

**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. :	:	

**PLAINTIFF’S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF
MOTIONS IN LIMINE REGARDING CHEP USA’S FAILURE
TO MAKE TIMELY DAMAGE DISCLOSURES**

I. Introduction

Buckeye Diamond Logistics (“Buckeye”) hereby submits this supplemental memorandum in support of its Motion in Limine filed February 2, 2004 (Docket # 77) regarding CHEP USA’s failure to make timely disclosure of its damage claims and evidence, in order to demonstrate the prejudice of actions taken by CHEP since the filing of Buckeye’s motion. Two days after the filing of Buckeye’s Motion, on the day the Final Pretrial Order was filed by the parties, CHEP tacitly acknowledged that it had made no previous disclosure of damages are required by Fed. R. Civ. P. 26(a)(1)(C) or 26(e)(1), and then went on to notify Buckeye for the first time that it was seeking more than \$159,000 in damages on its counterclaims in this case. See Letter from John McDonald to James Wilson dated February 4, 2004 (copy attached at Tab A). Specifically, CHEP at the eleventh hour has disclosed that it is seeking \$33,995 “depreciation” in the pallets held by Buckeye, \$39,936 for reconditioning of pallets held

by Buckeye, \$48,444 for the “cost of capital” supposedly incurred as the result of Buckeye’s actions and \$37,482 in damages for pallets Buckeye returned to CHEP’s customers for an agreed upon fee. See Summary of Damages (included in attachment A).

On February 9, 2004, CHEP produced 50 pages of documents and calculations supposedly supporting this damage claim. See Letter from Vicki Seckel to James Wilson dated February 9, 2004 (copy included in Tab A). All of these documents were marked “outside attorney’s eyes only,” thereby precluding Buckeye’s attorney from even sharing them with his client.

The events since Buckeye filed its Motion in Limine reinforce that CHEP’s damage disclosure is (1) untimely; (2) not excused by any action of Buckeye; and (3) prejudicial to Buckeye. CHEP’s claim for damages on its counterclaim should therefore be stricken. Unless this claim is stricken, Buckeye cannot fairly defend CHEP’s damage claim at trial next week.

II. Argument

A. CHEP’s Disclosure Is Untimely

Buckeye’s Motion in Limine demonstrates that CHEP failed to make timely disclosure of its calculation of damages in this case. Indeed, CHEP’s letter of February 4th tacitly concedes that fact. Moreover, the Court’s entry setting the current trial date noted that the date for damage disclosure had “expired.” Entry of Continuance dated December 12, 2003 (Docket # 70).

Further, in December 2002, the Court in extending the discovery cut-off expressly rejected a request by CHEP to extend the date for supplementing witness disclosures.

Entry Amending Scheduling Order dated December 30, 2002 (Docket # 21) at p. 2.

Notwithstanding that fact, CHEP has now added testimony concerning damages to the subjects upon which Elton Potts will testify, and in its witness list attached to the proposed Final Pretrial Order has added Derek Smith as a witness.

CHEP did not ask for leave to supplement its damage disclosure or add to its witness list either at the conference setting the current trial date nor upon receipt of the Court's Entry, notwithstanding the fact that as of those dates (1) Buckeye had already advised the Court and CHEP, in the proposed Final Pretrial Order submitted in April 2003, of its position that CHEP had failed to make any damage disclosure on its counterclaim; and (2) Buckeye had already advised CHEP that it was free to retrieve pallets from its property, and CHEP had retrieve most or all of those pallets. In short, CHEP has never sought leave of the Court to supplement its damage disclosure beyond the deadlines set by the Court. Instead, it has repeatedly ignored the Court's deadlines and waited until just 12 business days before trial to disclose a \$159,000 claim for damages.

B. CHEP's Untimely Damage Disclosure Is Not Excused by Any Action on the Part of Buckeye or Any Intervening Events Since the Close of Discovery

There is no reason that each of the elements of CHEP's damage claim could not have been disclosed in accordance with the Court's deadlines, or at least prior to the discovery cut-off in this case. CHEP's new damage disclosure has four elements: (1) depreciation loss on pallets held by Buckeye; (2) restoration costs for pallets held by Buckeye; (3) cost of capital for replacement pallets supposedly acquired by CHEP because of Buckeye's actions; and (4) damages for pallets Buckeye returned to CHEP's

customers for an agreed upon fee. All of these components of damages were identifiable by CHEP on its conversion claim from the beginning of this case. Plainly, CHEP was capable of calculating and disclosing purported depreciation loss and cost of capital at any time during this case. Likewise, it learned early in this case that Buckeye had charged an agreed-upon fee for returning pallets bearing the CHEP logo to certain mutual customers and could have disclosed this as an element of a damages claim. Finally, although perhaps not as apparently, CHEP had full opportunity to develop its claim for reconditioning pallets received from Buckeye prior to the supplementation date for damage disclosures. CHEP in discovery took advantage of its right under the rules to inspect the pallets held by Buckeye in January 2003. It could have done so even earlier. Moreover, during the course of this inspection, it could have determined what the reconditioning costs for such pallets should be and the exact number held by Buckeye. CHEP, however, did none of these things, instead choosing to lay in wait until 12 business days before trial to make these disclosures.

