

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

BUCKEYE DIAMOND LOGISTICS, INC., :
FKA BUCKEYE RECYCLERS, INC., :

Plaintiff, :

vs. : Case No. 3:01cv440

JUDGE WALTER HERBERT RICE
CHEP USA, :

Defendant. :

DECISION AND ENTRY SUSTAINING IN PART AND OVERRULING IN PART PLAINTIFF'S MOTION TO UNSEAL RECORD ON SUMMARY JUDGMENT MOTIONS AND TO REMOVE TRIAL EXHIBITS FROM COVERAGE OF PROTECTIVE ORDER (DOC. #46); DOCS. ##28, 29, 30, 33, 34, 35, 36, 37, 38, 40, 41, 42 AND 43 ORDERED UNSEALED; DECISION AND ENTRY OVERRULING DEFENDANT'S FIRST MOTION IN LIMINE (DOC. #49); DECISION AND ENTRY SUSTAINING DEFENDANT'S THIRD MOTION IN LIMINE (DOC. #51); DECISION AND ENTRY OVERRULING DEFENDANT'S FOURTH MOTION IN LIMINE (DOC. #52); DECISION AND ENTRY OVERRULING DEFENDANT'S FIFTH MOTION IN LIMINE (DOC. #53); DECISION AND ENTRY SUSTAINING IN PART AND OVERRULING IN PART DEFENDANT'S SIXTH MOTION IN LIMINE (DOC. #54); DECISION AND ENTRY SUSTAINING IN PART AND OVERRULING IN PART DEFENDANT'S SEVENTH MOTION IN LIMINE (DOC. #55); DECISION AND ENTRY OVERRULING DEFENDANT'S NINTH MOTION IN LIMINE (DOC. #57)

In its Decision of 2002, this Court set forth the facts giving rise to this litigation:

[Buckeye Diamond Logistics, Inc., fka Buckeye Recyclers, Inc. ("Buckeye")], is an Ohio corporation in the business of collecting, repairing, recycling, and/or reselling wooden pallets used for the shipment of goods. [CHEP USA ("CHEP")] rents pallets to any number of commercial entities. Typically, entities with the need for pallets purchase as much [as needed] from pallet

manufactures or pallet recyclers, or rent them from proprietors such as CHEP. Where pallet manufacturers inject pallets into the stream of commerce pursuant to their sale, they generally relinquish title thereto. A pallet's cost, and therefore its title, is generally passed along in the price of the good being shipped as it makes its way through the various trade points in the stream of commerce. On the other hand, some manufacturers require the return of pallets. However, because pallets are manufactured with uniform dimensions and typically have no distinguishing characteristics, such a requirement is typically for the return of pallets in general, not of specific pallets.

Because pallets tend to accumulate in large numbers at distribution and wholesale sites, recyclers such as Buckeye serve a key commercial role by purchasing them in bulk, carrying them away from the distributor's or wholesaler's site, and returning them to the stream of commerce by either reselling them to entities with a need for such or returning them to pallet manufacturers for a fee. In addition to purchasing pallets, Buckeye will also collect broken pallets, repair them, and return them to their owner for a fee. It charges up to \$2.50 for pallet repair and return, and up to \$5.40 for a pallet's resale. Buckeye does not pre-sort those pallets which it purchases in bulk, but, rather, purchases them sight unseen at the point of collection.

At any given time, about 3% of the total pool of pallets in the stream of commerce in the United States consists of proprietary pallets (i.e., pallets bearing the distinctive mark of their proprietor). CHEP is in the business of renting its proprietary pallets, and in contrast to the bulk of pallets in commerce, each of its pallets is distinctively marked. As part of its rental agreements with its various customers, be they manufacturers, distributors, wholesalers, etc., CHEP requires the return of its specially identified pallets. The exact CHEP pallet need not be returned, so long as a "CHEP" pallet in particular is returned. Failure to return a CHEP pallet may result in the imposition of a lost pallet fee. CHEP polices the flow of its pallets by requiring, pursuant to contract, that all of its customers ship goods on said pallets only to others in the stream of commerce with whom CHEP also has contractual agreements. It is inevitable, though, that a certain number of CHEP pallets get "lost" by CHEP's customers and make their way into the general accumulated mass of pallets collected and resold by recyclers such as Buckeye.

