

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

BUCKEYE DIAMOND LOGISTICS, INC. :	:	
fka BUCKEYE RECYCLERS, INC. :	:	
	:	
Plaintiff,	:	
	:	Case No. C3-01-440
	:	
v.	:	
	:	Chief Judge Walter Herbert Rice
CHEP USA, a general partnership :	:	
	:	
Defendant.	:	

**PARTIES' PROPOSED JOINT
FINAL PRETRIAL ORDER**

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

I. APPEARANCES:

For Plaintiff: James A. Wilson

For Defendant: John C. McDonald
Kevin L. Murch

II. NATURE OF ACTION AND JURISDICTION:

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

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

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

III. **TRIAL INFORMATION:**

A. Plaintiff anticipates that trial will take 4 days. Defendant anticipates trial will take 4-6 days. Defendant asserts, however, that Plaintiffs' claims are wholly equitable in nature (unjust enrichment and declaratory judgment) with the result that it has no right to trial by jury. If its Motion to Strike Jury Demand (Docket # 121) is granted, CHEP will waive its own right to trial by jury on its conversion claim with the result that trial time could be shortened by 1-2 days. Buckeye opposes CHEP's Motion to Strike Jury Demand (Docket # ___), and will not waive its right to a jury on CHEP's counterclaim.

B. Jury Trial has been set for October 12, 2004.

IV. **AGREED STATEMENTS AND LISTS:**

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

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

2. **Defendant's Position Relative to Plaintiff's Claims:** Defendant CHEP denies liability as asserted in Count Four (Unjust Enrichment) for the following reasons: (1) except as stipulated in paragraph B.25. below, it receives no benefit from Buckeye's services and neither directly nor indirectly consented to Buckeye providing any services; (2) Buckeye suffered no substantial detriment having generated \$37,482 from the sale of 11,414 CHEP pallets; (3) there is no causal connection between Buckeye's claimed detriment and CHEP's supposed benefit (or if a causal connection existed it was broken by Buckeye retaining the pallets subsequent to CHEP requesting their return); and (4) Buckeye can offer no admissible evidence as to the reasonable value of its services. CHEP further notes that in the declaratory judgment count of Buckeye's Complaint (¶ 42), Buckeye merely seeks a "declaration pursuant to O.R.C. § 2731 of CHEP's obligation to reimburse it in the future for such services." (Emphasis added).

3. **Defendant's Counterclaims:** Under the theory of conversion, Defendant CHEP seeks to be compensated for depreciation in value (\$53,146), cost of capital to replace (\$62,499), cost of repair (\$32,326), and return of proceeds from pallets "sold" by Buckeye (\$37,482) prior to September 15, 2003. Defendant CHEP also raised a claim for a permanent injunction, but that claim is rendered moot by the Stipulated Order entered November 12, 2003.

4. **Plaintiff's Position Relative to Defendant's Counterclaims:** Buckeye seeks summary judgment on CHEP's replevin claim (Docket #114). CHEP has not opposed that motion. Buckeye asserts that Buckeye's return of pallets to CHEP's

customers has not interfered with CHEP's claimed ownership interest in such pallets. Buckeye asserts that CHEP through its agents consented to Buckeye's actions.

B. Uncontroverted Facts:

The following facts are established by admissions in the pleadings or by stipulations of counsel. The parties' agreement to stipulate to the accuracy of these facts does not constitute a waiver of any objection as to the relevance or admissibility of the fact.

