

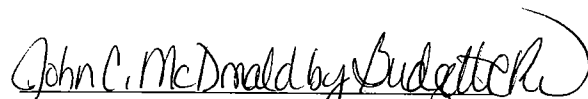
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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 PRESENTING
EVIDENCE OF DEFENDANT'S ALLEGED LOSS
OR ABANDONMENT OF ITS PALLETS**
(Motion in Limine #14)

Defendant CHEP USA moves the Court for an order prohibiting Plaintiff Buckeye Diamond Logistics, Inc. ("Buckeye") from introducing any evidence which purports to show CHEP's so-called loss or abandonment of its pallets. 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

Before this Court's Summary Judgment Decision and Entry (Docket #62), a central issue in this case was whether CHEP had lost or abandoned those of its pallets that came into Buckeye's possession in the normal course of Buckeye's business operations because it either (a) consented to its pallets passing out of the control of its agents; (b) negligently allowed its pallets to pass from its control into Buckeye's possession; or (c) because CHEP failed to monitor the location of the pallets. (See Buckeye's Complaint, Count Two, ¶'s 30, 33).

These so-called loss or abandonment theories set forth in Count Two of the Complaint have no continuing validity because this Court dismissed them by finding that CHEP continuously retained ownership of its pallets. (See Summary Judgment Decision and Entry, Docket #62, p. 19). Nevertheless, as demonstrated by the Joint Proposed Final Pretrial Order, Buckeye intends to put forth evidence to show that CHEP loses or abandons its pallets. 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 putting before the jury any evidence regarding CHEP's so-called loss or abandonment of its pallets including, but not limited to, evidence that CHEP (a) consented to its pallets passing out of the control of its agents; (b) negligently allowed its pallets to pass from its control into Buckeye's possession; or (c) failed to monitor the location of the pallets.

II. THE IRRELEVANT "CONTESTED ISSUES OF FACT" AND "UNCONTESTED ISSUES OF FACT"

The following are "Contested Issues of Fact" and "Uncontested Issues of Fact" in the Joint Proposed Pretrial Order that CHEP contends are irrelevant due to this Court's determination that CHEP had not lost or abandoned its pallets:

"Contested Issues of Fact"

4. Whether when a participating manufacturer ships blue pallets to a non-participating distributor, that manufacturer communicates to CHEP the number of pallets begin shipped and the non-participating distributor's location; whether the first time that a participating manufacturer ships blue pallets to a non-participating distributor, CHEP notifies that distributor by certified mail, by phone and/or by a personal visit that CHEP owns the blue pallets, that they are not to be bought or sold and to contact CHEP to arrange for a pick-up; and whether subsequent shipments to an NPD are followed by phone calls or personal visits regarding arrangements for CHEP to pick up the blue pallets.
7. Whether the per pallet up-charge is less than the replacement cost for anew pallet.
8. Whether at the point in time that CHEP permitted some of its manufacturer customers to ship blue pallets to NPDs, CHEP's controller predicted that CHEP would need to create a loss reserve for all pallets CHEP permitted its manufacturing customers to ship to uncooperative NPDs because "the thinking [was] that we would never recover these pallets."
10. Whether CHEP has admitted that between January of 1998 and July of 2002, CHEP's manufacturer customers shipped 1,080,389 blue pallets to NPDs in Ohio and CHEP's asset recovery group recovered possession of 375,827 blue pallets from NPDs in Ohio in that same time frame.
11. Whether in the twelve month period between April 2002 and March 2003, a total of 44,619,263 blue pallets were shipped to customers and distributors located within 150 miles of Buckeye's facility at South Charleston, Ohio and whether 20,988,507 of these pallets went to participating manufacturers, 23,258,982 pallets went to participating distributors, and 371,774 went to non-participating distributors; whether during the same time period, a total of 44,022,647 blue pallets were returned to CHEP of which returns from customers totaled 20,310,504, from participating distributors 23,348,736, from non-participating distributors 215,300, and another 148,107 from recyclers and other sources.
12. What are CHEP's current and historic collection goals and rates from NPDs and what number of pallets have yet to be collected or remain uncollected from NPDs?

