# Motion Ex. 7

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

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| **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.** | ) | |
| | ) | |
| **FLINT HILLS RESOURCES LLC,** | ) | |
| | ) | |
| **Third-Party Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | |
| **BP CORPORATION NORTH AMERICA INC.,** | ) | |
| | ) | |
| **Defendant.** | ) | |
| | ) | |

**PARTIAL SUMMARY JUDGMENT REPLY: "PRODUCTION CAPACITY" CLAIMS**

# BP AMOCO CHEMICAL COMPANY AND BP CORPORATION NORTH AMERICA INC.'S REPLY 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

*Teachers Realty Corp.*, 185 Ill. 2d 457, 464, 706 N.E.2d 882, 885 (Ill. 1999). Here, the PSA includes a comprehensive integration clause (PSA § 16.7, Reply to SOF ¶ 33), and it excludes the use of extrinsic evidence. *E.g.*, *Camico Mut. Ins. Co. v. Citizens Bank*, 474 F.3d 989, 993 (7th Cir. 2007); *Davis v. G.N. Mortgage Corp.*, 396 F.3d 869, 878 (7th Cir. 2005).

*Last*, FHR mischaracterizes what the witnesses said. In fact, the witnesses testified to interpretations consistent with the PSA's plain-language meaning. For example, Mr. Iain Conn was not involved in the PSA negotiations and had never read the contract before his deposition. Mr. Conn answered the questions posed to him based upon his understanding of the PSA's plain language.[1] He explained that "my interpretation of this is that it is intended to set a limit, to set a limit, not an expectation, on the maximum rates that have been achieved which, if annualized, gives a sense of the maximum capacity of the plant." (Resp. to FHR SOF ¶ 15)

Similarly, Mike Wrenn testified that he "understand[s] it to mean basically what it says" and upon further questioning provided meanings consistent with the dictionary definitions for words including "annualized" and "sustainable." (Resp. to FHR SOF ¶ 15) Kent Zigterman testified, consistent with Illinois law, that he "can't really go beyond what--what is said here" and that "the words are what they are." (*Id.* ¶ 16) John Dueker testified as to what information BP Amoco used to calculate the AMDSP, not whether the contract was ambiguous. (*Id.*) Their testimony, in short, does nothing to show the ambiguity FHR asserts.

**2. FHR's Contract "Interpretation" Rewrites The Contract.**

FHR now says that it "understood the term 'annualized maximum demonstrated sustained production' to mean that 'the units should be able to produce those volumes at any time.'" (FHRB 8) But that is not what the parties agreed to in the PSA. What is missing from FHR's response is any explanation of how FHR's post-litigation contract "interpretation" has any

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[1] Mr. Conn resides in and is a citizen of the United Kingdom, and thus is not subject to the Court's jurisdiction. His deposition was ordered, over BP Amoco's objections, pursuant to Letters Rogatory served under the Hague Convention. [Docket Nos. 182-83, 188, 204, 206] Judge Moran limited Mr. Conn's deposition to certain specific topics, which were identified in the English High Court's Order providing for the deposition. [Docket No. 204 at Exhibit A, Annex A; Tab 74, 10/27/08 High Court of Justice Order at 5(g)] Mr. Conn's understanding of the PSA was not included within the permitted deposition topics. (*Id.*) Counsel for BP Amoco objected to FHR's contract interpretation questions but did not instruct Mr. Conn not to answer the questions FHR posed, which would have entailed motion practice before the English High Court at considerable expense and time for all parties concerned. (Tab 67, Conn Dep. at 59:12-20, 61:22-62:14) Thus, in addition to the reasons explained above, Mr. Conn's testimony cannot be considered because his testimony was improperly obtained by FHR in violation of Judge Moran's order, the Letters Rogatory, and the English High Court's Order.

relevance or connection to the PSA's actual text concerning the AMDSP. *See PPM Finance, Inc. v. Norandal USA, Inc.*, 392 F.3d 889, 892 (7th Cir. 2004) ("And if clear and unambiguous, one party's particular interpretation of its terms at the time of execution is immaterial."); *Kaplan v. Shure Bros., Inc.*, 266 F.3d 598, 604 (7th Cir. 2001) (same); *American States Ins. Co. v. A.J. Maggio Co., Inc.*, 229 Ill. App. 3d 422, 427, 593 N.E.2d 1083, 1086 (Ill. App. Ct. 1992).

