

Motion Ex. 29

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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MEMORANDUM IN SUPPORT OF BP AMOCO CHEMICAL COMPANY AND
BP CORPORATION NORTH AMERICA INC.'S MOTION FOR STATUS
CONFERENCE TO DISCUSS THE APPROPRIATE RELIEF NECESSARY IN LIGHT
OF FHR'S SUPPLEMENTARY PRODUCTION LAST WEEK OF AN ADDITIONAL
48,000+ PAGES OF DOCUMENTS AND 4 DVDS CONTAINING 249 VIDEO
SEGMENTS OF THE JOLIET PLANT

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This case is nearly four years old; it is set for trial on September 8, 2009. The parties' Pretrial Order, including a list of all trial exhibits, is due in several weeks, on July 1, 2009. Yet last week, on May 13, 2009, long after the close of fact and expert discovery, FHR produced over 15,000 documents—totaling over 48,000 individual pages—and four DVD's containing 249 different video segments consisting of 123 minutes of video footage of maintenance and repair work relating to at least six of its individual claims. FHR produced these materials more than two years after FHR first represented that its document production would be complete by the Spring of 2007, and nearly nine months after FHR represented to the Court and to BP Amoco that its document production was "finished." Moreover, FHR's recent production took place long after the documents and videotapes were created. For example, approximately 92% of the 11,761 electronic documents produced last week were created in 2008 or earlier; the previously unproduced video segments were all created between July 27, 2008 and October 10, 2008; and monthly financial reports included in this production date back to August 2008. The documents came from over twenty different FHR employees, including key witnesses in this case.

In addition, on February 13, 2009, after fact discovery had closed, after expert reports, and after all but one of the expert depositions had been completed, FHR served a supplemental interrogatory response in the form of a revised "Claim Chart," seeking to revise its alleged cost-of-repair damages for 31 of its remaining claims. In its latest revised Claim Chart, FHR seeks to increase its "cost of repairs to date" for those claims by \$14 million, while decreasing its "estimated future costs" by \$68 million. But the revised Claim Chart includes no facts to explain or support these revised damages claims, and FHR has refused to provide any explanation for its revised damages, either by fully supplementing its interrogatory responses or by producing a witness to answer basic questions about its revised damages claims. The only "explanation" FHR has provided for its revised damages is the production last week of over 48,000 pages of documents and 249 video segments — two months after FHR served its revised Claim Chart.

BP Amoco does not seek an extension of the trial date. Instead, as summarized in its motion, BP Amoco suggests a variety of potential remedies available to the Court under the circumstances. The facts giving rise to this motion, the resulting prejudice to BP Amoco, and the applicable case law supporting the potential remedies are discussed below.

RELEVANT PROCEDURAL HISTORY

1. Since this litigation began in September 2005, the parties have engaged in

extensive discovery. Discovery served by BP Amoco has included document requests and interrogatories focusing on FHR's alleged damages and damages causation, including the amount of the alleged damages, how the alleged damages are calculated, the facts supporting the alleged damages, and the documentary support for the alleged damages. (Exs. 1-4)

2. In its responses to BP Amoco's discovery requests and the parties' discussions, FHR agreed to: (i) "conduct a reasonable search for and produce all non-privileged documents relating to its damages calculations as they become available to FHR"; and (ii) provide a "single comprehensive claim chart" describing its claimed damages with particularity and describing how such damages were calculated. (Ex. 5) FHR further agreed to "seasonably supplement" its response to BP Amoco's damages interrogatories (*id.*), as required in any event by Rule 26(e). FHR served its first "Master Claim Chart" on June 5, 2006, listing 73 claims. With each new revised Claim Chart thereafter, FHR changed its damages claims.

3. In December 2006, the parties jointly asked the Court for a revised schedule extending the discovery cutoff to June 29, 2007, which the Court granted. (Dkt. Nos. 97, 100) On April 2, 2007, FHR represented to BP Amoco in writing that it believed it was "on track to complete our document production by May 1st, [2007]." (Ex. 6) Based on this representation and the assumption that FHR would not continue to revise and change its claims, the parties agreed to a close of fact discovery on September 28, 2007. (Dkt. Nos. 117, 119)

4. FHR did not complete its production by May 1, 2007, and continued to produce documents well after that date. BP Amoco filed a contested motion seeking an extension of fact discovery. (Dkt. Nos. 140-41) On August 21, 2007, the Court granted BP Amoco's motion. (Dkt. No. 147) In late 2007, based on FHR's representation that it was essentially finished with its document production, the Court set a fact discovery cut off of April 30, 2008, which was later extended to May 31, 2008, and set a trial date of October 14, 2008. (Dkt. Nos. 156, 175)

5. Despite FHR's assurances and representations to BP Amoco and the Court that its document production was complete, BP Amoco continued to question FHR regarding what appeared to be significant gaps in FHR's document production. Most importantly, as of early 2008, FHR had produced few, if any, damages and damages causation documents. Beginning in February 2008, BP Amoco sent FHR a series of letters reminding FHR of its obligations under the Federal Rules and its written discovery agreements by producing all documents supporting its damages claims. (Exs. 7-11) BP Amoco also served requests to admit, asking FHR to admit

that it had no documents to support its alleged damages.

