

**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 AND COUNTERCLAIM DEFENDANT BUCKEYE DIAMOND
LOGISTICS' PROPOSED CLOSING JURY INSTRUCTIONS AND
INTERROGATORIES**

Plaintiff and Counterclaim Defendant Buckeye Diamond Logistics (“Buckeye”) hereby submits the following proposed instructions in support of its claims at trial. Buckeye specifically reserves the right to submit supplemental instructions to address issues raised by further rulings of the Court, including but not limited to the Court’s rulings on Buckeye’s Motion in Limine regarding CHEP USA’s Evidence of Damages and Buckeye’s First and Second Motions to Enforce Discovery Order, or by the evidence at trial.

s/James A. Wilson
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Proposed Jury Instructions

BUCKEYE'S PROPOSED INSTRUCTION NO. 1.

Introductory Instructions

MEMBERS OF THE JURY:

You have heard the evidence and the arguments of counsel. It is now my duty to give you the instructions of the Court as to the law which applies to this case. The Court and the jury have separate functions: You decide the disputed facts, and the Court provides the instructions of law. It is your sworn duty as jurors to accept these instructions and to apply the law as it is given to you to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider these instructions as a whole. You are not permitted to change the law, or to apply your own idea of what you think the law should be. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the Court, just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything but the evidence in the case. Your verdict may not be based on guesswork, conjuncture or speculation.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts, but rather your function.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors; and to arrive at a verdict by applying the same rules of law, as given in the instructions of the Court.

You must perform your duties as jurors without bias or prejudice as to any party. Our system of law does not permit jurors to be governed by sympathy, prejudice, or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and reach a just verdict, regardless of the consequences.

Authority: Kevin F. O'Malley, Jax E. Grenig and Hon. William C. Lee, Federal Jury Practice and Instructions (5th ed.) (hereinafter "Federal Jury Practice"), vol. 3, § 103.01 (modified).

BUCKEYE'S PROPOSED INSTRUCTION NO. 2.

Burden of Proof

The burden is on the plaintiffs in a civil action, such as this, to prove every essential element of their claim by a preponderance of the evidence. Likewise, the burden is on a counterclaimant in a civil action, such as this, to prove every essential element of its claim by a preponderance of the evidence. This obligation is known as the burden of proof. If the proof fails to establish any essential element of a claim by a preponderance of the evidence, that party's claims are not established, and you should find in favor of the other party.

Authority: 3 Federal Jury Practice § 104.01 (modified).

BUCKEYE'S PROPOSED INSTRUCTION NO. 3.

Preponderance of the Evidence

To “establish by a preponderance of the evidence” means to prove that something is more likely than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds the belief that what is sought to be proved is more likely true than not true. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, the jury may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

Authority: 3 Federal Jury Practice § 104.01 (modified).

BUCKEYE'S PROPOSED INSTRUCTION NO. 4.

Evidence and Inferences

Evidence is all of the testimony received from the witnesses you have heard, including depositions, the exhibits admitted during trial, the facts agreed to by counsel for the parties and any facts which the Court requires you to accept as true. When the attorneys on both sides stipulate or agree as to the existence of a fact you must, unless otherwise instructed, accept the stipulation and regard that fact as proven.

Evidence may be direct or circumstantial, or both.

Direct evidence is the testimony given by a witness who has seen or heard the facts to which he or she testifies. It includes exhibits admitted into evidence during the trial.

Circumstantial evidence is the proof of facts or circumstances by direct evidence from which you may reasonably infer other related or connected facts that naturally and logically follow, according to common experience.

To infer, or to make an inference, is to reach a reasonable factual conclusion that you may, but are not required to, make from other facts that you find have been established by direct evidence. Whether an inference is made rests entirely with you.

You may infer a fact or facts only from other facts or circumstances that have been proved by the greater weight of the evidence, but you may not infer a fact or facts from a speculative or remote basis that has not been established by the greater weight of the evidence.

Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses, regardless of who may have called them; and all exhibits received in evidence, regardless of who may have produced them; and all facts and events which may have been judicially noticed.

Statements and arguments of counsel are not evidence in the case. The opening statements and closing arguments of counsel were intended to assist you but are not evidence. Statements ordered stricken by the Court, or to which the Court sustained an objection, or which you were ordered to disregard, are not evidence and must be treated as though you never heard them. You also must not guess why the Court sustained the objection to any question. When the Court has sustained an objection to a question, you must disregard it entirely and may not speculate what the witness would have said if he or she were permitted to answer the question.

