

**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. :

**COUNTERCLAIM DEFENDANT BUCKEYE DIAMOND LOGISTICS’  
APPEAL FROM PORTION OF MAGISTRATE JUDGE’S DISCOVERY  
ORDER OF SEPTEMBER 10, 2004 BARRING BUKEYE DAIMOND LOGISTICS  
FROM OFFERING EXPERT TESTIMONY IN OPPOSITION TO CHEP USA’S  
DAMAGE CLAIM**

Counterclaim Defendant Buckeye Diamond Logistics (“Buckeye”) hereby  
appeals from the portion of the United States Magistrate Judge’s September 10, 2004  
Discovery Order (Docket # 112) barring Buckeye from offering expert testimony in  
opposition to CHEP’s USA’s damages theories on its conversion counterclaim against  
Buckeye . A memorandum in support is attached.

s/ James A. Wilson

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MEMORANDUM IN SUPPORT

On September 10, 2004, the Magistrate Judge issued a Discovery Order resolving a number of discovery issues, finding that a number of the issues raised by CHEP USA were appropriately left for the District Court at trial, but holding that Buckeye could not offer expert testimony in opposition to CHEP USA's damage claim at trial, because "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." Dock. # 112 at p. 16. Buckeye respectfully urges, pursuant to 28 U.S.C. § 636(b)(1)(A), that the portion of the Discovery Order barring it from opposing CHEP's damage claim with expert testimony be set aside as clearly erroneous because (a) it misapprehends the history of CHEP's belated disclosure of its damage claims and refusal to provide full discovery concerning those claims until ordered by the Magistrate Judge; (b) Buckeye did not violate any Court-imposed deadline in identifying an expert witness; (c) requiring Buckeye to disclose its expert opinions prior to receiving discovery it is entitled to would be prejudicial to Buckeye; and (d) there is absolutely no prejudice to CHEP in allowing such an expert to be identified. In short, the Magistrate Judge's order would allow CHEP to gain an unfair advantage in this litigation by reason of having served its damage disclosures a year after the close of discovery in this case – CHEP would be permitted to pursue its damage claim with no opposition from expert testimony despite the fact that Buckeye is the one party that honored the Court's deadlines in this case.

The need to overturn the Magistrate Judge's ruling barring Buckeye from offering expert testimony in opposition to CHEP's damage claim is shown from the undisputed sequence of events relevant to CHEP's damage claims: Specifically:

- On February 2, 2004, Buckeye moved to exclude any evidence of damages on its counterclaim by CHEP on the ground that CHEP had made no damage disclosure in the case other than the broad assertion that its damages exceeded \$75,000. At that point, discovery had been closed for more than a year, and CHEP's deadline for supplementing its damage disclosure had passed by more than 18 months.
- On February 4<sup>th</sup>, CHEP for the first time, notified Buckeye that it was seeking more than \$159,000 in damages on its counterclaims in this case.
- On February 18<sup>th</sup>, Buckeye filed a Supplemental Memorandum in Support of its Motion in Limine, advising the Court that if CHEP were permitted to disclose new damage claims, Buckeye would have to conduct additional discovery and potentially call additional witnesses in opposition to the belatedly disclosed damage claim.
- On February 20<sup>th</sup>, the Court advised it was vacating the February 23, 2004 trial date and giving Buckeye 60 days to take discovery on CHEP's damage claims. The Court did not set, and CHEP did not request, any deadline for Buckeye to identify additional lay or expert witnesses.
- On February 23<sup>rd</sup>, Buckeye served a Third Set of Interrogatories and a Fourth Set of Interrogatories on CHEP. CHEP failed to answer these discovery responses fully and completely, despite numerous efforts by Buckeye to resolve these issues.
- On April 21<sup>st</sup>, after seeking to extra-judicially resolve pending discovery disputes, Buckeye filed a Motion for Discovery Conference, to Strike Amended Damage Disclosure, to Extend Discovery Cut-Off (Dock. # 93). Ultimately, the Court's schedule did not permit it to resolve these discovery issues before the May 24<sup>th</sup> trial date the Court had reset. Subsequently, on May 26<sup>th</sup> the Court referred the remaining

discovery issues to the Magistrate Judge. In her September 10, 2004 Discovery Order, the Magistrate Judge found that virtually all of Buckeye's assertions concerning the defects in the discovery provided by CHEP had merit. See Dock. # 112 at pp. 3-9.

