

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

BUCKEYE DIAMOND LOGISTICS, INC., :
Plaintiff, :
vs. : Case No. 3:01cv440
CHEP USA, INC., : JUDGE WALTER HERBERT RICE
Defendant. :

ENTRY RESOLVING DISCOVERY DISPUTES; PLAINTIFF'S FIRST AND SECOND MOTIONS TO ENFORCE DISCOVERY ORDER (DOCS. ##133 AND 150) OVERRULED AS MOOT; PLAINTIFF'S MOTION TO COMPEL COMPLIANCE WITH DISCOVERY ORDER AND FOR COSTS (DOC. #161) OVERRULED IN PART AND OVERRULED, AS MOOT, IN PART; CONFERENCE CALL SET FOR OCTOBER 29, 2004, CANCELLED; FURTHER PROCEDURES SET

This litigation is before the Court on an ongoing discovery dispute between the parties, arising out of Plaintiff's efforts to obtain information from the Defendant which the former indicates is necessary to counter the latter's damages computation for its Counterclaim. Although this dispute was ostensibly resolved by the Discovery Order which was entered by Magistrate Judge Sharon Ovington (Doc. #112), it reappeared before this Court as Plaintiff's First and Second Motions to Enforce [the Magistrate Judge's] Discovery Order (Docs. ##133 and 150). In its motions, Plaintiff argued that the Defendant had failed to provide the information

pertaining to dwell time, pallet utilization rates and pallet revenues, as had been ordered by Judge Ovington. During the telephone conference which was conducted with counsel on October 13, 2004, the Court indicated that it was not able to determine whether the Plaintiff had been provided all the information Judge Ovington had ordered. Rather, in order to resolve the dispute, the Court directed Plaintiff to redepose Elton Potts ("Potts"), an executive of Defendant. Plaintiff has taken that deposition and has filed its Motion to Compel Compliance with Discovery Order and for Costs (Doc. #161), to bring the dispute before the Court once again.¹

Herein, the Court resolves this particular discovery dispute with finality. So that there will be no question about what is meant by finality, the Court will briefly explain the concept. Should the Plaintiff once again come to the Court alleging that the Defendant has failed to furnish some of the information which it has been ordered to produce and if the Court agrees with the Plaintiff that the Defendant has withheld such information, the Court will not order further production. Rather, it will strike the Defendant's counterclaim, rendering any discovery dispute over the Defendant's failure to provide such information moot. On the other hand, if, after Plaintiff brings the dispute before the Court again, the Court should conclude that the Plaintiff has been given all the information Defendant has been ordered to provide, the Court will enter a default on Defendant's Counterclaim against Plaintiff

¹Since the deposition of Potts and Plaintiff's Motion to Compel Compliance with Discovery Order and for Costs (Doc. #161) have superseded its First and Second Motions to Enforce Discovery Order (Docs. ##133 and 150), the Court overrules the latter two motions, as moot.

and prohibit the latter from introducing evidence on the question of the damages Defendant is entitled to recover on its Counterclaim.

In their recently filed memoranda (Docs. ##161-163), counsel for each party continues his attacks on his opponent. In essence, Plaintiff's counsel contends that his opponent is a slash and burn litigator who plays "hide the ball." Defendant's counsel essentially asserts that his opponent is a dullard, who cannot understand the discovery materials which have previously been provided. This Court is most decidedly not impressed with ad hominem attacks by counsel. Moreover, in resolving this ongoing discovery dispute, the Court will not address those attacks further herein or, for that matter, tolerate any further such during the course of this litigation.

In its most recently filed motion, the Plaintiff requests that the Court order the Defendant to produce five categories of information. See Doc. #161. The Defendant has agreed to produce one category of that information, the second such requested by the Plaintiff. Accordingly, the Court overrules, as moot, the Plaintiff's Motion to Compel Compliance with Discovery Order and for Costs (Doc. #161), as it relates to the second category of information requested therein.

With respect to the other categories of information, the Plaintiff asserts that it previously requested same and that Judge Ovington ordered its production. In response, Defendant argues, inter alia, that the Plaintiff did not previously ask it to produce that information and that, therefore, such information was not the subject of Judge Ovington's Order.² The Court will not resolve the question of which party

²The Court rejects two other arguments of Defendant, predicated upon the Rules of Civil Procedure. First, Defendant contends that, in accordance with Rule 34, the Court cannot order it to prepare documents which do not exist so that it can

is to blame for this impasse. Rather, in ruling upon this discovery dispute, the Court will focus upon the question of whether the requested information is available.³ Simply stated, Potts' recent deposition demonstrates that such information is available. See Potts October 14, 2004 Dep. at 4-6, 13, 15-18, 23-25, 33-34, 40-41 and 46-53. Accordingly, the Court orders Defendant to produce the following information as soon as possible:⁴

provide them to Plaintiff. Without commenting upon that argument, the Court notes that Rule 34(a) defines "document" to include "other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form." Although Defendant may be required translate information in its data bases into usable form (rather than the Court ordering Defendant to produce those data bases in toto), such is permitted by Rule 34.

