

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 8:05-cv-794-T-26TBM

CHEP USA, a New York General Partnership,

Plaintiff,

vs.

PERFORMANCE FOOD GROUP COMPANY,
a Tennessee corporation,

Defendant.

DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES

Defendant, Performance Food Group Company (hereinafter referred to as "PFG"), by and through undersigned counsel, and pursuant to Fed. R. Civ. P. 7(a), 8(b), and 10(g) hereby serves its Answer and Affirmative Defenses, and states as follows:

1. PFG states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1.
2. PFG admits the allegations contained in paragraph 2.
3. PFG admits that it entered into a written agreement for the use and rental of CHEP USA's (hereinafter "CHEP") pallets, but PFG denies the remaining allegations in paragraph 3.
4. PFG denies the allegations contained in paragraph 4 to the extent that the allegations inaccurately characterize the obligations applicable to control as more specifically recited in the contract attached to the Complaint
5. PFG admits the allegations contained in paragraph 5.

6. PFG admits the allegations contained in paragraph 6.

7. PFG admits that an audit of PFG locations was conducted by CHEP on or about the end of September, 2004, but denies the remaining allegations contained in paragraph 7.

8. Insofar as the allegations contained in paragraph 8, PFG admits same, but this Response assumes that the averment presupposes that CHEP issued an invoice for which it claims that the pallets were lost or could not be accounted for, not that PFG is being requested to admit the truth of those averments.

9. PFG admits the allegations contained in paragraph 9.

10. PFG denies the allegations contained in paragraph 10.

AFFIRMATIVE DEFENSES

First Affirmative Defense

11. For Defendant's First Affirmative Defense, PFG avers that CHEP had a duty to mitigate its damages.

Second Affirmative Defense

12. For Defendant's Second Affirmative Defense, PFG avers that the contract between the parties appears to contain an unenforceable liquidated damage provision.

Third Affirmative Defense

13. For Defendant's Third Affirmative Defense, PFG avers that CHEP has breached its implied obligation to act and perform its contractual responsibilities in good faith by failing to accurately disclose to PFG any standard or routine difficulties that arise as to accountability of pallets used by CHEP's manufacturers, or to disclose and take precaution against or otherwise

implement proper measures to insure that lost or unaccounted for pallets could be correctly accounted for.


Fourth Affirmative Defense

14. For Defendant's Fourth Affirmative Defense, PFG avers that the 1% provision in the contract applicable to CHEP's claim for damages is unenforceable due to its vagueness, or, alternatively, such provision should be construed and interpreted in favor of PFG and against CHEP.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to: **Kathryn B. Hoeck, Esq.**, Akerman Senterfitt, 255 S. Orange Avenue, 17th Floor, Orlando, Florida 33802-0231, this **10th** day of **May**, 2005.

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BY 
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