Motion Ex. 33

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BP AMOCO CHEMICAL COMPANY, Plaintiff/Counter–Defendant, v. FLINT HILLS RESOURCES LLC, Defendant/Counter–Plaintiff.	Consolidated Case No. 05 C 5661 Judge Amy J. St. Eve
FLINT HILLS RESOURCES LLC, Third-Party Plaintiff, v. BP CORPORATION NORTH AMERICA INC., Third-Party Defendant.	

BP AMOCO'S RESPONSE TO FHR'S MOTION *IN LIMINE* NO. 7
(RE-FILED IN UNSEALED FORM PER COURT ORDER, DKT. NO. 749)

RESPONSE OF BP AMOCO CHEMICAL COMPANY AND BP CORPORATION NORTH AMERICA INC. TO FHR'S MOTION TO BAR EVIDENCE OF THE POST-TRANSACTION FINANCIAL PERFORMANCE OF THE PCBU

Flint Hills Resources, LLC ("FHR") moves to bar the admission of evidence relating to the post-sale financial and operational performance of the Performance Chemicals Business Unit ("PCBU"), contending that such evidence is either irrelevant or that its probative value is substantially outweighed by its unfairly prejudicial effect. FHR's motion should be denied for several reasons.

First, FHR's motion is simply an untimely *Daubert* challenge. BP Amoco's principal damages expert, Craig Elson, relied on and referenced the very same evidence as one of the basis for certain of his opinions. FHR did not move to exclude those opinions on *Daubert* grounds, and therefore this motion should be denied as an untimely *Daubert* challenge.

Second, evidence of the post-sale financial performance of the PCBU is relevant and material to the damages issues the jury will be asked to decide. The Court's opinions have recognized that FHR is entitled to be returned to the position in which it would have found itself absent the alleged breach of warranty — but not to a better position. Thus, the jury can consider evidence of FHR's post-sale financial performance in determining whether awarding large repair costs would result in FHR being placed in a position better than that in which it expected to be absent any breach. Moreover, post-sale financial performance is relevant to assessing the reliability of the pre-sale financial projections upon which FHR seeks to have its expert, Jeffrey Baliban, rely. Similarly, such post-sale financial performance evidence is relevant to the jury's assessment of Sharon Moore Bettius's valuation opinions that the PCBU was worth only $200 million in the claimed "as-sold" condition, when in fact through July 2008, the first fifty months of ownership by FHR, the PCBU already had generated in excess of $160 million in earnings for FHR.

Third, FHR has asserted that it intends to argue to the jury that one of the reasons why it delayed making certain repairs and replacing certain equipment was a scarcity of financial resources. (*See* Dkt. # 585 at 6.) FHR has made this argument before as well. Thus, FHR has put at issue its financial ability to make repairs and the replacements it now contends are required to restore equipment and facilities to their warranted condition. Having put its financial ability to make repairs and pay for replaced equipment at issue, evidence of the PCBU's post-sale financial performance showing that FHR has earned substantial amounts of cash that it could have used to make repairs or replacements is certainly relevant and responsive to issues FHR has raised in this case. Such post-sale financial evidence directly rebuts FHR's resource-constraint assertions. For example, in 2007 alone the PCBU generated more than $106 million in earnings, belying FHR's assertions that it lacked sufficient cash to complete claimed necessary repairs and replacements sooner.

Last, this evidence is not unfairly prejudicial, confusing or time-consuming. FHR fails to support or explain these asserted grounds for excluding this evidence. Moreover, the relevance of the evidence to FHR's asserted damages claims is manifest, and the reasons for the post-sale profitability of the PCBU need not be presented to the jury at length. While this evidence is quite damaging to FHR's case, because it calls into serious question the veracity of FHR's witnesses, the reliability of the opinions of FHR's damages and capacity experts, and FHR's

recent assertions that limited financial resources constrained FHR's ability to address claimed problems with the condition and capacity of plant equipment sooner, such prejudice is neither unfair nor undue in this case.

