Motion Ex. 6

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 James B. Moran
FLINT HILLS RESOURCES LLC, **Third-Party Plaintiff,** **v.** **BP CORPORATION NORTH AMERICA INC.,** **Defendant.**	

PARTIAL SUMMARY JUDGMENT: "PRODUCTION CAPACITY" CLAIMS

BP AMOCO CHEMICAL COMPANY AND BP CORPORATION NORTH AMERICA INC.'S MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO FLINT HILLS RESOURCES, LLC'S "PRODUCTION CAPACITY" CLAIMS

Richard C. Godfrey, P.C. (ARDC #3124358)
Scott W. Fowkes, P.C.(ARDC #6199265)
Drew G.A. Peel (ARDC #6209713)
R. Chris Heck (ARDC #6273695)
KIRKLAND & ELLIS LLP
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

William L. Patberg (admitted *pro hac vice*)
SHUMAKER, LOOP, & KENDRICK, LLP
1000 Jackson Street
Toledo, Ohio 43624
(419) 321-1434

being sold "as is where is." The PSA also contains a broad integration clause, stating in part that "no party shall be bound by or liable for any alleged representation, warranty, promise … if it is not set forth in this Agreement or the Schedules or Exhibits." (SOF ¶¶ 31-33) Despite these express provisions of the PSA, FHR based its internal pre-acquisition financial models not on what the PSA said, but instead on the effective capacity numbers contained in the CIM -- the very numbers BP Amoco refused to represent and warrant in the PSA. (SOF ¶¶ 20-21, 23-24) Moreover, FHR used the CIM's effective capacity numbers even though: (i) the CIM explicitly stated that BP Amoco was not representing the accuracy of those numbers; (ii) the PSA itself provided that BP Amoco was not bound by those numbers; and (iii) BP Amoco refused during the parties' negotiations to represent and warrant those numbers. (SOF ¶¶ 14, 23-24, 31-33)

ARGUMENT

Summary judgment should be granted where the material facts are undisputed and the law establishes that the moving party should prevail. Fed. R. Civ. P. 56(c); *Geschke v. Air Force Ass'n*, 425 F.3d 337, 342 (7th Cir. 2005). Summary judgment is particularly appropriate in contract cases like this one, where the plain language of the contract dictates which party should be awarded judgment. *Ryan v. Chromalloy Am. Corp.*, 877 F.2d 598, 602 (7th Cir. 1989); *In re Ocwen Fed. Bank FSB Mortgage Serv. Litig.*, No. MDL 1604, 04 C 2714, 2005 WL 1027118, at *4 (N.D. Ill. 2005). In response to a summary judgment motion, the respondent cannot rely on allegations and denials, but instead must submit admissible evidence. *de la Rama v. Illinois Dep't of Human Serv.*, 541 F.3d 681, 685 (7th Cir. 2008); *Van Diest Supply Co. v. Shelby County State Bank*, 425 F.3d 437, 439 (7th Cir. 2005). Such evidence cannot be a mere scintilla; "a party opposing summary judgment must present evidence on which the jury could reasonably find for the nonmoving party." *de la Rama*, 541 F.3d at 685; *Van Diest*, 425 F.3d at 439.

The undisputed facts here, based on extensive discovery, establish that FHR has no valid production capacity claims, whether those claims sound in contract or in fraud. Instead, what the record indisputably shows is that FHR's production capacity claims are based upon its improper attempt to rewrite the PSA.

I. BP AMOCO DID NOT BREACH THE CAPACITY REPRESENTATION.

FHR's production capacity claim arises out of its attempt to use this Court to renegotiate the parties' contract, and thus is not based upon the actual contract terms to which the parties agreed.

A. The Production Capacity Representation Is Unambiguous And Must Be Interpreted According To Its Plain Meaning.

The first – and usually last – step in determining what a contract means is to analyze the language used by the parties. "If the language unambiguously answers the question at issue, the inquiry is over." *Emergency Med. Care, Inc. v. Marion Mem'l Hosp.*, 94 F.3d 1059, 1061 (7th Cir. 1996). "Where, as here, the terms of the contract are not ambiguous, its construction is to be determined from the four corners of the agreement." *Kallman v. Radioshack Corp.*, 315 F.3d 731, 737 (7th Cir. 2002); *see also PPM Fin., Inc. v. Norandal USA, Inc.*, 392 F.3d 889, 894 (7th Cir. 2004); *Montgomery v. Amoco Oil Co.*, 804 F.2d 1000, 1002 (7th Cir. 1986) (applying Indiana law). Courts are not in the business of adjusting the bargains struck by the parties: "A court must not rewrite a contract to suit one of the parties and must enforce the contract as written." *Miner v. Fashion Enters., Inc.*, 794 N.E.2d 902, 914 (Ill. App. Ct. 2003); *see also Davis v. G.N. Mortgage Corp.*, 396 F.3d 869, 881 (7th Cir. 2005) (similar).

