

**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  
DISCOVERY CONFERENCE AGENDA**

Pursuant to the Court's instructions in the telephone conference held May 13, 2004, Plaintiff Buckeye Diamond Logistics and Defendant CHEP USA hereby jointly file this Discovery Conference Agenda in order to set forth pending discovery issues and other matters that require the resolution of the Court, together with their respective positions on each:

**Summary of Agenda**

**A. Issues Raised by Plaintiff**

1. Plaintiff requests the Court strike CHEP's April 20, 2004 revision of its damage disclosure.
2. The Court should order CHEP to produce data or documents concerning pallet dwell times at NPD's, the entities from whom Buckeye frequently receives pallets, as requested in Interrogatory #2 and Request for Production of Documents #5, 6 and 24.

3. The Court should order CHEP to produce data or documents regarding pallet revenue and utilization rates as requested in Request for Production of Documents ##16 and 17.

4. The Court should order CHEP to respond directly and without objection to Buckeye's Interrogatory #1, parts e and f.

5. CHEP should be ordered 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, together with documents subsequently promised to Buckeye.

6. CHEP should be required to produce in Ohio the originals of documents in which the copies produced are illegible.

7. Defendant should be required to certify that all of its discovery obligations have been met.

8. The Court should clarify the proper use of the Protective Order and the procedure for filing confidential materials.

9. Buckeye should be provided unredacted copies of CHEP 14643-46 and any other documents that have been redacted in this case.

**B. Issues Raised by Defendant**

1. Buckeye has improperly refused to supplement its discovery responses.

2. Buckeye's damages claim has never been properly disclosed and is not legally sustainable.

3. The scope of "relevance" needs to be determined to avoid an unnecessary protracted trial.

4. The Court has determined that CHEP owns its pallets and Buckeye should be prevented from refuting ownership.

5. The Court has determined that CHEP has neither lost nor abandoned its pallets and Buckeye should be prevented from asserting otherwise at trial.

6. Bain & Co. is not an “agent” of CHEP and therefore its hearsay statements are inadmissible.

7. Buckeye’s stated intention to “reverse the right” to call an expert is untimely and Buckeye should be prevented from doing so.

8. Scope of examination/order of witnesses at trial.

At the outset, it should be noted that these are complicated issues that truly require a discovery conference with the Court. This written agenda is no more than a brief summary of the items requiring the Court's intervention. The sections that follow summarize the parties’ positions in each item.

**EXPLANTION OF PARTIES POSITIONS REGARDING  
THE SUMMARY ITEMS LISTED ABOVE**

A. Issues Raised by Plaintiff

1. Plaintiff requests the Court strike CHEP’s April 20, 2004 revision of its damage disclosure.

Plaintiff’s Position: Trial in this case has already been delayed once by CHEP’s failure to make a timely disclosure of its damages. On February 2, 2004, Buckeye file a Motion in Limine (Docket # 77) regarding CHEP USA’s failure to make timely disclosure of its damage claims and evidence. Two days after the filing of Buckeye’s Motion, 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. Specifically, CHEP disclosed that it is seeking \$33,995 “depreciation” in the pallets held by Buckeye, \$39,936 for reconditioning of pallets held by Buckeye, \$48,444 for the “cost of capital” supposedly incurred as the result of Buckeye’s actions and \$37,482 in damages for pallets Buckeye returned to CHEP’s customers for an agreed upon fee. 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 23<sup>rd</sup>, Buckeye served a Third Set of Interrogatories and a Fourth Set of Interrogatories on CHEP.

On April 20<sup>th</sup>, less than six weeks before the May 24<sup>th</sup> trial date the Court had reset, CHEP again sent to Buckeye a damage disclosure that drastically increases the amount of damages CHEP is claiming from Buckeye. Then on May 13, 2004, CHEP sent yet another revision to its damage disclosure, which disclaimed reliance it had previously made on a counterfeit invoice regarding the cost of washing and repairing pallets, but did not clearly specify what its new basis for such a damage claim was. Each of these revisions is a response to flaws in methodology or factual premise that Buckeye has uncovered in discovery. If either damage revision is allowed, Buckeye must redepose CHEP’s damages witnesses, incurring even more expense in defending an unfounded claim. The Court should bar CHEP from offering this revised damage disclosure, or any accompanying exhibits, at trial in this case.

Defendant’s Position: Because of the change in the trial date, CHEP has acquired *from Buckeye* additional and more current information about the number

of CHEP pallets that Buckeye received in the usual course of its business. On a daily basis, Buckeye faxes to CHEP a tally of the number of CHEP pallets it receives. CHEP utilized this information in computing two of the four elements of its damages claim (shown below with the “\*”). Although CHEP’s methodology has not changed at all, the numbers have changed because of more up-to-date information supplied by Buckeye and because it has separately considered block and stringer pallet data as suggested by Buckeye’s counsels’ deposition examination of Elton Potts:

	<u>Original</u>	<u>Current</u>
* Depreciation in Value	33,976	50,479
* Cost of Capital	47,107	60,676
** Cost to Repair	39,936	32,326
Sales by Buckeye	37,482	37,482
	158,501	180,963

The “Cost to Recondition” (noted by the “\*\*”) has actually gone down; this change inures to Buckeye’s benefit. The basic methodology for the computation of that portion of CHEP’s damages is the same. The reason for the lower numbers is little more than Buckeye’s own suggestion that slightly different multipliers be used. The use of the multipliers *suggested by Buckeye* resulted in a computation that reduced Buckeye’s liability by over \$7,000. Thus, the revisions to CHEP’s damages calculations are as a result of more up-to-date information *supplied by Buckeye*, separating out block and stringer pallets *as suggested by Buckeye*, and using a different multiplier *as suggested by Buckeye*. Buckeye can hardly be claimed to be prejudiced by these revisions which it itself raised. Furthermore, there is no reason why Buckeye would have to re-open depositions

as a result of these changes, as the methodology employed by CHEP in calculating its damages has not changed whatsoever.

2. The Court should order CHEP to produce 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.

Plaintiff's Position: 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. Buckeye will present evidence that pallets containing CHEP's logo have frequently been sent by non-participating distributors to both entities with no relation to CHEP and to CHEP participating distributors, and thus that the ultimate origin of pallets Buckeye has received containing CHEP's markings could be any of hundreds of non-participating distributors. Candice Southwick, the executive responsible for this area at CHEP, testified data concerning dwell times at non-participating distributors could easily be generated. Southwick dep. (4/7/04) at 72-75.