14. What were Bain & Company's conclusions regarding the current location of blue pallets that CHEP's customers sent to NPDs.
15. What knowledge CHEP has regarding where blue pallets go when they leave the possession of non-participating distributors.
16. Whether CHEP assigns the number of blue pallets that are unrecovered or yet to be recovered to broad categories of "lost pallets. "
17. Whether under CHEP's written agreement with Wal*Mart, dating back to 1996, Wal*Mart received free use of the blue pallets in exchange for encouraging its manufacturers and suppliers to ship to it on CHEP's pallets.
18. Whether Wal*Mart has any responsibility for reporting to CHEP information about where the blue pallets are/were sent and the reasons why/why not.
19. Whether Wal*Mart's use of blue pallets led CHEP to perform any accounting adjustments, and if so, what was CHEP's intent with regard to the recovery of these pallets.
20. Whether Wal*Mart ships blue pallets to NPDs and, whether CHEP's agreements with Wal*Mart prevent Wal*Mart from shipping to NPDs or require that Wal*Mart report where it ships pallets with CHEP's logo.
21. Whether Buckeye has received pallets containing CHEP markings from NPDs, including Consolidated Stores, who sent those pallets to Buckeye with the representation that they had the right to convey them, and whether Buckeye was entitled to rely on such statements.
23. Whether CHEP can determine where the pallets reported on a stray equipment report and located at a pallet recycler have come from.
26. Whether Buckeye has ever been offered any payment by CHEP for the return of pallets other than a payment that was conditioned upon it (a) agreeing that CHEP owned all pallets marked with its logo; (b) agreeing to reveal confidential customer lists to CHEP; and (c) agreeing to litigate all disputes in Orlando, Florida.

"Uncontested Issues of Fact"

12. CHEP made a business decision in late 1998 to allow certain of its manufacturer customers to ship blue pallets marked with CHEP's logo to any distributor (assuming CHEP was properly notified about the shipment and distributor's location), regardless of whether CHEP had a contract with the distributor. This decision was intended to increase CHEP's business.

13. In addition to its customary basic fees, CHEP charges participating manufacturers an additional charge, which CHEP calls an up-charge, for each blue pallet that the participating manufacturer ships to non-participating distributors.
14. The amount of the up-charge depends on whether the non-participating distributor is categorized by CHEP as "SEMIC" (semi-cooperative) or "NOTXX" (uncooperative) based upon the willingness of the distributor to return pallets containing CHEP's markings to CHEP.
15. If the NPD is determined by CHEP to be semi-cooperative, CHEP generally charges the manufacturer an up-charge of \$3.50 per pallet for shipping to such distributors.
16. If the NPD is determined by CHEP to be uncooperative, CHEP generally charges the manufacturer an up-charge of \$8.00 per pallet for shipping to such distributors.
17. Approximately 110 of CHEP's manufacturer customers are allowed to ship to NPDs.
18. The number of NPD locations to which CHEP's manufacturer customers are shipping pallets is between 21,000 and 32,000 locations nationwide. At the current time there are approximately 871 NPDs located within 150 miles of Buckeye's recycling facility.

III. ARGUMENT

Evidence directed at showing that CHEP lost or abandoned 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 abandoned its pallets by permitting them to pass out of its control or that CHEP lost the pallets by failing to monitor their location. Buckeye has included within the Joint Proposed Pretrial Order several matters in both the Uncontested and Contested Issues of Fact regarding CHEP's loss or abandonment of its

pallets. Such "facts" are, however, no longer relevant to the Plaintiff's sole remaining claim of unjust enrichment.