Unless otherwise defined, terms in a contract are generally given their "plain, ordinary, and popular meaning." *Outboard Marine Corp. v. Liberty Mutual Ins. Co.*, 607 N.E.2d 1204, 1215-16 (Ill. 1992); *see also Grundstad v. Ritt*, 166 F.3d 867, 871 (7th Cir. 1999) ("Illinois follows the plain meaning rule in interpretation of contracts."). "When interpreting a contract, we must determine the meaning of the provisions from the language, and we will not arrive at a construction of the contract which runs contrary to the plain and ordinary meaning of the language used." *Konewko v. Kidder, Peabody & Co.*, 528 N.E.2d 1, 3 (Ill. App. Ct. 1988). The plain meaning of a phrase is "that meaning which the particular language conveys to the popular mind, to most people, to the average, ordinary, normal person." *Traveler's Ins. Co. v. Eljer Mfg., Inc.*, 757 N.E.2d 481, 496 (Ill. 2001); *see also Outboard Marine*, 607 N.E.2d at 1216.

The production capacity language of the PSA is plain, unambiguous, and should be given its common meaning. Section 7.1(d)(ii) of the PSA represents the AMDSP of three specific production units at the Joliet Plant. Each of the key words in the representation has a "plain, ordinary and popular" meaning in the English language:

- "Annualized" means to adjust or calculate so as to reflect a number that is based on a full year (thus, to take a number representing less than a full year and to annualize it);
- "Maximum" means the greatest possible quantity or degree;
- "Demonstrated" means to have been shown to be true by reasoning or evidence;

- "Sustainable" means able to keep an action or process going for a period of time; and
- "Production" means the act or process of producing.[1]

Thus, the production capacity numbers set forth in Section 7.1(d)(ii) represented the greatest possible rate, supported by reasoning or evidence, at which each of the three different chemicals could be produced over some period of time, extrapolated into an annualized number — but, as the PSA expressly states, without accounting for planned or unplanned downtime. (SOF ¶ 26)

B. BP Amoco Did Not Breach The Unambiguous Capacity Representation.

Among other requirements, a plaintiff alleging breach of contract must prove a breach, damages, and that the defendant's breach proximately caused those damages. *E.g.*, *Ass'n Benefit Servs., Inc. v. Caremark Rx, Inc.*, 493 F.3d 841, 849 (7th Cir. 2007); *Priebe v. Autobarn, Ltd.*, 240 F.3d 584, 587 (7th Cir. 2001). Here, the undisputed evidence precludes FHR from establishing even the threshold requirement of a breach.

1. BP Amoco's Determination Of The AMDSP Of The Purified Isophthalic Acid Production Unit Was Supported And Reasonable.

The PSA represents the AMDSP of the purified isophthalic acid production unit as 170,000 metric tons. That statement is correct, as the undisputed evidence establishes that BP Amoco had empirical bases supporting its computation of the AMDSP. Among other support, the undisputed evidence includes actual production results from the purified isophthalic acid unit over the course of several days in the fall of 2002. Annualized, these daily production rates yield 155,000 metric tons in a year, assuming a 28-day shutdown and a 98% reliability factor. Thus, in calculating the represented AMDSP, which does not include scheduled (shutdown) or unscheduled (reliability) downtime, the 155,000 metric tons number was adjusted to eliminate days for shutdowns and to assume 100% reliability, resulting in an annualized rate of over 170,000 metric tons of purified isophthalic acid. (SOF ¶¶ 34-35)

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[1] All definitions from THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (Houghton Mifflin Co. 4th ed. 2004) retrieved from <Dictionary.com http://dictionary.reference.com/browse/production> last checked on November 11, 2008 or the CAMBRIDGE ADVANCED LEARNER'S DICTIONARY (Cambridge Univ. Press 2d ed. 2005) retrieved from <http://dictionary.cambridge.org> last checked on November 11, 2008. *See Geschke*, 425 F. 3d at 343 (7th Cir. 2005) (court cites to Webster Dictionary definition to define word used in policy and determine that no ambiguity exists); *Canal Barge Co. v. Commonwealth Edison Co.*, No. 98 C 0509, 2002 WL 1264002, at *5 (N.D. Ill. June 3, 2002) ("Courts commonly use dictionaries to determine the plain and ordinary meaning of unambiguous terms."). Also, the terms used in the contract are ordinary and readily understood; there is nothing obscure or ambiguous in their meaning.