Therein lies the rub of this dispute. Because CHEP asserts that at all times it retains ownership rights in its distinctively marked pallets, it asserts the correlative right to demand their return by any party which comes into possession of such, and its right to sue the possessing party for conversion to protect such right. Buckeye, which does in fact segregate and safeguard CHEP pallets after it makes a bulk purchase, argues that it (as with other recyclers) contributes value and efficiency to the pallet market; that in purchasing pallets in bulk as it does, it becomes the rightful owner of all such pallets; and that, quite the opposite from having a legal obligation to return CHEP pallets to CHEP at its own cost, it has a right either to resell CHEP pallets to others, or to extract a fee from CHEP for its service, as it would with any other manufacturer to whom it returns pallets. Indeed, the typical return fee collected from other proprietary pallet companies is

\$5 per pallet. Because of legal threats from CHEP, Buckeye alleges that it has lost, and continues to lose, revenue due to lost sales, and has been forced to store excess CHEP pallets at its facility.

Buckeye Recyclers v. CHEP USA, 228 F. Supp.2d 818, 819-20 (S.D.Ohio 2002).

This case is now before the Court on the following motions, to wit: Plaintiff's Motion to Unseal the Record on Summary Judgment Motions and to Remove Trial Exhibits from Coverage of Protective Order (Doc. #46); Defendant's First Motion in Limine (Doc. #49); Defendant's Third Motion in Limine (Doc. #51); Defendant's Fourth Motion in Limine (Doc. #52); Defendant's Fifth Motion in Limine (Doc. #53); Defendant's Sixth Motion in Limine (Doc. #54); Defendant's Seventh Motion in Limine (Doc. #55); Defendant's Ninth Motion in Limine (Doc. #57).¹ As a means of analysis, the Court will rule upon those motions in the above order.

I. Plaintiff's Motion to Unseal the Record on Summary Judgment Motions and to Remove Trial Exhibits from Coverage of Protective Order (Doc. #46)

With this motion, Plaintiff requests that the Court unseal the memoranda and exhibits offered in support of and in opposition to the parties' cross motions seeking summary judgment and place them in the public record. Additionally, Plaintiff requests that any document designated by either party in the Final Pretrial Order as a potential exhibit be excepted from the coverage of the Protective Order (Doc. #8) which the parties stipulated to and the Court entered. The Defendant has opposed both branches of the Plaintiff's motion. See Doc. #59 (filed under seal). As a means of analysis, the Court will address the Plaintiff's two requests in the above order.

¹The Court has ruled upon Defendant's Second and Eighth Motions in Limine (Docs. ##50 and 56) by separate entries. See Docs. ##61 and 86.

With respect to the summary judgment record, the Plaintiff argues that the Court should grant the requested relief, because the Defendant's general partner has disclosed much of the information contained in the sealed documents and that the Defendant's employees have admitted that the remainder of that information is not confidential. Not surprisingly, Defendant disagrees. This Court need not resolve the parties' dispute in that regard. The Court's authority to enter the Protective Order in this case is governed by Rule 26(c) of the Federal Rules of Civil Procedure. In Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219 (6th Cir. 1996), the Sixth Circuit held that "Rule 26(c) allows the sealing of court papers only 'for good cause shown' to the court that the particular documents justify court-imposed secrecy." Id. at 227. Therein, the Sixth Circuit stressed that a District Court's authority to permit papers to be filed under seal "is circumscribed by a long-established legal tradition' which values public access to court proceedings. Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1177 (6th Cir. 1983), cert. denied, 465 U.S. 1100 (1984)." Id. Herein, the Protective Order afforded to the parties the freedom to decide which papers would be filed under seal and which would be public, rather than requiring that cause be shown to exclude papers from public access. In Procter & Gamble, the Sixth Circuit expressly disapproved of Protective Orders which gave the parties such authority. Id. Based upon Procter & Gamble, a decision entered by the Sixth Circuit eight years ago, and the fact that the parties have not shown cause to keep the documents in question sealed, this Court sustains the first branch of Plaintiff's Motion to Unseal the Record on Summary Judgment Motions and to Remove Trial Exhibits from Coverage of Protective Order (Doc. #46). Accordingly, the Court orders the following documents unsealed, to wit: ##28, 29, 30, 33, 34, 35, 36, 37, 38, 40, 41, 42 and 43.

