

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

FILED
KENNETH J. MURPHY
CLERK
63 NOV 12 AM 9:29
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

BUCKEYE DIAMOND LOGISTICS, INC.:
fka BUCKEYE RECYCLERS, INC. :
:
Plaintiff, :
:
v. :
CHEP USA, a general partnership :
:
Defendant. :

Case No. C3-01-440

Judge Walter Herbert Rice

**STIPULATED ORDER CLARIFYING COURT'S
DECISION & ENTRY OF AUGUST 11, 2003 (DOCKET # 61)
AND RESOLVING IN PART PLAINTIFF'S MOTION FOR CLARIFICATION,
OR IN THE ALTERNATIVE, RECONSIDERATION (DOCKET #65) AND
DEFENDANT'S MEMORANDUM SEEKING CLARIFICATION OF PAGES 10
AND 41 OF THE COURT'S DECISION & ENTRY (DOCKET #64).**

This case is before the Court on CHEP USA's Memorandum seeking clarification of the Court's Decision & Entry (Docket #64) and on Buckeye Diamond Logistics, Inc.'s ("Buckeye") Motion to Clarify or in the Alternative for Reconsideration (Docket #65). In its Motion to Clarify or in the Alternative for Reconsideration (Docket # 65), Buckeye among other things sought clarification of this Court's Decision and Entry dated August 11, 2003 (Docket # 61) with respect to three specific issues:

- (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?

- (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?
- (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?

After meeting and discussing these issues, the parties have advised the Court that they have agreed that the answer to all three questions is "yes" subject to the following qualifications:

First, subject to Buckeye's reservation of its right to appeal the Court's Decision and Entry of August 11, 2003, if a common customer inadvertently loads CHEP-marked pallets on to Buckeye's van or trailer, Buckeye can return the pallets to the common customer as long as it returns those pallets in a commercially reasonable period of time (it being understood that Buckeye shall not accumulate greater than one truckload of CHEP-marked pallets per customer location without returning the CHEP-marked pallets within two days of accumulating a truckload). Alternatively, Buckeye can return the pallets to CHEP so long as not more than one full truckload of CHEP-marked pallets cumulative of all common customers (excepting those to whom Buckeye is returning pallets) accumulates in Buckeye's yard. If Buckeye returns the pallets to CHEP, and notifies CHEP as to the name of the common customer from whom the pallets came, the common customer will receive credit. If the truckload contains pallets from more than one common customer, and Buckeye notifies CHEP as to the portion of the returned pallets in the truckload to be credited to each of the

common customers, such customers will be credited for their return. This stipulation is made without prejudice to Buckeye's right to assert as a defense to CHEP's conversion claim that prior to this Order it acted in accordance with its customers' obligations to CHEP notwithstanding any instance in which it may not have returned pallets to a customer immediately upon obtaining a truckload quantity of such pallets.

Second, subject to Buckeye's reservation of its right to appeal the August 11, 2003, Decision and Entry, Buckeye can perform pallet sortation services, including sortation of pallet loads containing CHEP-marked pallets, either at a common customer's facility or at a facility owned or operated by Buckeye.

Third, again subject to Buckeye's right to appeal the Court's Decision an Entry dated August 11, 2003, when stray CHEP-marked pallets are obtained by Buckeye, it must either (1) return such pallets to a CHEP depot on not less than a monthly basis, or (2) notify CHEP within ten (10) days of receipt of such pallets, in which case all such pallets will be picked up by CHEP on a not less than monthly basis, with not less than two business days advance notice to Buckeye as to the date and time of the pickup. This stipulation is made without prejudice to Buckeye's right to assert as a defense to CHEP's conversion claim that prior to this Order it acted in accordance with its understanding of a customers' obligations to CHEP.

CHEP-marked pallets will be regarded as "stray" if Buckeye obtained them from any entity that Buckeye knows is a non-participating distributor and/or any person or entity that Buckeye knows does not have a contract with CHEP for the

return of the pallets, and if Buckeye obtained the pallets in the ordinary course of Buckeye's business operations. Buckeye may be compensated in accordance with CHEP's Asset Recovery Program ("ARP") for all stray pallets returned or may reserve its right to seek compensation from the Court.

In CHEP's Memorandum (Docket #64) it sought two specific clarifications. The following language from page 10 of the Court's August 11, 2003 Decision & Entry (Docket # 61), is hereby deleted:

CHEP does not object to Buckeye serving as a disinterested courier of CHEP pallets from one CHEP customer to another (Def.'s Memo. In Opp. To Pl.'s M.S.J. on Count I of Compl. (Doc. #36) at 15, but it does object. .

This deleted text should be replaced with:

"CHEP does not object to Buckeye serving as a courier of CHEP pallets from one CHEP customer to another location of that same customer or, if requested by said customer, to the customer's vendee (Def.'s Memo. In Opp. To Pl.'s M.S.J. on Count I of Compl. (Doc. #36) at 15, but it does object ...

The following language from Page 41 of the Decision & Entry is hereby deleted:

"Regarding their delivery of CHEP pallets to CHEP lessees, to the extent they collect a hauling or service fee, that itself is their remuneration."

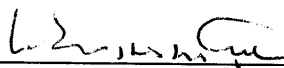
This deleted text should be replaced with:

"Regarding their delivery of CHEP pallets from one CHEP customer to another location of that same customer or, if requested by said customer, to the customer's vendee, to the extent they collect a hauling or service fee, that itself is their remuneration."

This Court approves the parties' agreement to the answers to the foregoing questions, the parties' agreed upon qualifications to those answers as set forth herein, and the parties' agreed upon deletion and amendments to the Court's prior Decision & Entry as set forth above, and makes these agreements an order of Court. The Court hereby incorporates by reference all of the terms of the Decision & Entry dated August 11, 2003, except those provisions of pages 10 and 41 and the answers to the above-questions which are modified by the provisions of this Order. This order does not resolve, and the Court will separately determine, the portion of Buckeye's Motion seeking reconsideration of the Court's determination that Buckeye's Motion to Deem Facts Admitted (Docket # 48) is moot in its entirety.

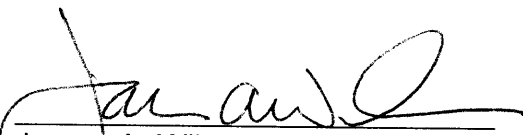
IT IS SO ORDERED.

November 12, 2003

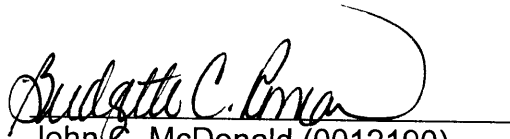


WALTER HERBERT RICE, JUDGE
UNITED STATES DISTRICT COURT

Approved:



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
jawilson@vssp.com
Attorneys for Plaintiff

A handwritten signature in cursive script, appearing to read "Bridgette C. Roman", is written over a horizontal line.

John C. McDonald (0012190)
Bridgette Roman (0040888)
Schottenstein Zox & Dunn
250 West Street
Columbus, OH 43215
(614) 462-2201
jmcdonald@szd.com
broman@szd.com
Attorneys for Defendant