

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

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U.S. DISTRICT COURT
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MAR 17 2003

U.S. DISTRICT COURT, Clerk
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Deputy Clerk

CHEP USA, a New York Partnership,)
)
Plaintiff,)
)
v.)
)
MOCK PALLET COMPANY,)
a Georgia Corporation,)
)
Defendant.)

CASE NO. 1:02-CV-2053 BMM

**CHEP USA'S REPLY IN FURTHER
SUPPORT OF MOTION TO COMPEL**

CHEP has moved to compel the production of information about Mock's receipt and transfer of CHEP pallets, establishing in its Memorandum of Law how this information is critical to the claims and defenses asserted in this litigation. CHEP also has moved to compel an unrestricted inspection of Mock's premises, so it can gather necessary evidence to prove its claims and to defend itself from Mock's counterclaims. Rather than address CHEP's motion on the merits, in its response, Mock chooses to obfuscate the issues by rhetoric that ignores its counterclaims and defenses and misinterprets Georgia law. CHEP is entitled to the discovery sought because the information asked for goes directly to the claims and defenses asserted in this case.

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CHEP's primary claim is for conversion of its pallets. Conversion involves "an act of dominion over the personal property of another inconsistent with his rights or an unauthorized appropriation." Tidwell v. Tidwell, 251 Ga. App. 863, 864-65, 554 S.E.2d 822, 823-24 (2001). Such an action is not limited to personal property currently in the defendant's possession but involves any property wrongly appropriated. See Miller & Miller v. Wilson, 98 Ga. 567, 569, 25 S.E. 578, 579 (1896) (holding that an action for conversion is proper even if the defendant no longer possesses the property converted); Ricketts v. Liberty Mutual Ins. Co., 127 Ga. App. 483, 484-85, 194 S.E.2d 311, 314 (1972) (upholding verdict for conversion against joint defendant who had sold and no longer possessed property converted). Nor is the remedy limited to recovery of the property converted. See O.C.G.A. § 44-12-151 (allowing for recovery of value of property and other damages).

Mock contends that CHEP's claims are limited to those pallets in Mock's possession when the Complaint was filed. (Mock's Response to Motion to Compel, pp. 6 & 8). Not only is this position unsupported by Georgia law, it also ignores the undisputable fact that Mock continued to convert CHEP pallets even after CHEP demanded their return. See Letter from Butt to Bassett, Jan. 28, 2003, point 3, attached as Exhibit "A" (noting that Mock possessed 28,000 CHEP pallets in September 2001 compared to 35,000-40,000 CHEP pallets today). Mock's

contention also fails to realize that discovery is intended “to provide both parties with information essential to proper litigation on all facts.” M. Berenson Co. v. Faneuil Hall Marketplace, Inc., 103 F.R.D. 635, 637 (D. Mass. 1984).

Accordingly, CHEP is entitled to discovery of all CHEP pallets that Mock converted.

Mock also appears to argue that the discovery CHEP seeks is inappropriate because the ownership question should be decided “at the time the pallet leaves CHEP’s possession and it should focus on CHEP’s relinquishment of ownership at that point.” (Response at 10). CHEP agrees that ownership is determined as CHEP pallets leave its possession -- when CHEP initially leases its pallets to customers -- and as explained in its response to Mock’s motion to compel, the evidence establishes CHEP’s ownership of CHEP pallets. CHEP’s Rental Agreements with its customers clearly state that CHEP is leasing its pallets, that CHEP maintains ownership of its pallets at all times, and that CHEP pallets are never sold. (See CHEP’s Resp. to Mot. to Compel, pp. 8-9; Affidavit of Elton Potts, ¶¶ 3, 8 & 10). Moreover, CHEP pallets are readily identified by their unique blue coloring and labeling. (See Potts Aff., ¶ 4). Mock, however, claims it owns CHEP pallets because CHEP abandoned them and Mock received them in the

ordinary course of business. (Mock's Resp. at 2, 6 & 9).¹ These affirmative defenses are for Mock to prove and CHEP is entitled to discover the evidence Mock intends to present as proof.² Importantly, CHEP also is entitled to discovery that will allow it to rebut Mock's evidence.

That Mock now claims it "did not keep records of the receipt of these CHEP-marked pallets, nor does it have records prior to the commencement of this litigation of how many, if any, CHEP-marked pallets were given [tractor-trailer] load", (Response at 9 (quoting Mock Aff. ¶ 11)), is disingenuous at best and misleading at worst. First, Mock did not claim that it lacked documents in response to Interrogatories 4 and 5 and Requests 25-27. It stated that documents would produced upon entry of a protective order. Even when it attempted to supplement its responses with new objections, Mock did not indicate that it had no responsive documents, only that it objected to producing documents. Second, documents produced by Mock suggest that it actively solicits CHEP pallets for purchase and in doing so maintains records of those sales. (See Exhibit "B" to CHEP's Resp. to Mot. to Compel). At a minimum, CHEP is entitled to discovery

¹ Mock's alleged "abandonment" and "sales" arguments, as CHEP explained in its Response to Mock's Motion to Compel, are unsupported by Georgia law and do not provide any basis for denying CHEP's motion. (See CHEP's Resp. to Mot. to Compel, pp. 5-10).