6. In May and early June 2008, on the eve of and after the close of fact discovery, FHR produced over 212,000 new documents. Over 137,000 related to damages issues, including: 66,680 invoices; 5,248 Purchase Orders; 2,305 Work Orders; 80 bank statements; 22,107 cancelled checks; approximately 40,875 Work Orders; and three CD's full of electronic information, consisting of Excel spreadsheets. Conservatively estimated, the total number of pages produced by FHR after May 1, 2008, exceeded 525,000. (Ex. 12)

7. Not only did FHR produce voluminous documents with detailed information after the close of fact discovery, it also supplemented its Master Claim Chart for the first time in over a year, after scores of depositions already had been taken using the old Chart. (The Claim Chart was and is FHR's answer to BP Amoco's damages Interrogatories No. 4, 5 and 6.) FHR only supplemented its Claim Chart in response to BP Amoco's repeated queries to FHR noting that the Chart appeared to be both out of date and incomplete. (Exs. 7-11) On June 9, 2008, a week after the close of fact discovery, FHR finally served a revised Claim Chart (Ex. 13), supplementing the version that FHR had last updated more than a year earlier. FHR's revised Chart increased its alleged damages for 58 of its then-remaining 59 claims by \$48.2 million.

8. Following FHR's untimely production of documents and its revised Claim Chart after the close of fact discovery, BP Amoco in July 2008 filed a motion (i) for an extension of time to complete fact discovery on damages and for a continuance of the trial date or, in the alternative, (ii) to preclude FHR's damages claims. (Dkt. Nos. 195-96) FHR opposed the motion. At the motion hearing on July 16, 2008, FHR's counsel represented to the Court that "[w]e believe we have finished our document production." (Ex. 14) After FHR's counsel explained that FHR would be producing additional de-privileged documents and certain other documents that were the subject of discovery negotiations, Judge Moran *asked FHR's counsel for a specific representation that FHR's document production was complete:*

THE COURT: In any event, what I'm hearing is your representation to this point is yes, we think we're done?

Mr. Stiles: Yes, your Honor.

Mr. Figliulo: Yes.

(*Id.* at 8) Judge Moran then granted BP Amoco's request for an extension of time to complete fact discovery on FHR's damages claims, and continued the trial date, but denied BP Amoco's alternative request for preclusion of FHR's damages claims. (Dkt. No. 201) BP Amoco was

permitted until September 15, 2008 to complete fact discovery on FHR's alleged damages. The additional discovery, including the review of the over half million pages of late produced materials by FHR, caused BP Amoco to incur significant expenses.

9. On September 4, 2008, FHR produced Richard Morris as its Rule 30(b)(6) witness to testify about "the damages that Flint Hills claims to have suffered, how those amounts were calculated or otherwise determined, the documents evidencing such amounts, and the accounting or other records confirming or reflecting any expenditures that Flint Hills claims to have made." (Ex. 15)

10. On October 6, 2008, BP Amoco's damages expert Craig Elson submitted his initial report. Elson's report analyzed the damages claims in the June 9, 2008 Claim Chart, as well as the documents FHR had produced as of his report, which FHR had represented to Judge Moran three months earlier was the extent of FHR's production. Elson's report included a claim-by-claim analysis of the specific damages amounts alleged by FHR in its June 9, 2008 Claim Chart. (Dkt. No. 425, Ex. 2) FHR's experts also issued reports, including opinions about the reasonableness of the damages claimed by FHR in its June 9, 2008 Claim Chart.

