

Motion Ex. 3

**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.)	
<hr style="border: 0.5px solid black;"/>		
FLINT HILLS RESOURCES LLC,)	
)	
Third-Party Plaintiff,)	
)	
v.)	
)	
BP CORPORATION NORTH AMERICA INC.,)	
)	
Defendant.)	
<hr style="border: 0.5px solid black;"/>		

**BP AMOCO CHEMICAL COMPANY’S MOTION FOR JUDGMENT AS A MATTER
OF LAW UNDER FRCP 50(a) AS TO ALL OR PORTIONS OF FLINT HILLS
RESOURCES LLC’S REPAIR COST DAMAGES FOR CERTAIN CLAIMS**

1. The evidence introduced in Flint Hills’ case-in-chief, on direct and cross-examination, establishes that certain components of its repair cost damages for certain claims are unrecoverable because they are barred by the PSA and/or because Flint Hills has introduced no evidence of the estimated costs. Therefore, for the reasons set forth in this motion and in the accompanying memorandum in support, BP Amoco moves for judgment as a matter of law pursuant to Rule 50(a) of the Federal Rules of Civil Procedure as to all or a portion of Flint Hills’ repair cost damages for certain of Flint Hills’ claims.

2. Pursuant to Federal Rule of Civil Procedure 50(a), if “reasonable persons could not find that the evidence justifies a decision for a party on an essential element of its claim, the court should grant judgment as a matter of law.” *Waubanascum v. Shawano County*, 416 F.3d 658, 664 (7th Cir. 2005); *Deimer v. Cincinnati Sub-Zero Prods., Inc.*, 58 F.3d 341, 343 (7th Cir. 1995). “[T]o avoid a directed verdict or a JNOV, a plaintiff must do more than merely

argue that the jury might have chosen to disbelieve all of the defendant's evidence. A plaintiff must offer substantial evidence to support the argument." *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1181 (7th Cir. 2002) (ellipsis and internal quotation marks removed); *see also Perfetti v. First Nat'l Bank*, 950 F.2d 449, 456 (7th Cir. 1991).

3. Damages are an essential element of both a breach of contract and a fraud claim. *See, e.g.*, Dkt. No. 437 at 5 ("Since proof of damages is an essential element of both breach of contract and fraud claims, 'a non-movant's failure to produce sufficient evidence of the damages element of its claim calls for the entry of summary judgment against that party.'") (quoting *Dunkin' Donuts Inc. v. N.A.S.T., Inc.*, 428 F. Supp. 2d 761, 767 (N.D. Ill. 2005)). The evidence here shows that, under the plain terms of the PSA, Flint Hills cannot recover the costs that are the subject of this motion.

A. PSA § 13.6 Prohibits Recovery Of Loss Of Use, Special, Indirect, Incidental Or Consequential Damages—Damages Which Flint Hills Seeks For Certain Of Its Claims.

4. Paragraph 3 of section 13.6 of the PSA prohibits the recovery of certain types of damages, stating relevant part:

SELLER WILL NOT BE LIABLE TO BUYER FOR ANY LOSS OF PROFIT, ***LOSS OF USE, SPECIAL, INDIRECT, INCIDENTAL, OR CONSEQUENTIAL DAMAGES*** SUFFERED BY BUYER, HOWSOEVER ARISING UNDER THIS AGREEMENT, WHETHER BASED ON BREACH OF WARRANTY, BREACH OF AGREEMENT, STATUTE, STRICT LIABILITY ***OR OTHERWISE***, INCLUDING WITHOUT LIMITATION NEGLIGENCE OF SELLER.