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

sufficient quantity of CHEP pallets to deliver the following quantities to those two customers (and invoiced them \$37,482 for these pallets) as follows:

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

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

10. During the period relevant to this suit Buckeye has sold repaired white wood pallets for between \$2.30 and \$5.40/pallet depending on grade or condition. [Plaintiff contends that this fact is irrelevant. Defendant believes Plaintiff's objections were overruled by the Court's earlier decisions].
11. CHEP's Agreements generally charge manufacturers three basic fees: an issue fee, a rental fee and a transfer fee. The issue fee is billed when pallets are shipped to the customer. The rental fee is a daily fee charged while the blue pallets are at the customer's location. The transfer fee is billed when the customer ships the pallets loaded with merchandise to its distributor.
12. CHEP made a business decision in late 1998 to allow certain of its manufacturer customers to ship blue pallets marked with CHEP's logo to any distributor (assuming CHEP was properly notified about the shipment and distributor's location), regardless of whether CHEP had a contract with the distributor. This decision was intended to increase CHEP's business. [Defendant contends that this fact is irrelevant. Plaintiff believes Defendant's objections were overruled by the Court's March 15, 2004 and September 8, 2004 decisions].
13. In addition to its customary basic fees, CHEP charges participating manufacturers an additional charge, which CHEP calls an up-charge, for each blue pallet that the participating manufacturer ships to non-participating distributors. [Defendant contends that this fact is irrelevant. Plaintiff believes Defendant's objections were overruled by the Court's March 15, 2004 and September 8, 2004 decisions].
14. The amount of the up-charge depends on whether the non-participating distributor is categorized by CHEP as "SEMIC" (semi-cooperative) or "NOTXX" (uncooperative) based upon the willingness of the distributor to return pallets containing CHEP's markings to CHEP. [Defendant contends that this fact is irrelevant. Plaintiff believes Defendant's objections were overruled by the Court's March 15, 2004 and September 8, 2004 decisions].
15. If the NPD is determined by CHEP to be semi-cooperative, CHEP generally charges the manufacturer an up-charge of \$3.50 per pallet for shipping to such distributors. [Defendant contends that this fact is irrelevant. Plaintiff believes Defendant's objections were overruled by the Court's March 15, 2004 and September 8, 2004 decisions].
16. If the NPD is determined by CHEP to be uncooperative, CHEP generally charges the manufacturer an up-charge of \$8.00 per pallet for shipping to such distributors. [Defendant contends that this fact is irrelevant. Plaintiff believes Defendant's objections were overruled by the Court's March 15, 2004 and September 8, 2004 decisions].
17. CHEP pallets come in two types, block and stringer, and pallets within each type are generally indistinguishable from one another. CHEP does not require that manufacturers or participating distributors return a specific pallet within the type

group, but accepts returns from these manufacturers and participating distributors of any blue pallet of the same type marked with CHEP's name or logo. [Defendant contends that this fact is irrelevant. Plaintiff believes Defendant's objections were overruled by the Court's March 15, 2004 and September 8, 2004 decisions].

18. CHEP regularly communicates to recyclers that it is the owner of any blue pallets with its markings, and advises recyclers to "instruct all of [their] employees not to purchase, collect, repair, sell, or otherwise dispose of the distinctively marked CHEP Pallet...If, despite your instructions, CHEP pallets do come into your possession, please keep them separate and advise us by contacting the Asset Protection Department at 1-800-487-4874 ext 276, so that we can arrange to collect our pallets at a mutually convenient time."
19. CHEP maintains a "pallet dealer database" comprised of several thousand pallet dealers and recyclers known to CHEP throughout the country. Twice each year, CHEP sends letters to every pallet dealer in its data base (who is not already a participant in a CHEP program) advising the dealer to instruct its employees not to purchase, accept, collect, repair or sell the blue pallets and to make arrangements for the collection of such pallets. True and correct examples of such communications are contained in Joint Exhibits JX 1-3 (Buckeye 00162-163, 00148-149 and CHEP 00111-112). [Plaintiff contends that this fact is irrelevant. Defendant believes Plaintiff's objections were overruled by the Court's earlier decisions].
20. Buckeye has received letters from CHEP such as those described above (in ¶ 19) since at least 1996. In addition, at various times since 1999, CHEP employees have made personal visits to Buckeye's South Charleston facility, and on some occasions have requested return of the blue pallets. Buckeye refused to return these pallets on the terms CHEP offered. Buckeye has never called CHEP's toll free telephone number to notify CHEP that it has blue pallets.
21. Joint Exhibits JX 1 and 3 (Buckeye 00162-163 and 00148-149) are true and accurate copies of correspondence (with enclosures) received by Buckeye at or near the date shown on the letters.
22. 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.
23. Beginning September 15, 2003, Buckeye began sending CHEP daily fax reports as to the number of CHEP pallets received at Buckeye's facility on the preceding

business day. [Plaintiff contends that this fact is irrelevant. Defendant believes Plaintiff's objections were overruled by the Court's earlier decisions].