RELEVANT BACKGROUND

A. FHR Prepares Financial And Operating Reporting Packages On A Monthly Basis In The Ordinary Course.

On a monthly basis, FHR prepares "Financial and Operating Reporting Packages," which are referred to in this response as "Packages." (Ex. 1, 7/9/08 Nicol Dep. at 134:5 - 139:8; Ex. 2, DX-2557 at Tabs 2 (12/04 Package), 4 (12/05 Package), 6 (12/06 Package), 8 (12/07 Package), 10 (5/08 Package); Ex. 3, Daugherty Dep. at 14:3 - 15:13; Ex. 4, DX-2608; Ex. 5, Sementelli Dep. at 256:21 - 270:19; Ex. 6, DX-2253.)

These Packages include both information for the financial and operating performance of the PCBU for the indicated month, as well as information for the year-to-date. (*See id.*) For example, the December 2005 Package includes information about the financial and operating performance of the business both for December 2005 and for the entire year of 2005. (*See* Ex. 2, DX-2557 at Tab 4.) Prior to May 2009, the most recent Package FHR had produced to BP Amoco was the Package for July 2008, but in May 2009, FHR produced to BP Amoco for the first time seven additional monthly Packages for the months of August 2008 through February 2009. (Ex. 7, 5/13/09 Letter From R. Stiles to S. Fowkes & W. Patberg at 2.)

B. FHR's Monthly Packages Establish That The PCBU Generated More Than $160 Million In Earnings For FHR Through July 2008.

The timely-produced Packages show that FHR realized from operating the former PCBU approximately $163 million in earnings before interest, taxes, depreciation, and amortization ("EBITDA") through July 2008. (*See* Ex. 2, DX-2557 at Tabs 2, 4, 6 & 8; Ex. 4, DX-2608 at Tab 6.) Indeed, in 2007 alone the former PCBU generated nearly $107 million in EBITDA for FHR. (Ex. 2, DX-2557 at Tab 8.[1])

These financial results contrast sharply with FHR's appraiser's opinions that the PCBU FHR acquired from BP Amoco had a fair market value of only $200 million in its actual

[1] In 2007, FHR acquired other business operations that became part of its "Intermediates Business," and therefore FHR redacted portions of its monthly Packages relating to such other business operations. (Ex. 5, Sementelli Dep. Tr. at 258:23 - 259:18.) As a result, for 2007 and subsequent periods, it is necessary to add the Geel and Joliet figures in the monthly packages in order to determine the results generated by the former PCBU. (*Id.* at 267:7 - 268:9.)

"as-sold" condition (Ex. 8, DX-2764 at 4), thus clearly calling into question the reliability of the valuation analysis prepared by FHR's appraiser, Ms. Bettius.

These financial results also contrast sharply with FHR's repeated allegations and assertions that the business it acquired from BP Amoco was in poor condition, that its earnings potential was overstated by means of inflated capacity estimates and constrained by the allegedly poor condition of the assets, and that the financial results achieved by the business were disappointing. (Ex. 9, Monte Miller Dep. at 87:10 - 88:23.)

C. FHR's Monthly Packages Establish FHR Has Run The TMA And MAN Units At Actual Rates That, When Annualized, Exceed The Rates FHR's Capacity Expert Has Opined Are Achievable.

In addition to financial performance information, the monthly Packages also contain information about the production volumes for the PCBU in FHR's hands. For example, each monthly Package contains a "Joliet Facility Production Summary" and a "Joliet Facility Yield Summary," which contains material information regarding the production volumes and yields achieved by the production units at the Joliet Plant in various months. (Ex. 2, DX-2557 at Tab 10 (5/08 Package) at FHR-AV-1406 to FHR-AV-1407; *id.* at Tab 9 (data used to create production and yield summaries); Ex. 1, 7/9/08 Nicol Dep. at 134:8 - 135:11.)

Using the information from these production and yield summaries, it is possible to calculate annualized actual production figures for the production units at the Joliet Plant, as summarized in the following table:

Chemical & Month	**Actual Monthly Volume**	**Annualized Actual Volume** **(Monthly Volume, Divided By Number Of Days In Month, Times 365 Days)**
PIA, September 2003	12.323 kmt	150 kmt
TMA, January 2007	5.738 kmt	68 kmt
MAN, January 2006	4.244 kmt	50 kmt

[Source: Ex. 2, DX-2557 at Tabs 9 & 10]

