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

BUCKEYE DIAMOND LOGISTICS, INC.,	:	Case No. 3 01cv440
Plaintiff,	:	District Judge Walter Herbert Rice Magistrate Judge Sharon L. Ovington
-vs-	:	
CHEP USA,	:	
Defendant.	:	

DISCOVERY ORDER

I. Introduction

A description of the parties and issues in this case is more fully set forth in *Buckeye Recyclers v. CHEP USA*, 228 F. Supp. 2d 818 (S.D. Oh 2002). By order dated May 26, 2004, this matter was referred to the undersigned for consideration of all outstanding discovery issues. (Doc. # 103). Upon request of the parties, a hearing was conducted on June 18, 2004. (Doc. # 104). A Discovery Conference Agenda was filed by the parties addressing outstanding issues, including matters relating to admissibility at trial rather than discovery. (Doc. # 105). The scope of the undersigned's referral was limited to discovery matters. Since the District Judge retained complete authority regarding rulings on the admissibility of evidence at trial, this Order will not address those matters.

II. Discovery Standards

It is well settled that "[p]arties may obtain discovery regarding any matter, not privileged,

that is relevant to the claim or defense of any party....” Fed. R. Civ. P. 26(b)(1)(West 2004). Information is subject to discovery if it is “relevant to the claim or defense of any party" or if it "appears reasonably calculated to lead to the discovery of admissible evidence.” Fed. R. Civ. P. 26(b)(1), s*ee also Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 98 S.Ct. 2380 (1978); *Lewis v. ACB Bus. Services, Inc*., 135 F.3d 389, 402 (6th Cir. 1998). However, discovery does have “ultimate and necessary boundaries.” *Oppenheimer Fund*, 437 U.S. at 351 (quoting *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S.Ct. 385, 91 L.Ed. 451 (1947)). “[I]t is well established that the scope of discovery is within the sound discretion of the trial court.” *Coleman v. American Red Cross*, 23 F.3d 1091, 1096 (6th Cir.1994). The court need not compel discovery if it determines that the request is “unreasonably cumulative ... [or] obtainable from some other source that is more convenient, less burdensome, or less expensive ... [or] the party seeking discovery has had ample opportunity by discovery in the action to obtain the information ... [or] the burden or expense of the proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(2)(i)-(iii).

III. The Parties Contentions[1]

A. Plaintiff Buckeye Diamond Logistic, Inc.’s (“Buckeye’s”) Issues

1. Buckeye requests that the Court strike Defendant CHEP USA’s (“CHEP’s”) April 20, 2004 revision of its damage disclosure.

Buckeye’s Position: The Court should bar CHEP from offering revised damages disclosures at trial. CHEP has submitted three different damages claims, the last two increasing

[1] The parties’ respective positions as set forth herein are derived from the Discovery Conference Agenda (Doc. # 105).

the damages claimed. Buckeye has also found that the second damages claim was based on a counterfeit invoice. If the Court accepts CHEP's additional damages claims, Buckeye will have to re-depose CHEP's damages witnesses, incurring even more expense in defending itself.

Chep's Position: CHEP's damage claim changed because it acquired additional and more current information from Buckeye about the number of CHEP pallets that Buckeye received in the usual course of business. CHEP has not changed its calculation method, and more up-to-date information has actually reduced the Cost to Repair, working to Buckeye's benefit. (Doc. # 105, p. 5). Therefore, Buckeye cannot claim to be prejudiced by the revisions made with the new information that Buckeye supplied. Buckeye will not have to re-depose CHEP employees because the calculation methodology has not changed.

Holding: To the extent that Buckeye seeks to exclude damages evidence at trial, that matter lies within the discretion of the District Judge. CHEP's damages calculation methodology has not changed and therefore further depositions on this issue are unnecessary.

2. Buckeye seeks an Order requiring CHEP to produce data or documents concerning pallet dwell times at non-participating distributors ("NPDs"), the entities from whom Buckeye frequently receives pallets, as requested in Buckeye's Interrogatory # 2 and Buckeye's Request for Production of Document #s 5, 6, and 24.

