

**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. :

**BUCKEYE DIAMOND LOGISTICS' MEMORANDUM IN OPPOSITION  
TO CHEP USA'S OBJECTIONS TO MAGISTRATE JUDGE'S DISCOVERY  
ORDER**

**I. Introduction**

CHEP USA, after having been ordered twice to produce the original file in which the document title "Benefit of Paying Recyclers for Recovered CHEP Pallets" (CHEP 00795) was found, now claims that it cannot produce the file because not even the minimum degree of care was take to review or preserve the file from which this document came. CHEP's Objections, which contradict its two earlier versions of the source of this document, should be overruled, and CHEP ordered to reconstruct the file from which CHEP 00795 came or be sanctioned by being precluded from disputing at trial that CHEP 00795 was (a) found by CHEP to be an accurate assessment of the benefit CHEP would receive from paying recyclers for the return of pallets; and (b) disregarded and concealed when CHEP began making qualified offers of compensation to recyclers such as Buckeye for returning pallets.

CHEP's attempt to avoid the implications of its own analysis of the benefit of paying recyclers has led to a series of ever changing stories regarding CHEP 00795. On January 13, 2003, Buckeye served a request for admission concerning CHEP 00795:

Admit that the document marked CHEP 00795 (a) is a true and accurate copy of a document regularly prepared in the ordinary course of CHEP USA's business, by an employee of CHEP; (b) contains an analysis of the benefits under various measures of paying recyclers for recovering CHEP pallets; and (c) is accurate in its analysis.

While CHEP admitted that CHEP 00795 was a true and accurate copy of a document it produced and purported to examine the benefit of paying recyclers to return pallets, it denied that the document was a business record of CHEP or that it was accurate in its analysis. On January 30, 2004, CHEP filed its Motion in Limine No. 11, which took its responses to Buckeye request for admission as step further and sought to exclude CHEP 00795 from evidence on the ground that no witnesses had authenticated CHEP 00795 as a business record because they all claimed to have no memory of it. The claim that this document was prepared by some anonymous CHEP associate acting without authority soon, however, showed itself to be a complete deception.

On March 15, 2004, in a conference call with the Court after CHEP represented that it could not locate the author of CHEP 00795, the Court ordered that CHEP's counsel provide an affidavit affirming that the author could not be identified and that CHEP produce the original file in which the document was found. At this point, the claim that the author of CHEP 00795 could not be found began to unwind, and within two weeks CHEP's counsel, rather than providing an affidavit, conceded that the document had been prepared by a CHEP employee – Glen Kolb, who was CHEP's Director of Financial Planning and Analysis – and that the document had even been requested by and set to Roger Miller, CHEP's then CFO, who had denied ever seeing the document in

deposition. Soon thereafter, in the deposition of Glen Kolb, Buckeye learned that Mr. Kolb despite his position, had never been asked to produce responsive documents, and that his original of CHEP 00795 existed on CHEP's computer system throughout the time CHEP was representing to the Court that the document was not a business record and that it could not determine its author.

The games, unfortunately, did not end at this point. Despite the Court's unambiguous order to produce the original file from which CHEP 00795 came, CHEP represented to the Magistrate Judge that: "CHEP has not been 'ordered to produce in Columbus the full original file in which CHEP 00795 was found.' The Court issued no such order." Discover Conference Agenda (Dock. # 105) at 14. CHEP then went on to represent to the Magistrate Judge "[t]here simply is no 'original file' from which the document came, other than the computer-based file which has been produced." Id. The Magistrate Judge, however, after the hearing on discovery issues, saw through CHEP's arguments:

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.

Discovery Order (Dock. # 112) at 7.

Now, having been ordered twice to produce the original files from which CHEP 00795 was taken, CHEP again seeks to dodge its obligations, by offering the affidavit of a former clerical worker whose statement deepens rather than relieves the concern that CHEP has not met its most basic discovery obligations. In fact, the affidavit of Rhonda Mueller both contradicts past representations of CHEP concerning the location of these documents and demonstrates that CHEP, at best recklessly and in disregard of its

obligation to preserve potentially responsive documents, failed to preserve potentially relevant documents. Specifically, Ms. Mueller in her affidavit states:

1. She located CHEP 00795 and other documents she though relevant to the litigation, and forwarded them to CHEP’s counsel – neither company executives nor CHEP’s counsel took any steps to assure that Ms. Mueller, a clerical new to the company, did a complete review, even when she turned over to them clearly responsive documents. Mueller aff. ¶¶ 5-6.

