

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' AND SAM MCADOW'S MOTION FOR PROTECTIVE ORDER, TO QUASH SUBPOENA AND FOR ORDER IN LIMINE

Buckeye Diamond Logistics and Sam McAdow respectfully move for a protective order with respect to the subpoena issued by CHEP USA (attached at Appendix A) and directed toward Sam McAdow on October 8, 2004, and to quash this subpoena. Buckeye further moves for an order in limine barring CHEP from raising this improper, belated and overbroad subpoena in the presence of the jury at trial. A memorandum in support is submitted herewith.

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MEMORANUDM IN SUPPORT

I. Introduction

Four business days before trial, on Friday, October 8, 2004, at approximately 4:00 p.m., CHEP USA served a subpoena (attached at Appendix A) on Sam McAdow, an officer and employee of Buckeye, seeking three broad categories of documents:

1. All books, records, ledgers, or other documents reflecting or containing calculations pertaining to transportation charges with respect to pallets (either on an aggregate or single pallet basis) created since January 1, 2003.
2. All books, records, ledgers, or other documents reflecting or containing calculations pertaining to labor charges with respect to pallets (either on an aggregate or single pallet basis) created since January 1, 2003.
3. All books, records, ledgers, or other documents reflecting or containing calculations pertaining to storage charges with respect to pallets (either on an aggregate or single pallet basis) created since January 1, 2003.

While directed to Sam McAdow, the subpoena apparently seeks documents, books and records from Buckeye, rather than from Mr. McAdow personally.

Buckeye and Mr. McAdow should be protected against this subpoena for numerous reasons: First, it is directed to Mr. McAdow personally, in an improper attempt to circumvent the rules barring the use of subpoenas to gain discovery from an opposing party; second, it is an improper attempt to divert Buckeye from its trial preparation in the four business days preceding trial in order to give CHEP discovery it failed to seek at the appropriate time; third, it seeks discovery on subjects the Court has found irrelevant to the claims that remain to be tried in this case; and, fourth, its scope is

grossly overbroad and harassing. The Court should therefore issue an order protecting Buckeye and Mr. McAdow from CHEP's abusive subpoena, quash the subpoena and enter an order in limine barring CHEP from raising this subpoena before the jury.

II. Argument

A. Legal Standards

Fed. R. Civ. P. 45(c)(3)(A) provides in part:

On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(iv) subjects a person to undue burden.

Rule 34(c) limits the use of subpoenas duces tecum to parties:

A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 45.

The scope of documents discoverable under Rule 34 is, of course, limited by the provisions of Rule 26(b)(1): "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party...."

As shown below, CHEP's subpoena to Mr. McAdow violates these provisions in that it (1) although directed to Mr. McAdow, it seeks the documents of Buckeye, a party to this case; (2) was served long after the discovery cut-off; (3) seeks documents this Court's previous decisions have held are irrelevant to the claims and defenses in this case; and (4) places an undue burden on Buckeye and Mr. McAdow without allowing a reasonable time for compliance.

B. The Subpoena Is Directed to the Wrong Person because It Cannot Be Properly Served on Buckeye

CHEP subpoena is addressed to Sam McAdow, at his home address, but seeks documents from the business operation of Buckeye. Mr. McAdow does not personally maintain, keep or control records of Buckeye's charges for transportation, labor or storage. His only access to those records is by reason of his status as an officer and employee of Buckeye, not because they are in his possession, custody or control.

CHEP's seeking Buckeye documents from Mr. McAdow is a transparent attempt to avoid the limitations of Fed. R. Civ. P. 34(c), which courts have found limits the use of a document subpoena to a non-party. For example, in Hasbro, Inc. v. Serafino, 168 F.R.D. 99, 100 (D.Mass.1996), the court held that Rule 45 subpoenas are only applicable to non-parties, and that documents sought from parties must be requested pursuant to Rule 34. In support of this position, the Hasbro court stated as follows:

Rule 34, which unquestionably applies only to parties, illuminates the scope of Rule 45 when it directs that "a person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 45."

168 F.R.D. at 100 (quoting Fed. R. Civ. P. 34(c)); see also Smith v. Pendergrass, 2003 WL 21919182, *3 (N.D. Ind. Jun 17, 2003) (copy attached at Appendix B); Alper v. United States, 190 F.R.D. 281, 283 (D.Mass.2000) (stating that "while the language of Rule 45 ... may ... not be crystal clear, it is apparent ... that discovery of documents from a party, as distinct from a non-party, is not accomplished pursuant to Rule 45") (quoting Hasbro, 168 F.R.D. at 100).

CHEP should not be permitted to circumvent the limitations on discovery through an 11th hour subpoena duces tecum by directing the subpoena to Mr. McAdow rather than Buckeye. Rather, the subpoena should be quashed.

C. **The Subpoena Is an Improper and Belated Attempt to Gain Discovery after the Court's Cut-Off**

The cut-off for CHEP to seek discovery in this case passed in January 2003. The Court subsequently has allowed Buckeye discovery on CHEP's belated damage disclosure, but the deadline even for that discovery passed on September 1, 2004. CHEP's subpoena seeks information – all of Buckeye's documents and records showing charges for transportation, labor and storage of pallets – not sought in any of CHEP's four Requests for Production of Documents in this case.

