

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

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. :

**DEFENDANT'S MEMORANDUM IN OPPOSITION
TO PLAINTIFF'S MOTION FOR CLARIFICATION OR,
IN THE ALTERNATIVE, RECONSIDERATION**

I. Introduction

Under the guise of requesting clarification or reconsideration of certain aspects of this Court's Decision and Entry dated August 11, 2003, Buckeye has asked this Court for a license to continue to exercise improper dominion and control over CHEP's pallets, to permit it to continue trafficking in CHEP pallets, and to permit it to continue to deprive CHEP of the pallets its owns and uses to operate its rental pool. Buckeye's request ignores the clear message of this Court's opinion: CHEP owns its pallets and, with a narrow exception, Buckeye must immediately surrender to CHEP any that come into its possession. That narrow exception allows Buckeye to provide specific logistics (i.e., transportation) services for mutual customers of Buckeye and CHEP by either (i) moving CHEP pallets from one customer location to another location of that same customer or (ii) moving CHEP pallets, on behalf of a mutual customer, between that customer's location and a CHEP depot or service center.

The Court's August 11, 2003, Decision and Entry makes it abundantly clear that any other action on the part of Buckeye constitutes a wrongful exercise of dominion and control over CHEP pallets. As this Court has already concluded, Buckeye "does not have the right to withhold [the return of the pallets] to CHEP. The CHEP pallets belong to CHEP, and they must be returned...The facts demonstrate that CHEP is, without question, the owner of said pallets, and arguably has the right to immediate possession of same." *Court's Decision and Entry*, pp.42-43.

Buckeye's Motion for Clarification or, in the Alternative, Reconsideration (filed September 2, 2003, and hereinafter referred to as "Buckeye's Motion") raises three requests: (1) for clarification of "what rights Buckeye has to return such pallets to CHEP's lessees rather than to CHEP or otherwise provide services to those lessees"; (2) that the Court answer three specific questions and; (3) that certain facts be deemed admitted even though they were specifically denied by CHEP in its' response to Buckeye's Second Set of Requests for Admissions. Each will be addressed in this order in the following section.

II. Argument

A. Buckeye cannot exercise dominion or control over CHEP's pallets inconsistent with the Court's determination that CHEP owns its pallets and has an immediate right to possession of same.

The first of Buckeye's requests has largely been briefed through Buckeye's unsuccessful Motions for Summary Judgment and the memoranda related thereto. Buckeye previously argued that it should be permitted to sell stray CHEP pallets that come into its possession to customers of CHEP. CHEP countered by arguing that this action was inconsistent with CHEP's ownership rights because it involved Buckeye stock-piling CHEP pallets at its facility, thus removing the pallets from the active rental pool which is a detriment to CHEP and thoroughly inconsistent

with CHEP's articulated intentions regarding the handling of its pallets.¹ This Court's August 11, 2003, Decision made crystal clear that Buckeye could not exercise dominion and control over CHEP's pallets inconsistent with CHEP's ownership rights. Whether characterized as selling, trafficking or charging a hauling fee, to the extent that Buckeye collects and retains CHEP pallets at its facility (regardless of the period of time involved), this is a wrongful exercise of dominion and control over CHEP's property.

Buckeye comes into actual or constructive possession of CHEP pallets in three ways: (a) through the provision of logistics services to mutual customers; (b) through collection and hauling of used pallets from businesses with which CHEP has no contract (which are removed to Buckeye's South Charlestown facility where Buckeye allows them to accumulate) and; (c) through collection and hauling of used pallets from mutual customers (which are removed to and accumulate at Buckeye's South Charlestown facility).² In the latter two instances, the only legally acceptable action by Buckeye is to return the pallets to their owner, CHEP, or allow CHEP to retrieve its pallets. Accumulating CHEP pallets for whatever reason – ostensibly for the purposes of returning to a mutual customer or otherwise – deprives CHEP of its ownership in its pallets and is an act of conversion.

¹ CHEP's contracts with its manufacturer customers and distributor customers make clear that the customers have an obligation to promptly return CHEP's pallets to CHEP when goods are off loaded from the pallets and that the customers have an obligation to report to CHEP all movements of CHEP pallets (date and location of transferee). See e.g. JX12, CHEP 10486-10487, and CHEP 6936.

² Buckeye states that it "has long taken the view that its customers are entitled to the return of pallets marked with CHEP's logo if they want them." (Buckeye Motion, p. 5). This view, however, demonstrates that Buckeye does not respect this Court's determination of CHEP's ownership rights. Unless Buckeye intends to *immediately* return the CHEP pallets that come into its possession to the very customer from whom Buckeye received them, the collection and holding of the pallets at Buckeye's facility and/or the return of the pallets to a customer other than the one from whom Buckeye received them, constitutes a wrongful exercise of dominion and control over CHEP's property. Thus, notwithstanding Buckeye's "view," Buckeye cannot undertake these actions without committing civil conversion.