Unless you are otherwise instructed, anything you may have seen or hear outside the courtroom is not evidence, and must be entirely disregarded.

Authority: 3 Federal Jury Practice § 103.30 and 104.05 (modified); 1 O.J.I. § 5.10.

BUCKEYE'S PROPOSED INSTRUCTION NO. 5.

Credibility of Witnesses and Discrepancies in Testimony

You are the judges of the facts, the credibility of the witnesses, and the weight of the evidence.

To weigh the evidence you must consider how credible or believable any witness is. In your daily life, you are constantly determining who is worthy of belief and who is not. In this case, employ the same tests in determining the weight and credibility, if any, you will assign to the testimony of each witness who testified in this trial.

These tests include the appearance of each witness upon the stand, his or her manner of testifying and the witness' entire appearance. Remember the witness' response to questions and their assurance or lack of assurance in answering. Consider also the reasonableness of the testimony, the opportunity that he or she had to see, hear, and know the things concerning which he or she testified, his or her accuracy of memory, frankness, or lack of it; intelligence, interest and bias, if any; together with all the facts and circumstances surrounding the testimony. Use these tests and assign to each witness' testimony such weight as you think proper.

You are not required to believe the testimony of any witness simply because he or she was under oath. You may believe or disbelieve all or any part of the testimony of any witness. It is your duty to determine what testimony to believe and what testimony not to believe.

In dealing with contradictory testimony, you may consider which testimony the exhibits admitted into evidence support or contradict.

Material inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause you to discredit that testimony. In considering the effect of a discrepancy, do not be misled by an unimportant detail, but do consider all discrepancies that relate to matters of importance. Consider also whether a discrepancy resulted from an innocent error or an intentional falsehood.

Keep in mind that two individuals rarely, if ever, describe an incident precisely alike in all minute details; note that one individual rarely, if ever, describes the same incident twice in the same minute detail.

If you believe that a witness has been discredited as to a part of their testimony, you may give the balance of their testimony such credence, if any, that you believe it deserves.

Authority: 3 Federal Jury Practice § 105.01 (modified); 1 O.J.I., § 5.30 (modified).

BUCKEYE'S PROPOSED INSTRUCTION NO. 6.

Impeachment- Inconsistent Statement or Conduct

A witness may be discredited or impeached by contradictory evidence; or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony; or by evidence that the character of the witness for truthfulness is bad.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars and you may reject all the testimony of that witness, or give it such credibility as you may think it deserves.

An act or omission is "knowingly" done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

Authority: 3 Federal Jury Practice § 105.04.

BUCKEYE'S PROPOSED INSTRUCTION NO. 7.

Effect of Prior Inconsistent Statements or Conduct

When a party to the case, by a statement or other conduct, admits some fact or facts against his or her interest, then such statement or other conduct, if knowingly made or done, may be considered as evidence of the truth of the fact or facts so admitted by such party, as well as for the purpose of judging the credibility of the party as a witness.

Authority: 3 Federal Jury Practice § 105.09 (modified).

BUCKEYE'S PROPOSED INSTRUCTION NO. 8.

Claims of the Parties

You the jury must determine two claims in this case consistent with the instructions I will give you: Buckeye's claim of unjust enrichment and CHEP's claim of conversion.

Buckeye claims that CHEP has been and continues to be unjust enrichment by Buckeye's sorting, separating and return of pallets marked with CHEP's logo to CHEP.

Specifically, Buckeye seeks the following:

1. An award of money damages for pallets returned to CHEP in September 2003;
2. An award of money damages for 4888 pallets returned to CHEP between October 2003 and July 2004; and
3. A declaration of the amount per pallet CHEP is obligated to pay for the return of pallets since the end of July 2004 and in the future.

CHEP claims that by failing to return pallets to it prior to September 2003, Buckeye is liable to pay money damages for the conversion of the pallets returned at that time.

BUCKEYE'S PROPOSED INSTRUCTION NO. 9.

Stipulated and Undisputed Facts

Certain facts are not in dispute in this trial, as these facts have either been agreed to by the parties or have been determined by the Court. 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 (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.

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 (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. [
24. 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.

Authority: Final Pretrial Order.

BUCKEYE'S PROPOSED INSTRUCTION NO. 10.