Notably, each of these actual annualized volumes is well in excess of the volumes that FHR's capacity expert, Dr. Ogle, has opined that the Joliet Plant was capable of producing on a non-simultaneous basis. (Ex. 10, DX-2815 at 22, Table 11.) Similarly, such volumes are well in excess of those that FHR's damages expert, Jeffrey Baliban, was instructed to assume for his analysis. (Ex. 11, DX-2782 at 32 ¶ 73; *id.* at 33 ¶ 74.[2])

[2] Mr. Baliban was asked to assume that the maximum capacity was 115 or 140 kmt for PIA, 65 kmt for TMA, and 48 kmt for MAN, which he then further reduced to assumed effective capacities of 108.2 or

Using the same production information, one can calculate actual annualized simultaneous production volumes, as summarized in the following table:

Chemical	**Actual Volume Produced For Month Of August 2003**	**Annualized Actual Volume For Month Of August 2003** **(Monthly Volume, Divided By Number Of Days In Month, Times 365 Days)**
PIA	12.251 kmt	144 kmt
TMA	5.173 kmt	61 kmt
MAN	3.569 kmt	42 kmt

[Source: Ex. 2, DX-2557 at Tabs 9 & 10]

These PIA and TMA actual annualized volumes are, once again, well in excess of the simultaneous PIA and TMA volumes that FHR's damages expert, Jeffrey Baliban, was instructed to assume for purposes of calculating damages. *See supra* n.2. Similarly, each of these actual annualized volumes appears to be well in excess of the simultaneous volumes that FHR's capacity expert, Dr. Ogle, has calculated. (Ex. 10, DX-2815 at 22, Table 11.)

D. BP Amoco's Damages And Capacity Experts Cited To Evidence Of FHR's Post-Closing Financial And Operational Performance, But FHR Raised No *Daubert* Objection To Either Expert's Reliance On Such Evidence.

In both his initial and rebuttal report, BP Amoco's principal damages expert, Craig Elson, cited to the same Packages and same financial performance information that FHR now seeks to exclude from evidence as additional support for certain of his damages opinions. (Ex. 12, DX-2773 at 14-15 & n.35; Ex. 13, DX-2775 at 34-35 & n.123.) Notwithstanding this, FHR's *Daubert* motion challenging Elson never argued that any of his opinions based in part on the Packages should be excluded as unreliable or inadmissible, or that his reliance on certain financial performance information contained in those Packages as additional support for certain of his opinions was improper. (*See* Dkt. # 406, 408.)

BP Amoco's production capacity expert, Dr. Van Brunt, similarly makes reference to and relies on certain post-closing operational information as additional support for certain of his opinions relating to the capability of the warranted production units to produce at the AMDSP rates. (Ex. 14, 10/08 Van Brunt Report at 7, 9 & 10; Ex. 15, 11/08 Van Brunt Report at 5.) Nevertheless, FHR did not move to exclude Dr. Van Brunt's opinions on the grounds that he improperly relied in part on evidence of FHR's post-closing operations in developing certain of

131.8 kmt for PIA, 56.8 kmt for TMA, and 45.2 kmt for MAN. (Ex. 11, DX-2782 at 2 n.3; *id.* at 32 ¶ 73; *id.* at 33 ¶ 74.)

his opinions that the production units at the Joliet Plant were capable of producing at the warranted AMDSP rates. (*See* Dkt. # 402, 405.[3])

ARGUMENT

FHR, as movant, bears the burden of identifying the particular evidence at issue, demonstrating its irrelevance, and demonstrating that any alleged unfair prejudice substantially outweighs the probative value of such evidence. *See, e.g., Mason v. City of Chicago,* 2009 WL 1891797, at *2 (N.D. Ill. Jul. 1, 2009) (noting that "the party moving to exclude evidence *in limine* has the burden of establishing the evidence is not admissible for any purpose."); *cf. Sanchez v. City of Chicago,* 2007 WL 2358632, at *1 (N.D. Ill. Aug. 17, 2007) (noting that where doubt exists as to admissibility of disputed evidence, evidentiary ruling should be against the party moving to exclude *in limine*).

