

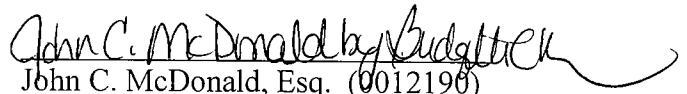
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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 SEEKING A LIMITATION
ON BUCKEYE'S EVIDENCE OF DAMAGES
(Motion in Limine #12)

Defendant CHEP USA moves the Court for an order limiting the evidence that Plaintiff Buckeye Diamond Logistics, Inc. ("Buckeye") may introduce to the jury on the issue of its damages on its sole remaining claim of unjust enrichment. 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

As a result of the Summary Judgment Order issued by this Court, Buckeye's sole remaining claim is for unjust enrichment. In Count Four of Buckeye's Complaint, Buckeye claimed that Buckeye's sorting of pallets is a benefit to CHEP and that CHEP has consented to Buckeye providing these services by its failure to effectively police the collection of its pallets. (See Buckeye's Complaint, p. 10). As a consequence, Buckeye claims that CHEP has been unjustly enriched by its labor. (*Id.*). Because this Court concluded that there was a disputed issue of fact regarding "the value of Buckeye's services" in connection with sorting and storing CHEP's pallets, Buckeye's unjust enrichment claim survived summary judgment. (Summary Judgment Decision and Entry, Docket #62, p. 42). Because this unjust enrichment claim survived, Buckeye is required to put forth evidence that: "(1) it conferred a benefit upon the defendant, (2) the defendant knew of the benefit, and (3) the defendant would be unjustly enriched to retain the benefit without compensating the plaintiff." (*Id.*). Once these elements have been established, Buckeye must prove its damages. This Court has characterized the role of damages as "what is fair and reasonable to both parties." (*Id.* at pp. 42-43).¹

¹ Ohio courts have held that damages for unjust enrichment are "just compensation for....services" rendered or "in the amount the defendant benefited." *Saraf v. Maronda Homes, Inc. of Ohio* (Dec. 10, 2002), 2002 WL 31750249, and *U.S. Health Practices, Inc. v. Blake* (Mar. 22, 2001), 2001 WL 277291.

As the Contested and Uncontested "Issues of Fact" inserted by Buckeye in the Joint Proposed Pretrial Statement reflect, Buckeye intends to offer evidence to the jury which is not probative of these elements but rather will unnecessarily prolong the trial and confuse the jury.

II. THE IRRELEVANT "ISSUES OF FACT"

The following are both "Uncontested Issues of Fact" and "Contested Issues of Fact" in the Joint Proposed Pretrial Statement that CHEP contends are irrelevant:

A. "Uncontested Issues of Fact" That Are Irrelevant

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.
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.

B. "Contested Issues of Fact" That Are Irrelevant

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.
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 a new pallet.
13. Whether there is any correlation between the amount of CHEP's gross margin on sales and its asset recovery rate.
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.
30. Whether CHEP derives any benefit from Buckeye's actions with respect to the CHEP pallets.

III. ARGUMENT

A. Irrelevant Issues & Facts

Evidence that is unrelated to Buckeye's costs to provide its so-called benefit to CHEP or unrelated to the value of that benefit 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."

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 limiting Buckeye's evidence of damages.

The factual matters addressed above do not relate to the measure of damages in an unjust enrichment claim and are therefore irrelevant. Each paragraph referred to reflects Buckeye's intention to introduce confusing and irrelevant evidence that is far beyond the scope of "just compensation" or the value of the "benefit conferred," the proper measure of Buckeye's damages, if any. For example, paragraph 13² of the Contested Issues of Fact discusses an issue

² The references to paragraph numbers herein refer to paragraphs within the Joint Proposed Pretrial Order.

that is completely unrelated to the proper damages for unjust enrichment. Whether there is or isn't a correlation between CHEP's gross margin on sales and its asset recovery rate has nothing to do with any element of unjust enrichment or damages.

In another example, paragraph 30 of the Contested Issues of Fact is irrelevant because it relates to the measure of damages associated with Buckeye's common law lien theory contained in Count Three of the Complaint. In Count Three, Buckeye claimed that it had a common law lien on CHEP pallets on account of its acts of sorting and safeguarding the pallets. As this Court properly found, there is a significant difference between the benefit to CHEP and the benefit to the pallets (which is the lien theory measure of damages) ---- and this Court found there was no lien claim. Consequently, evidence of benefit "to the CHEP pallets" is irrelevant. (See Summary Judgment Decision and Entry, Docket #62, p. 39).