In providing logistics services to mutual customers of Buckeye and CHEP, Buckeye either (a) hauls CHEP pallets between a CHEP depot/service center and Customer X's location(s) or (b) hauls CHEP pallets between one business location of Customer X and another business location of Customer X.³ It is essential to note that while providing these logistics services, the pallets are in transit, not sitting at Buckeye's facility. As CHEP made clear at page 15 of its Memorandum in Opposition to Plaintiff's Motion for Summary Judgment on Count I of its Complaint (Doc. #36), CHEP has no complaint with the performance of *specific* logistics functions.⁴ However, Buckeye now wants to expand CHEP's position (and the Court's characterization of it), to lengths that defy the balance of the Court's August 11, 2003, Decision and Entry.

Through its Motion, Buckeye wants this Court to sanction its collection and stock-piling of CHEP pallets at its South Charlestown facility if Buckeye (a) intends to return them to a CHEP customer for a fee⁵ or (b) intends to return them to CHEP if CHEP gives credit to a customer. Given the Court's findings, any accumulation or stock-piling of CHEP pallets at Buckeye's South Charlestown facility, regardless of Buckeye's intentions eventually to return

³ Some confusion may have been created by the Court's efforts to protect the public disclosure of the name of one of Buckeye's and CHEP's mutual customers. As is explained in CHEP's Memorandum filed on August 26, 2003 (Doc. #64), CHEP indicated its approval of the logistics services provided by Buckeye to one specific customer. However, in the Court's decision, which attempted to protect the identity of the customer, the Court substituted "customer" for the specific name of the customer and may have inadvertently created some confusion if the discussion is read out of context.

⁴ CHEP has reiterated this position in its Memorandum filed with this Court on August 26, 2003. (Doc. #64).

⁵ Buckeye's Motion makes it appear as though they return CHEP pallets to mutual customers without charge and that they do so immediately (see, Buckeye Motion, p. 5). In reality, Buckeye allows the CHEP pallets to accumulate at its facility until the mutual customer calls for their return, if the customer ever does so. With respect to the two specific customers mentioned by name at page 13 of CHEP's Motion for Summary Judgment, there is no indication that the pallets delivered by Buckeye to these "mutual customers" had originated with the mutual customer to which they were "returned," as opposed to originating from another source. Buckeye does not segregate the CHEP pallets acquired from Customer X from those acquired from Customer Y, and, therefore, does not necessarily return to Customer X the CHEP pallets acquired from Customer X. Additionally, Buckeye charges a substantial fee for those pallets, which serves as the basis for CHEP's recurring assertion that Buckeye has been trafficking in CHEP pallets. (See the discussion at CHEP's Motion for Summary Judgment, p. 13).

them to CHEP or to a CHEP customer, is a wrongful exercise of dominion and control over CHEP's pallets. As the italicized words above demonstrate, Buckeye seeks to impose conditions on the return of CHEP's property---rather than accepting the Court's determination that CHEP absolutely and unequivocally owns its pallets. In both instances noted above, Buckeye is keeping CHEP's pallets outside of CHEP's rental pool, treating the pallets in a manner inconsistent with the contract between CHEP and its customer and denying CHEP the unconditional possession and use of its pallets.

Buckeye also argues that it "believes that the law does not require it to return any CHEP-marked pallet it receives from a common customer." This statement clearly evidences Buckeye's intention to continue to stock-pile CHEP pallets at its facility if it acquires the pallets from a "common customer." After all, if in Buckeye's view it is not required to immediately return the pallets to CHEP, then Buckeye considers that it has a license to hoard the CHEP pallets and keep them outside of CHEP's rental pool. Such actions are inconsistent with CHEP's ownership rights as determined by this Court and constitute a wrongful exercise of dominion and control over the pallets.

Buckeye's Motion ignores the Court's discussion of CHEP's request for an injunction (a pending claim against Buckeye that remains to be tried), wherein the Court stated, "To the extent Buckeye stands ready to continue to collect CHEP pallets and deny CHEP its right to take possession of same, this Court is authorized to enjoin it from doing so." (Decision and Entry, p. 45). Buckeye's Motion evinces its intent to continue to collect CHEP pallets and stock-pile them at their South Charlestown facility. This Court should not tolerate Buckeye's assertion of wrongful dominion and control over CHEP's pallets by permitting Buckeye to hoard CHEP pallets at its facility under the guise of holding them for a mutual customer. The request on

Buckeye's part is little more than an effort to find a loophole in the Court's decision that would allow it to continue to traffic in CHEP pallets in a manner that is thoroughly inconsistent with CHEP's ownership rights.

B. The responses to each of Buckeye's "Three Questions" is already clear from the Court's August 11, 2003, Decision and Entry—Buckeye cannot exercise wrongful dominion and control over CHEP's pallets.