FHR's post-contract attempt to rewrite the PSA is legally impermissible. For example, while FHR does not dispute that "'Maximum' means the greatest possible quantity or degree" (Open. Br. 5), FHR's "interpretation" of AMDSP omits or deletes the word "maximum" entirely. Contrary to FHR's argument, the PSA does not say—and the word "maximum" does not mean—a rate that can be run constantly, but is instead an upper boundary which actual values may fall below. This single word alone contradicts FHR's argument that the production units "should be able to produce the stated volumes at any time." (FHRB 8) Because the word "maximum" does not mean and cannot reasonably be understood to equal the production of the stated volumes at any time, for all times, FHR makes no attempt to argue that its construction of the capacity representation is consistent with the word "maximum" (*id.* at 8), violating the well-established canon that each word in a contract should be given meaning. *E.g., Thompson v. Amoco Oil Co.*, 903 F.2d 1118, 1121 (7th Cir. 1990); *Atwood v. St. Paul Fire & Marine Ins. Co.*, 363 Ill. App. 3d 861, 864, 845 N.E.2d 68, 71 (Ill. App. Ct. 2006).

FHR's argument also is dependent upon a nonsensical interpretation of the word "sustainable." BP Amoco explained—and FHR does not dispute—that "sustainable" means to keep an action or process going for a period of time. (Open. Br. at 6; FHRB 8) Nevertheless, FHR rewrites the PSA by adding language to the word "sustainable." Not only that, the language FHR adds is contradictory. FHR claims that the word "sustainable" does not have its common and ordinary meaning, but that it means "*a period of time* that the units should be able to produce *at any time for any duration* outside of planned and unplanned downtime." (FHRB 8 (emphasis added)) But the contract does not say this. And FHR's argument that the units should be able to produce "at any time for any duration" is the same as saying that they should be able to produce "all the time." This should be contrasted to the accepted, undisputed definition of "sustainable," which means for "a period of time"—not "all the time." Moreover, use of the word "annualized" further confirms that "sustainable" refers to a period of time that is less than "at any time for any duration," because "annualized" refers to a period of less than a year.

*Bourke v. Dun & Bradstreet Corp.*, 159 F.3d 1032, 1038 (7th Cir. 1998) (noting that a court must examine the contract as a whole in interpreting its language). FHR's definition of "sustainable" is not sensible and should be rejected. *E.g.*, *FutureSource LLC v. Reuters Ltd.*, 312 F.3d 281, 284 (7th Cir. 2002) ("Nonsensical interpretations of contracts, as of statutes, are disfavored.")

FHR's attempt to rewrite the PSA, combined with the problem that its attempted rewriting is contradictory, confirms that its contract "interpretation" is impermissible and unreasonable. Such an approach cannot be the basis for establishing that the PSA's capacity representation is ambiguous. A contract is ambiguous only where more than one *reasonable* interpretation exists; a party's rewriting of a contract term, or suggestion of "creative possibilities," cannot render plain language ambiguous.[2] *PPM Finance*, 392 F.3d at 893; *see also Paul B. Episcope, Ltd. v. Law Offices of Campbell & Di Vincenzo*, 373 Ill. App. 3d 384, 391, 869 N.E.2d 784, 790 (Ill. App. Ct 2007) ("The interpretation of the party contending for ambiguity needs to be equally plausible to the construction of the party arguing the contract is unambiguous."). Nor does two litigating parties arguing for different interpretations of the same language create an ambiguity. *Kaplan*, 266 F.3d at 605; *Emergency Med. Care, Inc. v. Marion Mem'l Hosp.*, 94 F.3d 1059, 1061 (7th Cir. 1996). The capacity representation has one, unambiguous meaning—the one set forth in BP Amoco's opening brief.

### B. FHR's Response Confirms That It Seeks To Rewrite The PSA By Adding, Deleting, And Changing Terms. (Open. Br. 7-11)

The clarity of the PSA's capacity representation reveals FHR's remaining arguments for what they really are: impermissible attempts to rewrite the parties' contract through litigation. *Davis*, 396 F.3d at 881; *PPM Finance*, 392 F.3d at 893.