Buckeye's Unjust Enrichment Claim: Essential Elements

The first claim you must consider is Buckeye Diamond Logistics claim that CHEP has been unjustly enriched by Buckeye's return of pallets to CHEP. In order to establish its claim for unjust enrichment, Buckeye must prove three elements by a preponderance of the evidence:

1. that Buckeye conferred a benefit on CHEP;
2. that CHEP knew of the benefit; and
3. that CHEP would be unjustly enriched if permitted to retain the benefit without compensating Buckeye.

Authority: Decision and Entry dated September 8, 2004 (Docket # 110) at 5; Decision and Entry dated August 12, 2003 (Doc. #61) at 41-42.

BUCKEYE'S PROPOSED INSTRUCTION NO. 11.

Buckeye's Unjust Enrichment Claim – Benefit Conferred Defined

The first element of the claim for unjust enrichment is that Buckeye conferred a benefit on CHEP. CHEP has admitted and stipulated that with respect to pallets returned to it since October 2003, Buckeye has conferred a benefit upon it.

CHEP denies that Buckeye conferred a benefit on it with respect to pallets returned to CHEP in September 2003. Accordingly, Buckeye must prove by a preponderance of the evidence that Buckeye conferred a benefit on CHEP by sorting, separating and returning those pallets to CHEP. A person confers a benefit upon another if he, she or it gives to the other possession of goods (such as pallets) or performs services beneficial to or at the request of the other, or in any way adds to the other's security or advantage. He, she or it confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss. The word "benefit," therefore, denotes any form of advantage.

Authority: Decision and Entry dated September 8, 2004 (Docket # 110) at 5; Decision and Entry dated August 12, 2003 (Doc. #61) at 41-42; Restatement (First) of the Law of Restitution § 1, Comment b.

BUCKEYE'S PROPOSED INSTRUCTION NO. 12.

Buckeye's Unjust Enrichment Claim – Knowledge of Benefit Defined

The second element of the claim for unjust enrichment is that CHEP knew of the benefit to it. CHEP had knowledge of the benefit conferred on it if it was familiar with the actions Buckeye was taking that benefited CHEP.

Authority: Decision and Entry dated September 8, 2004 (Docket # 110) at 5; Decision and Entry dated August 12, 2003 (Doc. #61) at 41-42; Merriam Webster's Collegiate Dictionary (10th ed.) at 647.

BUCKEYE'S PROPOSED INSTRUCTION NO. 13.

Buckeye's Unjust Enrichment Claim – “Unjustly” Enriched Defined

The third element of the claim for unjust enrichment is that CHEP received the benefit conferred on it by Buckeye in such circumstances as would make it unjust for CHEP to retain or profit from the benefit without compensation to Buckeye.

The determination of whether any benefit or benefits your find CHEP has received by the sorting, separation and return of pallets by Buckeye is “unjust” should be based on the circumstances of the receipt of the benefit(s) by CHEP. Unjust means unfair.

Authority: Reisenfeld & Co. v. Network Group, Inc., 277 F.3d 856, 860 (6th Cir. 2002); Hambleton v. R.G. Barry Corp., 12 Ohio St.3d 179, 183, 465 N.E.2d 1298, 1302 (1984); Cosby v. Cosby, 141 Ohio App.3d 320, 750 N.E.2d 1207, 1213 (2001); Merriam Webster's Collegiate Dictionary (10th ed.) at 1293.

BUCKEYE'S PROPOSED INSTRUCTION NO. 14.

Buckeye's Unjust Enrichment Claim – Measure of Damages

If you find that Buckeye has established by a preponderance of the evidence each element of its claim for unjust enrichment, you must determine the amount of damages, if any, Buckeye should be awarded. The measure of damages Buckeye is entitled to recover on its unjust enrichment claim is the value of the benefit its actions with regard to CHEP's pallets that Buckeye has conferred upon CHEP, rather than the amount it cost Buckeye to take the actions that benefited CHEP. In other words, the measure of damages on Buckeye's unjust enrichment claim is the amount by which CHEP has or will profit from Buckeye's actions.

If you find Buckeye has proven its claim for unjust enrichment by a preponderance of the evidence, you should consider the amount of damages Buckeye should recover separately for:

1. Pallets returned to CHEP in September 2003;
2. Pallets returned to CHEP between October 2003 and July 2004; and
3. Pallets returned after July 2004 and into the future.