Defendant's Position: When the Court allowed Buckeye to conduct additional discovery, the Court specifically limited that discovery to CHEP's damage claims. Dwell time (which relates to revenue issues) is not factored anywhere in CHEP's damage claims, which are based solely on cost of repair, Buckeye's alleged sales proceeds, depreciation in value while the pallets were held by Buckeye and cost of capital to replace the pallets held by Buckeye. Buckeye's discovery request is

beyond the scope of what was permissible discovery. Furthermore, Buckeye's discovery requests directed to dwell time are grossly beyond the scope of any remote likelihood of leading to the discovery of admissible evidence.

"Dwell time" is the "amount of time that a pallet stay[s] in the distribution channel." (R. Miller Depo., p. 64). Buckeye questioned several CHEP employees about dwell time and received the same general response that such information is "not a meaningful calculation;" (Potts Depo. P. 206) that CHEP does not look at average dwell times for NPD's (Southwick Depo. P. 73); and that "in the instance of an NPD, it isn't value added information." (Southwick Depo. P. 74).

Buckeye's Interrogatory No. 2 (from its Third Set of Interrogatories) seeks dwell time for each of the more than 600 NPDs within 100 miles of Buckeye. Even ignoring the complete lack of relationship between CHEP's damages claim (the permissible scope of the limited discovery) and dwell time, Buckeye cannot name any more than 7 or 8 potential sources of CHEP pallets (3 of which are really one company – a company that is not an NPD). There are 846 NPD's within 150 miles of Buckeye's facility. Since there is no evidence that any of these NPDs, other than the handful identified by Buckeye as "possible sources" of CHEP pallets, are the actual source of the CHEP pallets coming into Buckeye's possession, there is no reason for Buckeye to obtain this information. (Buckeye has repeatedly denied the ability to identify its sources of CHEP pallets). To the extent that Buckeye believes that it is creating some savings to CHEP

demonstrable through dwell time reduction that savings could only be quantified, if at all, if Buckeye could identify its sources of CHEP pallets.

This is conceptually consistent with the Court's decision on the Motions in Limine (Docket #89). In that Decision, the Court foreclosed Buckeye from using information about possible losses from a particular customer because there was no evidence that Buckeye acquired any CHEP pallets from that customer. (See Docket # 89, at page 11). In this instance because Buckeye has no evidence that CHEP pallets come from any identifiable NPD, there is no reason for CHEP being required to create these reports.

Although the reports sought by Buckeye do not exist for any business purpose (and the testimony by the CHEP personnel establish that those reports have no business value to people within CHEP), the reports by particular NPDs are capable of being created. In order, however, to create these reports, an analyst would have to devote many days to creating individual reports for each of the hundreds of NPDs encompassed by the discovery requests. Since all but a few of these NPDs have no connection to Buckeye, no cause exists for so burdening CHEP.

Finally, Buckeye points to its Request for Production #24 as supportive of its request to force CHEP to create reports not otherwise created in the normal course of operations. In Request #24 Buckeye sought "documents referring or relating to any analysis of the costs incurred by CHEP since January 1, 1999, as the result of any delay in the return of pallets by any category of customers or

NPDs or of the benefit to CHEP of expediting the return of pallets or increasing its asset recovery rates”. As CHEP correctly responded,

Objection on the grounds of Relevance, Over-Breadth and Undue Burden. CHEP’s damage claim is restricted to depreciation in value, cost of capital or repair costs for the 27,345 CHEP pallets wrongfully withheld by Buckeye. This request is solely designed to buttress Buckeye’s damage claim for unjust enrichment. As CHEP is making no claim for lost revenue as part of its damage claims, the issue of “delay in the return of pallets by any customer, category of customers or NPDs or of the benefit to CHEP of expediting the return of pallets or increasing its asset recovery rates” for pallets is totally irrelevant as well as overly broad and unduly burdensome.

Although Buckeye had the ability to raise a dispute with CHEP’s position relative to dwell time prior to the original discovery cutoff, Buckeye elected not to do so. Rather, Buckeye is using, or mis-using, the limited additional damages discovery allowed by the Court to circumvent its failure to raise this issue in a timely fashion.

Given the testimony of CHEP’s personnel that this dwell time information is not a legitimate business evaluation tool and the fact that this data has no bearing on CHEP’s damages claim (the only limited further discovery permitted by the Court), CHEP’s objection is legitimate and it should not be required to create these reports to respond to Buckeye’s discovery requests.

3. The Court should order CHEP to produce data or documents regarding pallet revenue and utilization rates as requested in Request for Production of Documents ##16 and 17.

Plaintiff’s Position: 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. Elton Potts, a senior CHEP executive, has admitted that CHEP’s utilization rate information could be produced without substantial burden. Potts dep. at 88-90.

Defendant’s Position: As with “dwell time” addressed above “utilization rate” information does not have anything to do with the 27,395 CHEP pallets that Buckeye wrongfully withheld from CHEP.

Buckeye’s specific requests, which it ties to “utilization rates,” along with CHEP’s responses are as follows:

16. All documents referring or relating to any calculation the average daily, weekly or monthly revenue paid to CHEP for pallets in the possession of CHEP’s manufacturer or distributor customers or any NPD, for any period since January 1, 1999.

**RESPONSE:**

Objection on grounds of Overbreadth, Undue Burden and Relevance. This request is solely designed to buttress Buckeye's damage claim for unjust enrichment. As CHEP is making no claim for lost revenue as part of its damage claims the "calculation [of] the average daily, weekly or monthly revenue paid to CHEP for pallets in the possession of CHEP's manufacturer or distributor customers" is totally irrelevant as well as overly broad and unduly burdensome. CHEP's damage claim is restricted to depreciation in value, cost of capital and repair costs for the 27,345 CHEP pallets wrongfully withheld by Buckeye. As to the 27,395 CHEP pallets wrongfully held by Buckeye, there was no revenue paid to CHEP from any source nor has CHEP made any damage claim for any loss of revenue and, accordingly, no responsive documents related to same. See also, sworn testimony of Elton Potts, April 8, 2004.

