

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

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

BUCKEYE DIAMOND LOGISTICS’ REPLY MEMORANDUM
IN SUPPORT OF MOTION IN LIMINE
REGARDING CHEP USA’S EVIDENCE OF DAMAGES

I. Introduction

CHEP USA’s (“CHEP”) Memorandum in Opposition simply ignores a number of the objections Buckeye Diamond Logistics (“Buckeye”) has raised in its Motion in Limine regarding CHEP’s evidence of damages. Specifically, CHEP offers no opposition to the following objections to its damage evidence:

- CHEP’s claim for damages based on a “cost of capital” theory is not causally connected to the pallets held by Buckeye and is not based on actual costs of capital or borrowings to CHEP, but on an arbitrarily percentage set by CHEP’s general partner.
- CHEP’s claim for costs of washing and repair is barred because it is not based on actual charges necessarily incurred.
- The fees charged by Buckeye for handling and transportation of pallets marked with CHEP’s logo for mutual customers to return pallets to CHEP’s supposedly “close

looped system” are not chargeable as damages under Ohio law, particularly since

CHEP’s own employees suggested that a mutual customer recover pallets in this way.

Where it does respond, CHEP’s unconvincing argument reinforce Buckeye’s showing that CHEP damage claims are based on theories of damages inconsistent with the damages recoverable for conversion under Ohio law, and are duplicative and speculative:

- In support of its claim that a depreciation book keeping calculation of depreciation is a relevant measure of damages, CHEP asserts only that Mr. Potts testimony that depreciation from an accounting standpoint is a different thing than decrease in market value does not bar its proof because CHEP never sought to get a measure of decrease in market value.
- In response to Buckeyes arguments that CHEP’s damage proof is speculative, CHEP confuses Ohio and Sixth Circuit case law, and the burden of proof on it, to assert that it need only prove the fact that it has been damaged and the dates on which Buckeye supposedly converted CHEP’s property with some reasonable basis.
- In response to the assertion that CHEP suffered no damage from Buckeye’s holding stringer pallets, CHEP relies on the fallacious assertion as long as CHEP bought pallets during the time it thinks Buckeye held pallets, it is entitled to be paid for all of them, even if the ones Buckeye held were of a type CHEP was taking out of service and scrapping.
- In response to Buckeye’s assertion that CHEP’s damage claims are duplicative, CHEP ignores the duplication between the depreciation and cost of repair prongs of its damage claims, and asserts, without explaining, that depreciation and cost of capital are not duplicative, and argues that even if CHEP’s exhibits actively seek to

mislead by showing remedies as cumulative rather than alternative, such deception can be cured with a jury instruction.

Much of CHEP Memorandum in Opposition is pure misdirection. Thus, for instance, when CHEP claims it could have sought massive damages for lost income, its argument has nothing to do with the fact that the theory of damages it chose to pursue instead has no basis in law or fact. Likewise, the fact that CHEP did not direct that records be kept in order to attribute all washing and repair costs to Buckeye is irrelevant to the fact that those washing and repair cost are not based on actual charges or numbers of pallets washed or repaired, but on fabricated guesstimates as to what the cost really was. While CHEP Memorandum implies that somehow Buckeye is to blame for CHEP's inability to prove damages, the defects in CHEP's damage disclosures and evidence are CHEP responsibility, not Buckeye's. CHEP, not Buckeye, was responsible for tracking its pallets and knowing when they came into Buckeye's possession. CHEP, not Buckeye, was responsible for keeping accurate records of repair costs. CHEP, not Buckeye, is responsible for presenting reliable evidence of any decrease in value, pallets marked with CHEP's logo suffered when they were in Buckeye's possession.

Like CHEP's damage claim itself, the Memorandum in Opposition substitutes hyperbole for fact. Inflammatory language is not a proper basis for a damage claim – proof is. But relevant, admissible proof of damages is precisely what Buckeye has shown CHEP lacks. Accordingly, CHEP's purported damage evidence should be excluded.

II. Argument

A. CHEP Has Failed to Show that Its Depreciation Damage Evidence Is Probative of Damages Recoverable under Ohio Law

Buckeye's Motion in Limine asserts that evidence on the depreciation prong of CHEP's damage claim should be excluded for four reasons: such bookkeeping measures of depreciation are not a measure of damages recoverable on CHEP's conversion counterclaim, CHEP's proof of such damages is based in speculation, CHEP's calculations of such damages include pallets CHEP undisputedly scraped rather than depreciated, and such damages would be duplicative of the other damages sought by CHEP. CHEP's responses to each of these arguments are unconvincing and contradicted by its own witnesses' testimony.

