

Motion Ex. 35

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

BP AMOCO CHEMICAL COMPANY,)	
)	
Plaintiff/Counter-Defendant,)	
)	Consolidated Case No. 05 C 5661
v.)	
)	Judge Amy J. St. Eve
FLINT HILLS RESOURCES LLC,)	
)	
Defendant/Counter-Plaintiff.)	
<hr style="border: 0.5px solid black;"/>		
FLINT HILLS RESOURCES LLC,)	
)	
Third-Party Plaintiff,)	
)	
v.)	
)	
BP CORPORATION NORTH AMERICA INC.,)	
)	
Third-Party Defendant.)	
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BP AMOCO’S DESIGNATIONS FROM THE RULE 30(B)(6) DEPOSITION OF FLINT HILLS’ GLENN PERSONEY ON DUE DILIGENCE

Attached as Exhibit 1 are BP Amoco’s designations from the Rule 30(b)(6) deposition of Glenn Personey, who was Flint Hills’ corporate representative on the subject of due diligence. Exhibit 1 includes (i) BP Amoco’s designations, Flint Hills’ objections, and BP Amoco’s responses, and (ii) Flint Hills’ counter-designations and BP Amoco’s general objection to them.

For the reasons stated in Exhibit 1, BP Amoco’s Rule 30(b)(6) designation of 5:22-5:25, 6:25-7:7, 9:17-10:1, 10:15-11:3, and 157:4-157:19 should be permitted, and Flint Hills should not be permitted to make the counter-designations it has specified.

Dated: October 25, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that October 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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Exhibit 1

Exhibit 1: Glenn Personey Rule 30(b)(6) Deposition

The parties have by agreement submitted to the Court the following two issues which may moot all remaining disagreements: (1) Flint Hills' objection to BP Amoco's designation 157:4-157:19, and (2) BP Amoco's objection that Flint Hills' conditional counterdesignations are not appropriate for counterdesignations to 157:4-157:19. After the Court's rulings, BP Amoco reserves the right to make specific objections to Flint Hills' counterdesignations. Flint Hills reserves the right to make specific objections to BP Amoco's additional designations.

Designation	Objection and Response
BP Amoco: 5:22-5:25	Flint Hills: No Objection
BP Amoco: 6:25-7:7	Flint Hills: No Objection
BP Amoco: 9:17-10:1, 10:15-11:3	Flint Hills: No Objection;
<p data-bbox="354 835 688 867">BP Amoco: 157:4-157:19</p> <p data-bbox="266 940 764 1591">Relevance: This testimony is offered to show that, at the time of the sale, Flint Hills concluded that the equipment now at issue was in compliance with the PSA, and that the age, wear, and tear of that equipment was within what the PSA allowed. This testimony also clarifies for the jury the purpose for which the unavailable due diligence team deposition designations (Clem, Guillemette, Proops, Kotis, and Geisenhoff) are being offered (i.e., not to show knowledge of defects, but instead to show that Flint Hills did not view the age, wear, and tear of the equipment now at issue as being out of compliance with the PSA.)</p> <p data-bbox="266 1665 764 1875">Flint Hills has waived its objection: As the Court has noted, the cited 30(b)(6) testimony was not phrased as well as it could have been. This, however, was a problem with the form of the question. Flint Hills did</p>	<p data-bbox="802 842 1344 957">Flint Hills: Objection: Relevance, Unfair Prejudice (403), Misleading, Confusing.</p> <p data-bbox="802 978 1344 1703">This Court ruled at the pretrial conference on September 2, 2009 (pp 63 – 64): “I am not going to let you use this one during your opening. Whether or not you can use it during trial, I’ll see after I’ve heard what Flint Hills has put in as its case and if they’ve opened the door. What concerns me here, although I note there was no objection at the deposition, but what concerns me here is the first question: At the time of the sale, did Flint Hills believe the condition of assets representation was accurate? Again, that’s irrelevant, and that’s the - - that is the issue that we don’t want the jury to consider and that they can’t consider. I understand why you put it in there to put it in context, but I’m concerned about the misleading nature of it. So you may not use that one during your opening.”</p> <p data-bbox="802 1724 1344 1896">Flint Hills Has Not Opened the Door: Flint Hills did not open the door during trial, and instead consistently objected to testimony regarding Flint Hills’ knowledge of the condition of assets, and whether</p>