17. All documents referring or relating to CHEP's utilization rates (i.e., the percentage of CHEP's inventory not at customer locations or outside of CHEP's control and available for rental) for block or stringer pallets on an annual, monthly, weekly or daily basis for any period since January 1, 1999.

**RESPONSE:**

Objection on grounds of Over-breadth, Undue Burden and Relevance. In addition, as phrased, the request is ambiguous. This request is solely designed to buttress Buckeye's damage claim for unjust enrichment. As CHEP is making no claim for lost revenue as part of its damage claims the "utilization rates" are totally irrelevant. CHEP's damage claim is restricted to depreciation in value, cost of capital and repair costs for the 27,345 CHEP pallets wrongfully withheld by Buckeye. Utilization rates are a component of lost revenues and CHEP is not claiming any damages for lost revenues. The requested documents referring or relating to CHEP's utilization rates have no relevance whatsoever to CHEP's damage claims concerning the 27,395 CHEP pallets wrongfully withheld by Buckeye.

4. The Court should order CHEP to respond directly and without objection to Buckeye's Interrogatory # 1, parts e and f.

**Plaintiff's Position:** In its answer to Buckeye's Interrogatory #1, parts e and f, CHEP. rather than admitting that it lacks information as to pallets Buckeye

received, object as to “availability.” The reason for such avoidance 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 its lack of knowledge as an objection.

Defendant’s Position: CHEP has responded to the questions embodied in these interrogatory subparts again and again. The Interrogatory subparts Buckeye is complaining about (and CHEP’s responses) are as follows:

1. For all pallets recovered from Buckeye Diamond Logistics in August and September 2003, state:
  - (e) the date each such pallet was received by Buckeye and from whom Buckeye received it; and
  - (f) the condition of the pallet on the date it was received by Buckeye.

**RESPONSE:**

- (e) Objection on the grounds of Availability. This information is known to Buckeye or Buckeye has failed or refused to provide such information to CHEP. See also, sworn testimony of Elton Potts, April 8, 2004 (Potts Depo pp. 70-71, 79-81).
- (f) Objection on grounds of Availability. This information is known to Buckeye and Buckeye has failed or refused to provide such information to CHEP. See also, sworn testimony of Elton Potts, April 8, 2004 (Potts Depo pp. 70-71, 79-81).

Buckeye’s position articulated above is an example of the “best defense is a good offense.” In reality, who is in the best position to know “the date each [CHEP] pallet was received by Buckeye...from whom Buckeye received it...[and] the condition of the pallet on the date it was received by Buckeye?” Of course, Buckeye is and has been in the unique and sole position to know that information. Yet, all of CHEP’s efforts to obtain this information from Buckeye has met with one of two responses: (a) its sources of the CHEP pallets in its

possession are too confidential to reveal to a competitor (DeVaughn Depo., pp 165-67) or (b) that Buckeye did not know or have available such information (Buckeye's responses to Interrogatories 3-8, 11-12).

Clearly, at this phase of the litigation, with over 20 depositions of CHEP personnel having been taken and several of them asked questions in this same vein, Buckeye knows that CHEP does not have this information. CHEP's responses to subparts e & f of Interrogatory No. 1 (of Buckeye's Third Set of Interrogatories) is absolutely correct.

5. CHEP should be ordered 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, together with documents subsequently promised to Buckeye.

Plaintiff's Position: 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 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 15<sup>th</sup> order that it produce the original file in Columbus. Likewise, while on April 29, CHEP agreed to provide Buckeye with (a) a clean, legible hard copy of CHEP 00795; (b) an electronic (Excel) version of the document; (c) all metadata connected with the file; (d) identification of the server, drive, folder, and subfolder (if any) in which this document is located, and (e) copies of all other documents in that folder or subfolder, it has not done so. It should be ordered to provide all of this information without further delay.

Defendant's Position: CHEP has not been "ordered to produce in Columbus the full original file in which CHEP 00795 was found." The Court issued no such order.

Regardless, in addition to CHEP 00795, Buckeye has produced all available requested information, including:

1. CHEP 10967: Email from Glen Kolb (the author of 00795) regarding the initial draft of CHEP 00795.
2. CHEP 10968: Initial draft of CHEP 00795.
3. CHEP 10969: Email from Glen Kolb regarding the revised draft of CHEP 00795.
4. CHEP 10970: The revised version of CHEP 10969 and a perfectly legible duplicate of CHEP 00795.
5. CHEP 14652: A diskette with electronic duplicates of CHEP 10967, 10968, 10969, 10970, copied from CHEP's computer system.
6. Glen Kolb: Mr. Kolb was produced in Columbus for a deposition on April 27, 2004. He was fully questions about the subject documents.

The papers from which CHEP 00795 was originally pulled for the purposes of production to Buckeye were "old files" left behind by Roger Miller and found by Keith Norder when he moved into the office. (K. Norder Depo., pp. 200-202). Roger Miller was the addressee of the two emails noted above and left CHEP approximately two and one-half years ago. Keith Norder left CHEP approximately six months ago. There simply is no "original file" from which the document came, other than the computer-based file which has been produced.

Even if it was possible to reconstruct the exact location from which CHEP 00795 was originally pulled, CHEP provision of CHEP 10967, 10968, 10969, 10970 and 14652 and Glen Kolb's deposition more than adequately address anything related to CHEP 00795.

6. CHEP should be required to produce in Ohio the originals of documents in which the copies produced are illegible.

Plaintiff's Position: On April 9<sup>th</sup>, after CHEP's disclosure that it had failed to produce responsive documents related to CHEP 00795 that were due more than a year and a half ago, and produced clearer copies of earlier drafts of that document, 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. Since that request, Buckeye has learned that CHEP 00795 still exists on CHEP's computer system, and so there is no reason that with a diligent search, a clear copy could not have been produced two years ago. 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.

Defendant's Position: On January 13, 2003, Buckeye asked for more legible copies of certain documents. On February 10, 2003, CHEP responded by delivering to Buckeye's counsel better copies of most of the requested copies. In conveying the copies, CHEP communicated that "they [were] unable to locate the few remaining documents you listed." Buckeye was apparently satisfied with this

response because Buckeye communicated nothing on the subject of these copies for more than thirteen months after which it again asked for the very same "better copies" that had been supplied on February 10, 2003. CHEP again responded on April 13, 2004, that the correspondence of February 10, 2003 had fully addressed the issue.