1. Bookkeeping Calculations of Depreciation Are Not Measures of Recoverable Damages

CHEP concedes that its claim for depreciation is based upon an accounting treatment, rather than any actual decrease in the value of the pallets in the marketplace which its damages witness admitted was not about "the value of the pallets." Potts deposition (4/8/04) at 35 (emphasis added; cited pages attached to Buckeye Motion at Tab E). CHEP seeks to avoid this admission by claiming that this bookkeeping measure is relevant to damages because CHEP does not know the market value of its pallets before or after Buckeye received and returned them. CHEP could have offered evidence appraising the value of the pallets in question before and after Buckeye held them, but has chosen not to. The admission that CHEP does not have relevant evidence of damages for loss in value, however, does not make irrelevant evidence admissible. Not knowing

the actual decline in value of pallets (assuming there was one) does not make a bookkeeping calculation of depreciation into a measure of decrease in market value or of actual physical deterioration of the pallets.

Moreover, CHEP by its silence on the point concedes its depreciation calculation would be the same regardless of whether the pallets in question were sitting at one of its depots, located at a customer or sitting on Buckeye's lot. Potts deposition (4/8/04) at 38-39. Thus, CHEP must concede that its bookkeeping calculation of depreciation does not even measure a loss causally connected to Buckeye's alleged conversion of pallets. CHEP's depreciation calculation is simply not a measure of real damage, and should therefore be excluded from evidence.

2. The Depreciation Prong of CHEP's Damage Claim is Based on Speculation Rather than Admissible Evidence

CHEP Memorandum in Opposition also does not dispute that, despite its many representations to the Court that it operates a "close loop system" that allows it to know where its pallets are and when they got there, it has no idea when or from what source Buckeye received pallets containing CHEP's marking. Bizarrely, CHEP attacks Buckeye because in 2002, Sam McAdow signed an affidavit indicating his employees best estimate of the number of pallets with CHEP marking on its property. By January 2003, Buckeye had counted the pallets and found the number of pallets was 3700. CHEP inspected Buckeye's property in late January and had the chance to count pallets, but chose not to. By August 2003, the number of pallets with CHEP's markings had grown to a little more than 15,000. While CHEP seems to think this growth in the number of pallets is impossible, it is based on actual counts of pallets at Buckeye, rather than

speculation based upon a backward calculation from the erratic number of pallets received between October 2003 and the present.

Faced with no evidence on a crucial prerequisite to its damage claim except observations by Buckeye that CHEP does not want to believe, CHEP argues that its speculative “reverse calculation” of the time that Buckeye held the pallets returned to CHEP is acceptable because damages need not be proven with “mathematical precision.” Thus, CHEP’s argument asserts that as long as it proves conversion, damages are automatic, and can be premised on any reasonably possible scenario.

CHEP argument, however, is contradicted by the very case law it cites. That case law does indeed hold that the determination of the amount of damage is not held to the same rigorous standard of proof as the fact of damage:

“ ‘As a general rule, once a plaintiff establishes a right to damages, that right will not be denied because the damages cannot be calculated with mathematical certainty. * * * However, damages will not be awarded based on mere speculation and conjecture. * * * The plaintiff must show entitlement to damages in an amount ascertainable with reasonable certainty. * * * In assessing prospective damages, the trier of fact can only consider damages which are reasonably certain to follow the injury complained of.’”

In other words, recovery is precluded only when the existence of damages is uncertain, not when the amount is uncertain.

Allied Erecting and Dismantling Co. v. Youngstown, 151 Ohio App.3d 16, 32, 783 N.E.2d 523, 535 (7th Dist 2002) (citations omitted). See also Burns Bros. Plumbing v. Groves Venture Co., 412 F.2d 202, 209 (6th Cir. 1969) (distinguishing between proof of the fact of damage and the amount of a damage award); Coverdell v. Mid-South Farm Equipment Ass’n, 335 F.2d 9, 14 (6th Cir. 1964) (“rule which precludes recovery of

uncertain and speculative damages applies ... to situations where the fact of damage is uncertain”).

Thus, under the very case law CHEP relies upon, the first flaw in its argument is that the time Buckeye received a pallet is not, as CHEP claims, just a factor in determining the amount of damage CHEP supposedly suffered – it is an element of the claim of conversion itself. If arguendo CHEP suffered compensable depreciation damages, it only suffered those damages while Buckeye wrongfully held the pallets. Thus, the time during which Buckeye held the pallets goes to the existence of depreciation damage for that time period, not the amount (which is derived from CHEP accounting assumptions). CHEP can only recover damages for the period of time it proves a conversion occurred. It cannot recover damages for any time period pallets were in a non-participating distributor’s lot, a distributor’s warehouse or a manufacturer’s truck. If CHEP cannot show with reasonable certainty when Buckeye got particular pallets, it cannot prove the fact that it was damaged.