24. That since October 3, 2003 through July 30, 2004, CHEP has recovered a total of 4,888 CHEP pallets from Buckeye, as indicated in DX 24.
25. CHEP benefits when Buckeye notifies CHEP within ten (10) days of its receipt of CHEP pallets and allows CHEP to recover such pallets.
26. CHEP contends (and Buckeye disputes) that the Court has found that regarding Buckeye's "continued storage of CHEP pallets at [Buckeye's] depot, it cannot be said that they convey a benefit upon CHEP, for their actions are against CHEP's expressed wishes." (Court's Decision and Entry of August 11, 2003, p. 41).
27. Plaintiff's Exhibit PX 35 (CHEP 0795) (a) is a true and accurate copy of a spreadsheet prepared by a CHEP employee; (b) contains a CHEP employee's assumptions, projections, and analysis of the benefits of paying recyclers for recovered pallets as of March 15, 2001; and (c) contains accurate mathematical computations. [Defendant contends that this fact is irrelevant. Plaintiff believes Defendant's objections were overruled by the Court's March 15, 2004 and September 8, 2004 decisions].
28. Plaintiff's Exhibit PX8 (CHEP 06983) (a) is a true and accurate copy of a spreadsheet generated by CHEP's computer system; (b) contains a summary of information from audits of a small sampling of NPD locations and it compares the actual pallet balances that CHEP representatives were able to count at those locations to CHEP's book balance before adjustment for unidentified returns; and (c) is an accurate summary of the results of the physical counts conducted at the NPD locations reflected in the report. [Defendant contends that this fact is irrelevant. Plaintiff believes Defendant's objections were overruled by the Court's March 15, 2004 and September 8, 2004 decisions].
29. The parties stipulate to the authenticity of the following documents: PX 44, PX 45, PX 46, PX 47, PX 48, PX 49, PX 50, PX 51, PX 52, PX 53, PX 54, PX 55, PX 56, PX 57, PX 58, PX 59, PX 60, PX 61, DX1, DX 2, DX 12, DX 13, DX 14, DX 15, DX 17, DX18 and JT 1 through 16.

Pursuant to the Court's September 8, 2004 Order (Docket # 111), Plaintiff reserves the right to seek reconsideration of the Court's determination that the following issues are not relevant to the claims in this case:

30. Approximately 110 of CHEP's manufacturer customers are allowed to ship to NPDs.
31. The number of NPD locations to which CHEP's manufacturer customers are shipping pallets is between 21,000 and 32,000 locations nationwide. At the current time there are approximately 846 NPDs located within 150 miles of Buckeye's recycling facility.

C. Issues of Fact and Law:

1. Contested Issues of Fact.

The inclusion of any particular “contested issues of fact” that follows does not constitute a waiver of either party’s ability to contest the relevance or admissibility of any matter addressed in this section.