Buckeye uses CHEP's recent discovery and prompt disclosure of the author and "better copies" of CHEP 00795 to cast dispersions on CHEP's compliance with its discovery obligations. Buckeye's assertions are misleading. As Buckeye well knows from deposing the author of the document, the computer file version of CHEP 00795 was stored in one person's computer files in a system with no document management system (and, therefore, no ability to search for it on a global basis). (See, Kolb Depo, pp 37-38).

In addition, and contrary to the dispersions that Buckeye casts toward CHEP, CHEP has offered to open its doors to Buckeye's counsel to examine documents "as they are kept in the usual course of business" (which is the very language used in Fed. R. Civ. P. 34(b)). Since Buckeye has decided that anything CHEP does to locate documents is apparently inadequate, there is no better way for Buckeye to check up on CHEP's work than to go to the place where the data resides and view it as "kept in the usual course of business." Buckeye has declined CHEP's offer.

7. Defendant should be required to certify that all of its discovery obligations have been met.

Plaintiff's position: Unfortunately, a number of events have lead to substantial doubts as to whether CHEP has fulfilled its obligations to respond fully and accurately to Buckeye's discovery requests. As note above, on March 26, 2004, CHEP disclosed that its representations to the Court and to Buckeye at the telephone conference held on March 15<sup>th</sup> 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. Subsequently, in the deposition of Glen Kolb, the author of this document, Buckeye learned that he had never been asked to produce responsive documents, and that his original still existed on CHEP's computer system.

Moreover, recent depositions have raised other serious issues concerning the veracity of CHEP's discovery responses, and have revealed glaring defects and omissions in those responses. For example, Candice Southwick, who was identified in interrogatories and offered as the CHEP employee most knowledgeable about the mutual customers to whom Buckeye returned pallets for a fee 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. Another CHEP 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. 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 then been produced and that were readily available. See, e.g., id. at 120-21.

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; and (2) the continuing failure of CHEP to produce the original file and content in which CHEP 00795 was found, 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, 461 (1995), that no other responsive documents had been overlooked. CHEP has never responded to this request. 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. .

Defendant's position: Buckeye paints with a broad brush with regards to this issue. First, it issued extremely broad discovery requests that greatly exceed the

proper boundaries of discovery. CHEP has, where appropriate, interposed objections. In addition, CHEP has, "subject to and without waiving objections," produced over 14,500 documents, which it obtained from countless employees (there are more than 1,400 employees in CHEP's U.S. operations).

CHEP can, and is willing, to certify production of all non-objectionable documents. Fed. R.Civ. P. 34(b) states that when objections have been interposed, the "party submitting the request may move for an order under Rule 37(a) with respect to any to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested." Buckeye has never done so. In fact, when CHEP requested narrowing wildly broad requests, Buckeye responded with a thundering "no". One can only address certifying compliance with discovery obligations by doing so on a request-by-request basis and then only when the scope of the request is properly tailored to that which is reasonably calculated to lead to the discovery of admissible evidence.

8. The Court should clarify the proper use of the Protective Order and the procedure for filing confidential materials.

Plaintiff's Position: In its March 15, 2004, the Court held that no document may be filed under seal without the Court's prior approval. CHEP takes the position that the protective order in this case precludes Buckeye from filing any document marked confidential (which includes 99% of CHEP's production in this case) other than under seal. Without a clarification of the procedure, Buckeye is hamstrung in presenting its arguments in written filings to the Court.

Buckeye further objects to CHEP's belated effort to mark portions of Keith Norder's trial deposition confidential. First, such designations are untimely under the Court's order – which required that they be designated as confidential last February if CHEP wanted to use the Stipulated Protective Order's protection. Buckeye never invited CHEP to belatedly designate any of this transcript confidential. It simply asked CHEP to confirm that no correspondence timely designating the materials confidential had been sent. Second, the portions CHEP has designated confidential (which Buckeye is thereby precluded from attaching to this pleading) do not meet the standards for designation as confidential or attorneys eyes only under the Stipulated Protective Order. Under the order, to qualify to be marked with either confidentiality designation, CHEP must be able to show for each deposition transcript page marked:

- (1) that the information therein has not be disclosed to the public;
- (2) that this information therein contains genuine trade secrets or highly sensitive commercial, financial, or business information; and
- (3) that the disclosure (either to the public or to Buckeye) of such information in fact would adversely affect the business, commercial or financial interests of CHEP.

Buckeye is prepared to show at the discovery conference that the materials designated do not meet this standard. Third, there is absolutely no basis for keeping trial testimony confidential, either in law or under the facts of this case. “Simply showing that the information would harm the company's reputation is not sufficient to overcome the strong common law presumption in favor of public

access to court proceedings and records.” Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1179 (6<sup>th</sup> Cir. 1983). The aversion to secrecy becomes stronger once materials are submitted to the court in pleadings or at trial: “a court should not seal records unless public access would reveal legitimate trade secrets, a recognized exception to the right of public access to judicial records.” Id. at 1180. This rule rests on long standing and fundamental concerns with the integrity of the judicial process:

Throughout our history, the open courtroom has been a fundamental feature of the American judicial system. Basic principles have emerged to guide judicial discretion respecting public access to judicial proceedings. These principles apply as well to the determination of whether to permit access to information contained in court documents because court records often provide important, sometimes the only, bases or explanations for a court's decision.

Id. at 1177.

Defendant's Position: It is disingenuous for Buckeye to claim that the Protective Order "hamstrings" it in presenting arguments in written filings to the Court. After all, Buckeye managed to fully and completely brief all issues in connection with the summary judgment proceeding and comply with the Protective Order.

The only thing "hamstrung" by the Protective Order is Buckeye's efforts to turn these proceedings into a public spectacle for CHEP's competitors. As CHEP shows in graphic detail, largely provided by Buckeye's Chairman Sam McAdow, anything that Mr. McAdow learns about CHEP he disseminates to the recycling community through web-postings on *The Pallet Board*. See, Buckeye's Motion for Reconsideration (Docket # 92) for a detailed explanation of Buckeye's publication of information concerning CHEP.