Authority: Decision and Entry of September 8, 2004 (Docket # 110) at 506; U.S. Health Practices, Inc. v. Byron Blake, M.D., Inc., 2001 WL 277291 (Ohio App. 2001). Thoms v. Thayer, 1998 WL 65514 (Ohio App. 1998); Hartley v. Dayton Computer Supply, 106 F. Supp. 2d 976 (S.D. Ohio 1999).

BUCKEYE'S PROPOSED INSTRUCTION NO. 15.

Adverse Inference from Evidence Not Produced or Destroyed

If a party fails to produce evidence that is under that party's control and reasonably available to that party and not reasonably available to the adverse party, then you may infer that the evidence is unfavorable to the party who could have produced it and did not.

In this case, CHEP failed, despite an order of the Court, to produce the original file from which the document entitled "Benefit Of Paying Recyclers for Recovered CHEP Pallets" (PX 35) was obtained because the file was not maintained, as required by law, after this lawsuit began. As a result, Buckeye has been unable to determine whether the file in question contained documents that might support its case. Accordingly, you may infer that evidence from that file would have been unfavorable to CHEP and would contradict CHEP's assertions that PX 35 is not a true measure of the benefit it receives when recyclers such as Buckeye return pallets to it.

Authority: 3 Federal Jury Practice § 104.26 (modified).

BUCKEYE'S PROPOSED INSTRUCTION NO. 16.

CHEP Counterclaim for Conversion – Essential Elements

CHEP asserts a counterclaim against Buckeye for alleged conversion by the Buckeye of CHEP's property. 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. The action of conversion of personal property is based on the wrongful possession by one party of the property of another. It is the wrongful taking of the property that gives the right of action to the owner of the property against the wrongdoer. It is not necessary for the party taking wrongful possession of the property to assert absolute ownership of it in order to give the owner the right to an action for conversion. I instruct you as a matter of law that CHEP was the owner of the pallets in question and did not abandon such pallets. To prevail on its claim of conversion, you must find from the greater weight of the evidence:

1. that CHEP was entitled to the immediate possession of particular pallet held by Buckeye;
2. that Buckeye's continued possession of the pallets was not authorized or consented to by CHEP;
3. that CHEP demanded the return of the property from Buckeye after Buckeye exerted dominion or control over the property; and
4. that Buckeye, without privilege to do so, refused to deliver the property to CHEP.

Authority: 2 Ohio Jury Instructions 257.01 (modified); Decision and Entry dated September 8, 2004 (Docket # 110) at 6; Decision and Entry dated August 11, 2003 (regarding Court's finding of ownership, which Buckeye reserves the right to appeal); Bench Billboard Co. v. Columbus, 63 Ohio App.3d 421, 579 N.E.2d 240 (1989); Ohio Tel. Equip. & Sales, Inc. v. Hadler Realty Co., 24 Ohio App.3d 91, 493 N.E.2d 289 (1985).

BUCKEYE'S PROPOSED INSTRUCTION NO. 17.

CHEP Counterclaim for Conversion – Entitlement to Immediate Possession

The burden of proving by a preponderance of the evidence of the right to immediate possession at the time of alleged conversion is on CHEP. CHEP had a right of immediate possession to pallets unless it had an agreement with another party, such a distributor, by which the other party could seek return of the pallet ahead of CHEP. If CHEP fails to prove a right of immediate possession for any or all of the pallets in question, CHEP can not recover on its claim for conversion with respect to those pallets, and your verdict must be for Buckeye as to any such pallets.

Authority: September 8, 2004 (Docket # 110) at 6; Bench Billboard Co. v. Columbus, 63 Ohio App.3d 421, 579 N.E.2d 240 (1989); Ohio Tel. Equip. & Sales, Inc. v. Hadler Realty Co., 24 Ohio App.3d 91, 493 N.E.2d 289 (1985).

BUCKEYE'S PROPOSED INSTRUCTION NO. 18.

CHEP Counterclaim for Conversion –Consent Defined

In order to establish its conversion claim, CHEP must also prove by a preponderance of the evidence that it did not consent to Buckeye's continued possession of some or all of the pallets. Buckeye contends that CHEP consented to Buckeye holding pallets to return them, if needed, to mutual customers. If CHEP fails to show by a preponderance of the evidence that it did not consent to Buckeye holding particular pallets for return to mutual customers, you must find for Buckeye with respect to CHEP's claim that Buckeye converted those pallets. Consent or authorization means to permit, agree or acquiesce. Such consent may be explicit or may be implied from the circumstances of communications between Buckeye and CHEP.

