. Y at 11, Claim No. 67; Ex. H at 11.) FHR seeks \$1,144,695.75 for the repairs made to this equipment.

21. The following table summarizes which of FHR's claims have been affected and impacted by FHR's spoliation of evidence:

Claim(s)	Damages Claimed	Affected Equipment	Status of Equipment
10	\$152,000	Strahman-Fetterolf Valves	Destroyed
15	\$5,009,474.73	Underground Piping	Only samples preserved

19	\$337,065.85	TMA Dilute Caustic Tank MF-1502	Destroyed
22	\$1,495,568.49	Overhead Condensor HE-1404	Destroyed
48	\$1,647,935.75	Titanium Lined Vessel MD-801(2)	Destroyed
51	\$125,749.63	TMA Unit Regenerative Thermal Oxidizer MB-1050	Destroyed
53	\$279,596.12	IPA Acetic Acid Storage Tank HF-1404	Destroyed
54	\$351,734.01	Vent Recuperative Heater HE 1306-A	Only samples preserved
58	\$605,310.00	PIA Dryer PM-600	Only samples preserved
3, 57	\$2,542,595.88	Fire Water System Isolation Valves CG-1001, 1002, 1003, 1005, 1006	Destroyed
67	\$1,144,695.75	MAN Tube NE-300	Only samples preserved

22. In sum, BP Amoco has been prejudiced in its ability to defend at least 12 of FHR's individual claims, which collectively seek \$13,691,726.21 in alleged damages. But, as outlined below, that is not all of the evidence FHR destroyed.

FHR'S SPOILIATION OF ROBERTSON'S EMAILS

23. In December 2004, FHR notified its employees of a legal hold due to this case. (Ex. I at 605.) The notice instructed that "all documents and records in relation to an upcoming legal matter with BP" be preserved. (*Id.*) Rick Morris, FHR's Rule 30(b)(6) witness on the subject of evidence preservation, confirmed that FHR's legal hold notice required FHR employees to "maintain all records in all forms that they have them, whether they're electronic, they remain electronic, and whether they're paper, they remain paper." (*Id.* at 625-26.)

24. Throughout the negotiations and sale of the Joliet plant, David Robertson was FHR's president and CEO. He was FHR's key decision-maker: he presented the purchase to the Board of Directors of FHR's parent, Koch Industries; he attended the initial presentation to FHR made by BP Amoco's management team; he attended face-to-face meetings with representatives of BP Amoco throughout the sale process; and he signed the post-closing letters to BP Amoco listing the claims that are now at issue in this litigation. (Dep. Trans. of David Robertson at 6-7,

attached in part as Ex. N.) Before becoming FHR's president and CEO, Robertson was the president of Koch Agriculture Company, and, before that, he was the president of Koch Beef Company. (*Id.* at 9-10.) At the time of the sale of the Joliet plant, Robertson had served as a president or CEO of a Koch entity for at least eight years. (*Id.* at 6-9) Robertson is now the president and chief operating officer for Koch Industries, the parent company of FHR. (*Id.*) Koch Industries is one of the largest privately held companies in the country. Koch and its subsidiaries such as FHR have a presence in nearly 60 countries, employing about 80,000 people and earning \$110 billion in revenues each year. (*See* www.kochind.com.)

25. As the president and CEO of FHR, Robertson had the "ultimate responsibility and accountability for the performance of the company." (Ex. N at 11-12; 102.) Robertson was a routine user of email, using his laptop computer, office desktop computer, and home computer to send and receive communications via email. (Ex. N at 18-20.) At his deposition, Robertson testified that he used email with respect to FHR's purchase of the Joliet plant. (Ex. N at 21-22.)

26. On April 25, 2005, after sending several letters to BP Amoco alleging various breaches of the PSA, Robertson instructed BP Amoco of the duty to preserve evidence:

We assume that BP has preserved, and will continue to hold all records (electronic and hard copy) that are relevant to this dispute. We want to remind BP specifically of the back-up tapes being stored at Iron Mountain, and ask that those be preserved.

(*See* Ex. B (emphasis added).)

27. Given Robertson's unique and deep involvement in FHR's decision to purchase the Joliet plant from BP Amoco, counsel for BP Amoco specifically requested his documents, including his emails. FHR's response to these requests first was to delay; then to take the position with the Court that it was done or nearly done with discovery; and then, only in March of this year and a few weeks before Robertson's deposition, to finally produce a handful of his emails.² Thus, despite Robertson's involvement in the purchase of the Joliet plant and his

² BP Amoco served its initial document requests in November, 2005. FHR waited 9 months to begin producing any documents whatsoever, and then failed to produce any emails or other electronic documents from the files of Mr. Robertson and numerous other FHR executives who worked at FHR's headquarters in Wichita, Kansas. Thus, throughout 2007, BP Amoco repeatedly raised FHR's failure to produce these emails in correspondence with FHR. (*See* 3/13/07 email from S. Fowkes to R. Stiles, attached as Ex. R; 5/11/07 letter from S. Fowkes to R. Stiles, attached as Ex. S, 7/17/07 email from S. Fowkes to R. Stiles, attached as Ex. T.) FHR eventually responded by producing electronic documents from certain of its Wichita employees, but continued to fail to produce any electronic documents from

admission that he routinely used email with respect to that transaction, FHR did not produce any of Robertson's electronic files until March 28, 2008. (*See* Decl. of Frank Sramek, attached as Ex. O.). Even then FHR produced only eleven documents (consisting of seven emails and four attachments) as Robertson's entire electronic file. (*Id.*) Moreover, all of these documents were dated within a five-month period in 2006, and none were dated prior to 2006. (*Id.*)

28. At his deposition, Robertson testified *three separate times* that after he received the litigation hold notice, he intentionally deleted all of his emails relating to the issues in this case. (Ex. N at 18-24, 30.) Robertson admitted that he knew there was a litigation hold in place, and that when FHR's lawyers found out that he had deleted emails they informed him that his deletion of e-mails was "not acceptable." (Ex. N at 23.)