In addressing the Protective Order issues, the Trial Testimony of Keith Norder was taken on February 17, 2004. Although the Protective Order has procedures for addressing designation of Discovery Material as “confidential” or “outside attorney’s eyes only,” the Protective Order does not address how to handle this procedure when trial testimony is recorded in a deposition format. Counsel for Plaintiff raised an issue about this Trial Testimony and took the position that Defendant had failed to make any timely “confidential” or “outside attorney’s eyes only” designations. While Defendant responded to Plaintiff’s Counsel on May 12, 2004, and advised of several “confidential” pages (which allows representatives of Plaintiff’s to view and use this information for purposes of the litigation), Defendant’s position is that Trial Testimony (whether it be issues of the handling of same under the Protective Order or whether is has to do with advance ruling on the objections on the record of that Trial Testimony before it is heard by the Jury), is something that should be addressed at the Final Pretrial Conference.

The need for the reasonable security afforded by the Protective Order is addressed in far greater depth in Docket # 92 and # 98. Given Buckeye's repeated publications of information that CHEP had designated as "confidential," Buckeye's broadcast of information through *The Pallet Board* website, and the highly sensitive and commercially valuable information CHEP provided to Buckeye in reliance on the Protective Order, CHEP agrees that the use of the Protective Order and the procedures for handling of confidential information should be addressed by the Court.

9. Buckeye should be provided unredacted copies of CHEP 14643-46 and any other documents that have been redacted in this case.

Plaintiff's Position: A protective order exists in this case. Buckeye is willing to abide by any modification of that protective order the Court orders. Such procedures will provide CHEP with more than adequate protection of supposedly confidential materials.

Defendant's Position: Buckeye has violated the Protective Order on at least two occasions by filing documents with the Court that were required to be filed under seal (See Docket #93 and the Motion to Compel filed by Buckeye in an ancillary proceeding in Tennessee). These actions, coupled with Buckeye's efforts to open up the documents previously filed under seal when added to Buckeye's recurring public postings on *The Pallet Board* website, have forced CHEP to redact recently produced documents that contain either (1) extraneous information, not responsive to Buckeye's requests or (2) highly confidential and proprietary business information.

Buckeye cannot have it both ways. Either it abides by the Protective Order or CHEP is forced to redact information.

B. Issues Raised by Defendant:

1. Buckeye has improperly refused to supplement its discovery responses.

Defendant's Position: On April 21, 2004, CHEP requested that Buckeye review its previous responses to "Interrogatories 3 – 8, 11, and 12 and provide the necessary supplementation or affirm that the initial answers are complete and

correct.” These interrogatories address Buckeye’s sources of CHEP pallets. Buckeye disclosed seven to eight sources and did so specifically subject to the “Confidential Outside Counsel Only” designation. Through this supplementation request CHEP merely seeks complete and correct information responsive to the earlier queries.

CHEP also sought, through its supplementation request, updated financial statements (for the periods ending 6/30/03 and 3/31/04). Buckeye previously produced such statements for earlier periods.

Buckeye refused to supplement its production as indicated by Buckeye’s counsel’s letter of April 29, 2004. By letter of May 3, 2004, CHEP cited to Buckeye authority for the proposition that there is a duty to supplement where there are on-going procedures at issue in the litigation, such as the case here. Specifically, CHEP advanced these authorities in support of its position: Fed.R.Civ.P. 26(e), Moore's Federal Practice §26.131, and *Arthur v. Atkinson Freight Lines*, 164 F.R.D. 19, 20. Buckeye refuses to comply with its obligations.

Plaintiff’s Position: The request for supplementation of discovery responses is in fact an effort by CHEP to gain additional discovery that the Court has not authorized. CHEP overstates the scope of the obligations of Fed. R. Civ. P. 26(e) and ignores the scheduling orders of this Court in demanding such discovery.

The interrogatories CHEP claims Buckeye is obligated to supplement are the following:

**INTERROGATORY NO. 3:**

Please identify every person or entity with whom you have (or had at any time during the last two years), a contract, agreement, arrangement or understanding

(formal or informal, oral or written) relating in any way to the collection, transportation, storage, possession, use, or other handling of CHEP pallets, and, in the case of entities, please identify your primary contact person(s) for that entity.

**ANSWER:** None. Buckeye has no contract with CHEP and has never had a contract with CHEP. None of Buckeye's contracts with distributors requires it to return pallets marked with the CHEP logo or other proprietary pallets to those distributors. However, in response to a request from the Kroger Co., Buckeye has in the past several years transported pallets marked with the CHEP logo from the Kroger distribution center to CHEP's depot. In addition, Buckeye currently transports pallets marked with the CHEP logo from the Kroger distribution center to Kroger's Columbus bakery. Buckeye has been paid a transportation fee for these services. In addition, Buckeye occasionally transports pallets marked with the CHEP logo from its facility to the facilities of customers, at the request of customers, when those customers have a shortage of pallets to return to CHEP. These customers are charged a handling and transportation fee. All documents reflecting these transaction will be produced.

**INTERROGATORY NO. 4:**

For each person or entity identified in your Answer to Interrogatory No. 3, please describe the nature of the contract, agreement, arrangement, or understanding, and identify with specificity your rights and obligations under the contract, agreement, arrangement, or understanding.

**ANSWER:** See response to Interrogatory 3.

**INTERROGATORY NO. 5:**

For each contract, agreement, arrangement, or understanding identified in your Answer to Interrogatory No. 3, please identify the approximate number of CHEP pallets you have handled each week pursuant to that contract, agreement, arrangement or understanding.

**ANSWER:** See response to Interrogatory 3.

**INTERROGATORY NO. 6:**

For the CHEP pallets you handle pursuant to any of the contracts, agreements, arrangements, or understandings identified in your Answer to Interrogatory No. 3, please describe your procedures for collecting and transporting those pallets from the point of collection to a designated CHEP depot.

**ANSWER:** See response to Interrogatory 3.

**INTERROGATORY NO. 7:**

Please state whether all of the CHEP pallets you handle pursuant to any of the contracts, agreements, arrangements, or understandings identified in your Answer to Interrogatory No. 3 are delivered to a designated CHEP depot. If the answer is “no,” please identify with specificity what happens to those pallets that are not transported to a designated CHEP depot, and identify all persons with knowledge of these facts.

**ANSWER:** See response to Interrogatory 3.

**INTERROGATORY NO. 8:**

Please state whether any of the CHEP pallets you handle pursuant to any of the contracts, agreements, arrangements, or understandings identified in your Answer to Interrogatory No. 3 are ever transported to, or stored at, any of your business locations before being delivered to a designated CHEP depot. If the answer is “yes,” please state the reason those pallets are transported to or stored at your location(s).