Authority: 2 Ohio Jury Instructions 257.01 (modified); Uhlenbrock v. Key Bank, 2001 WL 50465 *3 (Ohio App. 10th Dist. Franklin Cty. Jan. 13, 2001) (copy attached at Appendix A); Merriam Webster's Collegiate Dictionary (10th ed.) at 246.

BUCKEYE'S PROPOSED INSTRUCTION NO. 19.

CHEP Counterclaim for Conversion – Actual and Apparent Authority to Consent

An employer, such as CHEP, is bound by a consent being granted on its behalf by an employee where the employee was acting within the scope of his or her authority. You will find for Buckeye on the conversion claim if you find by the greater weight of the evidence that CHEP's employees possessed actual authority to consent to Buckeye holding pallets for return to mutual customers or that such employees had apparent authority to grant such consent.

An employee's act is not within the scope of his or her authority and is not binding on his employer when it was forbidden by the employer.

Buckeye asserts that even if CHEP employees were not authorized by CHEP to consent to Buckeye holding pallets for return to mutual customers, CHEP created the apparent authority for these employees to grant such consent. You will find CHEP created the apparent authority for its employees to grant such consent if you find by the greater weight of the evidence that CHEP held its employees out as possessing sufficient authority to grant consent on behalf of CHEP and that Buckeye in good faith had reason to believe and did believe that CHEP's employees possessed such authority.

Authority: 1 O.J.I. § 15.10 (modified).

BUCKEYE'S PROPOSED INSTRUCTION NO. 20.

CHEP Counterclaim for Conversion – Demand for Return Defined

In order to establish its claim for conversion, CHEP must further prove by a preponderance of the evidence that it demanded that Buckeye return its pallets. A demand of the return of pallet may be communicated verbally or in writing, but must be considered in light of the circumstances of the communication. Buckeye asserts that with respect to pallets that Buckeye informed CHEP it was holding for return to mutual customers, CHEP withdrew its demand for the return of such pallets. You must determine from the totality of the evidence whether or not CHEP withdrew its demand for the return of pallets by Buckeye.

Authority: September 8, 2004 (Docket # 110) at 6; Bench Billboard Co. v. Columbus, 63 Ohio App.3d 421, 579 N.E.2d 240 (1989); Ohio Tel. Equip. & Sales, Inc. v. Hadler Realty Co., 24 Ohio App.3d 91, 493 N.E.2d 289 (1985).

BUCKEYE'S PROPOSED INSTRUCTION NO. 21.

CHEP Counterclaim for Conversion – Refusal to Deliver Property Defined

If you find that CHEP has established the other elements of its claim for conversion with respect to some or all pallets returned by Buckeye to CHEP in September 2003, you must determine whether Buckeye, without any privilege to do so, refused CHEP's demand to allow it to collect pallets from Buckeye. Buckeye admits that prior to September 2003, it did not return pallets to CHEP. Buckeye asserts that to the extent CHEP did not consent to Buckeye holding pallets for return to mutual customers, Buckeye was privileged to hold any other pallets if it had reasonable doubts as to CHEP's ownership interest in them, and brought this lawsuit to resolve those doubts.

Authority:

As to Requirement of a Refusal to Deliver: September 8, 2004 (Docket # 110) at 6; Bench Billboard Co. v. Columbus, 63 Ohio App.3d 421, 579 N.E.2d 240 (1989); Ohio Tel. Equip. & Sales, Inc. v. Hadler Realty Co., 24 Ohio App.3d 91, 24 OBR 160, 493 N.E.2d 289 (1985).

As to Privilege to Withhold: Restatement (Second) of Torts § 240 (see, in particular, Comment c, Illustration 1: "A finds B's lost watch. B demands the return of the watch, but offers no evidence of his ownership beyond his bare assertion. A refuses to surrender the watch until he has had an opportunity to make inquiry as to whether B owns it. This is not a conversion."); Triple-A Baseball Club Associates v. Northeastern Baseball, Inc., 655 F.Supp. 513 (D.Me. Feb 20, 1987), rev'd on other grounds. 832 F.2d 214 (1st. 1987).

BUCKEYE'S PROPOSED INSTRUCTION NO. 22.

