

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

BUCKEYE DIAMOND LOGISTICS, INC., :
Plaintiff, :
vs. : Case No. 3:01cv440
CHEP USA, INC., : JUDGE WALTER HERBERT RICE
Defendant. :

DECISION AND ENTRY SUSTAINING IN PART AND OVERRULING IN PART DEFENDANT'S MOTION IN LIMINE TO PREVENT PLAINTIFF FROM INTRODUCING EVIDENCE AS TO IRRELEVANT MATTERS IN THE CONTESTED ISSUES OF FACT SET FORTH IN THE PROPOSED FINAL PRETRIAL ORDER (DOC. #71); DECISION AND ENTRY OVERRULING, AS MOOT, DEFENDANT'S MOTION IN LIMINE TO EXCLUDE EVIDENCE RELATED TO PLAINTIFF'S EXHIBIT 35, WHICH CANNOT BE AUTHENTICATED BY ANY WITNESS (DOC. #72); DECISION AND ENTRY SUSTAINING IN PART AND OVERRULING IN PART DEFENDANT'S MOTION IN LIMINE TO PREVENT PLAINTIFF FROM ELICITING TESTIMONY FROM MEQUEL DEVAUGHN AND RALPH BUONO (DOC. #73); DECISION AND ENTRY SUSTAINING IN PART AND OVERRULING IN PART DEFENDANT'S MOTION IN LIMINE TO PREVENT PLAINTIFF FROM ELICITING TESTIMONY OR PRESENTING EVIDENCE DISPUTING DEFENDANT'S OWNERSHIP OF ITS PALLETS (DOC. #74); DECISION AND ENTRY SUSTAINING IN PART AND OVERRULING IN PART DEFENDANT'S MOTION IN LIMINE TO PREVENT PLAINTIFF FROM PRESENTING EVIDENCE OF DEFENDANT'S ALLEGED LOSS OR ABANDONMENT OF ITS PALLETS (DOC. #75); DECISION AND ENTRY SUSTAINING IN PART AND OVERRULING IN PART DEFENDANT'S MOTION IN LIMINE SEEKING A LIMITATION OF PLAINTIFF'S EVIDENCE OF DAMAGES (DOC. #76); DECISION AND ENTRY OVERRULING, AS MOOT, PLAINTIFF'S MOTION TO ALLOW SERVICE OF MORE THAN 25

INTERROGATORIES (DOC. #88); DECISION AND ENTRY
OVERRULING, AS MOOT, PLAINTIFF'S MOTION FOR DISCOVERY
CONFERENCE, TO STRIKE DEFENDANT'S AMENDED DAMAGE
DISCLOSURE AND/OR TO EXTEND DISCOVERY CUT-OFF
(DOC. #93); DECISION AND ENTRY SUSTAINING PLAINTIFF'S
MOTION FOR EXTENSION OF TIME TO FILE MOTION IN LIMINE
REGARDING DEFENDANT'S DAMAGE CLAIM (DOC. #97)

In its Decision of August 21, 2002, this Court set forth the facts giving rise to this litigation:

[Buckeye Diamond Logistics, Inc., fka Buckeye Recyclers, Inc. ("Buckeye")], is an Ohio corporation in the business of collecting, repairing, recycling, and/or reselling wooden pallets used for the shipment of goods. [CHEP USA ("CHEP")] rents pallets to any number of commercial entities. Typically, entities with the need for pallets purchase as much [as needed] from pallet manufactures or pallet recyclers, or rent them from proprietors such as CHEP. Where pallet manufacturers inject pallets into the stream of commerce pursuant to their sale, they generally relinquish title thereto. A pallet's cost, and therefore its title, is generally passed along in the price of the good being shipped as it makes its way through the various trade points in the stream of commerce. On the other hand, some manufacturers require the return of pallets. However, because pallets are manufactured with uniform dimensions and typically have no distinguishing characteristics, such a requirement is typically for the return of pallets in general, not of specific pallets.

Because pallets tend to accumulate in large numbers at distribution and wholesale sites, recyclers such as Buckeye serve a key commercial role by purchasing them in bulk, carrying them away from the distributor's or wholesaler's site, and returning them to the stream of commerce by either reselling them to entities with a need for such or returning them to pallet manufacturers for a fee. In addition to purchasing pallets, Buckeye will also collect broken pallets, repair them, and return them to their owner for a fee. It charges up to \$2.50 for pallet repair and return, and up to \$5.40 for a pallet's resale. Buckeye does not pre-sort those pallets which it purchases in bulk, but, rather, purchases them sight unseen at the point of collection.