² The discovery sought also is relevant to CHEP's affirmative defense of unclean hands. CHEP has asserted this defense because despite Mock's knowledge of CHEP's ownership rights, Mock has solicited and knowingly received CHEP pallets from others. See Fuller v. Fuller, 211 Ga. 201, 202, 84 S.E.2d 665 (1954)

to test the veracity of this new claim and seek appropriate sanctions if existing documents have been altered or destroyed. Such discovery would include, at a minimum, a list of all customers from whom Mock obtains pallets and sales agreements, bills of lading, and invoices, which may provide additional details about Mock's transactions with these customers.

If, as it claims, Mock has no documents recording the receipt and transfer of CHEP pallets, the need for a site inspection becomes more crucial. Only with a site inspection can CHEP discover (1) the number of pallets in Mock's possession, (2) the number of CHEP pallets being transferred to Mock, and (3) the number of CHEP pallets that Mock is transferring to others. This information, as explained previously, is critical for CHEP to pursue its claims and to rebut the evidence CHEP expects Mock to present in defense. In addition, a site inspection is necessary to discover the effort Mock expends in sorting and storing all pallets in general and CHEP pallets in particular. This information is directly relevant to Mock's counterclaim for unjust enrichment.

Mock, moreover, fails to offer any meaningful justification for unilaterally limiting an inspection. Photographing the inspection is appropriate to preserve CHEP's observations and an inspection during business hours is necessary to ensure its accurate portrayal of operations at Mock's facility. Contrary to Mock's self-serving, conclusory statements, it is difficult to understand how a site

inspection could reveal any more customer information than would be learned by sitting outside of Mock's premises and watching trailers of pallets enter the facility. Further, CHEP representatives must participate in the inspection because they are most knowledgeable about the collection, sorting and storing of pallets.

CHEP's discovery is reasonably calculated to determine facts relevant to the legal issues presented by the claims and defenses pled in this case and nothing more. This discovery includes facts about Mock's actions in obtaining and transferring CHEP pallets, Mock's knowledge of CHEP's ownership rights, and Mock's compensation upon transfer of CHEP pallets. "The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case." Fed.R.Civ.P. 26(b) advisory committee's note, 1946 Amendment (citing Engl v. Aetna Life Ins. Co., 139 F.2d 469 (2d Cir. 1948); Mahler v. Pennsylvania R. Co., 8 Fed.R.Serv. 33.351 (E.D. N.Y. 1945)). CHEP's discovery to Mock does nothing more, and accordingly, CHEP's Motion to Compel should be granted.

Respectfully submitted this 17th day of March, 2003.

KING & SPALDING LLP



Chilton Davis Varner
Georgia Bar No. 725450
W. Randall Bassett
Georgia Bar No. 041525

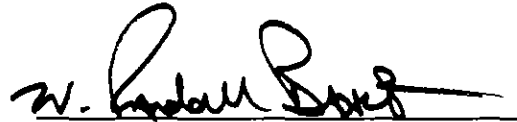
191 Peachtree Street
Atlanta, Georgia 30303-1763
(404) 572-4600

Counsel for Plaintiff CHEP USA

CERTIFICATION OF COMPLIANCE WITH L.R. 5.1B

I further certify that the foregoing REPLY IN FURTHER SUPPORT OF MOTION TO COMPEL has been computer processed with 14 point New Times Roman font in compliance with N.D.G.A. Local Rule 5.1B.

This 17th day of March, 2003.



W. Randall Bassett
Georgia Bar No. 041525
Attorney for the Purdue Defendants

KING & SPALDING LLP
191 Peachtree Street, N.E.
Atlanta, Georgia 30303-1763
(404) 572-4600
(404) 572-5144



EXHIBIT / ATTACHMENT

A

(To be scanned in place of tab)

Ballard, Stephenson & Waters, L.L.P.

A Professional Limited Liability Partnership

C.C. King, Sr. (1903-1963)
Donald G. Stephenson (1934-2002)
W. D. Ballard
W. Michael Waters
Eugene D. Butt

1148 Washington Street
Post Office Box 29
Covington, Georgia 30015
Telephone: 770-786-8123
Facsimile: 770-786-8127
BSWLaw@mindspring.com

January 28, 2003

W. Randall Bassett
King & Spalding
191 Peachtree Street
Atlanta, Georgia 30303-1763

RE: CHEP USA v. Mock Pallet Company

Dear Randy:

This letter will respond to your letter dated January 17, 2003, and January 21, 2003 and to serve as a good faith effort to try to reach a compromise and to express the views and concerns of Mock Pallet Company regarding the Discovery disputes that have arisen in this case.