FHR cannot satisfy this burden by means of unsupported or unexplained assertions of irrelevance and/or prejudice. *See, e.g., Capuano v. Consolidated Graphics, Inc.,* 2007 WL 2688421, at *4 (N.D. Ill. Sep. 7, 2007) (denying motions *in limine* based on mere "conclusory assertions" that were unsupported by facts or legal authority, and therefore "insufficient to warrant exclusion of evidence"); *McClain v. Anchor Packing Co.,* 1996 WL 164385, at *7 (N.D. Ill. Apr. 3, 1996) (similar); *U.S. v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991) ("We repeatedly have made clear that perfunctory and undeveloped arguments, and arguments that are not supported by pertinent authority, are waived."); *Hardrick v. City of Bolingbrook*, 522 F.3d 758, 762 (7th Cir. 2008) (similar).

While FHR asserts that "[a] motion *in limine* to exclude evidence should be granted if the evidence sought to be excluded is inadmissible for any purpose" (Mot. at 2), this Court already has ruled that the "court should exclude evidence *in limine* 'only when it is clearly inadmissible on ***all*** potential grounds.'" (Dkt. # 544 at 2 (emphasis added; quoting *Wafra Leasing Corp. 1999-A-1 v. Prime Capital Corp.*, 339 F. Supp. 2d 1051, 1054 (N.D. Ill. 2004) (citing *Hawthorne Partners v. AT&T Tech., Inc.,* 831 F. Supp. 1398, 1400 (N.D. Ill. 1993)).) *See also Euroholdings Capital & Inv. v. Harris Trust & Sav. Bank*, 602 F. Supp. 2d 928, 934 (N.D. Ill. 2009) (evidence

[3] While FHR moved to exclude opinions from Dr. Van Brunt on the grounds that he failed to opine as to the capacity of the warranted units as of the date of sale, the Court rejected these arguments, noting his opinions were relevant because they were based on both pre- and post-sale data. (Dkt. # 546 at 6.)

excluded *in limine* "is inadmissible on all potential grounds"); *Townsend v. Benya*, 287 F. Supp. 2d 868, 872 (N.D. Ill. 2003) (similar).[4]

I. FHR DID NOT RAISE *DAUBERT* CHALLENGES TO ELSON'S OR VAN BRUNT'S CITATION TO OR PARTIAL RELIANCE ON EVIDENCE OF FHR'S POST-SALE PERFORMANCE.

The Court's scheduling order required *Daubert* motions to be filed by April 10, 2009. (Dkt. # 279.) Indeed, the Court has now decided all of the parties' *Daubert* motions, subject to hearings that took place earlier this week. Yet FHR's instant motion is a new *Daubert* motion in the cloth of an *in limine* motion, as it seeks to preclude facts that BP Amoco's principal damages expert, Craig Elson, and its capacity expert, Dr. Van Brunt, relied on as additional support in forming certain of their opinions. Thus, FHR's motion should be denied as an improper and untimely *Daubert* motion filed long after the Court-ordered deadline. *See, e.g.*, *Shreve v. Am. Comm. Barge Line, LLC*, 2005 WL 6010527, at *1 (S.D. Ill. Apr. 21, 2005) (denying a party's motion *in limine* to preclude/limit expert testimony because the time for *Daubert* motions had passed) (citing district court rules on motion practice which instruct litigants that "[a]ll *Daubert* motions (seeking to exclude expert testimony/evidence) must be filed by the dispositive motion deadline not the motion *in limine* deadline."); *IMR USA Inc. v. GES Exposition Serv's, Inc.*, 2006 WL 5112760, at *1 (N.D. Ill. Jan. 6, 2006) (denying motion *in limine* to preclude expert testimony after the *Daubert* motions and hearings had concluded); *cf. Landmark Am. Ins. Co. v. Green Lantern Roadhouse, LLC,* 2009 WL 458561, at *2 (S.D. Ill. Feb. 24, 2009) (denying a motion *in limine* to challenge expert testimony because it was in the nature of a *Daubert* challenge).

II. THE PACKAGES AND OTHER EVIDENCE OF FHR'S POST-CLOSING FINANCIAL AND OPERATING PERFORMANCE ARE RELEVANT.

FHR contends that the post-closing financial and operating performance of the PCBU is irrelevant because such evidence "has no relevance to whether BP reached [sic] the representations under section 7.1(d)(ii) or what Losses BP must indemnify under section 13.2(a) of the PSA," and because "BP improperly seeks to add a term to the PSA that would limit its

[4] While FHR cites to *Plair v. E.J. Brach & Sons, Inc.*, 864 F. Supp. 67 (N.D. Ill. 1994) as support for its assertion that inadmissibility for a single purpose is sufficient to grant a motion *in limine*, in fact *Plair* states the same rule this other courts have stated. *See id.* at 69 ("A motion in limine to exclude evidence may be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose.") (citing *Hawthorne Partners*, 831 F. Supp. at 1400).

indemnification obligations to situations where the PCBU operated at a loss post-sale." (Mot. at 3-4.) These arguments are without merit.