Courts have repeatedly held that a Rule 45 subpoena seeking documents constitutes discovery, subject to the Court's discovery cut-offs. See, e.g., Dreyer v. GACS, Inc., 204 F.R.D. 120, 122 (N.D. Ind.2001) (noting that “[m]ost courts hold that a subpoena seeking documents from a third-party under Rule 45(a)(1)(C) is a discovery device and therefore subject to a scheduling order’s general discovery deadlines”); Integra Lifesciences I, Ltd. v. Merck, 190 F.R.D. 556, 561 (S.D. Cal.1999) (observing that “[c]ase law establishes that subpoenas under Rule 45 are discovery, and must be utilized within the time period permitted for discovery in a case”); Marvin Lumber and Cedar Co. v. PPG Indus., Inc., 177 F.R.D. 443, 443-44 (D.Minn.1997) (holding that subpoenas duces tecum meet the definition of discovery contained in Rule 26(a)(5), and that they are therefore “subject to the same time constraints that apply to all of the other methods of formal discovery”); Rice v. United States, 164 F.R.D. 556, 557 (N.D. Okla. 1995) (“Rule 45 subpoenas duces tecum ... constitute discovery.”); McNerney v. Archer Daniels Midland Co., 164 F.R.D. 584, 588 (W.D.N.Y.1995) (“[W]hen a plaintiff ... is aware of the existence of documents before the discovery cutoff date and issues

discovery requests including subpoenas after the discovery deadline has passed, then the subpoenas and discovery requests should be denied.”). CHEP can offer no excuse for seeking discovery just four business days before the beginning of trial in this case. The Court should issue an order protecting Buckeye against such discover and quash the subpoena.

D. The Subpoena Seeks Discovery Irrelevant to the Claims in this Case

In addition to being misdirected and untimely, CHEP’s subpoena is also inconsistent with the determinations this Court has already made concerning the remaining scope of the claims and defenses in this case. The mass of documents and records CHEP seeks has no relevance to either Buckeye’s unjust enrichment claim or CHEP’s conversion counterclaim. Buckeye’s transportation, labor and storage charges are irrelevant to each of the element of Buckeye’s unjust enrichment claim (i.e., proof that (1) Buckeye conferred a benefit upon CHEP, (2) that CHEP knew of the benefit, and (3) that CHEP would be unjustly enriched to retain the benefit without compensating Buckeye). Nor do Buckeye’s transportation, labor and storage charges have any relevance to the measure of damages (i.e., the benefit to CHEP) for Buckeye’s unjust enrichment claim. While CHEP has repeatedly claimed that the measure of damages on the unjust enrichment claim should be the cost to Buckeye of providing involuntary service to CHEP, this Court has rejected that argument:

As Plaintiff argues, the measure of damages it can recover on its unjust enrichment claim is the value of the benefit its actions with regard to Defendant’s pallets have conferred upon the Defendant, rather than the amount it would have cost Defendant to do what Plaintiff has done on its property, assuming for sake of argument that Defendant could have lawfully gained access to that property. U.S. Health Practices, Inc. v.

Byron Blake, M.D., Inc., 2001 WL 277291 (Ohio App. 2001). Accord, Thoms v. Thayer, 1998 WL 65514 (Ohio App. 1998); Hartley v. Dayton Computer Supply, 106 F. Supp.2d 976 (S.D. Ohio 1999).

Decision and Entry dated September 8, 2004 (Docket # 111) at 6. Likewise, Buckeye's transportation, labor and storage charges have no pertinence to the elements of CHEP's counterclaim for conversion. Thus, in addition to the subpoena's defects in avoiding the limits of Fed. R. Civ. P. 34(c) and the Court's discovery cut-off, the subpoena seeks documents that the Court has already found irrelevant to the issues remaining in this case, and should therefore be quashed as exceeding the limits of relevant discovery in this case.

E. The Subpoena Is Burdensome and Overbroad, and Allows Inadequate Time for Response

As noted above, Fed. R. Civ. P. 45(c)(3)(A) specifically authorizes the Court to grant relief where inadequate time for compliance is given or the request for production is unreasonably burdensome. A subpoena issued at the end of the day four business days before trial for a huge number of documents that had never been sought in discovery, by definition, cannot be said to give adequate time for compliance. More importantly, document requests that seek each and every document or record Buckeye has produced for the last 22 months regarding its charges for transportation, labor and storage relating to pallets. A huge portion of Buckeye's business involves the transportation, repair, handling and storage of pallets. CHEP's requests would call for every invoice that in any way reflects such charges, as well as for huge portions of Buckeye's sales reports. The requests would require Buckeye to produce such information for all pallets – not just CHEP pallets or even just 48x40 pallets. Simply put, compliance with CHEP's request would effectively require Buckeye to collect and produce the majority of the records it

has create related to its pallet manufacture, recycling and other businesses, as well as its records as a common carrier. Putting aside its untimeliness, CHEP's request is incapable of response without incredible burden to Buckeye. Buckeye should be protected from such discovery.

F. The Court Should Issue an Order in Limine Barring CHEP from Raising the Subpoena at Trial

Finally, CHEP should be barred from raising this subpoena – which is improper for the numerous reasons set forth above – in either argument or in its examination of Mr. McAdow. Mention of this subpoena can only confuse and prejudice the jury, and lead to extraneous explanation as to its impropriety.

III. Conclusion

For the foregoing reasons, the Court should (1) enter a protective order barring CHEP from seeking the discovery sought in its subpoena to Sam McAdow issued October 8, 2004; (2) quash the subpoena; and (3) enter an order in limine barring CHEP from mentioning the subpoena in argument or the examination of witnesses at trial.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Motion was served on
October 12, 2004, by electronic delivery upon:

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s/James A. Wilson
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