Second, the Defendant argues that it should not be required to furnish some of the requested information, since Plaintiff can derive it from the business records it has previously produced. Under Rule 33(d), the party answering interrogatories may provide its business records and require the other parties to ascertain the requested information therefrom, as long as "the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served." Herein, for the reasons set forth in Plaintiff's Reply Memorandum (see Doc. #163 at 9-10), the Court concludes that the burden upon Plaintiff would not be substantially the same as that upon the Defendant; rather, it would be substantially greater.

³Parenthetically, the Defendant argues that requested information concerning dwell time is not relevant, since this Court has concluded that it was relevant to Plaintiff's unjust enrichment claim. See Doc. #163 at 7-8 (citing Doc. #112 at 5). Although the Court so indicated in ruling upon one of the Defendant's many Motions in Limine, it did not remotely suggest that the information was not also relevant to the amount of damages Defendant can recover on its Counterclaim. On the contrary, information tending to establish that Defendant's pallets typically spend more time in the possession of non-participating distributors than they have in Plaintiff's possession could convince the finder of fact that the Defendant was not harmed by the Plaintiff's conversion of those pallets, since it could tend to show that Plaintiff's conversion of Defendant's pallets did not cause the latter to suffer harm or harm to the extent claimed by Defendant.

⁴The need for Defendant to produce the material as quickly as possible cannot be over-emphasized, since the Court presumes that Plaintiff's counsel will not be able

1. A month-by-month, non-participating distributor ("NPD")-by-NPD, spreadsheet containing a calculation, as suggested by Potts during his recent deposition (Potts Dep. at 40-41), of dwell time starting with the beginning inventory and then on a monthly basis, analyzing both transfers in and balance at end of month, in order to determine the average amount of time Defendant's pallets stay at each NPD.
2. A print-out of total holdings of pallets segregated by block and stringer types of pallets, from February, 2003, back to August, 2001, to be computed from Defendant's fixed asset ledger SAP system. For earlier dates back to 1999, a print-out of the same data from its previous computer system. In addition, Defendant's daily or weekly spreadsheets showing how many pallets, broken down between block and stringers, were available to put into the field for as far back such spreadsheets existed and, for any periods for which such documents do not exist, an affidavit explaining why the documents were destroyed and a certification that the data does not exist from any other source.
3. For the last two years, the reports of key performance indicators, and, for times prior to that back to January 1999, the management reports containing similar information regarding pallet utilization.
4. Samples of the various monthly reports regarding pallet revenue, including those showing the expenses Defendant incurs in earning such revenue, and an indication of the dates each such type of report was created for, to allow Plaintiff to determine which of such reports it wants full sets of.

If the Plaintiff decides that it needs full sets of some of the reports referenced in Number 4, it must so inform Defendant within one week of the receipt of the reports Defendant must produce in accordance therewith.

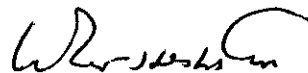
Given that the Court has ordered the Defendant to produce the four categories of information for reasons different than that urged by Plaintiff, it overrules, as moot, Plaintiff's Motion to Compel Compliance with Discovery Order and for Costs (Doc. #161), as it relates to those categories. In addition, since it

to determine whether the services of an expert witness will be needed until after that information has been both received and reviewed.

has resolved the pending discovery dispute without addressing the parties' contentions concerning fault, it overrules, as moot, Plaintiff's Motion to Compel Compliance with Discovery Order and for Costs (Doc. #161), as it relates to Plaintiff's request that the Court require Defendant, as a sanction, to pay the cost of the court reporter and transcription for Potts' most recent deposition. Simply stated, it would be inappropriate to impose a sanction on the Defendant without concluding that it caused this discovery dispute.

The Court cancels the telephone conference call, previously scheduled for Friday, October 29, 2004. The purpose of that call was to allow the Court and counsel to select a new trial date and to discuss what must be accomplished before that trial can occur. That discussion will be more fruitful after the Plaintiff has received the information ordered produced herein. Defendant's counsel will advise the Court when that information has been produced. The Court will then schedule a telephone conference call 7-10 days thereafter, thus affording Plaintiff's counsel the opportunity of reviewing those materials and deciding whether an expert witness will be required. During that conference call, the Court and counsel will select a trial date, which will be not only as soon as possible, but also realistic.

October 28, 2004



WALTER HERBERT RICE, JUDGE
UNITED STATES DISTRICT COURT

Copies to:

Counsel of record.