Buckeye raises three questions at page 7 of its Motion:

1. If a common customer inadvertently loads CHEP-marked pallets on one of Buckeye's vans, is Buckeye free to return those pallets to the customer prior to the time the customer is obligated to return those pallets to CHEP based upon whatever compensation the customer agrees to for Buckeye's efforts?
2. If the common customer inadvertently loads CHEP-marked pallets on one of Buckeye's vans, is Buckeye free to return those pallets to CHEP for credit to the common customer based upon whatever compensation the customer agrees to for Buckeye's efforts?
3. Is Buckeye free to contract with a common customer to sort pallets with CHEP markings from other pallets and to return the CHEP-marked pallets to the customer or to CHEP for agreed upon compensation?

The answer to each of the questions--- which is "No"--- is already embodied in the Court's Decision and Entry which clearly and unequivocally establishes that CHEP owns its pallets, that CHEP is entitled to immediate possession of its pallets when they come into the hands of parties with whom CHEP has no contract, and that the contracts that CHEP has with its customers establish the proper parameters for the handling of the CHEP pallets. However, so that there is no doubt about CHEP's position, the following is the response to the forgoing questions:

Questions One and Two

The fact that a common customer of Buckeye's and CHEP's may inadvertently (rather than purposefully) load the CHEP pallets onto Buckeye's trailer does not change the character of CHEP's ownership rights. When Buckeye comes into possession of a CHEP pallet, other than for the provision of logistics/transportation services to a mutual customer, CHEP is entitled to immediate possession of its pallet and Buckeye is obligated to surrender it to CHEP. Buckeye cannot retain CHEP's pallets at its facility (under the guise of holding them on behalf of the CHEP customer who may never even ask for them back) and thereby deprive CHEP of its ownership rights in its pallets.

With respect to Question Two, if Buckeye is acting as a logistics provider (by transporting CHEP pallets from Customer X's warehouse to the CHEP depot/service center), then the customer already receives credit for the return of the pallets. This is the logistics service that Buckeye is currently providing to one common customer of Buckeye and CHEP. It is essential to note that the pallets are *moving* from the customer's location to the CHEP depot/service center---they are not being stock-piled at Buckeye's facility.⁶ Buckeye seeks to improperly expand this logistics function to actually stockpile the pallets at its facility, and thereby deprive CHEP of its ownership rights in the pallets.

Question Three

The answer to Question Three is predicated on the same determination of ownership that is set forth in response to the previous two questions: If Buckeye is providing a service to a common customer that is consistent with CHEP's ownership rights *and* the customer's contract with CHEP, then Buckeye may sort and return the CHEP pallets. Thus, if Buckeye is in the

⁶ In the case of this common customer, the contractual arrangement between CHEP and the customer imposes on the customer the obligation to return CHEP pallets. Thus, the customer is merely outsourcing its contractual obligation to Buckeye. See, CHEP 6934-6946.

common customer's facility providing sorting services and then hauls the sorted CHEP pallets to CHEP's depot/service center (consistent with the common customer's contract that requires the customer to transport the pallets back to CHEP), this does not offend CHEP's ownership rights. However, CHEP's ownership rights are violated when Buckeye transports the CHEP pallets to its own facility and retains the pallets for an indefinite period of time (no matter how small), thereby keeping CHEP's pallets out of CHEP's rental pool circulation.

C. If the Court is inclined to reconsider the Motion to Deem Facts Admitted, then CHEP should be given the opportunity to file a Memorandum Contra.

Based on the Court's advance verbal advice of the scope of what was memorialized in the Court's August 11, 2003, Decision and Entry, CHEP did not file a Memorandum in Opposition to Buckeye's Motion to Deem Facts Admitted. Thus, if the Court is inclined to reconsider its determination that this Motion was rendered moot by the outcome of the motions for summary judgment, CHEP requests that it be given the opportunity it oppose the motion, particularly to address the claims that the subject matter has some relevance to the issue of damages on any of the remaining claims.

As a practical matter, the subject Requests for Admission seek admissions that certain documents constitute business records. CHEP responded to those Request for Admissions admitting that which was truthful and denying that which was not. Without any legal basis for so doing, Buckeye seeks to have documents that do not meet all of the elements necessary for a business records foundation to be transformed into business records. This is not proper from either a legal or a factual basis.

III. Conclusion.

While some minor clarification of the language in the Court's August 11, 2003, Decision and Entry is appropriate (as is sought through the Memorandum that CHEP filed with the Court), Buckeye's Motion seeks far more than simple clarification---its' Motion asks the Court to reconsider the ownership issue that was central to the Court's August 11, 2003, Decision and Entry. The Court's determinations about CHEP's ownership of its pallets are clear and do not nothing warrants revisiting those determinations. Moreover, Buckeye's efforts to have the Court reconsider its determination that the Motion to Deem Facts Admitted, should be denied or, in the alternative, the Court should permit CHEP to file a Memorandum in Opposition, particularly in light of the limited issues that remain for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by electronic service and by telefax this 8th day of September, 2003, to the following:

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