Designation	Objection and Response
<p>not object during the deposition to the form of the question. Thus BP Amoco had no opportunity to cure the defect.</p>	<p>Flint Hills believed the condition of assets warranty was true. Flint Hills made its counter-designations conditional on the Court denying its objections to BP’s designations.</p> <p>Flint Hills did not waive its right to object: At the time of the deposition, the question was relevant to Flint Hill’s fraud claim. Moreover, the hearsay objection was not waived because, under F.R.Civ.P. 32 (b), objections can be made at trial to “any deposition testimony that would be inadmissible if the witness were present and testifying.” The designated testimony would not be admissible if Mr. Personey were testifying at trial. Rule 32(b) is subject to 32(d)(3)(A), but hearsay objections are not waived under that rule “unless the ground for the objection might have been corrected at that time.” The relevance objection could not have been cured – there is no way the questioner could somehow transform this irrelevant and misleading testimony into admissible testimony.</p>
<p style="text-align: center;">FLINT HILLS’ COUNTER-DESIGNATIONS</p> <p>If the Court sustains Flint Hills’ objections to BP’s designations, Flint Hills does not have any counter-designations. If the Court overrules this objection, substantial counter-designations are necessary to provide context for Mr. Personey’s testimony, including the limited nature of Flint Hills’ due diligence, and the many BP assurances regarding the condition of the assets. <i>Westinhouse Electric Corp v. Wray Equipment Corp</i>, 286 F2d 491, 494 (1st Cir. 1961)(“The opposing party is entitled under the rule to have the context of any statement, or any qualifications made as part of the</p>	<p style="text-align: center;">BP AMOCO’S GENERAL RESPONSE TO COUNTER-DESIGNATIONS</p> <p>BP Amoco designated a significant amount of testimony from Clem, Guillemette, Proops, Kotis, and Geisenhoff regarding the particular findings of the due diligence team, and Flint Hills made extensive counter-designations to this testimony. BP Amoco now cites less than one page (16 lines) of substantive 30(b)(6) testimony on the topic of what Flint Hills’ ultimate conclusion was based on those findings, i.e., that the age, wear, and tear of particular assets now at issue met the PSA. In response, Flint Hills does not counter-designate any testimony on this topic, but instead designates 53 pages of testimony (i) relating to the particular findings of the due diligence team (“the limited nature of</p>

