

## **Motion Ex. 34**

**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’S MOTION AND SUPPLEMENTAL  
SUBMISSION REGARDING FLINT HILLS’ MOTION *IN LIMINE* NO. 7 AND  
EVIDENCE OF FLINT HILLS’ POST-TRANSACTION FINANCIAL PERFORMANCE**

Before trial, the Court granted in part, granted in part without prejudice, and denied in part without prejudice Flint Hills’ Motion *In Limine* No. 7, which sought to bar evidence of the actual post-transaction financial performance of the PCBU. (Dkt. 746) Since the start of trial, the arguments Flint Hills made to exclude the evidence have proven unfounded, and instead, Flint Hills’ entire approach to this trial has confirmed why this post-sale financial performance evidence is not only relevant, but critical, so that the jury is not misled. Throughout the trial, Flint Hills has repeatedly highlighted the relevance of and opened the door to this evidence, asking dozens upon dozens of questions and making repeated statements about post-transaction revenues, profitability, and EBITDA that Flint Hills contends could have been generated by the unutilized capacity of the PCBU. Flint Hills opened this door from the very start, during its opening statement, and has pursued this line of questioning and testimony with every “deal

witness” who has testified, starting with Mr. Mahoney, then Mr. Wrenn, then during Mr. Schumaker’s video deposition, and then with Mr. Sanders.

As a result of Flint Hills’ overarching trial theme, which focuses upon revenues, profitability, EBITDA, and growth, the jury has been given the false and unfair impression that Flint Hills was unable to make any of the alleged \$140 million or more in incremental revenue because of the allegedly deficient production capacity of the Joliet Plant. In addition, given the evidence that Flint Hills has elicited, the only rational conclusion the jury can draw is that Flint Hills’ purchase of the PCBU has been a very bad and financially disappointing deal as a result of BP Amoco’s alleged contract breach and fraud. In fact, based upon the evidence Flint Hills has put into the record, combined with its ability thus far to preclude BP Amoco from putting the complete facts before the jury, the jury can only conclude that the PCBU was not worth what Flint Hills paid for it. Indeed, that is precisely what Flint Hills has suggested and asserted to the jury, most recently through the testimony of its proposed expert Jeffrey Baliban.

The facts, which are based upon Flint Hills’ own financials and thus cannot be disputed, are starkly to the contrary. Although the jury thus far has not been allowed to know this, Flint Hills has done very well financially under this deal, and it has exceeded various of the economic projections presented to its Board of Directors when seeking approval for the deal. In sum, having put the success of the deal at issue with its questions and witness testimony, while at the same time having successfully kept the jury from learning of its actual post-sale financial performance, Flint Hills has used the Court’s initial ruling on its Motion *In Limine* No. 7 as both a sword and a shield – as a sword, to lead the jury to conclude that this was a bad deal for Flint Hills, and as a shield, to prevent the jury from learning the true facts about how well it did. The most recent example of this came from Flint Hills’ proposed expert, Mr. Baliban, when he testified that Flint Hills would not have done the deal at the \$300 million price had it known the production capacities assumed by Mr. Baliban. (Ex. 1, 9/23/09 Tr. at 2287:1-10) And yet, the pre-sale Board documents show what Flint Hills hoped to earn, and the fact is that Flint Hills did earn more than its acceptable “downside” case from 2004 to 2008, and earned better than its “expected” case in 2007 – evidence precisely at odds and in rebuttal to what Baliban affirmatively testified. (Ex. 2, Trial Ex. 5234.001)<sup>1</sup>

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<sup>1</sup> Flint Hills examined several different scenarios for doing the deal. The three acceptable future financial scenarios it outlined were the “downside” case, the “expected” case, and the “upside” case. The “downside” case projected over \$1.4 billion in future EBITDA over the 20 years following the

Flint Hills' trial approach, and the fundamentally unfair advantage it has gained by repeatedly stressing *future* post-transaction financial profitability and EBITDA themes and by playing the victim in this fashion could not have been anticipated by the Court before trial. And yet, that is the manner in which Flint Hills has chosen to try its case. In this regard, we note that early on, the Court at side-bar expressly warned Flint Hills about its approach – but after that side-bar, the warning was not heeded, and Flint Hills put even more evidence into the record on its theme of post-transaction profitability and EBITDA performance. (Ex. 3, 9/11/09 Tr. at 566:1-569:10)

The relevance of the post-transaction financial performance also has been made clear in several other respects, as described further below. Accordingly, BP Amoco respectfully requests that this Court allow BP Amoco to present evidence to the jury regarding the post-transaction financial performance of the PCBU. It is the only fair and non-prejudicial result possible, given how Flint Hills has chosen to present its evidence and try its case to the jury.

#### **ARGUMENT**

Now that the trial is well underway, evidence of the post-transaction financial performance of the PCBU should no longer be excluded. **First**, the jury should be allowed to know whether, as Flint Hills has repeatedly suggested, the PCBU's financial and EBITDA performance has not been up to Flint Hills' expectations. **Second**, the fact that the Joliet assets as well as the rest of the PCBU generated significant EBITDA in the first four years of post-sale operation supports the conclusion that those assets were in "substantially good *operating* condition ... ." **Third**, the PCBU's actual financial results are relevant to rebutting the opinion of Flint Hills' damages experts Jeffrey Baliban and Sharon Moore Bettius. **Fourth**, evidence of the PCBU's post-transaction financial performance also is relevant to establish that Flint Hills is seeking to obtain a windfall by claiming the amount of diminution-in-value damages it seeks. Moreover, such evidence is relevant to show that Flint Hills seeks cost-of-repair damages that are disproportionate, not reasonable, and thus improper as a matter of law.

