

**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. :

**PLAINTIFF’S REPLY MEMORANDUM IN SUPPORT OF
MOTION FOR CLARIFICATION OR,
IN THE ALTERNATIVE, RECONSIDERATION AND
MEMORANDUM IN OPPOSITION TO DEFENDANT’S
MEMORANDUM SEEKING MODIFICATION OF
DECISION AND ENTRY DATED AUGUST 11, 2003**

I. Introduction

CHEP’s Memorandum in Opposition to Buckeye’s request that the Court clarify, or if necessary reconsider, two issues raised by the Court’s Decision and Entry of August 11, 2003, confirms CHEP reads the Court’s decision far more broadly than the decision warrants, and intends to use that overbroad reading to damage Buckeye’s relations with its customers permanently and irreparably. CHEP’s memorandum begins with broadly mischaracterizing Buckeye’s intentions in respect to the business relationship that it has asked the Court to clarify. Thus, much of CHEP’s argument asserts that Buckeye should not be allowed to engage in practices Buckeye has not asserted should be permissible within the framework of the August 11th Opinion. Then, when CHEP turns to the actual questions Buckeye has asked the Court to clarify, CHEP asks the Court to (1) ignore the

contractual rights CHEP's lessees or bailees have with respect to pallets having CHEP's markings; (2) give CHEP legal license to charge a lost pallet fee to any lessee or bailee who inadvertently sends such a pallet to CHEP; and (3) thereby further unjustly enrich itself by damaging Buckeye's relationship with their mutual customers by preventing Buckeye from returning mis-shipped pallets to the bailee or lessee that is entitled to return them to CHEP rather than pay a lost pallet fee. None of these arguments supports denying Buckeye the clarifications it seeks, and accordingly the first prong of Buckeye's motion should be granted.

When CHEP's Memorandum turns to Buckeye's request for clarification or reconsideration of the Court's finding that Motion for Order to Deem Facts Admitted (Doc. # 48) is moot in its entirety, CHEP offers no reason to deny Buckeye's motion, but instead quibbles with what use Buckeye would make of the admissions it has made. Disputes as to the weight of CHEP's admission are irrelevant to this motion, and in any event unfounded. Accordingly, the second prong of Buckeye's motion should also be granted.

II. Neither CHEP's Mischaracterizations of Buckeye's Intentions Nor the August 11, Decision and Entry Are Grounds for the Interference with Buckeye's Rights to Do Business with Mutual Customers in a Manner Consistent with the Customers' Rights

The heart of CHEP's argument is that Buckeye has some unstated intention to stockpile pallets containing CHEP's markings in order to sell them back to CHEP customers. That is not what Buckeye asked. Buckeye understands that unless it appeals the finding of the Court's Decision and Entry that CHEP has not forfeited ownership of its pallets by its actions, and the Sixth Circuit reverses that determination, it may not

“stockpile” pallets bearing CHEP’s markings. Nowhere in the Motion to Clarify does Buckeye ask for a determination that it can keep CHEP pallets beyond the time its customers could keep those pallets.

Likewise, CHEP offers the Court several red-herrings when it suggests Buckeye’s Motion has something to do with either pallets Buckeye is hauling as a common carrier or with pallets Buckeye has received from an entity that has no agreement with CHEP (i.e., a non-participating distributor). There is absolutely no evidence in the record that Buckeye has done anything with a pallet it was hauling back to CHEP for a customer as a common carrier other than return the pallet to CHEP. Buckeye’s Motion made clear that it understands that under the Decision and Entry its recourse for pallets received from non-participating distributors is to return them to CHEP and sue to disgorge CHEP from the unlawful profits it has gained under a claim of unjust enrichment.

As CHEP must concede, the Court’s Decision and Entry is necessarily premised on the conclusion that the distributors who receive pallets containing CHEP’s markings and have a contract to return those pallets to CHEP are either CHEP’s lessees or some other type of bailee of these pallets. CHEP further cannot and does not dispute that these entities have the right to possession of pallets containing CHEP’s markings for whatever period their agreement with CHEP allows. Yet CHEP inexplicably insists that if some of these pallets in any way come into Buckeye’s possession, the lessee or bailee loses all of its rights and Buckeye must return the pallets to CHEP. Buckeye believes that such assertions are directly contrary to CHEP’s assertions as to the structure of distribution of its pallets that formed the basis for the Court’s findings of ownership.

