

Motion Ex. 30

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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**BP AMOCO CHEMICAL COMPANY AND BP CORPORATION NORTH AMERICA
INC.'S RENEWED MOTION SEEKING ADDITIONAL RELIEF IN LIGHT OF FHR'S
UNTIMELY DISCLOSED DOCUMENT PRODUCTION AND CLAIMS**

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Discovery closed in this case long ago. Yet, in February 2009, well after the close of discovery, FHR amended its interrogatory answers by submitting a new Claim Chart which significantly modified the damages it seeks in this case. Then, in May 2009, FHR produced over 48,000 pages of new documents, many of which were created well before the close of fact and expert discovery -- documents which supposedly support the new damages figures contained in FHR's "revised" February 2009 Claim Chart. In response to this late document production and Claim Chart, BP Amoco filed a motion on May 21, 2009 seeking relief. (Dkt. # 547)

The Court granted the motion, in part, by ordering FHR to make available a Rule 30(b)(6) witness for deposition. After further disagreement, (Dkt. # 571), FHR produced a Rule 30(b)(6) witness last week (on June 25, 2009) to testify about its newly produced documents and how those documents relate to FHR's revised and new damages claims. The deposition confirms what BP Amoco said in its May 21 Motion about FHR's discovery conduct: specifically, FHR's failure to timely produce documents upon which it is relying, and its revised February 2009 Claim Chart, have severely prejudiced BP Amoco.

The prejudice is in three parts. **First, experts:** FHR's newly produced documents and revised damages Claim Chart are different than the materials reviewed by BP Amoco's experts and upon which their expert reports were based. BP Amoco's experts have never been given the opportunity to analyze this new information, and to modify their opinions and reports accordingly. Nor has BP Amoco been given the opportunity to use this new evidence in cross-examining FHR's experts and their opinions about FHR's claims, including its damages. Moreover, it is now clear that FHR will use this new information in an attempt to criticize or render irrelevant much of the work done by BP Amoco and its experts during the fact and expert discovery phases of this case.

Second, changing claim facts: FHR's newly produced documents and revised damages Claim Chart mean that certain of the fact discovery done for many individual claims is now irrelevant or of little significance. During discovery, BP Amoco took the fact depositions of many persons identified by FHR as having knowledge about the damages claims. Documents were used, facts were tied down, and positions were ascertained. But again, it is now clear that FHR will use this new information in an attempt to criticize or render irrelevant much of the fact development and work done by BP Amoco in preparing to rebut various of the claims FHR is asserting.

Third, unknown factual basis for claims: FHR's revised damages Claim Chart now contains damages figures for which BP Amoco has little information or understanding. If the Claim Chart had been revised during fact discovery, and the documents produced earlier, various FHR fact witnesses could have been questioned about the revisions and the basis for them. But, as confirmed by the Rule 30(b)(6) deposition last week, the basis for various claims is unknown, or fundamentally different than what BP Amoco learned during fact and expert discovery.

During the hearing of May 27, 2009, the Court observed that BP Amoco has been prejudiced. (Ex. 1, 05/27/09 Hr'g. at 7) The question, of course, is to what degree. The Rule 30(b)(6) deposition, combined with the sheer magnitude and importance of the late produced documents, and revised Claim Chart, confirm that the prejudice here is substantial and cannot be cured. In fact, over 100 of the newly produced documents are on FHR's Trial Exhibit list. Accordingly, BP Amoco seeks an order barring and striking each of FHR's claims that (i) are the subject of its untimely document production and (ii) seek revised damages amounts reflected on its untimely February 2009 Claim Chart. In addition, BP Amoco seeks to bar and preclude any and all testimony, exhibits, and damages supported by or related to untimely produced documents, including those in FHR's May 2009 production, and its February 13, 2009 Claim Chart.¹

FACTUAL BACKGROUND

Since this litigation began in September 2005, the parties have engaged in extensive discovery including discovery focused upon FHR's alleged damages and damages causation. The parties had approximately three years to complete that discovery before expert reports were prepared and served.² On October 6, 2008, after spending substantial time reviewing FHR's document productions and forming opinions based on those documents and FHR's damages claims, BP Amoco's experts submitted their initial reports. BP Amoco's liability and damages experts issued reports analyzing the damages for each of FHR's claims, including its actual and estimated alleged damages. FHR's experts also submitted their reports, purportedly in support of

¹ BP Amoco files this Motion pursuant to the Court's acknowledgement that it was "not foreclosing the option" after BP Amoco reviewed the documents for it to seek additional relief. (Ex. 2, 06/04/09 Hr'g. at 15) On June 29 and July 1, pursuant to Local Rule 37.2, BP Amoco met and conferred with FHR regarding its positions and informed FHR that it intends to seek further relief from the Court. After consultation by telephone, the parties have been unable to reach an accord despite good faith attempts to resolve their differences over this issue.

