

**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. :

**COUNTERCLAIM DEFENDANT’S MOTION FOR EXTENSION OF TIME TO
FILE MOTION IN LIMINE REGARDING CHEP USA’S DAMAGE CLAIMS**

Counterclaim Defendant Buckeye Diamond Logistics (“Buckeye”) hereby moves the Court for an extension of time to file a motion in limine regarding CHEP USA’s damage claims on the grounds that (1) CHEP expansive use of the protective order currently precludes Buckeye from filing most of the deposition transcript pages and documents supporting its motion; and (2) CHEP has to date failed to provide full discovery concerning its damage claims. A memorandum in support of this motion is attached.

s/ James A. Wilson

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MEMORANDUM IN SUPPORT

Buckeye Diamond Logistics intends to file a motion in limine concerning CHEP USA's damage on its counterclaim in this case which it believes will show that (1) CHEP's theory of damages is inconsistent with controlling law; (2) that CHEP's damages calculations are based upon inadmissible evidence and speculations; and (3) that CHEP's damage claims are largely based in deceptive documents and misleading data compilations. Buckeye intends to support this motion with deposition testimony of CHEP employees Candace Southwick, Derrick Smith, Elton Potts and Glenn Kolb, as well as a number of document CHEP has produced. CHEP, however, by asserting that Buckeye may file nothing it has designated (or in the future may designate) as "confidential" or "attorney's eyes only" under the stipulated protective order in this case has effectively barred Buckeye from providing the Court with the evidence supporting its motion. Moreover, by refusing to produce discovery in response to legitimate requests, CHEP has kept Buckeye from fully developing evidence to show all the defects in its damage calculation. Buckeye therefore seeks an extension of time until the Court has resolved how materials designated confidential by CHEP should be filed and until CHEP has produced full discovery on its damage claims.

On March 15th, this Court ordered unsealed a number of documents filed under seal by the parties in this case, resting its decision on controlling Sixth Circuit precedent that holds the Court may not allow the parties unchecked discretion in filing materials under seal. CHEP, however, continues to take the position that documents or transcripts designated confidential cannot be filed with the Court unless Buckeye does what the

Court has said is impermissible – i.e., to file them under seal. See Letter from John McDonald to James Wilson dated April 22, 2004 (copy attached at Tab A); Letter from Bridgette Roman to James Wilson dated April 26, 2004 (copy attached at Tab B). CHEP has marked virtually every page of discovery produced regarding damages as confidential and insists upon enforcement of the provision deeming all portions of a transcript confidential for 21 days following its delivery. Thus Buckeye is currently, without risking violation of this Court's order or the threat of sanctions from CHEP, unable to file with the Court the evidence that will support its motion in limine.

Moreover, Buckeye believes, as pointed out in its Motion for Discovery Conference (Dock. # 93) that is entitled to several areas of additional discovery that could significantly undercut CHEP's damage claim and support Buckeye's motion in limine:

1. CHEP's failure to date to produce in Columbus the full original file in which CHEP 00795 was found, as ordered by the Court at the March 15th discovery conference.
2. CHEP's refusal to produce in Ohio the originals of documents in which the copies produced are illegible.
3. CHEP's objection to producing data or documents concerning pallet dwell times at NPDs, the entities from whom Buckeye frequently receives pallets as requested in Interrogatory # 2 and Request for Production of Documents # 5, 6 and 24.
4. CHEP's objection to producing data or documents regarding pallet revenue and utilization rates as requested in Request for Production of Documents ##16 and 17.
5. Misuse of objections to conceal a lack of information to support its damage claims in response to Buckeye's Interrogatory # 1.

CHEP's refusal to produce relevant discovery in a timely manner should not be permitted to prevent Buckeye from presenting the full range of arguments supporting its motion in limine.

Accordingly, for the forgoing reasons, Buckeye respectfully requests that the Court grant it an extension to file its motion in limine regarding CHEP's damage claims until the Court has resolved how materials designated confidential by CHEP should be filed and until CHEP has produced full discovery on its damage claims.

s/ James A. Wilson

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Motion was served on
April 28, 2004, by electronic delivery or facsimile upon:

John C. McDonald
Bridgette Roman
Schottenstein Zox & Dunn
250 West Street
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s/ James A. Wilson
James A. Wilson