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closing – and the evidence is that Flint Hills in fact did and has done better than that case over the first four years. (Ex. 2, Trial Ex. 5234.001 at FHR-00425603)

**I. FLINT HILLS HAS OPENED THE DOOR TO THIS POST-TRANSACTION FINANCIAL PERFORMANCE EVIDENCE, BY PUTTING SQUARELY AT ISSUE THE PCBU'S POST-SALE FINANCIAL AND EBITDA PERFORMANCE.**

In its opening statement and through its repeated questioning of witnesses, Flint Hills again and again has put at issue and raised questions regarding the post-transaction financial and EBITDA performance of the PCBU and Joliet Plant. This started with Flint Hills' opening statement, when Flint Hills' counsel stated that "the sale was made" after BP Amoco told Flint Hills that it could make \$140 million "of additional revenue" after the closing by taking advantage of the unutilized capacity of the PCBU:

The sale was made, "If you can sell it -- you have this spare capacity, this unutilized capacity that you can convert into," according to BP into "\$140 million of additional revenue. If you can sell it, you can produce it."

(Ex. 4, 9/9/09 Tr. at 28:18-21; *see also id.* at 30:22-31:3)

From this initial door opening and continuing through Mr. Baliban last week, Flint Hills has expressly put at issue the questions of post-transaction revenue, EBITDA, profitability and other financial metrics again and again. The first witness Flint Hills presented to the jury was James Mahoney. Consistent with Flint Hills' opening, Flint Hills' counsel elicited testimony from Mr. Mahoney that "\$140 million ... was presented as the capacity that was available in the plant today that could be used if you could develop the market and that that capacity did not require capital." (*Id.* at 177:20-178:2; *see also id.* at 179:14-180:6)

In addition to revenues, Flint Hills specifically questioned Mr. Mahoney about, and he testified concerning, post-sale EBITDA:

Q: And in the third bullet point, it talks about opportunity for EBITDA growth. Is that a term that -- EBITDA, is that an earnings term?

A: Yes, sir.

Q: And it talks about the way that BP was describing a potential purchaser could grow the earnings for that business; is that right?

A: Yes, sir.

...

Q: What's your best recollection of the substance of Mr. Schumaker's discussion about the opportunity for earnings growth?

A: ... And that the plant had an underutilized capacity in all of the chemicals. And if you could continue down that patch of changing the marketing strategy and trying to move more product, the plant could produce it.

(*Id.* at 175:17-175:24, 176:24-177:11; *see also id.* at 177:20-178:11; 179:14-180:6; Ex. 5, 9/10/09 Tr. at 232:6-9)

After Mr. Mahoney, Flint Hills called Michael Wrenn, a BP Amoco witness, adversely. Flint Hills then continued its theme of suggesting that the PCBU's post-transaction financial performance was worse than expected. Flint Hills asked Mr. Wrenn about whether BP Amoco "communicated" to Flint Hills the \$140 million in incremental revenue:

Q: And one of the things that you communicated was that if the buyer is able to utilize this effective capacity -- the unutilized effect capacity at market prices -- at current selling prices -- they could -- it could result in approximately \$140 million of incremental annual revenue, correct?

(Ex. 3, 9/11/09 Tr. at 565:17-22; *see also id.* at 588:12-16; Ex. 6, 9/14/09 Tr. at 711:11-14, 712:1-3) Flint Hills also repeatedly asked Mr. Wrenn about whether BP Amoco was communicating that the PCBU could generate substantial post-transaction profits:

Q: BP was communicating -- and you understood -- that this unutilized capacity provided a significant opportunity to a potential buyer to make a substantial profit?

...

Q: But what you have to have, to turn that risk into profit, was this unused capacity, right?

(Ex. 3, 9/11/09 Tr. at 564:12-14, 565:6-7)

Upon completion of Mr. Wrenn's testimony, Flint Hills decided to play deposition testimony from Mr. Schumaker to the jury. Once again, this testimony was replete with discussion of post-transaction revenues, EBITDA, and other financial metrics. Specifically, Flint Hills' counsel repeatedly asked Mr. Schumaker about, and he testified regarding, potential post-sale incremental revenues. (Ex. 7, Schumaker Dep. at 72:13-73:4, 75:20-25, 86:21-87:12, 88:10-17, 124:10-125:5, 127:9-128:18, 213:2-12) Likewise, Flint Hills presented deposition testimony from Mr. Schumaker concerning the projected post-transaction profitability of the PCBU and the sources of that profitability: "Q. And the profitability then being driven by a increase in sales volume. A. Predominantly." (*Id.* at 210:19-21) Flint Hills also presented deposition testimony from Mr. Schumaker where Flint Hills' counsel asked him about topics such as "Projected Financial Results" and "EBITDA growth." (*Id.* at 208:6-17) Thus, the first three witnesses presented by Flint Hills -- and the first three witnesses the jury heard -- all presented extensive testimony regarding post-sale financial performance.