Further, even under the lower standard for proof of the amount of damages to be admissible, it must be “reasonably certain to follow the injury complained of.” Allied Erecting and Dismantling, 151 Ohio App.3d at 32, 783 N.E.2d at 535. CHEP’s calculation cannot meet this standard. For the hypothesis underlying CHEP’s timeline to be reasonably certain, there would have to be evidence that Buckeye was receiving and returning pallets at the same rate before October 2003 as it was after. Buckeye denies this fact, and CHEP has admitted that it has no idea when Buckeye got pallets. Moreover, CHEP has no answer to the fact that CHEP’s calculation compares apples and oranges – its base number for the total number of pallets held by Buckeye includes pallets

that were returned to mutual customers, while the number of current returns, from which it works backward to the time Buckeye held pallets would not include such pallets.

CHEP does not dispute that by including such pallets, CHEP inflates the base number into which it divides the number of pallets currently being received, leading to an inflated calculation of the average length of time pallets were held by Buckeye. Again, such a manipulation demonstrates that even the baseline of CHEP's depreciation calculation is not based in a reasonable certainty, but in pure speculation.

3. CHEP Is Not Entitled to Seek Depreciation Damages for Pallets Taken Out of Circulation

CHEP does not dispute that its depreciation calculation include both block and stringer pallets or that stringer pallets were effectively taken out of circulation in 2001, and that substantial quantities of such pallets were physically scrapped. Likewise, CHEP admits that "conservatively" 35% of the pallets returned by Buckeye were stringer pallets. Faced with such facts, CHEP lamely asserts that all these facts make no difference because it was buying more block pallets at the time. Rather than saving CHEP's damage calculation, this argument reveals its glaring defect. If CHEP had received back the stringer pallets from Buckeye immediately, it would have scrapped them. The fact that they sat at Buckeye for a time does not change the fact that they would not have been used if CHEP possessed them. No measure of conversion damages allows recovery for depreciation of an asset that CHEP independently determined was worthless.

4. **CHEP's Depreciation Claim is Duplicative of the "Cost of Capital" and Repair Cost Prongs of Its Damage Claims**

Buckeyes' Motion showed that the depreciation prong of CHEP's claim was duplicative of both the "cost of capital" and "repair cost" prongs of CHEP's damage claim. CHEP has no response to the assertion that its depreciation claim is duplicative of its repair cost claim, other than the assertion that this duplication can be cured by a jury instruction. The availability of a jury instruction cautioning against duplicative damages, however, is not a cure for an admittedly misleading exhibit. CHEP should not be allowed to show the jury or offer any exhibit that treats duplicative damage theories as cumulative, such as its exhibit 30 (attached at Appendix A).

CHEP's denies that its cost of capital claim is duplicative of its depreciation on the ground that cost of capital is a substitute measure for lost income and depreciation is a substitute measure for lost market value of the pallets. This argument rests on the assertion the capital costs claim is a fair proxy for lost income, which is not true, and that depreciation is a fair proxy for decrease in market value, which is not true. What CHEP really seeks is its bookkeeping costs for both the new and old pallets. CHEP is not entitled to both, and the jury should not be presented with damage calculations that invite it to award duplicative damages.

B. **CHEP Has Failed to Show that Its Claim for Cost of Capital Damages Is Probative of Damages Recoverable under Ohio Law**

Buckeye's Motion in Limine showed that evidence on the cost of capital prong of CHEP's damage claim should be excluded for at least four reasons: such damages are not recoverable under Ohio law, CHEP has not used an actual cost of capital in its calculations, CHEP's proof of such damages (like its depreciation claim) is based in

speculation as to how long Buckeye held the pallets; and CHEP's calculations of such damages include pallets CHEP undisputedly scrapped rather than replaced. CHEP's responses to the assertions that the cost of capital claim is speculative and that it seeks damages for pallets that would have been scrapped is that same as it was for these arguments as they related to the depreciation claim. Buckeye above has shown that CHEP's arguments as to each of these points are without merit. The same arguments point out these flaws in CHEP's cost of capital claim. Thus, apart from its inadmissibility, as discussed below, as such an improper measure of damages under Ohio law and as not based on any actual cost of capital to CHEP, this prong of damages should be excluded as both speculative and erroneous in including pallets that were never replaced.