² The history of FHR's untimely document production is discussed in detail in Dkt. ## 547, 548.

the damages claims as then disclosed. For the next several months, BP Amoco and FHR each presented their liability and damages experts for deposition regarding their disclosed opinions, which included opinions about whether the equipment at issue in FHR's claims required repairs or replacement and whether the claimed damage amounts as stated in FHR's June 9, 2008 Claim Chart were reasonable and/or included betterments.³

Expert discovery concluded. But at the end of that discovery, FHR produced its February 13, 2009 Claim Chart, which was radically different than the previous version. (*Compare* Ex. 3, 02/13/09 Claim Chart, *with* Ex. 4, 06/09/08 Claim Chart) Various claims were dropped -- while BP Amoco is not complaining about the dropped claims, FHR's latest Claim Chart confirms that such claims never should have been brought -- and many of the remaining claims were changed significantly. For some of the remaining claims, the damages sought were increased; for others, the damages sought were reduced; and still for others, the breakdown between alleged incurred and future estimated damages changed significantly.

The explanations for the revised damages claims, set forth in the February 13, 2009 Claim Chart, were presumably to be reflected in the nearly 49,000 pages of documents first produced in May 2009. Indeed, FHR represented to the Court that its May 2009 document production was "to some extent backup ... for the [February 13, 2009] damages chart...." (Ex. 1, 5/27/09 Hrg. Trans. at 5). But upon review of the documents, BP Amoco could make little sense of how the new damages documents explained the newly revised damages claims.

As the Court knows, BP Amoco believes that FHR's discovery conduct has not only violated the Rules, but has prejudiced BP Amoco. Now that BP Amoco has had the opportunity to review the documents and take the Rule 30(b)(6) deposition of FHR, the prejudice, and the unique nature and extent of FHR's conduct, has been further revealed. The facts with respect to four of FHR's largest claims -- Claims 56, 72, 77 and 15 -- are illustrative.

CLAIM 56: Until February 2009, Claim 56 for the electrical system was in the amount of \$30 million, of which approximately \$29 million was for future "estimated" damages. FHR

³ The Claim Charts that FHR has produced and updated over time are, in fact, its answers to one of BP Amoco's damages interrogatories served in November 2005. The interrogatory asks FHR to "(a) describe the damage claimed with particularity and state the total amount of damages claimed; (b) detail how the damages were calculated; (c) identify all documents that relate to the damages claimed; (d) identify the persons having knowledge about the damages claimed and the subject of their knowledge; and (e) set forth all of the facts you will be relying on to support the damages claimed." (Ex. 5, BP 1st Set of Int'gs. #4, served 11/11/05) In short, the information on the Claim Charts was specifically requested by BP Amoco during discovery.

now seeks \$8.1 million for this claim, of which \$7 million is for future “estimated” damages. FHR’s reason for abandoning a vast majority of the claimed necessary work is unclear from FHR’s untimely document production. Indeed, many of the recently produced documents still reference the previously alleged \$30 million damage amount. But FHR’s 30(b)(6) witness, Mr. Nicol, shed little light on this last week. He testified, binding FHR, that “I didn’t review the documents or we didn’t attempt to explain that difference. And in my review of the documents, I didn’t find any document that would explain that difference.” (Ex. 6, 6/25/09 Nicol 30(b)(6) Dep. at 238:9-12) Instead, Nicol testified that the \$7 million is only for the A Substation that is part of the plant’s electrical system but that he had never seen a proposal for the work allegedly needed. (*Id.* at 244:14-18) He explained that he has only seen an internal FHR document that had an estimate of \$6.8 million for the A Substation, and that FHR had simply “rounded up” its damage claim by \$200,000:

