

**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.	:	
	:	Chief Judge Walter Herbert Rice
CHEP USA, a general partnership	:	
	:	
Defendant.	:	

**PARTIES' PROPOSED JOINT
FINAL PRETRIAL ORDER**

This action came before the Court at a final pretrial conference held on May 12, 2004 at 5:00 p.m. pursuant to Rule 16 FRCP. Earlier pretrial conferences were held on February 19, 2004, and on May 7, 2003.

I. APPEARANCES:

For Plaintiff:	James A. Wilson
For Defendant:	John C. McDonald Bridgette C. Roman

II. NATURE OF ACTION AND JURISDICTION:

A. The plaintiff's remaining claim in this case is for declaratory judgment and money damages for unjust enrichment under Ohio common law. Defendant seeks money damages on its counterclaim for conversion or replevin.

B. The jurisdiction of the Court is invoked under Title 28, United States Code, Sections 1331.

C. The subject-matter jurisdiction of the Court remains in dispute.

III. **TRIAL INFORMATION:**

- A. Plaintiff anticipates that trial will take 4 days. Defendant anticipates trial will take 4-6 days.
- B. Jury Trial has been set for May 24, 2004.

IV. **AGREED STATEMENTS AND LISTS:**

A. **General Nature of the Claims of the Parties:**

1. **Plaintiffs Claims:** Count Four seeks declaratory judgment and money damages in compensation for Buckeye's unjust enrichment of CHEP. Plaintiff claims that CHEP has been unjustly enriched by Buckeye's recovery, sorting and storage of pallets marked with defendant's logo.

2. **Defendant's Position Relative to Plaintiff's Claims:** Defendant CHEP denies liability as asserted in Count Four (Unjust Enrichment) for the following reasons: (1) it receives no benefit from Buckeye's services and neither directly nor indirectly consented to Buckeye providing any services; (2) Buckeye suffered no substantial detriment having generated \$37,482 from the handling of over 11,000 CHEP pallets; (3) there is no causal connection between Buckeye's claimed detriment and CHEP's supposed benefit (or if a causal connection existed it was broken by Buckeye retaining the pallets subsequent to CHEP requesting their return); and (4) Buckeye can offer no admissible evidence as to the reasonable value of its services. CHEP further notes that in the declaratory judgment count of Buckeye's Complaint (¶ 42), Buckeye seeks a declaration that CHEP "reimburse" it in the future for providing sortation and storage "services;" that CHEP pay to Buckeye its profit, if any, or the value of its benefit, if any. CHEP further asserts that Buckeye's claim for damages is barred by Buckeye's failure to supplement its Rule 26(a)(1) preliminary disclosures and January 15, 2003 disclosure relative to damages in a timely manner and by the fact that its theory of damages is inconsistent with controlling law.

3. **Defendant's Counterclaims:** Under theories of replevin or conversion, Defendant CHEP seeks to be compensated for the lost profits and cost of repair or replacement of more than 7000 of the 27,332 CHEP pallets held by Buckeye prior to August 30, 2003. Defendant CHEP also raised a claim for a permanent injunction, but that claim is rendered moot by the Stipulated Order entered November 12, 2003.

4. **Plaintiff's Position Relative to Defendant's Counterclaims:** Buckeye asserts that CHEP's replevin claim is moot. Buckeye further asserts that CHEP's claim for replevin must fail because CHEP has not followed the statutory requirements to obtain an order of replevin, and its claims are barred by the doctrines of unclean hands and estoppel. Buckeye asserts that Buckeye's return of pallets to CHEP's customers has not interfered with CHEP's claimed ownership interest in such pallets. Buckeye asserts

that CHEP through its agents consented to Buckeye's actions. Buckeye asserts that CHEP's revised damage disclosure of April 21, 2004 is untimely.

B. Uncontroverted Facts:

The following facts are established by admissions in the pleadings or by stipulations of counsel. The parties' agreement to stipulate to the accuracy of these facts does not constitute a waiver of any objection as to the relevance or admissibility of the fact. At the end of this section, each party has identified those facts which they contend are irrelevant.

