

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

BUCKEYE DIAMOND LOGISTICS, INC. :  
fka BUCKEYE RECYCLERS, INC. :

Plaintiff, :

Case No. C3-01-440

v. :

Judge Walter Herbert Rice

CHEP USA, a general partnership :

Defendant. :

**CHEP USA'S PRELIMINARY INSTRUCTIONS TO THE JURY**

CHEP USA hereby submits the following proposed instructions prior to opening statements with respect to the claims at trial.

Respectfully submitted,

s/ John C. McDonald

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CHEP USA, a general partnership :	:	
	:	
Defendant. :	:	

**PRELIMINARY INSTRUCTIONS TO THE JURY**

On September 18, 2001 Buckeye Diamond Logistics filed suit against CHEP USA asserting that CHEP pallets which were coming into Buckeye’s possession were lost or abandoned and that CHEP USA could no longer claim ownership of those pallets. Buckeye also maintained that CHEP USA had violated the Ohio Deceptive Trade Practices Act, that CHEP had interfered with Buckeye’s business relationships, that Buckeye was entitled to a common law lien on CHEP’s pallets and that CHEP had been unjustly enriched by Buckeye’s actions with respect to the CHEP pallets which came into its possession.

In an Answer and Counterclaim filed by CHEP on October 25, 2001, CHEP denied liability on any of the five counts in Buckeye’s Complaint and sought return of its pallets held by Buckeye, damages for Buckeye's wrongful taking of CHEP's pallets, and a permanent injunction preventing Buckeye from withholding CHEP’s pallets in the future.

In a Decision and Entry dated August 11, 2003, this Court found that CHEP has at all times retained ownership of its pallets (Doc. # 62 at p. 19) and dismissed Counts I, II, III and V of Buckeye’s Complaint. Buckeye’s claim of unjust enrichment and CHEP’s claim of

conversion are the issues remaining to be tried in this case. Specifically, you the jury must determine with respect to Buckeye's claim of unjust enrichment: (1) whether Buckeye conferred a benefit upon CHEP by its actions, (2) whether CHEP knew of that benefit and (3) whether CHEP would be unjustly enriched to retain that benefit without compensating Buckeye.

At the same time it will be necessary to determine whether, prior to September, 2003, when Buckeye began to return the pallets to CHEP, Buckeye had wrongly interfered with CHEP's ownership of those pallets and what damages, if any, CHEP has sustained as a result. To do so, you must determine, with respect to CHEP's conversion claim: (1) whether CHEP had ownership interests or a right to possession of the pallets at the time in question; (2) whether CHEP was deprived of that possession of its pallets by an unauthorized act of Buckeye; (3) whether CHEP demanded the return of the property from Buckeye after Buckeye exerted dominion or control over the property; (4) whether Buckeye refused to deliver the property to CHEP; (5) whether CHEP did not consent to Buckeye's continued possession of the pallets; and (6) whether, a result, CHEP suffered damages.

In September 2003, following the Court's August 11<sup>th</sup> Decision and Entry, Buckeye permitted CHEP USA to recover 15,981 CHEP pallets from Buckeye's recycling facility located at South Charleston, Ohio. The parties also agreed that when CHEP pallets were obtained by Buckeye, it would either (1) return such pallets to a CHEP depot on not less than a monthly basis, or (2) notify CHEP within ten days of receipt of such pallets in which case all such pallets will be picked up by CHEP on a not less than monthly basis. That agreement was incorporated in a Stipulated Order dated November 12, 2003 (Doc. # 69 at p. 3) and has eliminated the need for the permanent injunction requested by CHEP.

The Court specifically found in its August 11<sup>th</sup> Decision and Entry that continued storage of CHEP pallets at Buckeye's recycling facility cannot be said to convey a benefit upon CHEP for such actions are against CHEP's expressed wishes. (Doc. # 62 at p. 41) At the same time CHEP and Buckeye have stipulated and agreed that CHEP does benefit when Buckeye notifies CHEP within ten days of its receipt of additional pallets and allows CHEP to recover such pallets. Between October 3, 2003 and July 30, 2004 Buckeye has timely notified CHEP that it had received additional CHEP pallets and a total of 4,888 such additional pallets have been recovered by CHEP in that time period.

In considering these claims, the parties have stipulated a number of facts. Accordingly, I instruct you that in considering the claims and issues in this case you are to accept the following facts as true:

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 71 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	374
	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.
10. During the period relevant to this suit Buckeye has sold repaired white wood pallets for between \$2.30 and \$5.40/pallet depending on grade or condition.
11. 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.
12. 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.
13. 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."
14. 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.
15. Buckeye has received letters from CHEP such as those described above (in ¶ 13) 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.
16. Joint Exhibits JX 1 and 3 (which you will see during the course of the trial) are true and accurate copies of correspondence (with enclosures) received by Buckeye at or near the date shown on the letters.

17. 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.
18. Beginning September 15, 2003, Buckeye began sending CHEP daily fax reports as to the number of CHEP pallets received at Buckeye's facility on the preceding business day. True and correct copies of these daily fax reports are contained in Defendant's Exhibit DX18.
19. That since October 3, 2003 through July 30, 2004, CHEP has recovered a total of 4,888 CHEP pallets from Buckeye, as indicated in Defendant's Exhibit DX 24.
20. CHEP benefits when Buckeye notifies CHEP within ten (10) days of its receipt of CHEP pallets and allows CHEP to recover such pallets.

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Judge Walter Herbert Rice

Approved:

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was served the 5th day of October, 2004, via the Court's electronic filing notification upon:

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s/ John C. McDonald  
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