Buckeye's Position: Requests for dwell times go to whether Buckeye proximately caused CHEP any damage. If pallets typically dwell at NPDs longer than they do at Buckeye, such information will support Buckeye's contention that its actions decreased CHEP's cost rather than increased it. Buckeye will present evidence NPDs frequently send Buckeye pallets

containing CHEP's logo. Thus the origin of CHEP pallets in Buckeye's possession could be any of hundreds of NPDs. Candice Southwick, the executive responsible for this area at CHEP, testified that data concerning dwell times at NPDs could be generated. (Southwick Depos. (4/7/04) at pp. 72-75).

CHEP's Position: There is no reason to require CHEP to create dwell time reports. Dwell time is not a meaningful calculation and is not factored into CHEP's damage claims, which are based solely on cost of repair, Buckeye's alleged sales proceeds, depreciation in value while the pallets are held by Buckeye, and cost of capital to replace the pallets held by Buckeye. In addition, the savings that Buckeye believes it is creating for CHEP, demonstrable through dwell time reduction, could only be quantified if Buckeye could identify its sources of CHEP pallets. However, Buckeye has no evidence to identify any NPD. This is conceptually consistent with the Court's decision on the Motions in Limine. (Doc. #89). In that Decision, the Court foreclosed Buckeye from using information about possible losses from a particular customer because there was no evidence that Buckeye acquired any CHEP pallets from that customer. Since Buckeye has no evidence that CHEP pallets come from any identifiable NPD in this case, the Court should foreclose Buckeye from using information about dwell times from any customer. Furthermore, there is no evidence that NPDs are the actual source of the CHEP pallets coming into Buckeye's possession. Therefore, there is no reason for Buckeye to obtain information about NPD dwell times.

The reports sought by Buckeye about particular NPDs can be created. However, it would take an analyst many days to create individual reports for each of the hundreds of NPDs encompassed by the discovery requests. Since few of these NPDs have a connection to Buckeye,

no cause exists for burdening CHEP. Therefore, Buckeye's discovery requests directed to dwell time are beyond the scope of permissible discovery and will not lead to admissible evidence.

Holding: For the reasons stated in the trial court's decision and entry dated September 8, 2004 (Doc. # 111), the information sought is relevant and therefore discoverable. CHEP states that a "few of these NPDs have a connection to Buckeye" and thus CHEP appears to know which NPDs have such a connection. CHEP should therefore produce dwell time reports of NPDs that have a connection to Buckeye. In the event that CHEP claims that it does not know which NPDs have a connection to Buckeye, CHEP shall produce dwell time reports of all NPDs within a 150 mile radius of Buckeye's place of business.

3. Buckeye seeks an Order requiring CHEP to produce data or documents regarding pallet revenue and utilization rates as requested in Buckeye's Request for Production of Document #s 16 and 17.

Buckeye's Position: As part of its damages, CHEP seeks cost of capital for pallets it claims it had to buy to replace the ones that Buckeye possessed. Revenue rates are relevant to determine if CHEP is seeking to circumvent the fact that the revenue it could have gained from these pallets is less than its claimed damages for cost of capital and depreciation. Further, these requests are relevant to whether CHEP incurred additional capital costs to replace pallets held by Buckeye. For example, the testimony and discovery responses indicate that "stringer" pallets were being taken out of circulation by CHEP when Buckeye had them. Information showing low utilization rates for stringer pallets (by CHEP's estimate 35% of the pallets recovered from Buckeye) would undercut CHEP's claim that it expended capital to replace such pallets. Likewise, evidence of less than 100% utilization rates for other pallets would undercut CHEP's

claim that it had to replace the pallets Buckeye held to fill customer orders. (Doc. # 105, p. 10). Elton Potts, a senior CHEP executive, has admitted that CHEP's utilization rate information could be produced without substantial burden. (Potts Depos. at pp. 88-90).

CHEP's Position: As with "dwell time" addressed above, "utilization rate" information does not have anything to do with the 27,345 CHEP pallets that Buckeye withheld from CHEP. *See* Doc. # 89 at pp. 9-10. The requests are solely designed to buttress Buckeye's damage claim for unjust enrichment. CHEP is making no claim for lost revenue, and utilization rates are a component of lost revenue. CHEP's damage claim is restricted to depreciation in value, cost of capital and repair costs for the 27,345 CHEP pallets withheld by Buckeye. *See* Buckeye's specific requests and CHEP's responses in Doc. # 105, pp. 10-11.