11. During expert depositions, all of which except one had been completed before FHR produced its revised Claim Chart on February 13th, BP Amoco questioned FHR's experts about the specific damages amounts alleged in the June 9, 2008 Claim Chart. For example:

- In his report for Claim 56, FHR expert Philip Wheeler opines that "Flint Hills' current estimate to complete this [future] work is about \$30M which allows for inflation and elimination of any work on the two 138 kV lines. This cost estimate is reasonable based on the scope of work." BP Amoco questioned Wheeler about this estimate. (Ex. 16) Then, after Wheeler's deposition, FHR revised its Claim Chart and decreased its future estimated damages figure to \$7 million, approximately \$23 million less than what Wheeler testified was reasonable. Thus, BP Amoco never had the opportunity to ask Wheeler about FHR's latest alleged damages for this claim.
- In his report for Claim 77, FHR expert Eric Sullivan states that damages of between \$6.9 to \$19 million, including the \$10.76 million listed in FHR's June 9, 2008 Claim Chart, are reasonable. BP Amoco questioned Sullivan about this opinion and the lack of any support for this opinion. (Ex. 17) Then, after Sullivan's deposition, FHR decreased its future estimated damages for Claim 77 to \$3.6 million. BP Amoco never had the opportunity to ask Sullivan about FHR's revised damages claim or whether he now concedes that the prior claim – which he opined was reasonable – was, in fact, excessive and speculative.
- In his report for Claim 72, FHR expert Geoffrey Egan opines that damages of between \$27 to \$32 million, including the \$30.25 million listed in the 2008 Claim

Chart, are reasonable. FHR served the latest revised Claim Chart, which now seeks a total of \$3 million for this claim, six days before Egan's deposition. When questioned about FHR's revised damages, Egan testified that he only recently learned about the revised damages and that FHR was not going to replace the Thermox, but he was not involved in that decision and did not know the reasons for it. (Ex. 18) Thus, the only expert deposed after FHR served its revised Claim Chart could not answer basic questions about FHR's revised damages.

12. In November and December 2008, following fact discovery, BP Amoco filed motions for partial summary judgment. These motions were based on the allegations and evidentiary record at the time, including the individual damages amounts alleged in the June 9, 2008 Claim Chart, the documents produced by FHR, Morris' 30(b)(6) testimony on damages, and other testimony relating to the damages amounts set forth in the June 9, 2008 Claim Chart.

13. On January 23, 2009, at the initial Status Conference following the reassignment of this case, the Court asked the parties to submit a joint report listing the claims that remain at issue. At the Status Conference, counsel for FHR indicated that certain claims may be withdrawn altogether, but FHR did not inform BP Amoco or the Court that FHR intended to significantly revise its alleged damages or that FHR intended to produce additional documents, let alone 48,000+ pages of documents or 249 video segments. (Ex. 19)

14. FHR served a revised Claim Chart on February 13, 2009, eight months after its previous Chart. (Ex. 20) Five days later, FHR produced additional Excel spreadsheets, invoices, work orders and purchase orders, as well as an affidavit. In addition to dropping seven of its claims, FHR's revised Claim Chart purports to make significant revisions to its alleged damages on FHR's remaining claims. In total, FHR's "to-date" cost-of-repair damages for its remaining claims increased by \$14 million and its estimated future expenses decreased by \$68 million.

15. BP Amoco then spent time trying to figure out and determine—based upon FHR's prior document productions—the evidentiary bases for the revisions to the Claim Chart. On March 25, 2009, pursuant to Local Rule 37.2, BP Amoco wrote FHR asking questions about and expressing its concerns resulting from the timing of FHR's revised Claim Chart. (Ex. 21) BP Amoco reminded FHR of its obligations under the Rules by asking FHR to (i) supplement its document production by producing all documents relating to its revised damages claims; (ii) supplement its interrogatory responses to explain the revised damages figures; and (iii) provide a 30(b)(6) witness to answer basic questions about the revised damages claims. (*Id.*) When making this request, BP Amoco continued to rely on the accuracy of FHR's prior representation

to the Court that it was “finished” with its document production, and BP Amoco thus assumed that any new documents produced by FHR would be those that had been recently created and relied upon by FHR to create its revised Claim Chart on February 13, 2009.

16. On April 3, 2009, FHR rejected BP Amoco’s requests, but stated that it would be making a supplemental production of documents that FHR was “hopeful” would provide the information requested by BP Amoco. (Ex. 22) BP Amoco waited for this production, with the continued expectation that it would be comprised of a limited number of recently created documents which would explain the revisions to the Claim Chart.

17. On April 30, 2009, after giving FHR sufficient time to make its supplemental production, BP Amoco wrote FHR again, asking when the documents would be produced and requesting information regarding the volume of the production, and noting that BP Amoco would need adequate time to review the documents, to determine whether to bring any issues to the Court’s attention, and to determine whether to include any of the documents on its trial exhibit list. (Ex. 23) BP Amoco again reminded FHR of its obligation to fully supplement its interrogatory responses and again asked FHR to produce a corporate representative to explain its revised damages claims. (*Id.*) FHR did not respond to this letter.