(Trial Ex. 1.001 at 121 § 13.6 ¶ 3 (capitalization in original; bold-face italics added))

5. "Consequential damages mean loss or injury that does not flow directly and immediately from the wrongful act of a party but are the consequences or results of such an act." *Hartford Accident & Indem. Co. v. Case Found. Co.*, 10 Ill. App. 3d 115, 124, 294 N.E.2d 7, 14 (1st Dist. 1973); *cf. DP Serv., Inc. v. AM Int'l*, 508 F. Supp. 162, 167 (N.D. Ill. 1981) ("Consequential damages are such as are not produced without the concurrence of some other event attributable to some origin or cause; such damage, loss, or injury as does not flow directly and immediately from the act of the party, but only from the consequence or results of such act.") (quoting 25 C.J.S. Damages § 2); *cf. 2A Ill. Prac. § 5/2-715(2)(b)* ("Consequential damages resulting from seller's breach include ... injury to ... property proximately resulting from any breach of warranty."); 25 C.J.S. Damages § 3 (2009) ("Consequential damages' are

such as are not produced without the concurrence of some other event attributable to the same origin or cause. They are such damages as do not flow directly and immediately from the act of the party, but only from the consequences or results of such act. The term may include damage which is so remote as not to be actionable. ‘Consequential damages’ are defined as synonymous with the term ‘special damages.’”) (footnotes omitted).

6. Under analogous provisions of the Uniform Commercial Code, “[i]ncidental damages resulting from the seller’s breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected ... and any other reasonable expense incident to the delay or other breach.” 2A Ill. Prac. § 5/2-715(1) (2009); accord *S.M. Wilson & Co. v. Reeves Red-E-Mix Concrete, Inc.*, 39 Ill. App. 3d 353, 358, 350 N.E.2d 321, 325 (Ill. App. Ct. 1976) (“Plaintiff chose to conduct tests approved in the industry to determine if the slab could be used. We believe the cost of these tests to be a ... incidental expense....”).

7. Thus, courts have held that rental costs to replace a lost or damaged piece of equipment are incidental or consequential damages. See, e.g., *Cole Energy Dev. Co. v. Ingersoll-Rand Co.*, 913 F.2d 1194, 1202 (7th Cir. 1990). (“Cole’s *incidental damages* would be based on that portion of its expenses it would not have spent had it known that the equipment would not produce at full capacity, such as additional payroll, *rental costs*, debt service costs, etc.” (emphasis added)); *Albany Ins. Co. v. Bengal Marine, Inc.*, 857 F.2d 250, 253 (5th Cir. 1988) (disallowing costs “for the rental of replacement barge” where “the measure of damages does not include loss of use or other consequential damages”). Testing costs also have been held to be consequential, special, or incidental damages. See, e.g., *Marquette Cement Mfg. Co. v. Louisville & Nashville R.R. Co.*, 406 F.2d 731, 732 (6th Cir. 1969) (affirming trial court ruling that “an amount paid to a laboratory for testing the cement” was “special damages for which the railroad could not be made to respond”); *Keller v. Inland Metals All Weather Conditioning, Inc.*, 76 P.3d 977, 984 (Idaho 2003) (describing sums “spent to have additional testing of the water and air done” as “incidental damages”); *Fairway Builders, Inc. v. Malouf Towers Rental Co.*, 603 P.2d 513, 527 (Ariz. Ct. App. 1979) (categorizing testing expenses as “consequential damages”).

8. In this case, many of Flint Hills’ condition-of-asset claims include rental costs and other consequential and/or incidental damages that the PSA bars Flint Hills from recovering.

9. For example, in connection with its Claim 17 for the condition of the number 4 well, Flint Hills seeks hundreds of thousands of dollars for rental costs associated with renting a temporary water supply from a nearby quarry. (Ex. 1, Trial Ex. 3120; Ex. 2, Trial Tr. (Neumann) 4595:15-4596:18) However, these costs are consequential and/or incidental damages that PSA § 13.6 bars Flint Hills from recovering.

B. PSA § 13.5(b) Bars Recovery Of Costs That Can Be Mitigated Through Reasonable Commercial Efforts.

10. Section 13.5(b) of the PSA, in relevant part, requires Flint Hills to mitigate its losses:

Each party will take all reasonable steps and use commercially reasonable efforts to mitigate any and all Losses.

(Trial Ex. 1.001 at 119 § 13.5(b))

11. Thus, losses that can be avoided by using commercially reasonable efforts to mitigate are not recoverable by Flint Hills.

