

**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 MOTION FOR LEAVE TO SERVE INTERROGATORIES IN  
EXCESS OF 25 ON DEFENDANT CHEP USA**

Pursuant to Fed. R. Civ. P. 33(a), plaintiff and counterclaim defendant Buckeye Diamond Logistics hereby moves for leave to serve in excess of 25 interrogatories on counterclaim plaintiff CHEP USA, and for an order requiring CHEP to respond to its Third Set of Interrogatories without objection to their exceeding the numeric limitations of Rule 33(a). A memorandum in support of this motion, and that affidavit of James A. Wilson (attached at Tab A), demonstrating an impasse with CHEP on this issue, are attached.

s/ James A. Wilson

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**MEMORANDUM IN SUPPORT**

I. Introduction

Buckeye Diamond Logistics (“Buckeye”) seeks leave from the Court to serve in excess of 25 interrogatories on CHEP USA (“CHEP”). This motion arises from the service of Buckeye’s Third Set of Interrogatories upon CHEP on February 23, 2004, and CHEP’s subsequent indication that it would not waive its right to object to these interrogatories as exceeding the maximum number of interrogatories permitted by Fed. R. Civ. P. 33(a). As shown below, good cause exists for this additional discovery, and allowing such interrogatories will facilitate the expedited discovery the Court has ordered on CHEP’s belated damage disclosures in this case. Accordingly, Buckeye respectfully requests that the Court enter an order requiring CHEP to respond to these additional interrogatories.

As the Court is aware, on February 2, 2004, Buckeye file a Motion in Limine (Docket # 77) regarding CHEP USA’s failure to make timely disclosure of its damage claims and evidence. Two days after the filing of Buckeye’s Motion, CHEP for the first time, and more than a year after the close of discovery, notified Buckeye 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 B). Specifically, CHEP 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 B).

On February 20, 2004, the Court advised it was vacating the February 23, 2004 trial date and giving Buckeye 60 days to take discovery on CHEP's damage claims. On February 23<sup>rd</sup>, Buckeye served a Third Set of Interrogatories (copy attached at Tab C) and a Fourth Set of Interrogatories on CHEP. On February 24, 2004, counsel for CHEP wrote advising that CHEP had a number of objections to the discovery Buckeye served, specifically indicated that CHEP objected to interrogatories in addition to those previously served,<sup>1</sup> suggested that the parties confer regarding the discovery sought, and "[i]f we are unable to agree I suggest that we approach the Court immediately rather than wait until CHEP's responses and objections are due on March 20, 2004." Letter from John McDonald to James Wilson dated February 24, 2004, attached to affidavit of James Wilson (Tab A). In subsequent conversation and correspondence, CHEP backed away from a willingness to bring all discovery objections to the Court's attention prior to March 20<sup>th</sup>, but reiterated its unwillingness to waive the 25 interrogatory limit with respect at least to those interrogatories in Buckeye's Third Set that it did not wish to answer for other reasons. See Letter from John McDonald to James Wilson dated March 2, 2004, attached to affidavit of James Wilson (Tab A). Accordingly, in order to assure completion of discovery within the sixty day period the Court has allowed, Buckeye needs the Court's resolution of whether Buckeye should be allowed to seek discovery on CHEP's damage claims through its Third Set of Interrogatories.

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<sup>1</sup> Buckeye previously served two sets of interrogatories, containing a total of 20 interrogatories and a total of 26 interrogatories and discrete subparts. Copies of these interrogatories are attached at Tab D. CHEP in various pieces of correspondence has claimed that Buckeye has far exceeded the limit of 25 interrogatories, apparently based on the premise that any time Buckeye uses an "and" or an "or" in its interrogatories, that that constitutes a distinct subpart of the interrogatory.

II. Argument

Fed. R. Civ. P. 33(a) allows the Court to grant leave to a party to serve more than 25 interrogatories. Such leave is appropriate here with respect to the 8 interrogatories (containing 22 discrete subparts) Buckeye has propounded because each interrogatory is relevant to CHEP's recently disclosed damage claims for depreciation, costs of capital for supposed replacement pallets, reconditioning of costs and the supposedly wrongful negotiation of service fees from mutual customers for the return of pallets. Moreover, none of these Interrogatories is duplicative of previous interrogatories, and each is non-burdensome to CHEP and the most efficient means of gaining the discovery sought. Review of the particular interrogatories proposed demonstrates each of these assertions.

1. Interrogatory 1: This interrogatory simply asks CHEP to disclose specific information concerning pallets recovered from Buckeye in August and September 2003 for which it seeks damages. CHEP must either have this information in its ready possession or have based its damage claims on pure speculation. Specifically, Buckeye asks CHEP to disclose the total number of stringer pallets contained in those recovered,<sup>2</sup> the particular repairs made to each pallet recovered, the amount of payment received or the use made of the components for each of the returned pallets scrapped, CHEP's total cost of loading such pallets for removal and transportation (which goes to why it would move such pallets all the way to Tennessee for repair and reconditioning, rather than doing it locally where Buckeye could more easily investigate whether the repairs were necessary), the date each such pallet was received by Buckeye and from whom Buckeye

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<sup>2</sup> Springer pallets are a type of pallet Buckeye believes that CHEP has fully depreciated and taken out of general circulation several years ago. Thus, this request seeks to gain information to show that part of CHEP's damage claim – seeking depreciation and replacement capital costs for pallets it has written off and does not use – is baseless.

received it; and the condition of the pallet on the date it was received by Buckeye.