1. Buckeye Diamond Logistics is engaged in the business of recycling wooden pallets in Clark County, Ohio.
2. CHEP USA is a general partnership organized under the laws of New York with its principal place of business in Orlando, Florida. CHEP operates an "equipment rental pool" providing pallets to customers and distributors through-out the United States.
3. Pallets serve as platforms for the shipping of goods. Pallets may be unpainted wooden pallets or may be painted, such as those from CHEP that are painted blue and bear CHEP's logo, name and/or the words, "Property of CHEP." At the present time, there are approximately two billion wood pallets in use within the United States of which approximately 67 million are blue and bear the CHEP name or logo. Pallets circulate as part of the distribution of goods from manufacturer to wholesalers/distributors/retailers. After the product stacked on pallets is delivered to its destination and off-loaded, empty pallets may accumulate at the distributor level.
4. Some manufacturers require that for each pallet provided to a distributor another be returned to that manufacturer.
5. A substantial part of Buckeye's business consists of recycling and/or repair of white wooden pallets for resale. Buckeye provides pallet management services for a number of distributors. These distributors include both ones that participate in the CHEP system and others that do not participate in the CHEP system but nonetheless may receive blue pallets from manufacturers or distributors that participate in the CHEP system. Where Buckeye provides these pallet management services it hauls a trailer (filled with white pallets and occasional blue pallets) from the distributor's location to its facility in South Charleston, Ohio, where it off loads them with an automated destacker. Pallets are then manually sorted based on size and condition. After sorting, unusable pallets are sent to the shredder or broken down in order to use their constituent parts, repairable white wood pallets are sent to the repair line, and some other pallets, such as those painted blue and marked with CHEP's name and the words "Property of CHEP" as well as those painted pallets bearing the names of various beverage manufacturers, are set aside for storage in an area on Buckeye's

property. Buckeye accumulated CHEP pallets on its property and occasionally supplied the CHEP pallets to two of its customers. Buckeye accumulated a sufficient quantity of CHEP pallets to deliver the following quantities to those two customers (and invoiced them \$37,482 for these pallets) as follows:

July, 2000	2,955
August, 2000	832
November, 2000	677
December, 2000	2,746
February, 2001	300
March, 2001	1,760
July, 2001	1,770
August, 2001	<u>374</u>
	11,414

6. The blue pallets bearing the CHEP name or logo are manufactured to a uniform 48" x 40" footprint and are the subject of this lawsuit.
7. Because of the huge numbers of pallets that are part of this "delivery of goods" system, white pallets rapidly accumulate at various distribution locations. One option for distributors is to make arrangements with pallet recyclers such as Buckeye to address the excess white pallets at their locations. In the context of Buckeye's pallet management services Buckeye either (1) repairs and returns white wood pallets to the distributor for a fee or (2) purchases the excess white wood pallets outright. For the white wood pallets purchased by Buckeye from distributors, Buckeye inspects, repairs, if necessary, and grades the white wood pallets to create sound, functional, reusable pallets that are then re-sold to a vendee such as another manufacturer or distributor. This cycle enables the distributor to rid itself of white pallets that are damaged or broken or rid itself of white pallets that exceed the needs of the distributor.
8. Pursuant to agreements with distribution centers, Buckeye places semi-trailer vans at distributor's facilities to be filled up by distribution center employees as they accumulate; once the trailer is filled or nearly filled, Buckeye replaces it with another empty semi-trailer. After Buckeye separates and grades the pallets received from the distributor to assure that it only pays for usable white wood pallets, Buckeye either makes payment to the distributor for the usable white wood pallets or provides some value-added service to the distributor.
9. During the period relevant to this suit Buckeye has purchased the white wood pallets it acquires under these pallet management arrangements by paying the distributors between 25¢ and \$3.00 per white wood pallet depending on the grade or condition. Buckeye never pays for any blue pallet that it might receive from a distributor and it never repairs a blue pallet bearing CHEP's name or logo.
10. During the period relevant to this suit Buckeye has sold repaired white wood pallets for between \$2.30 and \$5.40/pallet depending on grade or condition.

