

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

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|----------------------------------|---|---------------------------------|
| 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 REPLY MEMORANDUM IN SUPPORT OF MOTION TO
EXCLUDE PX 2 ("BAIN REPORT")**

All evidence relating to the Bain Report should be excluded as inadmissible hearsay because Bain is not and has never been an agent of CHEP. It is Buckeye's burden as the offering party to establish that Bain was an agent of CHEP. See American Eagle Ins. Co. v. Thompson, 85 F.3d 327, 333 (8th Cir. 1996) (explaining that the offering party was required to establish a foundation demonstrating that the declarant was an agent of the opponent of the evidence at the time the statements were made). Because Buckeye fails to demonstrate that Bain was an agent of CHEP at the time it prepared the report, the report does not fall within the admission by a party-opponent hearsay exception set forth in Fed. R. Evid. 801(d)(2) and should be excluded as inadmissible hearsay.

In its March 15, 2004 Decision and Entry (Doc. # 89) overruling CHEP's Sixth Motion in Limine (Doc. # 54) as it pertained to the exclusion of the Bain Report, the Court noted only that Keith Norder, CHEP's former Chief Financial Officer, testified that CHEP retained Bain as a consultant and that Bain prepared the report. However, Norder never testified that Bain was

CHEP's agent or that Bain ever had any authority to act on behalf of CHEP. Thus, Norder's testimony does not support Buckeye's position that Bain was CHEP's agent. Additionally, the engagement letters between CHEP and Bain, which were not discussed in the Court's previous Decision and Entry, are the best evidence of the nature of the relationship between CHEP and Bain and clearly indicate that Bain was not CHEP's agent and that the parties never intended that Bain would be CHEP's agent.

In its Memorandum in Opposition, ignores the section of the Bain engagement letters that expressly states that Bain's relationship to CHEP "is that of an independent contractor. Bain shall have no authority to commit you contractually, or otherwise, to any third party." (Engagement letters (emphasis added).)¹ Rather, Buckeye quotes extensively from those portions of the engagement letters that discuss the compensation to be paid by CHEP to Bain. Those sections establish only what Bain will be paid for its consulting services and that Bain may be eligible for certain performance fees if CHEP exceeded certain targets related to its gross profit margin. Additionally, Buckeye quotes from Bain's explanation of the scope of its consulting services and the areas in which Bain was going to focus its efforts. From these sections, Buckeye baldly concludes that Bain was an agent of CHEP despite the fact that there is absolutely no evidence that CHEP ever authorized Bain to act on its behalf.

Buckeye also contends that because an element of Bain's compensation was tied to CHEP's success as a result of Bain's consultation, Bain "was hired to participate directly in the management of CHEP." However, Buckeye provides no evidence that would even suggest that Bain participated in the management of CHEP. Buckeye asserts further that because Bain received financial compensation directly for increasing CHEP's profitability, it had obligations of

¹ Relevant portions of the engagement letters were attached to the Motion to Exclude.

loyalty and obedience to CHEP. This assertion confuses the relationship and supports CHEP's position.² Bain's compensation was tied to the success of its suggestions as implemented by CHEP. Bain did not have an obligation of loyalty and obedience to CHEP but, rather, wanted CHEP to succeed because it benefited Bain's own bottom line. Thus, both CHEP and Bain stood to benefit from a successful undertaking. If Bain was truly a fiduciary, as Buckeye suggests, Bain's interests would have been subordinate to CHEP's and Bain certainly would not be in a position to profit from CHEP's success. In other words, Bain would have to refrain from all self-dealing and act for the sole benefit of CHEP. This was not the nature of the engagement and was not the nature of the relationship between CHEP and Bain.

Finally, Buckeye also ignores the Restatement (Second) of Agency, which explains the nature of agency as "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." Restatement (Second) of Agency ¶ 1 (1958) (emphasis added). The only evidence before the Court is the engagement letters in which CHEP and Bain expressly agree that Bain "shall have no authority to commit" CHEP in any manner whatsoever. Faced with such evidence, Buckeye cannot, and fails to, demonstrate that Bain was an agent of CHEP at the time the report was prepared. Accordingly, any documents prepared by Bain and any statements contained within those documents are inadmissible hearsay. Thus, those documents and statements, including PX 2, should be excluded.

² Buckeye's assertion that CHEP and Bain formed a "virtual partnership" is belied by the express language of the engagement letter, which specifically provides that "in no event will Bain be liable for any lost profits" and that CHEP "remains responsible for any reliance on [Bain's] ideas, judgments, opinions, projections, analysis or estimates." (Engagement letter at 7.)

For the foregoing reasons and for the reasons set forth in CHEP's Motion to Exclude PX 2, CHEP respectfully requests that Buckeye's proposed PX 2 and any other documents or statements by Bain be excluded from evidence as inadmissible hearsay.

Respectfully Submitted,

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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