18. On May 6, 2009, BP Amoco again asked FHR when it would be making its supplemental production, the expected volume of the production, and whether FHR would agree to fully supplement its interrogatory responses and to produce a witness to testify about its revised damages claims. (Ex. 24) FHR responded on May 7, 2009, informing BP Amoco that it intended to make its supplemental production sometime the week of May 11th. (Ex. 25) FHR did not agree to further supplement its interrogatory responses or to produce a witness to explain its revised damages claims.

19. Finally, three months after serving its revised Claim Chart, on May 13, 2009, FHR made its supplemental production, consisting of: (i) 11,761 electronic documents, such as emails, Word files, and Excel spreadsheets, consisting of approximately 41,338 pages; (ii) 3,554 hard-copy documents, consisting of 6,966 pages; (iii) 4 DVDs consisting of 249 individual video segments, showing maintenance and other activities relating to equipment that is the subject of FHR’s claims; and (iv) 7 monthly financial reports, totaling 571 pages. (Ex. 26; Ex. 27) An example of one of the Excel spreadsheets is Exhibit 28. The sheer size of FHR’s document production was unexpected and arresting; BP Amoco never suspected that FHR would be

producing this volume of documents or documents that were not recently created.

20. According to data on the DVDs, the 249 video segments produced last week were all created by FHR between March 28, 2008 and October 10, 2008. (Ex. 27) Collectively, these 249 video segments total over two hours (123 minutes) of video footage. (*Id.*) Three of the 249 video segments (dated March 28, March 28 and April 23, 2008, and totaling 1 minute and 40 seconds) were previously produced by FHR on May 16, 2008. Copies of the DVDs are provided to the Court as Exhibit 29, and selected still photos made by BP Amoco from the videos are attached as Exhibit 30.

21. According to the metadata on the electronic documents produced last week by FHR, 8% were created in 2009 and 92% were created in 2008 or earlier. The metadata reflects that 4,260 (36%) are emails or email strings. (Ex. 27) Of the 3,554 hard-copy documents, approximately 2,723 include date information, approximately 2,622 (96%) of which were created in 2008 or earlier. Further breakdowns of the dates of the documents are attached to Exhibit 27 at Tabs A and B. The monthly financial reports produced on May 13, 2009 start with a report for August 2008 and end with February 2009. (The August 2008 report is attached as Exhibit 31.) Collectively, the 11,761 electronic documents, 3,554 hard-copy documents, and 7 financial reports total 48,875 pages and fill approximately 18 boxes. (Ex. 27)

ARGUMENT

FHR's untimely document production, relating to its revised Claim Chart and other issues, has severely prejudiced BP Amoco, as summarized below.

I. THE TIMING AND SHEER MAGNITUDE OF FHR'S SUPPLEMENTAL DOCUMENT PRODUCTION HAVE PREJUDICED BP AMOCO.

In November and December 2005—over forty months ago—BP Amoco served written discovery seeking, among other things, the basic and standard information about FHR's alleged damages. (Exs. 1-2) In response, and after meeting and conferring, FHR entered into a signed letter agreement and agreed to “conduct a reasonable search for and produce all non-privileged documents relating to its damages calculations *as they become available to FHR.*” (Ex. 5; emphasis added) FHR further agreed to “seasonably supplement” its response to BP Amoco's damages interrogatories. (*Id.*) Even if FHR had not agreed to this, Rule 26(e) imposes an affirmative obligation upon FHR to supplement its discovery responses in a timely manner.

FHR has not produced documents “as they become available to FHR” or otherwise in accord with its supplementation obligations, as confirmed by the following facts:

- The 240+ previously unproduced video segments produced last week by FHR were created between July 27, 2008 and October 10, 2008.
- Of the 11,761 electronic documents produced last week by FHR, 10,816 (92%) were created on or before December 31, 2008. Approximately 3,524 (30%) were created in the first six months of 2008. (Ex. 27)
- Of the 2,723 hard-copy documents that are dated, approximately 2,622 (96%) are dated on or before December 31, 2008. Approximately 836 (31%) are dated in the first six months of 2008. (Ex. 27)
- The earliest of the seven monthly financial reports produced last week is dated August 2008. (Ex. 31)

There is no reason why FHR could not have produced these documents sooner, on a rolling basis as created. This is confirmed by FHR's ability, as of May 13, 2009, to produce electronic documents created as late as April 2009 and financial reports current as of February 2009.¹

Nor are these insignificant documents. They were produced from the files of 17 different witnesses who were deposed during fact discovery, including some of the most important witnesses in the case, such as Tim Nicol (FHR's Plant Manager); Rick Morris (FHR's 30(b)(6) witness on damages issues); Jim Neumann (FHR's Facilities Manager at the Joliet Plant); and Tom Stephan (FHR's Optimization Engineer and 30(b)(6) witness on certain production capacity issues). Moreover, as FHR has acknowledged, various of these thousands of documents allegedly support and explain the recently revised damages claims. (Ex. 25)