Holding: The information sought is relevant to Buckeye's unjust enrichment claim and is therefore discoverable. CHEP has admitted that CHEP's utilization rate information could be produced without substantial burden. CHEP must therefore produce the pallet revenue and utilization rate information as sought by Buckeye's Request for Production of Documents #s 16 and 17.

4. Buckeye seeks an Order requiring CHEP to respond directly and without objection to Buckeye's Interrogatory # 1, parts e and f.

Holding: It was established during the discovery hearing, and therefore resolved, that CHEP had no information pertaining to Buckeye's Interrogatory # 1, parts e and f.

5. Buckeye seeks an Order requiring CHEP to produce, in Columbus, Ohio, the full original file in which CHEP 00795 was found, as ordered by the Court at the March 15th discovery

conference, together with documents subsequently promised to Buckeye.

Buckeye's Position: CHEP has not produced the original file of a document entitled CHEP 00795 in Columbus, including a clean, legible hard copy of the file; an electronic (Excel) version of the document; all metadata connect with the file; identification of the server, driver, folder; and subfolder (if any) in which this document is located, and copies of all other documents in that folder or subfolder. CHEP should be directed to produce these materials as the Court ordered on March 15th. *See* Doc. # 105, p. 13.

CHEP's Position: The Court ordered CHEP to produce the full original file in which CHEP 00795 was found. However, CHEP 00795 was pulled from "old files" left behind by Roger Miller and found by Keith Norder when he moved into the office. (K. Norder Depos., pp. 200-202). So, there is no "original file" from which the document came, other than the computer-based file which has been produced. (Doc. # 105 p. 14).

Holding: The Court previously issued an order for CHEP to produce in Columbus, Ohio the full original file in which CHEP 00795 was found. CHEP represents that CHEP 00795 was pulled from the "old files" left behind by Roger Miller and found by Keith Norder when he moved into the office. CHEP should immediately produce the "old files" from which CHEP 00795 was found, as previously ordered.

6. Buckeye seeks an Order requiring CHEP to produce in Ohio certain original documents, rather than the unclear or illegible copies CHEP has produced.

Buckeye's Position: Buckeye has asked CHEP to confirm that no better copies exist of a number of documents, each of which was produced in a partially illegible form. Since that request, however, Buckeye has learned that CHEP 00795 still exists on CHEP's computer

system, and so a clear and legible copy should exist. Buckeye requests that the original documents be produced in Columbus if CHEP claims it has no clear and legible copies of these documents..

CHEP's Position: On January 13, 2003, Buckeye asked for more legible copies of certain documents. On February 10, 2003, CHEP delivered better copies of most of the requested copies. In conveying the copies, CHEP communicated that "they [were] unable to locate the few remaining documents" listed. Buckeye then did not respond to CHEP on this subject for more than thirteen months after which Buckeye again asked for the same "better copies" that CHEP had already supplied on February 10, 2003. CHEP responded on April 13, 2004 that the correspondence of February 10, 2003 had fully addressed the issue.

As far as CHEP 00795 still existing on CHEP's computer system, the computer file version of CHEP 00795 was stored on one person's computer in a system with no document management system, and therefore there is no way to search for these documents on a global basis. *See* Kolb Depos., pp. 37-38. CHEP has offered to open its doors to Buckeye's counsel to examine documents "as they are kept in the usual course of business" (which is the very language used in Fed. R. Civ. P. 34(b)). There is no better way for Buckeye to check up on CHEP's work than to go to the place where the data resides and view it as "kept in the usual course of business."