As is indicated, the Plaintiff also requests that the Court remove the documents which the parties have identified as potential trial exhibits from the coverage of their

agreed Protective Order. The Plaintiff argues that such relief is necessary so that its counsel can share documents, which Defendant has designated “Outside Counsel Only,” with its employees for purposes of final trial preparation. In response, Defendant indicates that it has agreed to designate all trial exhibits as confidential, so that Plaintiff’s counsel can share them with its employees. Given that Plaintiff’s reason for wanting to remove trial exhibits from the coverage of the Protective Order has been eliminated, the Court overrules the second branch of Plaintiff’s Motion to Unseal the Record on Summary Judgment Motions and to Remove Trial Exhibits from Coverage of Protective Order (Doc. #46).

II. Defendant’s First Motion in Limine (Doc. #49)

With this motion, the Defendant requests that the Court preclude Plaintiff from introducing evidence that it (Defendant) reported suspected criminal activity to authorities, which resulted in criminal prosecutions of individuals, not parties to this case, who have allegedly held its (Defendant’s) pallets without authorization. Defendant points out that it has never threatened, let alone initiated, any prosecution of the Plaintiff and argues that such evidence is not relevant. Alternatively, the Defendant argues that the Court should exclude such evidence pursuant to Rule 403 of the Federal Rules of Evidence, because its probative value is substantially outweighed by the danger of unfair prejudice and confusion of the issues. Defendant contends that such evidence might cause the jury to believe that it had engaged in unfair business tactics and that it has used its strength to pick on smaller entities such as Plaintiff. With respect to unfair prejudice, Defendant contends that “evidence of this nature only seeks to appeal to the feelings of the jury and to paint a picture of [Defendant] as a bully at best or an extortionist at worst—which is far from the truth and is highly prejudicial and inflammatory.” Doc. #49 at 5. Defendant contends that such evidence could confuse

the issues by requiring that it introduce evidence explaining the criminal charges which were filed.

Plaintiff counters by stating that it does not intend to introduce such evidence in order to support its remaining unjust enrichment claim; however, it intends to use such evidence to counter Defendant's conversion counterclaim, to the extent that Defendant challenges Plaintiff's assertion that Defendant consented to the its holding the pallets for the mutual benefit of the parties' customers. Plaintiff argues that evidence that the Defendant was not hesitant to seek the initiation of criminal prosecutions, coupled with its failure to seek a prosecution of Plaintiff, raises an inference that the Defendant consented to Plaintiff's continued possession of the pallets. It is axiomatic that such consent would negate the Defendant's conversion claim.

The Court agrees with Plaintiff that the evidence of the Defendant's efforts to cause prosecutions of those who it believed wrongfully possessed its pallets could make it more likely that the Defendant consented to the Plaintiff's continued possession of Defendant's pallets, since Defendant did not attempt to have Plaintiff prosecuted despite its lack of hesitancy to have others prosecuted, and that, therefore, Plaintiff did not convert those pallets. With respect to Defendant's argument under Rule 403, it is simply not possible for the Court to conclude on a barren evidentiary record that this evidence will be unfairly prejudicial or that it will have a tendency to confuse the issues. Accordingly, the Court overrules Defendant's First Motion in Limine (Doc. #49). Defendant's Rule 403 argument may be renewed at trial if Plaintiff attempts to use this evidence.