Over the past few days, BP Amoco has had only an opportunity to conduct an initial review of selected documents from FHR's supplemental production. Nevertheless, this initial review has revealed the following examples of important documents found in this production:

- In Claim 70, FHR alleges that the aeration basin tanks, including EF-104A, were not properly inspected and maintained by BP Amoco. As of March 2008, FHR had not yet repaired the EF-104A tank, but had taken it out of service. However, an April 2008 inspection report for the EF-104A tank included in FHR's recent production found that the "overall condition of the [EF104-A] tank is good." (Ex. 35)
- In Claims 3 and 57, FHR alleges that damage to the fire water system piping was a result of BP Amoco's failure to install a firewater jockey pump. But a December 2008 document found in FHR's recent production suggests that FHR cancelled an AFE related to the firewater jockey pump and replaced that project with an entirely

¹ Indeed, as noted above, FHR previously produced three of these video segments (dated in March and April 2008) on May 16, 2008, confirming that FHR understood the relevance of these types of videos and had the ability to produce them in a relatively short time period after their creation.

new and different fire water supply debottlenecking project. (Ex. 36)

- In Claim 77, FHR seeks an additional \$3.6 million to repair the CB-704 Boiler. However, a budgetary quote dated January 27, 2009, found in FHR's recent production, stated that the estimated costs for repairing the CB-704 would be about \$2.5 million, over \$1 million less than what FHR is claiming. (Ex. 37)

Additional examples of newly produced and important documents are attached as Exhibit 32. Again, these are only selected examples based on an initial review of a very limited number of the documents. BP Amoco also has begun to review the video segments produced last week. Those videos appear on first viewing to be relevant to FHR's claims: according to a chart provided by FHR, the videos relate to Claims 8, 16/70, 66, 72, and 78. (Ex. 33)

The timing and volume of these newly produced documents makes them of little or no use to BP Amoco and its experts. Fact discovery has been completed, expert reports have been filed, expert depositions have been taken, and summary judgment motions have been filed and largely decided. Trial exhibits and other requirements of the Pretrial Order are due in six weeks. FHR's supplemental production consists of 11,761 electronic documents (including 4,260 emails and email strings) and 3,554 hard-copy documents, totaling approximately 15,261 multi-page documents. Reviewing these documents and deciding how to use them will take a significant amount of time. Assuming a lawyer could review one document every three minutes, just the initial review of these new documents would take approximately 763 hours, or 76 full ten-hour days. And that does not consider the time necessary to review certain documents further, discuss certain documents with experts, add documents to the trial exhibit list, etc. At this stage of the litigation, there is simply no time for this type of review, even if there were nothing else to do. In addition, BP Amoco's experts have had no opportunity to examine the documents, much less the video clips. It is difficult to understand why these videos were not produced earlier.

In short, some of FHR's late-produced documents relate to the Claim Chart which was revised in February, leading one to wonder how the Claim Chart could have been revised but the documents not made available to BP Amoco at the same time. But setting aside the Claim Chart, there are many other relevant documents that should have been produced last year, when the documents could have been used during fact discovery, with experts, and in motion practice.

II. FHR'S REVISED CLAIM CHART HAS PREJUDICED BP AMOCO. THIS HAS BEEN CONFIRMED BY FHR'S LATE DOCUMENT PRODUCTION LAST WEEK, AND THE SHEER VOLUME OF THE DOCUMENTS PRODUCED.

In its responses to BP Amoco's initial interrogatories and the parties' subsequent

discussions, FHR agreed to provide a “single comprehensive claim chart” describing its claimed damages with particularity and describing how such damages were calculated. (Ex. 5) FHR further agreed to “seasonably supplement” this response to BP Amoco’s damages interrogatories, as required by Rule 26(e). Before serving its revised Claim Chart on February 13, 2009, FHR last supplemented its interrogatory response on June 9, 2008. The June 9, 2008 Claim Chart, and the 212,000 documents FHR produced at the same time, led to an extension of the time period for BP Amoco to complete discovery on FHR’s damages claims. (Dkt. No. 201)

The timing of FHR’s supplemental response raises significant issues and causes significant problems. FHR served its revised Claim Chart on February 13, 2009, many months: (i) after the close of fact discovery, (ii) after FHR served its prior Claim Chart in June 2008, (iii) after BP Amoco took a Rule 30(b)(6) deposition of FHR on damages issues, (iv) after the parties served expert reports on damages issues, (v) after expert depositions on damages issues, and (vi) after BP Amoco filed summary judgment motions.² The revised Claim Chart did not simply drop claims; it changed the alleged damages for 31 of the remaining claims. And FHR did so, apparently, based upon documents it produced only last week.