At any given time, about 3% of the total pool of pallets in the stream of commerce in the United States consists of proprietary pallets (i.e., pallets bearing the distinctive mark of their proprietor). CHEP is in the business of renting its proprietary pallets, and in contrast to the bulk of pallets in commerce, each of its pallets is distinctively marked. As part of its rental

agreements with its various customers, be they manufacturers, distributors, wholesalers, etc., CHEP requires the return of its specially identified pallets. The exact CHEP pallet need not be returned, so long as a "CHEP" pallet in particular is returned. Failure to return a CHEP pallet may result in the imposition of a lost pallet fee. CHEP polices the flow of its pallets by requiring, pursuant to contract, that all of its customers ship goods on said pallets only to others in the stream of commerce with whom CHEP also has contractual agreements. It is inevitable, though, that a certain number of CHEP pallets get "lost" by CHEP's customers and make their way into the general accumulated mass of pallets collected and resold by recyclers such as Buckeye.

Therein lies the rub of this dispute. Because CHEP asserts that at all times it retains ownership rights in its distinctively marked pallets, it asserts the correlative right to demand their return by any party which comes into possession of such, and its right to sue the possessing party for conversion to protect such right. Buckeye, which does in fact segregate and safeguard CHEP pallets after it makes a bulk purchase, argues that it (as with other recyclers) contributes value and efficiency to the pallet market; that in purchasing pallets in bulk as it does, it becomes the rightful owner of all such pallets; and that, quite the opposite from having a legal obligation to return CHEP pallets to CHEP at its own cost, it has a right either to resell CHEP pallets to others, or to extract a fee from CHEP for its service, as it would with any other manufacturer to whom it returns pallets. Indeed, the typical return fee collected from other proprietary pallet companies is \$5 per pallet. Because of legal threats from CHEP, Buckeye alleges that it has lost, and continues to lose, revenue due to lost sales, and has been forced to store excess CHEP pallets at its facility.

Buckeye Recyclers v. CHEP USA, 228 F. Supp.2d 818, 819-20 (S.D.Ohio 2002).

This case is presently before the Court on the following motions, to wit:
Defendant's Motion in Limine to Prevent Plaintiff from Introducing Evidence as to Irrelevant Matters in the Contested Issues of Fact Set Forth in the Proposed Final Pretrial Order (Doc. #71); Defendant's Motion in Limine to Prevent Plaintiff from Eliciting Testimony from Mequel DeVaughn and Ralph Buono (Doc. #73); Defendant's Motion in Limine to Prevent Plaintiff from Eliciting Testimony or Presenting Evidence Disputing Defendant's Ownership of its Pallets (Doc. #74); Defendant's Motion in Limine to Prevent Plaintiff from Presenting Evidence of

Defendant's Alleged Loss or Abandonment of its Pallets (Doc. #75); Defendant's Motion in Limine Seeking a Limitation of Plaintiff's Evidence of Damages (Doc. #76).¹

With those motions, Defendant argues that the evidence it seeks to exclude thereby is irrelevant. Relevant evidence is defined by Fed. R. Evid. 401, as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Therefore, before deciding whether to exclude any of the evidence in question, the Court will briefly review the claims

¹A number of other motions are also pending. First, Defendant's Motion in Limine to Exclude Evidence Related to Plaintiff's Exhibit 35, which Cannot Be Authenticated by Any Witness (Doc. #72), is also pending. In the Final Pretrial Order, the parties indicate that Defendant believes that motion to be moot. Since the party which filed the motion is of the opinion that it is moot, the Court overrules, as moot, Defendant's Motion in Limine to Exclude Evidence Related to Plaintiff's Exhibit 35, which Cannot Be Authenticated by Any Witness (Doc. #72).

Second, the Court overrules, as moot, Plaintiff's Motion to Allow Service of More than 25 Interrogatories (Doc. #88) and its Motion for Discovery Conference, to Strike Defendant's Amended Damage Disclosure and/or to Extend Discovery Cut-Off (Doc. #93), since a discovery conference has taken place, during which all pending discovery disputes were resolved, and the discovery deadline has been extended.

Third, the Court rules upon Plaintiff's Motion to Vacate and to Lift Stay (Doc. #91), Defendant's Motion for Reconsideration of Court's Decision of March 15, 2003, Unsealing Documents Relating to Summary Judgment Motions (Doc. #92) and Defendant's Motion in Limine to Exclude Plaintiff's Exhibit 2 ("Bain Report") (Doc. #102) by separate entry. The Court notes that the Plaintiff's have not filed a memorandum opposing the latter motion. If Plaintiff opposes that request to exclude evidence, it must file such a memorandum within ten days from date.

Fourth, the Court sustains the Plaintiff's Motion for Extension of Time to File Motion in Limine Regarding Defendant's Damage Claim (Doc. #97), since the Court has continued the trial of this matter. Such a motion in limine must be filed in accordance with the time constraints set forth in General Order No. 1.

which remain in this litigation and the essential issues of those claim, in order to ascertain the facts which are "of consequence" in this litigation.