2. BP Amoco's Determination Of The AMDSP Of The TMA Production Unit Was Supported And Reasonable.

The AMDSP for the TMA production unit was based on several factors, most importantly the production rate of 195 metric tons per day expressed in contemporaneous internal BP Amoco operating plans. The 195 metric tons per day was multiplied by 365 to arrive at an annualized figure of 71,175 metric tons of TMA, which was then rounded down to the 71,000 metric tons for the represented AMDSP in the PSA. (SOF ¶¶ 34, 36)

3. BP Amoco's Determination Of The AMDSP Of The MAN Production Unit Was Supported And Reasonable.

As with the purified isophthalic acid and TMA production units, BP Amoco based its AMDSP determination for the MAN production unit on a variety of factors, including historical production data, rates generally accepted by personnel at the Plant, and other production rate information. Among other considerations, BP Amoco considered historical production rates and data. The AMDSP for MAN can be confirmed by multiplying 140 metric tons per day by 365 days to arrive at approximately 51,000 metric tons. (SOF ¶¶ 34, 37)

C. The PSA's Production Capacity Representation Cannot Be Rewritten In The Manner That FHR Urges.

Not satisfied with the agreement it negotiated over the course of several months in 2003 and 2004 and then signed, FHR now seeks to rewrite the production capacity representation. FHR seeks to both add and subtract words from the representation in order to have BP Amoco warrant production capacity that is far different from what is actually referenced in the PSA. In essence, FHR contends that BP Amoco represented that the Plant had guaranteed annual production numbers, that is, that the Plant's guaranteed actual production was the amounts in the PSA for all three production units over the course of a full year. Similarly, FHR improperly attempts to expand the carefully limited language of the representation from the three "production units" to cover all of the support facilities, equipment, and infrastructure at the Joliet Plant, none of which is covered by or even mentioned in the representation.

1. The PSA Does Not Require That The AMDSP Be Demonstrated Over A Particular Period Of Time.

FHR's plant manager at the Joliet Plant, Tim Nicol, who served as FHR's Rule 30(b)(6) witness on production capacity issues, acknowledged that the PSA does not prescribe any formula for computing the AMDSP. Indeed, according to FHR, BP Amoco only needed to make a "reasonable inquiry" to satisfy itself that the represented AMDSPs were reasonable. (SOF ¶

30) Nevertheless, despite its Rule 30(b)(6) admissions, FHR's litigation experts now claim that the AMDSP must be calculated by a particular formula, such as performance over a period of at least one month. In so doing, FHR's experts improperly seek to rewrite the contract. Nothing in the PSA specifies the formula; nor does anything in the PSA specify the length of time that a rate must be achieved for it to be considered "sustainable" or "demonstrated." (SOF ¶ 26) To require now that the rates used to determine the AMDSP have been calculated pursuant to a specific formula and sustained over a one month (or longer) period would conflict with FHR's Rule 30(b)(6) admissions and improperly rewrite the PSA to add language and requirements that the parties did not see fit to include in their agreement. *FSC Paper Corp. v. Sun Ins. Co. of New York*, 744 F.2d 1279, 1281 (7th Cir. 1984) (holding that "courts may not rewrite" a parties' contract by adding terms); *Intersport, Inc. v. Nat'l Collegiate Athletic Ass'n*, 885 N.E.2d 532, 543 (Ill. App. Ct. 2008) (rejecting "an interpretation [that] would essentially amount to adding the terms … to the contract"); *see also Adusumilli v. City of Chicago*, 164 F.3d 353, 360 (7th Cir. 1998) (holding that a party cannot create a disputed issue for summary judgment by contradicting sworn deposition testimony).

2. FHR's Interpretation Of The Capacity Representation Is Contrary To Its Plain Language And Fundamental Rules Of Contract Interpretation.

FHR attempts to rewrite several key terms of the production capacity representation that the parties bargained for and agreed to in the PSA.

