

**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 DISCOVERY
CONFERENCE, TO STRIKE AMENDED DAMAGE DISCLOSURE, TO
EXTEND DISCOVERY CUT-OFF, AND TO SET DATE FOR FULL
COMPLIANCE WITH ALL DISCOVERY REQUESTS BY CHEP USA**

Counterclaim Defendant Buckeye Diamond Logistics (“Buckeye”) hereby moves the Court:

- (1) to set a discovery and status conference concerning the outstanding discovery and damage disclosure disputes as set forth herein;
- (2) to strike CHEP latest, untimely changes to its damage disclosures;
- (3) for an extension of the discovery cut-off to May 11, 2004, in order for Buckeye to complete depositions on the 3000 pages of documents produced yesterday, on April 20, 2004, one month after they were due; and
- (4) to set a deadline of April 30, 2004, for CHEP to respond fully to all pending discovery requests, and for its counsel to certify the completeness of all response pursuant to Braska v. Anheuser-Busch Company, Inc., 164 F.R.D. 448 (1995), or face appropriate sanctions.

A memorandum in support of this motion, which sets forth Buckeye's position with respect to each of the discovery and damage disclosure issues it seeks to have addressed by the Court, is attached.

s/ James A. Wilson
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MEMORANDUM IN SUPPORT

I. Introduction

Since the Court continued the February 23, 2004 trial date in this case to May 24, 2004, and gave Buckeye sixty days to complete discovery on CHEP USA's damage claim, Buckeye has been diligently seeking to complete discovery within the time limits the Court has set. CHEP, by incomplete and inaccurate responses, belated and constantly shifting disclosures, and refusal to engage in extrajudicial efforts to resolve discovery disputes, however, has done its best to prevent the timely completion of this discovery.

As the Court is aware, on February 4, 2004, 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 (copies of all correspondence referenced are attached at Tab A). 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 23rd, Buckeye served a Third Set of Interrogatories 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, 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. In subsequent conversation and correspondence, CHEP however changed its position and refused to discuss its objections to discovery until its responses were served. See, e.g., Letter from John McDonald to James Wilson dated March 2, 2004.

When Buckeye received CHEP's responses to the interrogatories and document requests (attached as Tabs B and C, respectively) by mail nearly a week after CHEP represented they would be served, it found numerous objections, including objections to producing documents showing dwell times at the entities from whom Buckeye received a number of the pallets in question, utilization rates (despite the claim that Buckeye's actions caused a shortage of pallets that had to be replaced by CHEP), full documentation regarding CHEP's write-off of stringer pallets, costs to repaint pallets (an alternative to washing) or the documents and data underlying most of CHEP's damage calculations. Buckeye promptly brought these deficiencies to CHEP's attention. See Letter from James Wilson to John McDonald dated April 1, 2004. In response, CHEP asserted that the three deposition witnesses it was producing could answer any questions related to the

gaps in CHEP's interrogatories, rather than responding to Buckeye's request to engage in extra-judicial resolution of its objections. See Letter from John McDonald to James Wilson dated April 6, 2004.

These depositions, however, rather than answering the questions left unanswered by CHEP's discovery responses, revealed even more glaring defects and omissions in CHEP's discovery responses than was apparent on their face. For example, CHEP's first witness, Candace Southwick, who was offered as the CHEP employee most knowledgeable about the mutual customers to whom Buckeye returned pallets for a fee (and identified as such in CHEP's interrogatory answers) testified that all she knew about these customers was what she had learned in preparation for her deposition. Southwick dep. (4/7/04) at 13-14 (cited pages of all depositions are attached at Tab D). Ms. Southwick did testify, however, that the dwell time information Buckeye asked for was easily retrievable from a CHEP database. Id. at 72-75. CHEP's next witness, Derrick Smith, admitted that CHEP had not asked him to produce important documents, including an e-mail he sent to CHEP's vendor, Greenten, directing them to create a deceptive invoice upon which CHEP has now based a significant portion of its damage claims. Smith dep. (4/7/04) at 86-90. Mr. Smith also testified that he had destroyed the only notes that apparently exist regarding CHEP's inspection of the pallets returned by Buckeye. Id. at 29. CHEP's final witness, Elton Potts, who had verified CHEP's interrogatories, admitted that several of those interrogatory answers were incomplete or inaccurate, including the identification of Ms. Southwick and the list provided of individuals who had participated in creating CHEP's damage calculation. Potts dep. (4/8/04) at 76-77, 109-11, 199-200. Mr. Potts further testified that a number of CHEP's