As a result of this Court's Decision of August 12, 2003 (Doc. #61), the Plaintiff's sole remaining claim in this litigation is based upon an unjust enrichment theory. In that Decision, the Court noted that there are three essential issues raised by a claim of unjust enrichment, to wit: 1) that the plaintiff conferred a benefit on the defendant; 2) that the defendant knew of the benefit; and 3) that the defendant would be unjustly enriched if permitted to retain the benefit without compensating the plaintiff. *Id.* at 41-42. As Plaintiff argues, the measure of damages it can recover on its unjust enrichment claim is the value of the benefit its actions with regard to Defendant's pallets have conferred upon the Defendant, rather than the amount it would have cost Defendant to do what Plaintiff has done on its property, assuming for sake of argument that Defendant could have lawfully gained access to that property. U.S. Health Practices, Inc. v. Byron Blake, M.D., Inc., 2001 WL 277291 (Ohio App. 2001). Accord, Thoms v. Thayer, 1998 WL 65514 (Ohio App. 1998); Hartley v. Dayton Computer Supply, 106 F. Supp.2d 976 (S.D.Ohio 1999).² Thus, the parties are entitled to introduce any evidence

²In Hartley, this Court wrote:

DCS requests summary judgment on Plaintiff's claim for unjust enrichment/quantum meruit. "An action for unjust enrichment will lie where a party retains money or a benefit that in equity or justice belongs to another." Eyerman v. Mary Kay Cosmetics, Inc., 967 F.2d 213, 222 (6th Cir. 1992), citing, Hummel v. Hummel, 133 Ohio St. 520, 14 N.E.2d 923, 926- 27 (1938). However, absent fraud, illegality, or bad faith, a plaintiff may not recover if the defendant retains the disputed money or benefit under the terms of an agreement between the parties. *Id.*, Aultman Hosp. Ass'n v. Community Mut. Ins. Co., 46 Ohio St.3d 51, 544 N.E.2d 920, 924 (1989); Ullmann v. May, 147 Ohio St. 468, 72 N.E.2d 63, 67 (1947). Quantum meruit "contains the same elements as required for recovery under unjust

which has any tendency to make it more or less likely: 1) that the Plaintiff confers a benefit upon the Defendant when it recovers, sorts, separates and returns pallets to Defendant; 2) that Defendant knows of that benefit; 3) that it would be unjust for Defendant to retain that benefit without compensating the Plaintiff; and 4) the degree to which the Defendant has profited from the Plaintiff's activities in that regard.

In addition, the Defendant's counterclaim of conversion remains pending.³ In R.G. Engineering & Mfg. v. Rance, 2002 WL (Ohio App. 2002), the court reviewed the essential elements of a claim of conversion:

In Tabar v. Charlie's Towing Serv., Inc. (1994), 97 Ohio App.3d 423, 427-428, 646 N.E.2d 1132, the court outlined the essential elements of conversion as follows:

"Conversion is the wrongful control or exercise of dominion over property belonging to another inconsistent with or in denial of the rights of the owner. Bench Billboard Co. v. Columbus (1989), 63 Ohio App.3d 421, 579 N.E.2d 240; Ohio Tel. Equip. & Sales, Inc. v. Hadler Realty Co. (1985), 24 Ohio App.3d 91, 24 OBR 160, 493 N.E.2d 289. In order to prove the conversion of property, the owner must demonstrate (1) he or she demanded the return of the property from the possessor after the possessor exerted dominion or control over the property, and (2) that the possessor refused to deliver the property to its rightful owner. Id. The measure of

enrichment. The difference is the manner in which damages are computed. In unjust enrichment, damages are conferred in the amount the defendant benefitted. In quantum meruit, damages are the measure of the value of the plaintiff's services." Loyer v. Loyer, No. H-95-068, 1996 WL 463728, *3 (Ohio Ct.App. Aug. 16, 1996).

106 F. Supp.2d at 984. Accord, Reisenfeld & Co. v. Network Group, Inc., 277 F.3d 856, (6th Cir. 2002).

³Defendant's counterclaim of replevin also remains pending. However, the Plaintiff has not argued that the Court should overrule one or more of the Defendant's motions, since the evidence it seeks to exclude as a result is relevant to that counterclaim. On the contrary, the Plaintiff argues that Defendant's replevin claim is moot. See Doc. #87 at 4. Therefore, the Court does not consider that claim further herein, as it relates to the subject motions.

damages in a conversion action is the value of the converted property at the time it was converted. Brumm v. McDonald & Co. Securities, Inc. (1992), 78 Ohio App.3d 96, 603 N.E.2d 1141.” See, also, Kraft Constr. Co. v. Cuyahoga Cty. Bd. of Commrs. (1998), 128 Ohio App.3d 33, 41, 713 N.E.2d 1075.

Id. at *8. See also, Allied Erecting & Dismantling Co., Inc. v. Youngstown, 151 Ohio App.3d 16, 34-35, 783 N.E.2d 523, 537 (Ohio App. 2002).

With the foregoing understanding of the claims at issue in this litigation, the Court turns to the five Motions in Limine filed by the Defendant, which are listed above, discussing them in the order in which they were filed.