Flint Hills had intended to present the testimony of Stephen Sanders next, but took him out of order and presented his testimony a week later. Mr. Sanders' testimony served as a forceful reminder of Flint Hills' recurrent theme that the PCBU's post-sale financial performance was not good and did not live up to Flint Hills' expectations. When Stephen Sanders testified, Flint Hills had Mr. Sanders quote language from the Confidential Informational Memorandum ("CIM") about the \$140 million in incremental revenue and provide exhaustive testimony on how he believed that number was determined. (Ex. 8, 9/22/09 Tr. at 1883:11-18, 1892:21-1894:14) Mr. Sanders even used a flip-chart and presented detailed calculations about the alleged future revenues of the PCBU. (*Id.* at 1956:5-1966:19) The overriding purpose of this testimony was to tell the jury that the PCBU could not achieve those revenues after the transaction. Sanders also testified about Flint Hills' belief that it would be able to increase EBITDA after buying the PCBU (*id.* at 1888:11-1889:2, 1889:20-1890:5), again leading the jury to conclude that its beliefs and expectations have been disappointed. Mr. Sanders further testified about the lengthy list of projected post-transaction financial metrics contained in Flint Hills' financial modeling, such as EBITDA, internal rate of return, return on capital employed, and return on capital consumed. (*Id.* at 1927:3-1928:10)

Finally, Mr. Sanders continually asserted in his testimony that there were post-transaction production capacity constraints, which cost Flint Hills the deal with Eastman. (*Id.* at 1900:1-11; Ex. 1, 9/23/09 Tr. at 2122:23-2124:2) The Eastman transaction relates entirely to post-transaction financial performance. (Ex. 8, 9/22/09 Tr. at 1898:19-1900:11) Flint Hills chose to put that post-transaction event – the alleged Eastman deal failure – at issue, and that alone justifies allowing the jury to hear the evidence of how Flint Hills actually has done financially after the sale.

The questions and testimony cited above are far from random, unintentional or unimportant. Because there are far too many examples to include in the body of this brief, portions of the transcript containing the myriad questions posed by Flint Hills' counsel and the statements made by Flint Hills' witnesses concerning the PCBU's post-sale financial performance are included at Exhibit 9.

One final piece of evidence completes the picture of Flint Hills' approach to this case – the testimony from Flint Hills' witness Jeffrey Baliban. Mr. Baliban testified extensively about the alleged Eastman deal, which Flint Hills contends was to be an entirely post-transaction event.

Moreover, Mr. Baliban testified that had Flint Hills known about the allegedly “true” capacities assumed by him, then Flint Hills would never have done this deal at the \$300 million PCBU price. (Ex. 1, 9/23/09 Tr. at 2287:1-10) This testimony, standing alone, justifies admission of the post-transaction financial performance. Why? Because evidence that Flint Hills met or exceeded various of its pre-transaction financial expectations directly rebuts Baliban’s assertion. Baliban alone – just last week – swung the door wide open with the testimony Flint Hills’ counsel elicited from him.

By asking questions and making statements about the PCBU’s post-transaction financial performance, such as its profitability, earnings, EBITDA, and future revenues and revenue opportunities, and by expressly stating that Flint Hills would not have done the deal at the price it actually paid had it known the “truth,” Flint Hills has put at issue the PCBU’s actual post-transaction financial performance. Flint Hills has chosen to approach the trial of this case by making its ability to earn future profits and EBITDA post-sale – whether through the Eastman deal or otherwise – the central issue in this case. As a result, the jury should be allowed to hear the true facts about whether Flint Hills – post-transaction – was able to realize EBITDA and profits equal to or greater than what it told its Board of Directors about the basis for doing the deal in the first place.

It is axiomatic that “when a party opens the door to evidence that would be otherwise inadmissible, that party cannot complain on appeal about the admission of that evidence.” *Griffin v. Foley*, 542 F.3d 209, 219 (7th Cir. 2008); *see also S.E.C. v. Koenig*, 557 F.3d 736, 740-41 (7th Cir. 2009) (affirming district court’s admission of evidence originally excluded *in limine* where party opposing such evidence put the evidence at issue; court noted that party must “accept the consequence” of opening the door); *Jenkins v. Chrysler Motors Corp.*, 316 F.3d 663, 665-66 (7th Cir. 2002) (noting that district court did not its abuse discretion in admitting evidence previously excluded *in limine* where testimony at trial opened the door to the evidence); *Hasham v. Cal. State Bd. of Equalization*, 200 F.3d 1035, 1050 (7th Cir. 2000) (upholding trial court’s admission of testimony, the door to which was opened at trial, and noting that “[a]bsent manifest abuse, a district court has and must have wide discretion over the...administration of a trial.”) (citing *United States v. Murvine*, 743 F.2d 511, 514 (7th Cir. 1984)); *United States v. Shields*, 999 F.2d 1090, 1100 (7th Cir. 1993); *Mayoza, M.D. v Heinold Commodities, Inc.*, 871 F.2d 672, 679-80 (7th Cir. 1989).



Flint Hills' questions already have misled the jury into thinking that the PCBU could not achieve any incremental revenue, and certainly not in the magnitude Flint Hills and its Board of Directors considered at the time. The plain effect of the statements, questions and testimony from Flint Hills is to convey to the jury that the PCBU's financial performance did not live up to the claims Flint Hills alleges that BP Amoco made. In other words, Flint Hills is giving the jury a false impression that, contrary to BP Amoco's "sales pitch," the PCBU did not generate additional revenues post-transaction, did not fulfill its "opportunity for EBITDA growth" or "earnings growth," and that Flint Hills did not make a "substantial profit" as a result of the unutilized capacity. Moreover, Flint Hills has now had its witnesses explicitly complain about the future, post-transaction Eastman deal, as well as testify that Flint Hills would not have purchased the PCBU but for the alleged underutilized capacities, which would have generated additional EBITDA and profits. As Flint Hills well knows, however, and contrary to its witnesses' testimony and the picture it has painted for the jury, the evidence in Flint Hills' own financial reports establishes that the PCBU generated \$163 million worth of EBITDA over the four years after closing, with the Joliet Plant alone contributing \$62 million. (Dkt. 654 Ex. 2 / Trial Ex. 5493 at Tabs 2, 4, 6 & 8; Dkt. 654 Ex. 4 / Trial Ex. 5508.007 at Tab 6) Moreover, as described in more detail below, the PCBU has seen significant increases in revenue after the sale. (Ex. 12, Trial Ex. 8342)