Q. And was the cost for the A substation that’s on that document \$7 million?

A. It’s roughly \$7 million.

Q. And when you say “roughly”, to the best of your knowledge, what was that estimate?

A. 6.8

Q. And so do you know what the difference is between -- ***what the reason is for the difference between the \$6.8 million that stated in that document and the \$7 million that’s on the Claims Chart?***

A. ***I believe it was rounded.***

Q. By \$200,000, is that correct?

A. I believe. (*Id.* at 244:20-245:9) (emphasis added)

Not only is FHR’s damage figure conveniently “rounded up” by \$200,000, but the internal document that Mr. Nicol reviewed was only produced as part of the May 2009 document production. (*See* Ex. 20, Dep. Ex. 2908, Ex. 6, Nicol 30(b)(6) Dep. at 250:23-251:9; 252:6-19) That document, in turn, is purportedly based on a proposal from Valdes Engineering. Critically, Valdes Engineering was not disclosed by FHR as a party with knowledge, and after a thorough search by BP Amoco and its expert, it has not been able to locate the Valdes Engineering “proposal” in any of FHR’s document productions.⁴

⁴ Although an internal FHR document referencing the Valdes Engineering proposal was contained in FHR’s May 2009 document production, Mr. Nicol testified, “I haven’t reviewed this document....” (*Id.* at 265:22-24) Mr. Nicol then was asked, “Has Flint Hills received any further updated information from Valdes as to the cost of the A substation replacement project?” (*Id.* at 266:24-267:2) FHR’s corporate representative testified, “In my review of the documents, I didn’t see any other information.” (*Id.* at 267:3-4)

The newly produced document that forms the basis of Mr. Nicol's understanding of FHR's newly revised damages figure for Claim 56 also states that \$3.2 million was needed for interrelated electrical improvements. (*See* Ex. 20, Dep. Ex. 2908) When asked about whether this amount was previously in FHR's claimed damages for Claim 56, Mr. Nicol, again testified, "I didn't review any documents in preparation that would have helped me understand whether that was in or out so I don't know." (Ex. 6, Nicol 30(b)(6) Dep. at 253:10-13) (*See also id.* at 256:19-257:3 ("Q. [A]s you sit here today, you don't know what the reason is for the decrease from the \$28.9 million estimated to the \$7 million estimated, is that correct. MR. STILES: Objection. Scope, foundation. A. It wasn't -- I didn't review any documents preparing for this deposition that would give me that information.")))

CLAIM 72: Until February 2009, Claim 72 for the MAN Thermox also was in the amount of \$30 million. The specific claim was that the unit had to be torn down and a new one built. (*See, e.g.*, Ex. 7, Bidwell Dep. at 648:12-651:9, Ex. 8, FHR Expert Egan Rpt. at 5-6) But this claim now is only for \$3 million according to the February 2009 Claim Chart. FHR's late produced documents do not fully explain the basis for the change, but FHR's 30(b)(6) witness provided a partial answer. Apparently, by the fall of 2008 -- most likely September 2008 (before expert discovery began) -- FHR had concluded that in fact it did not need to tear down and replace the Thermox; instead, it only needed to repair it. (Ex. 6, Nicol 30(b)(6) Dep. at 303:12-24) FHR did not disclose this fact to BP Amoco or the Court. Instead, FHR continued to assert a \$30 million claim, not the \$3 million repair claim it currently asserts. Thus, FHR's expert opined as to the validity and reasonableness of the \$30 million MAN Thermox replacement claim; BP Amoco's experts responded to FHR's claim, concluding after significant expense and work that the claim was not valid and largely speculative. (*See, e.g.*, Ex. 9, Elson Rpt. at App. A, pp. 2, 11-14) It is unclear how or why a party would pursue a claim and have its experts opine about a claim it decided long before is not valid.⁵

CLAIM 15: Until February 2009, Claim 15, which involves underground piping, was in the amount of \$5 million, of which \$3 million was for future "estimated" damages. But in

⁵ When BP Amoco moved for summary judgment, it also moved with respect to individual claims, including the MAN Thermox unit. (Dkt. # 280) FHR opposed summary judgment and never informed BP Amoco or the Court that the claim was not for \$30 million but only \$3 million. (Dkt. # 266) Nor did it inform BP Amoco or the Court that the claim was not for a replacement of the unit, but only for its repair.

