Motion Ex. 27

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.	Case No. 05 C 5661 **Judge Amy J. St. Eve**
FLINT HILLS RESOURCES, LLC, Plaintiff, v. BP CORPORATION NORTH AMERICA INC., Defendant.	

FLINT HILLS RESOURCES, LLC'S SURREPLY IN OPPOSITION TO BP'S MOTION FOR SANCTIONS

Dated: March 18, 2009

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BP accuses Flint Hills of intentionally destroying email communications and physical evidence that BP collectively characterizes as "core evidence" which is "at the heart of its claims" (BP Amended Reply at 17, 18). An examination of the factual record proves that BP's accusations are false. Although discovery has not been perfect[1], by either side, Flint Hills did not destroy relevant emails and any loss of physical evidence was inadvertent, unintentional, and not prejudicial to BP.

I. DAVID ROBERTSON DID NOT INTENTIONALLY DESTROY RELEVANT EMAILS AFTER RECEIVING THE LEGAL HOLD.

BP alleges that "Robertson saved only 2 out of at least 316 relevant emails he received or sent after [December 17, 2004]; he destroyed the other at least 314."[2] BP Amended Reply at 2-3. BP also alleges that "Robertson, for example, destroyed at least 314 emails dated after December 17, 2004 and that he did not print and preserve in hard-copy format, but that were produced by other FHR employees in this litigation." BP Amended Reply at 6. Both statements are false.

A. BP Overstated the True Number of Emails By Counting the Same Email Multiple Times.

After reviewing BP's original reply brief, Flint Hills requested copies of the 314 emails BP stated were destroyed by Mr. Robertson. BP provided those emails to Flint Hills on Friday,

[1] "Perfection in document production is not required." *Southern Capitol Enterprises, Inc. v. Conseco Services, L.L.C.*, 04-CV-705, 2008 WL 4724427, at *2 (M.D. La. Oct. 24, 2008).

[2] In its reply brief, BP refers to "massive amounts of emails." BP Amended Reply at 11. In its initial motion for sanctions, BP claimed that 2,083 emails were sent to or from Mr. Robertson and produced by other Flint Hills custodians but not by Mr. Robertson. BP Mem at 6. After Flint Hills pointed out that most of the 2,083 were dated prior to the Flint Hills' legal hold (FHR Resp. at 13), BP reduced the number of emails it claims Mr. Robertson intentionally destroyed to 314 (BP Amended Reply at 10). Despite these facts, BP in its Amended Reply still challenges Flint Hills' assertion that "most" of the 2,083 emails were sent to or received by Mr. Robertson before he was under a legal duty to retain them. FHR Resp. at 13; BP Amended Reply at 10.

March 6, 2009. On Monday, March 9, 2009, BP filed its amended reply, second supplemental affidavit of a legal assistant, and copies of the emails with the Court.

The emails themselves prove that BP's accusations are false. In calculating the 314 email total that BP contends were intentionally destroyed by Mr. Robertson, BP counted the same email multiple times. One example, among many, demonstrates that BP overcounted even in its March 9th Amended Reply: On February 21, 2006, Melissa Funderburk (a Flint Hills' accountant) transmitted a routine financial data report to a large mailing list at 5:02pm. See Exhibit 1, FHR-E00116100. BP counted that email 5 times when calculating the number of emails it alleges that Mr. Robertson destroyed. See Exhibit 2, FHR-E00116100, FHR-E00157610, FHR-E00163875, FHR-E00173094, FHR-E00273866. But that count is plainly incorrect; Mr. Robertson did not receive the February 21, 2006 email 5 times – he received it only once. He could not possibly have deleted that email 5 times.

BP's overcount is not an isolated occurrence. Of the 314 emails BP claims Mr. Robertson intentionally destroyed after December 17, 2004, 122 of those emails are exact duplicates of other emails in the collection.[3] The duplicates are grouped together as Exhibit 3. Contrary to BP's accusation, Mr. Robertson has not "destroyed at least 314 emails dated after December 17, 2004." BP Amended Reply at 6.

