Motion Ex. 9

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

BP AMOCO CHEMICAL COMPANY,	
Plaintiff/Counter–Defendant,	
v.	**Consolidated Case No. 05 C 5661**
FLINT HILLS RESOURCES LLC,	Judge James B. Moran
Defendant/Counter–Plaintiff.	
FLINT HILLS RESOURCES LLC,	
Third-Party Plaintiff,	
v.	
BP CORPORATION NORTH AMERICA INC.,	
Third-Party Defendant.	

PARTIAL SUMMARY JUDGMENT:
"CONDITION OF ASSETS" AND "SPENDING" CLAIMS

BP AMOCO CHEMICAL COMPANY AND BP CORPORATION NORTH AMERICA INC.'S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO CONDITION OF ASSETS AND SPENDING CLAIMS

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nonmoving party identifies specific facts, supported by more than a "mere scintilla" of evidence, establishing a genuine, material issue for trial. *See Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1320 (7th Cir. 1993); *see also Murphy v. ITT Educ. Servs., Inc.*, 176 F.3d 934, 936 (7th Cir. 1999). By these standards, BP Amoco is entitled to judgment as a matter of law on FHR's condition-of-assets claims and its motion should be granted.

I. As A Matter of Law, BP Amoco Did Not Breach The Contract's Condition-Of-Assets Representation Or Its Maintenance-And-Capital-Spending Representation.

FHR's claims for breach of the condition-of-assets and maintenance-and-capital spending representations fail because they are contrary to the contract's unambiguous and plain language as well as a fundamental principle of contract law, specifically, that because contracts are to be enforced as written, courts may not rewrite a contract at the request of one of the parties. And thus a party cannot claim — as FHR does here — that a contract has been breached if the claimed breach turns upon an "interpretation" that is nothing more than a rewriting of a contract term. *PPM Finance, Inc. v. Norandal USA, Inc.*, 392 F. 3d 889, 893-894 (7th Cir. 2004); *Am. Bankcard Int'l v. Schlumberger Tech., Inc.*, No. 99 C 6434, 2002 WL 80944, at *3 (N.D. Ill. Jan. 22, 2002); *Abbott v. Amoco Oil Co.*, 619 N.E.2d 789, 795 (Ill. App. Ct. 1993) ("A court must enforce a contract as written and may not rewrite it to suit one of the parties").

Despite the size and supposed complexity of this case, FHR's condition-of-assets claims (and maintenance-and-capital spending claims) can be resolved simply by applying the plain contract language and rejecting FHR's opportunistic efforts to rewrite it. And if BP Amoco is right about the plain meaning of the relevant contract provisions, then FHR's claims fail and the Court will not even have to reach or consider any of the specific problems and undisputed facts that independently defeat and bar each of FHR's approximately 40 individual condition-of-assets claims.

A. FHR's Contract Claims Depend Upon Rewriting The Parties' Agreement, Which The Law Does Not Allow.

1. The contract's condition-of-assets representation unambiguously applies to all Joliet Plant assets "as a whole"— not to each individual asset separately.

In FHR's view, BP Amoco warranted the condition of each and every individual asset and piece of equipment at the Joliet Plant. The contract, however, does not say that, but instead refers to the condition of "***all*** tangible Assets" as a whole:

"All of the Joliet Plant process units and buildings are structurally sound, and ***all***

> ***tangible Assets*** have been maintained substantially in accordance with normal industry practice, are 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....") (Section 7.1(d)(ii)) (emphasis added)

Given FHR's claims, the core question facing the Court is: does the representation in Section 7.1(d)(ii) apply to "all tangible Assets" collectively, that is, the Joliet Plant as a whole, or does it apply to each nut, bolt, screw, piece of equipment and asset individually? If the answer is that the representation applies to "all," collectively or as a whole, then FHR's claims must be dismissed. If the answer to the core question is that the representation applies individually, to each separate asset and piece of equipment, then the Court will need to consider the various other specific reasons why FHR's claims fail.