To respond and rebut Flint Hills' testimony, and to prevent the jury from receiving a false and misleading presentation of the facts, the evidence of the PCBU's actual post-transaction financial performance should be admitted. This is only fair, because Flint Hills (i) has put future profitability and EBITDA at issue, (ii) has put the post-transaction Eastman deal at issue, (iii) has put the \$140 million in incremental revenues at issue, and (iv) has put at issue the question of whether Flint Hills' and Koch Industries' Boards of Directors even would have approved the deal at the price paid. Indeed, Flint Hills has put these issues front and center for the jury from the very start of this trial.

The Seventh Circuit and other courts have held that it is unfairly prejudicial "to leave the jury with the wrong impression" by not allowing previously excluded evidence once a party has opened the door at trial. *See Lawson v. Trowbridge*, 153 F.3d 368, 379-80 (7th Cir. 1998) (reversing district court for not allowing previously-inadmissible evidence where party "opened the door" with evidence of "financial circumstance": "the district court should not have allowed

[the parties] to leave the jury with the wrong impression.”); *Wood v. Morbark Industries, Inc.*, 70 F.3d 1201, 1208 (11th Cir. 1995) (in reversing district court, Eleventh Circuit noted that a trial court’s refusal to admit evidence, the door to which has been opened at trial, “substantially affected” the rights of the parties); *see also Bohannon v. Pegelow*, 652 F.2d 729, 734 (7th Cir. 1981) (affirming admission of evidence, the exclusion of which “would have resulted in an incomplete presentation of the facts to the jury”); *United States v. Bennett*, 460 F.2d 872, 877 (D.C. Cir. 1972) (reversing and remanding for new trial on the basis of the presentation of misleading evidence to the jury); *see also United States v. Moussaoui*, 2003 WL 21277161, at \*2 (E.D. Va. May 15, 2003); *United States v. Merritt*, 2002 WL 1821828, at \*2 (S.D. Ind. June 27, 2002).

**II. THE POST-TRANSACTION FINANCIAL EVIDENCE IS RELEVANT TO DEMONSTRATING THAT THE PLANT’S ASSETS WERE IN THE CAPACITIES AS REPRESENTED, AS WELL AS IN SUBSTANTIALLY GOOD OPERATING CONDITION, ETC.**

Flint Hills alleges that the assets at issue were (i) not at the represented capacities, and (ii) not “in substantially good *operating* condition and repair for their age (taking account of their nature, normal wear and tear and continued repair and replacement in accordance with Seller’s past practice).” The only reason the Joliet Plant’s equipment operates is to make product, which is then sold to generate revenues and earnings. Thus, one way to evaluate whether the assets were in the capacities as represented as well as in “substantially good operating condition” is to look at whether the equipment could operate in order to generate positive operating cash flow and EBITDA.

The PCBU’s post-transaction financial evidence makes it more probable that the assets at issue were in substantially good *operating* condition; cash flows generated by the PCBU also respond to Baliban’s contrary assertions and opinions. *See* Fed. R. Evid. 401. Flint Hills was able to operate those assets and the PCBU’s other assets to generate \$163 million in EBITDA in the first four years of post-sale operation. (Dkt. 654 Ex. 2 / Trial Ex. 5493 at Tabs 2, 4, 6 & 8; Dkt. 654 Ex. 4 / Trial Ex. 5508.007 at Tab 6) Indeed, in 2007 alone the PCBU generated nearly \$107 million in EBITDA for Flint Hills, demonstrating that the assets of the business were fully capable of generating large cash flows as well as earnings when sufficient market demand was present. (Dkt. 654 Ex. 2 / Trial Ex. 5493 at Tab 8)

BP Amoco's damages expert, Craig Elson, relies in part on the post-transaction financial performance to support his opinions.<sup>2</sup> As Mr. Elson explains in his expert report, because "business[es] acquire and deploy assets in a productive capacity to generate cash ... to the extent the allegedly misrepresented facility or assets fulfilled their intended functional utility, no investment or economic injury follow from such circumstances." (Ex. 13, Elson Rpt. at 15 & n. 36) Elson specifically relies on the actual post-transaction financial performance evidence showing that through July 2008 the PCBU generated EBITDA in excess of \$163 million (and the Joliet assets generated in excess of \$62 million) and has had positive cash flow in each year except 2005. (*Id.* at 14-15) Based on this information, Elson concluded that Flint Hills has not been economically injured except to the extent that Flint Hills could prove that it had incurred or would incur remediation costs to achieve those production levels and EBITDA. (*Id.* at 14-15 & nn. 36, 38). But, Flint Hills has no evidence of such costs. Mr. Elson's opinion thus confirms that the post-sale financial performance evidence is relevant to determining the operating capacities and condition of the Joliet Plant's assets. Moreover, in light of Mr. Baliban's testimony, as well as Mr. Sanders' testimony concerning Eastman – which was a future, post-transaction potential deal – the post-sale financial performance is relevant and squarely addresses points and assertions Flint Hills has put at issue.