CHEP Counterclaim for Conversion –Privileged Refusal to Surrender
Where Claim Is Doubtful

A person who possesses goods who is in reasonable doubt as to the right of a claimant to its immediate possession does not liable for conversion by making a qualified refusal to surrender the chattel to the claimant for the purpose of affording a reasonable opportunity to inquire into such right. In this case, Buckeye contends that it had reasonable doubts as to CHEP's right of possession of pallets marked with its logo, and therefore brought this lawsuit for a determination of that issue. You are instructed that the filing of this lawsuit was a reasonable effort to inquire into CHEP's right of immediate possession of pallets held by Buckeye. If you find that Buckeye had reasonable doubts as to CHEP's right of possession of the pallets and promptly returned such pallets after a determination by the Court of CHEP's right of possession, then you must find that CHEP has failed to prove that Buckeye's refusal to surrender pallets from the time it formed a reasonable doubt as to CHEP's right of possession to when it return pallets to CHEP was not a conversion of those pallets.

Authority: Restatement (Second) of Torts § 240 (see, in particular, Comment c, Illustration 1: "A finds B's lost watch. B demands the return of the watch, but offers no evidence of his ownership beyond his bare assertion. A refuses to surrender the watch until he has had an opportunity to make inquiry as to whether B owns it. This is not a conversion."); Triple-A Baseball Club Associates v. Northeastern Baseball, Inc., 655 F.Supp. 513 (D.Me. Feb 20, 1987), rev'd on other grounds. 832 F.2d 214 (1st Cir. 1987).

BUCKEYE'S PROPOSED INSTRUCTION NO. 23.

CHEP Counterclaim for Conversion – Proximate Cause of Damages

If you find CHEP has proven by a preponderance of the evidence each element of its claim for conversion for some or all of the pallets returned to it by Buckeye in September 2003, you must determine whether CHEP has proven by a preponderance of the evidence whether Buckeye's conversion of such pallets was the proximate cause of any harm to CHEP. A party who seeks to recover damages for conversion must prove not only that the other party converted its property, but also that such conversion was a proximate or direct cause of injury damage. An injury or damage is proximately caused by an act or a failure to act whenever it appears from the evidence that the act or failure to act played a substantial part in bringing about or actually causing the injury or damage, and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

Authority: 3 Federal Jury Practice § 120.60 (modified); see also 1 O.J.I 11.10 (modified).

BUCKEYE'S PROPOSED INSTRUCTION NO. 24.

CHEP Counterclaim for Conversion – Measure of Damages

If you find that CHEP as show that Buckeye converted some or all of the pallets that were returned in September 2003, and that Buckeye's actions were the proximate cause of damage to CHEP with respect to some or all of those pallets, then you must determine if CHEP is entitled to an award of money damages with respect to such pallets. On a claim for conversion, if the goods have been returned, the measure of damages the difference in the value of the property at the time it was received and when it was returned to CHEP.

The burden is on CHEP to show the amount of compensation it should receive, if any, for any loss you find was proximately caused by Buckeye. You are not to speculate in regard to damages. The law deals in probabilities and not mere possibilities. In determining whether damage has occurred, you must find CHEP has proven the fact of damage by a preponderance of the evidence. In determining the amount of damages, you may consider only those things that you find, from the preponderance of the evidence, are reasonably certain.

“Reasonably certain” means probable, that is, more likely to occur than not.

Authority: Sopronyi v. Asztalos, 60 Ohio L. Abs. 137, 101 N.E.2d 161, 163 (Ct. App. 2d Dist. Montgomery County 1949); Restatement (Second) of Torts § 922(1), Comment (“When a chattel has been converted and ... the converter tenders its return and the return is accepted, the damages recoverable for the conversion are diminished to the extend of the value of the value of the chattel at the time of its recovery or return”); 1 OJI Civil 23.01(5)-(6) (modified); Allied Erecting and Dismantling Co. v. Youngstown, 151 Ohio App.3d 16, 32, 783 N.E.2d 523, 535 (7th Dist 2002); Burns Bros. Plumbing v. Groves Venture Co., 412 F.2d 202, 209 (6th Cir. 1969); Coverdell v. Mid-South Farm Equipment Ass'n, 335 F.2d 9, 14 (6th Cir. 1964).

BUCKEYE'S PROPOSED INSTRUCTION NO. 25.

CHEP Counterclaim for Conversion – Damages – Adverse Inference from Evidence Destroyed or Fabricated

If you should find that a party willfully destroyed evidence in order to prevent its being presented in this trial, you may consider such destruction in determining what inferences to draw from the evidence or facts in the case. In this case notes taken from the inspection of pallets returned by Buckeye were not preserved. CHEP was under a legal obligation to preserve all documents that pertained to these returned pallets insofar as they might relate to the condition of the pallets returned. Because CHEP failed to preserve these notes and allowed them to be destroyed, you are entitled to infer that these notes would contain information contrary to CHEP's assertions as to the condition of the pallets returned and would show that some or all of the repair or washing charges CHEP seeks to recover from Buckeye were unnecessary.