Specifically, turning to the three situations in which Buckeye, by its Motion, seeks clarification of its rights:

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 common 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?¹

CHEP, without citation of authority, asserts that the answer to this question must be "no," asserting: "When Buckeye comes into the possession of a CHEP pallets, other than for the provision of logistics/transportation services to a mutual customer, CHEP is entitled to immediate possession of the pallet and Buckeye is obligated to surrender it to CHEP." Mem. Opp. at 7. Thus, CHEP's position is that in cases in which CHEP pallets are inadvertently sent to Buckeye, those customers cannot retrieve such pallets from Buckeye to return them to CHEP or ask Buckeye to haul them back to CHEP on their behalf. As pointed out in Buckeye's Motion, CHEP's financial incentive for its position is obvious – it is much better off getting its pallets back for the 50 cents it has begun offering since the lawsuit was filed (or for whatever compensation a jury decides is reasonable on Buckeye's unjust enrichment claim) and receiving a \$24 lost pallet fee from its customer than it is having the customer pay Buckeye for its handling and transportation costs and returning the pallet to CHEP. However, the logic of CHEP's position is far less obvious.

CHEP's only explanation for its position that Buckeye must surrender these pallets to CHEP rather than allow its customers to retrieve them rests on a misstatement of Buckeye's request. CHEP argues "Buckeye cannot retain these pallets at its facility."

¹ The emphasis was not in Buckeye's motion, but is meant to clarify the request Buckeye has made to the Court.

Buckeye, however, has not asked for the right to retain them at its facility. All that Buckeye asserts it has the right to do is to return those pallets to the common customer prior to the time the customer is obligated to return those pallets to CHEP. To be specific, all Buckeye has asked is that the Court clarify it has the right to do is to separate the CHEP-marked pallets from the rest of the customers load, and then to send them back to the customer before the customer's obligation to return the pallet to CHEP arises. CHEP offers no explanation as to how this interferes with its ownership of the pallet. Nor does it dispute that CHEP does not have any term in its contracts with distributors that allows CHEP to prohibit those distributors from obtaining pallets from recyclers. Norder dep. (1/9/03) at 190-91. Thus Buckeye submits that there is nothing in either the Court's Decision and Entry or the ownership rights the Court has found CHEP has that could lawfully or logically preclude Buckeye from returning those pallets mistakenly sent to Buckeye back to the common 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 a 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?

Again, CHEP asserts the answer should be "no." Insofar as Buckeye can tell, CHEP offers no rationale for this position. Logically, it is difficult to square CHEP's position that Buckeye cannot sort and haul such pallets to CHEP with its position that "CHEP is entitled to immediate possession of the pallet and Buckeye is obligated to surrender it to CHEP." Mem. Opp. at 7. That is exactly what Buckeye proposes to do.

CHEP's only objections can be to (1) having to give the common customer credit for return of the pallet; or (2) allowing Buckeye to negotiate with the common customer reasonable compensation for its efforts. Notwithstanding the Court's finding as to CHEP's ownership of such pallets, there is no basis for CHEP to claim that it should not have to give credit for return of a pallet to a customer it knows had the pallet and arranged its prompt return. Likewise, CHEP's putative ownership of the pallet is no ground for it to interfere with Buckeye's customer relationship by seeking to prevent Buckeye from negotiating a fee for its services.

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?

While CHEP asserts the answer to Buckeye's final question should be "no," its argument concedes that there is no basis for keeping Buckeye from sorting pallets at a customer's business location. Without citation to any contractual right, however, CHEP claims that its customers are not entitled to have pallets sorted at another site, and that Buckeye therefore cannot do so. Buckeye can find no section of CHEP's contracts with participating distributors that provides such a limitation. To the contrary, all the contract provides is that CHEP pallets are to be segregated and returned at regular intervals as agreed between CHEP and the distributor. See CHEP 10474-76 in Exhibit I to Plaintiff's Exhibits in Support of Motion for Summary Judgment (CHEP contract with Abbott Foods). Nothing in the agreement specifies where the pallets are to be stored or sorted.

Again, CHEP has no greater rights against Buckeye that it has against its lessees or bailees. Nothing in CHEP's ownership interest can be compromised by Buckeye

sorting and returning these pallets – to the contrary, such sorting, separation and return is exactly what CHEP has asked for. It should make no difference where that work is done.