FHR’s newly revised Claim Chart purports to change FHR’s alleged damages in significant respects for many of FHR’s remaining claims. For example:

- **Claim 8:** In its June 2008 Claim Chart, FHR alleged repair costs to date of \$558,893 and future estimated costs of \$800,000, for a total of \$1.35 million. In its revised Claim Chart, FHR alleges repair costs to date of \$1,910,998, but continues to allege the same future estimated costs of \$800,000, for a revised total of \$2.71 million.
- **Claim 15:** FHR’s repair costs to date have increased by approximately \$58,000, while FHR’s future estimated costs have decreased from \$3,000,000 to \$300,000.
- **Claim 77:** FHR has increased its repair costs to date from \$768,203 to \$969,978, while decreasing its estimated future repair costs from \$10,000,000 to \$3,605,948.

FHR’s revised Claim Chart reflects similar types of revisions for many of the other claims for which FHR is attempting to change its damages claims. (*See* Exhibit 34, reflecting changes to damages for 31 of FHR’s remaining claims.) Presumably, the newly produced documents substantiate or relate to these revisions.

² FHR was well aware of the importance of timely supplementations to its Claim Chart, having revised its Chart three times as of June 9, 2008. In addition, on several occasions after June 9, 2008, FHR produced revised Excel spreadsheets and other documents purporting to increase its alleged repair costs.

After receiving and analyzing FHR's revised Claim Chart, and evaluating that chart against documents previously produced, BP Amoco sent FHR a letter noting its concerns and the unanswered questions raised by the revised damages claims, such as:

- What is the factual basis and evidentiary support for FHR's revised estimates of future repair costs?
- Did FHR receive or otherwise consider alternative estimates for the cost of future repair work or equipment replacement? If so, why, how and by whom was the estimate provided on the revised Claim Chart selected?
- How and why did certain of FHR's repair costs to date decrease since last June?
- Why have certain future estimated expenses decreased significantly in certain instances, with no corresponding decrease in repair costs to date?
- Why have certain future estimated repair costs been eliminated altogether?
- What anticipated work is included in the revised estimated future repair costs? Why has that work not yet been completed? When is it expected to be completed? Who will be performing the work, and under whose supervision?
- For those claims where FHR has decreased but not eliminated its alleged future repair costs, what specific work is FHR now conceding is not needed? Why is that work no longer necessary?
- For claims where FHR is no longer seeking future repair costs, does FHR believe that the current condition of the equipment satisfies the relevant PSA representation even under FHR's interpretation of the representation?

As these questions illustrate, FHR's revised claims, when combined with the late-produced documents, have a significant impact on how these claims will be supported and defended at trial, even for those claims where FHR has reduced its alleged damages and even though FHR's total alleged cost-of-repair damages have decreased overall.

To date, FHR has refused to answer BP Amoco's questions or otherwise explain its revised damages claims. FHR has refused, for example, to supplement its written interrogatory responses to provide this information, or to produce a 30(b)(6) witness to testify about its revised claims. (Exs. 21-25)³ During meet and confer discussions before filing this motion, BP Amoco asked FHR to identify which specific documents it relied on to prepare its new damages claims in February. FHR stated that it would attempt to do so, but has not yet provided this information.

³ In this correspondence, BP Amoco addressed FHR's contentions that: (i) BP Amoco is asking FHR to respond to a "new interrogatory" after the close of fact discovery; and (ii) the 30(b)(6) deposition that BP Amoco took on damages issues in September 2008 is sufficient to answer BP Amoco's questions.

And even when it does so, it will be too late to be of any use in discovery, expert analysis, *Daubert* motions, etc.

III. A VARIETY OF REMEDIES WOULD BE APPROPRIATE IN LIGHT OF FHR'S UNTIMELY SUPPLEMENTAL DOCUMENT PRODUCTION, REVISED CLAIMS, AND REFUSAL TO PROVIDE FURTHER SUPPLEMENTATION.

FRCP 26(a)(1)(A)(iii) requires a party's initial disclosures to contain "a computation of each category of damage claimed by the disclosing party – who must also make available ... the documents or other evidentiary material ... on which each computation is based." Rule 26(e)(1), in turn, requires a party to supplement its disclosures when the party learns that its response is incomplete. Under Rules 37(b) and (c), if "a party fails to provide information or identify a witness as required by Rule 26(a) or (e)," a court may impose sanctions including "prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence."