[3] The exact duplicates include emails that were identically redacted. They also include emails with redactions that are identical to emails without redactions. Giving BP the benefit of the doubt for not knowing the content of what was redacted, BP knew that at least 98 emails were exact duplicates. BP's argument in its Amended Reply that Mr. Robertson destroyed 314 emails is contradicted by the declaration of BP's own legal assistant. See BP 2nd Supp. Sramek Decl. ¶7.

B. The Remaining Emails are Irrelevant and Duplicative of Other Data Produced By Flint Hills.

After factoring in BP's overcount of duplicate emails, there are 192 emails either to or from Mr. Robertson dated after December 17, 2004 that Mr. Robertson did not produce.[4] Of those 192 emails, approximately 160 are emails relating to the general financial performance of the Flint Hills chemicals business well after the sale had closed. Most are simply transmittal notes, like the February 21, 2006 Funderburk email in Exhibit 1, enclosing copies of interim post-sale financial performance data with the exact same statement "please let me know if you have any questions." Twenty-two emails fall into this general category. By May 2006, Flint Hills had stopped attaching copies of the financial data to the transmittals. Instead, Flint Hills routinely notified employees via email that new financial data was available and included a link to the financial data on a shared server with a slightly modified message of "Please let me know if you have any problems accessing the file, or if you have any questions" and "ChemIntBPLEGALHOLD" in the pathname. See e.g., Exhibit 4, FHR-E00315410. Nearly 100 of the 160 financial performance-related emails fall into this category of routine notification emails alerting Flint Hills employees to the fact that new financial data is available on a shared server that is plainly identified as a holding place for the financial data.[5] Many of the remaining emails that fall into post-sale "general financial performance" category contain even less

[4] December 17, 2004 is the date on which Flint Hills' legal hold was issued. In its accusations against Mr. Robertson, BP charges Mr. Robertson with a duty to retain records well before Flint Hills' legal hold was issued and accuses Flint Hills of stalling its legal hold issuance until at least five months after it anticipated litigation. BP Amended Reply at 5-6. Any work-product designations that Flint Hills has made in this litigation were made during the course of responding to voluminous discovery requests long after December 17, 2004. To the extent that any such designation on a privilege log asserts certain documents were work product before December 17, 2004, that may raise an issue about the work product privilege designation, but it certainly does not contradict Mr. Robertson's testimony, affidavit or conduct.

[5] Flint Hills produced the Joliet plant's monthly financial reporting packages over relevance and over-breadth objections. See e.g., Exhibit 5, FHR-AV-0726-0802; Exhibit 8, FHR Answer to BP's Second Set of Document Requests at p. 6; Exhibit 9, FHR Answer to BP's Sixth Set of Document Requests at pp. 2, 8-10; Exhibit 10, FHR Answer to BP's Fourth (Sic) Set of Document Requests at pp. 2, 3.

information. A few inform the recipient list that the financial data is not ready yet or that no estimate will be sent out on that date. See e.g., Exhibit 6, FHR-E00315325, FHR-E00315342, FHR-E00315357, FHR-E00157154, FHR-E00172969. One simply transmits the password to access the spreadsheets. Exhibit 7, FHR-E00172441.

These are the emails that BP contends are "documentary evidence at the core of the claims in this case." BP Amended Reply at 4. BP's contention that these documents are "core" evidence is not accurate.[6] In fact, BP served a request asking for documents relating to the financial performance of the Joliet Plant. Flint Hills objected on both relevance and overbreadth grounds, and produced the official monthly financial reports as a compromise. See Exhibit 8, FHR Answer to BP's Second Set of Document Requests at p. 6; Exhibit 9, FHR Answer to BP's Sixth Set of Document Requests at pp. 2, 8-10; Exhibit 10, FHR Answer to BP's Fourth (Sic) Set of Document Requests at pp. 2, 3. BP never challenged Flint Hills' objections to its financial document request or Flint Hills' more narrow production of the monthly financial reports. Consistent with Flint Hills' objections to BP's document request, Mr. Robertson was under no obligation to produce those emails at all.

