

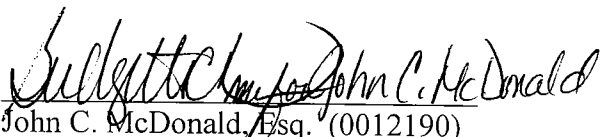
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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 PREVENT BUCKEYE FROM ELICITING
TESTIMONY FROM MEQUEL DEVAUGHN AND RALPH BUONO**
(Motion in Limine #10)

Defendant CHEP USA moves the Court for an order in limine preventing Plaintiff Buckeye Diamond Logistics, Inc. ("Buckeye") from calling either Mequel DeVaughn or Ralph Buono as witnesses in their case. 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

The parties have prepared a Joint Proposed Final Pretrial Order listing witnesses to be called at trial. Buckeye's list includes the names of Miguel DeVaughn and Ralph Buono, who are both CHEP employees. Any testimony that might be elicited from Mr. DeVaughn or Mr. Buono is irrelevant to Plaintiff's sole remaining claim of unjust enrichment. Under Fed. R. Evid. 402, "evidence which is not relevant is not admissible." Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

In order to simplify the presentation of evidence at trial and avoid numerous objections, CHEP seeks a preliminary ruling from the Court under Federal Rules of Evidence 401 and 402 precluding Buckeye from calling Mr. DeVaughn or Mr. Buono as witnesses.

II. ARGUMENT

A. Testimony That May be Elicited from Mr. DeVaughn Is Irrelevant.

Mr. DeVaughn has been employed by CHEP for more than three years. Mr. DeVaughn was questioned by Buckeye in deposition about his position as a customer service representative, which involves managing accounts and monitoring CHEP's assets. (DeVaughn Depo., p. 16). He was also questioned about visiting pallet dealers and filling out stray equipment reports. (Id.

at pp. 26-27). In addition, Mr. DeVaughn was asked about his training at CHEP. (Id. at pp. 46-52). Mr. DeVaughn testified regarding the electronic mail system and software utilized by CHEP to monitor its assets as they move about the stream of commerce. (Id. at pp. 56-57). Mr. DeVaughn also testified regarding the responsibility of CHEP's customers to appropriately account for the CHEP pallets in its custody. (Id. at pp. 109-110). He was also questioned about a single visit to Buckeye several years prior to the commencement of this litigation. (Id. at pp. 176-77). He testified that he went to a Buckeye facility because he had heard there were a lot of CHEP pallets stored there and sought to investigate the situation further. (Id. at p. 172). Mr. DeVaughn testified that before leaving Buckeye, he gave the Buckeye employee in charge his CHEP business card and a CHEP flyer and sought to obtain possession of the CHEP pallets at Buckeye. (Id. at p. 177).

This brief summary of Mr. DeVaughn's deposition testimony generally demonstrates that he lacks any ability to speak to the few remaining issues to be litigated. However, the lack of probative benefit from any testimony by Mr. DeVaughn is highlighted by the fact that in Buckeye's Motion for Summary Judgment and the four memoranda it submitted in connection with the Summary Judgment proceedings the only facts which Buckeye sought to establish by citation to Mr. DeVaughn's deposition testimony was cited by Buckeye five times in connection with the four memoranda Buckeye submitted during the summary judgment proceedings. These five citations demonstrate

- "Although the CHEP pallets are distinguishable from ordinary pallets, individual pallets with CHEP markings are indistinguishable from one another." Buckeye's Motion for Summary Judgment, pp. 34, under the subheading "CHEP's Business Practices and Claims of Ownership") and Buckeye's Memorandum in Opposition to CHEP's Motion for Summary Judgment, at p.5 under a heading entitled "...How CHEP Does Business" This "fact is also not in

controversy, having been determined by the Court at p. 4 of the Summary Judgment Decision and Entry.

- “The manufacturer is not responsible for returning the pallet to CHEP, but must report to CHEP where it has sent the pallet.” (Buckeye’s Claims of Coverage Report) This “fact” is also not in controversy, having been determined by the Court at pp. 4 – 7 of the Summary Judgment Decision & Entry.
- That there is no requirement that a CHEP customer return the specific pallet that CHEP leased to the customer. (Buckeye’s Motion for Summary Judgment, p. 12 in Common Law of Mutuum, CHEP’s Arrangements with it’s customers constitute “Sale of Its Pallets” and Buckeye’s Memorandum in Opposition to CHEP’s Motion for Summary Judgment at p. 24 under the portion of the Legal Argument addressing Mutuum.) The Court dispensed with this theory and determined the irrelevance of this fact at pp. 23, 27 of the Summary Judgment Decision & Entry.