11. CHEP's Agreements generally charge manufacturers three basic fees: an issue fee, a rental fee and a transfer fee. The issue fee is billed when pallets are shipped to the customer. The rental fee is a daily fee charged while the blue pallets are at the customer's location. The transfer fee is billed when the customer ships the pallets loaded with merchandise to its distributor.
12. CHEP made a business decision in late 1998 to allow certain of its manufacturer customers to ship blue pallets marked with CHEP's logo to any distributor (assuming CHEP was properly notified about the shipment and distributor's location), regardless of whether CHEP had a contract with the distributor. This decision was intended to increase CHEP's business.
13. In addition to its customary basic fees, CHEP charges participating manufacturers an additional charge, which CHEP calls an up-charge, for each blue pallet that the participating manufacturer ships to non-participating distributors.
14. The amount of the up-charge depends on whether the non-participating distributor is categorized by CHEP as "SEMIC" (semi-cooperative) or "NOTXX" (uncooperative) based upon the willingness of the distributor to return pallets containing CHEP's markings to CHEP.
15. If the NPD is determined by CHEP to be semi-cooperative, CHEP generally charges the manufacturer an up-charge of \$3.50 per pallet for shipping to such distributors.
16. If the NPD is determined by CHEP to be uncooperative, CHEP generally charges the manufacturer an up-charge of \$8.00 per pallet for shipping to such distributors.
17. Approximately 110 of CHEP's manufacturer customers are allowed to ship to NPDs.
18. The number of NPD locations to which CHEP's manufacturer customers are shipping pallets is between 21,000 and 32,000 locations nationwide. At the current time there are approximately 871 NPDs located within 150 miles of Buckeye's recycling facility.
19. CHEP pallets come in two types, block and stringer, and pallets within each type are generally indistinguishable from one another. CHEP does not require that manufacturers or participating distributors return a specific pallet within the type group, but accepts returns from these manufacturers and participating distributors of any blue pallet of the same type marked with CHEP's name or logo.
20. CHEP regularly communicates to recyclers that it is the owner of any blue pallets with its markings, and advises recyclers to "instruct all of [their] employees not to purchase, collect, repair, sell, or otherwise dispose of the distinctively marked CHEP Pallet...If, despite your instructions, CHEP pallets do come into your possession, please keep them separate and advise us by contacting the Asset

Protection Department at 1-800-487-4874 ext 276, so that we can arrange to collect our pallets at a mutually convenient time."

21. CHEP maintains a "pallet dealer database" comprised of several thousand pallet dealers and recyclers known to CHEP throughout the country. Twice each year, CHEP sends letters to every pallet dealer in its data base (who is not already a participant in a CHEP program) advising the dealer to instruct its employees not to purchase, accept, collect, repair or sell the blue pallets and to make arrangements for the collection of such pallets. True and correct examples of such communications are contained in Joint Exhibits JX 1-3 (Buckeye 00162-163, 00148-149 and CHEP 00111-112).
22. Buckeye has received letters from CHEP such as those described above (in ¶ 21) since at least 1996. In addition, at various times since 1999, CHEP employees have made personal visits to Buckeye's South Charleston facility, and on some occasions have requested return of the blue pallets. Buckeye refused to return these pallets on the terms CHEP offered. Buckeye has never called CHEP's toll free telephone number to notify CHEP that it has blue pallets.
23. Joint Exhibits JX 1 and 3 (Buckeye 00162-163 and 00148-149) are true and accurate copies of correspondence (with enclosures) received by Buckeye at or near the date shown on the letters.
24. Beginning September 15, 2003, Buckeye began sending CHEP daily fax reports as to the number of CHEP pallets received at Buckeye's facility on the preceding business day. True and correct copies of these daily fax reports are contained in DX18.
25. Since September 15, 2003, Buckeye has agreed to notify CHEP within ten (10) days of Buckeye's receipt of CHEP pallets and has further agreed to allow CHEP to collect such pallets. Since November 12, 2003, Buckeye has been under an agreed Court order to notify CHEP of the receipt of CHEP's pallets and allow CHEP to recover those pallets, unless Buckeye returns those pallets to the CHEP customer from which it received them or returns them to CHEP on the customer's behalf.
26. CHEP benefits when Buckeye notifies CHEP within ten (10) days of its receipt of CHEP pallets and allows CHEP to recover such pallets.
27. CHEP contends (and Buckeye disputes) that the Court has found that regarding Buckeye's "continued storage of CHEP pallets at [Buckeye's] depot, it cannot be said that they convey a benefit upon CHEP, for their actions are against CHEP's expressed wishes." (Court's Decision and Entry of August 11, 2003, p. 41).
28. Plaintiff's Exhibit PX 35 (CHEP 0795) (a) is a true and accurate copy of a spreadsheet prepared by a CHEP employee; (b) contains a CHEP employee's assumptions, projections, and analysis of the benefits of paying recyclers for