1. Whether manufacturers are required to make reports to CHEP about transfers of the blue pallets, including the date of the transfer, the name of the transferee, the address to which the pallets will be transferred and the number of pallets being transferred to that location, and whether such reports are accurate and monitored by CHEP.
2. Whether CHEP permits certain participating manufacturers to ship goods on CHEP pallets to distributors that have no written agreement with CHEP, who CHEP refers to as “non-participating distributors”. [Defendant contends that this fact is irrelevant. Plaintiff believes Defendant’s objections were overruled by the Court’s March 15, 2004 and September 8, 2004 decisions].
3. Whether some or all manufacturers and participating distributors, in their contracts with CHEP, agree to pay to CHEP a “lost pallet fee” in certain circumstances. [Defendant contends that this fact is irrelevant. Plaintiff believes Defendant’s objections were overruled by the Court’s March 15, 2004 and September 8, 2004 decisions].
4. Whether when a participating manufacturer ships CHEP pallets to a non-participating distributor, that manufacturer communicates to CHEP the number of pallets being shipped and the non-participating distributor’s location; whether the first time that a participating manufacturer ships CHEP pallets to a non-participating distributor, CHEP notifies that distributor by certified mail, by phone and/or by a personal visit that CHEP owns the blue pallets, that they are not to be bought or sold and to contact CHEP to arrange for a pick-up; and whether subsequent shipments to an NPD are followed by phone calls or personal visits regarding arrangements for CHEP to pick up its pallets.
5. Whether regardless of contractual stipulations participating distributors fail to isolate pallets containing CHEP’s markings and commingle those pallets with white wood pallets, and, as a result, CHEP pallets come into the possession of pallet recyclers such as Buckeye, and if so, in what amount. [Defendant contends that this fact is irrelevant. Plaintiff believes Defendant’s objections were overruled by the Court’s March 15, 2004 and September 8, 2004 decisions].
6. Whether CHEP’s up-charges for shipments to NPDs compensate CHEP for, among other things, its increased cost of recovering those pallets, increased dwell time and lost income, or whether such fees in whole or in part compensate CHEP

- for unrecoverable pallets. [Defendant contends that this fact is irrelevant. Plaintiff believes Defendant's objections were overruled by the Court's March 15, 2004 and September 8, 2004 decisions].
7. Whether the per pallet up-charge is less than the replacement cost for a new pallet. [Defendant contends that this fact is irrelevant. Plaintiff believes Defendant's objections were overruled by the Court's March 15, 2004 and September 8, 2004 decisions].
 8. Whether at the point in time that CHEP permitted some of its manufacturer customers to ship CHEP pallets to NPDs, CHEP's controller predicted that CHEP would need to create a loss reserve for all pallets CHEP permitted its manufacturing customers to ship to uncooperative NPDs because "the thinking [was] that we would never recover these pallets." [Defendant contends that this fact is irrelevant. Plaintiff believes Defendant's objections were overruled by the Court's March 15, 2004 and September 8, 2004 decisions].
 9. What was CHEP's intent and expectation regarding pallet recovery when it began allowing its customers to ship to NPDs. [Defendant contends that this fact is irrelevant. Plaintiff believes Defendant's objections were overruled by the Court's March 15, 2004 and September 8, 2004 decisions].
 10. What are CHEP's current and historic collection goals and rates from NPDs and what number of pallets have yet to be collected or remain uncollected from NPDs? [Defendant contends that this fact is irrelevant. Plaintiff believes Defendant's objections were overruled by the Court's March 15, 2004 and September 8, 2004 decisions].
 11. Whether there is any correlation between the amount of CHEP's gross margin on sales and its asset recovery rate. [Defendant contends that this fact is irrelevant. Plaintiff believes Defendant's objections were overruled by the Court's March 15, 2004 and September 8, 2004 decisions].
 12. What were Bain & Company's conclusions regarding the current location of CHEP pallets that CHEP's customers sent to NPDs. [Defendant contends that this fact is irrelevant. Plaintiff believes Defendant's objections were overruled by the Court's March 15, 2004 and September 8, 2004 decisions].
 13. What knowledge CHEP has regarding where CHEP pallets go when they leave the possession of non-participating distributors. [Defendant contends that this fact is irrelevant. Plaintiff believes Defendant's objections were overruled by the Court's March 15, 2004 and September 8, 2004 decisions].
 14. Whether Buckeye received pallets containing CHEP markings from NPDs including Consolidated Stores.
 15. Whether CHEP assigns the number of CHEP pallets that are unrecovered or yet to be recovered to broad categories of "lost pallets." [Defendant contends that this

fact is irrelevant. Plaintiff believes Defendant's objections were overruled by the Court's March 15, 2004 and September 8, 2004 decisions].