First, evidence of the post-sale financial performance of the business in FHR's hands is relevant to damages issues that the jury will have to decide. As the Court held in ruling on BP Amoco's summary judgment motion addressed to damages, "Illinois law is an overlay on the PSA's exclusive remedy scheme," and "[c]ontract damages should neither place the injured party in a better position nor result in a windfall recovery." (Dkt. # 437 at 18 (citing *Platinum Tech., Inc. v. Fed. Ins. Co.*, 282 F.3d 927, 932 (7th Cir. 2002).) Evidence of the post-closing financial performance of the business, considered in connection with the sums that FHR now seeks as damages, is relevant to the jury's determination of whether FHR will receive an impermissible windfall if it recovers the full amounts that it is now demanding. *See also Kokomo Opalescent Glass Co. v. Arthur W. Schmid Int'l Inc.*, 371 F.2d 208, 214-15 (7th Cir. 1966) (noting relevance of post-transaction evidence including financial performance and sales data in determining damages under a breach of contract action where lost profits were not sought; in fact, testimony regarding lost profits was admitted as partial evidence in the overall damages calculation as well); *Hawthorne Partners*, 831 F. Supp. at 1402-03 (denying a motion to exclude post-transaction evidence of sales and refinancing attempts, and noting the probativeness of post-sale events to determine diminished property value in action where lost profits were not sought); 3 Dan B. Dobbs, *Dobbs Law of Remedies: Damages-Equity-Restitution* (2d Ed. 1993) at 36 § 12.2(2) ("On the other hand, if the property is used solely for income production and the breach does not affect the property's value or the income it produces, recovery of large sums to provide substitute performance is likely to be windfall or waste.") (footnote omitted).

Second, evidence of the post-sale operational performance of the business in FHR's hands is relevant to assessing the opinions that FHR's capacity expert intends to offer regarding the "annualized maximum demonstrated production" or "AMDSP" of the production units at the Joliet plant. Historical production data from the business subsequent to closing demonstrates that Dr. Ogle's opinions regarding the AMDSP of the production units at the Joliet Plant likely understate the capacities of those units by a material amount, whether considered on a simultaneous or non-simultaneous basis. Moreover, such post-closing production data demonstrates the unreasonableness of the production capacity assumptions that Mr. Baliban, one of FHR's damages experts, was asked to make by FHR's counsel. *Cf. U.S. v. Turner*,

198 F.3d 425, 429 n.2 (4th Cir. 1999) ("The partiality of a witness is always relevant as discrediting the witness and affecting the weight of his testimony.").

Third, FHR's parol evidence rule arguments are misplaced. BP Amoco does not intend to offer evidence of FHR's post-closing financial or operating performance to interpret any provisions of the PSA. To the contrary, BP Amoco intends to introduce evidence of FHR's post-closing financial and operating performance, *inter alia*, to impeach FHR's capacity and damages experts and to demonstrate the improper windfall that FHR will receive should it be awarded the damages it is claiming in addition to realizing the substantial economic benefits it has enjoyed from that business to date. Use of extrinsic evidence for such purposes does not run afoul of the parole evidence rule. *See, e.g., Web Comm's Grp., Inc. v. Gateway 2000, Inc.*, 169 F.R.D. 108, 111 (N.D. Ill. 1995) (on motion *in limine* to exclude alleged extrinsic evidence in breach of contract case, court found evidence to be admissible, relevant, and probative on issue of damages); *Bublitz v. Wilkins Buick, Mazda, Suzuki, Inc.*, 377 Ill. App. 3d 781, 787, 881 N.E.2d 375, 381 (Ill. App. Ct. 2007) (extrinsic evidence offered for the purposes of determining actual value and damages does not run afoul of the parol evidence rule); *see also Dancy v. William J. Howard, Inc.*, 297 F.2d 686, 688 (7th Cir. 1961) ("[P]arol or extrinsic evidence is admissible to explain the purpose of the execution of a written instrument, what the parties intended, the consideration for its execution and the circumstances surrounding its execution") (quotations omitted); *In re Apex Automotive Warehouse, L.P.*, 238 B.R. 758, 769 (Bkrtcy. N.D. Ill. 1999) (similar).