#### 1. The PSA's Text Does Not Warrant Simultaneous Production.

FHR does not dispute that the PSA does not contain the words "simultaneous" or "at the same" time in the capacity representation. Thus, to accept FHR's contract argument about simultaneous production requires the Court and/or a jury to insert such words into the contract, contrary to Illinois law. *Klemp v. Hergott Group, Inc.*, 267 Ill. App. 3d 574, 581, 641 N.E.2d 957, 962 (Ill. App. Ct. 1994) ("A court will not add another term about which an agreement is silent."); *American States*, 229 Ill. App. 3d at 427, 593 N.E.2d at 1086 (same). Language in a

[2] FHR's citation to *William Blair & Co. v. FI Liquidation Corp.*, 358 Ill. App. 3d 324, 830 N.E.2d 760 (Ill. App. Ct. 2005) is unhelpful, as the particular term at issue in that case had so many varied meanings that it was ambiguous. *Id.* at 335-36, 830 N.E.2d at 770-71. That is not true here.

contract is defined according to its plain and ordinary meaning; not according to one party's attempt to rewrite it. *Traveler's Ins. Co. v. Eljer Mfg., Inc.*, 197 Ill. 2d 278, 301, 757 N.E.2d 481, 496 (Ill. 2001); *Konewko v. Kidder, Peabody & Co.*, 173 Ill. App. 3d, 939, 942-43, 528 N.E.2d 1, 3 (Ill. App. Ct. 1988). Nothing in the PSA or the plain and ordinary meaning of the text warrants simultaneous production by the three specified productions units. That a term such as "simultaneous" could easily have been included in the PSA but was not further establishes that the PSA does not represent simultaneous production. *Berryman Transfer & Storage Co., Inc. v. New Prime, Inc.*, 345 Ill. App. 3d 859, 863, 802 N.E.2d 1285, 1288 (Ill. App. Ct. 2004) ("Illinois recognizes a strong presumption against provisions that easily could have been included in a contract but were not."); *Klemp*, 267 Ill. App. 3d at 581, 641 N.E.2d at 962.

As an alternative to adding the "simultaneous" or "at the same time" language, FHR argues that the word "and" means the same things as "simultaneous" or "at the same time." (FHRB 9) FHR's uniquely expansive definition of the word "and" proves too much and is contradicted by FHR's own citation to an online dictionary. FHR's dictionary citation lists the very first definition of "and" as a conjunction "used to connect grammatically coordinate words, phrases, or clauses." (FHRB, Ex. A) Likewise, the plain and ordinary meaning of "and" is simply to connect words, phrases, or clauses; the average person would not understand the word "and" without more to mean "simultaneous" or "at the same time." "And" is merely a connector, not a license to rewrite the contract's representation by adding new language and phrases.

Moreover, words in a contract are to be interpreted in conjunction with surrounding language as a whole. *Bourke*, 159 F.3d at 1038. The context of the capacity production representation further confirms that the PSA does not represent simultaneous production. In particular, the representation states that the AMDSP "of the TMA, purified isophthalic acid and MAN productions units at the Joliet Plant are 71,000 metric tons, 170,000 metric tons, and 51,000 metric tons, *respectively*." (Reply to SOF ¶ 26) "Respectively" means "*[s]ingly* in the order designated or mentioned." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (Houghton Mifflin Co. 4th ed. 2006) (emphasis added) retrieved from <Dictionary.com http://dictionary.reference.com/ browse/respectively> last checked Feb. 4, 2009. Under FHR's approach, the word "respectively" has no meaning and is deleted. The

parties' agreement to use the word "respectively" also confirms that each production unit's AMDSP is given "singly"—not on a simultaneous basis.[3]

At bottom, FHR could have memorialized its hidden intent that the PSA represent "simultaneous" or "at the same time" production capacity by asking for that at the bargaining table. But FHR did not ask, and BP Amoco did not agree to give such a representation. As a matter of law, FHR cannot use litigation to insert such a term now. *Davis*, 396 F.3d at 881. And even if the law would not otherwise require this result, Section 7.3 of the PSA does because it proscribes the implicit representations and warranties that FHR is now asserting. (Reply to SOF ¶ 31; *see also* 8/25/06 Mem. Op. and Order at 8)

**2. The PSA's Text Does Not Require That The AMDSP Be Demonstrated Over 30 Days.**

FHR asserts that the time period for measuring "sustainable" is 30 days (FHRB 10), but it cannot point to a single word in the PSA that defines "sustainable" as 30 days. It could have asked for that in the contract; but that is not the language to which the parties agreed.

Nor can FHR claim that the common, ordinary meaning of sustainable is lasting for 30 days. It has no basis for making that claim. Indeed, the plain text of the capacity representation simply sets forth the "annualized maximum demonstrated sustainable production" for each production unit, without setting forth any minimum time period as to what "sustainable" requires. No one could possibly confuse the word "annualized" with a 30-day period. And, as explained in Section I.D., *infra*, it cannot be disputed that BP Amoco did in fact demonstrate the sustainable rates set forth in the PSA before the Plant was sold to FHR.