First, FHR asserts that BP Amoco warranted the "simultaneous" production capacity of each of the three production units. (SOF ¶ 29) But FHR admits -- because it must -- that the term "simultaneous" does not appear in the PSA, and thus FHR is "not sure if there is a textual basis for" its contractual interpretation. (*Id*.) That is because there is none. Terms such as "simultaneous" or "at the same time" appear nowhere in the capacity representation. Instead, the production capacity representation provides a separate number, "respectively," for each of the specified "production units at the Joliet Plant." (SOF ¶ 26) FHR's "simultaneous" interpretation would improperly require the Court to add words to the PSA, which, as a matter of law, cannot be done. *E.g.*, *FSC Paper*, 744 F.2d at 1281; *Intersport*, 885 N.E.2d at 543. And this is especially true where, as here, the contract itself disclaims any implied representations and warranties. (SOF ¶¶ 31-32)

Second, BP Amoco did not warrant the average daily production capacity of the

production units over a one-year period. When asked how much it believes BP Amoco represented could be produced, FHR claims that "we re-express [the AMDSP] in terms of dates, divided it by 365, yes, that's what we would expect that rate to be." (SOF ¶ 30) This contention would rewrite the PSA to warrant "[average daily] ~~annualized~~ maximum demonstrated sustainable production" rates instead of AMDSP. Of course, the PSA does not contain an average daily capacity representation. Instead, the PSA expressly represents "annualized" production, meaning that a period of time that is less than one year is being extrapolated or interpolated to be equivalent to a full year. (SOF ¶ 26) Put simply, if the parties had agreed to what FHR contends was agreed, then the PSA would simply have stated that the plant was guaranteeing production of a certain amount of each chemical over a 365-day period. Obviously, the language used in the PSA is much different.

Third, FHR's interpretation of the capacity representation deletes the words "maximum" and "annualized" from the contract. FHR reveals its desire to rewrite the PSA in its own allegations, omitting these words when it claims that that BP Amoco "represented that it could demonstrate sustainable production at the levels embodied in the Agreement." (FHR 10/17/05 Counterclaims ¶ 155, *see also* ¶¶ 156, 158, 162) FHR's Steve Sanders concedes that when reviewing the representation before signing, the only words he likely focused on were "demonstrated" and "sustainable," and that he "would have probably read past" other words including "annualized." (SOF ¶ 27) Just like Mr. Sanders did before FHR signed the contract, FHR continues to read past and delete words in the PSA such as "annualized" and "maximum."

Of course, FHR does not get to pick and choose which words of the contract apply. *Rymer v. Kendall College*, 380 N.E. 2d 1089, 1092-93 (Ill. App. Ct. 1978) ("In construing contracts, to determine their intent, it is long established law that a construction should be adopted, if possible, which ascribes meaning to every clause, phrase and word used."); *Premcor USA, Inc. v. Am. Home Assurance Co.*, 400 F.3d 523, 527 (7th Cir. 2005); *Miniat v. Ed Miniat, Inc.*, 315 F.3d 712, 715 (7th Cir. 2002). Words cannot be subtracted from a contractual representation. *Home Ins. Co. v. Chicago & Northwestern Transp. Co.*, 56 F.3d 763, 769 (7th Cir. 1995); *Karpowicz v. General Motors Corp.*, No. 97 C 1390, 1998 WL 142417, at *4 (N.D. Ill. Mar. 26, 1998) Instead, the representation must be read as a whole, giving each word and phrase meaning. *E.g.*, *Bourke v. Dun & Bradstreet Corp.*, 159 F.3d 1032, 1038 (7th Cir. 1998).

As stated above, each of the words used in the capacity representation has a plain,

common-English meaning. Interpreting the production capacity representation to give meaning to each word demonstrates that BP Amoco has not breached the AMDSP warranty.

D. BP Amoco Warranted The AMDSP Of Three Specific "Production Units" At The Joliet Plant.

Yet another part of the capacity representation that FHR seeks to read out of the contract is that the representation is limited to specified "production units" at the Joliet Plant: "The annualized maximum demonstrated sustainable production of the TMA, purified isophthalic acid and MAN *production units* at the Joliet Plant are . . . ." (SOF ¶ 26 (emphasis added)) FHR's claims seek to delete this limitation to expand the representation to cover support facilities, the IPA unit, and working capital, none of which is covered by the plain language of the PSA.