recovered pallets as of March 15, 2001; and (c) contains accurate mathematical computations.

29. Plaintiff's Exhibit PX8 (CHEP 06983) (a) is a true and accurate copy of a spreadsheet generated by CHEP's computer system; (b) contains a summary of information from audits of a small sampling of NPD locations and it compares the actual pallet balances that CHEP representatives were able to count at those locations to CHEP's book balance before adjustment for unidentified returns; and (c) is an accurate summary of the results of the physical counts conducted at the NPD locations reflected in the report.
30. The parties stipulate to the authenticity of the following documents: PX 44, PX 45, PX 46, PX 47, PX 48, PX 49, PX 50, PX 51, PX 52, PX 53, PX 54, PX 55, PX 56, PX 57, PX 58, PX 59, PX 60 and PX 61.

Plaintiff contends that of the foregoing paragraphs, paragraphs 21 and 24 are irrelevant.

Defendant contends that of the foregoing paragraphs, the following are irrelevant: 12 through 19 and 28 through 30.

C. Issues of Fact and Law:

1. Contested Issues of Fact.

The inclusion of any particular "contested issues of fact" that follows does not constitute a waiver of either party's ability to contest the relevance or admissibility of any matter addressed in this section. At the end of this section, each party has identified those issues which they contend are irrelevant.

1. Whether manufacturers are required to make reports to CHEP about transfers of the blue pallets, including the date of the transfer, the name of the transferee, the address to which the pallets will be transferred and the number of pallets being transferred to that location, and whether such reports are accurate and monitored by CHEP.
2. Whether CHEP permits certain participating manufacturers to ship goods on CHEP pallets to distributors that have no written agreement with CHEP, who CHEP refers to as "non-participating distributors".
3. Whether some or all manufacturers and participating distributors, in their contracts with CHEP, agree to pay to CHEP a "lost pallet fee" in certain circumstances, and whether the contracts between CHEP and its participating manufacturers and distributors state that this payment of the fee does not result in the transfer of, or otherwise affect, CHEP's ownership of the pallets.

