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

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.	:	

DEFENDANT CHEP USA'S RESPONSE TO PLAINTIFF BUCKEYE DIAMOND LOGISTICS, INC.'S APPEAL FROM PORTION OF MAGISTRATE JUDGE'S DISCOVERY ORDER OF SEPTEMBER 10, 2004 BARRING BUCKEYE DIAMOND LOGISTICS, INC. FROM OFFERING EXPERT TESTIMONY IN OPPOSITION TO CHEP USA'S DAMAGE CLAIM

In its appeal from the Magistrate Judge's Discovery Order issued September 10, 2004 (the "Order"), Plaintiff Buckeye Diamond Logistics, Inc. ("Buckeye") contends that the portion of the Order barring Buckeye from naming a new expert witness at this late stage of the litigation is prejudicial to Buckeye and unfairly benefits Defendant CHEP USA ("CHEP"). Buckeye conveniently ignores several factors in its appeal. In particular, since suit was filed in September 2001 Buckeye steadfastly refused to return CHEP's pallets or even to identify where it obtained those pallets. Indeed, Buckeye swore under oath on February 25, 2002 that it had received approximately 800 CHEP pallets during the last year, a discovery response it has adamantly refused to supplement. It was not until a month after the court's order of August 11, 2003 that CHEP was finally able to recover its pallets (numbering 15,981, not 800) and to fully assess its damage. That information was provided to Buckeye in written form in early 2004 and discussed

in detail during depositions of CHEP personnel in early April. Although the numbers have changed slightly due largely to additional information provided by Buckeye, the methodology has not changed and Buckeye's appeal is little more than a thinly veiled attempt to avoid the day of reckoning. Buckeye provides no adequate justification for why it could not have retained an expert seven months ago, if not earlier.

Moreover, the topics on which Buckeye seeks to offer expert testimony – pallet dwell times, utilization rates, and revenue rates – have no bearing on CHEP's damages claims as both the Court and the Magistrate Judge have noted in their recent rulings. Buckeye has consistently argued that those topics impact its own claim for unjust enrichment and the Court agreed. Buckeye's right to identify an expert in support of its own claims expired long before the delineation of CHEP's claims which was necessarily delayed by Buckeye's prolonged and illegal retention of CHEP's pallets.

Finally, during the June 30, 2004 pre-trial conference, the Court established a discovery cut-off date of September 1, 2004. Buckeye's appeal is silent to this fact.[1] Implicit in the Court's order setting the discovery cut-off date is that Buckeye was required to name its expert in a timely manner that would permit CHEP to depose the expert prior to September 1, 2004. Thus, Buckeye's repeated assertion that it has complied with all of the Court's deadlines is false.

A. <u>Buckeye Has Had Sufficient Time to Name an Expert Witness</u>

Any delay in CHEP's disclosure of its damages was caused by Buckeye's conversion and inappropriate retention of CHEP's pallets. Buckeye refused to surrender possession of the pallets until September 2003. After recovering the pallets, CHEP assessed the pallets, analyzed its

---

[1] Although Buckeye repeatedly states that CHEP did not disclose its damages until a year after the discovery deadline, it fails to acknowledge that the Court subsequently extended the discovery deadline to September 1, 2004, more than six (6) months after CHEP first disclosed its damages claim.

damages, and provided the methodology and elements of its damages claim to Plaintiff on February 2, 2004. CHEP provided detailed backup information on its claims on February 9, 2004. Buckeye deposed CHEP's lay witnesses on damages in April 2004. Although CHEP has revised its actual damage claim (by about $5,000) based on facts learned both by Buckeye and CHEP as the litigation progressed, the methodology supporting the damages claim remained unchanged since February 2, 2004.

Although CHEP is content to proceed without an expert on its damages, Buckeye has been aware since at least February 2, 2004 that it wanted to use an expert witness to rebut the methodology and calculations supporting CHEP's damages claim. Buckeye elected to delay in either retaining or disclosing its expert. Buckeye cannot now seek to place blame for its litigation decisions on CHEP. Buckeye fails to set forth any justification for its failure to timely name an expert. As the Magistrate Judge correctly concluded in the Order, "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." (Doc. # 112 at 16.)

Moreover, Buckeye says that it needs every single document it requested, and every single interrogatory answered, before it can determine if it needs to expend the money to use an expert. However, experts are hired during discovery, not after discovery completion. The Magistrate Judge acknowledged this fact explaining that "[i]ndeed, it is not uncommon for experts to be provided documents as discovery progresses." (Doc. # 112 at 16.) Notably, Buckeye never discloses if it has yet hired an expert. Presumably it has, based on its assertion that "if Buckeye chooses to use such an expert, it is prepared to disclose the identity of the expert promptly after CHEP fulfills its discovery obligation." (Doc. # 105 at 37.) More notable is the fact that Buckeye never discloses when it hired its expert and how soon after CHEP disclosed its

damages the expert was retained. Surely Buckeye would have retained an expert, and received some preliminary guidance, to try to comply with the court's September 1, 2004 discovery cut off date. If it did not, it is, as the Magistrate Judge properly held, too late to do so now.

B. Buckeye Seeks to Name a New Expert to Support its Own Claims, Not to Challenge CHEP's Damages Claim

Buckeye explained that it could only determine whether it would use an expert to rebut CHEP's damages after seeing CHEP's data regarding pallet dwell times, utilization rates and revenue rates. (See Doc. # 112 at 16.) Buckeye further claims that it would be prejudiced by having to disclose an expert report without having all such information from CHEP. However, both the Magistrate Judge and this Court found that this information goes to Buckeye's unjust enrichment claim – not to CHEP's damages claim.