CHEP will likely argue that its delay is somehow excused by the fact that Buckeye allowed CHEP to pick up the pallets in August 2003 after the Court's ruling on the parties' summary judgment motions. This is a red herring. First, CHEP had made no damage disclosure at all prior to Buckeye's return of the pallets – this is not a case of Buckeye's actions requiring a change to a damage disclosure already made. Second, Buckeye's return of the pallets does not change the fact that CHEP's damage claim has always been on its conversion action, not the replevin action that Buckeye's return of the pallets mooted. CHEP's claim for replevin was moot due to CHEP's failure at any time to seek possession of the pallets through the statute's procedures. See America Rents v.

Crawley, 77 Ohio App.3d 801, 803-04 (Franklin County 1991) (“Chapter 2737, in clear and unambiguous language, states that replevin is a prejudgment remedy that is available only if specific procedures are followed.”). Finally, even if the return of the pallets would have entitled CHEP to supplement its damage disclosures, the time for doing that (and for seeking the Court’s leave to do so) was in September or October 2003, not 12 business days before trial.¹

C. CHEP’s Untimely Damage Disclosure Is Prejudicial to Buckeye

The prejudice to Buckeye of a \$159,000 damage disclosure is manifest: Buckeye is forced either to go to trial with out discovery or the opportunity to identify its own witnesses to defend against this damage claim or it must forego the second setting of the trial date in the case and yet further delay resolution of its own claims.² The discovery and additional witnesses Buckeye would have sought, and will need to seek are not minor or something that could be accomplished in the few days between CHEP’s disclosure and the trial date. Specifically, but not exhaustively, Buckeye would need at least the following areas of discovery to contest fully and fairly CHEP belated disclosure:

1. As to the claim for depreciation: Buckeye would need full document discovery on CHEP methods and calculations of depreciation, whether any or all of the pallets in Buckeye’s possession had been already fully depreciated,³ and what

¹ CHEP had the invoice for the reconditioning of pallets it claims Buckeye’s actions necessitated on October 27, 2003. As shown above, all other information pertaining to its damage disclosure has been in CHEP’s position for at least a year and a half.

² Buckeye would also be prejudiced by having to make another trip to Florida to depose CHEP witnesses, when such witnesses could have been deposed on one of Buckeye’s two previous trips to Florida. If the Court delays the trial to accommodate CHEP, the quid pro quo should be to require CHEP to bring any additional employees to Ohio for deposition.

³ CHEP’s public disclosures indicate it may have written off of its books all “stringer” pallets, and if those had been fully depreciated apart from Buckeye’s actions, separate from other arguments as to the validity

information CHEP had supporting its assumptions as to how long Buckeye possessed the pallets in question. In addition, Buckeye would need to depose the individuals at CHEP most knowledgeable concerning these areas, and the person who created various documents at CHEP (e.g., CHEP 00795 “Benefit of Paying Recyclers for Recovering CHEP Pallets”) that seem to use different methodologies to calculate what it costs CHEP to have its pallets dwelling outside its control and use. Finally, after such discovery, Buckeye would have to determine whether it needed to call additional witnesses to rebut CHEP’s claims or discredit its analysis.

2. As to the claim for reconditioning: Buckeye would need full document discovery on CHEP payments for similar reconditioning, its basis for washing pallets that were scrapped or reconditioning pallets it had written off its books, and what information CHEP had supporting its assumptions as to the portion of the cost attributable to Buckeye. In addition, Buckeye would need to depose the individuals at CHEP most knowledgeable concerning these areas, and perhaps the persons who did such work for CHEP. Again, after such discovery, Buckeye would have to determine whether it needed to call additional witnesses to rebut CHEP’s claims or discredit its analysis.

3. As to the claim for capital costs: Buckeye would need full document discovery on CHEP methods and calculations of determining its capital costs, whether any or all of the pallets in Buckeye’s possession had been already fully depreciated and therefore would not reasonably have been replace, and what information CHEP had supporting its assumptions as to how long Buckeye possessed the pallets in question. In addition, Buckeye would need to depose the individuals at CHEP most knowledgeable

of this damage methodology, CHEP should not be able to claim depreciation loss for pallets it would have written down to zero in any case.

concerning these areas, and (as in paragraph 1) the person who created various documents at CHEP (e.g., CHEP 00795 “Benefit of Paying Recyclers for Recovering CHEP Pallets”) that seem to use different methodologies to calculate what it costs CHEP to have its pallets dwelling outside its control and use. Again, after such discovery, Buckeye would have to determine whether it needed to call additional witnesses to rebut CHEP’s claims or discredit its analysis.

4. Damage due to agreed-upon fee paid by CHEP customers for Buckeye returning pallets: Buckeye would need complete transaction records between CHEP and these customers and any other documents CHEP might claim show hard to CHEP due to Buckeye performing these services for mutual customers, and would need to depose the individuals at CHEP most knowledgeable concerning these documents and customer relationships. Buckeye would also need the opportunity to identify additional witnesses, including potentially employees of these customers, to rebut the allegation of injury to CHEP.

Buckeye should not have to choose between fair discovery and keeping its trial date. Because of this prejudice, the Court should strike CHEP’s belated damage disclosure.

III. Conclusion

For the forgoing reasons, CHEP's belated damage disclosure should be stricken and Buckeye's Motion in Limine granted.

s/ James A. Wilson

James A. Wilson (0030704)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-5606
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Motion was served on
February 18, 2004, by electronic delivery or facsimile upon:

John C. McDonald
Bridgette Roman
Elaine M Darr
Schottenstein Zox & Dunn
250 West Street
Columbus, OH 43215

_____ s/ James A. Wilson
James A. Wilson