

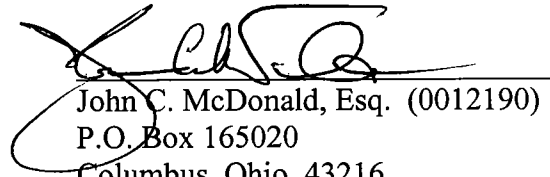
**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

BUCKEYE DIAMOND LOGISTICS, INC.	:	
flka BUCKEYE RECYCLERS, INC.	:	
	:	Civil Action No. C3-01-440
Plaintiff,	:	
	:	Chief Judge Walter Herbert Rice
v.	:	
	:	
CHEP USA, a general partnership,	:	
	:	
Defendant.	:	

DEFENDANT'S MOTION TO EXCLUDE PX 2 ("BAIN REPORT")

In the Court's March 15, 2004, Decision and Entry (Docket #89), at page 13 the Court invited CHEP USA ("CHEP") to seek reconsideration of the ruling on the admissibility of PX 2 (the "Bain Report" or PX 2), if Bain & Co. ("Bain") is or was not CHEP's agent. Based on the engagement letters between Bain and CHEP which expressly disclaim any agency relationship, CHEP respectfully requests that this Court reconsider its March 15, 2004 Decision and Entry (Docket #89) and exclude Plaintiff's PX 2 evidence as well as other evidence related to Bain's work product. Bain has never been an agent of CHEP, and thus any documents or statements by Bain or its representatives are inadmissible hearsay. The grounds supporting this Motion are set forth in the attached Memorandum in Support.

Respectfully Submitted,



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MEMORANDUM IN SUPPORT

I. INTRODUCTION

There are two important points: (1) Bain is not and has not ever been an agent of CHEP and (2) thus, any evidence relating to statements by Bain, either via documents or testimony, is inadmissible hearsay.¹ This Court has already properly excluded Buckeye's Trial Exhibit PX 11 (the Wal*Mart report), but in its Decision and Entry declined to exclude Buckeye's PX 2 (the Bain Report). However, all evidence relating to the Bain Report should be excluded as inadmissible hearsay, since Bain is not CHEP's agent.

¹ This assumes that Buckeye will not offer testimonial evidence by Bain representatives, since Buckeye has never deposited or disclosed a Bain representative as a witness.

II. ARGUMENT

PX 2 (and all Bain documents and statements for that matter) is inadmissible hearsay. A statement other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted is not admissible, unless it falls within an exception. Fed. R. Evid. 801, 802. Rule 801(d)(2)(D) allows the introduction of evidence of “a statement by [the party-opponent’s] agent or servant concerning a matter within the scope of the agency or employment.” Although the Federal Rules of Evidence do not define the terms “agent” or “servant”, courts have held that Congress intended Rule 801(d)(2)(D) “to describe the traditional master-servant relationship as understood by common law agency doctrine.” *Boren v. Sable*, 887 F.2d 1032, 1038 (10th Cir. 1989); *see also American Eagle Ins. Co. v. Thompson*, 85 F.3d 327 (8th Cir. 1996) (same); *Lippay v. Christos*, 996 F.2d 1490 (same). Because the Federal Rules of Evidence are to have a uniform application, courts apply federal common law of agency, rather than state agency law. *Boren, supra*, at 1038.

The Restatement (Second) of Agency provides the common law definition of agency: (1) agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act; (2) the one for whom action is to be taken is the principal and (3) the one who is to act is the agent. *Id.* (citing Restatement (Second) of Agency §1 (1958)). It is the offering party’s burden to demonstrate that the declarant is the agent of the party-opponent. *American Eagle Ins. Co., supra*, at 333.

Here, not only has Buckeye failed to meet its burden in previous filings, it cannot demonstrate that Bain is an agent of CHEP. The undisputable evidence demonstrates that Bain was an independent contractor or consultant for CHEP, which had no fiduciary relationship with

CHEP, no authority to act for CHEP and was not subject to CHEP's control. A review of the documents defining CHEP and Bain's relationship bears this out. [Attachment "A" – Bain Engagement Letters].²

By explicit agreement of the parties, Bain had no authority to bind CHEP or act on CHEP's behalf. Annex B to one of the documents comprising Bain and CHEP's engagement, signed by both Bain and CHEP, provided:

3) Personnel

a) Independent Contractor. Bain's relationship to you is that of an independent contractor. Bain shall have no authority to commit you contractually, or otherwise, to any third party.

[Attachment "A", Annex B, ¶3a]. In addition, Bain had exclusive control over whom it hired and assigned to its project with CHEP. [*Id.*, ¶3b]. Moreover, CHEP and Bain agreed not to offer employment to any employee of the other. [*Id.*, ¶3c].

Even more telling is CHEP and Bain's acknowledgment that Bain will be exercising *independent* professional judgment. [*Id.*, ¶4f]. CHEP and Bain agreed:

You acknowledge that performance of Bain's services will involve the expression of professional ideas, judgments and opinions by Bain, and that it is in your interest to have such ideas, judgments and opinions expressed frankly, without concern on the part of Bain that such ideas, judgments and opinions will be deemed representations, warranties or covenants upon which you may claim reliance.

[*Id.*]. If Bain expressly provided that CHEP could not rely on any of its opinions or representations, it can hardly be said that Bain was CHEP's agent, one over whom CHEP had control or that Bain could act on CHEP's behalf. Where there is no evidence that CHEP authorized Bain to act on its behalf and no evidence of an agency relationship, Buckeye cannot meet its burden of proving an agency relationship between CHEP and Bain. *See, e.g., American*

² Because of the risk imposed by Buckeye's Motion to Unseal CHEP's Confidential and Proprietary Documents, redacted copies of the engagement letters are attached.

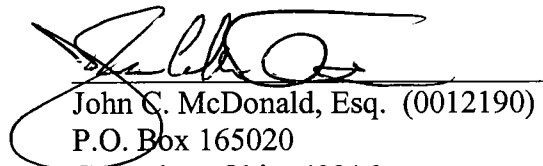
Eagle Ins. Co., supra, at 333 (holding that where “no evidence indicated that American Eagle authorized [the declarant] to act on its behalf,” the court is “constrained to conclude that [the offering party] failed to meet her burden of establishing the necessary agency relationship.”)

So too here, the only evidence is that Bain was not CHEP’s agent. Bain went to great lengths to include numerous provisions in its contractual engagement with CHEP to foreclose its ability to act for or bind CHEP. As such, Bain is not CHEP’s agent, and any Bain documents or statements contained within those documents are inadmissible hearsay, including Buckeyes’ proposed PX 2.

III. CONCLUSION

Buckeye’s proposed PX 2 and any other documents or statements by Bain are inadmissible hearsay. Bain is not an agent of CHEP, and Buckeye should be prohibited from introducing this exhibit and any evidence relating to the exhibit or its contents.

Respectfully Submitted,



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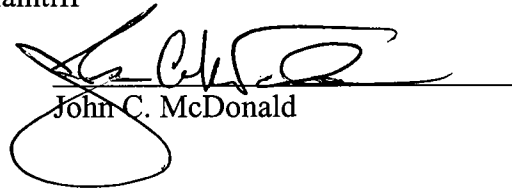
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Defendant's Motion to Exclude PX2 ("Bain Report") was served upon the following via hand delivery the 13th day of May, 2004.

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