The Magistrate Judge found that the pallet dwell times are relevant "for the reasons stated in the trial court's decision and entry dated September 8, 2004." (Doc. # 112 at 5.) The only time that dwell times are mentioned in the September 8, 2004 Order are with respect to the purpose of CHEP's up-charges to ship to NPDs, which the district court held is relevant to Buckeye's claims of unjust enrichment. (Doc. # 111 at 12-13, 21-22) Thus, the availability of this information will have little, if any, impact on rebutting CHEP's damage claims which include $32,000 in repair costs and recovery of $37,482 for CHEP pallets sold by Buckeye to third parties.

C. Buckeye Did Not Comply with the Court's Discovery Cut-Off Date

Despite Buckeye's repeated assertion that it has not violated any court order on cut-off dates, Buckeye completely ignores the fact that during the June 30, 2004 pre-trial conference, the Court established September 1, 2004 as the discovery cut-off date, which was memorialized in the Entry of Continuance; New Trial and Other Dates Set. (Doc. # 108.) Implicit in such order

is that all depositions – whether fact or expert – must be concluded by September 1, 2004.[2] Accordingly, Buckeye was obligated to disclose any experts in a reasonable amount of time to allow CHEP to timely depose the experts by September 1, 2004. Buckeye did not disclose its expert in a timely manner and, in fact, still has not identified an expert. Furthermore, Buckeye never properly requested or received an extension to disclose its expert. As the magistrate properly concluded, "it is too late to name a new expert." (Doc. # 112 at 16.)

D. <u>CHEP Would be Unfairly Prejudiced if Buckeye is Permitted to Identify an Expert Witness for the First Time Less Than a Month Before Trial</u>

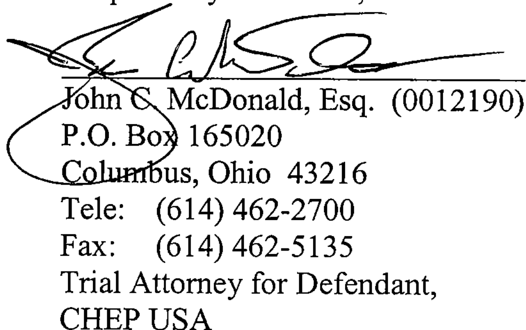
Despite intending to identify an expert witness for the <u>first time</u> three weeks before trial, Buckeye baldly states that "there is absolutely no prejudice to CHEP in allowing such an expert to be identified." (Doc. #113 at 2.) Even assuming that Buckeye identified its expert witness at this late stage in the litigation, the expert would need to prepare a report pursuant to Fed. R. Civ. P. 26(a)(2)(B), CHEP would need to depose the expert and, if necessary, CHEP would have to disclose its own counter expert. The trial is scheduled to commence in just over three weeks. CHEP cannot adequately respond to new expert testimony in such a short period of time. Conversely, had Buckeye simply identified its expert in advance of the September 1, 2004 discovery deadline, CHEP would have had an opportunity to properly respond to such an expert. Buckeye's assertion that "there is absolutely no prejudice to CHEP in allowing an expert to be identified" at the eleventh hour is without merit and Buckeye's request that the Court set aside a portion of the Magistrate Judge's Discovery Order should be denied.

---

[2] The fact that that same Entry of Continuance left many areas blank, including the date to disclose expert witnesses, cannot be interpreted to mean that Buckeye had ultimate control over when it disclosed its experts. Identification of experts and expert reports is done during discovery, not after discovery cut-off. If Buckeye anticipated a need for an expert, which it should have been in a position to do as early as February 2, 2004 and no later than April 2004, it should have so raised the issue during the June 2004 conference and sought relief from the Court at that time.

For the foregoing reasons, CHEP respectfully requests that the Court overrule Buckeye's Appeal from the Portion of Magistrate Judge's Discovery Order of September 10, 2004 Barring Buckeye Diamond Logistics, Inc. from Offering Expert Testimony in Opposition to CHEP's Damage Claim.

Respectfully submitted,



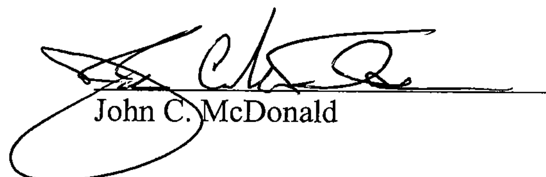
John C. McDonald, Esq. (0012190)
P.O. Box 165020
Columbus, Ohio 43216
Tele: (614) 462-2700
Fax: (614) 462-5135
Trial Attorney for Defendant,
CHEP USA

OF COUNSEL:
Kevin L. Murch, Esq. (0066833)
Schottenstein, Zox & Dunn
P.O. Box 165020
Columbus, Ohio 43216
Tele: (614) 462-2700
Fax: (614) 462-5135

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Defendant CHEP USA's Response to Plaintiff Buckeye Diamond Logistics, Inc.'s Appeal from Portion of Magistrate Judge's Discovery Order of September 10, 2004 Barring Buckeye Diamond Logistics, Inc. from Offering Expert Testimony in Opposition to CHEP USA's Damage Claim was served the 20th day of September, 2004, via the Court's electronic filing notification upon:

James A. Wilson
Vorys, Sater, Seymour & Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
Trial Attorney for Plaintiff



John C. McDonald

{H0471679.1 }