The parties' use of the term "production units" is significant and not an accident because the PSA expressly defines and distinguishes between: (i) "Process Units," and (ii) "Support Facilities," such as "Waste Storage," "Waste Treatment & Filtration," "Sewage" and the "Potable Water System." (SOF ¶ 42) Moreover, while the PSA defines "PIA" as including both isophthalic acid ("IPA") and purified isophthalic acid, the capacity representation refers solely to the "purified isophthalic acid … production unit[] at the Joliet Plant." (SOF ¶ 40) Nothing in the text of the capacity representation states that it covers parts of the plant other than the three specified production units. To the contrary, the PSA expressly provides that process units are not the same as "Support Facilities" such as the waste treatment facilities or well water system (SOF ¶ 42) The production capacity representation likewise excludes the IPA unit, which includes items such as air compressors, cooling towers, and silos. (SOF ¶¶ 40-41) Similarly, the PSA draws a distinction between the "fixed assets and fixtures of such chemical plant" (such as the production units) and working capital which includes "inventories of tangible goods" and explicitly includes "maleic anhydride catalyst." (SOF ¶ 43)

Despite the contract's plain language, FHR asks this Court to rewrite the capacity representation so that it covers the entire Joliet Plant. Thus, much of the damages that FHR seeks for the capacity representation are for repairs of items or upgrades that are not part of the "TMA, purified isophthalic acid and MAN production units," including over $30 million to repair and improve the wastewater treatment plant, over $6.5 million for MAN catalyst, $3.2 million to buy water and drill a new water well, $2.8 million to install a silo scrubber, $1.49 million to overhaul a process air compressor, and $250,000 to refurbish an overhead cooling tower. (SOF ¶¶ 38-39)

It is undisputed that these items are not part of the three production units that are the subject of the capacity representation and, therefore, these alleged damages (totaling approximately $45 million) could not be recovered even if FHR were somehow able to establish a breach of the AMDSP representation. *See, e.g., First Nat'l Bank of Elgin v. Dusold*, 536 N.E.2d 100, 104 (Ill. App. Ct. 1989) (denying damages for ceilings, walls, and wallpaper, because they "cannot in any sense be considered equipment as the term is used in the warranty").

II. BP AMOCO DID NOT DEFRAUD FHR.

Pursuant to the Court's April 24, 2007 opinion on BP Amoco's motion to dismiss, FHR's fraud claim is limited to a claim of fraudulent inducement arising from the PSA representations at issue, including the capacity representation. (4/24/07 Mem. Op. and Order at 9-10) "In Illinois, fraudulent inducement requires proof of five elements: (1) a false statement of material fact; (2) known or believed to be false by the person making it; (3) an intent to induce the other party to act; (4) action by the other party in reliance on the truth of the statement; and (5) damage to the other party resulting from such reliance." *Hoseman v. Weinschneider*, 322 F.3d 468, 476 (7th Cir. 2003); *see also Caremark*, 493 F.3d at 852. FHR can defeat summary judgment only if it can introduce sufficient admissible evidence that would permit a jury to find by clear and convincing evidence that BP Amoco defrauded FHR. *Caremark*, 493 F.3d at 853-54.

The undisputed record establishes that FHR cannot introduce sufficient admissible evidence for a jury to find that FHR has clearly and convincingly proven the elements of fraud.

A. The PSA's Production Capacity Representation Is True, And Thus BP Amoco Did Not Make A False Statement.

A basic premise of a fraud claim is that the defendant has made a false statement. There is no false statement here. As explained above, the contractual language must be given its plain meaning. BP Amoco based the AMDSP numbers for the three production units on undisputed evidence – including historical production data – that confirms the AMDSP amounts. Because FHR cannot prove by clear and convincing evidence that the represented production capacities were false, its fraud claim must fail. *See Geschke*, 425 F.3d at 345 (affirming grant of summary judgment to defendants where plaintiff presented no evidence that defendants made false statements or misrepresentations); *Hoseman*, 322 F.3d at 476 (affirming judgment in favor of defendant where plaintiff's assertions were not false); *Seefeldt v. Millikin Nat'l Bank of Decatur*, 506 N.E. 2d 1052, 1056 (Ill. App. Ct. 1987).

In addition, FHR cannot assert a fraud claim based on contractual language where there

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Respectfully submitted,

/s/ R. Chris Heck

Richard C. Godfrey, P.C. (ARDC #3124358)
Scott W. Fowkes, P.C. (ARDC #6199265)
Drew G.A. Peel (ARDC #6209713)
R. Chris Heck (ARDC #6273695)
Kirkland & Ellis LLP
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

Attorneys for BP Amoco Chemical Company and BP Corporation North America Inc.

William L. Patberg
(admitted *pro hac vice*)
Shumaker, Loop & Kendrick, LLP
1000 Jackson Street
Toledo, Ohio 43624
(419) 321-1434