The remaining 32 emails are also not relevant. Indeed, BP was already in possession of most of those 32 emails before discovery began because most of the emails are actually emails from Mike Wrenn, BP's deal team leader. For example, Mr. Wrenn wrote Mr. Robertson on February 21, 2005 at 1:21pm to give him a status update. Exhibit 11, FHR-E00275862. Mr. Robertson produced a hard copy of that email. Id. Mr. Robertson forwarded Mr. Wrenn's email

[6] Flint Hills intends to move in limine to exclude the actual post-sale financial performance of the PCBU as not relevant because, for instance, Flint Hills is not seeking damages for lost profits. BP's repeated assertions that the financial performance of the Joliet plant since closing is "central to FHR's claims for damages" is plainly false. BP Amended Reply at 4, 12. Moreover, Flint Hills has complied with BP's requests for post-sale financial information producing, among other financial data, the official monthly financial reports for the Joliet plant. See e.g. Exhibit 5, FHR-AV-0726-0802. And the routine transmittal emails that account for a large portion of BP's 192 emails add nothing to this litigation.

to several other individuals, including internal counsel for Flint Hills. Mr. Robertson did not produce that email. But the entire text of his message is "Status update. FYI." This is one of the two emails BP identifies in its brief as being "egregious" examples of Mr. Robertson's not retaining every single email. BP Amended Reply at 11, fn9.

When Flint Hills pointed out in its Response that Mr. Wrenn failed to produce many emails to Flint Hills that were subsequently produced by Flint Hills, BP responded that it had previously objected to producing emails after December 21, 2004 because they were irrelevant, and refused to produce them. BP Amended Reply at 7, fn.5. BP is now in the curious position of claiming that Mr. Robertson and Flint Hills should be sanctioned for failing to produce the "FYI" portion of emails from BP personnel, even though BP itself objected on relevance grounds and did not produce any part of the emails and apparently thousands of other post-December 17, 2004 emails.

Similarly, BP faults Mr. Robertson for failing to produce emails that contain news articles about the Texas City explosion at a BP refinery. See Exhibit 12, FHR-E00175176. BP has gone to great lengths to try to exclude any evidence relating to this matter at all. In fact, BP objected to Flint Hills' document request for information relating to the Texas City explosion, and refused to produce any such documents. See Exhibit 13, BP Resp. to FHR First Set of Document Requests at p. 14.

The lack of relevance of the 192 emails is further confirmed by BP's conduct in discovery in this case. Although BP has taken over 90 depositions in this case and defended at least 35, and although over 3000 exhibits have been marked in those depositions, not a single one of the 192 emails has ever been offered as an exhibit during any deposition, including at Mr. Robertson's deposition. It is highly unlikely that any one of those emails will even be offered by

either party as a trial exhibit, let alone accepted by the Court. Flint Hills objected generally to the relevance of BP's document requests.[7] See Exhibit 8 at p. 6; Exhibit 9 at p. 2; Exhibit 10 at p. 2. If parties were challenged on every single email and document that is marginally related to the litigation, courts would rapidly become even more bogged down in discovery and sanction disputes.

C. BP's Cited Authority Is Clearly Distinguishable from The Present Facts and Issues.

BP attempts to support its position by relying on cases that are factually and legally distinct from the instant case. BP relies heavily on *Nursing Home Pension Fund v. Oracle Corporation*, 254 F.R.D. 559, 566 (N.D. Cal. 2008), a securities fraud case, where the emails that were not produced spoke directly to the CEO's knowledge of the issues on which the plaintiff's fraud case was based, a key element of the plaintiff's fraud case. Here, by contrast, neither party is contending that Mr. Robertson's *knowledge* of the content of the 192 emails has any relevance to any issue in this case. In addition, the *Oracle* court determined that the conduct complained of did *not* warrant default sanctions, because the plaintiff had not suffered sufficient prejudice to warrant such a harsh sanction "primarily because plaintiffs have received a large quantity of materials through the discovery process." *Id.* at 564.