damage calculations were based upon other CHEP documents that had not been produced and that were readily available. See, e.g., id. at 120-21. He also admitted that CHEP's utilization rate information could be produced without substantial burden. Id. at 88-90.

Shortly before taking these three depositions, Buckeye had additional cause to be concerned as to whether CHEP was taking seriously its discovery obligations when CHEP disclosed that its representations to the Court and to Buckeye at the telephone conference held on March 15th that it could not determine the author of CHEP00795 were untrue. Moreover, rather than submit the affidavit the Court had ordered regarding the inability to identify that author, CHEP produced previously undisclosed documents concerning this calculation of the benefit to CHEP of recyclers retrieving pallets existed. See Letter from Bridgette Roman to James Wilson dated March 26, 2004. Faced with (1) serious concerns regarding the and inaccuracy and incompleteness of CHEP's productions in light of the disclosure regarding CHEP 00795 and the deposition testimony; (2) repeated delays on CHEP's part in response to Buckeye's requests to resolve discovery disputes extra-judicially; (3) the continuing failure of CHEP to produce the original file and content in which CHEP 00795 was found; and (4) concerns regarding completing damage discovery within the sixty days allowed by the Court, Buckeye again wrote CHEP, asking that it withdraw its objections to making a full and complete production of documents, complete and correct its responses to Buckeye's interrogatories, and assure Buckeye, pursuant to Braska v. Anheuser-Busch Company, Inc., 164 F.R.D. 448 (1995), that no other responsive documents had been overlooked. See Letter from James Wilson to John McDonald and Bridgette Roman dated April 9,

2004. In response, CHEP again stonewalled, advising that it was unwilling to discuss its objections to Buckeye's interrogatories and document requests for yet another week.

Rather than respond specifically to Buckeye's specifications of the defects in CHEP's discovery responses, on April 20, 2004, CHEP: (1) submitted a new damage disclosure, changing the methodology and assumptions its witnesses had previously testified to, and increasing the damages claimed to \$181,675; (2) produced for the first time 3000 pages of documents responsive to the requests due a month earlier; and (3) served revised answers to Buckeye's Third Set of Interrogatories and Fourth Request for Production of Documents (attached at Tabs E and F respectively) which, while correcting a few of the most admitted inaccuracies with CHEP's previous answers, maintain most of CHEP's previous objections to the production of data and documents essential to Buckeye's defense of CHEP's ever growing damage claim.

III. Argument

A. CHEP's Refusal to Provide Relevant Discovery Requires Judicial Resolution of These Issue through a Discovery Conference

1. Buckeye Has Exhausted Extra-Judicial Attempts to End CHEP's Stonewalling

As the correspondence attached at Tab A shows, Buckeye has been diligently seeking to resolve CHEP's objections to Buckeye's discovery requests since late February. After CHEP served its responses, on April 1st Buckeye detailed the deficiencies in those responses, and requested a prompt response. CHEP on April 6th refused to respond, indicating its deposition witness on April 7th and 8th could answer all remaining questions. As shown above, all these depositions showed was the incompleteness of CHEP's discovery responses, and the ease with which CHEP could