CHEP has not gone through each of the above quoted Issues of Fact because each generally falls within the same objectionable arena. They are all irrelevant and tend to do little more than offer an opportunity to substantially confuse the jury. Thus, CHEP submits that Buckeye should be precluded from offering evidence as to any matter encompassed within the above-quoted Issues of Fact.

B. Buckeye's Discovery Responses Should Preclude Buckeye From Introducing Any Evidence of Its Costs

Fed.R.Civ.P. 37(c)(1) makes clear that if "a party that without substantial justification fails to disclose information required by Rule 26(a) or Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on motion of any witness or information not so disclosed." Although relevant to the proper measure of damages on

Buckeye's unjust enrichment claim³, Buckeye should be prevented from introducing evidence of its "costs" associated with transportation, handling or storage of CHEP pallets. Buckeye should be foreclosed from presenting this evidence because, notwithstanding the request for reimbursement in Buckeye's Complaint, throughout discovery, Buckeye repeatedly denied that such evidence was available. Buckeye, however, now apparently intends to put forth such evidence at trial. Three Buckeye witnesses, Patrick Murphy, Buckeye's CFO Sam McAdow, Sr., Buckeye's Chairman of the Board and Sam McAdow, Buckeye's President, all testified that Buckeye did not track and could not produce any such cost evidence. These same witnesses all disavowed any ability on Buckeye's part to even track its costs associated with those activities. (See Murphy Depo., pp. 55-57, 74, and 115-116; Sam McAdow, Sr. Depo., pp. 71-72; S. McAdow Depo., p. 47⁴.)

Because Buckeye has for over two years denied its ability to track evidence of its costs of transporting, sorting and/or storage of CHEP pallets and denied the existence of such evidence, CHEP submits that this Court should prohibit Buckeye from introducing such evidence now.

IV. CONCLUSION

The factual matters raised in the Contested and Uncontested Issues of Fact set forth above are not probative of the few remaining issues on Buckeye's unjust enrichment claim. These facts are little more than Buckeye's efforts to introduce to the jury irrelevant evidence and unnecessarily prolong the trial. As to the issue of Buckeye's "costs" while the evidence is relevant, Buckeye's inability, failure or refusal to provide this evidence in discovery warrants

³ It should also be noted that Buckeye's Complaint at Para. 42 sought a declaration that it be "reimbursed" for providing sortation and storage "services." Buckeye did not seek damages based on a theory of disgorgement of CHEP's profits or based on the value of the benefit to CHEP. Buckeye's Complaint should both set the parameters for its recovery and serve as sound justification for precluding evidence that Buckeye knew or should have known it would need to produce in discovery.

⁴ CHEP cannot attach copies of the referenced pages of the depositions because these pages have been designated under the Protective Order by Buckeye. Presumably Buckeye designated these pages because of testimony as to what the Plaintiff's representatives knew, not because of what they did not know.

prohibiting Buckeye's introduction of it to the jury. Therefore, CHEP seeks an order prohibiting Buckeye from introducing any of the following evidence:

Uncontested Issues of Fact

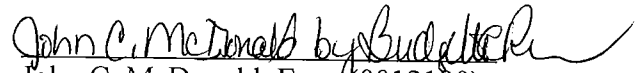
12. CHEP made a business decision in late 1998 to allow certain of its manufacturer customers to ship blue pallets marked with CHEP's logo to any distributor (assuming CHEP was properly notified about the shipment and distributor's location), regardless of whether CHEP had a contract with the distributor.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

Contested Issues of Fact

3. 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.
6. 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. The per pallet up-charge is less than the replacement cost for a new pallet.
13. Any correlation between the amount of CHEP's gross margin on sales and its asset recovery rate.
26. 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.

29. Buckeye's costs allegedly incurred in sorting, storage and/or transportation of CHEP's pallets.
30. CHEP's pallets benefit from Buckeye's actions.

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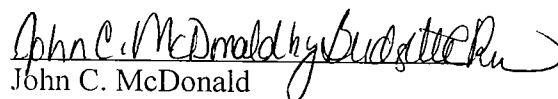
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CERTIFICATE OF SERVICE

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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