29. As an excuse for his destruction of evidence, Robertson testified that before he destroyed the emails, he personally printed out hard copies of the emails before deleting them. *Id.* This testimony was untrue. How do we know this? Because FHR's own production of Robertson's hard-copy (printed out) files refutes Robertson's testimony. FHR produced only 20 hard-copy emails from Robertson's files, covering the span of several critical years, from 2003 through 2006. (Ex. O.) Only two emails were produced by Robertson for the entire year of 2004, the year of the Joliet plant sale, and only one email was produced by Robertson for the entire year of 2003. (*Id.*) Of the 20 hard-copy and 7 electronic emails FHR produced from Robertson's files: 8 emails consisted of press articles regarding an explosion at a BP refinery in Texas, which are documents that were not requested by BP Amoco in this case; 3 emails were completely redacted; 7 emails were status updates *from BP* regarding data requests; 3 emails were to set up conference calls and confirm the delivery and receipt of packages and emails;

Mr. Robertson's files. In a motion BP Amoco filed on August 9, 2007, BP Amoco noted that "Flint Hills has not yet produced a single e-mail or electronic document from the files of Mr. Robertson, even though he is one of the most important witnesses in the case." (*See* BP Memo. in Support of Mot. to Extend Fact Disc., dated 8/9/07, attached as Ex. V, at 4.) Despite BP Amoco's repeated reminders to FHR of its discovery obligations, FHR once again failed to produce any emails from Mr. Robertson's files or to inform BP Amoco that Mr. Robertson had deleted hundreds if not thousands of his emails. Indeed, FHR led BP Amoco and the Court to believe that Mr. Robertson must not have used email when it represented to the Court at several status conferences in late 2007 that its document production was complete. In fact, FHR's document production was far from complete, as evidenced by the fact that FHR produced 27 emails (7 electronic and 20 hard-copy) from Mr. Robertson's files many months later, on March 28, 2008, only after BP Amoco served a notice for Mr. Robertson's deposition (*see* 2/22/08 Robertson Dep. Notice, attached as Ex. U) and only weeks before his April 18, 2008, deposition.

1 email was sent to forward FHR's changes to a tolling agreement; 1 email included a draft press release regarding the purchase of the Joliet plant; 2 emails were sent to Robertson by BP after the sale containing plant production data; and 2 emails summarized routine issues at the plant, including a report that a contractor chipped some teeth when a pipe wrench slipped.

30. In stark contrast to his "I printed out hard copies before destroying my e-mails" testimony, and in surprising contrast to the handful of emails produced from Robertson's electronic and hard-copy files, FHR produced approximately **2,083** electronic emails from the files of other FHR employees for which Robertson was the recipient, sender, or copied. Robertson was the recipient of 1,897 of these emails, the sender of 67 of these emails, and copied on 119 of these emails. (*See Ex. O.*) Thus, while Robertson testified under oath that he printed and saved a hard-copy of all of his emails, in fact he printed and saved only 20 of his emails, and of those 20, at most 2 of them arguably relate to the issues in this litigation. There were at least, in sum, 2,083 emails sent by or to Robertson relating to the issues in this litigation which he did not print out in hard copy, did not produce, but instead destroyed. Robertson's destruction of his emails, however, makes it impossible to know exactly how many additional emails he sent or received but were deleted and thus not produced to BP Amoco. Similarly, Robertson's destruction of his emails makes it impossible to know whether he had drafts, whether he had email communications to others who did not produce those emails, etc.

31. In addition, Robertson's destruction of emails leaves serious gaps in the evidence—gaps on core issues infecting the entire case. These gaps include emails relating to many key issues in this case, including: (i) when FHR discovered each of the alleged problems at the plant; (ii) how FHR discovered the alleged problems; (iii) who discovered the alleged problems; (iv) how the alleged problems were investigated; (v) who investigated the alleged problems; (vi) how the facts and underlying documents relating to the alleged problems were maintained at the Joliet plant; and (vii) how and when Robertson was made aware of these issues and claims before he personally signed and sent FHR's written claims notices to BP Amoco.

CONCLUSION

FHR's destruction and spoliation of critical equipment and emails determinative of the issues in this case has severely prejudiced BP Amoco and BPCNA. This prejudice and the legal authority for imposing sanctions on FHR are summarized in the Memorandum of Law accompanying this motion.

For the reasons stated above, BP Amoco and BPCNA respectfully request that the Court dismiss FHR's counterclaims, strike FHR's answer to BP Amoco's declaratory judgment complaint, and award attorneys' fees and costs to BP Amoco and BPCNA in light of FHR's conduct. In the alternative, BP Amoco and BPCNA respectfully request that the Court: (1) dismiss the 12 individual FHR claims that are most directly affected by FHR's spoliation of evidence; (2) award BP Amoco and BPCNA their attorneys' fees, costs, and expenses associated with defending those 12 claims; (3) dismiss FHR's fraud claim as a result of its unclean hands; (4) order that an adverse inference be given to the jury to the effect that the destroyed emails and physical evidence would have been unfavorable to FHR; and (5) take this adverse inference into account when ruling on summary judgment motions.

Date: December 19, 2008

Respectfully submitted,

s/Marla Tun Conneely

Marla Tun Conneely (ARDC #6276076)

*One of the attorneys for BP Amoco Chemical
Company and BPCNA*

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2008, 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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