

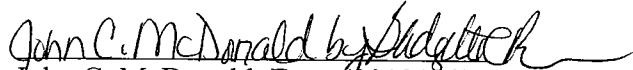
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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 OR PRESENTING EVIDENCE DISPUTING DEFENDANT'S
OWNERSHIP OF ITS PALLETS**
(Motion in Limine #13)

Defendant CHEP USA moves the Court for an order in limine excluding any testimony elicited by or evidence offered by Plaintiff Buckeye Diamond Logistics, Inc. ("Buckeye") that purports to question or refute CHEP's ownership of its pallets. The grounds supporting this Motion are set forth in the attached Memorandum in Support.

Respectfully Submitted,


John C. McDonald, Esq. (0012190)
Schottenstein, Zox & Dunn, L.P.A.
250 West Street
Columbus, Ohio 43215
Tele: (614) 462-2700
Fax: (614) 462-5135
Trial Attorney for Defendant,
CHEP USA

OF COUNSEL:

Bridgette C. Roman, Esq. (0040888)
Schottenstein, Zox & Dunn, L.P.A.
250 West Street
Columbus, Ohio 43215
Tele: (614) 462-2700
Fax: (614) 462-5135

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Prior to this Court's conclusive determination that CHEP owns its pallets which this Court made in its Summary Judgment ruling (Docket #62), the central issue in this case was whether CHEP forfeited ownership of those CHEP pallets that came into Buckeye's possession in the normal course of Buckeye's business operations. In Count One of the Complaint, Buckeye claimed that CHEP's placement of its pallets into the stream of commerce constituted a "sale" and that when the pallets came into Buckeye's possession they received the pallets free of CHEP's ownership rights. (See Buckeye's Complaint, p. 7). Buckeye further claimed in Count One of its Complaint that CHEP's assertion of its ownership rights in the pallets violated the Deceptive Trade Practices Act contained in Ohio Revised Code Chapter 4165. (Id. at pp. 7-8).

These claims, however, were dismissed on summary judgment based on this Court's determination as a matter of law that CHEP retains ownership of its pallets, even those in Buckeye's hands. (See Summary Judgment Decision and Entry, Docket #62, p. 19). Notwithstanding this Court's conclusive determination that CHEP owns its pallets, Buckeye is apparently intent on continuing to challenge CHEP's ownership rights. Buckeye's determination in this regard is evidenced by the Proposed Joint Final Pretrial Order, wherein Buckeye has framed a number of issues of fact that are probative only of ownership issues. 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 offering any testimony and evidence that, in any way, challenges or questions CHEP's ownership of its pallets.

II. THE IRRELEVANT "CONTESTED ISSUES OF FACT"

The following are "Contested Issues of Fact" in the Joint Proposed Pretrial Statement that CHEP contends are irrelevant due to this Court's determination of the ownership issue:

3. Whether some or all manufacturers and participating distributors, in their contracts with CHEP, agree to pay to CHEP a "lost pallet fee" in certain circumstances, and whether the contracts between CHEP and its participating manufacturers and distributors state that this payment of the fee does not result in the transfer of, or otherwise affect, CHEP's ownership of the pallets.
5. Whether regardless of contractual stipulations participating distributors fail to isolate pallets containing CHEP's markings and commingle those pallets with white wood pallets, and, as a result, blue pallets come into the possession of pallet recyclers such as Buckeye, and if so, in what amount.
6. Whether CHEP's up-charges for shipments to NPDs compensate CHEP for, among other things, its increased cost of recovering those pallets, increased dwell time and lost income, or whether such fees in whole or in part compensate CHEP for unrecoverable pallets.
7. Whether the per pallet up-charge is less than the replacement cost for anew pallet.
9. What was CHEP's intent and expectation regarding pallet recovery when it began allowing its customers to ship to NPDs.

III. ARGUMENT

Evidence disputing CHEP's ownership of its pallets is irrelevant. 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."

A recurring theme in Buckeye's case has been that CHEP's pallets were transferred to Buckeye free of any ownership rights claimed by CHEP and that CHEP had no legal right to interfere in Buckeye's relationship with a party that conveyed pallets to Buckeye. This recurring theme, however, no longer has any validity because of this Court's conclusive determination that CHEP owns its pallets, regardless of whether they wind up in Buckeye's hands.

Apparently undeterred by this Court's Summary Judgment ruling, Buckeye intends to offer evidence to somehow illustrate that CHEP relinquishes ownership of its pallets when it places them into circulation. However, this evidence is patently irrelevant because CHEP's ownership rights in its pallets have already been decided in the Summary Judgment Order. (See Summary Judgment Decision and Entry, Docket # 62, pp. 19-39). This Court dismissed Buckeye's argument that CHEP's agreements with its manufacturers were sales and found that the Rental Agreement used by CHEP represents a true lease. (Id. at p. 21). In addition, this Court found that "even if the identical pallet leased to the lessee does not need to be returned to satisfy the terms of the Rental Agreement as to that particular pallet, at some point it will be returned, and CHEP does not give up its claim to that particular pallet while it is out of its possession or control." (Id. at p. 26). Based on these findings, this Court granted summary judgment to CHEP on Count One of the Complaint, finding that "the evidence demonstrates without question that CHEP has at all times retained ownership in its pallets." (Id. at p. 19).


The paragraphs from the Joint Proposed Pretrial Order set forth above demonstrate Buckeye's intention to offer evidence directed at questioning CHEP's ownership of its pallets, but such evidence does not have any tendency to make the existence of any fact relating to its sole remaining claim of unjust enrichment more probable or less probable than it would be without

the evidence. This Court's decision regarding CHEP's ownership of its pallets renders evidence on this issue irrelevant. Evidence on this issue should therefore be excluded.

IV. CONCLUSION

Evidence regarding CHEP's ownership of its pallets is irrelevant and permitting Buckeye to introduce such evidence may confuse the task of the jury. Accordingly, Defendant CHEP respectfully requests that the Court issue an Order prohibiting Buckeye from presenting evidence regarding CHEP's ownership of its pallets.

Respectfully Submitted,

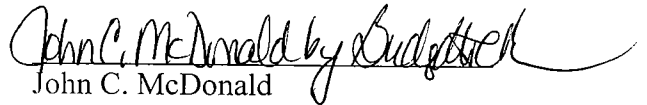

John C. McDonald, Esq. (0012198)
Schottenstein, Zox & Dunn, L.P.A.
250 West Street
Columbus, Ohio 43215
Tele: (614) 462-2700
Fax: (614) 462-5135
Trial Attorney for Defendant,
CHEP USA

OF COUNSEL:
Bridgette C. Roman, Esq. (0040888)
Schottenstein, Zox & Dunn, L.P.A.
250 West Street
Columbus, Ohio 43215
Tele: (614) 462-2700
Fax: (614) 462-5135

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:

James A. Wilson
Vorys, Sater, Seymore & Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
Trial Attorney for Plaintiff


John C. McDonald