16. Whether Buckeye's segregating pallets marked with CHEP's logo from other pallets provides a benefit to CHEP.
17. Whether prior to August 30, 2003, Buckeye was in possession of 27,332 CHEP pallets.
18. Whether during this same time period, Buckeye invoiced two customers, Mills Pride and Abbott Foods, \$37,482 for 11,414 blue pallets bearing the CHEP name, and if so what those charges were for. [Plaintiff contends that this fact is irrelevant. Defendant believes Plaintiff's objections were overruled by the Court's earlier decisions].
19. Whether CHEP consented through its employees to Buckeye retaining any pallets containing CHEP's logo Buckeye had received.
20. Whether Buckeye has suffered compensable and calculable money damages as the result of any of CHEP's actions.
21. Whether CHEP has instructed Buckeye to segregate pallets marked with CHEP's logo from other pallets.
22. Whether Buckeye can demonstrate any costs incurred for the alleged services rendered to CHEP. [Plaintiff contends that this fact is irrelevant. Defendant believes Plaintiff's objections were overruled by the Court's earlier decisions].
23. Whether CHEP derives an unjust benefit without compensating Buckeye for its actions with respect to the CHEP pallets.
24. The degree, if any, to which CHEP has unjustly benefited from Buckeye's activities with respect to the CHEP pallets.
25. Whether Buckeye's expenses, if any, associated with transportation, handling and/or storage of CHEP pallets were self incurred for its own business purposes. [Plaintiff contends that this fact is irrelevant. Defendant believes Plaintiff's objections were overruled by the Court's earlier decisions].
26. What is the damage or injury to CHEP, if any, arising from Buckeye's refusal to surrender to CHEP those CHEP pallets that came into its possession prior to September 15, 2003.
27. Whether the amount per pallet that CHEP pays under its Asset Recovery Program, or any prior or current offerings, represents reasonable compensation to Buckeye for its transportation, sortation and storage of CHEP pallets. [Plaintiff contends that this fact is irrelevant. Defendant believes Plaintiff's objections were overruled by the Court's earlier decisions].

28. Whether Buckeye's decision to store CHEP pallets outside caused damage to the pallets and/or caused CHEP to incur increased repair and cleaning expenses. [Plaintiff contends that this fact is irrelevant. Defendant believes Plaintiff's objections were overruled by the Court's earlier decisions].
29. What is the reasonable value of Buckeye's services in transporting, sorting and storing 15,981 CHEP pallets that were recovered by CHEP in September 2003.
30. Whether Plaintiff's Exhibit PX35 (CHEP 0795) (a) is a record regularly prepared in the ordinary course of CHEP's business; and (b) reflects the actual benefits inuring to CHEP under the various scenarios presented and it is based on various assumptions and projections on March 15, 2001. [Defendant contends that this fact is irrelevant. Plaintiff believes Defendant's objections were overruled by the Court's March 15, 2004 and September 8, 2004 decisions].
31. Whether Plaintiff's Exhibit PX8 (CHEP 06983) is a record regularly prepared in the ordinary course of CHEP's business. [Defendant contends that this fact is irrelevant. Plaintiff believes Defendant's objections were overruled by the Court's March 15, 2004 and September 8, 2004 decisions].
32. Whether CHEP can demonstrate it would have recovered the pallets received in September of 2003, sooner or in better condition if they had not come into Buckeye's possession.
33. Whether CHEP is able to identify which particular distributors sent pallets marked with its logo to Buckeye. [Defendant contends that this fact is irrelevant. Plaintiff believes Defendant's objections were overruled by the Court's March 15, 2004 and September 8, 2004 decisions].
34. Whether CHEP has any reports in its possession identifying who sent pallets marked with its logo to Buckeye. [Defendant contends that this fact is irrelevant. Plaintiff believes Defendant's objections were overruled by the Court's March 15, 2004 and September 8, 2004 decisions].
35. Whether CHEP directed Buckeye to store pallets marked with its logo in a different manner than they were stored or offered Buckeye compensation for doing so.
36. Whether CHEP recovered possession of 15,981 CHEP pallets from Buckeye between September 9 and September 19, 2003.

