

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

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

**DEFENDANT CHEP USA'S MEMORANDUM IN OPPOSITION BUCKEYE DIAMOND
LOGISTICS' MOTION IN LIMINE REGARDING EVIDENCE OF PARTICIPATION
IN CHEP USA'S PALLET RETURN PROGRAM**

In its Motion in Limine Regarding Evidence of Participation in CHEP USA's Asset Recovery Program (ARP), Buckeye states that evidence of the number or identity of participants in CHEP's pallet return program is irrelevant to the claims in this case. In particular, Buckeye asserts that such evidence has no relevance to any of the elements of Buckeye's unjust enrichment claim. In this equitable action however, the Court must weigh both the benefit (to CHEP) and the detriment or cost (to Buckeye) in order to make the ultimate determination of whether or not CHEP has been unjustly enriched by Buckeye's activities. Buckeye would stop the process merely with a determination of whether CHEP has been enriched. The final determination, however, is whether that enrichment is unjust, which in turn requires inquiry into Buckeye's costs.

Evidence of what hundreds of other recyclers consider to be just compensation for their services is clearly relevant to the value of Buckeye's services. This is particularly true, where as here, Buckeye claims that it cannot quantify its costs. Even if Buckeye were to affix a price tag

to those services, market place evidence is relevant to assess whether Buckeye's price tag is "reasonable."

Evidence regarding the identity and number of participants in CHEP's pallet recovery program provides verifiable independent market place evidence of the value CHEP ascribes to the benefit of having recyclers collect and return CHEP's pallets. Thus, such evidence is relevant to Buckeye's unjust enrichment claim.

Buckeye's complaint also explicitly asks for a declaration of CHEP's "obligation to reimburse it" for its services. The pallet program was so specifically designed to reimburse recyclers for their services. This extrinsic evidence is particularly necessary as a result of Buckeye's total failure to demonstrate its costs associated with its activities related to CHEP pallets:

Q. What price would you consider acceptable to reimburse the recyclers for the actual cost of storing, handling or transporting the CHEP pallets?

A. (By Mr. McAdow): I don't know.

Q. Do you have any way of calculating that?

A. (By Mr. McAdow) I never have.

(Sam McAdow Sr. Deposition, p. 243 – 244.)

Without evidence concerning Buckeye's costs, it will be difficult, if not impossible for the Court, to determine the amount of "fair compensation" that would be required so that the benefit to CHEP would not be considered "unjust". Evidence of what CHEP pays to other recyclers similarly situated to Buckeye, and what those recyclers are willing to accept as reimbursement for the sorting and storage of CHEP's pallets, is relevant to both the benefit and detriment aspects of the equation.

The significant number of recyclers participating in the recovery program (over 1500, including nearly 50 of Buckeye's fellow recyclers operating in Ohio) is relevant to show that recyclers other than Buckeye have found the reimbursement paid by CHEP reasonable, or they would not have agreed to participate. Additionally, the substantial number of participants validates the pallet recovery program and the amounts paid by CHEP to the recyclers. The evidence will show that the amount paid by CHEP is not just a one time agreement with one recycler. Rather, it is a widely accepted measure of reimbursement accepted by over 1500 recyclers, many of whom conduct business in the same manner and in the same or similar areas as Buckeye. The evidence of what similarly situated recyclers accept as reimbursement for sorting and storing CHEP's pallets is relevant to determine not only the value of those activities to CHEP but also to a determination of what is reasonable "reimbursement" to be paid to Buckeye for sorting and storing CHEP's pallets in the future.

The evidence regarding participation in CHEP's pallet recovery program is essential because of Buckeye's failure (or refusal) to quantify its costs associated with the handling of CHEP's pallets. During his deposition, Sam McAdow, Sr. testified that he never had any way of calculating or determining those costs. (McAdow Sr. Deposition p. 244.) Because of Buckeye's inability or refusal to determine its costs, the best evidence of that value is the amount that CHEP pays similarly situated recyclers and the amount that the recyclers accept as reimbursement. The credibility of that evidence is substantiated by the identity and significant number of recyclers who participate in CHEP's pallet recovery program. The evidence proves that the value attached to recyclers' activities with CHEP pallets is widely accepted by companies in Buckeye's industry operating in the same geographic area as Buckeye.

For the foregoing reasons, CHEP respectfully requests that Buckeye's Motion in Limine be overruled.

Respectfully Submitted,

s/ John C. McDonald

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following via the Court's electronic filing system the 1st day of October, 2004.

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s/ Kevin L. Murch_____