Kvitka v. Puffin Company is fundamentally different on its facts. 2009 WL 385582, at *4 (M.D. Pa. Feb. 13, 2009). In *Kvitka*, the court found that the plaintiff acknowledged that "the entire thing has a lot to do with some emails, yet nevertheless discarded her old laptop that contained the emails relevant to her claims in direct defiance of instructions provided to her attorney." *Id.* Here, not even BP contends that the entire case "has a lot do with some emails",

[7] Nevertheless, Flint Hills cannot be charged with withholding the information and transmittals that BP has presented in the 192 emails because Flint Hills actually produced these emails (albeit from other custodians).

as was the circumstance in *Kvitka*. As discussed above, the subject emails are not even relevant and BP already has copies produced by other custodians at Flint Hills. The plaintiff in *Kvitka*, throughout the litigation, "conducted herself in an evasive and confrontational manner . . . and attempted to mislead the court." *Id.* BP's characterization of Flint Hills' conduct as "indistinguishable from the conduct at issue in *Kvitka*" is not credible.

BP relies on *American Cash Card Corporation v. AT&T Corporation* to support its contention that it has been "deprived of key evidence" that would show that the problems with the condition of the Joliet Plant arose after its transfer to Flint Hills. BP Amended Reply at 16. In *American Cash Card* the district court imposed default sanctions after the defendant failed to comply with five of the court's orders, including an earlier order imposing a lesser sanction. *Id.* at 524. The defendant had "flouted its obligations, and it [was] clear it [would] continue to do so." *Id.* at 525. *American Cash Card* is further distinguishable as the sanctioned party in that case failed to produce specific "underlying financial records", thereby leaving gaps in the record. *Id.*. While the sanctioned party in *American Cash Card* intentionally ignored discovery orders, failed to pay monetary sanctions imposed by the Court, and fabricated an impossible story to explain its conduct, that is not the case here – Flint Hills has not made any mispresentations to the Court,[8] has not violated any court orders, rules or law, and moreover, has produced the official monthly financial reports of the Joliet Plant. See e.g. Exhibit 5, FHR-AV-0726-0802.

BP cites *Barnhill v. United States*, 11 F.3d 1360, 1368 (7th Cir. 1993) to support its position that prejudice is not required to justify the harsh sanction of dismissal. BP Amended Reply at 12. The *Barnhill* decision instead recognizes that "the particular sanction of dismissal with prejudice or judgment is draconian . . . and must be infrequently resorted to by district

[8] BP also claims in both its opening brief and Amended Reply that Flint Hills has somehow misrepresented the status of its document production to the Court. BP cites to no material in the record, and Flint Hills has not mislead the Court regarding its document production.

courts." *Id.* at 1367 (internal quotes and citation omitted). The decision goes on to note "[i]n the normal course of events, justice is dispensed by the hearing of cases on their merits." *Id.* Indeed, "[a] dismissal with prejudice is a harsh sanction which should usually be employed only in extreme situations." *Id.* While BP cites *Barnhill* as supporting its contention that prejudice is not required, BP fails to note the Court's warning that "dismissal or judgment is such a serious sanction that it should not be invoked without first considering what effect, if any, the challenged conduct has had on the course of the litigation." *Id.* at 1368. As discussed above, the emails at issue have no impact on the course of this litigation.

II. FLINT HILLS DID NOT INTENTIONALLY DESTROY RELEVANT PHYSICAL EVIDENCE.

BP's Amended Reply does not establish that any of the physical evidence that is the subject of its motion would have been material to its case. BP provides no affidavits from any of its experts explaining how the challenged physical evidence is crucial to its experts' opinions. BP instead alleges that Flint Hills is engaging in "rank speculation" about what BP would have done with that physical evidence. But Flint Hills' claim is not speculative; it is supported by BP's conduct before, during and after the September 2007 Joliet Plant visit.