Lacking any textual support in the PSA, FHR claims to base its 30-day argument on a document in the data room given to FHR before the sale. (FHRB 10) But that document does not measure AMDSP; instead, it measures a different kind of capacity known as MSDR. Moreover, under black letter law, such parol evidence from the data room cannot be used to interpret (rewrite) the unambiguous PSA. *E.g.*, *Air Safety*, 185 Ill. 2d at 464, 706 N.E.2d at 885.

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[3] FHR argues that because the PSA only has one production capacity representation, that somehow means BP Amoco represented simultaneous production capacity. (FHRB at 9 & n. 4) This is a non-sequitur. There is only one capacity representation, which by its plain language sets forth separate numbers for each of three production units—"respectively." Nothing in that representation's text provides for a representation of simultaneous production capacity. Moreover, in pre-sale due diligence, BP Amoco gave FHR the actual production rates for the Plant. FHR thus knew that the Plant was not run simultaneously with all three units at maximum capacity. (Reply to SOF ¶ 18)

This is particularly true given that the parties expressly agreed in PSA § 16.7 that "no party shall be bound by or liable for any alleged representation, warranty … [in] the Data Room…." (Reply to SOF ¶ 33) Indeed, Judge Moran's orders relied on the integration clause to reject precisely this argument, explaining that FHR's reliance on extracontractual statements "would null the plain import of the integration clause, which emphasizes the text of the written agreement and excludes reliance on the Descriptive Memorandum and Data Room. Flint Hills agreed that it would base any claims only on the written agreement. It cannot now go beyond that agreement to establish liability." (8/25/06 Mem. Op. and Order at 8)

Had FHR wanted a representation of the highest rate that had been achieved over a 30-day period, it was free to seek that at the bargaining table. And FHR should have done so given its claim now that it knew that a 30-day period was one possible way to measure "sustainable." (FHRB 10) Indeed, FHR admits that the "omission of [a] known term in [a] contract provision shows [the] parties' intent not to apply term." (FHR COA Br. 7); *see also Berryman*, 345 Ill. App. 3d at 863, 802 N.E.2d at 1288; *Klemp*, 267 Ill. App. 3d at 581, 641 N.E.2d at 962. FHR's own argument confirms that the absence of the known term of "over a 30 day period" from PSA means that the parties did not intend to use or agree to that term.

**3. The PSA's Capacity Representation Is Limited By Its Plain Language To "Production Units."**

The PSA limits the capacity representation to the "TMA, purified isophthalic acid and MAN production units at the Joliet Plant." (Reply to SOF ¶ 26) The capacity representation is precise and specific; it does *not* warrant the entire Plant, nor does it represent the "production units, support facilities, and other structures of the Plant." Undeterred by the PSA's plain language, FHR rewrites the parties' agreement once again through an argument about damages that misses the point. Under Illinois law, a party claiming breach of a representation can recover damages only for items covered by the representation. *First Nat'l Bank of Elgin v. Dusold*, 180 Ill. App. 3d 714, 720, 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"); *see also Smith v. Kennedy*, 798 P.2d 832, 834 (Wyo. 1990); *Hennes Erecting Co. v. Nat'l Union Fire Ins. Co.*, 813 F.2d 1074, 1081 (10th Cir. 1987). If an item is not covered by the representation, then damages cannot be recovered for repairing and/or improving it. *Id.* Similarly, the only relevant "Losses" for which BP Amoco must indemnify FHR are those for breach of a representation. (Reply to SOF ¶ 41) But the problem for FHR is

that the capacity representation does not cover much of the equipment which FHR claims causes bottlenecks. Because the representation at issue does not cover such equipment and alleged bottlenecks—no matter how AMDSP is measured—FHR has no valid claim as a matter of law.

