

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

BUCKEYE DIAMOND LOGISTICS, INC. :	:	
fka BUCKEYE RECYCLERS, INC. :	:	
	:	
Plaintiff, :	:	
	:	Case No. C3-01-440
	:	
v. :	:	
	:	Judge Walter Herbert Rice
CHEP USA, a general partnership :	:	
	:	
Defendant. :	:	

**PLAINTIFF’S MOTION FOR CLARIFICATION OR,
IN THE ALTERNATIVE, RECONSIDERATION AND
MEMORANDUM IN OPPOSITION TO DEFENDANT’S
MEMORANDUM SEEKING MODIFICATION OF
DECISION AND ENTRY DATED AUGUST 11, 2003**

Buckeye Diamond Logistics (“Buckeye”) moves the Court for clarification of its Decision and Entry dated August 11, 2003 regarding the rights and obligations of Buckeye Diamond Logistics (“Buckeye”) to return to its customers pallets marked with CHEP’s logo. Alternatively, to the extent the Court believes that its Decision and Entry have already resolved this issue, Buckeye respectfully seeks reconsideration of that decision.

In addition, Buckeye seeks clarification or, in the alternative, reconsideration of the Court’s determination that Buckeye’s Motion to Deem Facts Admitted (Doc. # 48) is moot insofar as it seeks to have facts related to CHEP 0795 deemed admitted.

A memorandum in support of this Motion, and in opposition to CHEP USA's Memorandum seeking modification of pages 10 and 41 of the Decision and Entry is attached.

s/ James A. Wilson
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**MEMORANDUM IN SUPPORT OF MOTION
AND IN OPPOSITION TO CHEP'S MEMORANDUM**

I. Introduction

Buckeye requests that the Court clarify, or if necessary reconsider, two issues raised by its Decision and Entry of August 11, 2003. First, Buckeye requests that the Court clarify, in light of its finding that the pallets marked with CHEP's logo that Buckeye has received from its customers are subjects of leases between CHEP and those customers, what rights Buckeye has to return such pallets to CHEP's lessees rather than to CHEP, or to otherwise provide services to those lessees. Second, Buckeye requests that the Court clarify or reconsider its decision that Buckeye's Motion for Order to Deem Facts Admitted (Doc. # 48) is moot in its entirety in light of Buckeye's desire to use the admissions it sought in prosecuting its remaining claim in this case.

A. Buckeye's Right to Return Pallets to CHEP's Lessees or Agents

In its Decision and Entry, the Court determined that all of CHEP's arrangements with respect to the circulation of its pallets constitutes leases rather than sales, gifts or other transfers of those pallets. It further found that while Buckeye's claim to a lien on pallets it received and sorted could not survive summary judgment, Buckeye's claim for unjust enrichment did. Based on these finding, the Court denied Buckeye's motions for summary judgment, and granted in part and denied in part CHEP USA's motion for summary judgment. Accordingly, Buckeye's claims for unjust enrichment and CHEP's counterclaims for conversion, replevin, and injunctive relief remain for trial.

The Court's Decision and Entry, while concluding that CHEP remains the owner of its pallets in all circumstances and that its arrangements with manufacturers and distributors constituted leases, did not clearly address, at least insofar as Buckeye can determine, the impact of these conclusions on Buckeyes legal rights and responsibilities with respect to the customers it shares with CHEP. Buckeye specifically raised this issue in its Memorandum in Opposition to CHEP's Motion for Summary Judgment, at pages 26-28, in Section IV(A)(5). Because such a determination is important both for continuing business purposes and for purposes of determining the defenses available to Buckeye on CHEP's conversion counterclaim, Buckeye respectfully requests that the Court clarify, or if necessary reconsider, its Decision and Entry in this regard.

CHEP also, apparently, agrees that this issue is an important one. On August 21, 2003, CHEP filed a Memorandum asking the Court to amend its decision on pages 10 and 41 to limit, in effect, Buckeye to hauling pallets marked with CHEP's logo from one location of a customer to another of the same customer. While the parties do not agree

how the Court should decide this issue, they both appear to agree that it is an issue that needs resolved.