I. Defendant’s Motion in Limine to Prevent Plaintiff from Introducing Evidence as to Irrelevant Matters in the Contested Issues of Fact Set Forth in the Proposed Final Pretrial Order (Doc. #71)

The Defendant argues that the Court should prohibit the Plaintiff from introducing evidence which would tend to establish the following contested issues of fact which Defendant quotes from the parties’ proposed Final Pretrial Order (Doc. #87):

1. Whether manufacturers are required to make reports to [Defendant] 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 [Defendant].

2. Whether [Defendant] permits certain participating manufacturers to ship goods on [its] pallets to distributors that have no written agreement with [Defendant], whom [it] refers to as “non-participating distributors.”

17. Whether under [Defendant’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 [Defendant's] pallets.

18. Whether Wal* Mart has any responsibility for reporting to [Defendant] 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 [Defendant] to perform any accounting adjustments, and if so, what was [Defendant's] intent with regard to the recovery of these pallets.

20. Whether Wal* Mart ships blue pallets to NPDs ["non-participating distributors"] and, whether [Defendant's] agreements with Wal* Mart from shipping to NPDs require that Wal* Mart report where it ships its pallets with [Defendant's] logo.

Doc. #71 at 2-3. According to Defendant, evidence attempting to establish these matters is not relevant. In response, Plaintiff argues that this evidence is relevant to its claim of unjust enrichment.

With respect to the first two contested issues of fact quoted above (numbers 1 and 2), the Court agrees with Plaintiff. Simply stated, the matters set forth in those two contested issues of fact go to the question of whether the Plaintiff has conferred a benefit upon the Defendant. Proof that the Defendant does not require the types of reports mentioned in number 1, or, if it requires such reports, that they are not accurate or monitored could show that the Defendant would have difficulty recovering its pallets and that, therefore, the Plaintiff's actions with regard to the pallets have benefitted it. With respect to number 2, proof that Defendant has permitted certain manufacturers to ship to non-performing distributors ("NPDs") could also show that the Defendant would have difficulty recovering its pallets and that, therefore, the Plaintiff's actions with regard to the pallets have benefitted it. Accordingly, the Court overrules

Defendant's Motion in Limine to Prevent Plaintiff from Introducing Evidence as to Irrelevant Matters in the Contested Issues of Fact Set Forth in the Proposed Final Pretrial Order (Doc. #71), as it relates to contested issues of fact numbered 1 and 2.

Numbers 17-20 all address the Defendant's relationship with Wal*Mart. Previously, this Court sustained the portion of the Defendant's Sixth Motion in Limine (Doc. #54), with which Defendant had sought exclusion of an exhibit that addressed the large leakage of pallets it had experienced as a result of its relationship with Wal*Mart. Doc. #89 at 12-13. The Court concluded that this exhibit was not relevant, because there was no evidence that the Plaintiff had returned pallets to Defendant which had formerly been in the possession of Wal*Mart. Id. Based upon the same reasoning, the Court sustains Defendant's Motion in Limine to Prevent Plaintiff from Introducing Evidence as to Irrelevant Matters in the Contested Issues of Fact Set Forth in the Proposed Final Pretrial Order (Doc. #71), as it relates to contested issues of fact numbered 17-20.

Accordingly, the Courts sustains in part and overrules in part Defendant's Motion in Limine to Prevent Plaintiff from Introducing Evidence as to Irrelevant Matters in the Contested Issues of Fact Set Forth in the Proposed Final Pretrial Order (Doc. #71).

II. Defendant's Motion in Limine to Prevent Plaintiff from Eliciting Testimony from Mequel DeVaughn and Ralph Buono (Doc. #73)

With this motion, the Defendant argues that the Court should prohibit Plaintiff from eliciting testimony from Mequel DeVaughn ("DeVaughn") and Ralph

Buono ("Buono"), two of its (Defendant's) employees. According to the Defendant, neither of those individuals can offer relevant testimony. In response, the Plaintiff argues that the testimony from each of those individuals is relevant. As a means of analysis, the Court will initially discuss the relevance of DeVaughn's testimony, following which it will turn to the relevance of that which Plaintiff intends to elicit from Buono.

Plaintiff indicates that it will question DeVaughn about the actual workings of Defendant's relationships with distributors and his audits to insure that the distributors return pallets to Defendant.⁴ Plaintiff contends that this testimony will be relevant, because it will help the jury understand the flow of Defendant's pallets and how its (Plaintiff's) return of pallets to Defendant's customers assists those customers. Plaintiff also contends that this testimony will help establish a defense to Defendant's claim that it was harmed when Plaintiff returned pallets to those customers for an agreed upon fee. The flaw in Plaintiff's position is that it has failed to explain how demonstrating the three matters it says DeVaughn's testimony will establish will prove its claim of unjust enrichment or defeat Defendant's counterclaim of conversion. Accordingly, the Court sustains Defendant's Motion in Limine to Prevent Plaintiff from Eliciting Testimony from Mequel DeVaughn and Ralph Buono (Doc. #73), as it relates to testimony from

⁴Plaintiff also points out that DeVaughn's testimony is implicated by Defendant's Third Motion in Limine (Doc. #51), with which it sought to have the Court prevent Plaintiff from introducing evidence that DeVaughn misrepresented his identity in order to gain access to Plaintiff's property. Given that the Court has sustained that motion (see Doc. #89 at 7-8), the proposed testimony cannot serve as the basis for overruling the motion currently under discussion.

