

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

BUCKEYE DIAMOND LOGISTICS, INC.	:	
fka BUCKEYE RECYCLERS, INC.	:	
	:	Civil Action No. C3-01-440
Plaintiff,	:	
	:	Judge Walter Herbert Rice
v.	:	
	:	
CHEP USA, a general partnership,	:	
	:	
Defendant.	:	

**DEFENDANT'S MOTION IN LIMINE TO EXCLUDE EVIDENCE RELATED
TO PLAINTIFF'S EXHIBIT 35 WHICH CANNOT BE AUTHENTICATED
BY ANY WITNESS LISTED IN THE JOINT PROPOSED PRETRIAL ORDER
(Motion in Limine #11)**

Defendant CHEP USA moves for an order in limine preventing Plaintiff Buckeye Diamond Logistics, Inc. ("Buckeye") from publishing to the jury or adducing testimony concerning the contents of Plaintiff's Exhibit 35 ("PX 35"). The grounds supporting this Motion are set forth in the attached Memorandum in Support.

Respectfully Submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

PX 35 is not a CHEP business record. Despite the fact that six CHEP employees and former employees were asked questions concerning this document, not a single one could provide a foundation for it as a business record.¹ Buckeye seeks to use this document and inadmissible hearsay information contained in this document in an effort to support its claim that it conferred a benefit on CHEP which constitutes an unjust enrichment to CHEP. On every level, PX 35 is inadmissible hearsay and should be kept from the jury.

II. ARGUMENT

PX 35 and the information contained in this document are inadmissible hearsay. A statement other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted is not admissible, unless it falls within an exception. Fed. R. Evid. 801, 802. The only possible exception to permit admission of or testimony relating to what PX 35 contains would be the business records exception, Fed. R. Evid. 803(6). The business records exception is only available if the custodian of the record can authenticate the record by stating that (1) the records have been made in the course of business; (2) that they have been kept in the regular course of business; (3) the regular practice of that business must have been to have made the record; and (4) the record must have been made by a person with

¹ PX 35 bears Bates No. CHEP00795 and was Deposition Exhibit 112.

knowledge of the transaction or from information transmitted by a person with knowledge. Redken Laboratories, Inc. v. Levin, 843 F.2d 226, 229 (6th Cir.), cert. denied, 488 U.S. 852 (1988). In addition, Rule 803(6) requires that a foundation be laid by the "custodian or other qualified witness." United States v. Fawaz, 881 F.2d 259, 266 (6th Cir. 1989).

In depositions, Plaintiff asked six witnesses (CHEP employees and former employees) about the document and not a single person asked could establish that the document was made or kept in the regular course of business, that it was a regular practice to make such a record, and who made it (let alone that they had personal knowledge). (See, Brumsey Depo., p. 70; Kirk Depo., p. 74; Miller Depo., p. 93; Norder Depo., pp. 200-201; Southwick Depo., p. 112; Russell Depo., p. 8). Buckeye cannot point to a single witness on their witness list who can authenticate PX 35.

In order to simplify the presentation of evidence at trial and avoid numerous well-founded objections, CHEP seeks a preliminary ruling from the Court under Federal Rules of Evidence 801 and 802 prohibiting Buckeye from publishing PX 35 to the jury or adducing testimony concerning its contents.

Because Buckeye has listed this document as a trial exhibit, it is clear that it intends to publish this document to the jury and intends to elicit testimony about the content of the document. Because the identity of the individual who prepared this document is unknown and because it cannot be authenticated, this document cannot be considered a business record of CHEP, and is, therefore, inadmissible hearsay. The contents of the document are equally inadmissible and Buckeye should not be permitted to elicit testimony about the contents.

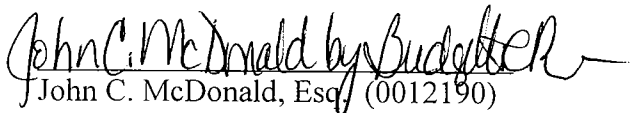
This document, prepared by an unknown person, which has not been and cannot be authenticated by any witnesses, should not be used by Buckeye at trial because the document and

its contents are inadmissible hearsay. As discussed above, the only possible exception is the business records exception under Fed. R. Evid. 803(6). Because the custodian is unknown and because no one can properly authenticate the document, Buckeye cannot satisfy the criteria of Fed. R. Evid. 803(6), and the document and its contents should be excluded from evidence.

III. CONCLUSION

PX 35 has not been and cannot be authenticated as a business record by any trial witness identified in this matter. Buckeye therefore should be prohibited from publishing this exhibit to the jury and from eliciting any testimony relating to the exhibit or its contents.

Respectfully Submitted,



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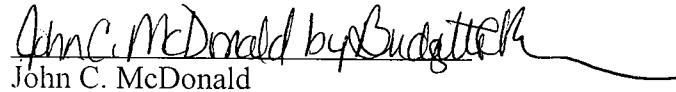
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Defendant's Motion in Limine was served this 30th day of January, 2004, via the Court's electronic filing notification, upon:

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