### **III. ACTUAL POST-TRANSACTION FINANCIAL EVIDENCE ALSO IS RELEVANT TO REBUT MS. BETTIUS' OPINION AND PROJECTIONS OF THE PCBU'S POST-TRANSACTION FINANCIAL PERFORMANCE.**

In its Order granting without prejudice Flint Hills' motion *in limine* in part, the Court stated that BP Amoco had not provided sufficient information as to how the post-transaction financial evidence rebuts the valuation opinions of Flint Hills' expert Sharon Bettius' opinions. (Dkt. 746 at 2) BP Amoco, therefore, provides further explanation of the various reasons why such evidence is relevant to impeach Bettius. In short, actual post-transaction results can be used to rebut the reasonableness of and bases for Bettius' opinion – which is predicated upon her assumptions of what the PCBU's financial performance would be post-transaction.

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<sup>2</sup> Consistent with the Court's prior *Daubert* ruling, Mr. Elson will not be expressing any engineering judgments regarding the functioning of the equipment. Instead, he will address only the economic results that the equipment has been used to produce – opinions that are *not* based on any engineering expertise, but instead are based on his assessment of the economic evidence (*i.e.*, financial results) in light of his expertise and experience in damages, valuation, finance and economic matters.

Ms. Bettius' opinion is built on a number of different assertions and conclusions that flow from certain assumptions, as explained in her reports and at deposition. Bettius' projections are based on Lehman Brothers' financial projections of the PCBU's post-sale performance, to which she then applies various modifications such as discounts, decreasing the amount of the PCBU's gross post-sale profits, and increasing the PCBU's post-sale capital expenditures. (Ex. 14, Bettius Rpt. at 15-17, 24, 29-31; Ex. 15, Bettius Dep. 208:3-14, 263:19-264:20, 269:5-8) These projections all assume and concern what the PCBU's financial performance will be *after* the transaction. For example, Bettius makes projections of what the PCBU's total revenues, gross profit, operating expenses, EBITDA, and various other financial metrics will be from 2004 through 2013. (Ex. 14, Bettius Rpt. at 50-51, Exs. K & L) Based on these projections, Bettius calculates a value for the PCBU in its allegedly as-sold condition.

When Ms. Bettius testifies at trial, the key questions will include whether her assumptions and conclusions are reasonable, whether they are credible, and whether they can be tested. In other words, her assumptions and conclusions are a "fact that is of consequence to the determination of the action." Fed. R. Evid. 401. Courts have recognized that actual results properly can be used to assess the reliability of projections. *See, e.g., Nilssen v. Motorola, Inc.*, 1998 WL 513090, at \*14 n. 21 (N.D. Ill. Aug. 14, 1998) (rejecting criticisms of "Motorola's expert for having used what Nilssen's counsel calls 'hindsight reconstruction'-the use of actual experience, rather than projections that proved to have been unsound, to calculate damages based on a reasonable royalty rate" in trademark misappropriation case); *Advent Systems Ltd. v. Unisys Corp.*, 925 F.2d 670, 682 (3d Cir. 1991) (expressing "serious reservations about the validity of expert testimony based on prior predictions of sales for a given period when actual performance data for that same time span are available" and remanding for new trial, inter alia, as to lost profit damages); *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 738-39 (3d Cir. 1991) (similar, remanding for new trial as to net lost profits damages). *Cf. Pa., Dep't of Env'tl. Prot. v. Allegheny Energy, Inc.*, 2008 WL 4960100, at \*13, 15 (W.D. Pa. Sept. 2, 2008) (finding a disputed issue of fact preventing award of summary judgment where one expert "examined the reliability of [another expert]'s method for projecting emissions increases by comparing his projections at several Allegheny projects to their actual emissions outcomes").

Put simply: Ms. Bettius makes certain assumptions and assertions about post-transaction financial performance, but fails to consider or test the validity of her assumptions by examining

the actual post-financial performance. BP Amoco should be entitled to test the reasonableness and validity of her assumptions by challenging them with the actual post-sale transaction performance.<sup>3</sup> This is particularly true given how Flint Hills has tried the case thus far – where it has put at issue post-sale financial performance, while at the same time excluding BP Amoco from presenting the evidence to the jury which tells the complete picture of the facts.

Moreover, while the PSA bars the recovery of lost profits, it does not bar the use of post-transaction financial evidence generally. Nothing in the PSA prohibits a party from critiquing claims for loss of value or challenging the reasonableness of claimed repair costs using actual post-transaction financial evidence. Thus, actual post-transaction financial performance should be admissible to show that the assumptions used in a diminution-in-value analysis were unreasonable. *See Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 1991 WL 1839, at \*3 (N.D. Ill. Jan. 4, 1991) (“Medcom Holding attempts to circumscribe all damages evidence inconsistent with its benefit of the bargain theory and its expert’s opinions. Medcom’s value at the time of purchase is a central factual issue in the compensatory damages retrial. The motion is denied.”).