Designation	Objection and Response
<p>deponent’s testimony also put into evidence.”). Contrary to BP’s objections, these designations are “necessary for completeness.” For example, the meaning and weight of any testimony by Flint Hills witnesses regarding the condition of assets is directly impacted by what information the witness had (and did not have) at the time the statement was made. Indeed, in some cases BP gave Flint Hills specific assurances that the asset was in good condition, and/or that repairs would be made before the sale (but BP did not then make the repairs.) E.g. 327:14 – 329:3 (Dueker representation that firewater system repairs could not cost more than \$50,000); 341:25 – 343:7 (feed tanks did not require any “significant work”); 115:22 – 116:9 (John D’Andrea told Flint Hills that BP would make repairs to the firewater system in 2003); 345:13 – 346:7 (Capital Projects List showed lab roof would be repaired in 2003, with no money allocated to repairs of the lab roof in 2004 or 2005); 366:20 – 367:6 ; 367:24 – 368:8; 371:24 – 372:3 (BP assurance that it would fix the PIA sewer line). Flint Hills’ counter-designations should “in fairness” be considered by the jury with the testimony designated by BP. F.R.Civ.P. 32 (a)(6). This conclusion is not changed by BP’s assertion that the testimony “should have been designated, if at all, during Flint Hills’ case in chief”, as evidenced by Flint Hills’ willingness to withdraw all of its counter-designations if the Court sustains its objections to BP’s designation of the irrelevant testimony regarding whether Flint Hills believed the warranty was true.</p>	<p>Flint Hills’ due diligence”), (ii) relating to Flint Hills’ theory that BP Amoco gave assurances at the October 20, 2003 meeting that ended Flint Hills’ due diligence (“the many BP assurances”), and (iii) relating to what Flint Hills allegedly discovered after the sale. These extensive counter-designations are not responsive to BP Amoco’s lone designation (page 157:4-19), and should not be allowed. Flint Hills had an opportunity to call Mr. Personey affirmatively on a range of topics in its case in chief, and should not be allowed to do so during BP Amoco’s case under the guise of counter-designations.</p> <p>In the alternative, if Flint Hills is permitted to make its counter-designations regarding the particular findings of the due diligence team (“the limited nature of Flint Hills’ due diligence”), then his full testimony on that topic should be designated for completeness and to allow the jury to assess his credibility and knowledge of that subject: Composite DX 2584, DX 2585, 2586 & 29:8-29:22, 30:19-30:25, 33:13-34:3, 34:18-36:7, 42:4-44:2, 48:22-49:5, 52:18-55:7, 56:12-62:11, 65:15-67:6, 69:7-69:11, 69:22-69:25, 70:9-70:18, 70:24-71:6, 75:1-75:20, 77:7-77:13, 79:8-79:14, 81:9-82:4, 84:5-84:23, 89:12-91:14, 94:18-95:10, 95:15-96:19, 98:3-98:11, 98:25-100:8, 100:16-101:18, 103:6-104:18, 104:19-106:16, 106:25-113:1, 114:2-115:21, 118:1-120:11, 128:2-130:24, 133:19-135:2, 138:13-139:4, 146:20, 149:8, 149:11-151:25, 153:4-154:4</p> <p>In the alternative, if Flint Hills is permitted to make its counter-designations relating to its theory that BP Amoco gave assurances at the October 20, 2003 meeting that ended Flint Hills’ due diligence (“the many BP assurances”), then his full testimony on the topic of the October 20 meeting should be designated.</p>

Designation	Objection and Response
<p>BP did not object at the deposition to any of Flint Hills' counter-designations.</p> <p>Flint Hills disagrees with BP's characterization of the "Nature of testimony."</p> <p>BP repeatedly responds that Personey is not "unavailable" because he is a Flint Hills employee and because he is listed as a "may call" witness. But all that is required for unavailability under F.R.Civ.P 32(a)(4)(B) is that Personey (who lives and works in Kansas), be more than 100 miles from the place of trial. Similarly, Rule does 32 (a)(4)(B) does not recognize the distinction attempted by BP, that the jury should only hear the portion of the deposition where BP's attorney's, rather than FHR's attorneys, are asking the questions.</p>	<p>In particular, BP Amoco should be permitted to designate its cross-examination of Mr. Personey regarding whether the October 20 meeting related to and resulted in a price reduction which ended Flint Hills' equipment due diligence. This is necessary for completeness and to allow the jury to assess his credibility and knowledge of the subject: 163:18-213:9 & Composite DX 2587.</p> <p>In the alternative, if Flint Hills is permitted to make its counter-designations relating to what Flint Hills allegedly discovered post-sale, BP Amoco should be permitted to designate testimony concerning Personey's lack of knowledge of the Joliet Plant after the sale for completeness and to allow the jury to assess his credibility: 379:14-380:4, 382:2-22, 386:1-386:7.</p>
6: 1 - 4	<p>Nature of testimony: Personey was deposed once before in this case. Objection: not necessary for completeness of 157:4-19.</p>
8:11 – 17	<p>Nature of testimony: Personey reviewed documents to prepare for deposition. Objection: not necessary for completeness of 157:4-19.</p>
41:3 – 42:3	<p>Nature of testimony: Personey takes the position that pre-sale spending estimates were rough estimates. Objection: not necessary for completeness of 157:4-19.</p>
49:6 -9	<p>Nature of testimony: Personey states he is not aware of Mr. Guillemette and Geisenhoff's findings that Flint Hills would spend its own money to repair</p>