- On July 2<sup>nd</sup>, the Court reset the trial date to October 12, 2004. Despite being aware of the possibility that Buckeye might call additional witnesses since mid-February and being specifically aware of Buckeye's reservation of the right to identify an expert since April 30<sup>th</sup>, CHEP again did not request that the Court set a cut-off date for the disclosure of such an expert.
- In the meantime, on April 20<sup>th</sup>, CHEP again sent to Buckeye a damage disclosure that drastically increases the amount of damages CHEP is claiming from Buckeye. Then on May 13<sup>th</sup>, CHEP sent yet another revision to its damage disclosure, which disclaimed reliance it had previously made on a counterfeit invoice regarding the cost of washing and repairing pallets, but did not clearly specify what its new basis for such a damage claim was. On September 10<sup>th</sup>, CHEP sent Buckeye yet another revision of its damage calculation.

In sum, Buckeye has consistently advised the Court that once it had discovery on CHEP's belated damage claim (which now, more than seven months after its disclosure it still does not have) it potentially would have to identify new witnesses, including possibly an expert, to defend those claims. Further, Buckeye diligently pursued discovery concerning CHEP's damage claim, issuing document requests and interrogatories just a few days after such discovery was ordered and bringing CHEP's failure to provide such discovery to the Court as soon as it possibly could exhaust

extrajudicial efforts at resolution. Buckeye has, on the other hand, not violated any cut-off this Court has set – the only cut-off violated was the date for disclosure of damage claims, which CHEP violated.

The Magistrate Judge's order therefore represents an extraordinary sanction against Buckeye for doing nothing contrary to the orders of this Court. Moreover, a finding that Buckeye had some obligation – notwithstanding the lack of any order requiring it to do so – to provide an expert disclosure while CHEP stonewalled attempts to gain discovery the Magistrate Judge found plainly appropriate, creates an invitation to unfairness and obstruction of discovery. Under the Magistrate's ruling, Buckeye (despite never having an order in place requiring it to do so) presumably should have guessed when it was going to get all of the discovery from CHEP it might hope for absent judicial intervention, and make an expert disclosure and report based on the partial disclosures CHEP chose to make – even if Buckeye was unsure whether it would need to use an expert witness prior to learning what the undisclosed discovery showed. Presumably such an expert report further would have to guess what information CHEP was hiding would show or risk being precluded from testifying as to the subject of such discovery.

Thus by obstructing discovery, CHEP would force Buckeye to go to the expense of retaining an expert before it even knows whether the expense would be merited when considered in light of the full breadth of discovery provided (or whether belatedly provided discovery provided information that might make retaining an expert worth an expense that previously seemed unnecessary). Further, the Magistrate Judge's order is an invitation to an obstructionist to withhold discovery in order to force the opposing expert to disclose opinions without the opportunity to review and consider all the available facts,

and thereby expose their expert to cross-examination based either upon (a) knowledge the obstructionist has but has not produced; or (b) the expert's unawareness of information that the obstructionist has not produced that could bolster the expert's opinion.

Buckeye was ready for trial last February, prior to CHEP's belated disclosure of its damage claim. All of the delay that has occurred in this case falls squarely on CHEP's shoulders. CHEP, not Buckeye, is that party in this case that has made a belated damage disclosure, hid until the eleventh hour disclosure of highly relevant to documents CHEP should have produced years ago, created the multiple versions of damage disclosures and refused until now to provide basic discovery as to damages ordered by the Magistrate Judge. CHEP should not be permitted to turn these obstructions of this case to its advantage by precluding the use of an expert to defend against its damage claim.

As soon as CHEP produces the discovery it should have provided last March, Buckeye is more than willing to promptly determine whether it will use an expert, and if it does, to produce an expert report and provide a deposition of the expert within a few days – well in advance of trial if CHEP commits to providing all discovery ordered by September 20<sup>th</sup>. CHEP cannot point to any prejudice not of its own creation that would be caused by such a disclosure. The prejudice to Buckeye of not being permitted to make such a disclosure is clear. Accordingly, Buckeye respectfully urges the Court to set aside the portion of the Magistrate Judge's September 10, 2004 Discovery Order preventing

Buckeye from using an expert to oppose CHEP's belatedly disclosed and often revised damage claim.

s/ James A. Wilson

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of this Motion was served on  
September 13, 2004, by electronic delivery or facsimile upon:

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s/ James A. Wilson  
James A. Wilson