

**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 REPLY MEMORANDUM IN  
SUPPORT OF MOTION FOR DISCOVERY CONFERENCE,  
TO EXTEND DISCOVERY CUT-OFF, AND TO SET DATE  
FOR FULL COMPLIANCE WITH ALL DISCOVERY REQUESTS  
BY CHEP USA (DOCKET # 93)**

I. Introduction

CHEP USA’s Memorandum Contra Buckeye’s Motion concedes that a discovery conference is necessary in the case, although it seeks to delay further the discovery issues presented by the request that the conference take place in person. CHEP’s response also concedes that the extension of the discovery deadline to May 11, 2004 sought by Buckeye is appropriate. CHEP offers no opposition to Buckeye’s request that it certify the completeness of all of its discovery responses by April 30<sup>th</sup>. Finally, while CHEP seeks to defend its latest attempt to change its damage disclosure at the close of the period allowed by the Court for supplement discovery on its first belated damage disclosure.

II. CHEP's Concedes that the Pending Discovery Disputes Require Judicial Resolution of These Issue through a Discovery Conference, But Seeks to Delay Such a Conference by Unnecessarily Demanding an In-Person Conference

The vast majority of CHEP's Memorandum Contra Buckeye's Motion accuses Buckeye of not exhausting extra-judicial attempts to resolve the five discovery disputes that Buckeye has brought to the Court for resolution. Given CHEP's concession (at page 3) that such a conference is necessary, it is strange that CHEP chooses to spend the majority of its memorandum attacking Buckeye for supposedly not exhausting such efforts. Notwithstanding the mootness of this issue, Buckeye remains convinced that (1) CHEP's repeated refusal to answer Buckeye's April 9<sup>th</sup> letter; and (2) CHEP's reaffirmation of its objections to the items Buckeye has repeatedly sought discovery upon, more than adequately demonstrate that extra-judicial efforts to resolve discovery disputes in this case have been exhausted. The fact that Buckeye has not narrowed requests for dwell time, utilization and revenue requests when CHEP employees knowledgeable about the availability of such information have testified that it could be readily gathered is hardly evidence of a failure to exhaust extra-judicial efforts at resolution – since the issue was not the burden of these requests, and they are admittedly not burdensome, there is no basis for CHEP to expect such request to be narrowed.

While CHEP concedes that discovery conference is necessary, it seeks to delay the scheduling of that conference by demanding that the conference occur in person. While Buckeye has no opposition to meeting with the Court whenever and wherever it desires, the five discovery issues pending (given CHEP's agreement to the discovery cut-off extension requested) and the issue of whether CHEP should again be allowed to change its damage disclosure after substantial discovery has occurred as to its previous

disclosure hardly would seem to require an in-person conference with the Court. Indeed, review of these issues show that they the Court cannot easily decide them by means of a phone conference:

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 15<sup>th</sup> 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.

Buckeye respectfully suggests that these issues could be dealt with most efficiently by phone, particularly if CHEP is required to outline its positions as to each in writing prior to the call.

III. CHEP's Memorandum Confirms the Court Should Strike CHEP's April 20<sup>th</sup> Revision of its Damage Disclosure

CHEP's only response to Buckeye's request to strike its latest damage is the assertion that the revised disclosure was made in response to errors that Buckeye uncovered in deposition testimony regarding the assumptions and methodology of CHEP's damage claim. While CHEP misleadingly phrases its characterization of its revised damage disclosure as made in response to "Mr. Wilson's objections to CHEP's original calculations," the only "objections" made to CHEP's damage calculation were

deposition questions in which CHEP witnesses were forced to admit serious flaws in CHEP damage methodology. Trial in this case has already been delayed once by CHEP's failure to make a timely disclosure of its damages. The Court should not allow CHEP at this late hour to try to rehabilitate discredited damage calculations.

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

CHEP states in its Memorandum Contra that it has no objections to May 11, 2004, the date of the final pretrial conference with the Court. Accordingly, this issue seems to be resolved.

V. CHEP's Silence regarding Its 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

CHEP is silent regarding Buckeye's request that it be required to certify that all responsive documents to these requests have been fully answered and all documents produced, pursuant to Braska v. Anheuser-Busch Company, Inc., 164 F.R.D. 448 (1995). CHEP does not dispute that its own disclosure that its prior representations concerning CHEP 00795 were untrue and its document production was incomplete. Buckeye is therefore entitled to promptly receive such a certification

V. 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.

\_\_\_\_\_  
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 Memorandum was served on April 23, 2004, by electronic delivery or facsimile upon:

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

s/ James A. Wilson  
James A. Wilson