Holding: This is simply an issue of obtaining legible copies of previously produced documents. CHEP does not dispute Buckeye's assertion that a clear copy should exist since CHEP 00795 still exists on CHEP's computer system. CHEP's assertion that the computer file version of CHEP 00795 was stored on one person's computer in a system with no document

management system, and therefore there is no way to search for it on a global basis, does not free CHEP from its obligation to produce legible copies of previously produced documents. *See Delozier v. First Nat'l Bank*, 109 F.R.D. 161, 164 (E.D. Tenn. 1986)(requesting party should not be responsible for production cost when costliness of discovery procedure is product of responding party's record-keeping scheme over which requesting party has no control); *see also Baxter Travenol Lab., Inc. v. LeMay*, 93 F.R.D. 379, 383 (S.D. Ohio 1981)(plaintiff's unwieldy record-keeping system was not adequate excuse to frustrate discovery and plaintiff had not shown discovery to be burdensome despite contention that production would require search of several million documents). CHEP must endeavor to obtain legible copies of the previously produced documents at issue. In the event CHEP fails to produce legible copies within fourteen days from the date of this order, CHEP shall permit counsel for Buckeye to enter the place where the documents or computer system is for the purpose of obtaining legible copies of the disputed previously produced documents, and CHEP shall pay **all costs** associated with Buckeye's trip to obtain legible copies of the previously produced documents at issue.

7. Buckeye seeks an Order requiring CHEP to certify that it has met all of its discovery obligations.

Buckeye's Position: Buckeye wishes to have CHEP's assurance that no other responsive documents have been overlooked and that CHEP has fulfilled its obligations to respond fully and accurately to Buckeye's discovery requests pursuant to *Braska v. Anheuser-Busch Company, Inc.,* 164 F.R.D. 448, 461 (1995).

CHEP's Position: Buckeye has issued broad discovery requests that exceed the proper boundaries of discovery. CHEP has, where appropriate, interposed objections. CHEP is willing

to certify production of all non-objectionable documents. Rule 34(b) of the Federal Rules of Civil Procedure states that when objections have been interposed, the "party submitting the request may move for an order under Rule 37(a) with respect to any or other failure to respond to the request or any party thereof, or any failure to permit inspection as requested." Buckeye has refused to do so. One can only address certifying compliance with discovery obligations by doing so on a request-by-request basis.

Holding: Buckeye has failed to demonstrate the need for an Order requiring CHEP to provide a global certification that it has fulfilled its obligations to respond fully and accurately to Buckeye's discovery requests. As a result, CHEP is not be required to certify compliance with discovery obligations on a global basis.

8. Buckeye seeks clarification regarding the proper use of the Court's prior Protective Order and the required procedure for filing confidential materials.

Buckeye's Position: On March 15, 2004, the Court held that no document may be filed under seal without the Court's prior approval. CHEP takes the position that the protective order in this case precludes Buckeye from filing any document marked confidential other than under seal. Without a clarification of the procedure, Buckeye is hamstrung in presenting its arguments in written filing to the Court.

Buckeye further objects to CHEP's belated effort to mark portions of Keith Norder's trial deposition confidential. First, such designations are untimely under the Court's order – which required that they be designated as confidential last February if CHEP wanted to use the Stipulated Protective Order's protection. Second, the portions of documents CHEP has designated as confidential do not meet the standards for such designation for the attorney's-eyes-

only designation under the Stipulated Protective Order. Third, there is no basis for keeping trial testimony confidential, either in law or under the facts of this case. *See Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177, 1179-80 (6th Cir. 1983).

CHEP's Position: The Protective Order does not address how to designate trial testimony as confidential or outside attorney's eyes only when trial testimony is recorded in a deposition format. The use of the Protective Order and the procedures for handling confidential information should be addressed by the Court.

Holding: This is a matter for resolution by the District Judge.

9. Buckeye seeks an Order requiring CHEP to produce unredacted copies of CHEP 14643–46 and any other redacted documents CHEP has produced in this case.

Buckeye's Position: Since there is a Protective Order in this case, Buckeye is willing to abide by any modification of that Protective Order the Court orders, which will provide CHEP with adequate protection of confidential materials.

CHEP's Position: Buckeye has violated the Protective Order on at least two occasions by filing documents with the Court that were required to be filed under seal. These actions, coupled with Buckeye's efforts to open documents previously filed under seal and when added to Buckeye's recurring public postings on *The Pallet Board* website, will force CHEP to redact recently produced documents that contain extraneous information or information not responsive to Buckeye's requests or highly confidential and proprietary business information. CHEP requests that Buckeye either abide by the Protective Order or CHEP will redact information.