The post-transaction financial evidence, and particularly the PCBU’s actual earnings, rebut Ms. Bettius’ assumptions and conclusions. As BP Amoco has explained, Flint Hills’ Financial and Operating Reporting Packages show that the PCBU in Flint Hills’ hands realized \$163 million in EBITDA through July 2008. (Dkt. 750 at 3 & n.1; *see* Dkt. 654 Ex. 2 / Trial Ex. 5493 at Tabs 2, 4, 6 & 8; Dkt. 654 Ex. 4 / Trial Ex. 5508.007 at Tab 6) By contrast, over the same period Ms. Bettius projects an EBITDA of only \$139.0 million.<sup>4</sup> (Ex. 14, Bettius Rpt. at

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<sup>3</sup> A good example of this is the issue of the Eastman deal. Eastman is an entirely post-transaction potential revenue stream for Flint Hills. Baliban himself looked at post-sale evidence, such as the December 2004 presentation for senior Flint Hills’ management, regarding Eastman. (Ex. 16, Baliban Rpt. at 29-30 & nn. 122-23). And as a result, BP Amoco at trial – without objection by Flint Hills – tested the reasonableness of Flint Hills’ and Baliban’s assertions and assumptions regarding Eastman by using documents from December 2004 and May 2005 to show what Eastman really intended and did not intend, as well as the reasons for why the alleged potential Eastman deal did not go forward. (Ex. 1, 9/23/09 Tr. at 2321:21-2323:14, 2324:23-2328:4) Much of the evidence regarding Eastman is post-transaction. Flint Hills should not be allowed to use and introduce to the jury the post-transaction evidence and testimony it likes, but exclude that which it does not. Yet, that is precisely what has taken place in this trial thus far.

<sup>4</sup> This number is calculated by taking 7/12 of Ms. Bettius’ projected 2004 EBITDA to account for Flint Hills operating the PCBU from June to December of that year; the full year projected EBITDA for 2005, 2006, and 2007; and then 7/12 of the projected EBITDA for 2008. (Ex. 14, Bettius Rpt. at 50-51, Exs. K & L)

50-51, Exs. K & L) Thus, the PCBU's actual earnings were more than 17% higher than what Ms. Bettius projected and upon which she based her opinion. The post-transaction financial evidence makes it "more probable" that Ms. Bettius' projections and assumptions are unreasonable and incorrect "than it would be without the evidence." Fed. R. Evid. 401. At a minimum, the jury should be allowed to hear evidence which provides it with a basis for questioning or rejecting Ms. Bettius' assumptions and opinions. *See also Trident Inv. Mgmt., Inc. v. Amoco Oil Co.*, 194 F.3d 772, 780 (7th Cir. 1999) (holding that court properly admitted post-transaction evidence to determine value of property, including evidence of the sale price of the property three years after the transaction); *Johnson v. United States*, 2008 WL 4722080, at \*3 (N.D. Ill. Oct. 16, 2008) ("A party who disagrees with the conclusion drawn by an expert may present its own evidence to rebut it.") (citing *Vollmert v. Wis. Dep't of Transp.*, 197 F.3d 293, 300-01 (7th Cir.1999)). Moreover, if Ms. Bettius had used more reasonable assumptions and projections, her calculations would have resulted in a higher "as-sold" value for the PCBU, which in turn would result in lower diminution-in-value damages.

Finally, the post-transaction financial performance evidence also is relevant to comparing Ms. Bettius' opinion with that of BP Amoco's valuation expert, Brian Bergmark. Mr. Bergmark explains that Ms. Bettius erred by basing her analysis on a stale set of financial projections prepared in January 2003 by Lehman Brothers, instead of using more up-to-date projections that Lehman Brothers prepared in May 2003. (Ex. 17, Bergmark Rpt. at 10-11) Ms. Bettius' error leads to her projections being understated, which has the effect of decreasing the value of the PCBU in its as-sold condition and thus increasing her diminution-in-value damages. (*Id.* at 11) Similarly, Mr. Bergmark points out that Ms. Bettius' analysis overstates the expected capital expenditures for the PCBU. (*Id.* at 11-12) These overstated capital expenditures also have the effect of decreasing the value of the PCBU and thus increasing the diminution-in-value damages Ms. Bettius calculates.

The PCBU's actual post-transaction financial performance reinforces and supports Mr. Bergmark's rebuttal opinions, while showing serious errors with Ms. Bettius' approach and conclusions. For example, the PCBU's actual revenues have been significantly higher than Ms. Bettius' assumptions and closer to what Mr. Bergmark forecast:

**Revenues – Projections vs. Actual**

	2004	2005	2006	2007	2008
Bettius	\$ 266,700,000	\$ 274,400,000	\$ 282,500,000	\$ 281,200,000	\$ 287,600,000
Bergmark	\$ 302,820,000	\$ 311,904,600	\$ 321,261,738	\$ 330,899,590	\$ 340,826,578
Actual <sup>5</sup>	\$ 305,348,571	\$ 327,436,000	\$ 389,049,000	\$ 555,754,000	\$ 594,371,000

(Ex. 12, Trial Ex. 8342) Why should the jury not be allowed to know that Ms. Bettius makes assumptions which in fact are incorrect and off the true facts by error ranges of between 12.65% (2004) to 51.61% (2008)? That is relevant, probative evidence which goes to the heart of whether Ms. Bettius has made valid assumptions. And this is particularly true given the focus upon the \$140 million in incremental revenues which Flint Hills has made so much of during this trial. In fact, total *actual* post-transaction revenues have increased since 2004 by over \$289 million. It seems more than fair and relevant for the jury to know this information, especially given the repeated assertion by Flint Hills that the estimate of \$140 million in future incremental revenues made in the CIM and Management Presentation was baseless. Because Flint Hills has put the \$140 million in post-transaction future revenues at issue, BP Amoco should be allowed to tell the jury what the actual revenues, and actual revenue increases, have been. It is only fair – and, after all, it is the facts based on Flint Hills’ own financials.