have produce a number of the documents it refuses to produce. Buckeye again wrote on April 9th, adding to and expanding its list of the deficiencies in CHEP's discovery, and again requesting a response. Again, on April 13th, CHEP refused. On April 20th, it offered amended answers to interrogatories and document request, maintaining its objections to the vast majority of requests in dispute. Buckeye took this as CHEP answer to the previously unanswered correspondence, and notified the Court of the need for a conference. When CHEP received this notice, notwithstanding having served amended discovery responses affirming its objections just hours before, its counsel John McDonald left Buckeye a voice mail indicating it had failed to exhaust extra-judicial resolution of the disputed items. Buckeye immediately offered CHEP another chance to respond in writing to any of the outstanding issues. See Letter from James Wilson to John McDonald dated April 21, 2004. CHEP again refused, insisting that it would only discuss the matter by phone. See Letter from John McDonald to James Wilson dated April 20, 2004. Plainly parties are at an impasse, and with trial less than six weeks away, Buckeye needs the intervention of the Court to assure it receives the discovery it needs to defend against CHEP's damage counterclaim.

2. Buckeye Is Entitled to Complete Responses to Its Discovery Requests

While CHEP has steadfastly dodged conferring to resolve its objections to Buckeye's discovery requests, CHEP revised answers to Buckeye's Third Set of Interrogatories and Fourth Request for Production of Documents, as well as its failure to follow a direct order of this Court and its refusal to allow inspection or original documents in Columbus, show that a number of disputes concerning discovery require

the Court's resolution. Accordingly, Buckeye has requested that the Court set a telephonic discovery conference in this case as soon as the Court's calendar allows.

The issues upon which Buckeye seeks resolution by the Court, in addition to those raised in sections B, C and D of the argument below are the following:

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. While CHEP has admitted that its previous representation to the Court that it could not determine who authored the document was not true, and has produced additional documents (marked in typical CHEP fashion as for outside counsel only, thereby precluding their filing with the Court) showing that CHEP believed that recyclers benefited CHEP substantially by the return of pallets, CHEP has failed to honor the Court's March 15th order that it produce the original file in Columbus.

2. CHEP's refusal to produce in Ohio the originals of documents in which the copies produced are illegible. See Letter from John McDonald to James Wilson dated April 13, 2004. On April 9th, after CHEP's disclosure that it had failed to produce responsive documents due more than a year and a half ago, Buckeye asked CHEP to confirm that no better copies existed of a number of highly damaging documents to CHEP's case, each of which was produced in a partially illegible form. Buckeye requested that the originals of these documents be produced in Columbus, if CHEP claim it had no clear copies. CHEP has refused, insisting Buckeye must go to Orlando to see the originals. The only purpose for such a condition is to make inspection of such documents prohibitively expensive.

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. These requests for dwell times go to whether Buckeye proximately caused CHEP any damage. If pallets typically dwell at non-participating distributors longer than they did at Buckeye, then such information will support Buckeye's contention that its actions actually decreased CHEP's cost rather than increased it. Ms. Southwick testified such data could easily be generated. Southwick dep. (4/7/04) at 72-75. The Court should order it produced.

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. A major portion of CHEP's damage claim seeks CHEP's cost of capital for pallets it claims it had to buy to replace the ones that Buckeye possessed. Revenue rates are relevant to determine if CHEP is simply seeking to circumvent the fact that the revenue it could have gotten from these pallets is less than its claimed damages for supposed cost of capital and depreciation. Further, these requests are relevant to whether CHEP in fact incurred additional capital costs to replace pallets held by Buckeye. For example, the testimony and discovery responses indicate that "stringer" pallets were being taken out of circulation by CHEP when Buckeye had them. Information showing low utilization rates for stringer pallets (by CHEP's estimate 35% of the pallets recovered from Buckeye) would completely undercut CHEP's claim that it expended capital to replace such pallets. Likewise, evidence of less than 100% utilization rates for other

pallets would completely undercut CHEP's claim that it had to replace the pallets Buckeye held to fill customer orders.