III. Defendant's Third Motion in Limine (Doc. #51)

With this motion, the Defendant requests that the Court prevent the Plaintiff from introducing evidence of Mequel DeVaughn's misrepresentation of his identity.² Apparently, DeVaughn misrepresented his identity in order to gain access to Plaintiff's property. The Defendant argues that such evidence is irrelevant and, if relevant, its probative value is substantially outweighed by the danger of unfair prejudice and confusion of the issues. In response, the Plaintiff argues that DeVaughn's actions are relevant to the issue of whether Defendant consented to Plaintiff holding its (Defendant's) pallets for mutual customers. The Plaintiff states that DeVaughn's use of a false name "makes no sense if [Defendant] wanted to have pallets returned to it rather than to investigate whether [Plaintiff] was holding [Defendant's pallets]." Doc. #87 at 7. Simply stated, the fact that Defendant may have wanted to know whether the Plaintiff possessed any of its pallets does not make it more likely that it (Defendant) consented to such possession for the parties' mutual customers. Defendant would have just as likely wanted to find out whether Plaintiff had any of its pallets, if it was going to assert that the Plaintiff had converted same. Accordingly, the Court sustains Defendant's Third Motion in Limine (Doc. #51).

IV. Defendant's Fourth Motion in Limine (Doc. #52)

With this motion, the Defendant requests that the Court prevent the Plaintiff from introducing evidence as to what certain customers, Abbott Foods, Mills Pride and Consolidated Stores, said about their reasons for paying money to Plaintiff to return Defendant's pallets to them. The Defendant argues that such statements are hearsay. Plaintiff points out the alleged hearsay testimony to which Defendant objects are all statements by its witnesses, Linda Zbacnik, Tim Flynn and Sam McAdow, Sr., which Defendant elicited during depositions. Plaintiff states that the only such statements it

²DeVaughn is an employee of the Defendant.

would introduce would not be offered for a hearsay purpose or would be admissible pursuant to an exception to the hearsay rule, such as present sense impression.

According to Plaintiff, the statements would be offered as non-hearsay, verbal acts, rather than for the truth of the matter. In Echo Acceptance Corp. v. Household Retail Services, Inc., 267 F.3d 1068 (10th Cir. 2001), the Tenth Circuit explained non-hearsay verbal acts:

The Federal Rules of Evidence define "hearsay" as an out-of-court statement "offered in evidence to prove the truth of the matter asserted." Fed.R.Evid. 801(c). By contrast, "[i]f the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay." Fed.R.Evid. 801 advisory committee's note (1972)

The verbal acts doctrine applies only where the out-of-court statement actually "affects the legal rights of the parties, or where 'legal consequences flow from the fact that the words were said.'" U.S. v. Pungitore, 965 F. Supp. 666, 673 n. 1 (E.D.Pa.1997) (quoting Black's Law Dictionary 1558 (6th ed.1990)).

Id. at 1087. See also, United States v. Murphy, 193 F.3d 1, 5-6 (1st Cir. 1999) (noting that statement introduced for a purpose other than to prove the truth of the matter asserted is not hearsay regardless of whether it is a verbal act). Plaintiff also argues that it is premature to rule on the admissibility of particular customer comments, since it is not possible to ascertain the admissibility of same without reference to the evidentiary context in which the evidence is offered.

The Court agrees with the Plaintiff that it is not possible to rule upon the admissibility of its questioning of its witnesses concerning comments by mutual customers without hearing the particular question in the context of the evidence that exists when the question is asked. That said, it is quite possible that such comments will be offered for the truth of the matter asserted and not come within an exception to the hearsay rule. Accordingly, the Court directs Plaintiff's counsel to refrain from mentioning such comments during voir dire and his opening statement. Before eliciting such testimony, he must approach the bench so that the Court and counsel can resolve

the matter before such a question is asked. Accordingly, the Court overrules Defendant's Fourth Motion in Limine (Doc. #52).