In addition, if you should find that a party willfully fabricated evidence in order to mislead the finder of fact as to any issue, you may consider such fabrication in determining what inferences to draw from the evidence or facts in the case. In the preparation of this case, CHEP produced to Buckeye an invoice it claimed was for the cost of repairing and washing pallets returned by Buckeye and sent by CHEP to Greenten Corp. in Greenville, Tennessee. CHEP's initial calculation of damages for repair and washing was based upon this invoice. After sworn testimony was taken of Derrick Smith, a CHEP employee, regarding this invoice, CHEP admitted that the invoice was a fabrication created by Greenten based on directions and calculations received from Mr. Smith, and was neither an invoice received in the ordinary course of business by CHEP nor an accurate statement of charges incurred for the repair or washing of these pallets. You are entitled to consider this fabricated invoice both as it bears on the credibility of CHEP's other proof and insofar as it shows that CHEP continues to rely upon inaccurate information in seeking to establish its damage claim, and are entitled to infer from the fabrication of this document that CHEP does not have accurate information as to the cost of washing or repairing the pallets returned by Buckeye in September 2003.

Authority: 3 Federal Jury Practice § 104.27 (modified).

BUCKEYE'S PROPOSED INSTRUCTION NO. 26.

CHEP Counterclaim for Conversion – Duty to Mitigate Damages

Any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to “mitigate” those damages – that is, to take advantage of any reasonable opportunity the person may have had under the circumstances to reduce or minimize the loss or damage.

If you should find Buckeye has proved that CHEP failed to seek out or take advantage of an opportunity to reduce or minimize the loss or damage that was reasonably available to plaintiff under all the circumstances shown by the evidence, then you should reduce the amount of CHEP's damages by the amount CHEP could have reasonably realized if CHEP had taken advantage of such opportunity.

Authority: 3 Federal Jury Practice § 129.50 (modified).

BUCKEYE'S PROPOSED INSTRUCTION NO. 27.

Instruction as to Damages Not Indication Damage Has Occurred or Is Recoverable

The fact that I have instructed you as to the proper measure of damages should not be considered as intimating any view of mine as to which party is entitled to your verdict in this case as to both parties' claim. Instructions as to the measure of damages are given for your guidance, in the event you should find in favor of the Buckeye from a preponderance of the evidence on its claim for unjust enrichment or for CHEP from a preponderance of the evidence on its claim for conversion in accordance with the other instructions.

Authority: 3 Federal Jury Practice § 106.02.

BUCKEYE'S PROPOSED INSTRUCTION NO. 28.

Closing Instructions

Any verdict you return must represent the considered judgment of each of you. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without disregard of individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges – judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Nothing said in these instructions and nothing in any form of verdict prepared for your convenience is meant to suggest or convey in any way or manner any suggestion or hint as to what verdict I think you should find. What the verdict shall be is your sole and exclusive duty and responsibility.

Authority: 3 Federal Jury Practice § 106.02 (modified) & § 106.07.

Proposed Interrogatories to Jury

Buckeye's Unjust Enrichment Claim

1. Do you find that Buckeye has proved by a preponderance of the evidence that Buckeye conferred a benefit upon CHEP by the sortation, separation and return of those pallets returned to CHEP?

Yes _____ No _____

If your answer is yes, proceed to interrogatory 2; if your answer is no, proceed to interrogatory 5.

2. Do you find that Buckeye has proved by a preponderance of the evidence that CHEP had knowledge of the benefit conferred upon it by Buckeye by the sortation, separation and return of those pallets returned to CHEP in September 2003?

Yes _____ No _____

If your answer is yes, proceed to interrogatory 3; if your answer is no, proceed to interrogatory 5.

3. Do you find that Buckeye has proved by a preponderance of the evidence that it would be unjust for CHEP to retain the benefit conferred on it by Buckeye without compensating Buckeye with regard to those pallets returned to CHEP in September 2003?

Yes _____ No _____

If your answer is yes, proceed to interrogatory 4; if your answer is no, proceed to interrogatory 5.

4. In what amount do you find that CHEP has profited by the sortation, separation and return of those pallets returned to CHEP in September 2003?