February 2009, FHR changed its total claimed damage for this claim to \$2.3 million, of which only \$300,000 was future estimated damages to reline 30 inches of the process sewer and part of the lab sewer. Again, the documents produced in May 2009 do not explain the change in FHR's damages claim nor do they explain the basis of the \$300,000 figure. And, last week, FHR's corporate representative testified that he was not aware of any written proposal for this work and that the basis for his knowledge for the alleged damages was a conversation with Jim Neumann of FHR in preparation for the deposition. (Ex. 6, Nicol 30(b)(6) Dep. at 118:2-119:7) In addition, despite a statement in a document in FHR's May 2009 document production inquiring about abandoning the line entirely, (*see* Ex. 10, Dep. Ex. 2888), Nicol was not sure whether FHR "could [] abandon this sewer entirely" or whether any work had been done to investigate this possibility. (Ex. 6, Nicol 30(b)(6) Dep. at 119:8-122:1) Nor did Nicol know whether FHR would incur any of the \$190,000 in alleged estimated damages for this project if the line were abandoned.⁶ (*Id.* at 121:14-122:1)

CLAIM 77: This claim involves a utility boiler, for which FHR sought \$10 million in future "estimated" damages as of June 2008. In February 2009, FHR changed its damages for this claim to \$3.6 million. Once again, the late produced documents in May 2009 do not explain this change; and once again, Rule 30(b)(6) witness Nicol last week was unable to explain how the untimely produced documents relate to FHR's revised claim:

Q. Based on your review of the documents, can you tell me what the reason is for the change in the estimated cost from June of '08 to February of '09?

A. I can't -- I didn't review what drove the difference in costs, and none of the documents that I reviewed discussed the difference in these two costs.

There are documents that talk about what we are doing and how we arrived at the estimates, and so we can discuss those documents, and hopefully, that helps you understand. (Ex. 6, Nicol 30(b)(6) Dep. at 308:24-309:12)

Mr. Nicol then explained that an FHR employee, George Roman, had determined FHR's estimated damage amount based on vendor proposals. FHR never disclosed Mr. Roman as a person with knowledge of this claim, as required by Rule 26(a). Nor was Mr. Roman disclosed as a person with knowledge about this claim in FHR's answers to BP Amoco's interrogatories. (*See* Exs. 11, 12, 13, 06/05/06 Claim Chart, 03/20/07 Claim Chart, 04/17/07 Claim Chart) In

⁶ FHR's corporate representative testified that the remaining \$110,00 in estimated damages for Claim 15 is for repairs to the lab sewer line for which he has not seen any estimates. (*See* Ex. 6, Nicol 30(b)(6) Dep. at 123:5-11)

addition, Mr. Nicol could not answer whether FHR had obtained any other proposal than the one Roman had told him about. (*See* Ex. 6, Nicol 30(b)(6) Dep. at 319:3-21); (*see also id.* at 320:2-22 (“A. In developing [] Document 2921, it’s possible that George, Mr. Roman, received several estimates. It’s not listed here. I’m not aware that we’ve went out and requested further estimates beyond what was used to develop [Ex. 2921].”))⁷

In sum, throughout fact and expert discovery, FHR sought specific amounts in alleged damages for its various claims. FHR had its experts proclaim the reasonableness and justification for the damages numbers and claims. BP Amoco’s experts examined and opined on the problems with FHR’s damages claims. The Court ruled on summary judgment on those claims and made *Daubert* rulings with respect to FHR’s experts. (Dkt. # # 437, 554) And yet, much of this is for naught, because FHR now is seeking a significantly different amount in damages for those claims, although the basis for the revised amounts is apparently not understood or known by its Rule 30(b)(6) witness. FHR’s May 2009 document production, and its revised February 13, 2009 Claim Chart, have prejudiced BP Amoco. They reflect new work, previously undisclosed documents, a key new witness for Claims 21 and 77, and very different facts and justifications for the claims FHR is making. All of this was done after discovery closed and has resulted not only in unnecessary expense and waste of time, but has precluded BP Amoco and its experts from having access to the information and materials to which they were entitled to during the discovery phase of this case. The four illustrative claims discussed above represent over \$70 million of FHR’s original condition of assets claims. The same types of problems exist for the other revised and new damages claims numbers on the February 13, 2009 Claim Chart.