In effect, CHEP is asking the Court to extend its finding of ownership into an excuse for CHEP to engage in anticompetitive exclusion of recyclers such as Buckeye from servicing their customers. Apart from their circulation of pallets through the supposed “closed-loop” system, CHEP competes with Buckeye in offering customers so-called “total pallet services” – arrangements whereby CHEP or Buckeye contracts with the customer to sort and properly dispose of all pallets the customer receives. CHEP’s assertion that Buckeye cannot sort pallets off of a customer’s work site is plainly an attempt to gain an unfair and anticompetitive advantage. CHEP’s ownership rights do not prevent customers with no contractual obligation not to sort pallets off-site from using Buckeye to do so. The Court should not sanction CHEP’s attempt to turn its claimed ownership of such pallets into an excuse to exclude Buckeye from legitimate existing and future business opportunities.

In sum, CHEP has offered no good reason that the Court should not grant Buckeye’s request to clarify its decision and entry to make clear that Buckeye may return CHEP-marked pallets to common customers (or deliver them to CHEP on the customer’s behalf) and may contract with customers to sort CHEP pallets from other pallets to facilitate their return to CHEP.

IV. If the Court Finds CHEP Has the Immediate Right to Possession of Its Pallets, It Should Require CHEP to Sort Those Pallets Immediately upon Receipt by Buckeye and to Remove Them from Buckeye Premises

If the Court agrees with CHEP that it has the right to immediate possession of all pallets marked with its logo, then the Court should require CHEP to act accordingly – in

other words, the Court should require CHEP to come to Buckeye's premises within 24 hours of notice that Buckeye has received pallets, to sort them and remove them. CHEP as owner of the pallets has no right to force Buckeye to sort its pallets and, upon notice that Buckeye has such pallets, should have no right to let them interfere with Buckeye's operation of its business. Thus, if the Court finds CHEP entitled to immediate possession of all pallets containing its markings, it should require CHEP to take immediate possession of those pallets.

IV. Determination as to Whether CHEP Has Made Admissions as to CHEP 0795 Is Relevant to Buckeye's Remaining Claim for Unjust Enrichment

Buckeye's Motion also requests that the Court clarify or reconsider its decision that Buckeye's Motion for Order to Deem Facts Admitted (Doc. # 48) is moot in its entirety, and asked the Court to find CHEP has admitted that CHEP 0795 to be a spreadsheet prepared by a CHEP employee showing the employee's assumptions, projections, and analysis of the benefits of paying recyclers for recovered pallets as of March 15, 2001. Buckeye's Motion points out that CHEP 0795 is directly relevant to Buckeye's proof of damages on its unjust enrichment claim because it contains CHEP's own calculations of the benefits of paying recyclers for recovered pallets as of March 15, 2001. CHEP does not dispute that Buckeye is entitled to offer such proof. Rather, CHEP's only argument against Buckeye's Motion is that the admissions it has made are insufficient to qualify the document for admission into evidence as a business record.

CHEP's argument, again, however, is a red-herring. The issue at this point is whether CHEP has made the admission Buckeye seeks to have reflected by its Motion. Moreover, Buckeye's purpose in seeking the admissions is not to establish the document

falls within the business record exception to the hearsay rule. Buckeye does not need that exception to gain admission of the document and the facts CHEP has admitted – if the Court finds that CHEP 0795 is (a) a true and accurate copy of a spreadsheet prepared by a CHEP employee; (b) it contains a CHEP employee's assumptions, projections, and analysis of the benefits of paying recyclers for recovered pallets as of March 15, 2001; and (c) contains accurate mathematical computations, the document would be admissible under Fed. R. Evid. 801(d)(2) as the admission of a party opponent. Accordingly, the Court should also grant the second branch of Buckeye's Motion.

V. Conclusion

CHEP's Memorandum in Opposition offers no reason the Court should not clarify (or alternatively reconsider) its Decision and Entry to make clear Buckeye's right to perform services for common customers that do not interfere with CHEP claim of ownership as to pallets containing its markings. Nor does CHEP's opposition offer any sound reason why the Court should not also reconsider its determination that Buckeye's Motion for Order to Deem Facts Admitted is moot in its entirety, and grant that motion with respect to Buckeye's assertion that the document produced by CHEP and marked CHEP 0795 is (a) a true and accurate copy of a spreadsheet prepared by a CHEP employee; (b) a CHEP employee's assumptions, projections, and analysis of the benefits

of paying recyclers for recovered pallets as of March 15, 2001; and (c) contains accurate mathematical computations.

s/James A. Wilson

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Reply Memorandum was served on September 12, 2003, by electronic delivery or facsimile upon:

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