

**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. :	:	
	:	Chief Judge Walter Herbert Rice
CHEP USA, a general partnership :	:	
	:	
Defendant. :	:	

Emergency Motion of Buckeye Diamond Logistics for Leave to File Memorandum in Opposition to CHEP USA’s Motion to Exclude PX 2 ("Bain Report") and Motion in Limine regarding CHEP Damage Claims (with Exhibits thereto) Publicly or, in the Alternative, for Leave to File under Seal

Buckeye Diamond Logistics hereby moves for an order permitting it to file its Memorandum in Opposition to CHEP USA’s Motion to Exclude PX 2 ("Bain Report") and to File Motion in Limine regarding CHEP’s Damage Claims, and the exhibits to each, in the public record. Alternatively, Buckeye seeks an order directing it to file these pleadings under seal without prejudice to their being unsealed by the Court upon review.

Buckeye brings this Motion on an emergency basis because it Memorandum in Opposition is required to be filed on September 20, 2004 by the Court’s Decision and Entry of September 8, 2004 and its Motion in Limine must be filed on September 24, 2004 pursuant to this Court’s General Order No. 1.

A memorandum in support is attached.

s/ James A. Wilson
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MEMORANDUM IN SUPPORT

Buckeye seeks guidance from the Court as to the manner in which it should file two pleadings that are due within the next week and a half – its Memorandum in Opposition to CHEP USA's Motion to Exclude PX 2 ("Bain Report") and its Motion in Limine concerning CHEP's Damage Claims. Specifically, in its Decision and Entry of September 8, 2004 (Dock. # 111) (at p. 4, n. 1) the Court ordered Buckeye to file its Memorandum in Opposition within ten days (i.e., on September 20, 2004).¹ Likewise, under the Court's General Order No. 1, Buckeye's motions in limine, including the one it previously advised it would file as to CHEP's damage claim, are due on September 24, 2004.²

¹ The Court previously granted Buckeye's Motion for Extension of Time to file its opposition to Docket # CHEP USA's Motion to Exclude PX 2 ("Bain Report") (Dock. # 106) by a notion order dated June 26, 2004. Buckeye's Motion for Extension had sought an extension of time to file its Memorandum in Opposition until after the Court sets in place a process for the filing of materials CHEP claims are confidential. Confusion may have been created, however, because the Court's electronic filing system required Buckeye to enter a specific date to which an extension was sought. Buckeye chose June 25th because at the time it understood that the issue of setting in place a process for the filing of materials CHEP claims are confidential would be handled at the discovery hearing set for June 18th. The Court's September 8th order make clear that the Court does not wish to delay further the determination of this issue, and thus Buckeye seeks direction as to whether this opposition should be file publicly or temporarily under seal.

² Buckeye had previously sought an extension of time to file this motion in limine until (a) CHEP fully complied with its discovery obligations relating to damages; and (b) the Court set in place a process for the filing of materials CHEP claims are confidential. Dock. # 97. The Court in its Decision and Entry of

On March 15th, this Court ordered unsealed a number of documents filed under seal by the parties in this case, resting its decision on controlling Sixth Circuit precedent that holds the Court may not allow the parties unchecked discretion in filing materials under seal. CHEP, however, continues to take the position that documents or transcripts designated confidential cannot be filed with the Court unless Buckeye does what the Court has said is impermissible – i.e., to file them under seal without a showing of good cause. Buckeye cannot in good faith certify to the Court that good cause exists to file any of the documents CHEP has marked confidential under seal. To the contrary, it has repeatedly advised the Court that it believes CHEP has misused the protective order to designate materials that are simply embarrassing, but not commercially harmful, as confidential. Thus Buckeye is currently, without risking violation of this Court’s order or the threat of sanctions from CHEP, unable to file with the Court the evidence that will support its opposition to CHEP’s motion in limine or in support of its own.

Both filings in question will require reference to documents and deposition testimony CHEP has claimed – but Buckeye denies – are confidential. Specifically, CHEP’s Motion in Limine selectively cites portions of a heavily redacted documents to argue that Bain & Company was not an agent of CHEP within the meaning of Fed. R. Evid. 801. The full text of these documents, however, as well as other documents produced by CHEP and deposition testimony concerning the retention of Bain, belies the assertion that Bain was not CHEP’s agent. Buckeye is hamstrung in presenting this evidence to the Court, because CHEP marked the original, unredacted versions of these

September 8, 2004 (at p. 4, n. 1) ruled that motion moot, and specifically directed Buckeye to file its Motion in accordance with the deadline in the Court’s General Order No. 1 (i.e., September 24, 2004).

documents, as confidential “counsel’s eye’s only” and much of the relevant deposition testimony as either confidential or confidential “counsel’s eye’s only.”

Likewise, CHEP takes the position that documents or transcripts related to its damage claim cannot be filed with the Court unless to filed under seal. CHEP has marked virtually every page of discovery produced regarding damages, and large portions of the deposition, as confidential. All of these material, of course, will become public at trial. However, Buckeye is currently, without risking violation of this Court’s March 15th order or the threat of sanctions from CHEP, unable to file with the Court the evidence that will support its motion in limine.

Buckeye, as noted above, cannot certify to the Court that these pleadings belongs under seal, because it believes they do not. The Court, however, has directed that these pleading be filed promptly. Accordingly Buckeye seeks the Court’s direction on an emergency basis either ordering that these pleadings and their exhibits be filed publicly (which Buckeye believes this Court’s March 15th Decision and Entry requires) or ordering that the pleading be temporarily filed under seal subject to public disclosure upon review by the Court.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Motion was served on
September 14, 2004, by electronic delivery or facsimile upon:

John C. McDonald
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s/ James A. Wilson
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