⁷ According to Mr. Nicol, George Roman is now the project manager and has developed “estimated” damage documents for Claim 21 (Waste Water Treatment Capacity Project) for over \$23 million but FHR has again never disclosed him as a person with knowledge of Claim 21. (*See* Exs. 11-13, FHR Claim Charts)

ARGUMENT

I. FHR's Untimely Production Of Key Documents And Damages Information Violated The Rules of Discovery.

Under Rule 37(c)(1), if “a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or harmless.” The timing, volume and substantive nature of FHR's newly produced documents and Claim Chart make them of little or no use to BP Amoco and its experts. Nor does the examination of FHR's 30(b)(6) witness previously ordered by this Court cure the prejudice caused by FHR's discovery conduct.

Given the timing and volume of FHR's late discovery production, barring FHR from asserting any claims or damages for claims that involve untimely produced documents and information in FHR's February 13, 2009 Claim Chart is appropriate. Such a remedy would ensure that BP Amoco is not prejudiced in this case and would prevent FHR from taking unfair and improper advantage of the discovery process. *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).⁸

As courts repeatedly have recognized, revising 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 *6-7 (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*

⁸ *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).

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 sanctioned party can show that its violation of Rule 26(a) was either justified or harmless") (citing *David v. Caterpillar, Inc.*, 324 F.3d 851, 857 (7th Cir. 2003)).⁹

II. FHR's Late Document Production And February Claims Chart Revision Are Neither Substantially Justified Nor Harmless, And Seriously Prejudice BP Amoco.

FHR has not—and cannot—show that its late disclosure of information and documents is substantially justified. FHR has not provided any justifiable reason for continuing to revise its damages figures months after the close of discovery, or why it continues to produce documents dated months or even over a year ago in an effort to support its claims.¹⁰ Moreover, as the facts for just four claims totaling over \$70 million in damages illustrate, there is no justification for FHR's late production and discovery conduct. FHR not only has failed to timely produce documents, it has not disclosed an apparent key, knowledgeable witnesses for two of FHR's largest claim, Claims 21 and 77. That witness, Mr. Roman, is now central to these two claims which involve approximately \$28 million in alleged damages.

FHR's late disclosure of revised damages and new documents several months after the close of fact and at the end of or after expert discovery—has severely prejudiced BP Amoco. The "Federal Rules of Civil Procedure seek to avoid the surprise and secrecy that are antithetical to the informed determination of cases of their merits." *Parra v. Neal*, 2008 WL 205441, at *2

⁹ *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 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.").

¹⁰ FHR's prior explanation to the Court that it conducts annual document sweeps resulting in it producing documents more than a year after they were created cannot justify its discovery violation -- especially not when it obviously relied on those documents months before it produced them to "revise" its February 13, 2009 Claim Chart.

(N.D. Ill. Jan. 24, 2008); *see also In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 331, 342 (N.D. Ill. 2005) (“Modern discovery practices seek to facilitate (however haltingly and ineffectively) open and even-handed development of the relevant facts so that justice may be delivered on the merits and not shaped by surprise or like tactical stratagems.”) (internal quotation marks omitted). “The long accepted view that once regarded discovery as an intolerable form of prying has been replaced by the modern attitude toward discovery that regards secrecy as uncongenial to truth-seeking and trial by ambush as destructive of the overarching goal that cases be justly determined on their merits.” *Lancelot Investors Fund, L.P.*, 2008 WL 1883435, at *4; *see also Vodak v. City of Chicago*, 2004 WL 1381043, at *2 (N.D. Ill. May 10, 2004); *Kyles v. JK Guardian Sec. Services, Inc.*, 2000 WL 1810003, at *3 (N.D. Ill. Dec. 11, 2000).

Not only is the magnitude of late produced material unusual, but so too is the fact that this is not the first time FHR has produced masses of material late -- with unnecessary and prejudicial consequences. Fact discovery in this case closed on May 31, 2008. (Dkt. No. 175) On June 9, 2008, FHR produced a “revised” Claim Chart, and in May and June of 2008, it produced hundreds of thousands of pages of new damages documents. Because of FHR’s prior productions of damages discovery after the close of fact discovery, the Court extended the time for BP Amoco to take damages discovery until September 15, 2008. (Dkt. # 201; *see generally* Dkt. # 548 at pp. 1-7 for a summary of FHR’s pattern of late produced discovery). Without any justification, FHR has repeated that same conduct.