Similarly, the PCBU’s capital expenditures from 2004 through 2007 have been less than what Ms. Bettius forecast, and from 2004 to 2006 as well as 2008 were closer to Mr. Bergmark’s projections than Ms. Bettius’ forecasts:

**Capital Expenditures– Projections vs. Actual**

	2004	2005	2006	2007	2008
Bettius	\$ 20,000,000	\$ 20,000,000	\$ 15,000,000	\$ 15,000,000	\$ 15,000,000
Bergmark	\$ 14,500,000	\$ 14,740,000	\$ 14,987,200	\$ 15,241,816	\$ 15,504,070
Actual	\$ 7,144,500	\$ 10,006,000	\$ 11,776,000	\$ 11,314,000	\$ 18,486,000

<sup>5</sup> Figures for 2004 and 2008 in this revenue chart and the following capital expenditures chart are annualized.

(Ex. 18, Trial Ex. 8346) These actual post-transaction financial results establish that Mr. Bergmark used more reasonable and reliable assumptions than Ms. Bettius, and thus Mr. Bergmark's ultimate conclusion concerning the PCBU's value in its as-sold condition is more reasonable as well. The jury is going to have to decide these issues, including which expert has the more fact-based, reliable, and reasonable assumptions and approach. The jury only can decide this with the benefit of all the evidence – including the post-transaction financial performance evidence.

**IV. EXCLUDING THE POST-TRANSACTION FINANCIAL EVIDENCE WOULD PREJUDICE BP AMOCO, AND ALSO WOULD RESULT IN A WINDFALL TO FLINT HILLS.**

Flint Hills has put at issue the actual financial performance, post-sale, of the PCBU. It has done so through its fact witness testimony; it did so through its claimed expert Mr. Baliban; and it did so through its reliance upon the Eastman deal. It is only fair that the jury hear all the evidence on these issues—not just the one-sided presentation Flint Hills has offered up thus far. Moreover, as this Court has previously held, under “Illinois law, damages for breach of contract should place the injured party in the position it would have been in had the contract not been breached. Contract damages should neither place the injured party in a better position nor result in a windfall recovery.” (Dkt. 437 at 18); *see also Platinum Tech., Inc. v. Fed. Ins. Co.*, 282 F.3d 927, 932 (7th Cir. 2002); *First Nat'l Bank of Elgin v. Dusold*, 180 Ill. App. 3d 714, 719, 536 N.E. 2d 100, 103 (Ill. App. Ct. 1989); *Kalal v. Goldblatt Bros., Inc.*, 53 Ill. App. 3d 109, 112, 368 N.E. 2d 671, 673-74 (Ill. App. Ct. 1977). The Court's order on Flint Hills' Motion *In Limine* No. 7 indicated that BP Amoco had not sufficiently explained how the post-transaction financial evidence was relevant to a “windfall” under the proper damages measures. (Dkt. 746 at 2 (“BP has not explained how such evidence of the overall performance is relevant to the cost to repair or diminution-in-value damages at issue.”))

To clarify, BP Amoco's arguments do not refer to a windfall in terms of lost profits, but rather a windfall and betterment under the diminution-in-value and cost-of-repair measures of damages. The evidence of actual post-transaction financial performance goes to the value of the PCBU received by Flint Hills. In this case, Flint Hills claims diminution-in-value damages of \$100 million through Bettius. That amount depends upon and is a function of Flint Hills paying \$300 million for the PCBU and Bettius' opinion that the actual value of the PCBU was only \$200 million. But as explained above, the actual post-transaction financial evidence



demonstrates that Ms. Bettius' projections of post-transaction financial performance, leading to a value of \$200 million, are too low. Instead, the evidence shows that the value of the PCBU actually received by Flint Hills was much higher than \$200 million. Because the PCBU was worth more than \$200 million in value, if Flint Hills were to receive the \$100 million in diminution-in-value damages it seeks, it would have received a total value well in excess of the \$300 million purchase price. That excess is a windfall that is prohibited by Illinois law. *Platinum*, 282 F.3d at 932; *Dusold*, 180 Ill. App. 3d at 719, 536 N.E.2d at 103; *Kalal*, 53 Ill. App. 3d at 112, 368 N.E.2d at 673-74.

To persuade the jury not to award such a windfall, BP Amoco should be allowed to introduce evidence that the PCBU had a value of greater than \$200 million. This includes evidence of the PCBU's actual post-transaction financial performance showing that the PCBU performed significantly better than forecast by Ms. Bettius. Moreover, that evidence corroborates the opinions of BP Amoco's rebuttal valuation expert, Mr. Bergmark, that the fair market value of the business was more than what Flint Hills paid for the business.<sup>6</sup>

Similarly, BP Amoco intends to argue that the cost-of-repair damages Flint Hills seeks are disproportionate to the benefit to Flint Hills and the results obtained. (Dkt. 247 at 4-5, 8-10; Dkt. 437 at 10) Flint Hills currently seeks approximately \$104 million under this cost-of-repair measure. As BP Amoco has previously argued, and the Court has held, under Illinois law this amount must be compared to the benefit received and results obtained to determine if the cost of repairs is unreasonably disproportionate. (Dkt. 437 at 9-11)

The amount of the PCBU's loss in value is based on the purchase price of \$300 million minus the value of the PCBU in its as-sold condition. As explained above, however, the post-transaction financial performance evidence supports BP Amoco's position that the PCBU as-sold was worth far greater than \$200 million. (*See also* Ex. 17, Bergmark Rpt. at 13-14 (calculating a fair market value of the PCBU as of May 28, 2004 of \$310,000,000)) Because the value of the PCBU in its as-sold condition is much higher than \$200 million, the loss in value – if it exists – is not what Ms. Bettius claims. Therefore, because the actual post-transaction financial performance of the PCBU establishes that the loss in value opinion of Ms. Bettius is incorrect, this evidence makes it more probable that Flint Hills' claimed \$104 million in cost-of-repair damages is either disproportionate or would result in a betterment.