1. Cost of Capital Is Not a Measures of Recoverable Damages

As show in Buckeye's Motion in Limine, cost of capital is hardly a fair proxy for lost profits. Lost profits must be measured by the amount of revenue that would have been received less expenses necessary to gain such revenue. It requires proof that the pallets converted would actually be generating revenue, proof of the revenue that would be gained and consideration of the cost of gaining such income. CHEP offers no response to the fact that its financial statements are contrary to this assertion (see Tab F to original motion). The fact that CHEP (while withholding documents ordered produced by the it is hardly surprising that it seeks to improperly substitute cost of capital as a proxy for lost profit in this case.

Finally, the cost of capital prong of CHEP's damage claim rests on the premise that CHEP actually had to acquire additional pallets to substitute for the one's held by

Buckeye. CHEP's utilization disclosures, however, show to the contrary – during the entire period for which CHEP provided data, its utilization rate (out of a total of roughly 70,000,000 pallets) never was greater than 91.8%. See Tab G. Thus, in addition to being unable to show that cost of capital is a legally relevant measure of damages, CHEP cannot even show that it needed to purchase additional pallets to replace the ones held by Buckeye – at its tightest point, CHEP had more than 5,700,000 pallets not in use that could serve its customers' needs.

2. CHEP's Cost of Capital Calculation Is Not Based on Actual Costs of Capital, but on an Arbitrary Accounting Measure by CHEP's General Partner

CHEP Memorandum does not dispute that, even if cost of capital were a relevant measure of damages on a conversion claim, CHEP's calculation of this prong of damages is erroneously based not what on it actually paid for capital, but on the accounting treatment its general partner, Brambles, chose to take with respect to its investment in CHEP, even if CHEP does not generate this return on investment. However, CHEP adds to the confusing concerning this issue by assertion, contrary to what all of its witnesses have testified, that this calculation is really based upon interest rates rather than cost of capital. Mem. Opp. at 6, n. 1. Adding confusion by claiming this is an interest rate based calculation cannot same CHEP's claim when it witness have affirmed it is a calculation based solely on the accounting treatment its general partner, Brambles, chose to take with respect to its investment in CHEP.

C. CHEP Has Failed to Rebut Buckeye's Showing that CHEP's Evidence of Cost of Repair and Washing Damages Is Inadmissible

CHEP's Memorandum in Opposition avoids discussing its fabricated and speculative claim for the cost of repair and washing entirely. It does not dispute that CHEP originally based this portion of its damage claim on a fabricated invoice, that Mr. Smith destroyed the only notes that apparently exist regarding CHEP's inspection of the pallets returned by Buckeye, that its summary exhibit continues to rely on its costs for repair of pallets, replaces the cost of component lumber with a new, unexplained number and continues to use Mr. Smith's estimates of how many pallets were repaired rather than actual repair numbers, or that it cannot determine what its actual costs of repair were. CHEP's tacit admission of these facts bars its attempt to offer this evidence. See, e.g., McLin v. Leigh, 74 Ohio App.3d 127, 13-34, 598 N.E.2d 731, 736 (2nd Dist. 1991) (proof of repair costs must be based on competent evidence offered by this with personal knowledge).

D. CHEP Has Failed to Rebut that Its Damage Claim for Pallets Returned to Mutual Customers Is Defective as a Matter of Law

Finally, Buckeye's Motion in Limine showed that the prong of CHEP's damage claim seeking fees paid by mutual customers for the return of pallets to CHEP's "closed loop system" failed a matter of law because CHEP cannot show any damage as the result of Buckeye returning such pallets to their mutual customers. CHEP, notwithstanding all evidence to the contrary, continues to call these handling fees payments for a sale because the software Buckeye uses puts the header "sale" on its summary report. The deposition testimony has made clear that these are not sale. See Deposition of Sam McAdow Jr. (attached at App. B) at 89-91; Woods dep. (attached at Tab C) at 50-51. Likewise, Buckeye's invoice show the fee was for handling and transportation. See Tabs

D and E. There is simply no basis for CHEP to claim that the issue of these handling fees should go to the jury as a damage claim.

III. Conclusion

For the reasons set forth in its Motion in Limine and herein, Buckeye urges the Court to preclude CHEP USA from offering into evidence or mentioning in argument damage evidence on its conversion counterclaim insofar as it is based on theories of damages inconsistent with the damages recoverable for conversion under Ohio law.

s/James A. Wilson
James A. Wilson (0030704)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-5606
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Memorandum was served on October 6, 2004, by electronic delivery upon:

John C. McDonald
Kevin L. Murch
Schottenstein Zox & Dunn
250 West Street
Columbus, OH 43215

s/James A. Wilson

James A. Wilson