As in any large and complex case, damages will be a key issue at trial. BP Amoco depended on FHR’s damages information and document production being complete in developing its case -- particularly with respect to experts. FHR’s revisions of its damages claims and untimely production of new documents has prejudiced BP Amoco as outlined above and further discussed below.

A. FACT WITNESSES: BP Amoco Cannot Re-Depose FHR’s Fact Witnesses Regarding Its New And Revised Damages And Newly Produced Documents.

During discovery, BP Amoco deposed dozens of witnesses on liability and damages issues. These included 30(b)(6) depositions of Timothy Nicol and Richard Morris on damages issues. These depositions were based on, and the witnesses were questioned about, FHR’s June 9, 2008 Claim Chart as well as the documents FHR had produced at that time.

FHR has now changed both the bases and the amounts it is seeking for numerous claims - - as illustrated by the claims discussed above. But BP Amoco has not had any opportunity to

depose FHR fact and expert witnesses on these “revisions” to FHR’s claims and damages or about its newly produced liability documents. For example, BP Amoco has been deprived of asking FHR’s fact witnesses why they made the decisions to make repairs instead of a full replacement of the equipment and why certain damages previously claimed necessary are no longer part of this case. For certain claims, the total damages being sought by FHR are now more than they were before discovery closed. BP Amoco has been deprived of its right to determine the factual basis for these changes.

Moreover, the testimony of FHR’s recent 30(b)(6) witness suggests that FHR is not only changing the amount and bases of its claim, but also the witnesses that will testify in support of them. For example, Mr. Nicol identified George Roman as the project manager for several claims including Claim 77, for which FHR seeks over \$4.5 million, as well as a \$23 million project that is part of Claim 21. (Ex. 6, Nicol 30(b)(6) Dep. at 310:21-311:24) During discovery, BP Amoco had served FHR with interrogatories asking the identity of “persons having knowledge about the damages claimed and the subject of their knowledge,” and for “the facts [FHR] will be relying on in support the damages claimed.” (Ex. 5, BP Amoco 1st Set of Interrogs. # 4) FHR did not list and to this day has never listed Mr. Roman as a person with knowledge for either Claim 21 or 77. (Ex. 13, 4/17/07 Claim Chart) Yet, Mr. Roman now is revealed as the apparently key person who is developing cost estimates for these large claims. (Ex. 6, Nicol 30(b)(6) Dep. at 190:2-22, 207:17-209:19, 213:20-214:1, 308:16-310:20) BP Amoco should have been able to depose Mr. Roman about how he developed these estimates, what methods he used, what information he relied on, and other related facts. But because FHR failed to disclose this information, BP Amoco has been deprived of the opportunity to develop its damages case on these multi-million dollar claims.

B. EXPERTS: BP Amoco’s Experts Have Been Deprived Of Vital Information For Use In Developing Their Opinions. BP Amoco’s Counsel Have Been Deprived Of Key Documents For Use In Cross-Examining FHR’s Experts.

FHR’s discovery conduct has prevented BP Amoco’s experts from considering, using and taking account of this new information and documents in reaching their opinions. Each of the opinions developed by BP Amoco’s experts were based in part upon the claim information and documents produced by the summer of 2008. FHR’s May 2009 document production -- which contains many documents prepared long before the close of expert discovery -- fundamentally changes the facts and allegations on which these experts reached their opinions.

For example, BP Amoco's damages expert, Craig Elson, opined on FHR's damages identified in its June 2008 Claim Chart. Mr. Elson did an extensive, detailed claim-by-claim economic analysis of FHR's alleged damages, based on the amounts of the claimed damages and the many documents that had been produced as of the date of his initial report in October 2008. One aspect of Mr. Elson's opinion consists of an analysis of whether and to what extent the specific dollar amounts of damages claimed by FHR are or are not supported by the evidentiary record. Long after Mr. Elson provided his opinion, and was deposed, FHR submitted its newly revised Claim Chart damages and significantly changed the amount of damages it seeks for many claims. Mr. Elson did not have an opportunity to incorporate any of this new information and documents into his analysis of FHR's damages.

