

**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. :	:	

**BUCKEYE DIAMOND LOGISTICS' REPLY MEMORDANUM IN SUPPORT OF
SECOND MOTION TO ENFORCE DISCOVERY ORDER (WITH RESPECT TO
PRODUCTION OF UTILIZATION RATE AND REVENUE INFORMATION)**

Following what has now become a pattern, CHEP USA, rather than explaining the shortcomings of its response to the Discovery Order, attacks the competence of Buckeye's counsel. Such attacks, however, cannot obscure the fact that CHEP has not produced what it was ordered to produce. CHEP, notwithstanding its attacks, cannot dispute that Buckeye has not been provided with the following categories of responsive document:

1. Data showing separately CHEP's total holdings of block and string pallets in the period from February 2003 to present
2. Data showing separately (a) CHEP's total holdings of block and string pallets and (b) block and string pallets available for use in the period from January 1999 to January 2003

3. All CHEP month reports from January 1999 forward, including all reports referenced by Mr. Potts in his deposition at pages at 44-50 and 88-90 (attached at Appendices G and H); and

4. All weekly or monthly reports from January 1999 forward that report on CHEP's average revenue per pallet on a daily, weekly or monthly basis and show the variable expenses incurred in earning such income.

Incredibly, notwithstanding their failure to object to the Magistrate Judge's order regarding the production of utilization and revenue documents, they now seek to revisit that issue. The time, however, is past for such debates.¹ CHEP has an order of the Court to produce this information which it is ignoring.

CHEP's repeated claim that Buckeye is avoiding trial does not mesh with its insubordinate refusal to comply with the Discovery Order. Perhaps CHEP believes that in the Court's desire to bring this case to completion, CHEP can dodge the Discovery Order. The Court should not allow such conduct. CHEP's assertion that Buckeye is seeking to enforce the discovery order to avoid trial is absurd. The same disputes that

¹ Buckeye set forth at length in its portion of Discovery Conference Agenda the relevance:

A major portion of CHEP's damage claim seeks CHEP's cost of capital for pallets it claims it had to buy to replace the ones that Buckeye possessed. Revenue rates are relevant to determine if CHEP is simply seeking to circumvent the fact that the revenue it could have gotten from these pallets is less than its claimed damages for supposed cost of capital and depreciation. Further, these requests are relevant to whether CHEP in fact incurred additional capital costs to replace pallets held by Buckeye. For example, the testimony and discovery responses indicate that "stringer" pallets were being taken out of circulation by CHEP when Buckeye had them. Information showing low utilization rates for stringer pallets (by CHEP's estimate 35% of the pallets recovered from Buckeye) would completely undercut CHEP's claim that it expended capital to replace such pallets. Likewise, evidence of less than 100% utilization rates for other pallets would completely undercut CHEP's claim that it had to replace the pallets Buckeye held to fill customer orders. Elton Potts, a senior CHEP executive, has admitted that CHEP's utilization rate information could be produced without substantial burden. Potts dep. at 88-90.

CHEP does not respond to these arguments in its Opposition.

delay trial in May – CHEP’s refusal to produce dwell time, utilization and revenue information and the original file its study of the benefit of paying recyclers to return pallets came from – are the ones now presented. CHEP, not Buckeye, is the one blocking trial. Buckeye, not CHEP, sought this trial date. Buckeye is ready, willing and able to go to trial as soon as CHEP produces what it was ordered to produce and gives Buckeye adequate opportunity to review those documents. Buckeye urges the Court to craft a remedy to issue this happens.

s/James A. Wilson
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Motion was served on
October 5, 2004, by electronic delivery and regular mail upon:

John C. McDonald
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s/James A. Wilson

James A. Wilson