BP concedes that it visited the Joliet Plant in September 2007 and failed to test any of the retained equipment. BP claims that it did not do so because Flint Hills would not permit any such testing. BP Amended Reply at p. 8-9, 13. The facts are different; the record shows that Flint Hills explicitly permitted BP to perform non-intrusive testing, and requested BP to inform it of any intrusive testing it wished to conduct in advance of the Joliet Plant visit:

> BP Amoco may conduct non-intrusive tests and take non-intrusive measurements and surveys of the equipment to be inspected. If BP Amoco intends to conduct any tests or take any other actions that would potentially interfere with the normal operations of the equipment, or would be disruptive or destructive in any way, BP Amoco will

> consult with Flint Hills in advance of any proposed tests or actions and attempt to resolve any issues that may arise.

Exhibit 14, Fowkes 12/12/06 Letter. BP did not consult with Flint Hills regarding any testing it desired to perform either before or after the Plant visit. As BP admits in its Reply, the Court told BP it could raise with the Court any additional issues that arose during the September 2007 Plant visit. BP Amended Reply at 8, fn.7. BP has never raised any such issues with Flint Hills or with the Court.

BP further claims that its conduct with regard to the retained equipment is not relevant to what BP would have done with the equipment that was not retained. That is not credible. For 8 of the 12 claims that BP asserts spoliation, Flint Hills retained samples of the equipment or repaired a portion of the equipment in place, yet BP never tested the samples or repairs. FHR Resp. at 17-22. For example, Flint Hills retained tube samples from a dryer (Claim 58). Yet BP now contends that it was "crucial" for its experts to examine the other tubes, even though BP never tested the sample tubes to which it had access. For other claims, the discarded material would have been of no assistance to BP. For example, sections of the underground piping associated with the lab sewer line (Claim 15) crumbled when they were removed. The fact that the pipe crumbled is evidence of its condition. No amount of testing would show that a crumbled piece of pipe was in good condition. See also Flint Hills Resp. at 17-22 (discussing facts of individual claims).

Moreover, BP owned and operated all of the equipment at the Joliet Plant at the time of BP's representations and warranties under the PSA, including the equipment at issue in the 12 claims that BP asserts spoliation. For the 9 condition-of-assets claims for which BP asserts spoliation, Flint Hills also produced detailed information identifying the condition of the equipment at the time it was repaired and/or taken out of service by Flint Hills. FHR Resp. at

19-22. For the 3 environmental claims, the physical condition of the equipment is not relevant and BP did not test the equipment repaired in place by Flint Hills. FHR Resp. at 17-18.

BP's contention that it was prejudiced is further undermined by the conduct and testimony of its own experts. One of its experts conceded at his deposition that he did not need to examine MD-801 to form his opinions regarding Claim 48, and that if he had access to MD-801, he would not have done any testing. Exhibit 15, Bidwell Dep., Vol. II at 553:18-554:6, 558:7-18. ("Was there anything with respect to Claim 48 that was not available to you that would hinder your ability to render your opinions with respect to Claim 48? . . . . I had enough information to form my opinions."). Two of BP's condition of assets experts, who opined on 8 claims, did not even participate in the Plant visit (Jonannes Laun and Richard Kaczkowski). The BP experts who did attend the Plant visit were not even aware of the issues on which they would be opining when they visited the Plant. Exhibit 16, Howe Dep. at 36:23-37:1; Exhibit 17, McKinney Dep. at 177:8-11; Exhibit 18, Bidwell Vol. I at 78:4-7. None of BP's experts requested that any of the equipment retained by Flint Hills be turned over for any additional testing after the September 2007 Plant visit.

In any event, the uncontroverted evidence in this case shows that Flint Hills took extensive and reasonable efforts to retain the equipment. BP does not dispute that Flint Hills conducted multiple meetings and training sessions with staff, and sent timely periodic email reminders to stress the importance of document and equipment retention. Exhibit 19, Morris Dep. at 605:25-606:19; *see also*, Exhibit 20, FHR-00422275. To justify a serious sanction, BP must show clear and convincing evidence of willfulness, bad faith, or fault. Flint Hills Response at 24-25. BP only offers unsupported accusations of bad faith that are contradicted by Flint Hills' efforts to retain the equipment and the enormous production of discovery materials in this