Holding: CHEP must produce to Buckeye's trial counsel unredacted copies of CHEP 14643–46 and any other redacted documents CHEP previously produced in this case. Buckeye

shall abide by the terms of the Protective Order regarding these unredacted documents unless and until the Protective Order is modified by the District Judge.

B. <u>CHEP's Issues:</u>

At the outset – and as the following indicates where warranted – it appears that many of CHEP's issues have either been recently resolved by District Judge Rice's Decision and Entry (Doc. #111) or concern matters that relate to potential evidentiary issues at trial rather than pure discovery issues. Evidentiary issues related to trial must be resolved by District Judge Rice as he recently did. (Doc. #111). With this in mind, the undersigned turns to CHEP's issues.

1. Buckeye has improperly refused to supplement its discovery responses.

<u>CHEP's Position</u>: Buckeye refused to supplement its production as indicated by Buckeye's counsel's letter of April 29, 2004, even though it has a duty to do so. *See* Fed. R. Civ. P. 26(e); *see also* Moore's Federal Practice § 26.131; *Arthur v. Atkinson Freight Lines*, 164 F.R.D. 19, 20 (S.D.N.Y.1995).

<u>Buckeye's Position</u>: Buckeye does not believe that any answers are "incomplete or incorrect" because each sought information Buckeye possessed when it responded to the discovery requests. Buckeye does not believe that it is obligated to produce its financial statements on an on-going basis, each time trial continues simply because as time passes it will inevitably have more recent statements.

<u>Holding:</u> Rule 26(e) of the Federal Rules of Civil Procedure provides that "a party who has... responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired...(a)

if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing..." Pursuant to Rule 26(e), Buckeye has a duty to supplement its discovery responses and must do so immediately.

2. Buckeye's damages claim has never been properly disclosed and is not legally sustainable.

CHEP's Position: CHEP submits that Buckeye's damages disclosures neither meet the required standards nor constitute legally permissible theories for Buckeye's claim of unjust enrichment. *See* Doc. #s 76 & 84 (for further discussion).

Buckeye's Position: CHEP admits that Buckeye supplemented its damages disclosure on January 15, 2003, before discovery was closed. CHEP also took discovery on the damages disclosure and made no complaint during the discovery period that this disclosure was inadequate. In addition, CHEP produced an internal analysis of the benefit to CHEP of paying recyclers for the return of pallets (CHEP 00795). Buckeye notified CHEP that it would use this document as an alternative ground for proof of damages. Therefore, CHEP cannot claim that Buckeye never disclosed its damages.

Holding: Buckeye's unjust enrichment claim has been properly disclosed and is legally sustainable according to applicable established law. *See* Doc. # 111.

3. The scope of "relevance" needs to be determined to avoid an unnecessary protracted trial.

CHEP's Position: The Proposed Joint Pretrial Statement includes a number of "uncontroverted facts" that are irrelevant. The Court has determined that CHEP owns its pallets

and CHEP has stipulated that CHEP benefits when Buckeye returns the pallets. Also, the Court previously found that CHEP's Wal*Mart relationship is irrelevant because there is no evidence that Buckeye returned pallets to CHEP that it obtained from Wal*Mart (Doc. #89, p. 11). Therefore, accounting loss reserves and CHEP pallets in the Wal*Mart system are not probative of the remaining issues.

Buckeye's Position: CHEP's practices with respect to the shipment of pallets to NPDs shows the circumstances in which Buckeye comes into possession of these pallets, as well as the benefit CHEP receives when Buckeye returns such pallets. This motion ignores the issues remaining for trial in this case, and seeks to circumscribe Buckeye to a different case than it has pled and is prepared to prove. Judge Rice has rejected this position in the Court's March 15, 2004 Decision and Entry at 9-10 and 14-15.

Holding: This is a matter for resolution by the District Judge. *See* Doc. #111.

