

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

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.	:	

**BENCH BRIEF OF DEFENDANT CHEP USA REGARDING THE "BUSINESS
RECORDS" EXCEPTION TO THE HEARSAY RULE**

I. INTRODUCTION

CHEP anticipates that issues regarding the applicability of the "business records" exception to the hearsay rule as it pertains to certain of Plaintiff's exhibits will arise during trial. Therefore, CHEP submits this bench brief setting forth relevant law from this Court explaining the application and scope of the business records exceptions.

II. LAW

A. Federal Rules of Evidence 801(c), 802 and 803(6)

Fed. R. Evid. 801(c) defines "hearsay" as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 802 states:

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Fed. R. Evid. 803 sets forth those instances in which evidence that would otherwise amount to hearsay and may be admissible. In particular, Fed. R. Evid. 803(6), also known as the "business records" exception, states the following:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(Emphasis added). Thus, by its express language, the exception applies only to those documents kept in the course of "regularly conducted" activity.

B. Case Law Regarding the Business Records Exception

In U.S. v. Atlas Lederer Co., 282 F. Supp. 2d 687 (S.D. Ohio 2001), this Court, citing binding Sixth Circuit case law, set forth the requirements for a business record to be admissible and explained that:

The Sixth Circuit has recognized that "for a business record to be admissible under Rule 803(6), Federal Rules of Evidence, the record must satisfy four requirements: (1) it must have been made in the ordinary course of a regularly conducted business activity; (2) it must have been kept in the regular course of that business; (3) the regular practice of that business must have been to have made the memorandum; and (4) the memorandum must have been made by a person with knowledge of the transaction or from information transmitted by a person with knowledge."

Id. at 696 (quoting Redken Laboratories, Inc. v. Levin, 843 F.2d 226, 229 (6th Cir.1988)) (emphasis added).

Additionally, in Griggs v. Allstate Ins. Co., S.D. Ohio Case No. C-3-96-48, 1997 WL 1764777 (S.D. Ohio Sept. 15, 1997), this Court was asked to rule upon the defendant's motion to strike certain evidence attached to the plaintiff's motion for summary judgment as inadmissible hearsay. In response, the plaintiff argued that the challenged exhibits were admissible under the business records exception. One exhibit in particular contained a list of items that were damaged in a fire. The list also included the value of the items as determined by their owner. This Court explained that although the list itself was not hearsay because the author of the list had personal knowledge of the items that were damaged, the portion of the list that set forth the value of the items was hearsay because they were an out of court statement by the owner of the items that was being offered for the truth of the matter asserted. In rejecting the plaintiff's claim that the list was admissible under the business records exception, this Court explained:

The valuation list is not admissible as a business record. Fed. R. Evid. 803(6) provides that "records of regularly conducted activity" are admissible despite being hearsay and even though the declarant may be available. The compilation of this list, however, was not made "in the course of a regularly conducted business activity." It was, rather, a one-time occurrence. Accordingly, it falls outside the purview of this Rule.

Id. at n.6 (emphasis added). Therefore, as this Court held, a document created as a one-time occurrence does not constitute a regularly conducted business activity and, consequently, does not satisfy the requirements of the business records exception.

III. CONCLUSION

As the foregoing demonstrates, the business records exception to the hearsay rule does not apply to any and all documents that are created in the course of business. Rather, the document must be created in the course of a regularly conducted business activity. As this Court previously held, a document created as a "one-time occurrence" does not satisfy the "regularly conducted business activity" requirement of the rule. Moreover, it must be the regular practice

of the business to create the document in question. If evidence that constitutes hearsay does not meet these requirements, it must be excluded.

Respectfully submitted,

s/ John C. McDonald

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