Moreover, by definition the post-closing evidence at issue here is not covered by the parol evidence rule because it does not pre-date and is not contemporaneous with execution of the PSA. *See, e.g., Niebur v. Town of Cicero*, 212 F. Supp. 2d 790, 805 (N.D. Ill. 2002) (facts subsequent to contract execution are not subject to parol evidence rule and are admissible); *Land of Lincoln Sav. & Loan v. Michigan Ave. Nat. Bank of Chicago*, 103 Ill. App. 3d 1095, 1102-03, 432 N.E.2d 378, 384 (Ill. App. Ct. 1982) (courts can consider parol/extrinsic evidence regarding facts subsequent to the execution of a contract because "the [parol evidence] rule is applied to prior or contemporaneous parol evidence"); *Houck v. Martin*, 82 Ill. App. 3d 205, 212, 402 N.E.2d 421, 427 (Ill. App. Ct. 1980) (noting that the parol evidence rule "prohibits introducing only prior or contemporaneous, not subsequent" evidence).

Fourth, the post-closing performance of the business is relevant evidence for the jury to consider in assessing whether FHR's appraiser, Ms. Bettius, has reasonably concluded that the fair market value of the PCBU in the claimed as-sold condition was merely $200 million -- or some $37 million more than the cash that the business had already generated for FHR after only four years of ownership. *See, e.g.*, *Hawthorne Partners*, 831 F. Supp. at 1402-03 (denying motion to exclude post-transaction evidence of sales and refinancing attempts, and noting the probativeness of such evidence to the issue of whether and by how much the property value was diminished by the claimed breach); *Cerabio LLC v. Wright Med. Tech., Inc.*, 410 F.3d 981, 994 (7th Cir. 2005) (reversing decision that excluded evidence that was probative to defendant's defenses).

Last, the relevance of such evidence of post-closing financial and operational performance is further confirmed by the fact that FHR's own list of trial exhibits served on BP Amoco on June 24, 2009 specifically includes such evidence. (Ex. 16, FHR 6/24/09 Trial Ex. List, identifying DX-2557 as trial exhibit.) FHR has put the evidence on its exhibits list; it is also on BP Amoco's list. The evidence thus should not be excluded as irrelevant.

III. HAVING PUT THE POST-CLOSING FINANCIAL AND OPERATING PERFORMANCE OF THE BUSINESS AT ISSUE, FHR CANNOT NOW HAVE SUCH EVIDENCE EXCLUDED.

It is well established that evidence may be made relevant by the positions and arguments a party advances, and having put a matter in dispute, a party cannot subsequently have excluded evidence introduced to rebut the party's positions and arguments. *See, e.g.*, *Hasham v. Cal. State Bd. of Equalization*, 200 F.3d 1035, 1050 (7th Cir. 2000) (affirming trial court's admission of evidence where "Defendant's line of questioning opened the door to such testimony"); *Mayoza, M.D. v. Heinold Commodities, Inc.*, 871 F.2d 672, 679-80 (7th Cir. 1989) (affirming trial court's admission of evidence because plaintiff opened the door to its admission); *Nutrition Mgmt. v. Harborside Healthcare Corp.*, 2004 WL 887401, at *1 (E.D. Pa. Mar. 19, 2004) (court denies motion *in limine* to exclude certain evidence about quality of services Plaintiff provided where Plaintiff "made numerous representations about the quality of service provided to Defendants" in complaint, and Defendant responded with general denials, noting that "Plaintiff opened the door" and thereby made such evidence relevance).

FHR intends to argue to the jury here that the business BP Amoco sold to FHR was in poor mechanical condition and could not produce at the warranted capacities, thereby disappointing FHR's contractual and financial expectations. (*See, e.g.*, Dkt. # 14,

FHR Countercl. at ¶¶ 1-5, 21, 43-45, 57, 124-26, 148, 151-64, 168; Ex. 11, DX-2782.) Having thus put the operating condition and financial performance of the business at issue, FHR cannot now seek to exclude evidence that the actual operating and financial performance of the business since closing has not been as disappointing as FHR's claims and arguments would suggest.