B. Buckeye's Motion for Order to Deem Facts Admitted

In its Decision and Entry, the Court also (at pages 46-47) found that Buckeye's Motion for Order to Deem Facts Admitted (Doc. # 48) was moot because it "relate[s] to evidence which concerns the question of ownership of CHEP's pallets" Buckeye respectfully believes that the facts it seeks to have deemed admitted by this Motion as it relates to CHEP 0795, a document that CHEP has admitted to be a spreadsheet prepared by a CHEP employee showing the employee's assumptions, projections, and analysis of the benefits of paying recyclers for recovered pallets as of March 15, 2001, are relevant to its remaining claim for unjust enrichment, and therefore also seeks clarification of the Decision and Entry in this regard.

II. Argument

A. The Court Should Clarify Its Order by Finding that Buckeye Is Entitled to Perform Services for CHEP's Lessees or Bailees Consistent with Their Obligations to CHEP

As the Court knows from the summary judgment briefing, Buckeye has received pallets containing CHEP's logo from two sources: (1) non-participating distributors who do not want CHEP pallets or the burden of having CHEP come onto its property to pick them up and therefore send them to Buckeye along with all of their other excess pallets; and (2) mutual distributor customers of Buckeye and CHEP who inadvertently load pallets marked with CHEP's logo on a trailer left by Buckeye. See Deposition of Sam McAdow Sr. (Tab F to Buckeye's Exhibits in Support of Summary Judgment) at 90, 98-

99. This motion does not concern the first category of pallets. However, Buckeye has long taken the view that its customers are entitled to the return of pallets marked with CHEP's logo if they want them. Id. at 90. Indeed, prior to the filing of this lawsuit, CHEP was aware of this practice and never told Buckeye it was impermissible. The Court's decision seems to leave this issue unresolved.

CHEP, however, publicly and in its pleadings takes the position that Buckeye not only may not sell pallets marked with CHEP's logos to third parties, but cannot return those pallets to customers of CHEP for a fee. See Potts Affidavit (submitted with CHEP's Motion for Summary Judgment) Exhibit 5 (Buckeye 00164) (CHEP "Asset Recovery" letter stating "Chep rents rather than sells their pallets to third parties, retaining ownership at all times. As a result, ... under no circumstances may Chep pallets ... be bought, altered or sold" and advising recyclers to instruct their employees "not to purchase, accept, collect, repair, sell or otherwise dispose of ... Chep pallets"); Miller dep. at 150 (recyclers should not do business with any entity from whom they inadvertently receive pallets with CHEP's markings).

The Court's Decision and Entry (not surprisingly given the focus on ownership in the summary judgment briefing) does not directly address what Buckeye is legally entitled to do when it receives a pallet marked with CHEP's logo from a distributor having an agreement with CHEP. However, on page 41 of the Decision and Entry, the Court at least suggests that there is nothing improper in Buckeye returning pallets to such common customers, and even being compensated for doing so: "Regarding their delivery of CHEP pallets to CHEP lessees, to the extent they collect a hauling or service fee, that

itself is their remuneration.”¹ CHEP seeks to overturn this suggestion that Buckeye can collect a fee for returning pallets to these customers and to gain legal recognition for its strict view that Buckeye can do nothing with a pallet containing CHEP marking other than return it to CHEP by asking the Court in its Memorandum to amend its decision at pages 10 and 41 to limit Buckeye to hauling CHEP pallets between locations of a particular customer, and thereby implicitly prohibiting it from any other transportation of pallets marked with CHEP’s logo.

First, with respect to CHEP’s Memorandum, no legal authority exists for limiting Buckeye to hauling CHEP-marked pallets only between two locations of a single customer. Absent an agreement between CHEP and its customers prohibiting Buckeye from hauling pallets (which would raise interesting antitrust issues), CHEP’s customers are as free to contract with Buckeye as any other hauler to haul pallets wherever their contracts with CHEP permit – between locations of that customer, back to CHEP or (again, if the customer’s contract with CHEP permits) to another CHEP customer. Buckeye is a licensed common carrier. As such, it is entitled to compete with any other common carrier for the opportunity to transport pallets or any other item for CHEP’s customers. No basis exists for CHEP’s effort to expand the Decision and Entry to impair Buckeye’s hauling business.