There can be no doubt that any evidence that may be elicited from Mr. DeVaughn is not related to Buckeye's sole remaining claim for unjust enrichment but is yet another example of the thinly veiled effort to re-litigate the ownership issue. Evidence elicited from Mr. DeVaughn is patently irrelevant because it does not make it more or less probable that CHEP has been unjustly enriched by Buckeye and certainly is not probative of the value of the benefit, if any. Permitting Buckeye to elicit testimony from Mr. DeVaughn may mislead the jury, will cause undue delay, and will result in the introduction of evidence that is irrelevant to Buckeye's sole remaining claim of unjust enrichment. Therefore, Buckeye should be prevented from calling Mr. DeVaughn as a witness.

B. Testimony That May be Elicited from Mr. Buono Is Irrelevant.

Mr. Buono has been employed by CHEP for more than nine years. He resides in New Jersey and has for his entire life. Mr. Buono was questioned in deposition about his position as Manager of Asset Protection for CHEP, which involves protecting CHEP's pallets. (Buono

Depo., pp. 47-48). He was also questioned about his handling of stray equipment reports, including to whom these reports are forwarded. (Id.). In addition, he was asked about sending certified letters to pallet recyclers requesting that pallets be returned. (Id. at p. 59). Mr. Buono testified that he creates hard copy files when he receives stray equipment reports indicating that a customer service representative has visited an entity that refuses to return CHEP's pallets. (Id.).

Again, this is a brief summary of Mr. Buono's deposition testimony. But, again, Buckeye's brief references in its four memoranda submitted in connection with the summary judgment proceedings further spot-light the fact that Mr. Buono has nothing to testify to that is relevant to the Buckeye sole remaining claim:

- The frequency with which asset recovery driver's visit known pallet dealer locations (Buckeye cited Mr. Buono as the source of this irrelevant "fact" at p. 10 of its Memorandum in Opposition to CHEP's Motion for Summary Judgment under a subheading dedicated to facts related to its "loss" & "abandonment" theories).
- That CHEP cannot tell from looking at a stray equipment report which one of its customers was the source of the so-called stray pallet. (Buckeye cited Mr. Buono as, the source of this irrelevant "fact" at pp. 16 – 17 of its Memorandum in Opposition to CHEP's Motion for Summary Judgment under the subheading directed to facts related to its "loss" and "abandonment" theories).
- That CHEP customers do not receive a credit equal to the lost pallet fee charged if the so-called "lost pallet" is subsequently recovered. (Buckeye cited Mr. Buono as the source of this irrelevant "fact" at p. 26 of its Memorandum in Opposition to CHEP's Motion for Summary Judgment under the Legal Argument framed by Buckeye by Buckeye as "CHEP Has No Ownership Interest in Pallets Containing It's Markings"). This Court at p. 38 of its Summary Judgment Decision & Entry found this "irrelevant to Buckeye's claims."

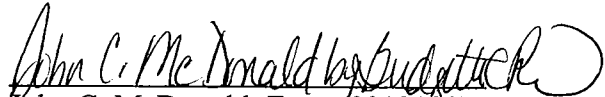
As is clearly demonstrated by Buckeye's own use of Mr. Buono's testimony, Buckeye's sole and exclusive purpose of calling Mr. Buono would be an effort to relitigate the ownership issue --- an issue that has already been determined in CHEP's favor.

Any evidence that may be elicited from Mr. Buono is not related to Buckeye's sole remaining claim for unjust enrichment. Evidence elicited from Mr. Buono is patently irrelevant because it does not make it more or less probable that CHEP has been unjustly enriched by Buckeye. Moreover, there is nothing in Mr. Buono's deposition which would properly allow him to give an opinion as to the value, if any, of Buckeye's services or the value, if any, to CHEP. Permitting Buckeye to elicit testimony from Mr. Buono may mislead the jury, will cause undue delay, and will result in the introduction of evidence that is irrelevant to Buckeye's sole remaining claim of unjust enrichment. Therefore, Buckeye should be prevented from calling Mr. Buono as a witness.

III. CONCLUSION

Testimony that may be elicited from Mr. DeVaughn or Mr. Buono does not have any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. This Court's decision to grant summary judgment to CHEP on all of Buckeye's claims except for that of unjust enrichment renders testimony on other issues irrelevant. Testimony on these other issues should therefore be excluded. Accordingly, Defendant CHEP respectfully requests that the Court issue an Order prohibiting Buckeye from calling either Mr. DeVaughn or Mr. Buono as witnesses in their case.

Respectfully Submitted,

A handwritten signature in black ink that reads "John C. McDonald by [unclear]". The signature is written in a cursive style and is positioned above the typed name.

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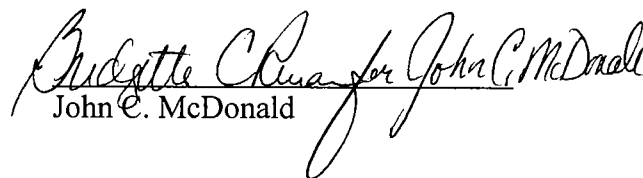
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CERTIFICATE OF SERVICE

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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