4. The Court has determined that CHEP owns its pallets and Buckeye should be prevented from refuting ownership.

CHEP's Position: As detailed in CHEP's Motion in Limine (Doc. # 74), and based upon the Proposed Joint Pretrial Order (Doc. # 101) (specifically "contested issues of fact" 3,4,5,6,7 and 9 therein), Buckeye appears poised to elicit evidence that is directed toward CHEP's ownership of its pallets.

Buckeye's Position: District Judge Rice has rejected CHEP's position in his March 15, 2004 Decision and Entry at pp. 9-10 and 14-15. The evidence Buckeye intends to elicit is on the elements of unjust enrichment, which is relevant and therefore an appropriate area of proof at trial in this case.

Holding: This is a matter for resolution by the District Judge. *See* Doc. # 111.

5. The Court has determined that CHEP neither lost nor abandoned its pallets and consequently Buckeye should be prevented from asserting otherwise at trial.

CHEP's Position: Buckeye should be prevented from continuing to advance loss/abandonment evidence related to CHEP pallets in the Wal*Mart system because the Court has already ruled that there is no evidence that Buckeye is returning pallets to CHEP which had formerly been in the possession of Wal*Mart. (Doc. # 89, pp. 10-11). "Thus, there is no indication that Buckeye provided a benefit to CHEP in the form of remedying [any problems with the Wal*Mart relationship]." (Doc. #89, p. 11).

Buckeye's Position: District Judge Rice has rejected this position in the Court's March 15, 2004 Decision and Entry at pp. 9-10 and pp. 14-15. Buckeye understands the Court's previous ruling regarding documents referring to Wal*Mart but believes it is obligated to proffer those documents and facts in order to preserve this issue for appeal.

Holding: This is a matter for resolution by the District Judge. *See* Doc. # 111.

6. Bain & Co. is not an "agent" of CHEP and therefore its hearsay statements are inadmissible.

CHEP's Position: CHEP's Motion in Limine (Doc. # 102) fully details the absence of any agent relationship and the hearsay nature of Bain & Co.'s statements.

Buckeye's Position: Buckeye submits that this issue is addressed in CHEP's Motion in Limine (Doc. # 102) but that it illustrates the need for clarification of the Protective Order in light of CHEP's position that 99% of documents it marked confidential may not be filed with

the Court other than under seal. Buckeye claims that documents previously marked as confidential show that Bain & Co. was CHEP's agent.

Holding: This is a matter for resolution by the District Judge.

7. Buckeye's stated intention to "reserve the right" to call an expert is untimely and Buckeye should be prevented from doing so.

CHEP's Position: Buckeye seeks to "reserve the right" to call an expert without any name and without describing the scope of the possible opinion testimony. Such a reservation is inadequate and too late.

Buckeye's Position: Buckeye can only determine whether it will use an expert to rebut CHEP's damage claims after it sees CHEP's data regarding pallet dwell times, utilization rates and revenue rates. If Buckeye chooses to use an expert, it is prepared to disclose the identity of the expert promptly after CHEP discloses the needed information.

Holding: Buckeye has been aware of CHEP's damages claim for an extensive period of time and certainly could have identified an expert prior to the present time. Indeed, it is not uncommon for experts to be provided documents as discovery progresses. Even though this Court has ordered production of certain pallet dwell times, utilization rates and revenue rates, that fact alone is insufficient to allow Buckeye to name a new expert at this juncture. In short, it is too late to name a new expert.

8. Scope of examination/order of witnesses at trial.

CHEP's Position: CHEP requests advance directive from the Court about the scope of witness examination because it would assist the flow of the trial.

Buckeye's Position: Buckeye understands that its case in chief is limited to its claims and not to defense of CHEP's counterclaims. However, there are a number of factual overlaps between the issues, which Buckeye believes are most appropriately addressed in the course of trial.

Holding: This is a matter for resolution by the District Judge.

IT IS THEREFORE ORDERED:

1. The parties' discovery issues are resolved as set forth herein; and

2. An informal telephone conference is set before the undersigned on **Friday, September 24, 2004 at 9:00 a.m.**

September 10, 2004

s/ Sharon L. Ovington
Sharon L. Ovington
United States Magistrate Judge