2. Contrary to CHEP’s statement to the Magistrate Judge that “[t]here simply is no ‘original file’ from which the document came,” CHEP 00795 actually came from an unlabeled file. Id. ¶ 5.

3. Ms. Mueller was permitted, notwithstanding having found a document entitled “Benefit of Paying Recyclers for Recovered CHEP Pallets” in the files she was reviewing (as well as other unidentified responsive documents) to sort the documents from the original file into other folders, with no instruction to note the content of the original file, let alone review by legal counsel to assure that a complete production had been made. Id. ¶ 7.

Thus, rather than serve as any excuse for CHEP failure to produce the file that CHEP 00795 was found in, Ms. Mueller’s affidavit only heightens the concern that has evolved concerning CHEP’s handling of discovery obligations in this case. The affidavit makes plain that counsel abdicated assuring compliance with discovery obligations to a clerical, whose work was neither checked nor overseen even when she found a document as obviously germane to this litigation as the one entitled “Benefit of Paying Recyclers for Recovered CHEP Pallets.” Indeed, the procedure followed by CHEP stands in stark

contrast to the procedure the Court in Braska v. Anheuser-Busch Company, Inc., 164 F.R.D. 448, 461 (S.D. Ohio 1995) described as a basic expectation for counsel:

The Court expects that any trial attorney appearing as counsel of record in this Court who receives a request for production of documents in a case such as this will formulate a plan of action which will ensure full and fair compliance with the request. Such a plan would include communicating with the client to identify the persons having responsibility for the matters which are the subject of the discovery request and all employees likely to have been the authors, recipients or custodians of documents falling within the request. The plan should ensure that all such individuals are contacted and interviewed regarding their knowledge of the existence of any documents covered by the discovery request, and should include steps to ensure that all documents within their knowledge are retrieved. All documents received from the client should be reviewed by counsel to see whether they indicate the existence of other documents not retrieved or the existence of other individuals who might have documents, and there should be appropriate follow up. Of course, the details of an appropriate document search will vary, depending upon the circumstances of the particular case, but in the abstract the Court believes these basic procedures should be employed by any careful and conscientious lawyer in every case.

At a minimum, the file that CHEP 00795 was found it should have immediately been order preserved and review by someone with more knowledge of the case than a clerical should have been done of the file.

If the affidavit of Ms. Mueller is true, and CHEP's own actions have prevented the file in which CHEP 00795 from being produced, sanctions against CHEP are the only means of undoing the harm to the truth-seeking process caused by CHEP. CHEP has repeatedly tried to hide CHEP 00795 from the jury – first by an answer to a request for admission and a motion in limine that both denied CHEP 00795 was a business record despite the fact that when CHEP finally met its original duty to investigate the source of the document, it was clear it was; second, by failing until long after the original discovery cut-off was passed, to conduct a diligent search for other documents showing the context and credibility given CHEP 00795 when it was produced; and third, as now has been

revealed, by failing to take even the most basic steps to assure that the original file in which this important document was found, was preserve for review.

In short, CHEP's conduct, not the Magistrate Judge's order, is what is objectionable. CHEP has repeatedly sought to stymie Buckeye in using CHEP's own analysis to show the benefit CHEP receives when recyclers return pallets to it. The Court should tolerate such conduct no more. CHEP should be ordered to reconstruct the file from which CHEP 00795 came or be sanctioned by being precluded from disputing at trial that CHEP 00795 was (a) found by CHEP to be an accurate assessment of the benefit CHEP would receive from paying recyclers for the return of pallets; and (b) disregarded and concealed when CHEP began making qualified offers of compensation to recyclers such as Buckeye for returning pallets.

s/ James A. Wilson

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of this Memorandum was served on October 3, 2004, by electronic delivery or facsimile upon:

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s/ James A. Wilson  
James A. Wilson