Pursuant to the Court's September 8, 2004 Order (Docket # 111), Plaintiff reserves the right to seek reconsideration of the Court's determination that the following issues are not relevant to the claims in this case:

37. Whether the contracts between CHEP and its participating manufacturers and distributors state that this payment of the fee does not result in the transfer of, or otherwise affect, CHEP's ownership of the pallets.
38. Whether CHEP has admitted that between January of 1998 and July of 2002, CHEP's manufacturer customers shipped 1,080,389 blue pallets to NPDs in Ohio and CHEP's asset recovery group recovered possession of 375,827 blue pallets from NPDs in Ohio in that same time frame.
39. Whether in the twelve month period between August 2003 and July 2004, a total of 47,880,925 blue pallets were shipped to customers and distributors located within 150 miles of Buckeye's facility at South Charleston, Ohio and whether 23,933,241 of these pallets went to participating manufacturers, 23,552,792 pallets went to participating distributors, and 377,202 went to non-participating distributors; whether during the same time period, a total of 46,982,573 pallets were returned to CHEP of which returns from customers totaled 23,956,657, from participating distributors 22,607,855, from non-participating distributors 214,960, and another 203,101 from recyclers and other sources.
40. Whether under CHEP's written agreement with Wal*Mart, dating back to 1996, Wal*Mart received free use of the blue pallets in exchange for encouraging its manufacturers and suppliers to ship to it on CHEP's pallets.
41. Whether Wal*Mart has any responsibility for reporting to CHEP information about where the blue pallets are/were sent and the reasons why/why not.
42. Whether Wal*Mart's use of blue pallets led CHEP to perform any accounting adjustments, and if so, what was CHEP's intent with regard to the recovery of these pallets.
43. Whether Wal*Mart ships blue pallets to NPDs and, whether CHEP's agreements with Wal*Mart prevent Wal*Mart from shipping to NPDs or require that Wal*Mart report where it ships pallets with CHEP's logo.
44. Whether CHEP can determine where the pallets reported on a stray equipment report and located at a pallet recycler have come from.
45. Whether Buckeye has ever been offered any payment by CHEP for the return of pallets other than a payment that was conditioned upon it (a) agreeing that CHEP owned all pallets marked with its logo; (b) agreeing to reveal confidential customer lists to CHEP; and (c) agreeing to litigate all disputes in Orlando, Florida.

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

1. Whether CHEP has been unjustly enriched by Buckeye's taking, sorting, separation and storage of pallets containing CHEP's logo, and if so the amount of compensation to which Buckeye is entitled for such services in the past.
2. Whether Buckeye is entitled to a declaration pursuant to O.R.C. § 2721 of CHEP's obligation to reimburse it in the future for such services as requested by ¶ 42 of the Complaint and Buckeye's second request for relief. Buckeye asserts and CHEP denies that such declaration also includes the amount to which Buckeye is entitled to be compensated for the future return of pallets.
3. Whether Buckeye is entitled to disgorgement of profits earned by CHEP as the result of a system CHEP knowingly put into place by which Buckeye would be forced to bear the expense of recovering pallets for CHEP.
4. Whether Buckeye has converted CHEP's pallets and otherwise interfered with CHEP's ownership of its pallets.
5. Whether CHEP is entitled to be compensated for depreciation in value, cost of capital to replace, cost to repair and return of proceeds from pallets "sold" by Buckeye together with prejudgment interest and reasonable attorney fees as the result of Buckeye's conversion.
6. Whether Buckeye's unjust enrichment claim is limited by the terms of its 26(a)(1) disclosures and its January 15, 2003 supplemental disclosure to fair and reasonable compensation for the sorting, storage and transportation of CHEP pallets based on either (a) the surcharge price CHEP charges for shipment of pallets to hostile or non-cooperative NPDs or (b) the price Buckeye is paid by those who put in circulation other proprietary pallets for return of those pallets. [Plaintiff believes Defendant's objections to its disclosures were overruled by the Court's September 10, 2004 Discovery Order.]
7. Whether either of the two measures of damage set forth in the preceding paragraph is an appropriate measure of damages for unjust enrichment in this case. [Plaintiff believes this issue was resolved by the Court's September 8, 2004 decision].
8. Whether the equitable doctrines of either unclean hands or estoppel constitute valid defenses to CHEP counterclaims for conversion.