DeVaughn. The Plaintiff may, however, seek to revisit this question during the trial, at which time the relevance of that testimony may be apparent.

Plaintiff states that it will elicit testimony from Buono about his involvement in Defendant's initial program to pay recyclers to return pallets with its logo, which Plaintiff argues is relevant because it will tend to establish that its actions with regard to the Defendant's pallets have benefitted the latter. Since an essential element of Plaintiff's claim of unjust enrichment is whether it has conferred a benefit on the Defendant, the Court concludes that testimony from Buono concerning the Defendant's initial program to pay recyclers will be relevant.⁵ Accordingly, it overrules Defendant's Motion in Limine to Prevent Plaintiff from Eliciting Testimony from Mequel DeVaughn and Ralph Buono (Doc. #73), as it relates to testimony from Buono.⁶

Based upon the foregoing, the Court sustains in part and overrules in part Defendant's Motion in Limine to Prevent Plaintiff from Eliciting Testimony from Mequel DeVaughn and Ralph Buono (Doc. #73).

⁵Plaintiff argues that Buono's testimony concerning the initial plan to pay recyclers will also be relevant on the question of the scope of the benefit it has conferred on Defendant. Given this Court's conclusion that it will be relevant on the question of whether a benefit was conferred, it is not necessary to consider Plaintiff's alternative argument.

⁶Plaintiff also states that Buono will testify about his knowledge concerning Defendant's efforts to use criminal laws to protect its pallets. The admissibility of evidence pertaining to that topic was the subject of Defendant's First Motion in Limine (Doc. #49), which this Court has previously overruled. See Doc. #89 at 6-7. Consequently, Buono may also be questioned on that topic.

III. Defendant's Motion in Limine to Prevent Plaintiff from Eliciting Testimony or Presenting Evidence Disputing Defendant's Ownership of its Pallets (Doc. #74)

With this motion, the Defendant seeks to prevent the Plaintiff from introducing any evidence which disputes its (Defendant's) ownership of the pallets. This motion is predicated upon the Court's Decision of August 12, 2003, which concluded, as a matter of law, that Defendant retained ownership of the pallets, even those in the possession of the Plaintiff. See Doc. #61 at 19. The Defendant argues that evidence pertaining to the following contested issues of fact, which are quoted from the parties' proposed Final Pretrial Order (Doc. #87), is irrelevant to that question and, thus, inadmissible at trial:

3. Whether some or all manufacturers and participating distributors, in their contracts with [Defendant], agree to pay to [Defendant] a "lost pallet fee" in certain circumstances, and whether the contracts between [Defendant] and its participating manufacturers and distributors state that this payment of the fee does not result in the transfer of, or otherwise affect, [Defendant's] ownership of the pallets.
5. Whether regardless of contractual stipulations, participating distributors fail to isolate pallets containing [Defendant'] markings and commingle those pallets with white wood pallets, and, as a result, blue pallets come into the possession of pallet recyclers such as [Plaintiff], and, if so, in what amount.
6. Whether [Defendant's] up-charges for shipments to NPDs compensate [Defendant] for, among other things, its increased cost of recovering those pallets, increased dwell time and lost income, or whether such fees compensate [Defendant] for unrecoverable pallets.
7. Whether the per pallet up-charge is less than the replacement cost for a new pallet.
9. What was [Defendant's] intent and expectation regarding pallet recovery when it began allowing its customers to ship to NPDs.

Doc. #74 at 3. The Plaintiff acknowledges that it cannot, as a result of this Court's earlier Decision, contest the ownership of the pallets at trial. It argues, however, that evidence establishing these contested issues of fact is relevant, because it will help prove its unjust enrichment claim and the amount of damages it can recover thereon. With two exceptions, this Court agrees with Plaintiff. As to the first exception, contested issue of fact number 3 provides in part "whether the contracts between [Defendant] and its participating manufacturers and distributors state that this payment of the fee does not result in the transfer of, or otherwise affect, [Defendant's] ownership of the pallets." Given this Court's conclusion, as a matter of law, that Defendant retains ownership of its pallets, the question of whether Defendant's contracts affect its ownership of the pallets is of no relevance in this litigation. The second exception relates to a portion of contested issue of fact number 5, which addresses recyclers generally. Evidence demonstrating that commingling of Defendant's pallets has caused some of them to come into Plaintiff's possession and the number of such pallets could help establish that Plaintiff's actions have benefitted the Defendant and the value of such a benefit. Therefore, such evidence is relevant to Plaintiff's remaining unjust enrichment claim; however, such evidence with regard to other recyclers is of no relevance to Plaintiff's claim.