For example, FHR seeks damages under the capacity representation for alleged limitations caused by, or supposed repairs and replacements to, equipment that is not part of the production units. These include items such as the isophthalic acid (or IPA) unit and support facilities such as the waste treatment plant. (Reply to SOF ¶ 39) BP Amoco's opening brief explained that the PSA defined "PIA" to include both purified isophthalic acid and isophthalic acid, that the capacity representation does not use the term "PIA" but instead uses "purified isophthalic acid." (Open Br. 10) As a result, the plain language compels the conclusion that the PSA does not represent the isophthalic acid (or IPA) unit. In response, FHR does not cite any language in the PSA to support its assertion that the IPA unit is covered by the capacity representation. Indeed, FHR's interpretation would render the parties' decision to use "purified isophthalic acid" rather than "PIA" meaningless, violating canons of contractual interpretation. *E.g.*, *Thompson*, 903 F.2d at 1121; *Atwood*, 363 Ill. App. 3d at 864, 845 N.E.2d at 71.

Similarly, the plain language of the capacity representation does not include support facilities or anything else besides the three specified production units. The PSA makes clear that the production units are separate from support facilities, buildings, and other fixtures at the Joliet Plant, as well as current working capital such as MAN catalyst.[4] (Reply to SOF ¶¶ 40, 42-43 ) Once again, FHR could have bargained to have the PSA's production capacity representation cover "the Plant" or the "production units, support facilities, and other fixtures." But FHR did not, and the PSA does not say what FHR claims. Moreover, Section 7.3 of the PSA prohibits any such implicit representations and warranties from now being read into the PSA. (Reply to SOF ¶ 31)

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[4] FHR points out that "production units" is used in Section 7.1(d)(ii), while "process units" is used in Section 2.1(a) and the Schedules, but courts frequently give similar phrases the same meaning where called for by the context. *Wachovia Bank v. Schmidt*, 546 U.S. 303, 314-15 (2006); *Pub. Citizen, Inc. v. United States Dep't of Health & Human Servs.*, 332 F.3d 654, 665 (D.C. Cir. 2003). Moreover, FHR provides no explanation of what "production units" means that is consistent with the PSA's text. FHR also notes that "process units" and "production units" are not defined terms, but this is besides the point. A term is not ambiguous simply because it is undefined, especially where (as here) the surrounding context establishes the term's meaning. *See Chapman v. Engel*, 372 Ill. App. 3d 84, 88, 865 N.E.2d 330, 333 (Ill. App. Ct. 2007); *RBC Mortgage Co. v. National Union Fire Ins. Co. of Pittsburgh*, 349 Ill. App. 3d 706, 714, 812 N.E.2d 728, 735 (Ill. App. Ct. 2004).

### C. Extrinsic Evidence Cannot Be Used To Interpret The Unambiguous PSA. Regardless, Such Evidence Supports BP Amoco's Position.

The authorities hold—and FHR admits—that if a contract is unambiguous and contains an integration clause, then the Court should interpret the contract based on the material within the four corners of the document. *E.g.*, *Air Safety*, 185 Ill. 2d at 464, 706 N.E.2d at 885; *Davis*, 396 F.3d at 878; *PPM Finance*, 392 F.3d at 894; (FHRB 7). As discussed above, the PSA's capacity representation is unambiguous. Moreover, Judge Moran previously ruled that Sections 7.3 and 16.7 of the PSA (the no-reliance and integration clauses) provide that FHR "cannot now go beyond that agreement to establish liability." (8/25/06 Mem. Op. and Order at 8) Thus, much of what FHR argues in opposition to summary judgment is based upon nothing more than legally irrelevant extrinsic evidence, which is prohibited by the PSA and this Court's prior orders.

To the extent the Court considers extrinsic evidence, the reality of the circumstances and undisputed record outside the PSA's text is far different from the story FHR's brief tells. In particular, the undisputed extrinsic facts confirm that FHR knew that the capacity representation is an annualized maximum rate rather than the amount of chemicals that can be produced every day for an indefinite period in the ordinary course of business. In short, FHR's interpretation has no support either within or outside the four corners of the contract.

#### 1. Undisputed Facts Prove FHR Knew That The PSA Represented A Maximum Rate Rather Than An Ordinary Course Rate.

While FHR self-servingly argues that "purchasers want to know how much a plant is capable of producing as it is run in its ordinary course of business" (FHRB at 10), it is undisputed that FHR knew and agreed that BP Amoco was not representing such "ordinary course" numbers in the PSA. During contract negotiations FHR asked for a representation of a measure of capacity known as "effective capacity," which incorporates shutdowns and reliability. (Reply to SOF ¶¶ 23-24; Resp. to FHR SOF ¶ 12) BP Amoco declined to give that representation because of its concerns about FHR's ability to operate and maintain the plant. (*Id.*) The parties agreed not on what FHR says that it and other purchasers "want to know," but on the AMDSP, which by its plain language is a calculated, annualized maximum number. FHR cannot rewrite the contract now to get from the Court or a jury that which it was unable to obtain at the bargaining table. *Dresser Indus., Inc. v. Pyrrhus AG*, 936 F.2d 921, 933 (7th Cir. 1991).