12. For example, in connection with its Claim 18 for the condition of the MAN Unit Wastewater Sump, Flint Hills now seeks to recover *either* the higher cost of a replacement sump *or* the lower cost to repair the existing sump. (Ex. 3, Trial Ex. 3121; Ex. 4, Trial Tr. (Morris) 4030:21-25, 4032:09-12)

13. However, PSA § 13.5(b) prohibits the recovery of these higher replacement costs when lower repair costs admittedly will suffice.

C. PSA § 13.4(q) Bars The Recovery Of Charges For Flint Hills' Affiliate's Time.

14. Section 13.4(q) of the PSA prohibits recovery for any time expended by Flint Hills or its affiliates:

Time expended by personnel of Buyer or Seller *or their respective Affiliates* in connection with a Direct Claim or Third Party Claim will not be considered Losses hereunder.

(Trial Ex. 1.001 at 114 § 13.4(q) (emphasis added))

15. However, Flint Hills' Claim 21 includes costs for Koch Modular Process Systems ("KMPS"). (Ex. 5, Trial Ex. 2406 (listing \$861,425 in charges relating to KMPS); Ex. 6, Trial Tr. (Daugherty) 4919:9 - 4921:3.)

16. Further, because Flint Hills' witnesses could not say how much of these KMPS charges were attributable to fees for KPMS personnel time and how much were for materials

(Ex. 6, Trial Tr. (Daugherty) 4921:1-3), the entirety of the KMPS costs should be excluded. *See, e.g., First Nat'l Bank of Elgin v. DuSold*, 180 Ill. App. 3d 714, 720, 536 N.E.2d 100, 104 (Ill. App. Ct. 1989) (“Since the bill does not itemize what cost was incurred for what work, there is no way to tell what amount was incurred for work that was done because there had been a breach of warranty. Thus, the trial court had no basis before it for awarding the damages for repairs in the amount of \$839.”).

D. Flint Hills Has Introduced No Evidence Of Estimated Repair Costs To Address Alleged MAN Process Air Capacity Constraints.

17. One of the constraints for which Flint Hills is suing is an alleged process air constraint with the MAN unit. (Ex. 7, Trial Tr. (Ogle) 1644:2-4)

18. While prior to trial Flint Hills asserted that it could remedy this constraint by renting an air compressor, Flint Hills has not introduced any evidence at trial of what it will cost to address this constraint in the future—either by means of a rental air compressor or otherwise.

19. Moreover, such rental costs—even if Flint Hills had introduced competent evidence of them—again would be consequential damages that PSA § 13.6 ¶ 3 bars Flint Hills from recovering.

E. Other Damages Are Unrecoverable

20. Additional components of Flint Hills’ repair cost damages also are unrecoverable for one or more of the foregoing reasons and/or for other similar and related reasons, which will be fully and comprehensively set forth in the memorandum to be filed in support of this motion.

* * *

WHEREFORE, BP Amoco respectfully requests the Court grant BP Amoco judgment as a matter of law on the repair cost damages components of certain of Flint Hills’ claims, which will be more fully described memorandum to be filed in support of this motion.

Dated: October 19, 2009

Respectfully submitted,

By: /s/ Richard C. Godfrey
Richard C. Godfrey, P.C. (ARDC #3124358)
Scott W. Fowkes, P.C.(ARDC #6199265)
Drew G.A. Peel (ARDC #6209713)
KIRKLAND & ELLIS LLP
300 North LaSalle Street
Chicago, IL 60654
(312) 862-2000

*Attorneys for BP Amoco Chemical Company
and BP Corporation North America*

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2009, I caused a true and correct copy of the foregoing to be served electronically via the CM/ECF system on the following:

James Figliulo, Esq.
Ryan P. Stiles, Esq.
FIGLIULO & SILVERMAN, P.C.
10 South LaSalle Street, Suite 3600
Chicago, IL 60603

Susan M. Franzetti, Esq.
FRANZETTI LAW FIRM, P.C.
10 South LaSalle Street, Suite 3600
Chicago, IL 60603

/s/ Richard C. Godfrey