Moreover, FHR has asserted and continues to argue that one of the reasons it neglected to repair and/or replace equipment and facilities was a lack of available cash. (*See* Dkt. # 585 at 6.) BP Amoco is entitled to rebut such arguments by introducing evidence of the substantial amounts of cash that the business has generated for FHR -- cash that FHR has refrained from using to more expeditiously effect the allegedly necessary repairs, replacements, and improvements it has put at issue in this case. In short, FHR may not "plead poverty" as an excuse for not repairing and replacing allegedly defective equipment and facilities, while at the same time keeping from the jury evidence that the business was in fact generating tens of millions in cash for FHR. *See, e.g.*, *Hasham*, 200 F.3d at 1050; *Mayoza*, 871 F.2d at 679-80; *Nutrition Mgmt.*, 2004 WL 887401, at *1.

IV. EVIDENCE OF THE POST-CLOSING FINANCIAL AND OPERATING PERFORMANCE OF THE BUSINESS IS NOT UNFAIRLY PREJUDICIAL.

FHR contends that evidence of the post-closing financial and operating performance of the business would be unduly prejudicial and confusing, and should be excluded under Rule 403. (Mot. at 5.) Once again, FHR's unsupported and unexplained contentions are without merit.

FHR has no legal or factual support for its arguments, and for this reason alone its motion can and should be denied.[5] *Capuano*, 2007 WL 2688421, at *4; *McClain*, 1996 WL 164385, at *7; *Hardrick*, 522 F.3d at 762; *Berkowitz*, 927 F.2d at 1384.

Regardless, evidence relating to financial performance is not the type of emotional or highly charged evidence that is excludable as "unfairly prejudicial" under Rule 403. *Cook v Hoppin*, 783 F.2d 684, 689 (7th Cir. 1986) ("It is well settled that evidence is unfairly prejudicial only if it will induce the jury to decide the case on an improper basis, commonly an emotional one, rather than on the evidence presented. Evidence that appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of

[5] While FHR cites to *Old Chief*, 519 U.S. at 180-92, that case does not address the use of purchase price allocations. To the contrary, *Old Chief* addresses the completely unrelated matter of whether a party by stipulating to a prior conviction can force the prosecutor to forego introducing evidence on FRE 403 grounds of the details of the prior conviction.

human action may cause a jury to base its decision on something other than the established propositions in the case."). "Rule 403 does not exclude evidence because it is strongly persuasive or compellingly relevant -- the rule only applies when it is likely that the jury will be moved by a piece of evidence in a manner that is somehow unfair or inappropriate." *In re Air Crash Disaster*, 86 F.3d 498, 538 (6th Cir. 1996); *see also Wilson v. Groaning*, 25 F.3d 581, 585 (7th Cir. 1994) (similar).

In fact, the only party seeking to confuse matters here is FHR, which apparently intends to offer in rebuttal evidence about the reasons for its post-closing financial performance. But FHR cannot create grounds for excluding evidence merely by threatening extensive rebuttal evidence that is irrelevant and confusing. *See, e.g.*, 22 Charles Alan Wright & Kenneth W. Graham, Jr., *Fed. Prac. & Proc. Evid.* § 5216 (1978) ("But courts should not assume that the choice is between not admitting the evidence and opening the door to a tedious rebuttal. In some cases it may be appropriate to apply Rule 403 to portions of the proposed rebuttal rather than to the proffered evidence.").

Finally, FHR's unsupported and largely unexplained fears that the jury will make use of evidence of the post-closing financial and operating performance of the business for a purpose that may be inconsistent with the Court's instructions is not grounds for the exclusion of this evidence. The Court will instruct the jury as to liability and damages, and the jurors are presumed to follow those instructions. *3M v. Pribyl*, 250 F.3d 587, 600 (7th Cir. 2001); *see also U.S. v. Hans*, 684 F.2d 343 (6th Cir. 1982) (trial court abused discretion in excluding financial evidence that was relevant and that could be distinguished from other relevant financial evidence offered for different purposes by jury instructions).

CONCLUSION

For all of the foregoing reasons, FHR's motion *in limine* number 7 should be denied.

Dated: August 25, 2009

Respectfully submitted,

By: /s/ Drew G. A. Peel

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 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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