As to FHR's similar argument that "[n]o purchaser of a Joliet plant would care about the hypothetical production capacity of a plant running its units one at time [sic]" (FHRB 10), the

short answer is that while FHR says it wanted ordinary course or guaranteed production numbers, BP Amoco declined to agree to them, and the PSA does not contain them. Also, and from the seller's side, no seller would ever want to warrant or represent actual or ordinary course production numbers given that it would be the buyer, not the seller, who would be operating the plant in the future—which was BP Amoco's point at the time. (Reply SOF ¶ 23)

In addition, undisputed extrinsic evidence refutes any claim that the "ordinary course" of the Plant was to run all three units at maximum production rates, day-in and day-out. (FHRB 10) FHR knew from the CIM and other actual production data that BP Amoco operated the Joliet Plant well below its maximum production rates and that the units were periodically shut down. (Reply to SOF ¶ 18) In fact, it is undisputed that *BP Amoco gave FHR the actual historical production data.* (*Id.*; Resp. to FHR SOF ¶ 13) That data showed far less actual production than the AMDSP, and it stretches credulity for FHR to contend otherwise.

Thus, the "ordinary course" of the Joliet Plant at the time the parties negotiated the PSA was to run the units at less than any possible maximum capacity. (Reply to SOF ¶ 18; Resp. to FHR SOF ¶ 13) Indeed, FHR's argument amounts to an assertion that the PSA warranted the particular purpose for which FHR sought to use the Joliet Plant. But the PSA expressly states that the sellers "make no, and expressly disclaim any, implied warranty, including any … fitness for a particular purpose or for any use or purpose whatsoever … ." (Resp. to FHR SOF ¶ 13)

**2. FHR's Remaining Extrinsic "Evidence" Is Either Contrary To Undisputed Facts Or Not Probative.**

Citing two documents, FHR claims that in a pre-PSA management presentation, BP Amoco advertised a "$140 million" opportunity, and "[t]hat is only true if the units are running at the represented levels at the same time." (FHRB 11) This argument is simply wrong. The first document FHR cites (Ex. 1794) contains handwritten calculations made years after the sale by its own litigation counsel, Mr. Figliulo, and is nothing more than inadmissible speculation. (*See* FHR App. Tab 18) The second document, incredibly, is the deposition transcript of a BP Amoco witness who told Mr. Figliulo that his calculations in the first document were wrong. (Resp. to FHR SOF ¶ 8)[5] Moreover, as Judge Moran previously ruled (8/25/06 Mem. Op. and

[5] FHR's reliance upon Exhibit 1794 concerning the $140 million number is misplaced. First, the document is hearsay, created by FHR's litigation counsel during the deposition of John Dueker. Second, Dueker did not agree with the document FHR's counsel created. (BP Amoco Resp. to FHR SOF ¶ 8) The exhibit thus lacks any proper foundation and is inadmissible under the Federal Rules of

Order at 8), FHR cannot rely upon the pre-contract management presentation because the PSA expressly prohibits such reliance. (Reply to SOF ¶¶ 32-33)

FHR also cites to memoranda discussing capacity, but none help its argument. (FHRB 10-11) None of the memoranda FHR cites measure AMDSP and none define terms in the production capacity representation. (Resp. to FHR SOF ¶¶ 3-6) Instead, they deal with other studies or measures of capacity different from the representation agreed to in the PSA. (*Id.*) For example, FHR cites a document to argue that "sustainable" means a 30-day period (FHRB 10), but that document was measuring a different type of capacity called MSDR, not the AMDSP used in the contract. (Resp. to FHR SOF ¶ 10)

### D. The Undisputed Facts Establish That BP Amoco Complied With The Plain Meaning Of The PSA's Capacity Representation. (Open Br. 6-7)

BP Amoco previously explained the undisputed facts showing how it determined the AMDSP. (Open Br. 6-7) FHR has no response as to why those undisputed facts are inconsistent with the word "demonstrated" in the PSA's production capacity representation.