Responsive information for each of these questions is essential to defend CHEP's claims that it suffered the specific damages it claims due to Buckeye holding these pallets during this dispute. If CHEP's damage claim is actually founded in fact, CHEP cannot claim that it is burdensome to produce this information. This interrogatory is a much more efficient means of gaining this information than depositions.

Interrogatory 2: This request simply seeks information CHEP has on the average time its pallets are held by NPDs before return. CHEP witnesses have previously testified that CHEP keeps a database of NPDs from which it should be able to determine when NPDs receive and return pallets. Such information is necessary to establish a baseline for what damages were proximately caused by Buckeye. If, for example, the average dwell time at NPDs from whom Buckeye gets pallets is 8 months, and Buckeye can show it returned a pallet sent by a NPD in six, a jury could conclude that CHEP was not proximately damaged by Buckeye's actions.

Interrogatory 3: The request simply seeks to insure that Buckeye is provided with the identity of the individuals at CHEP with knowledge of the facts underlying CHEP's damage claim: the employees who (1) participated in the recovery of pallets from Buckeye in August or September 2003, (2) had responsibility for arranging or making determinations with respect to transportation, reconditioning or washing of pallets recovered of pallets from Buckeye, (3) participated in any calculating CHEP's damages, (4) had responsibility for determining CHEP's depreciation rates for pallets, (5) had responsibility for the customers (Abbott Foods and Mills Pride) Buckeye returned pallets to for a service fee (which CHEP claims damaged it in the amount of the service fee), and

(6) know CHEP's costs of capital. Each of these individuals must be reality known to CHEP, and there is no reason Buckeye should have to take a series of depositions to determine who these individuals are.

Interrogatory 4: This interrogatory asks CHEP to disclose the sources from which it obtained capital, so that Buckeye can test whether it really paid 9% for capital during a period that interest rates were at historic lows. This information should not be hard for CHEP to gather, and disclosure by interrogatory is, again, far more efficient than the taking of depositions on this basic point.

Interrogatory 5: This interrogatory relates to the damage CHEP claims it suffered when Buckeye negotiated to charge a fee to mutual customers for the return of pallets inadvertently sent by the customers to Buckeye. The specifics sought – the date the pallet was returned to CHEP; any physical damage CHEP claims was caused by Buckeye to the pallet and the cost of repairing such damage; the length of time CHEP claims Buckeye's actions delayed the return of the pallet to CHEP; and the nature and amount of any other damages CHEP asserts it suffered with respect to each such pallet as the result of Buckeye's actions – simply test whether CHEP has any actual, quantifiable damages based upon these returns, or is asserting a damage claim based upon pure speculation. If CHEP's damage claim is based in fact, it should have no difficulty responding to this interrogatory.

Interrogatory 6: This interrogatory also relates to the damage CHEP claims it suffered when Buckeye negotiated to charge a fee to mutual customers for the return of pallets inadvertently sent by the customers to Buckeye. The information sought, which again should be readily available to CHEP, is simply intended to help show that when

Mills Pride and Abbott Foods paid Buckeye to return to them pallets inadvertently sent, those transactions actually benefited CHEP rather than harmed it. This information is of the type that CHEP regularly tracks in its databases, and a simple query to the system should allow CHEP to provide this information sought.

Interrogatory 7: This interrogatory simply asks CHEP to identify the author of a document regarding the benefits CHEP receives when recyclers return pallets to it. This document is relevant to CHEP's damage claim, because it shows that these damage calculations are deficient in that they consider only the alleged harm to CHEP of Buckeye's conduct and fail to account for the benefit CHEP has received by Buckeye returning these pallets. The fact that Buckeye has also asserted that this document is relevant to its proof of its own damage claim does not make this document any less relevant as a defense to CHEP's damage claim. It is not burdensome for CHEP to disclose who wrote the document, and requiring an answer to the interrogatory is far more efficient than requiring Buckeye to depose one or more witnesses on this simple point.

Interrogatory 8: This interrogatory is simply intended to insure that if CHEP says it has previously produced documents responsive to Buckeye's Fourth Request for the Production of Documents, it tells Buckeye which of these thousands of previously produced documents are responsive to Buckeye's request rather than requiring Buckeye to unravel which such documents CHEP is claiming discloses how it calculates depreciation, what its capital costs are or what the dwell time of its pallets at NPDs has been. Buckeye has no alternative to this interrogatory to unraveling what CHEP claims is relevant to its damage claims.

III. Conclusion

For the forgoing reasons, Buckeye respectfully requests that the Court grant it leave to propound its Third Set of Interrogatories.

s/ James A. Wilson  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of this Motion was served on  
March 5, 2004, by electronic delivery or facsimile upon:

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

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s/ James A. Wilson  
James A. Wilson