Attached to this motion is Mr. Elson's affidavit, explaining the prejudice and unfairness he faces as an expert in this case because of FHR's discovery conduct. At trial, FHR will undoubtedly attempt to cross-examine Mr. Elson and attack his previously rendered opinions by referring to FHR's new damages claims and the newly produced documents, neither of which are analyzed in his expert report. As Mr. Elson concludes, "if Flint Hills were allowed to rely on its new February 2009 Claim Chart and additional corresponding document production, the opinions and quantifications provided in my October 6, 2008 report would require significant updating in order to avoid being subject to unfair criticism as to relevance, since the amounts of the claims, and, in some cases, the remediation activity asserted by Flint Hills as necessary, have changed in a significant manner on the basis of information not contemporaneously available to me." (Ex. 14, Elson Aff. at ¶ 12) If FHR is permitted to revise its alleged damages after the close of expert discovery, and to rely on documents produced after the close of discovery to cross-examine Mr. Elson and other experts, thousands of hours of expert time will have been for naught. Many more hours of additional expert analysis will be necessary to prepare for trial, all in less than 2 months, after submission of the Pre-Trial Order, *Daubert* motions, exhibit lists and objections, and other trial preparation work. (See also Ex. 15, Laun Aff. 7-at ¶¶ 6-9 identifying issues with FHR's latest document production for Claim 56)

In addition, FHR has produced documents showing that third party vendors' estimates for the cost of repair are subject to large variances. For example, FHR seeks \$7 million in future damages for Claim 56 based on a proposal from third party vendor Valdes Engineering. But Valdes Engineering indicated that this estimate has a variance of plus or minus 30 to 50 percent.

(Ex. 21, Dep. Ex. 2910) (*See also* Ex. 6, Nicol 30(b)(6) Dep. at 265:5-266:6) The Valdes Engineering proposal does not appear to be in FHR's production, and Valdes was not a previously disclosed witness or party in FHR's discovery responses. Similarly, FHR seeks approximately \$23 million for the waste treatment capacity work, but "expected accuracy for [the] estimates typically range from -20% to +30%" according to a document dated January 25, 2008 that FHR only produced 16 months later in May 2009.¹¹ (Ex. 22, Dep. Ex. 2910) Such admittedly wide variances should bar FHR from showing that its damages are reasonably certain as required under the law. *TAS Distrib. Co., v. Cummins Engine Co.*, 491 F.3d 625, 635 (7th Cir. 2007); *Roboserve, Inc. v. Kato Kagaku Co.*, 78 F.3d 266, 274 (7th Cir. 1996); *Kirkpatrick v. Strosberg*, 385 Ill. App. 3d 119, 130-31, 894 N.E.2d 781, 792-93 (Ill. App. Ct. Aug. 8, 2008).

Moreover, as explained in the attached affidavit of expert John McKinney, FHR's new production includes key liability documents for FHR's claims. (*See* Ex.16 , McKinney Aff. at ¶ 6-7) For example, Claim 66 is based on supposed issues with the compressor motor windings but FHR's newly produced documents reveal that the FHR's operating conditions may be the cause of the alleged issues. (*Id.* at ¶ 7) Similarly, Claim 15 is based on supposed anomalies found in an investigation of the plant's underground piping, but FHR's newly produced documents reveal that almost none of the anomalies were found in areas where piping was even located, and that for several anomalies, there was a low probability of leaks from the piping. (Exs. 17, 18, Dep. Exs. 2889, 2890)

Equally as important, FHR's discovery conduct has prejudiced BP Amoco in deposing FHR's experts, and in developing responses and counterarguments to FHR's experts' opinions. The scope and magnitude of FHR's late production of documents and information is arresting. It affects nearly all condition of assets claims; it affects scores of fact witnesses; it affects most of the experts. There is no way at this late stage to cure the prejudice FHR's conduct has caused.

¹¹ FHR's corporate representative was not aware whether a more accurate estimate had been provided to FHR. (*See* Ex. 6, Nicol 30(b)(6) Dep. at 210:5-10) ("Q. Has Brown & Caldwell provided any supplemental cost information in connection with Alternative A, B and C as revised for carbon steel? A. I don't have any documents that I've reviewed that they've provided that.") Nor was Mr. Nicol aware of any alternative or other vendor estimates obtained by FHR. (*Id.* at 215:4-8)

III. FHR's 30(b)(6) Deponent Did Not Cure The Prejudice To BP Amoco. To The Contrary, He Confirmed And Revealed The Full Extent And Breadth Of The Prejudice.