Accordingly, the Court sustains in part and overrules in part Defendant's Motion in Limine to Prevent Plaintiff from Eliciting Testimony or Presenting Evidence Disputing Defendant's Ownership of its Pallets (Doc. #74). In particular, the Court has sustained that motion as it relates to the aspect of contested issue of fact number 3, which provides "whether the contracts between [Defendant] and

its participating manufacturers and distributors state that this payment of the fee does not result in the transfer of, or otherwise affect, [Defendant's] ownership of the pallets;" and contested issue of fact number 5, to the extent that it addresses recyclers generally. That Court has overruled that motion as it relates to the aspect of contested issue of fact number 3, which provides "[w]hether some or all manufacturers and participating distributors, in their contracts with [Defendant], agree to pay to [Defendant] a 'lost pallet fee' in certain circumstances;" contested issue of fact number 5, to the extent that it addresses the Plaintiff; and contested issues of fact numbers 6, 7 and 9.

IV. Defendant's Motion in Limine to Prevent Plaintiff from Presenting Evidence of Defendant's Alleged Loss or Abandonment of its Pallets (Doc. #75)

With this motion, Defendant argues that the Court should prevent the Plaintiff from introducing evidence that it (Defendant) has lost or abandoned some of its pallets. Defendant bases this motion on the Court's conclusion in its Decision of August 12, 2003, that Defendant had not, as a matter of law, abandoned or lost its pallets. Doc. #61 at 32. Defendant contends that evidence relating to 16 contested issues of fact and 7 uncontested issues of fact, which it has quoted from the parties' proposed Final Pretrial Order (Doc. #89), is irrelevant, since it would merely establish that it has abandoned or lost some of its pallets. In response, Plaintiff states that it is aware of the Court's prior ruling on the questions of Defendant's loss or abandonment and argues that, in order to establish its unjust enrichment claim, it is entitled to introduce evidence showing the benefits its actions provide to Defendant, by proving that, but for its actions,

Defendant would incur substantial expenses to recover its pallets and that its actions reduce or eliminate that expense. In principle, the Court cannot disagree with either Plaintiff or Defendant. However, the Court must resolve the question of whether the evidence relating to 16 contested issues of fact and 7 uncontested such implicated by this motion would make the matters relied upon by Plaintiff more likely, rather than merely demonstrating the Defendant abandoned or lost some of its pallets.

As an initial matter, the Court notes that it has previously concluded that evidence relating to one of the contested issues of fact in question, number 7, is relevant. In addition, the Court has also concluded that evidence relating to contested issues of fact numbers 17-20 is not relevant. Accordingly, the Court sustains this motions as it relates to those four contested issues of fact, overrules it as it relates to number 7 and begins its analysis of the other 11 contested issues and the 7 uncontested issues of fact implicated with this motion by reviewing them:

Contested Issues of Fact

4. Whether when a participating manufacturer ships blue pallets to a non-participating distributor, that manufacturer communicates to [Defendant] the number of pallets [being] shipped and the non-participating distributor's location; whether the first time that a participating distributor ships pallets to a non-participating distributor, [Defendant] notifies that distributor by certified mail, by phone and/or by a personal visit that [Defendant] owns the pallets, that they are not to be bought or sold and to contact [it] to arrange for a pick-up; and whether subsequent shipments to an NPD are followed by phone calls or personal visits regarding arrangement for [Defendant] to pick up the blue pallets.

8. Whether at the point in time that [Defendant] permitted some manufacturer customers to ship blue pallets to NPDs, [Defendant's] controller predicted that [it] would need to create a loss reserve for all pallets

[it] permitted its manufacturing customers to ship to uncooperative NPDs because "the thinking [was] (sic) that we would never recover those pallets."

10. Whether [Defendant] has admitted that between January of 1998 and July of 2002, [Defendant's] manufacturer customers shipped 1,080,389 blue pallets to NPDs in Ohio and [its] 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 [Plaintiff's] facility in 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 that same time period, a total of 44,022,647 blue pallets were returned to [Defendant] 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 [Defendant'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?

14. What were Bain & Company's conclusions regarding the current location of blue pallets that [Defendant's] customers sent to NPDs.

15. What knowledge [Defendant] has regarding where the blue pallets go when they leave the possession of non-participating distributors.

16. Whether [Defendant] assigns the number of blue pallets that are unrecovered or yet to be recovered to broad categories of "lost pallets."

21. Whether [Plaintiff] has received pallets containing [Defendant's] markings from NPDs, including Consolidated Stores, who sent those pallets to [Plaintiff] with the representation that they had the right to convey them, and whether [Plaintiff] was entitled to rely on such statements.

23. Whether [Defendant] can determine where the pallets reported on a stray equipment report and located at a pallet recycler have come from.

26. Whether [Plaintiff] has ever been offered any payment by [Defendant] for the return of pallets other than payment that was conditioned on (a) agreeing that [Defendant] owned all the pallets marked with its logo; (b) agreeing to reveal confidential customer lists to [Defendant]; and (c) agreeing to litigate all disputes in Orlando, Florida.