D. Witnesses:

1. Plaintiff will call or will have available for testimony at trial those witnesses listed in Appendix A hereof.
2. Defendant will call or will have available for testimony at trial those witnesses listed in Appendix B hereof.
3. There is reserved to each of the parties the right to call such rebuttal witnesses as may be necessary, without prior notice thereof to the other party.
4. Each party objects to the other calling any witness not identified in its initial or supplemental witness disclosures.

E. Expert Witnesses:

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

Plaintiff has appealed an order from the Magistrate denying it the right to identify and call an expert witness on the issue of CHEP's conversion damages calculations. (Docket # 113.) Defendant has opposed that appeal. (Docket # 119) and reserves the right both to depose that expert and to call its own expert should the Magistrate's order be overturned.

CHEP asserts that if the Court determines that it is entitled to recover attorneys' fees on its conversion claim, then the issue of the amount of the attorneys' fees that CHEP is entitled to recover should be bifurcated for a separate hearing at which time CHEP would present expert testimony on that issue.

F. Exhibits:

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

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

G. Depositions:

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

Steven Fisher
Andrew Brumsey
Tom Kirk
Tod Sizemore
Walter Russell (if not present for trial)
Keith Norder (by videotape)

2. Defendant reserves the right to make counter designations to the extent that the Court permits the reading of any deposition. Consistent with Defendant's Motions in Limine, Defendant objects to all portions of the designated testimony that are beyond the scope of the remaining issues.
3. Designated portions of deposition testimony and objections are contained in Appendix F hereof.

H. Discovery:

A hearing concerning discovery issues was held on June 18, 2004 and an order was issued by the Magistrate on September 10, 2004. Subject to appeal of portions of that order, both parties expect to be in compliance by September 30, 2004.

I. Pending motions

The following motions are pending at this time:

1. Buckeye Motion for Clarification or Reconsideration of Order Denying Buckeye's Motion to Deem Facts Admitted (Docket #65)
2. CHEP's Motion for Reconsideration of Court's Decision Issued March 15, 2004 Unsealing Documents Relating to Summary Judgment Motions (Docket # 92)
3. CHEP's Motion in Limine Regarding Bain & Co. (Docket # 102)
4. Buckeye's Appeal of Magistrate Order. (Docket # 113)
5. Buckeye's Motion for Summary Judgment on CHEP's Counterclaim for Replevin. (Docket # 114)

6. Buckeye's Emergency Motion for Leave to File Memorandum in Opposition to CHEP USA's Motion to Exclude PX 2 ("Bain Report") and Motion in Limine regarding CHEP Damage Claims (with Exhibits thereto) Publicly or, in the Alternative, for Leave to File under Seal. (Docket # 115)
7. CHEP's Objection to the Magistrate Judge's Discovery Order Filed September 10, 2004. (Docket # 120)
8. CHEP's Motion to Strike Jury Demand. (Docket # 121)
9. Buckeye's Motion in Limine Regarding Evidence Of Participation In CHEP USA's Pallet Return Program (Docket # 122)
10. Buckeye's Motion in Limine regarding CHEP USA's Damage Claims (Docket # __)

J. Miscellaneous Orders:

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

V. **MODIFICATION**

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

VII. **SETTLEMENT EFFORTS**

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

VII. **JURY INSTRUCTIONS**

PROPOSED INSTRUCTIONS

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

Approved following Final Pretrial
Conference:

Walter Herbert Rice, Judge

s/James A. Wilson
Counsel for Plaintiff

s/John C. McDonald
Counsel for Defendant