4. Whether when a participating manufacturer ships blue pallets to a non-participating distributor, that manufacturer communicates to CHEP the number of pallets begin shipped and the non-participating distributor's location; whether the first time that a participating manufacturer ships blue pallets to a non-participating distributor, CHEP notifies that distributor by certified mail, by phone and/or by a personal visit that CHEP owns the blue pallets, that they are not to be bought or sold and to contact CHEP to arrange for a pick-up; and whether subsequent shipments to an NPD are followed by phone calls or personal visits regarding arrangements for CHEP to pick up the blue pallets.
5. Whether regardless of contractual stipulations participating distributors fail to isolate pallets containing CHEP's markings and commingle those pallets with white wood pallets, and, as a result, blue pallets come into the possession of pallet recyclers such as Buckeye, and if so, in what amount.
6. Whether CHEP's up-charges for shipments to NPDs compensate CHEP for, among other things, its increased cost of recovering those pallets, increased dwell time and lost income, or whether such fees in whole or in part compensate CHEP for unrecoverable pallets.
7. Whether the per pallet up-charge is less than the replacement cost for a new pallet.
8. Whether at the point in time that CHEP permitted some of its manufacturer customers to ship blue pallets to NPDs, CHEP's controller predicted that CHEP would need to create a loss reserve for all pallets CHEP permitted its manufacturing customers to ship to uncooperative NPDs because "the thinking [was] that we would never recover these pallets."
9. What was CHEP's intent and expectation regarding pallet recovery when it began allowing its customers to ship to NPDs.
10. Whether CHEP has admitted that between January of 1998 and July of 2002, CHEP's manufacturer customers shipped 1,080,389 blue pallets to NPDs in Ohio and CHEP's asset recovery group recovered possession of 375,827 blue pallets from NPDs in Ohio in that same time frame.
11. Whether in the twelve month period between April 2002 and March 2003, a total of 44,619,263 blue pallets were shipped to customers and distributors located within 150 miles of Buckeye's facility at South Charleston, Ohio and whether 20,988,507 of these pallets went to participating manufacturers, 23,258,982 pallets went to participating distributors, and 371,774 went to non-participating distributors; whether during the same time period, a total of 44,022,647 blue pallets were returned to CHEP of which returns from customers totaled 20,310,504, from participating distributors 23,348,736, from non-participating distributors 215,300, and another 148,107 from recyclers and other sources.

12. What are CHEP's current and historic collection goals and rates from NPDs and what number of pallets have yet to be collected or remain uncollected from NPDs?
13. Whether there is any correlation between the amount of CHEP's gross margin on sales and its asset recovery rate.
14. What were Bain & Company's conclusions regarding the current location of blue pallets that CHEP's customers sent to NPDs.
15. What knowledge CHEP has regarding where blue pallets go when they leave the possession of non-participating distributors.
16. Whether CHEP assigns the number of blue pallets that are unrecovered or yet to be recovered to broad categories of "lost pallets. "
17. Whether under CHEP's written agreement with Wal*Mart, dating back to 1996, Wal*Mart received free use of the blue pallets in exchange for encouraging its manufacturers and suppliers to ship to it on CHEP's pallets.
18. Whether Wal*Mart has any responsibility for reporting to CHEP information about where the blue pallets are/were sent and the reasons why/why not.
19. Whether Wal*Mart's use of blue pallets led CHEP to perform any accounting adjustments, and if so, what was CHEP's intent with regard to the recovery of these pallets.
20. Whether Wal*Mart ships blue pallets to NPDs and, whether CHEP's agreements with Wal*Mart prevent Wal*Mart from shipping to NPDs or require that Wal*Mart report where it ships pallets with CHEP's logo.
21. Whether Buckeye has received pallets containing CHEP markings from NPDs, including Consolidated Stores, who sent those pallets to Buckeye with the representation that they had the right to convey them, and whether Buckeye was entitled to rely on such statements.
22. Whether Buckeye's segregating pallets marked with CHEP's logo from other pallets provides a benefit to CHEP.
23. Whether CHEP can determine where the pallets reported on a stray equipment report and located at a pallet recycler have come from.
24. Whether prior to August 30, 2003, Buckeye was in possession of 27,332 CHEP pallets.
25. Whether during this same time period, Buckeye invoiced two customers, Mills Pride and Abbott Foods, approximately \$37,000 for more than 11,000 blue pallets bearing the CHEP name, and if so what those charges were for.