The "facts" within the paragraphs from the Joint Proposed Pretrial Order mentioned above are irrelevant because of this Court's finding that, "CHEP has not engaged in any equivalent act, demonstrating, in substance if not in words, an intent to abandon ownership of property." (See Summary Judgment Decision and Entry, Docket #62, p. 33).

With regard to factual matters dealing with CHEP's so-called surcharges for NPD shipments by its customers, this Court stated that, "it is also inconsequential that CHEP imposes a surcharge on its lessees of about \$8.00 per pallet for pallets used to ship goods to uncooperative NPDs, while the average book value of those pallets it writes off for accounting purposes is only about \$6.30." (*Id.* at p. 36).

Regarding facts dealing with CHEP's fees and accounting treatment of so-called "lost pallets," these are irrelevant because of this Court's finding that, "the fact that CHEP writes off a certain percentage of CHEP pallets each year, even a large percentage, only adds to the evidence that it, and not any other entity, considers itself, and intends to be regarded by others as, the owner of all CHEP pallets." (*Id.* at p. 34, fn. 14). In addition, this Court found that "regarding the lost pallet fee, the fact that CHEP charges secondary customers such a fee does not require it to give up its claim of ownership over the lost pallet." (*Id.* at p. 37).

A number of the "facts" above are directed at Buckeye's theory (a now dismissed theory) that CHEP "abandons" its pallets when they pass out of its control or loses its pallets by failing to monitor their location. However, this evidence is patently irrelevant because CHEP's ownership rights in its pallets have already been decided in the Summary Judgment Order. (*Id.* at pp. 19-39). This Court found that neither the doctrine of loss nor that of abandonment was applicable to

the facts of this case. (Id. at p. 32). This Court found that "CHEP exerts a significant amount of effort in an attempt to recover the CHEP pallets that have fallen into the hands of entities with which it does not have contractual agreements," and that "it has always expressed an unambiguous intent to retain ownership of its pallets." (Id. at pp. 32-33).

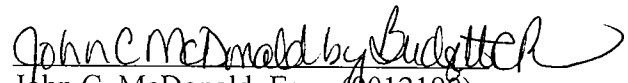
With regard to those "facts" above that support Buckeye's futile claim that CHEP loses its pallets by failing to monitor their location, this Court stated that "CHEP has not lost track of these particular pallets, and the facts demonstrate that it pays close attention to the activities of Buckeye as they concern those pallets." (Id. at pp. 34-35). This Court further stated that "given the obvious identification of CHEP pallets on their face, CHEP's efforts to track the flow of its pallets (successful or not), and the amount of effort CHEP puts into notifying downstream entities such as Buckeye that it desires and expects the return of its pallets, or at least that they be made available for pick-up, Buckeye cannot claim that CHEP has allowed its pallets to pass out of its possession, unwittingly, by neglect, carelessness or inadvertence, or that it is not aware of the true owner of CHEP pallets once they come within its possession." (Id. at pp. 35-36). Based on these findings, this Court granted summary judgment to CHEP on Count Two 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).

Evidence offered by Buckeye regarding what Buckeye would very much like to characterize as CHEP's loss or abandonment of its pallets does not have a tendency to make the existence of any fact relevant to its sole remaining claim of unjust enrichment more probable than it would be without the evidence. This Court's decision regarding CHEP's loss or abandonment of its pallets renders evidence related to such "facts" irrelevant. Evidence on these issues, including all of the factual matters set forth above, should therefore be excluded.

IV. CONCLUSION

Evidence regarding Buckeye's theories about CHEP's loss or abandonment 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 any theory that CHEP lost or abandoned its pallets, including evidence of the matters set forth on pages 3-5 above.

Respectfully Submitted,

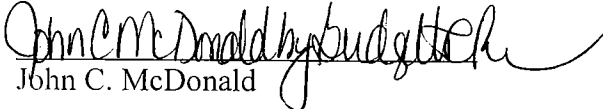

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CERTIFICATE OF SERVICE

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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