Designation	Objection and Response
	sewers after the sale. Objection: not necessary for completeness of 157:4-19.
55:8 – 56:11	Nature of testimony: Personey states that Flint Hills did not think the wastewater feed tanks were a problem. Objection: not necessary for completeness of 157:4-19.
67:7 – 69:6	Nature of testimony: Personey states that Flint Hills would pay more attention to “big ticket” capital projects on the capital project list. Objection: not necessary for completeness of 157:4-19.
115:22 – 116:9	Nature of testimony: Personey mentions a conversation (of which he has no personal knowledge) between Tracy Clem and John D’Andrea regarding BP Amoco’s plan to fix the firewater pumps. Objection: not necessary for completeness of 157:4-19.
130:25 – 131:9 ; 131:17 – 132:9	Nature of testimony: Personey talks about Mr. Geienhoff’s late October 2003 tank due diligence and conclusions regarding spending. Objection: not necessary for completeness of 157:4-19.
152:1 – 153:3	Nature of testimony: Personey characterizes the nature of the projects Flint Hills anticipated doing after the sale regarding the electrical system and sewers. Objection: not necessary for completeness of 157:4-19.
300:4 – 301:1	Nature of testimony: Personey characterizes the money Flint Hills spent on due diligence as including due diligence and other activities. Objection: not necessary for completeness of 157:4-19.
324:4 – 17; 324;23 – 326:14 (TX 5163 (Admitted))	Nature of testimony: Personey characterizes the nature of the projects Flint Hills anticipated doing after the sale regarding the sewers and waste treatment facility. Personey (who has no personal knowledge of the post-sale period) testifies to what Flint Hills allegedly discovered

Designation	Objection and Response
	<p>after the sale and the claims Flint Hills then made.</p> <p>Personey (who was not at the October 20 meeting) states what he believes BP Amoco’s plant manager said at that meeting.</p> <p>Objection: this series of designations is from an extensive direct examination of Mr. Personey conducted by Mr. Kuckelman at the deposition. It is not 30(b)(6) testimony or an admission, as it was elicited by and is offered by Flint Hills. Nor is Mr. Personey unavailable to Flint Hills, as he was disclosed as a may call witness, and is a current employee. It is not necessary for completeness of 157:4-19 and should have been designated, if at all, during Flint Hills’ case in chief.</p>
327:14 – 329:3 (TX 2166 (Admitted))	<p>Nature of testimony: Personey reads from an internal BP email (which he did not receive) and states what he believes BP Amoco and its plant manager said at the October 20 meeting (which he did not attend).</p> <p>Objection: this series of designations is from an extensive direct examination of Mr. Personey conducted by Mr. Kuckelman at the deposition. It is not 30(b)(6) testimony or an admission, as it was elicited by and is offered by Flint Hills. Nor is Mr. Personey unavailable to Flint Hills, as he was disclosed as a may call witness, and is a current employee. It is not necessary for completeness of 157:4-19 and should have been designated, if at all, during Flint Hills’ case in chief.</p>
330: 15 – 25	<p>Nature of testimony: Personey discusses the effect of the October 20 meeting (which he did not attend) on Tracy Clem’s firewater system estimate.</p> <p>Objection: this series of designations is from an extensive direct examination of</p>