As ordered by the Court, FHR produced a 30(b)(6) witness to testify regarding its May 2009 document production. That deposition, however, cannot cure the prejudice caused to BP Amoco and its experts. Moreover, the deposition itself revealed the extent and broad scope of the prejudice. In this regard, FHR does not and cannot dispute that BP Amoco has never been given an opportunity to question its witnesses about the newly produced documents and revised damages stated in its February 2009 Claim Chart. Nor can FHR dispute that if FHR had produced many of the documents dated before the end of fact discovery, BP Amoco could have used them during the depositions of facts and expert witnesses. Likewise, FHR cannot dispute that had it produced the February 2009 Claim Chart with its very different damages numbers during the discovery period, that BP Amoco would have been permitted to ask FHR's many fact witnesses about the basis for FHR's alleged damages as set forth on that Claim Chart. Nor can FHR dispute that its untimely produced Claim Chart disclosed information that is significant to its claims. Finally, FHR cannot dispute that its corporate representative did not know answers to basic questions arising from its May 13, 2009 document production -- which even FHR concedes was a proper subject of the deposition.

As one further example of the problem and prejudice here, consider FHR Claim No. 3, which is for the firewater system. FHR's June 9, 2008 Claim Chart listed the total value of the claim as \$2.52 million, of which \$1.6 million was for future damages to replace the underground firewater piping, butterfly valves and a jockey pump. During the September 2008 Rule 30(b)(6) deposition of Richard Morris, FHR's corporate representative, he testified that "that's the minimum number. It's likely to increase with the latest piping estimate." (Ex. 19, Morris 30(b)(6) Dep. at 862:22-863:3) Mr. Morris claimed that he was "aware that estimates are being prepared. We've asked for a third-party to provide that estimate for us.... As I sit here today I do not have it. However, I know it's been requested that that be done." (*Id.* at 858:2-9)

FHR has never produced that estimate. Instead, FHR produced a revised Claim Chart five months later, in February 2009, that sought \$1.242 million for this claim, of which \$300,000 is for future estimated damages.¹² FHR did not produce a single document regarding the

¹² The amounts FHR allegedly actually spent on this claim have actually decreased from June 2008 through February 2009. (*See* Claim 3 on Exs. 3 and 4)

estimated damages for this claim after Mr. Morris' deposition and prior to disclosing its "revised" Claim Chart on February 13, 2009. Three months later, in May 2009, FHR produced additional documents, but none of them explain why the estimated damages dropped from \$1.3 million to \$300,000. Nor do they explain the basis for the \$300,000 claim. The only explanation provided during the recently ordered 30(b)(6) deposition was that FHR's future "estimated" damages *only* seek to recover for a *jockey pump* despite what is stated in February 13, 2009 Claim Chart. (See Ex. 3, 02/13/09 Claim Chart: Claim 3: (FHR "estimates that it will cost \$300,000 to make further repairs, *including replacing butterfly isolation valves* and installing a jockey pump *and loop line.*") (emphasis added)

In short, FHR's claims today are based upon documents not previously produced, documents from third parties which have never been disclosed, estimates from witnesses or parties unknown or not previously disclosed as persons with knowledge of certain claims, and/or documents and materials produced long after the close of discovery. The prejudice to BP Amoco resulting from all of this should be obvious.

CONCLUSION

FHR's discovery conduct is in violation of the Rules, and has prejudiced BP Amoco. The prejudice cannot be cured. The only solution is to strike and bar the FHR claims which are affected by its discovery conduct. Accordingly, BP Amoco and BP Corporation North America Inc. seek an order barring and striking each of FHR's claims that (i) are the subject of its untimely document production and/or (ii) involve "revised" damages amounts reflected on its late disclosed February 2009 Claim Chart. Of approximately 44 claims remaining in this case, BP Amoco by this motion asks the Court to strike and bar FHR from proceeding at trial with respect to 20 of them: Claim Nos. 3/57, 8, 9, 15, 16/70, 17, 38, 39, 45, 48, 55, 56, 63, 66, 67, 72, 77 and the waste water treatment portion of Claim 21. In addition, BP Amoco seeks to bar and preclude any and all testimony, exhibits, and damages supported by or related to untimely produced documents, including those in FHR's May 2009 document production, and its February 13, 2009 Claim Chart.

DATED: July 1, 2009

Respectfully submitted,

/s/ Hariklia Karis
One of the attorneys for BP Amoco and
BPCNA

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2009, I caused a true and correct copy of the foregoing to be served electronically via the CM/ECF system on the following attorneys of record:

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