In answering this core question, the Court must first determine whether Section 7.1(d)(ii) is unambiguous and, if so, its meaning. In making this determination, a contract's terms are generally given their "*plain, ordinary, and popular meaning*" unless they are otherwise specially defined. *See, e.g., Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 607 N.E.2d 1204, 1215-16 (Ill. 1992); *Grundstad v. Ritt*, 166 F.3d 867, 871 (7th Cir. 1999); *Konewko v. Kidder, Peabody & Co.*, 528 N.E.2d 1, 3 (Ill. App. Ct. 1988).

Here, a straightforward reading of the contract's plain language confirms that the phrase "all tangible Assets" refers to the Joliet Plant's equipment ***collectively***, in its totality or ***as a whole***, but not individually to each and every component of each and every one of thousands of pieces of equipment at the Joliet Plant. This was FHR's understanding as well, as it admitted through the deposition testimony of its 30(b)(6) witness:

> Q: I'd like to focus specifically on the part that says "are in substantially good operating condition and repair for their age with respect to all tangible assets" . . .
>
> * * * ***Was it your understanding that this referred to all Joliet plant assets as a whole***?
>
> A: Yes. (SOF at ¶ 16) (4/21/08 Personey 30(b)(6) Dep. at 81).[4]

This plain meaning — describing collective rather than individual assets — is confirmed by leading dictionaries. *See Matter of Envirodyne Indus., Inc.*, 29 F.3d 301, 305 (7th Cir. 1994)

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[4] Tellingly, FHR likewise refers, in its Counterclaim, to the Plant *as a whole* when discussing the condition-of-assets representation. (*See, e.g.,* 11/17/05 Counterclaim at ¶ 5 ("The plant that [BP Amoco] promised was not the plant that [FHR] got"); *see also id.*, at ¶ 128; *id.* ¶ 145)

(dictionaries are "entirely appropriate ... interpretive aids").[5] According to these dictionaries "all, when used as an adjective, means "whole":

- ***"the whole number, amount or quantity of"*** WEBSTER'S II NEW COLLEGE DICTIONARY 35 (3rd Ed. 2005);
- ***"Being or representing the entire or total number, amount or quantity"*** AM. HERITAGE COLLEGE DICTIONARY 35 (4th Ed. 2007);
- ***"the whole number of (used in referring to individuals or particulars, taken collectively)"*** WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 38 (1989);
- ***"Being or representing the entire or total number, amount or quantity of"*** AM. HERITAGE DICTIONARY 94 (4th Ed. 2006);
- ***"the whole amount or number or extent of"*** OXFORD AM. DICTIONARY 22 (1980).

Various courts likewise have recognized this unambiguous, straightforward meaning. According to the Delaware Chancery Court, the word "all, ***when used before a plural noun such as 'assets,'*** means ***'[t]he entire or unabated amount or quantity of; the whole extent, substance, or compass of; the whole.'"*** *Hollinger Inc. v. Hollinger Int'l, Inc.*, 858 A.2d 342, 377 (Del. Ch. 2004) (emphasis added). Similarly, in *Price v. Code-Alarm, Inc.*, No. 91 C 0699, 2002 WL 1870041, at *7 (N.D. Ill. Aug. 13, 2002), the court held that a contract entitling plaintiff to "35%-of-*all*-monetary-recovery" in certain litigation referred to the "aggregate" of money recovered in all the cases; plaintiff was thus not entitled to 35% of the amount recovered in *each* of the individual suits (without regard to losses in other cases). *Id.*; *see also Arizona v. Atchison, Topeka & Santa Fe R.R.*, 656 F.2d 398, 404 (9th Cir. 1981); *Yturria v. Kerr-McGee Oil & Gas Onshore, LP*, No. 7:05-cv-181, 2006 WL 3227326, at *9 (S.D. Tex. Nov. 6, 2006) ("all" means "the whole quantity or amount"); *Centimark Corp. v. Village Manor Assocs.*, No. CV030080166, 2007 WL 2081276, at *14 (Conn. Super. Ct. June 21, 2007) ("all" means "the whole amount, quantity, or extent of"); *Stewart Title Co. v. Herbert*, 85 Cal. Rptr. 654 (Cal Ct. App. 1970) ("The word 'all'...means 'Completely, wholly, the whole amount, quantity or number'").