Here, FHR not only failed to timely supplement its interrogatory responses, it represented to the Court in July 2008 that its production was "finished," when in fact it was not, as confirmed by its recent production of materials pre-dating July 16, 2008. Moreover, this is not the first time FHR has produced significant volumes of documents after the close of fact discovery. Courts regularly dismiss cases for such conduct, and such an order would be more than warranted here. *E.g., Ladien v. Astrachan*, 128 F.3d 1051, 1057 (7th Cir. 1997) (affirming dismissal where plaintiff abused discovery process by failing to timely produce documents and inaccurately verifying that his document production was complete); *Aura Lamp & Lighting Inc. v. Int'l Trading Corp.*, 325 F.3d 903, 909-10 (7th Cir. 2003) (affirming dismissal where plaintiff abused discovery process through noncompliance with discovery deadlines); *Jensen v. City of Wilmington*, 71 Fed. Appx. 576, at 578-79 (7th Cir. 2003) (same); *Patterson v. Coca-Cola Bottling Co.*, 852 F.2d 280, 283 (7th Cir. 1988) ("Judges must be able to enforce deadlines. Doing so means the use of sanctions, even severe ones such as default, when parties ignore the ongoing proceedings and demand the right to set their own deadlines.")⁴

⁴ See also *Margoles v. Johns*, 587 F.2d 885, 889 (7th Cir. 1978) (affirming dismissal as Rule 37(b)(2)(C) sanction for failure to timely produce documents); *Charter House Ins. Brokers, Ltd. v. New Hampshire Ins. Co.*, 667 F.2d 600, 603 (7th Cir. 1981) (affirming district court's dismissal where "plaintiff has deliberately withheld documents which are unarguably discovery-relevant to this action"); *Hindmon v. National-Ben Franklin Life Ins. Corp.*, 677 F.2d 617, 621 (7th Cir. 1982) (affirming dismissal (Continued...))

Although entry of a default judgment against FHR and in favor of BP Amoco would be appropriate here, another appropriate remedy would be to bar FHR from making any damages claims or defenses and from introducing any evidence on damages and damages causation. Such a remedy would ensure that BP Amoco is not prejudiced in this case, prevent FHR from taking unfair and improper advantage of the discovery process, and deter other parties from engaging in this conduct. *E.g.*, *Salgado v. General Motors Corp.*, 150 F.3d 735, 741-42 (7th Cir. 1998) (precluding all of plaintiff's expert witnesses from testifying as a sanction for failure to comply with discovery schedule); *see also Happel v. Wal-Mart Stores, Inc.*, 2007 WL 495277, at *5 (N.D. Ill. Feb. 9, 2007) (granting motion to bar records and opinions where plaintiffs failed to disclose medical treatments before close of discovery, despite defendant's repeated requests).⁵

The Court may also preclude FHR from seeking any increased alleged damages not properly disclosed during discovery. As courts repeatedly have recognized, increasing a damages claim after the close of discovery is "palpably unfair and prejudicial" to the party against whom the claim is asserted. *See Lancelot Investors Fund, L.P. v. TSM Holdings, Ltd.*, 2008 WL 1883435, at *6 (N.D. Ill. Apr. 28, 2008) (finding a violation of Rules 26 and 37(c) and granting plaintiff's motion to exclude "tardy [damages] calculations and purportedly supporting evidence"). Indeed, in *Barsky v. Metro Kitchen & Bath, Inc.*, 587 F. Supp. 2d 976 (N.D. Ill. 2008) (St. Eve, J.), this Court denied the plaintiffs' post-trial motion for leave to file an amended complaint, in part because the plaintiffs claimed to possess documents detailing alleged damages which they had never produced, despite Rule 26(a)'s disclosure requirement and defendants' discovery requests. *See* 587 F. Supp. 2d at 996 ("The sanction for withholding such information is exclusion" and noting that "the sanction of exclusion is automatic and mandatory unless the

as sanction for discovery abuse where, among other things, "as a result of Hindmon's untimely document production, National-Ben was unable to examine the plaintiff with respect to the documents he produced on November 26th") (internal quotations omitted).