A. Mock's "Other Responses to Discovery"

1. Mock is copying the photos identified and I will make them available for inspection within a week.
2. With regard to Interrogatory No. 6, Mock also identifies Nancy Mock, Tim Mock, Emily Jenkins and David Mock as people who may have witnessed any meetings with CHEP representatives.
3. With regard to Interrogatory No. 14, Mock made a visual count of CHEP-marked pallets in September, 2001 and counted approximately 28,000 pallets. Before September, 2001, Mock did not keep track of the number of CHEP-marked pallets. On an occasion a Mock employee told a representative of CHEP that there were at least 5,000 CHEP-marked pallets owned and possessed by Mock Pallet Company in Covington, Georgia.
4. Mock did respond to request No. 31. It just made a typo thereon and erroneously wrote No. 32. I trust you will accept the above answers in lieu of a more formal response. If not please notify me immediately.
5. Mock agrees that the parties need a sixty (60) day extension of discovery.
6. I am also enclosing a 30(b)6 Notice. Please feel free to reschedule if the date does not suit you or CHEP. I included the date so that the Notice would make sense.

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B. Chep's Inspection of Mock's Premises

Mock does not object to an inspection of the premises provided the following conditions are met:

1. The inspection is limited to those acres of Mock where it separates out the Chep-marked pallets;
2. The inspection is limited to you and any other attorney who has signed the pleadings in this case, as Mock is fearful that bringing a Chep employee would run the risk of him learning Mock's customers.
3. The protective order Mock proposed is signed by Judge Martin.
4. The inspection takes place after 5:00 p.m.
5. No pictures are to be taken

C. The Proposed Protective Order

I sent you an appropriate protective order. My client is petrified that the more people who would have access to his highly secret customer list, (especially CHEP employees or lawyers outside the State of Georgia, who view the discovery) the greater the danger that their trade secrets will be divulged and that Mock Pallet Co. will be squashed by your multi-billion dollar client, who in the past has gone to such extreme steps as having an innocent man, such as Edgar Lozano arrested. As stated in our objections, and below, Mock's customers are irrelevant to your claims of conversion. This argument is even more compelling in the face of Chep's contention, that despite the fact that Chep has operational and structural problems, which leads to millions of Chep-marked pallets not being returned to it, and despite CHEP charging a liquidated fee in the nature of a penalty (but doesn't require the identical pallet returned), that what happens to the CHEP-marked pallet when it is initially sold or transferred is irrelevant to the question of ownership. This information is most relevant, especially since these pallets are often sent to "Non-Participating Distributors" who have no obligation to return the pallet to CHEP or any liability if the pallet is lost. You must remember that Mock claims CHEP USA does not own these pallets and that CHEP, through its actions of omission or commission, has abandoned the pallets. Mock also contends that CHEP has ratified by their loss of control of the pallet pool and serious leakage problems in the millions that they do not own the subject CHEP-marked pallets. Thus, these matters should be discoverable.

D. Mock's objections are timely and properly before the Court

Judge Carnes ruled that one waives its right to object only when the party completely fails to respond or object during the allocated time. Thus, Defendant's supplemental interrogatories (which were additive to the trade secret objection) should be

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properly before the Court, as the initial objections and responses were timely made. See Cahela v. Bernard, 155 FRD 221, at 227 (N.D. Ga. 1994) (Carnes, J.)

E. Mock's objections to Interrogatories 4, 7, 8, 9, 10 and Request 8, 11, 25, 26 and 27 based on relevancy.

While CHEP maintains that it is acting in "good faith" in resolving the discovery disputes, one must wonder why it remains adamant in refusing to turn over Mock's request for copies of contracts with any entity regarding CHEP pallets that "might reasonably be anticipated to be shipped, used, located, possessed or stored in the State of Georgia. If as you claim, this is irrelevant, then there is nothing pertaining to the distribution of the CHEP-marked pallets that is relevant, either upstream or downstream.

Since CHEP-marked pallets are indistinguishable from one another, as they do not contain a means of individual identification, your willingness to turn over documents only pertaining to entities Mock does business with (far downstream) will amount to your turning over nothing, since it would be next to impossible to trace these fungible Chep-marked pallets up the distribution chain.