5. Misuse of objections to conceal a lack of information to support its damage claims. Interrogatory #1, subparts e and f, rather than admitting that CHEP lacks information as to pallets Buckeye received, object as to "availability." The reason for such a dodge is obvious – CHEP does not want to admit directly that it has no knowledge to support critical assumptions underlying its damage claims. If CHEP has no knowledge upon which it can respond, it should be required to state and verify that fact rather than seek to disguise it as an objection.

B. The Court Should Strike CHEP's April 20th Revision of its Damage Disclosure

Trial in this case has already been delayed once by CHEP's failure to make a timely disclosure of its damages. On April 20th, less than six weeks before trial, CHEP again sent to Buckeye a damage disclosure that drastically increases the amount of damages CHEP is claiming from Buckeye. The Court should not tolerate such sandbagging twice in one case. If the damage revision is allowed, Buckeye must redepose CHEP's damages witnesses, incurring even more expense in defending an utterly specious claim. The Court should bar CHEP from offering this revised damage disclosure, or any accompanying exhibits, at trial in this case.

C. Extension of the Discovery Cut-off until May 11, 2004 Is Necessary because of CHEP's Delays and Its Inaccurate and Incomplete Responses

Had CHEP made a full production of documents and complete and accurate answers to interrogatories, met promptly to resolve its objections extra-judicially and

produced witnesses who had personal knowledge of the issues upon which they were offered, Buckeye would be nearly done with its damage discovery in this case. Instead, because CHEP has refused to confer or respond to Buckeye's attempts to seek extra-judicial resolution of objections and has failed to produce full and accurate discovery responses or appropriate witnesses, Buckeye still must complete substantial discovery concerning CHEP's belated damage claim. Such discovery cannot be completed until CHEP makes a full production and produces the right witnesses. The only way Buckeye can be assure that CHEP's stonewalling will not prejudice its defense of the \$159,000 (or \$181,000) damage counterclaim is to extend the discovery cut-off in this case to May 11, 2004, the date of the final pretrial conference with the Court.

D. CHEP's Delays and Its Inaccurate and Incomplete Responses, and the Pending Trial Date, Require the Court to Set a Date for CHEP to Supplement Completely All Discovery Responses

As discussed above, to date numerous defects remain in the document production and interrogatory answers CHEP was supposed to provide in March. Obviously, as its conduct has shown, CHEP has no incentive to give complete and timely responses to Buckeye's discovery. The more CHEP sandbags, the more chance it has at keeping Buckeye from being fully prepared to rebut CHEP's damage claims at trial on May 24th. Only an order requiring CHEP to completely respond to all of Buckeye's discovery requests by a date certain can avoid Buckeye from being prejudiced by this sandbagging. If the Court orders discovery extended in this case to May 11th, Buckeye urges that the Court require CHEP to have full and complete discovery responses in Buckeye's hands no later than April 30th. Moreover, given the delays and incompleteness of previous productions, CHEP through counsel should be required to certify that all responsive

documents to these requests have been fully answered and all documents produced. See Braska v. Anheuser-Busch Company, Inc., 164 F.R.D. 448 (1995).

III. Conclusion

For the forgoing reasons, Buckeye respectfully requests that the Court:

(1) set a discovery and status conference concerning the outstanding discovery and damage disclosure disputes as set forth herein;

(2) strike CHEP latest, untimely changes to its damage disclosures;

(3) extend the discovery cut-off to May 11, 2004, in order for Buckeye to complete depositions on the 3000 pages of documents produced yesterday, on April 20, 2004, one month after they were due; and

(4) set a deadline of April 30, 2004, for CHEP to respond fully to all pending discovery requests, and for its counsel to certify the completeness of all response pursuant to Braska v. Anheuser-Busch Company, Inc., 164 F.R.D. 448 (1995), or face appropriate sanctions.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Motion was served on
April 21, 2004, by electronic delivery or facsimile upon:

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s/ James A. Wilson

James A. Wilson