V. Defendant's Fifth Motion in Limine (Doc. #53)

With this motion, the Defendant requests that the Court prevent the Plaintiff from introducing Plaintiff's Exhibits 14 through 24 and 53, which constitute evidence of Defendant's accounting treatment of pallets sent to what Plaintiff refers to as NPDs.³ The Defendant's self-described "conservative" accounting principles characterize a certain percentage of its pallets as being lost. The Defendant argues that this evidence is not relevant.⁴ In so arguing, the Defendant focuses on the Plaintiff's claim that the Defendant has abandoned its pallets; however, the Court has sustained the Defendant's request for summary judgment on that claim. See Doc. #61. Nevertheless, Plaintiff argues that this accounting evidence is relevant to its claim of unjust enrichment. Plaintiff points out that two of the elements of that claim are that it conferred a benefit on the Defendant and that the latter knew of that benefit. Plaintiff argues that Defendant's accounting records and loss reserves show that either delay or inability to recover pallets increases Defendant's cost of doing business and that Defendant knew that fact. Plaintiff contends that its proof, including Defendant's own records, will show that gaining the return of pallets sent to NPDs through a recycler, such as Plaintiff, is essential to Defendant in reducing the delay or inability to recover pallets, and, thus, the

³NPD is an acronym for "non-participating distributor." Plaintiff defines NPDs as the approximately 32,000 locations to which Defendant allows its pallets to be shipped, even though it has no contractual or other basis for recovering those pallets, other than through its own asset recovery program or through efforts of recyclers such as the Plaintiff. Doc. #87 at 4 n. 1.

⁴The Defendant also argues that such evidence should be excluded pursuant to Rule 403. As is indicated above, it is simply not possible at this time for the Court to exclude evidence under Rule 403 based upon the presently non-existent trial record.

efforts of Plaintiff benefit Defendant, which is one of the elements of Plaintiff's unjust enrichment claim.

Alternatively, Plaintiff argues that these documents are relevant for other reasons. For instance, Plaintiff asserts that its Exhibit 19 shows that Defendant was experiencing an 80% loss rate. Plaintiff contends that it is entitled to use this document to show the jury the context in which its return of pallets benefits Defendant. In addition, the Plaintiff argues that this document is relevant on Defendant's counterclaim of conversion, since it will show that Defendant could not recover its pallets more quickly from NPDs than from Plaintiff, thus negating the claim that Plaintiff's "conversion" of the pallets caused it to suffer damages. Plaintiff also argues that these documents show that Defendant had already written off a number of the pallets that it returned to Defendant, for reasons entirely unrelated to Plaintiff's possession of same. Plaintiff contends that proof that a number of pallets included in Defendant's damages calculations no longer had value to the Defendant is relevant to its defense of Defendant's claim for damages.

Simply stated, for the reasons provided by the Plaintiff, the Court overrules Defendant's Fifth Motion in Limine (Doc. #53).

VI. Defendant's Sixth Motion in Limine (Doc. #54)

With this motion, the Defendant requests that the Court prevent the introduction of Plaintiff's Exhibits 2 and 11. Plaintiff's Exhibit 2 is entitled "NPD Strategy Working Session," and Exhibit 11 is entitled "Wal*Mart Audit Results." According to Defendant, these documents "purport" to have been prepared by Bain & Company ("Bain"), a consulting firm it had hired. Defendant argues that Exhibits 2 and 11 are irrelevant and

constitute inadmissible hearsay.⁵ In response, Plaintiff argues that Exhibits 2 and 11 are relevant and that they constitute statements of an agent of a party opponent under Rule 801(d)(2)(D) of the Federal Rules of Evidence, rather than being hearsay.⁶ As a means of analysis, the Court will address the parties' arguments in the above order.