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	<p>Mr. Personey conducted by Mr. Kuckelman at the deposition. It is not 30(b)(6) testimony or an admission, as it was elicited by and is offered by Flint Hills. Nor is Mr. Personey unavailable to Flint Hills, as he was disclosed as a may call witness, and is a current employee. It is not necessary for completeness of 157:4-19 and should have been designated, if at all, during Flint Hills' case in chief.</p>
332: 8 – 14	<p>Nature of testimony: Personey discusses what BP Amoco's plant manager said at the October 20 meeting (which he did not attend) and whether it was true (despite his lack of post-sale knowledge).</p> <p>Objection: this series of designations is from an extensive direct examination of Mr. Personey conducted by Mr. Kuckelman at the deposition. It is not 30(b)(6) testimony or an admission, as it was elicited by and is offered by Flint Hills. Nor is Mr. Personey unavailable to Flint Hills, as he was disclosed as a may call witness, and is a current employee. It is not necessary for completeness of 157:4-19 and should have been designated, if at all, during Flint Hills' case in chief.</p>
335:9 – 336:25 (TX 5163)(Admitted)	<p>Nature of testimony: Personey discusses the effect of the October 20 meeting (which he did not attend) on Tracy Clem's electrical system estimate.</p> <p>Objection: this series of designations is from an extensive direct examination of Mr. Personey conducted by Mr. Kuckelman at the deposition. It is not 30(b)(6) testimony or an admission, as it was elicited by and is offered by Flint Hills. Nor is Mr. Personey unavailable to Flint Hills, as he was disclosed as a may call witness, and is a current employee. It is not necessary for completeness of 157:4-19 and should have been designated, if at all, during Flint Hills' case in chief.</p>

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337:7 – 339:24	<p>Nature of testimony: Personey discusses what BP Amoco's plant manager said at the October 20 meeting (which he did not attend) regarding tanks and tank maintenance.</p> <p>Objection: this series of designations is from an extensive direct examination of Mr. Personey conducted by Mr. Kuckelman at the deposition. It is not 30(b)(6) testimony or an admission, as it was elicited by and is offered by Flint Hills. Nor is Mr. Personey unavailable to Flint Hills, as he was disclosed as a may call witness, and is a current employee. It is not necessary for completeness of 157:4-19 and should have been designated, if at all, during Flint Hills' case in chief.</p>
341:25 – 343:7 (TX 2174(Admitted))	<p>Nature of testimony: Personey discusses what BP Amoco's plant manager and reliability manager said at the October 20 meeting (which he did not attend) regarding tanks.</p> <p>Objection: this series of designations is from an extensive direct examination of Mr. Personey conducted by Mr. Kuckelman at the deposition. It is not 30(b)(6) testimony or an admission, as it was elicited by and is offered by Flint Hills. Nor is Mr. Personey unavailable to Flint Hills, as he was disclosed as a may call witness, and is a current employee. It is not necessary for completeness of 157:4-19 and should have been designated, if at all, during Flint Hills' case in chief.</p>
344:12 – 22; 345:13 – 16; 345:24 – 346:7 (TX 5237.010(Admitted))	<p>Nature of testimony: Personey (who lacks knowledge of the post-sale period) states what Flint Hills allegedly discovered about the lab roof after the sale.</p> <p>Objection: this series of designations is from an extensive direct examination of Mr. Personey conducted by Mr. Kuckelman at the deposition. It is not 30(b)(6) testimony or an admission, as it</p>