⁵ *See also United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1370 (9th Cir. 1980) (affirming the district court's decision to preclude the United States from introducing any evidence on the issue of damages where the government failed to comply with court-ordered discovery after a lengthy delay); *Spina v. Forest Preserve of Cook County*, 2001 WL 1491524, at *4-5 (N.D. Ill. Nov. 23, 2001) ("Defendants are barred from introducing any witnesses or documents not properly disclosed prior to the close of discovery."); *Texas Instruments Inc. v. Powerchip Semiconductor Corp.*, 2007 WL 1541010, at *11 (S.D.N.Y. May 24, 2007) (declaring that if defendant failed to produce documents by new deadline, court would deem established certain facts detrimental to defendant's case).

sanctioned party can show that its violation of Rule 26(a) was either justified or harmless”) (citing *David v. Caterillar, Inc.*, 324 F.3d 851, 857 (7th Cir. 2003)).⁶

Finally, the prejudice and unfairness to BP Amoco, as well as to the Court for that matter, is not limited to the damages claims and related Claim Chart revisions. FHR’s conduct goes far beyond that. FHR has produced documents, including videos of the Plant’s equipment, long after the close of fact and expert discovery. This material should have been made available during the taking of fact depositions last year; it should have been available for consideration by BP Amoco’s experts; it should have been available for purposes of summary judgment; it should have been available for use in cross-examining FHR’s experts during deposition; and it should have been available for consideration on the various *Daubert* motions. It is simply too late to unwind the clock and start discovery over. The only question now is the appropriate relief under the circumstances, particularly given FHR’s pattern of untimely discovery responses.

IV. FHR’S SUGGESTED REASONS FOR THE TIMING OF ITS DOCUMENT PRODUCTION CONFIRM THE NEED FOR RELIEF AND THAT FHR FAILED TO COMPLY WITH THE DISCOVERY RULES.

During meet-and-confer discussions leading up to this motion, FHR suggested that BP Amoco has no basis to complain because it was BP Amoco who asked FHR in March of this year to supplement its document discovery, which FHR then did. FHR misses the point. *First*, under the Federal Rules, FHR had (and has) an affirmative obligation to supplement. BP Amoco had no obligation to ask; instead, it was FHR’s affirmative obligation to disclose and produce without being asked. *Second*, in addition to the Federal Rules, FHR in a written letter agreement promised BP Amoco that it would seasonably supplement its interrogatory responses, which it then failed to do. (Ex. 5) *Third*, FHR represented to Judge Moran last July that it was finished with its document production—a representation that has turned out not to be the case. (Ex. 14) *Fourth*, the only reason BP Amoco even thought to ask FHR to supplement its production was that BP Amoco could not understand the bases for various of the revisions to FHR’s Claim Chart

⁶ See also *Advanced Cleanroom Technologies v. Newhouse*, 2002 WL 206960, at *5 (N.D. Ill. Feb. 11, 2002) (noting that where party had opportunity during discovery phase to make necessary disclosures regarding damages, new related damages disclosed following close of discovery were excluded); *W.A. Taylor & Co. v. Griswold and Bateman Warehouse Co.*, 742 F. Supp. 1398, 1412 (N.D. Ill. 1990) (refusing to permit a party to increase its damages claim following the close of discovery, holding that “the presentation of new and surprising claims at advanced stages of the litigation process (an outcome that the discovery rules were designed to forestall) could not be countenanced by this Court.”).

when measured against the documents FHR previously had produced. *Last*, FHR has told BP Amoco that various of the newly produced documents relate to or explain the revisions in its Claims Chart. That means that FHR necessarily had identified and used these documents to prepare its revised Claims Chart, which it served on February 13, 2009. Yet, FHR did not produce those documents until three months later.

FHR also has suggested that BP Amoco has no basis to complain, because FHR lowered its overall damages claims by over \$60 million in its revised Claims Chart. It is true that the total claims have been reduced. But BP Amoco's complaint is not about the overall reduction; it is instead about (i) the fact that for various claims, FHR's alleged damages incurred to date have increased, but FHR's estimated alleged future damages have stayed the same or not decreased by a corresponding amount; (ii) the fact that for certain claims, even though FHR has reduced its alleged damages, BP Amoco does not know the basis for the reductions and what the bases are for the revised, albeit reduced damages amounts; and (iii) there are 48,000+ pages of documents and 4 DVDs of 249 video segments that relate not only to damages, but also to liability issues that should have been the subject of discovery and expert work, but were not.

CONCLUSION

BP Amoco requests a status with the Court to discuss the appropriate relief necessary to address the unfairness and prejudice to BP Amoco caused by FHR's discovery conduct. Put simply, FHR should not be permitted to increase its alleged damages, produce 249 video segments, produce financial reports dating back to August 2008, and produce over 15,000 documents—over 48,000 pages of materials—well after the close of discovery and six weeks before the due date for trial exhibits. Such conduct is prejudicial, fundamentally unfair, and contrary to the spirit and letter of the Federal Rules of Civil Procedure.

Date: May 21, 2009

Respectfully submitted,

/s/ Scott W. Fowkes

One of the attorneys for BP Amoco and
BPCNA

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2009, I caused a true and correct copy of the foregoing to be served electronically via the CM/ECF system on the following:

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