**ANSWER:** See response to Interrogatory 3.

**INTERROGATORY NO. 11:**

For the CHEP pallets identified in your Answer to Interrogatory No. 10, please identify how those pallets come into your possession (including *but not limited to* from whom you receive them and how they are transported to your location(s)), identify with specificity what you do with those pallets after they come into your possession, and identify all persons with knowledge of these facts.

**ANSWER:** Buckeye parks semi trailer vans at the facilities of distributors and wholesalers, which are then filled with pallets by distribution center employees as they accumulate. Once the trailer that is filled, Buckeye replaces it with another empty semi-trailer. Buckeye accepts the contents of these semi-trailers, sight unseen. Buckeye receives pallets marked with the CHEP logo, as well as pallets marked with other logos, co-mingled with a other incoming pallets in the semi-trailers of pallets it receives from distributors, but and does not know ahead of time how many pallets it will receive containing CHEP markings or logos or other proprietary pallets. Buckeye also receives pallets marked with the CHEP logo and other logos from retailers that have bought goods from distressed distributors on a “fully packaged basis.” In such circumstances, the major retailers have purchased the goods at a price that included the cost of the pallet upon which they

were shipped and are thereby entitled to sell or transfer these pallets to Buckeye. Buckeye does not record or track which distributors send it pallets containing CHEP markings or logos. In order to maintain its flow of business, these unwanted transferred pallets are sorted, stored and safeguarded by Buckeye. In light of CHEP's history of threats directed to recyclers, Buckeye does not sell these pallets as it would other pallets it receives. Nor is Buckeye compensated for the services it provides with respect to such pallets as it is for similar services provided to other companies circulating proprietary pallets. In order to reduce the amount of storage space devoted to pallets containing CHEP markings or logos, Buckeye delivers such pallets, as described in Buckeye's answer to Interrogatory 3, to customers who advise Buckeye that they have a shortage of pallets to return to CHEP.

The persons knowledgeable about these facts are the individuals identified in response to Interrogatory 2.

**INTERROGATORY NO. 12:**

To the extent not already identified in your Answers to Interrogatory No. 3, please identify every person or entity from whom you have collected CHEP pallets at any time in the two years preceding the date of these discovery requests, and, in the case of entities, identify your primary contact person(s) with that entity.

**ANSWER:** Buckeye does not record or track which distributors send it pallets containing CHEP markings or logos. Subject to the provisions of the protective order in this case, and designated "Confidential – Outside Attorneys Only," attached is a list of the customers of Buckeye who may have sent pallets marked with the CHEP logo to Buckeye.

Buckeye does not believe that any of these answers are now "incomplete or incorrect" because each sought information as of the time of the answer. Likewise, Buckeye does not believe that it is obligated to produce its financial statements on an on-going basis, each time trial is continues simply because as time passes it will inevitably have more recent statements. Finally, CHEP position is inconsistent with its own actions, given that it has not offered any supplementation of its discovery responses. If Buckeye is obligated to

supplement these interrogatories and to produce additional documents, CHEP should be required to do the same.

2. Buckeye's damages claim has never been properly disclosed and is not legally sustainable.

Defendant's Position: In its 26(a)(1) Disclosure, Buckeye's position was that its damages were loss of "average net profit per pallet which Plaintiff has not resold because of CHEP's threats" or (2) "reasonable compensation for services provided." Buckeye subsequently advised that it could "sell these pallets" for between "\$9 - \$12 per pallet." And, with "respect to its claims for fair compensation" it put forth two alternate theories: "(a) the surcharge price CHEP charges for shipment of pallets to hostile or non-cooperative NPD's ...(b) the price Buckeye is paid by those who put into circulation other proprietary pallets...(i.e. \$4 to \$6.50 per pallet)." (January 15, 2003, correspondence).

CHEP submits that these "disclosures" neither meet the required standards nor constitute legally permissible theories for Plaintiff's sole claim of unjust enrichment. (See Docket #76, & 84 for further discussion).

Plaintiff's Position: The issues CHEP seeks to present by this item are largely set forth in the briefing of CHEP's Motion in Limine regarding damages (Docket # 76), with the exception of CHEP's belated disclosure of a fully legible copy of CHEP 00795, which Buckeye advised CHEP on April 28, 2004 would be an alternative grounds for its proof of damages.

CHEP admits that Buckeye supplemented its damage disclosure on January 15, 2003, before discovery was closed. ICHEP specifically took

discovery on this damage disclosure and made no complaint during the discovery period that this disclosure was inadequate. See, e.g., Deposition of Sam McAdow Sr. (Jan. 22, 2003) at 319-23. CHEP does not and cannot claim that Buckeye failed to produce all of its supporting documentation showing the compensation it was paid by beverage distributors for the return of pallet, and documentation concerning CHEP's surcharges for shipments to non-participating distributors are uniquely within CHEP's position.

As noted above in connection with plaintiff's issues 5 and 7, CHEP produced a fully legible copy of an internal analysis of the benefit to CHEP of paying recyclers for the return of pallets (CHEP 00795) on March 26, 2004, despite the fact the document had been requested and was responsive to plaintiff's original document requests served at the filing of the case. When Buckeye took the author's deposition on April 27, 2004, he disclosed for the first time that the bottom, previously-illegible portion of this document were a calculation of the full benefit to CHEP of recovering pallets through recyclers such as Buckeye. At that point, Buckeye immediately notified CHEP that it would use this document as an alternative ground for proof of damages. Since the document is a CHEP document and the witnesses knowledgeable concerning the document are CHEP employees, CHEP cannot claim that the use of this document in Buckeye's damage claim in any way prejudices it.