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<sup>6</sup> Notably, Flint Hills did not file any *Daubert* motions challenging Mr. Bergmark's valuation opinions.

Finally, this is a breach of contract case. Flint Hills should not be entitled to recover more in damages than the benefit of its bargain. In this regard, Flint Hills projected the benefit of that bargain to its Boards of Directors and Koch Industries' Board of Directors in February 2004. (Ex. 2, Trial Ex. 5234.001) Baliban testified that the Boards of Flint Hills and Koch Industries would not have approved the deal had the financial projections made to them been untrue. (Ex. 1, 9/23/09 Tr. at 2287:1-10) Thus, BP Amoco should be entitled to present to the jury the evidence of post-transaction financial performance which shows that Flint Hills not only got the benefit of its bargain as it outlined for the Boards of Directors, but that it did better than its downside case and better than its expected case in 2007. Recovering damages under these circumstances would, by definition, result in a windfall to Flint Hills and an improper recovery from BP Amoco. *See Roboserve, Inc. v. Kato Kagaku Co.*, 121 F.3d 1027, 1032-33 (7th Cir. 1997) (holding in a case involving breach of contract and wrongful termination of an agreement that plaintiff could not recover damages above the value for terminating the agreement, as that would result in a windfall); *Mulligan v. QVC, Inc.*, 382 Ill. App. 3d 620, 629, 888 N.E.2d 1190, 1198-99 (Ill. App. Ct. 2008) (holding that where a plaintiff has already received the full value of what she purchased, any damages would result in a windfall). *Cf. Hamlin Inc. v. Hartford Accident & Indem. Co.*, 86 F.3d 93, 95 (7th Cir. 1996) (holding that requiring insurers to pay the entire value of a judgment, rather than the incremental harm to an insured by the insurer's alleged failure to defend, would result in a windfall to the plaintiff).

**V. FLINT HILLS' RATIONALE FOR ITS CONTINUAL EMPHASIS ON EVIDENCE OF FUTURE REVENUES AND EBITDA CONFIRMS THE ADMISSIBILITY OF THE EVIDENCE OF THE PCBU'S ACTUAL POST-SALE FINANCIAL PERFORMANCE.**

During trial, Flint Hills has suggested that the reason it is focusing upon the \$140 million in future revenues is because of its belief that the \$140 million can be made only with simultaneous production of all three production units at the AMDSP numbers. (Ex. 3, 9/11/09 Tr. at 566:21-567:16) Setting aside Flint Hills' incorrect assumption that the only way to calculate the \$140 million is by simultaneous maximum production, its argument misses the mark.

First, even if Flint Hills were correct about its reason for introducing the \$140 million and related financial information evidence, the use of that evidence has material consequences beyond the purpose for which Flint Hills claims. The consequences are that Flint Hills has put at

issue during this trial the actual profitability and financial post-sale performance of the PCBU. Any fair reading of the transcript confirms this.

Second, Flint Hills has gone overboard. It did not limit its questions or evidentiary submissions to only those necessary for the limited “simultaneous production” purpose Flint Hills claims. It went far, far beyond that. In fact, if one reviews the testimony concerning the \$140 million in revenues, future EBITDA, potential profitability, etcetera, there are very few references to the simultaneous production issue, but many references to future profits, revenues, and cash flows. (Ex. 9) Flint Hills made a choice – it could have with one witness and one witness alone, such as Mr. Sanders, focused narrowly and surgically upon its stated purpose – that the \$140 million only can be achieved by simultaneous maximum production. That would have consisted of 5-7 questions, totaling two pages of testimony at best. Instead, Flint Hills went overboard, and its stated purpose for use of this \$140 million revenue evidence became, at best, an afterthought.

Last, Flint Hills not only went overboard with respect to the \$140 million number, it expressly put at issue other post-transaction information when it came to future EBITDA, Eastman, and whether the Boards of Flint Hills and Koch Industries would have authorized the purchase at all. Again, that was Flint Hills’ choice and trial strategy. But its choice has consequences – and the principal consequence here is that the evidence of the PCBU’s actual post-sale financial performance is not only relevant, but at the heart of Flint Hills’ case, and central to the jury’s understanding and deliberations in this case. Flint Hills, by its approach at trial, has made this so.

As this Court has observed before, evidence should not be excluded if there is any basis for its admissibility. (Dkt. 730 at 1); *see also Hawthorne Partners v. AT & T Techs., Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993). Here, there are multiple bases for the admissibility of the PCBU’s post-transaction financial performance, including the use of such evidence: (i) to respond to and rebut Flint Hills’ trial approach; (ii) to prevent the jury from being misled about basic facts; (iii) to respond to and rebut Flint Hills’ experts’ opinions about damages; (iv) to prevent a windfall; (v) to show that Flint Hills’ experts’ opinions are based upon incorrect and unreasonable assumptions; (vi) to show that the incremental revenues that have been generated since acquisition have exceeded \$289 million – validating the projections made in the CIM and in the Management Presentation; and (vii) to show that, in fact Flint Hills did better than its



**CERTIFICATE OF SERVICE**

I hereby certify that September 27, 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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