#### 1. The Documents FHR Relies Upon Do Not Measure AMDSP.

FHR pins its argument on a few documents which measured capacity differently than AMDSP. But these documents are irrelevant and immaterial. Why? Because the documents do not purport to measure AMDSP and, tellingly, FHR does not assert that they do. (FHRB 10)

The undisputed facts regarding measurements of TMA production illustrate FHR's misunderstanding of the record. Documents provided to FHR in pre-sale due diligence stated with respect to the TMA unit that "[m]aximum expected daily rates were demonstrated in early 2000, however, with further operational experience it was determined that more reliable and efficient operation would result by lowering the reaction batch size." (Resp. to FHR SOF ¶ 5) These maximum daily rates showed a capacity of 71,000 kmta, but that document also told FHR that with the batch size reduction, the TMA unit's production would decrease by approximately 1,700 kmt. (*Id.*) FHR now asserts that other documents, which again do not measure AMDSP, report a capacity equal to 69,700 kmta. But these documents incorporated the batch size reduction, which explains their lower number. (*Id.*) Thus, far from showing that the 71,000 kmta number "was wrong" (FHRB 11), the cited documents are consistent and simply show two

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Evidence. Fed. R. Evid. 602; *Campania Mgmt. Co. v. Rooks, Pitts & Poust*, 290 F.3d 843, 853 (7th Cir. 2002) ("it is universally known that statements of attorneys are not evidence").

different ways of measuring capacity. (*See generally* Resp. to FHR SOF ¶¶ 3-6)

**2. There Are Multiple Periods Of 3 Or More Consecutive Days Where Production Is Calculated To Be Higher Than The AMDSP.**

FHR is in error when it argues that neither BP Amoco nor its expert can identify dates when the units demonstrated their production. (FHRB 11) The amount of chemicals that each unit produced is not available on a daily basis. (Resp. to FHR SOF ¶ 21) Accordingly, Dr. Vincent Van Brunt analyzed the production yields and daily feedrates of inputs into the three production units. He relied on the Joliet Plant's "PI Database," which is the record of actual plant data, to determine days on which the feedrate of inputs indicate that chemical production exceeded the AMDSP rates in the PSA. Based on this analysis, Dr. Van Brunt found that, for example, the feedrate for TMA inputs exceeded the rate necessary to meet the AMDSP statement on 14 days in April 2001. (*Id.*) Similarly, Dr. Van Brunt found that the feedrates for PIA and MAN also exceeded the amount required to meet the AMDSP representation. (*Id.*) In sum, the undisputed actual historical data supports BP Amoco's calculation of the AMDSP, as confirmed by Dr. Van Brunt's analysis of the actual data.

**3. Ogle's Opinions Contradict The PSA's Plain Language.**

The opinions of FHR's putative expert, Russell Ogle, are immaterial and irrelevant because they are based upon FHR's attempts to rewrite the PSA as well as on inadmissible extrinsic evidence at odds with the PSA. Because his opinions are based on flawed facts, they cannot be considered on BP Amoco's summary judgment motion. *E.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993); *St. Paul Fire & Marine Ins. Co. v. Michelin Tire Corp.*, 12 Ill. App. 3d, 165, 179-80, 298 N.E. 2d 289, 299 (Ill. App. Ct. 1973).

For example, Ogle calculates average daily production over a 30-day period and then annualizes this daily number to arrive at what he claims are the true AMDSP amounts. (Resp. to FHR SOF ¶ 19) But nothing in the PSA requires that AMDSP be measured over a 30-day period, and Ogle admitted that he could not say whether the highest months of production before the sale included any days when the respective production units were down. (*Id.*) Similarly, Ogle measures alleged bottlenecks by determining if two or three production units could be run simultaneously at the maximum rates. (*Id.*) But again, nothing in the PSA represents simultaneous production capacity. Moreover, Ogle's alleged bottlenecks include wastewater treatment, process air, and well water even though these are support facilities not warranted in PSA § 7.1(d)(ii), and even though he admits that none of the support facilities constrain

production at the PSA-represented capacities unless two or three of the production units are being run simultaneously at their maximum rates. (Resp. to FHR SOF ¶¶ 19, 23; Reply to SOF ¶¶ 42, 46) In addition, Ogle claims bottlenecks in the IPA unit, which are not covered by the representation in Section 7.1(d)(ii), and in the MAN catalyst, which is working capital rather than part of the production units. (Resp. to FHR SOF ¶¶ 19, 22-23; Reply to SOF ¶¶ 40-41, 43, 45) Ogle's opinions are contrary to the PSA and inadmissible on summary judgment. *E.g.*, *Mid-State Fertilizer Co. v. Exchange Nat'l Bank of Chicago*, 877 F.2d 1333, 1339-40 (7th Cir. 1989).