The use of the collective word "all" to modify "tangible Assets" is consistent with the

[5] *See also Supreme Laundry Serv., L.L.C. v. Hartford Cas. Ins. Co.*, 521 F.3d 743, 747 (7th Cir. 2008) ("Illinois courts have held that if a term in a contract is undefined, a court should afford the term its 'plain, ordinary and popular meaning ... [as] derived from the term's dictionary definition.'"); *CSX Transp., Inc. v. Chicago & N. W. Transp. Co.*, 62 F. 3d 185, 190 (7th Cir. 1995).

context and purpose of the parties' contract here. The PSA did not concern the sale of particular individual assets or the 40 specific pieces of individual equipment and assets about which FHR now complains. Instead, the transaction memorialized in the PSA involved the sale of a global performance chemicals business and a massive chemical plant composed of broad categories of tangible and intangible assets. Accordingly, the phrase "tangible Assets" is defined as comprising the "Joliet Plant," "Real Property," "Owned Equipment," and "Leased Equipment" — broad categories of assets, not itemized individual ones. (*See* Tab 18B, PSA § 2.1(a)-(d)) Indeed, given the scope of the transaction, the Plant's age and the inherently challenging environment of a chemical plant, it would make little economic sense for the seller to extend (and the buyer to pay for) a warranty about the present and future condition of each and every nut, screw, and bolt, which is what FHR's claims require. Such an unreasonable interpretation must be rejected. *See Dispatch Automation, Inc. v. Richards*, 280 F.3d 1116, 1119 (7th Cir. 2002) ("When a contractual interpretation makes no economic sense, that's an admissible and, in the limit, a compelling reason for rejecting it."); *McElroy v. B.F. Goodrich Co.*, 73 F.3d 722, 727 (7th Cir. 1996); *see also Omnitrus Merging Corp. v. Ill. Tool Works, Inc.*, 628 N.E.2d 1165, 1170 (Ill. App. Ct. 1994) ("a court will not place an illogical and ridiculous construction upon the language").[6]

Given the plain and straightforward meaning of "all" as describing the assets as a whole, FHR's individual condition-of-assets claims depend on rewriting the contract's representation to delete "all," add the phrase "each and every," and then change the nouns, pronouns, and verbs from plural to singular forms:[7]

> "All of the Joliet Plant process units and buildings are structurally sound, and ~~all~~ ***each and every*** tangible Assets~~ have~~ ***has*** been maintained substantially in accordance with normal industry practice, ~~are~~ ***is*** in substantially good operating condition and repair for ~~their~~ ***its*** age (taking account of ~~their~~ ***its*** nature, normal wear and tear and continued repair and replacement in accordance with Seller's past practice)...." (Tab 18B) (PSA § 7.1(d)(ii))

But this is not what the contract provides, and it is well settled that "[a] court must not rewrite a

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[6] Nevertheless, had FHR wanted a representation for each and every individual piece of equipment and asset, it could have asked and negotiated (and paid) for that. It did not. *See Phelps Dodge Corp. v. Schumacher Elec. Corp.*, No. 01 C 4305, 2004 WL 443992, at *4 (N.D. Ill. Mar. 9, 2004); *Air Safety, Inc. v. Teachers Realty Corp.*, 706 N.E.2d 882, 886 (Ill. 1999).

[7] *See, e.g.*, Bryan A. Gardner, *Garner's Modern American Usage*, at 281 ("'each and every,' like *each* or *every* alone, requires a singular verb.") (Oxford Univ. Press 2003).

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); *PPM Finance, Inc.*, 392 F. 3d at 894; *Klemp v. Hergott Group, Inc.*, 641 N.E.2d 957, 962 (Ill. App. Ct. 1994).