Moreover, notwithstanding the Court’s adverse ruling regarding the ownership of pallets marked with CHEP’s logo, Buckeye believes that the law does not require it to return any CHEP-marked pallet it receives from a common customer. Nor does Buckeye believe that the Court’s decision should disqualify it from negotiating with its customers

¹ On the other hand, on pages 43-44 of the decision, the Court states: “CHEP is, without question, the owner of said pallets, and arguably has the right to immediate possession of same”

for a service fee for returning to CHEP any CHEP-marked pallets those customers send to Buckeye. To be clear, Buckeye is not in this Motion seeking the right to sell pallets it receives from a non-participating distributor to one of the customers it has in common with CHEP.² This Motion simply seeks to determine Buckeye's rights with respect to pallets inadvertently set it by its customers who happen to be CHEP's bailees as well. Specifically, Buckeye seeks clarification of its rights in at least three situations:

1. If a common customer inadvertently loads CHEP-marked pallets on one of Buckeye's vans, is Buckeye free to return those pallets to the common customer prior to the time the customer is obligated to return those pallets to CHEP based upon whatever compensation the customer agrees to for Buckeye's efforts?

2. If a common customer inadvertently loads CHEP-marked pallets on one of Buckeye's vans, is Buckeye free to return those pallets to CHEP for credit to the common customer based upon whatever compensation the customer agrees to for Buckeye's efforts?

3. Is Buckeye free to contract with a common customer to sort pallets with CHEP markings from other pallets and to return the CHEP-marked pallets to the customer or to CHEP for agreed upon compensation?

Buckeye believes that under the reasoning of the Court's Decision and Entry, the answer to each of these questions should be "yes." Under the Court's decision, the customers Buckeye shares with CHEP, which the Court refers to as "secondary customers," must be either CHEP's lessees or its bailees. In either event, these common customers have a

² Buckeye recognizes it would have to seek such a right from the Court of Appeals in light of the Court's determination as to ownership, and does not by seeking this clarification within the legal framework the

possessory interest in CHEP-marked pallets up until the time CHEP requires their return. See Tab I to Exhibits to Buckeye Motions for Summary Judgment, pages CHEP 10475, CHEP 10487; CHEP 10478 (“You will return CHEP Pallets at your expense to a CHEP depot at frequencies which we shall agree from time to time.”) Nothing in these contracts prohibits these common customers from outsourcing the sorting, hauling or storage of CHEP-marked pallets.

Moreover, as noted above, Buckeye is a licensed common carrier. As such, it is entitled to compete with any other common carrier for the opportunity to transport pallets or any other item for CHEP’s customers. Its common carrier license entitles it to compete on an even playing field with other such haulers.

In cases in which CHEP pallets are inadvertently sent to Buckeye, it is illogical and contrary to basic fairness to suggest that those customers cannot retrieve such pallets from Buckeye to return them to CHEP or ask Buckeye to haul them back to CHEP on their behalf. To expand on the Court’s analogy (Decision and Entry at 33-34), if a watch owned by X, and rented to Y for a period of time, is mistakenly included in a box of jewelry sold by Y to Z, Y and Z should be perfectly free to work out the return of the watch in order to allow Y to return the watch to X rather than to have to pay X for the watch. Likewise, Y should be free to offer Z \$5.00 (or any other freely negotiated amount) to return the watch to X on Y’s behalf. In either of these instances, X suffers no harm by Y and Z correcting the accidental conveyance of the watch from Y to Z, other than the lost opportunity to recover the value of the watch from Y.

The same is true here. CHEP’s financial incentive for its apparent position that even pallets Buckeye receives inadvertently from a common customer must be sent

Court has found to exist, waive its right to appeal the Court’s determination as to the framework.

directly to CHEP is obvious – it is much better off getting its pallets back for the 50 cents it has begun offering since the lawsuit was filed (or for whatever compensation a jury decides is reasonable on Buckeye’s unjust enrichment claim) and receiving a \$24 lost pallet fee from its customer than it is having the customer pay Buckeye for its handling and transportation costs and returning the pallet to CHEP. Keith Norder, CHEP’s Chief Financial Officer and the person responsible for administering its contracts with distributors, however, concedes that CHEP does not have any term in its contracts with distributors that allows CHEP to prohibit those distributors from obtaining pallets from recyclers. Norder dep. (1/9/03) at 190-91. Indeed, consistent with its policy of deference to its customers while aggressively attacking recyclers, CHEP has not even discussed including such a term in its contracts with distributors. Id. at 183.