## II. BP AMOCO DID NOT DEFRAUD FHR.

### A. FHR Rewrites, Misstates, And Ignores The Law. (Open. Br. 11-15)

When BP Amoco moved to dismiss FHR's fraud claim, the Court held that FHR had stated only the *limited* claim of fraudulent inducement based upon representations contained in the contract itself. (4/24/07 Mem. Op. and Order at 9 ("As the earlier order of this court made clear, the no-reliance clause in the contract prevents a claim of fraud based on external representation not explicitly referred to in the contract.")) Thus, the only question now is whether FHR has sufficient admissible evidence that would permit a jury to find under the "clear and convincing" standard that BP Amoco defrauded FHR based upon the PSA's production capacity representation in Section 7.1(d)(ii).

In answering this question, FHR cites to but then rewrites and/or ignores this Court's prior decision concerning the elements of and limitations to its fraud claim. (FHRB 13) Thus, the heart of FHR's fraud argument is based upon parol evidence and other alleged statements not contained in the PSA. (FHRB 14, 16) But this Court already rejected FHR's arguments on this point in its prior opinions on BP Amoco's motion to dismiss, where the Court limited FHR's claim to one based upon the specific production capacity representations *contained* in the PSA—not based upon statements or alleged representations about capacity made *prior to* contract signing or *outside of* the PSA. (4/24/07 Mem. Op. and Order at 9, 10; 8/25/06 Mem. Op. and Order at 8) This is the law of the case; and it governs and disposes of most of FHR's arguments.

In addition to this Court's prior rulings, the law precludes FHR from pointing to any allegedly false statements made outside of the PSA. Why? Because FHR expressly agreed in the PSA that it was not relying upon such statements, documents and materials. (Reply to SOF ¶¶ 31-32) Moreover, the PSA is an integrated contract. (Reply to SOF ¶ 33) Thus, because of the contract's express contractual disclaimer and integration clauses, FHR's capacity fraud claim

SOF ¶ 8; *see also supra* pages 11-12) And finally, FHR's argument that the production units cannot run at the rates represented in the PSA relies on its purported "expert" (Ogle), whose opinions assume that FHR's improper rewriting of the PSA is correct. (Resp. to FHR SOF ¶ 19)

Thus, the facts here are quite unlike those in *Kirkpatrick v. Strosberg*, 385 Ill. App. 3d 119, 133-34, 894 N.E.2d 781, 795 (Ill. App. Ct. 2008). There, a defendant building developer represented the height of ceilings to condominium purchasers, was then told by a superintendent that the ceiling height representation was wrong, but never told the purchasers. *Id.* By contrast, BP Amoco warranted the AMDSP in the production capacity representation, but FHR has no evidence to contradict that AMDSP and, instead, relies on documents and testimony that do not concern the AMDSP numbers but involve entirely different kinds of capacity measurements.

Last, FHR's argument that intent cannot be decided at the summary judgment stage is wrong. (FHRB at 16) *See, e.g., Roger v. Yellow Freight Sys., Inc.*, 21 F.3d 146, 148 (7th Cir. 1994) ("Summary judgment will not be defeated simply because motive or intent are involved. If a plaintiff fails to establish any motive or intent to support his position, summary judgment is appropriate.") (citation omitted); *Oliver v. Deen*, 77 F.3d 156, 158 (7th Cir. 1996); *Meister v. Georgia-Pacific Corp.*, 43 F.3d 1154, 1159 (7th Cir. 1995).

**CONCLUSION**

FHR opposes summary judgment by first attempting to rewrite the PSA, and second by ignoring or rewriting this Court's prior opinions. The Court should reject FHR's arguments. The PSA is unambiguous, and FHR should not be allowed to rewrite the PSA to warrant guaranteed simultaneous production capacity numbers. That is what FHR wanted at the contract bargaining table, but admittedly did not get. Finally, FHR's fraud claim fails because it depends upon FHR's attempt to rewrite the contract, is precluded by FHR's ambiguity argument, and because FHR cannot establish each of the elements of its fraud claim by clear and convincing evidence. Summary judgment, in short, should be granted to BP Amoco and BPCNA.

Date: February 5, 2009

Respectfully submitted,

/s/ R. Chris Heck
One of the Attorneys for BP Amoco Chemical Company and BP Corporation North America Inc.