The plain language of the PSA, the dictionaries, authorities, FHR's admission, and common sense support only one interpretation: the PSA's reference to "all tangible Assets" means the whole, entire, or total collection of Joliet Plant equipment. FHR's attempt to rewrite the parties' agreement, under the guise of interpretation, to have the representation apply singularly to each specific asset and piece of equipment is improper as a matter of law and must fail. And for this reason alone, summary judgment should be entered in favor of BP Amoco and against FHR on its breach of contract condition-of-assets claims. *See PPM Finance,* 392 F. 3d at 894; *Am. Bankcard Int'l,* 2002 WL 80944, at *3; *Abbott*, 619 N.E.2d at 795; *see also Air Safety, Inc.*, 706 N.E.2d at 886.

2. The structurally-sound warranty unambiguously applies only to "Process Units and Buildings."

For the same reason, the term "all" in the first clause of Section 7.1(d)(ii) means "as a whole," not "each and every":

> "***All of the Joliet Plant process units and buildings*** are structurally sound ...) (Tab 18B, PSA § 7.1(d)(ii))

This clause, therefore, represents that the process units and buildings as a whole are structurally sound — not each and every component of each piece of equipment at issue. Put simply, equipment is not a process unit or building.

Moreover, on its face, the "structurally sound" representation in Section 7.1(d)(ii) applies only to the "process units" and "buildings" at the Joliet Plant. FHR ignores this limitation and attempts to rewrite the contract so that the representation applies to each of its 40 condition-of-asset claims — regardless of whether it is a "process unit" or "building." FHR's overreaching, opportunistic interpretation must be rejected. The Joliet Plant comprises separate specific categories (only two of which are included in the structurally-sound representation): "process units," "buildings," and "support facilities."[8] (*See* Tab 18B, PSA § 2.1(a); Schedule 2.1(a))

[8] "Process units" refers to the four multi-level structures housing the many different individual pieces of equipment used in the major steps of each production process, for example, reaction, drying, solvent recovery, and product storage. (*See* PSA Schedule 2.1(a)) "Buildings" are buildings occupied by Plant

permit fraud claims among sophisticated commercial parties arising from purported representations ***contained in the parties' agreement.*** In fact, in the only Illinois Appellate Court decision that has applied the purported exception to allow a fraud claim among contracting parties, the alleged misrepresentations were ***outside the agreement*** and the parties were not commercial parties but rather a buyer and seller of residential real estate. *Zimmerman*, 510 N.E.2d at 415; *see also Town of East Troy v. Soo Line R.R. Co.*, 653 F.2d 1123, 1129 (7th Cir. 1980) (federal court is not bound by "'cases involving significantly different facts'").[20] Regardless, because the Court only permitted FHR to base its claim for fraudulent inducement on representations in the PSA, and because FHR has not identified any such misrepresentation, its claim for fraud (or fraudulent inducement) must fail.

CONCLUSION

For the foregoing reasons, BP Amoco and BPCNA request that the Court grant summary judgment in their favor on FHR's breach of contract and fraud claims related to the condition of the Joliet Plant Assets and to BP Amoco's pre-sale maintenance and capital spending.

Date: November 12, 2008

Respectfully submitted,

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[20] The same is true of the relevant federal cases, each of which involves extra-contractual representations that were separate from the parties' contract. *See Faust Printing*, 2006 WL 1719532, at *4, 6 (allegations "separate from the alleged failures in performance under the terms of the contract" not barred by economic loss doctrine); *Daimler Chrysler Ins. Co. v. Barrington Motor Sales RV*, No. 05 C 6306, 2006 WL 1005859, at *2 (N.D. Ill. Apr. 1, 2006) ("representations about the title and ownership" made to induce sale of stolen vehicle); *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, No. 01 C 9389, 2004 WL 532717, at *4 (N.D. Ill. Feb. 26, 2004) (extra-contractual representations about electrical requirements and installation time); *Kingsford Fastener, Inc. v. Hitachi Koki USA, Ltd.*, 2002 WL 992610, at *3 (N.D. Ill. May 15, 2002) (plaintiff induced to enter distribution agreement for nail guns by extra-contractual assurances about performance of defendant's allegedly defective nails).