Uncontested Issues of Fact

12. [Defendant] made a business decision in late 1998 to allow certain of its manufacturer customers to ship blue pallets marked with [Defendant's] logo to any distributor (assuming [Defendant] was properly notified about the shipment and the distributor's location) regardless of whether [Defendant] had a contract with the distributor. This decision was intended to increase [its] business.

13. In addition to its customary basic fees, [Defendant] charges participating manufacturers an additional charge, which [it] calls an up-charge, for each blue pallet that the participating manufacturer ships to non-participating distributors.

14. The amount of the charge-up is dependent upon whether the non-participating distributor is characterized by [Defendant] as "SEMIC" (semi-cooperative) or "NOTXX" (uncooperative) based upon the willingness of the distributor to return pallets containing [Defendant's] markings to [Defendant].

15. If the NPD is determined by [Defendant] to be semi-cooperative, [Defendant] generally charges the manufacturer an up-charge of \$3.50 per pallet for shipping to such distributors.

16. If the NPD is determined by [Defendant] to be uncooperative, [Defendant] generally charges the manufacturer an up-charge of \$8.00 per pallet for shipping to such distributors.

17. Approximately 110 of [Defendant's] manufacturer customers are allowed to ship to NPDs.

18. The number of NPD locations to which [Defendant'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 [Plaintiff's] recycling facility.

Doc. #75 at 3-5.

With the following exceptions, the Court concludes that the matters set forth in the above-quoted contested and uncontested issues of fact are relevant to Plaintiff's unjust enrichment claim, the amount of damages it can recover with that claim or the Defendant's counterclaim of conversion. Therefore, evidence tending to establish the matters set forth in the contested issues of fact, to which the Court has not noted an exception, is admissible.⁷ As a means of analysis, the Court will discuss the exceptions in the order in which they appear above.

First, contested issues of fact numbers 10 and 11 set forth aggregate numbers relating to Defendant's pallets generally. This is not a class action on behalf of all recyclers. Therefore, since there is no indication that Plaintiff returned to Defendant all of the unrecovered pallets mentioned in or which can be inferred from numbers 10 and 11,⁸ proving those numbers will not establish that the Plaintiff has benefitted the Defendant and the amount of that benefit, or serve to defend against the conversion counterclaim. Therefore, Plaintiff will not be permitted to introduce evidence tending to establish the matters set forth in these contested issues of fact.

Second, the issues set forth in contested issue of fact number 21 are whether Plaintiff has obtained Defendant's pallets from entities, including

⁷Since the Court will read the uncontested facts to the jury, as stipulations set forth in the jury instructions, there will be no need to introduce evidence tending to establish them.

⁸For instance, in number 10, the number of pallets shipped to NPDs in Ohio and the number of pallets Defendant has recovered from them in the same period is set forth. One could infer that the difference between the two numbers represents the number of unrecovered pallets.

Consolidates Stores, which have indicated that they had the right convey them, and whether Plaintiff could rely upon those representations. Simply stated, evidence establishing those matters is relevant to the questions of the ownership of the pallets and whether they have been lost or abandoned (issues which this Court resolved as a matter of law in its Decision of August 12, 2003 (Doc. #61)), rather than to the remaining claims in this litigation. Therefore, Plaintiff will not be permitted to introduce evidence tending to establish the matters set forth in this contested issue of fact.

Third, with respect to contested issue of fact number 23, the Plaintiff has not demonstrated that evidence tending to show that Defendant can or cannot determine where certain pallets came from, although listed on a stray equipment report and located at a recycler, will make it more likely that Plaintiff benefitted Defendant or the value of that benefit, or make it less likely that Defendant will prevail on its counterclaim. Therefore, Plaintiff will not be permitted to introduce evidence tending to establish the matters set forth in this contested issue of fact.

Fourth, with respect to contested issue of fact number 26, the Plaintiff has not demonstrated that evidence that Defendant put conditions on its offer to pay Plaintiff to return pallets will make it more likely that Plaintiff benefitted Defendant or the value of that benefit, or make it less likely that Defendant will prevail on its counterclaim. Therefore, Plaintiff will not be permitted to introduce evidence tending to establish the matters set forth in this contested issue of fact. Of course, it bears emphasis that there is no indication that, in order to defeat Plaintiff's claim or diminish the amount of damages it can recover, the Defendant will attempt to introduce evidence that it offered payment to the Plaintiff to return

pallets. If the Defendant were to offer such evidence, the Plaintiff would unquestionably be entitled to offer evidence concerning the conditional nature of the offer in order to convince the jury that the offer was illusory.

Fifth, uncontested issues of fact numbers 17 and 18 set forth aggregate numbers of manufacturers who are permitted to ship pallets to NPDs and the number of locations at which NPDs operate both nationwide and within 150 miles of Plaintiff's recycling facility. The Plaintiff has failed to demonstrate that those numbers will make it more likely that Plaintiff benefitted Defendant or the value of that benefit, or make it less likely that Defendant will prevail on its counterclaim. It bears emphasis that the Plaintiff has not argued that any of the numbers set in these uncontested issues of fact represent the number of NPDs from which it has returned pallets to Defendant. Therefore, the Court will not include these uncontested issues of fact in the stipulations to be read to the jury.

