

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

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

**DEFENDANT CHEP USA'S OBJECTIONS TO THE MAGISTRATE JUDGE'S
DISCOVERY ORDER FILED SEPTEMBER 10, 2004**

Defendant CHEP USA ("CHEP"), pursuant to Fed. R. Civ. P. 72(a), objects to the holding on Buckeye Issue No. 5 in the Discovery Order of the Magistrate Judge ("Discovery Order") filed September 10, 2004.

I. INTRODUCTION

By order dated May 26, 2004, the Court referred this matter to the Magistrate Judge for consideration of all outstanding discovery issues. (Doc. # 103.) Pursuant to the joint request of the parties, the Magistrate Judge conducted a hearing on the discovery issues on June 18, 2004. In anticipation of that hearing, the parties filed a Discovery Conference Agenda setting forth the outstanding discovery issues and each party's position with respect to each issue. (Doc. # 105.)

On September 10, 2004, the Magistrate Judge issued a Discovery Order resolving many of the discovery issues and deferring the remaining issues, which related to the admissibility of certain evidence at trial, to the District Judge. (Doc. # 112.) Among the issues determined by the Magistrate Judge was Plaintiff Buckeye Diamond Logistic, Inc.'s ("Buckeye") request for 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." (Doc. # 112

p. 7.) With respect to this issue, the Magistrate Judge held:

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.¹

(Doc. # 112 p. 7.) Although CHEP indicated in the Discovery Conference Agenda that CHEP 00795 was pulled from "old files," CHEP respectfully submits that the Magistrate Judge misapprehended CHEP's explanation regarding the "old files." Accordingly, CHEP objects to the Magistrate Judge's holding with respect to the production of the "old files" in which CHEP 00795 was found.

II. GROUND FOR OBJECTION

CHEP endeavored to explain to the Magistrate Judge at the June 18, 2004 conference that there was no "original file" from which CHEP 00795 but, rather, that it was located in papers left behind by Roger Miller ("Miller"), CHEP's former Chief Financial Officer. The other papers that were left behind were not maintained as a separate file or kept in any discernible manner. Attached as Exhibit "A" is an Affidavit from Rhonda Mueller ("Mueller Aff."), the former executive assistant to Miller, and then Keith Norder ("Norder"), who took over as Chief Financial Officer following Miller in November 2001, which explains the discovery of CHEP 00795 and the efforts to locate the other documents with which it was grouped when discovered.

¹ Buckeye also requested "an electronic (Excel) version of the document; all metadata connected 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." (See Doc. # 112 p. 7.) CHEP explained that the computer-based file was previously produced and the Magistrate Judge did not order CHEP to produce anything else associated with the electronic version of CHEP 00795.

In or around December 2001, when Miller no longer worked at CHEP, and shortly after the commencement of this litigation Rhonda Mueller ("Mueller") was asked to go through files that had been kept in Miller's office at CHEP to determine whether there were any documents relevant to the issues in the instant litigation. (Mueller Aff. at ¶ 3.) As Mueller went through the files, she pulled and set aside those documents that were relevant to the litigation and provided them to CHEP's legal counsel. (Mueller Aff. at ¶ 4.) Among the relevant documents that Mueller set aside was CHEP 00795. (Mueller Aff. at ¶ 5.) CHEP 00795 was found in a stack of documents in Miller's office that was not labeled or organized in any discernible manner. (Mueller Aff. at ¶ 6.) Mueller did not maintain any sort of file consisting of the documents in which CHEP 00795 was found nor did she set aside that stack of documents. (Mueller Aff. at ¶ 7.) Rather, Mueller only pulled and set aside those documents that were relevant to the litigation. (Mueller Aff. at ¶ 7.) Mueller left the documents that were not relevant to the litigation in Miller's office. (Mueller Aff. at ¶ 7.)

The papers from Miller's office were subsequently removed and sent to various persons. (Mueller Aff. at ¶ 8.) Just over a year later, upon request of CHEP's legal counsel, Mueller attempted to locate the other documents that made up the stack of documents in which she found CHEP 00795 but was unable to do so. (Mueller Aff. at ¶ 9.) The papers among which CHEP 00795 was found were not maintained in any manner nor is there any file that exists that could be recognized as the stack of documents in which CHEP 00795 was found. (Mueller Aff. at ¶ 10.) Mueller, along with other CHEP employees, made repeated efforts to locate the stack of documents in which CHEP 00795 was found and was unable to do so. (Mueller Aff. at ¶ 11.) When deposed and presented with the document in question, Miller explained that he did not

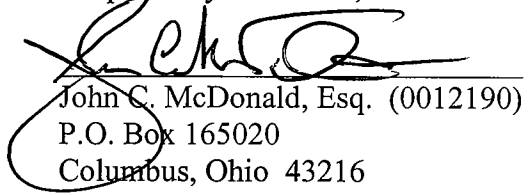
recall ever seeing the document before nor did he even understand some of the analysis contained in the document. (Miller Depo. at 93-98.)

Nearly three years have passed since Mueller found CHEP 00795 in an unmarked pile of papers. Despite repeated attempts, neither Mueller nor anyone else at CHEP has been able to locate that specific stack of documents. In short, the stack of documents in which CHEP 00795 was originally found no longer exists and there is no index or list of the documents that were included in that stack of documents that would allow CHEP to recreate the "old files." Additionally, to the extent any of the documents in that stack were relevant to this litigation, Mueller would have pulled those documents, as she did with CHEP 00795, and they would have already been produced. Because it is impossible for CHEP to produce documents that are impossible to identify and locate, and because an electronic version of the file containing the original document has been produced, CHEP objects to that portion of the Discovery Order obligating CHEP to produce such documents.

C. CONCLUSION

Based on the foregoing, CHEP objects to that portion of the Discovery Order directing CHEP to produce the "original files" in which CHEP 00795 was found. CHEP respectfully requests that the Court set aside that portion of the Discovery Order and find that CHEP has complied with Buckeye's discovery requests pertaining to CHEP 00795.

Respectfully submitted,


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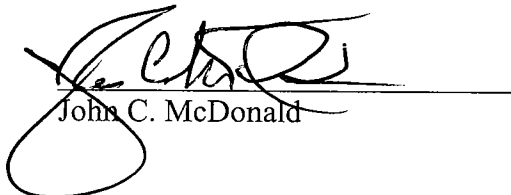
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Defendant CHEP USA's Objections to the Magistrate Judge's Discovery Order Filed September 10, 2004 was served the 20th day of September, 2004, via the Court's electronic filing notification upon:

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