

**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. :

**CHEP'S MEMORANDUM CONTRA COUNTERCLAIM DEFENDANT'S
MOTION FOR DISCOVERY CONFERENCE AND TO STRIKE (DOCKET #93)**

Despite its self serving assertion that "Buckeye had been diligently seeking to resolve CHEP's objections to Buckeye's discovery requests since late February," nothing could be further from the truth! See, Buckeye's Motion for Discovery Conference, Docket #93¹. As revealed by even the carefully selected correspondence offered by Buckeye (additional responsive correspondence is attached as Tab (A)), counsel for CHEP asked opposing counsel in February to "review your requests to see if they can be narrowed" (see February 24 letter from McDonald to Wilson). This suggestion was rejected by Buckeye out of hand on the very same day (see

¹ Buckeye filed this Motion without regard to the Protective Order issued in this case that requires that for a period of twenty-one days following the transcription of a deposition, the testimony will be treated by counsel as "Attorney's Eyes Only." Buckeye's motion attaches portions of the depositions transcribed on April 21, 2004. These were required to be filed under seal. While Buckeye's counsel's ex-parte letter to Court of April 22, 2004, seeks to side-step the Protective Order, the reality is that this Order is and remains to date a valid order of this Court. CHEP's Motion for Reconsideration (Docket #92) demonstrates that sound basis exists for the protections afforded to CHEP's confidential and proprietary business information. Given that Buckeye has filed no opposition to this Motion (and that its time to do so has long past), Buckeye presumably agrees with the need for these reasonable protections.

February 24 letter from Wilson to McDonald, delivered on Friday February 27, and March 2 reply from McDonald to Wilson: "when in response to my request that you review your discovery requests to see if they could be narrowed, your immediate response was that you were entitled to all of the discovery you had requested".)

To this day, Buckeye has adamantly refused to narrow a single request – or for that matter to even discuss these issues by telephone or in person. Notwithstanding the fact that despite the limitations in Fed. R. Civ. P. 33(a), Buckeye has propounded to CHEP a total of eighty-six interrogatories which CHEP has diligently endeavored to answer, CHEP has been required to devote hundreds of man hours to assembling and providing over 3,000 further pages of documentation in response to Buckeye's Fourth Request for Production² (in addition to the more than 10,000 produced previously as requested by Buckeye).

Buckeye's "we want it all attitude" can be found in Mr. Wilson's letters of April 1 and April 9 and is best summarized on page 7 of Buckeye's April 21 Memorandum in Support: "Buckeye is Entitled to Complete Responses to Defendant's Discovery Requests". The following statement by Buckeye in support of that position is a blatant misrepresentation: "CHEP has steadfastly dodged conferring to resolve its objections. . . ." Counsel in his haste to make his April 21 argument circumventing Local Rule 37.2 omits the following from his recital of the facts:

- April 20 letter from McDonald to Wilson: I will be available to speak with you concerning our remaining objections in person or by phone either today or tomorrow".

² The Court did not issue a written Order allowing Buckeye to conduct further discovery but based on the telephone conference with the Court, CHEP has complied with Buckeye's requests within the parameters of the Court's verbal directive that Buckeye was entitled to further discovery limited to CHEP's claim for damages. CHEP's damages are predicated on four elements: depreciation in value of the pallets wrongfully held by Buckeye, the cost of capital related to those pallets, the repair cost for damage to those pallets and the proceeds of Buckeye's wrongful sale of CHEP pallets. CHEP has complied with Buckeye's discovery requests within these parameters, but was justifiably unwilling to allow Buckeye to use this limited further discovery to advance its own damages claims.

- April 21 voice mail message from McDonald to Wilson: "as indicated in my letter of last week and yesterday, I am available in person or by phone to discuss our remaining objections to your discovery requests."
- April 21 letter from McDonald to Wilson: "Please call me at 462-2201 or Bridgette at 462-2348 to discuss these issues before you have further ex-parte contacts with the Court."

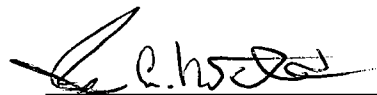
(See Tab (A) for full text)

Buckeye has also purposely omitted the transmittal letter accompanying and explaining CHEP's revised damage calculations for the obvious reason that it clearly rebuts the assertions made in supporting Buckeye's effort to strike this calculation (see April 20 letter from McDonald to Wilson attached as part of Tab (A), explaining that changes were made as a direct result of Wilson's objections to CHEP's original computation and the fact that the methodology for the computation explained by Smith and Potts during their depositions remains unchanged.)

Although CHEP maintains that it has fulfilled its obligation to comply with Buckeye's overly broad discovery requests, CHEP readily agrees that a discovery and status conference concerning both the outstanding discovery and damage disclosure disputes should be conducted. Given the multitude of issues (eight additional interrogatories with numerous subparts, twenty-five additional document requests covering numerous broad categories, over 3,000 pages of documentation and 440 pages of deposition testimony), counsel respectfully requests that such conference be held in person, perhaps with a magistrate assigned to review the propriety of the objections raised and the adequacy of production made. Further, subject to the Court's review, CHEP does not object to an extension of discovery, subject to reasonable restrictions on Buckeye's overly broad and burdensome demands, (see, e.g., CHEP Amended Response to Request for Production No. 8: "Plaintiff's counsel is fully aware of the extent to which CHEP has computerized its data system and the fact that source data underlying the summaries provided

involve literally hundreds of thousands of documents . . . arrangements can be made for counsel to visit the CHEP offices and have the appropriate employee pose the queries that have generated the summary data. . . ").

Respectfully submitted,



John C. McDonald, Esq. (0012190)
250 West Street
Columbus, Ohio 43216
Tele: (614) 462-2700
Fax: (614) 462-5135
Trial Attorney for Defendant,
CHEP USA

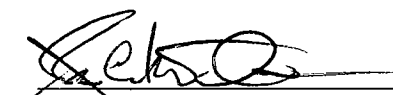
OF COUNSEL:

Bridgette C. Roman, Esq. (0040888)
Schottenstein, Zox & Dunn
250 West Street
Columbus, Ohio 43216
Tele: (614) 462-2700
Fax: (614) 462-5135

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was served this 22nd day of April, 2004, via the Court's electronic filing notification, upon:

James A. Wilson
Vorys, Sater, Seymour & Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
Trial Attorney for Plaintiff



John C. McDonald