In sum, the Court sustains in part and overrules in part Defendant's Motion in Limine to Prevent Plaintiff from Presenting Evidence of Defendant's Alleged Loss or Abandonment of its Pallets (Doc. #75). That motion is sustained as it relates to contested issues of fact numbers 10, 11, 17-21, 23 and 26, and uncontested issue of fact 17 and 18. Otherwise, that motion is overruled.

V. Defendant's Motion in Limine Seeking a Limitation of Plaintiff's Evidence of Damages (Doc. #76)

With this motion, Defendant requests that the Court limit the evidence the Plaintiff may introduce to prove the amount of damages it is entitled to recover on

its unjust enrichment claim. In particular, the Defendant challenges the relevance of the following contested and uncontested issues of fact, which it has quoted from the parties' proposed Final Pretrial Order (Doc. #87):

Uncontested Issues of Fact

12. [Defendant] made a business decision in late 1998 to allow certain of its manufacturer customers to ship blue pallets marked with [Defendant's] logo to any distributor (assuming [Defendant] was properly notified about the shipment and the distributor's location) regardless of whether [Defendant] had a contract with the distributor. This decision was intended to increase [its] business.

14. The amount of the charge-up is dependent upon whether the non-participating distributor is characterized by [Defendant] as "SEMIC" (semi-cooperative) or "NOTXX" (uncooperative) based upon the willingness of the distributor to return pallets containing [Defendant's] markings to [Defendant].

15. If the NPD is determined by [Defendant] to be semi-cooperative, [Defendant] generally charges the manufacturer an up-charge of \$3.50 per pallet for shipping to such distributors.

16. If the NPD is determined by [Defendant] to be uncooperative, [Defendant] generally charges the manufacturer an up-charge of \$8.00 per pallet for shipping to such distributors.

Contested Issues of Fact

3. Whether some or all manufacturers and participating distributors, in their contracts with [Defendant], agree to pay to [Defendant] a "lost pallet fee" in certain circumstances, and whether the contracts between [Defendant] and its participating manufacturers and distributors state that this payment of the fee does not result in the transfer of, or otherwise affect, [Defendant's] ownership of the pallets.

6. Whether [Defendant's] up-charges for shipments to NPDs compensate [Defendant] for, among other things, its increased cost of recovering those pallets, increased dwell time and lost income, or whether such fees compensate [Defendant] for unrecoverable pallets.

7. Whether the per pallet up-charge is less than the replacement cost for a new pallet.

13. Whether there is any correlation between the amount of [Defendant's] gross margin on sales and its asset recovery rate.

26. Whether [Plaintiff] has ever been offered any payment by [Defendant] for the return of pallets other than payment that was conditioned on (a) agreeing that [Defendant] owned all the pallets marked with its logo; (b) agreeing to reveal confidential customer lists to [Defendant]; and (c) agreeing to litigate all disputes in Orlando, Florida.

30. Whether Defendant derives any benefit from [Plaintiff's] actions with respect to [Defendant's] pallets.

Doc. #76 at 3-4. Above, this Court has concluded that the matters set forth in the four uncontested issues of fact and contested issues of fact numbers 6 and 7, as well as the first portion of contested issue of fact number 3, are relevant.

Accordingly, the Court overrules this motion as it relates to those matters. In addition, the Court has concluded that the second portion of number 3 and contested issue of fact number 26 are not relevant. Accordingly, the Court sustains this motion as it relates to those matters.

That leaves contested issues of fact numbers 13 and 30. With respect to number 13, since proof that there is or is not a correlation between the amount of Defendant's gross margin on sales and its asset recovery rate might affect the value of the benefit bestowed upon Defendant by Plaintiff's return of the pallets, such evidence is relevant to the amount of damages Plaintiff can recover. With respect to number 30, the question of whether Plaintiff has benefitted Defendant is at the heart of its (Plaintiff's) claim of unjust enrichment. Accordingly, the Court overrules this motion as it relates to numbers 13 and 30.

In sum, the Court sustains in part and overrules in part Defendant's Motion in Limine Seeking a Limitation of Plaintiff's Evidence of Damages (Doc. #76). That motion is sustained as it relates to the second part of contested issue of fact number 3 and contested issue of fact number 26. Otherwise, it is overruled.

It bears emphasis that the Defendant is free to object at trial to the introduction of any evidence which is the subject of one of the motions discussed herein and which the Court has concluded is relevant, and that the Plaintiff may seek to introduce any such evidence, which the Court has concluded is irrelevant. By so doing, the parties will protect the record, as well as possibly convincing the Court that, in view of the record as it then stands, evidence previously deemed irrelevant is now relevant and vice versa.

September 8, 2004

/s/ Walter Herbert Rice

WALTER HERBERT RICE, JUDGE
UNITED STATES DISTRICT COURT

Copies to:

Counsel of record.