The Plaintiff argues that Exhibits 2 and 11 are relevant, because they show the massive problems Defendant faces in gaining the return of pallets from NPDs and the large leakage of pallets it has experienced in its relationship with Wal*Mart. According to Plaintiff, these pieces of evidence help establish an essential element of its claim of unjust enrichment—the huge savings, and, thus, benefit, Plaintiff confers on Defendant by virtue of its retrieval of Defendant's pallets from NPDs. With respect to Exhibit 2, the Court agrees with the Plaintiff's theory that the evidence is relevant. That Exhibit could convince the jury that the Plaintiff is conferring a benefit upon Defendant, thus helping to establish one of the elements of Plaintiff's remaining claim of unjust enrichment. Although relevant, the Plaintiff must overcome other evidentiary hurdles to admissibility discussed, *infra*. With respect to Exhibit 11, the record does not convince the Court to reach the same conclusion. Simply stated, there is no evidence before the Court that the Plaintiff is returning pallets to Defendant which had formerly been in the possession of Wal*Mart. Thus, there is no indication the Plaintiff provided a benefit to Defendant in the form of remedying Defendant's problem identified by Exhibit 11. Accordingly, the Court sustains the Defendant's Sixth Motion in Limine (Doc. #54), as it relates to Exhibit

⁵The Defendant also argues that such evidence should be excluded pursuant to Rule 403. As is indicated above, it is simply not possible for the Court to exclude evidence under Rule 403 based upon the presently non-existent trial record.

⁶The Plaintiff also argues that there is evidence that these Exhibits are authentic. Given that the Defendant has not challenged their authenticity, the Court does not address that issue.

11. The Court will revisit this ruling, if, during trial, the Plaintiff presents evidence that it has returned pallets formerly in the possession of Wal*Mart to the Defendant.

As is indicated, the Plaintiff argues that, rather than being hearsay, Exhibit 2 constitutes a statement of an agent under Rule 801(d)(2)(D), which provides in pertinent part:⁷

(d) Statements which are not hearsay. A statement is not hearsay if--

* * *

(2) Admission by party-opponent. The statement is offered against a party and is ... (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

To be admissible under Rule 801(d)(2)(D), a statement must have been made by the agent of the party, against whom it is offered, concerning a matter within the scope of the agency and during the course of the agency.

In order to establish that Exhibit 2 is admissible under Rule 801(d)(2)(D), the Plaintiff relies upon the deposition testimony of Keith Norder ("Norder"), Defendant's former Chief Financial Officer. Therein, Norder indicated that, during his tenure, Defendant had retained Bain as a consultant, that Bain had studied NPDs and that Exhibit 2 was one of the documents which Bain had prepared while engaged as a consultant for Defendant. This Court agrees with Plaintiff that Norder's deposition testimony establishes that Exhibit 2 was prepared by Defendant's agent, Bain,

⁷Having concluded that Exhibit 11 lacks relevance, the Court need not decide whether it constitutes hearsay.

concerning a matter within the scope of its agency and during the course of that agency. Therefore, that Exhibit is admissible under Rule 801(d)(2)(D).⁸

Accordingly, the Court overrules Defendant's Sixth Motion in Limine (Doc. #54), as it relates to Exhibit 2.

VII. Defendant's Seventh Motion in Limine (Doc. #55)

With this motion, Defendant argues that the Court should exclude Exhibits 26, 27 and 28 from evidence. Those documents are referred to generically as "Simplex Meeting Notes." According to Defendant, the Simplex Meeting was a brainstorming session attended by various employees of Defendant. Defendant argues that Exhibits 26, 27 and 28 have not been authenticated and that they constitute double hearsay (the document itself is hearsay, with the comments recorded therein being the second level of hearsay). In response, the Plaintiff only addresses Exhibit 26. Accordingly, for the reasons set forth by Defendant in its Seventh Motion in Limine (Doc. #55), the Court sustains same as it relates to Exhibits 27 and 28.