Buckeye's theory of its damages is well-founded in established law. By its Decision and Entry of August 11, 2003, the Court granted summary judgment to CHEP on all of Buckeye's claims other than Count 4 of its complaint, its claim

for unjust enrichment. As the Court recognized in its decision, to prevail on its unjust enrichment claim, Buckeye must establish “(1) it conferred a benefit upon the defendant, (2) the defendant knew of the benefit, and (3) the defendant would be unjustly enriched to retain the benefit without compensating the plaintiff.” Id. at 41-42. If Buckeye proves its unjust enrichment claim, the authority previously cited by CHEP itself holds that Buckeye is entitled to damages based on the benefit of its activities to CHEP. See U.S. Heath Practices, Inc. v. Byron Blake M.D., Inc., 2001 WL 277291, at \*2 (Franklin Cty. Ct. App. Mar. 22, 2001) (copy attached at Tab A) (cited in CHEP’s Motion in Limine #12, at p. 2, n. 1) (“The difference between quantum meruit and unjust enrichment is the manner in which damages are computed. For unjust enrichment, damages are conferred in the amount the defendant benefited.”). See also SEC v. Blavin, 760 F.2d 706, 713 (6<sup>th</sup> Cir.1985). “[T]he doctrine of unjust enrichment provides that a person shall not be allowed to profit or enrich himself inequitably at another’s expense, but should be required to make restitution of or for property or benefits received, retained, or appropriated, where it is just and equitable that such restitution be made.”); Harris v. Physicians Mutual Ins. Co., 240 F.Supp.2d 715, 722 (N.D. Ohio 2003) (Carr, J.) (citing Gavriles v. Verizon Wireless, 194 F.Supp.2d 674, 681 (E.D.Mich.2002); Glasstech, Inc. v. TGL Tempering Systems, Inc., 50 F.Supp.2d 722, 731 (N.D. Ohio 1999) (Katz, J.) (citing Norton v. City of Galion, 60 Ohio App.3d 109, 110, 573 N.E.2d 1208, 1209 (App. Dist. 3, Crawford Cty. 1989)); Shonac Corp. v. Amko Int’l, Inc., 763 F. Supp. 919, 946 (S.D. Ohio 1991) (Graham, J.) (plaintiff’s damages not measured by its losses, but rather by

defendant's gain). Accordingly, if it proves its unjust enrichment claim, may recover the profits CHEP made from Buckeye's recovery, sorting and separation of pallets as damages.

CHEP's own admissions, as well as the controlling case law, demonstrate that Buckeye's three approaches to proof of damages in this case are appropriate. CHEP's surcharge to customers for the right to ship to NPDs and the fees paid by other entities for the return of proprietary pallets are appropriate benchmarks of Buckeye's damages in this case, as well its own document admitting the benefit it receives when recycles return pallets, are proper measures for a jury to use in assessing damages in this case.

CHEP, in its Motion in Limine #8 (Docket #, on page 6, asserts:

In is undisputed that the amount of the surcharge that CHEP charges its customers to ship to NPDs is based on the increased dwell time (i.e., the length of time CHEP's pallet is sitting unutilized outside of the revenue generating stream), CHEP's lost revenue and CHEP's increased asset recovery cost ....

Assuming that this is true, and Buckeye cannot show that any element of the surcharge is to compensation for the increased risk of non-recovery of a pallet sent to a NPD,<sup>1</sup> this admission supports rather than contradicts Buckeye's use of the NPD surcharge is an appropriate measure of the benefit CHEP receives with Buckeye returns a pallet to CHEP. Buckeye's proof at trial will show that the pallets it gets and returns to CHEP (as opposed to those it returns to mutual

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<sup>1</sup> Buckeye will present proof at trial that could convince a reasonable jury that at least part of the NPD surcharge is for the risk of non-return of pallets as well as for the other increased expenses CHEP incurs when pallets are shipped to NPDs. This evidence includes CHEP's asset recovery rates from various categories of NPDs and CHEP own statements regarding its expectations as to higher lost property rates when it started shipping en mass to NPDs. The fact that the Court has found such evidence does not prove abandonment on CHEP's part does not mean that it is irrelevant to the benefit CHEP receives when Buckeye get pallets back for it.

customers under the Stipulated Order entered by the Court on November 12, 2003 (Docket # 69) come almost exclusively from NPDs, and for the most part from the NPDs CHEP considers hostile (i.e., they do not return pallets directly to CHEP) and therefore imposes it \$8 surcharge on. Further, Buckeye will show that under its arrangements with these NPDs, CHEP gets its pallets back after no greater dwell time than for participating distributors of CHEP. Thus, Buckeye's proof will show that through its actions, CHEP avoids the increased dwell time, lost revenue and increased asset recovery cost it usually experiences with shipments to NPDs. In other words, Buckeye will show that the benefit it provides CHEP (in addition to reducing CHEP's risk of never recovering the pallet) correlates precisely to the basis for its NPD surcharges.

Buckeye's other proffer of damage evidence will simply be proof of how entities similarly situated to CHEP value the return of proprietary pallets by Buckeye. Specifically, Buckeye will present proof as to what beverage distributors have voluntarily and in arms-length bargaining agreed to pay Buckeye for the return of pallets to them. Such freely negotiate compensation is plainly a measuring rod that is relevant to a jury's consideration of the amount by which CHEP benefits from Buckeye's return of its pallets. Obviously, others seeking the return of proprietary pallets would not pay Buckeye more than they benefit from the return of such pallets. Therefore, this evidence is likewise relevant to reasonable compensation for the services rendered by Buckeye as measured by the amount CHEP has benefited by those services.

3. The scope of “relevance” needs to be determined to avoid an unnecessary protracted trial.

Defendant’s Position: The Proposed Joint Pretrial Statement (Docket #101) includes a number of “uncontroverted facts” that are irrelevant. Specifically, CHEP contends that “Uncontroverted Facts” 12 – 19 and 28 – 30 are irrelevant and that “Contested Issues of Fact” 2, 3, 5 – 10, 12 – 21, 23, 36 – 38, 40 and 41 are irrelevant. CHEP has addressed several of these issues in its Motion in Limine (Docket #71). For example, “contested issue of fact” 8 deals with the creation of accounting loss reserves associated with potential shrinkage and 17-20 deals with CHEP pallets in the Wal\*Mart System. The Court has determined that CHEP owns its pallets and CHEP has stipulated that the prompt return of its pallets by Buckeye is a benefit to CHEP (see Docket #101, p. 6 at paras. 25 – 26). Moreover, the Court has previously found that CHEP’s Wal\*Mart relationship is irrelevant because there is no evidence that Buckeye returned pallets to CHEP that it obtained from Wal\*Mart (Docket #89, p. 11). Therefore, accounting loss reserves and CHEP pallets in the Wal\*Mart system are not probative of the remaining issues.

