

**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. :

Judge Walter Herbert Rice

CHEP USA, a general partnership :

Defendant. :

**PLAINTIFF’S PROPOSED PRELIMINARY JURY INSTRUCTIONS**

Plaintiff and Counter-claim Defendant Buckeye Diamond Logistics (“Buckeye”) hereby submits the following proposed instructions prior to opening statements with respect to the claims at trial.

s/James A. Wilson

James A. Wilson (0030704)  
Vorys, Sater, Seymour and Pease LLP  
52 East Gay Street  
P.O. Box 1008  
Columbus, Ohio 43216-1008  
(614) 464-5606  
Attorney for Plaintiff

**PRELIMINARY INSTRUCTIONS TO THE JURY**

On September 18, 2001 Buckeye Diamond Logistics filed suit against CHEP USA alleging, among other things, that CHEP had been unjustly enriched by Buckeye's actions with respect to pallets marked with CHEP's logo that came into Buckeye's possession and seeking a determination of the amount that Buckeye should be compensated by CHEP for the return of pallets.

In an Answer and Counterclaim filed by CHEP on October 25, 2001, CHEP denied liability on the allegation Buckeye's Complaint and asserted, among other things, a counterclaim for damages for Buckeye's alleged conversion of pallets marked with CHEP's logo.

Buckeye's claim of unjust enrichment and CHEP's claim of conversion are the issues 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. If you find that Buckeye has established these elements, you must determine the amount by which CHEP has benefited as the result of Buckeye's actions in considering an award of damages to 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 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, that as a result, CHEP suffered damages.

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 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. 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. 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.
11. 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.

12. 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.
13. 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.
14. 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.
15. 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.
16. 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.
17. 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."
18. 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.
19. 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.
20. 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.

21. 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.
22. CHEP benefits when Buckeye notifies CHEP within ten (10) days of its receipt of CHEP pallets and allows CHEP to recover such pallets.
23. Plaintiff's Exhibit PX 35 (which you will see during the course of the trial) (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.
24. Plaintiff's Exhibit PX8 (which you will see during the course of the trial) (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.
25. 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. [Update]

The Court and the parties have already resolved some of the issues in this case.

1. With respect to pallets marked with its logo, CHEP remains the owner of the pallets in question and has not abandon them.<sup>1</sup>

2. If a common customer of Buckeye and CHEP inadvertently loads CHEP-marked pallets on to Buckeye's van or trailer, Buckeye can return the pallets to the common customer or CHEP as long as it returns those pallets in a commercially reasonable period of time. The parties agreed that after September 2003, Buckeye would return the CHEP-marked pallets within a specified period of time after accumulating a full truckload of pallets.

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<sup>1</sup> Buckeye offers this portion of the instruction as a statement of the pertinent portion of the Court's ruling on summary judgment, without waiving its right to appeal from the Court's Decision and Entry of August 11, 2003.

3. The parties have also agreed that it is lawful and permissible for Buckeye to perform pallet sortation services, including sortation of pallet loads containing CHEP-marked pallets, either at a common customer's facility or at a facility owned or operated by Buckeye.

4. The parties agreed that after September 2003, when stray CHEP-marked pallets are obtained by Buckeye, it will 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, with not less than two business days advance notice to Buckeye as to the date and time of the pickup.

As I indicated, in September 2003, Buckeye permitted CHEP to recover 15,981 CHEP pallets from Buckeye's recycling facility located at South Charleston, Ohio. 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.

As noted, 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. However, for the time period before September 2003, it is for you, the jury, to determine whether CHEP benefited from Buckeye's recovery of pallets and ultimate return of those pallets to CHEP. It is also for you the jury to determine whether Buckeye acted in accordance with its customers' obligations to CHEP and/or returned pallets to customers within a commercially reasonable period of time for the period prior to September 2003, to the extent you find CHEP did not consent to Buckeye's actions.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of this Motion was served on  
October 5, 2004, by electronic delivery upon:

John C. McDonald  
Kevin L. Murch  
Schottenstein Zox & Dunn  
250 West Street  
Columbus, OH 43215

s/James A. Wilson  
James A. Wilson