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	<p>was elicited by and is offered by Flint Hills. Nor is Mr. Personey unavailable to Flint Hills, as he was disclosed as a may call witness, and is a current employee. It is not necessary for completeness of 157:4-19 and should have been designated, if at all, during Flint Hills' case in chief.</p>
348:16 – 349:1	<p>Nature of testimony: Personey agrees that PSA has no exceptions for capital spending plans or what Flint Hills might have learned.</p> <p>Objection: this series of designations is from an extensive direct examination of Mr. Personey conducted by Mr. Kuckelman at the deposition. It is not 30(b)(6) testimony or an admission, as it was elicited by and is offered by Flint Hills. Nor is Mr. Personey unavailable to Flint Hills, as he was disclosed as a may call witness, and is a current employee. It is not necessary for completeness of 157:4-19 and should have been designated, if at all, during Flint Hills' case in chief.</p>
353:11 – 354:7	<p>Nature of testimony: Personey discusses the Geisenhoff's claim that inspection files were disorganized, and claims that after the sale (a subject Personey has no personal knowledge of) Flint Hills discovered that D'Andrea had been instructed to narrowly answer questions.</p> <p>Objection: this series of designations is from an extensive direct examination of Mr. Personey conducted by Mr. Kuckelman at the deposition. It is not 30(b)(6) testimony or an admission, as it was elicited by and is offered by Flint Hills. Nor is Mr. Personey unavailable to Flint Hills, as he was disclosed as a may call witness, and is a current employee. It is not necessary for completeness of 157:4-19 and should have been designated, if at all, during Flint Hills' case in chief.</p>

Designation	Objection and Response
354:22 – 356:22	<p>Nature of testimony: Personey discusses the purpose of Geisenhoff’s late October 2003 tank due diligence. Personey discusses the October 20 meeting that he did not attend. Personey discusses what FHR allegedly learned after the sale (despite his lack of personal knowledge on that subject).</p> <p>Objection: this series of designations is from an extensive direct examination of Mr. Personey conducted by Mr. Kuckelman at the deposition. It is not 30(b)(6) testimony or an admission, as it was elicited by and is offered by Flint Hills. Nor is Mr. Personey unavailable to Flint Hills, as he was disclosed as a may call witness, and is a current employee. It is not necessary for completeness of 157:4-19 and should have been designated, if at all, during Flint Hills’ case in chief.</p>
363:14 – 364:23; 365:7 – 22 (TX 779(Admitted))	<p>Nature of testimony: Personey discusses how the \$24 million version of Claim 56 (which Flint Hills no longer is asserting) compares to Tracy Clem’s pre-sale electrical system estimate.</p> <p>Objection: this series of designations is from an extensive direct examination of Mr. Personey conducted by Mr. Kuckelman at the deposition. It is not 30(b)(6) testimony or an admission, as it was elicited by and is offered by Flint Hills. Nor is Mr. Personey unavailable to Flint Hills, as he was disclosed as a may call witness, and is a current employee. It is not necessary for completeness of 157:4-19 and should have been designated, if at all, during Flint Hills’ case in chief.</p>
366:20 – 367:6 ; 367: 24 – 368:8	<p>Nature of testimony: Personey is asked whether Flint Hills did further due diligence of ongoing piping repairs observed during the plant tour.</p> <p>Objection: this series of designations is from an extensive direct examination of</p>

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	<p>Mr. Personey conducted by Mr. Kuckelman at the deposition. It is not 30(b)(6) testimony or an admission, as it was elicited by and is offered by Flint Hills. Nor is Mr. Personey unavailable to Flint Hills, as he was disclosed as a may call witness, and is a current employee. It is not necessary for completeness of 157:4-19 and should have been designated, if at all, during Flint Hills' case in chief.</p>
371:24 – 372:3	<p>Nature of testimony: Personey states that after the sale (a subject he has no knowledge of) an employee told Flint Hills management to dig up the PIA sewer line.</p> <p>Objection: this series of designations is from an extensive direct examination of Mr. Personey conducted by Mr. Kuckelman at the deposition. It is not 30(b)(6) testimony or an admission, as it was elicited by and is offered by Flint Hills. Nor is Mr. Personey unavailable to Flint Hills, as he was disclosed as a may call witness, and is a current employee. It is not necessary for completeness of 157:4-19 and should have been designated, if at all, during Flint Hills' case in chief.</p>