Plaintiff’s Position: This issue seems to be one appropriately dealt with at the final pretrial conference rather than at this discovery conference, In any event, CHEP’s argument misses the elements of the unjust enrichment claim Buckeye is entitled to prove. CHEP’s practices with respect to the shipment of pallets to NPDs shows the circumstances in which Buckeye comes into possession of these pallets, as well as the benefit CHEP receives by Buckeye’s actions in returning

such pallets. This motion ignores the issues remaining for trial in this case, and seeks to circumscribe Buckeye to a different case than it has plead and is prepared to prove. Judge Rice has rejected this position in the Court's March 15, 2004 Decision and Entry, at 9-10 and 14-15.

4. The Court has determined that CHEP owns its pallets and Buckeye should be preventing from refuting ownership.

Defendant's Position: As is detailed in its Motion in Limine (Docket #74), and based upon the Proposed Joint Pretrial Order (Docket #101) (specifically "contested issues of fact" 3, 5, 6, 7 and 9 therein), Buckeye appears poised to elicit evidence that is directed toward CHEP's ownership of its pallets.

Plaintiff's Position: This issue seems to be one appropriately dealt with at the final pretrial conference rather than at this discovery conference, In any event, Judge Rice has rejected this position in the Court's March 15, 2004 Decision and Entry, at 9-10 and 14-15. The evidence Buckeye intends to elicit, as was also explained in Buckeye's opposition to this Motion in Limine, is offered not on the issue of ownership, but on the elements of unjust enrichment. Thus, for example, proof in support of issue number 6 – that "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 unrecovered pallets" – is squarely relevant to the issues of liability and damages on Buckeye's unjust enrichment claim, and is therefore an appropriate area of proof at trial in this case.

5. The Court has determined that CHEP has neither lost nor abandoned its pallets and Buckeye should be prevented from asserting otherwise at trial.

Defendant's Position: As is detailed in its Motion in Limine (Docket #75) and based upon the Proposed Joint Pretrial Order (Docket #101) (specifically "contested issues of fact" #4, 7, 8, 10, 12, 14 – 21, and 23 and "uncontested issues of fact" 13 – 18), Buckeye appears poised to elicit evidence that is directed toward the already resolved loss/abandonment issues. In particular, Buckeye's inclusion of a number of contested issues of fact related to Wal\*Mart appear to be squarely at odds with the Court's ruling (Docket #89, at pp. 10-11) relative to pallets in the Wal\*Mart System. In that Decision, the Court stated, "there is no evidence before the Court that the Plaintiff is returning pallets to Defendant which had formerly been in the possession of Wal\*Mart. Thus, there is no indication the Plaintiff provided a benefit to Defendant in the form of remedying [any problems in the Wal\*Mart relationship]." (Docket #89, p. 11)

To the extent that Buckeye contends that this evidence is relevant to the issue of benefit, CHEP has stipulated as follows:

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.

CHEP benefits when Buckeye notifies CHEP within ten (10) days of its receipt of CHEP pallets and allows CHEP to recover such pallets.

(Docket #101, pg. 6). Moreover, the Court has already found, 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." (Decision and Entry of August 11, 2003, Docket 61, p. 41).

Therefore, Buckeye should be prevented from continuing to advance loss/abandonment evidence at all related to CHEP pallets in the Wal\*Mart system.

Plaintiff's Position: This issue seems to be one appropriately dealt with at the final pretrial conference rather than at this discovery conference, In any event, Judge Rice has rejected this position in the Court's March 15, 2004 Decision and Entry, at 9-10 and 14-15. Buckeye understands the Court's previous ruling regarding documents referring to Wal\*Mart, but believes it is obligated to proffer those documents and facts in order to preserve this issue for appeal.

6. Bain & Co. is not an "agent" of CHEP and therefore its hearsay statements are inadmissible.

Defendant's Position: CHEP's Motion in Limine (Docket #102) fully details the absence of any agent relationship and the hearsay nature of Bain's statements.

Plaintiff's Position: This issue is covered by CHEP's Motion. It does not seem to be a discovery or pretrial issue. Buckeye is stymied by the conflict between the Court's March 15<sup>th</sup> Decision and Entry (holding that materials may not be filed under seal without a showing of cause) and CHEP's position that the 99% of documents it marked confidential may not be filed with the Court other than

under seal. If the Magistrate Judge chooses to address this issue, Buckeye is prepared to show that unredacted copies of the full documents CHEP has filed with its motion, as well as other documents produced and the testimony of witnesses CHEP has marked as confidential, show that Bain was CHEP's agent for purposes of Fed. R. Evid. 801 in preparing the reports in question. This motion does illustrate the need for clarification of the protective order and the process for filing materials CHEP has marked confidential.

7. Buckeye's stated intention to "reserve the right" to call an expert is untimely and Buckeye should be prevented from doing so.

Defendant's Position: Buckeye has had months to digest CHEP's damages methodology. In the Proposed Joint Pretrial Statement (Docket #101), Buckeye purported to "reserve the right" to call an expert. It did so without any name and without describing the scope of the possible opinion testimony. Such a "reservation" is inadequate and far too late.

Plaintiff's Position: CHEP has failed to produce all of the discovery relating to damages to which Buckeye is entitled. Buckeye can only determine whether to go to the expense of using an expert to rebut CHEP's damage claims after it sees CHEP's data regarding pallet dwell times, utilization rates and revenue rates, and balanced the expense of an expert against the need for one to clarify the numerous error and fallacies in CHEP's damage disclosure(s). If Buckeye chooses to use such an expert, it is prepared to disclose the identity of the expert promptly after CHEP fulfills its discovery obligations.

8. Scope of examination/order of witnesses at trial.

Defendant's Position: Because there are claims and counterclaims, CHEP submits that advance directive from the Court about the scope of witness examination would assist the flow of the trial. For example, Buckeye has listed a number of CHEP employees on its witness list, it would be beneficial for the Court to direct that Buckeye's questioning of these witnesses be limited to the sole issue in its case-in-chief and that Buckeye not be permitted to questions these witnesses about CHEP's counterclaims or its damages.

Plaintiff's Position: This issue seems to be one appropriately dealt with at the final pretrial conference rather than at this discovery conference. Buckeye understands that that its case in chief is limited to its claims and not to defense of CHEP's counterclaims. Nevertheless, a number of factual overlaps exist between these issues, which Buckeye believes are most appropriately addressed in the course of trial.

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