26. Whether Buckeye has ever been offered any payment by CHEP for the return of pallets other than a payment that was conditioned upon it (a) agreeing that CHEP owned all pallets marked with its logo; (b) agreeing to reveal confidential customer lists to CHEP; and (c) agreeing to litigate all disputes in Orlando, Florida.
27. Whether Buckeye has suffered compensable and calculable money damages as the result of any of CHEP's actions.
28. Whether CHEP has instructed Buckeye to segregate pallets marked with CHEP's logo from other pallets.
29. Whether Buckeye can demonstrate any costs incurred for the alleged services rendered to CHEP.
30. Whether CHEP derives any benefit from Buckeye's actions with respect to the CHEP pallets.
31. Whether Buckeye's expenses, if any, associated with transportation, handling and/or storage of blue pallets were self incurred for its own business purposes.
32. What is the damage or injury to CHEP, if any, arising from Buckeye's refusal to surrender to CHEP those blue pallets that came into its possession prior to August 30, 2003.
33. Whether the amount per pallet that CHEP pays under its Asset Recovery Program, or any prior or current offerings, represents reasonable compensation to Buckeye for its transportation, sortation and storage of CHEP pallets.
34. Whether Buckeye's decision to store CHEP pallets outside caused damage to the pallets and/or caused CHEP to incur increased repair and cleaning expenses?
35. What is the reasonable value of Buckeye's services in transporting, sorting and storing 27,332 CHEP pallets.
36. Whether Plaintiff's Exhibit PX35 (CHEP 0795) (a) is a record regularly prepared in the ordinary course of CHEP's business; and (b) reflects the actual benefits inuring to CHEP under the various scenarios presented and it is based on various assumptions and projections on March 15, 2001.
37. Whether Plaintiff's Exhibit PX8 (CHEP 06983) is not a record regularly prepared in the ordinary course of CHEP's business.
38. Whether Buckeye has added value to CHEP pallets.
39. Whether CHEP can demonstrate it would have recovered the pallets received in September of 2003, sooner or in better condition if they had not come into Buckeye's possession.

40. Whether CHEP is able to identify which particular distributors sent pallets marked with its logo to Buckeye.
41. Whether CHEP has any reports in its possession identifying who sent pallets marked with its logo to Buckeye.
42. Whether CHEP directed Buckeye to store pallets marked with its logo in a different manner than they were stored or offered Buckeye compensation for doing so.
43. Whether on or about September 9, 10 and 11, 2003, CHEP recovered possession of 15,981 CHEP pallets from Buckeye.

Plaintiff contends that of the foregoing paragraphs, paragraphs 25, 34 and 38 are irrelevant.

Defendant contends that of the foregoing paragraphs, the following are irrelevant: Paragraphs 2, 3, 5 through 10, 12 through 21, 23, 36 through 38, 40 and 41.

2. Contested Issues of Law. The inclusion of any particular issue of law, as phrased herein, does not constitute an agreement by either party that the stated issue includes an accurate statement of the legal principle involved. The contested issues of law (in addition to those implicit in the foregoing issues of fact), that may be presented are:

1. Whether CHEP has been unjustly enriched by Buckeye's taking, sorting, separation and storage of pallets containing CHEP's logo, and if so the amount of damages Buckeye has suffered as the result of CHEP's unjust enrichment and the amount of compensation Buckeye is entitled to in the future for each pallet recovered.
2. Whether Buckeye is entitled to disgorgement of profits earned by CHEP as the result of a system CHEP knowingly put into place by which Buckeye would be forced to bear the expense of recovering pallets for CHEP.
3. Whether Buckeye has converted CHEP's pallets and otherwise interfered with CHEP's ownership of its pallets.
4. Whether CHEP is entitled to be compensated for lost profits, repair and replacement cost together with prejudgment interest and reasonable attorney fees as the result of Buckeye's conversion, interference with its ownership of its pallets or CHEP's right to replevin.
5. Whether Buckeye's claimed measure of damages (as set forth in ¶¶ 27 and 38 in Section 1 above and ¶ 2 above) is an accurate measure of damages under an unjust enrichment theory.