Plaintiff argues that Norder's deposition testimony both authenticates Exhibit 26 and demonstrates that it is admissible under Rule 801(d)(2)(D). Therein, Norder

⁸If the Defendant believes that the independent contractor Bain was not its agent, it may seek reconsideration of the Court's conclusion that Exhibit 2 is admissible under Rule 801(d)(2)(D). If such a motion is made, the Court will apply common law principles of agency, since neither Rule 801(d)(2)(D), nor its accompanying commentary defines the term "agent." See e.g., American Eagle Ins. Co. v. Thompson, 85 F.3d 327 (8th Cir. 1996); Lippay v. Christos, 996 F.2d 1490 (3rd Cir. 1993); United States v. Saks, 964 F.2d 1514 (5th Cir. 1992). Under the common law, an independent contractor can be, but is not necessarily, an agent. See Restatement (Second) of Agency § 2(3) (noting that independent contractor "may or may not be an agent").

testified that he recognized that document as constituting notes created by a member of the Simplex team and distributed to all members of the team. The Court agrees with Plaintiff that Norder's testimony establishes that the document is authentic and that it is not hearsay.

With respect to authenticity, Rule 901(a) provides:

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Rule 901(b)(1) provides that one method of establishing authenticity is through testimony of someone with knowledge who states that the thing is what it purports to be. Norder's deposition testimony meets that criteria.

With respect to hearsay, the Plaintiff argues that Norder's deposition testimony establishes that, in accordance Rule 801(d)(2)(D), neither Exhibit 26, nor the comments of Defendant's employees recorded thereon are hearsay. The Court agrees with Plaintiff that Norder's deposition testimony raises a fair inference not only that an employee of Defendant acting in the scope of his employment created Exhibit 26, but also that the individuals, whose comments are recorded thereon, were made in the course of their employment by the Defendant. Therefore, the double hearsay problem identified by the Defendant has been resolved.

Accordingly, the Court overrules the Defendant's Seventh Motion in Limine (Doc. #55), as it relates to Plaintiff's Exhibit 26.

VIII. Defendant's Ninth Motion in Limine (Doc. #57)

With this motion, the Defendant argues that the Court should exclude evidence of its national collection rate from NPDs. In addition, Defendant requests that the Court exclude Exhibit 13, a report by Brambles Industries, one of the Defendant's general partners, which discusses the problem of obtaining the return of pallets from NPDs.

The Defendant argues that this evidence is irrelevant and that Exhibit 13 is hearsay.⁹ The Court cannot agree. The evidence is relevant, because it will show Defendant's inability to obtain prompt return of its pallets which have ended up in the possession of NPDs, with the concomitant benefit conferred upon Defendant by Plaintiff. Moreover, as Plaintiff argues, such evidence is relevant to the issue of the amount of the benefit Plaintiff's actions conferred upon Defendant, by giving the jury a frame of reference by which to measure the likelihood that Defendant would either not regain a pallet or fail to regain it in timely fashion.

The Court also rejects Defendant's argument that Exhibit 13 is hearsay. On the contrary, it constitutes the statement of an agent under Rule 801(d)(2)(D). It is recognized that a partner (Brambles) is an agent of the partnership (Defendant). See e.g., In re Brown, 342 F.3d 620 (6th Cir 2003) (Michigan law); FDIC v. Cremona, 832 F.2d 959 (6th Cir. 1987 (Ohio law)).

Based upon the foregoing, the Court overrules Defendant's Ninth Motion in Limine (Doc. #57).

March 15, 2004

/s/ WALTER HERBERT RICE

WALTER HERBERT RICE, JUDGE
UNITED STATES DISTRICT COURT

Copies to:

Counsel of record.

⁹The Defendant also argues that such evidence should be excluded pursuant to Rule 403. As is indicated above, it is simply not possible for the Court to exclude evidence under Rule 403 based upon the presently non-existent trial record.