case. See e.g., BP Amended Reply at 18. Unsubstantiated speculation regarding intentional destruction of evidence "falls far short of the standard for imposing a default judgment or other case-dispositive sanction." *Trade Finance Partners, LLC v. AAR Corp.*, No. 06-CV-3466, 2008 WL 904885, at *12-13 (N.D. Ill. Mar. 31, 2008). Surely if Flint Hills had "chose[n] to selectively destroy certain equipment surreptitiously" (BP Amended Reply at 14), the Flint Hills employee charged with retaining equipment through March 2006 for Flint Hills at the Joliet Plant would have known about it. Yet Mr. D'Andrea, who left Flint Hills' employment and now works for BP again (as he had for his entire professional career), remains silent. In sum, there is no evidence that Flint Hills "surreptitously" destroyed equipment. BP Amended Reply at 14.

III. BP'S MOTION IS AN UNTIMELY DISCOVERY MOTION.

In its Amended Reply, BP does not contest the principal that discovery motions filed after the close of discovery are untimely; instead, BP argues only that its motion is not a "discovery motion."[9] BP Amended Reply at 11. It its opening brief, BP twice cited Rule 37 for authority to sanction Flint Hills. Only upon Flint Hills' raising the untimeliness issue did BP disclaim any reliance on Rule 37. But the caselaw regarding spoliation and Rule 37 demonstrates that spoliation motions are discovery motions. *See Litetronics Int'l, Inc. v. Technical Consumer Products, Inc.*, No. 03-CV-5733, 2006 WL 2850514, at *1 (N.D. Ill. Sept. 28, 2006) (holding that the magistrate had authority to rule on the sanctions motion pursuant to a referral regarding "discovery matters"); *Diersen v. Walker*, No. 00-CV-2437, 2003 WL

[9] BP's arguments are about discovery. The facts in this case do not provide any basis for ignoring the framework of Rule 37. *See Rodgers v. Lowe's Home Centers, Inc.*, 05-CV-0502, 2007 WL 257714, at *11 (N.D. Ill. Jan. 30, 2007) ("Finally, since the inherent power of the court 'is a residual authority, to be exercised sparingly' and only when other rules do not provide sufficient basis for sanctions, if Rule 37 does not allow entry of default judgement as a sanction, the court's inherent authority cannot be the basis for relief."); *see Dal Pozzo v. Basic Machinery Co., Inc.*, 463 F.3d 609, 614 (7th Cir. 2006); *Zapata Hermanos Sucesores v. Hearthside Baking*, 313 F.3d 385, 390-391 (7th Cir. 2002) (Posner, J.), *cert. denied* 540 U.S. 1068, 124 S. Ct. 803, 157 L.Ed.2d 732 (2003)."). Timeliness is part of that framework.

21317276, at *3 (N.D. Ill. June 6, 2003). As recently as two months ago, a district court in this circuit likewise considered a spoliation motion pursuant to Rule 37. *Vukadinovich v. Griffith Public Schools*, No. 02-CV-472, 2008 WL 5377720, at *1 (N.D. Ind. Dec. 18, 2008). BP fails to cite even a single case holding that a spoliation motion brought after the close of fact discovery is timely. Nor has BP even attempted to justify why it waited for months and years after it was aware of the issues raised in BP's motion to bring the matter to the Court's attention.

CONCLUSION

Flint Hills made a good faith effort to preserve all relevant documents and physical evidence. Discovery is seldom perfect, and any inadvertent and unintentional failure to retain all documents and equipment, even if some of it were marginally relevant, is not grounds for dismissal or an adverse inference instruction to the jury. Moreover, nothing has been discarded or destroyed which would make any difference to BP's case. For the foregoing reasons, and the reasons set forth in Flint Hills' Response, Flint Hills respectfully requests that this Court deny BP's Motion for Sanctions and award Flint Hills its fees in connection with this Motion.

Dated: March 18, 2009

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that he caused a copy of the attached **FLINT HILLS RESOURCES, LLC'S SURREPLY IN OPPOSITION TO BP'S MOTION FOR SANCTIONS** to be served upon all individuals listed below on March 18, 2009 via electronic mail pursuant to Federal Rule of Civil Procedure 5(b)(2)(D) and Local Rules 5.9 and 83.15.

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