\$ _____

Proceed to interrogatory 5

5. Do you find that Buckeye has proved by a preponderance of the evidence that Buckeye conferred a benefit upon CHEP by the sortation, separation and return of the 4888 pallets returned to CHEP between October 2003 and July 2004?

Yes _____ No _____

If your answer is yes, proceed to interrogatory 6; if your answer is no, proceed to interrogatory 9.

6. Do you find that Buckeye has proved by a preponderance of the evidence that CHEP had knowledge of the benefit conferred upon it by Buckeye by the sortation, separation and return of the 4888 pallets returned to CHEP between October 2003 and July 2004?

Yes _____ No _____

If your answer is yes, proceed to interrogatory 7; if your answer is no, proceed to interrogatory 9.

7. Do you find that Buckeye has proved by a preponderance of the evidence that it would be unjust for CHEP to retain the benefit conferred on it by Buckeye without compensating Buckeye with regard to the 4888 pallets returned to CHEP between October 2003 and July 2004?

Yes _____ No _____

If your answer is yes, proceed to interrogatory 8; if your answer is no, proceed to interrogatory 9.

8. In what amount do you find that CHEP has profited by the sortation, separation and return of the 4888 pallets returned to CHEP between October 2003 and July 2004?

\$ _____

Proceed to interrogatory 9.

9. Do you find that Buckeye has proved by a preponderance of the evidence that Buckeye conferred or will confer a benefit upon CHEP by the sortation, separation and return of those pallets returned to CHEP since July 2004 and into the future?

Yes _____ No _____

If your answer is yes, proceed to interrogatory 10; if your answer is no, proceed to interrogatory 13.

10. Do you find that Buckeye has proved by a preponderance of the evidence that CHEP had knowledge of the benefit conferred upon it by Buckeye by the sortation, separation and return of those pallets returned to CHEP since July 2004 and into the future?

Yes _____ No _____

If your answer is yes, proceed to interrogatory 11; if your answer is no, proceed to interrogatory 13.

11. Do you find that Buckeye has proved by a preponderance of the evidence that it would be unjust for CHEP to retain the benefit conferred on it by Buckeye without

compensating Buckeye with regard to those pallets returned to CHEP since July 2004 and into the future?

Yes _____ No _____

If your answer is yes, proceed to interrogatory 12; if your answer is no, proceed to interrogatory 13.

12. In what amount per pallet do you find that CHEP has profited or will profit by the sortation, separation and return of those pallets returned to CHEP since July 2004 and into the future?

\$ _____ per pallet

Proceed to interrogatory 13

CHEP's Conversion Claim

13. Do you find that CHEP has proved by a preponderance of the evidence that it had a right to immediate possession of any of the pallets returned by Buckeye to CHEP in September 2003 prior to the date such pallets were returned to CHEP?

Yes _____ No _____

If your answer is yes, proceed to interrogatory 14. If your answer was no, your deliberations are complete.

14. Do you find that CHEP has proved by a preponderance of the evidence that Buckeye held without CHEP's consent any pallets to which you have found CHEP had a right to immediate possession?

Yes _____ No _____

If your answer is yes, proceed to interrogatory 15. If your answer was no, your deliberations are complete.

15. Do you find that CHEP has proved by a preponderance of the evidence that it demanded the return of any of the pallets you have found Buckeye held without CHEP's consent any pallets to which CHEP had a right to immediate possession?

Yes _____ No _____

If your answer is yes, proceed to interrogatory 16. If your answer was no, your deliberations are complete.

16. Do you find that CHEP has proved by a preponderance of the evidence that Buckeye refused to return of any of the pallets you have found CHEP demanded be returned, without being privileged to do so because of reasonable doubts as to ownership?

Yes _____ No _____

If your answer is yes, proceed to interrogatory 17. If your answer was no, your deliberations are complete.

17. How many pallets do you find CHEP has proven it has a right to immediately possess, did not authorize Buckeye to hold, and demanded be return, which Buckeye refused to return, without being privileged to do so because of reasonable doubts as to ownership?

Proceed to Interrogatory 18.

18. How many of the pallets listed in your answer to Interrogatory 19 were damaged as a proximate result of Buckeye's withholding them from CHEP?

Proceed to Interrogatory 19.

19. In what total amount do you find CHEP suffered damage by a reduction in the market value of or lost of income from the pallets listed in Interrogatory 19?

\$ _____

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of these Proposed Jury Instructions was served on October 8, 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