Likewise, since nothing in CHEP’s contracts with common customers prohibits those customers from contracting with Buckeye to sort pallets on their behalf, Buckeye likewise believes that it is entitled to a clarification of the Decision and Entry in this regard. Again to pick up on the Court’s watch analogy, if Y were to have accumulated a hundred (or to make the analogy more apt, several thousand) watches, some of which were his own and some of which belonged to others, it would hardly violate X’s rights as bailor of the watch for Y to send all the watches over to Z, a professional sorter, to have X’s watch separated and either sent back to Y or returned directly to X. The same logic should apply to Buckeye’s dealings with its customers.

Accordingly, Buckeye requests that the Court clarify its decision and entry to make clear that Buckeye may return CHEP-marked pallets to common customers (or

deliver them to CHEP on the customer's behalf) and may contract with customers to sort CHEP pallets from other pallets to facilitate their return to CHEP.

B. Determination as to Whether CHEP Has Made Admissions as to CHEP 0795 Is Relevant to Buckeye's Remaining Claim for Unjust Enrichment

Buckeye also requests that the Court clarify or reconsider its decision that Buckeye's Motion for Order to Deem Facts Admitted (Doc. # 48) is moot in its entirety. Buckeye's Motion asked the Court to deem facts admitted regarding two documents. The first, CHEP 0795, is a document that CHEP has admitted to be a spreadsheet prepared by a CHEP employee showing the employee's assumptions, projections, and analysis of the benefits of paying recyclers for recovered pallets as of March 15, 2001. The second, CHEP 06983, is a spreadsheet generated by CHEP's computer system containing a summary of information from audits of a small sampling of NPD locations and comparing the actual pallet balances that CHEP representatives were able to count at those locations to CHEP's book balance before adjustment for unidentified returns. Buckeye concedes that, at least at this point in time, CHEP 06983 does not appear relevant to the remaining claims between the parties.

CHEP 0795, however, is directly relevant to Buckeye's proof of damages on its unjust enrichment claim. This document contains CHEP's own calculations of the benefits of paying recyclers for recovered pallets as of March 15, 2001. Its findings are therefore probative evidence on Buckeye's damages claim for unjust enrichment in that they show the benefit to CHEP of Buckeye's actions, and are one measure that a jury could use to assess . See Reisenfeld & Co. v. The Network Group, Inc., 277 F.3d 856,

862 n. 1 (6th Cir. 2002) (“Ohio courts set damages for quasi-contract cases at the reasonable value of the goods or services provided”).

Accordingly, Buckeye respectfully requests that the Court clarify or reconsider the portion of its decision holding the Motion for Order to Deem Facts Admitted moot in its entirety, and determine whether Buckeye is entitled, as it requested, to an order finding that the document product by CHEP and marked CHEP 0795 is (a) a true and accurate copy of a spreadsheet prepared by a CHEP employee; (b) a CHEP employee's assumptions, projections, and analysis of the benefits of paying recyclers for recovered pallets as of March 15, 2001; and (c) contains accurate mathematical computations.

III. Conclusion

For the foregoing reasons, the Court should clarify (or alternatively reconsider) its Decision and Entry to make clear Buckeye's right to perform services for common customers that do not interfere with CHEP claim of ownership as to pallets containing its markings. It should also reconsider its determination that Buckeye's Motion for Order to Deem Facts Admitted is moot in its entirety, and grant that motion with respect to Buckeye's assertion that the document product by CHEP and marked CHEP 0795 is (a) a true and accurate copy of a spreadsheet prepared by a CHEP employee; (b) a CHEP employee's assumptions, projections, and analysis of the benefits of paying recyclers for

recovered pallets as of March 15, 2001; and (c) contains accurate mathematical computations.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Motion was served on
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