6. Whether Buckeye is limited to its relief as sought by its Complaint; namely, that CHEP “reimburse” Buckeye in the future for providing sortation and storage of CHEP pallets, rather than pay to Buckeye its profit or the value of the so-called benefit, if any.
7. Whether the equitable doctrines of either unclean hands or estoppel constitute valid defenses to CHEP counterclaims for replevin or conversion.
8. Whether CHEP has waived its claim for money damages by failing to supplement its pretrial disclosure and interrogatory answers.
9. Whether Buckeye has waived its claim for money damages by failing to supplement its pretrial disclosures and interrogatory answers.

D. Witnesses:

1. Plaintiff will call or will have available for testimony at trial those witnesses listed in Appendix A hereof. Plaintiff objects to any attempt by CHEP to call as “rebuttal witnesses” any witness whose testimony could reasonably have been anticipated to be necessary before trial or to any witness whose identity was not timely disclosed.
2. Defendant will call or will have available for testimony at trial those witnesses listed in Appendix B hereof. Defendant objects to the addition of “Mike Woods,” and “Tera Lynn King” to plaintiff’s witness list. These individuals were, for the first time, disclosed to CHEP on April 30, 2004.
3. There is reserved to each of the parties the right to call such rebuttal witnesses as may be necessary, without prior notice thereof to the other party.
4. Each party objects to the other calling any witness not identified in its initial or supplemental witness disclosures.

E. Expert Witnesses:

Parties are limited to the following number of expert witnesses, including treating physicians, whose names have been disclosed to the other side:

Plaintiff: Plaintiff reserves the right to identify an expert witness in rebuttal to CHEP’s damages calculation on its counterclaim upon the completion of CHEP’s responses to outstanding discovery requests. Buckeye notes that the potential need for additional witnesses to respond to CHEP’s February 4, 2004 damage disclosure was set forth in Buckeye’s Supplemental Memorandum in Support of Motion in Limine filed February 18, 2004.

Defendant: Defendant objects to the untimely designation of such an expert and reserves the right to depose any such expert prior to trial in accordance with the Federal Rules of Civil Procedure. Defendant further notes that when the Court asked the Plaintiff, at the February pretrial what further discovery was needed, plaintiff made no mention of any need for and expert. Plaintiff at that time was fully apprised of the Defendant's methodology for its calculation of damages. Moreover, CHEP asserts that there are no "outstanding discovery" responses due from CHEP at this time.

Accordingly, no expert resumes are currently attached. Buckeye will supplement if necessary. CHEP asserts that if the Court determines that it is entitled to recover attorneys' fees on its replevin or conversion claims, then the issue of the amount of the attorneys' fees that CHEP is entitled to recover should be bifurcated for a separate hearing at which time CHEP would present expert testimony on that issue.

F. Exhibits:

The parties will offer as exhibits during their respective case-in-chief those items listed herein and numbered with Arabic numerals as follows (these listings do not preclude the use of additional documents for rebuttle or impeachment):

1. Joint Exhibits -- Appendix C (marked "JX ____") – The inclusion of a document on the "Joint Exhibit " list is not a waiver of any objection to its relevance or admissibility. It is merely a stipulation to its authenticity.
2. Plaintiff Exhibits Appendix D (marked "PX ____")
3. Defendant Exhibits Appendix E (marked "DX ____")

G. Depositions:

1. Plaintiffs will seek to offer testimony of the following witnesses by deposition:

Steven Fisher
Andrew Brumsey
Tom Kirk
Tod Sizemore
Walter Russell
Keith Norder (by videotape)
Glen Kolb (if unwilling to appear)

2. Defendant reserves the right to make counter designations to the extent that the Court permits the reading of any deposition. Consistent with

Defendant's Motions in Limine, Defendant objects to all portions of the designated testimony that are beyond the scope of the remaining issues. Defendant further objects to any deposition designations not made by Plaintiff as of the date of Plaintiff's submission of its Proposed Pretrial Order (Docket #99).