As Credit Suisse First Boston writes in a research report dated February 27, 2002 at page 14, "Leakage of the pool to NPDs"- in launching the Accelerated Volume Program (AVP) in 1997, CHEP didn't appear to ensure that it had the necessary controls and sales representatives to 1) prevent Manufacturers from sending pallets to NPDs; and/or 2) follow the pallets and product downstream and then signing up the NPDs. This has resulted in an estimated 20% of the pallet pool being sent to NPDs, distributors who have don't have a contract with CHEP, and hence comply with the care of the assets. "Ramifications" - There are several ramifications including: i) reduced asset turns; ii) increased damage rate; iii) increase in lost pallets; iv) greater collection and transport costs; v) "Black Market" pallet pool; vi) litigation; and vii) the dilution of value incorporated in the Participating Distributor Agreement.

Thus, it is well documented that Chep has structural and operational difficulties in keeping track of these CHEP-marked pallets, and that up to 20% of the pallets it sells, leases or transfers to others are not returned to it. Thus, evidence of the requested contracts and the amount of liquidated penalties CHEP charges these entities is relevant to the issue of abandonment, which can be accomplished either by omission or commission. Walden v. Jones, 252 Ga. App. 692 (556 SE 2d 566)(2001).

With regard to your request that Mock turn over any information regarding Chep-marked pallets that it might have transferred, not only would this divulge highly sensitive trade secrets, but it would also be irrelevant to your alleged conversion claim, as Chep

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has only made a demand for the pallets which Mock owns and which they possess in Covington, Georgia. See Cotton v. Pendley, 130 Ga. App. 552 (1974).

Moreover, with regard to your request for the names of the entities from whom Mock acquires its pallets, what knowledge Mock had at the time it acquired the Chep-marked pallets in the ordinary course of its business or what the mind set of these bona fide purchasers, who conveyed these pallets would be irrelevant in any claim for conversion. See Lovinger v. Hix Green Buick Co., 110 Ga. App. 699, at 701 (1964). It is CHEP's burden to prove legal title in this case, and therefore what is relevant is whether CHEP owned the subject pallets prior to Mock's acquisition. Consequently, and to reiterate Mock's position, the identity of the entities who first receive any CHEP-marked pallets is quite relevant and should be discoverable.

F. CHEP's Objections

I discussed in my January 15 letter, why I think that the various requests were discoverable.

Without reiterating the entire letter, it is apparent to Mock that since ownership of the subject pallets are the *sine qua non* to CHEP's conversion claim, and since CHEP cannot specifically identify by serial number or any other mechanism the source of origin of any specific pallet, the most significant piece of the ownership puzzle would be the arrangements CHEP has with the entities that are at the top of their distribution scheme. Mock should not be required to trust CHEP characterization of their arrangement with these entities, nor CHEP's promise that once they learn Mock's client list, they will be able to trace with certainty the manufacturers or distributors who they transferred the pallets to initially. Given CHEP's well documented problems, one must be skeptical of their capability to accomplish this task. Furthermore, given the adversarial nature of the litigation process, one would not expect Mock to be compelled to trust CHEP implicitly without any means of verification.

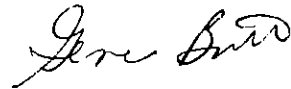
Furthermore, with regard to Interrogatory No. 8, I detailed above in quoting from the Credit Suisse report why information about these who ship pallets to non-participating pallets is relevant as they highlight the claim that the subject pallets and millions of other CHEP-marked pallets have been abandoned due to the serious "leakage" problem that CHEP suffers from.

Furthermore, Requests No. 30 and 29 are relevant and not privileged. Request No. 26 is relevant as it goes to the liquidated penalty charged by CHEP which would then turn any transfer into a sale under the UCC and pertinent case law. See Carter v. Tokai Financial Services, Inc., 231 Ga. App. 755, at 756-757 (1)(500 SE 2d 638)(1998).

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Accordingly, it would seem that we have reached an impasse, and it would be best left for Judge Martin to decide these discovery disputes as well as the ownership issue as soon as possible.

Very Truly Yours,

A handwritten signature in cursive script, appearing to read "Eugene D. Butt".

Eugene D. Butt

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CHEP USA, a New York Partnership,)	
)	
Plaintiff,)	
)	
v.)	Case No. 02-CV-2053-BBM
)	
MOCK PALLET COMPANY,)	
a Georgia Corporation,)	
)	
Defendant.)	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **CHEP USA'S
REPLY IN FURTHER SUPPORT OF MOTION TO COMPEL** was served upon counsel for defendant by depositing same in the United States mail, with sufficient postage thereon to insure delivery, and addressed as follows:

Eugene D. Butt, Esq.
Ballard, Stephenson & Waters, LLP
P.O. Box 29
Covington, GA 30015.

This 17th day of March, 2003.



W. Randall Bassett
Georgia Bar No. 041525