3. Designated portions of deposition testimony and objections are contained in Appendix F hereof.

H. Discovery:

Plaintiff believes that discovery has been completed on all issues except CHEP's claim for damages. CHEP disagrees and states that it has undertaken reasonable efforts to fully comply with Plaintiff's burdensome and overly broad discovery requests and has produced over 3000 additional documents to Plaintiff in response to Plaintiff's further discovery requests and has produced four CHEP employees for depositions. Conversely, Buckeye has refused to supplement its prior discovery requests as required by Fed. R. Civ. P. 26(e). These issues should be the subject of discussion at a discovery conference as requested by Buckeye and agreed to by CHEP.

I. Pending motions

The following motions are pending at this time:

1. Buckeye Motion for Clarification or Reconsideration of Order Denying Buckeye's Motion to Deem Facts Admitted (Docket #65)
2. CHEP's Motion in Limine Preventing Buckeye from Introducing Evidence as to Irrelevant Matters in the Contested Issues of Fact Set Forth in the Proposed Joint Pretrial Order (Docket #71)
3. CHEP's Motion in Limine to Exclude Evidence Related to PX 35 Which Cannot be Authenticated by Any Witness in the Joint Proposed Pretrial Order (Docket #72) (CHEP submits that this Motion is now moot as the author of the subject document has been located and identified to Plaintiff).
4. CHEP's Motion in Limine to Prevent Buckeye from Eliciting Testimony from Mequel DeVaughn and Ralph Buono (Docket #73)
5. CHEP's Motion in Limine to Prevent Plaintiff from Eliciting Testimony or Presenting Evidence Disputing CHEP's Ownership of its Pallets (Docket #74)
6. CHEP's Motion in Limine to prevent Buckeye from Presenting Evidence of CHEP's Alleged Loss or Abandonment of its Pallets (Docket #75)

7. CHEP's Motion in Limine Seeking a Limitation on Buckeyes Evidence of Damages (Docket #76)
8. CHEP's Motion for Reconsideration of Court's Decision Issued March 15, 2004 Unsealing Documents Relating to Summary Judgment Motions (Docket # 92)
9. Buckeye's Motion for Discovery Conference, to Strike Amended Damage Disclosure, to Extend Discovery Cut-Off (Docket # 93)
10. Buckeye's Motion for Extension of Time to File Motion in Limine Regarding CHEP USA's Damage Claim (Docket #97).
11. CHEP's Motion in Limine Regarding Bain & Co., which CHEP anticipates filing shortly.

J. Miscellaneous Orders:

1. Agreed upon set of definitions of commonly used terms in the industry for the benefit of the Jury.
2. Instructions on reading of deposition testimony.
3. Commitment of counsel to scheduling and timing of witnesses.
4. Scope of cross and direct examination of witnesses to be called in Plaintiff's case in chief.
5. Courtroom technology (Elmo, laptop projector)
6. Instruction to the Jury on the Court's prior orders and Buckeye's late August – early September, 2003, turnover of CHEP pallets in its possession.
7. Schedule for submission of memoranda in opposition to those motions in limine that were filed previously and to which the parties have not yet responded.
8. Order of examination, limits on examination and order of opening statement and closing argument.
9. How the Court intends to handle witnesses and exhibits that may testify to or that contain or refer to "confidential" or "Attorney's Eyes Only" information.
10. The Court's practice regarding publication of exhibits to the jury prior to admission of same into evidence.

V. **MODIFICATION**

This final pretrial order may be modified at the trial of this action or prior thereto, to prevent manifest injustice. Such modification may be made by application of counsel or on motion of the Court.

VII. **SETTLEMENT EFFORTS**

The parties have had intermittent settlement discussions that have been unsuccessful in resolving the remaining claims to date

VII. **JURY INSTRUCTIONS**

PROPOSED INSTRUCTIONS

The parties will submit proposed Jury Instructions not later than one week prior to a confirmed trial date or at such time as the Court directs.

Approved following Final Pretrial
Conference:

Walter Herbert Rice, Judge

s/James A. Wilson
Counsel for Plaintiff

s/Bridgette C. Roman
Counsel for Defendant