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.	:	

BUCKEYE DIAMOND LOGISTICS' TRIAL BRIEF

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TRIAL BRIEF

Pursuant to the Court's General Order, Buckeye Diamond Logistics ("Buckeye") submits this trial brief setting forth the anticipated proof and authorities supporting its claim of unjust enrichment against CHEP USA ("CHEP") and its defenses as to CHEP's claim of conversion.

I. Overview of the Claims

This case concerns CHEP USA's systematic attempt to shift the cost of recovering pallets marked with its logo to recyclers such as Buckeye Diamond Logistics ("Buckeye"). Buckeye is a pallet recycler – it receives excess pallets and other scrap wood from customers, sorts usable pallets, repairs broken pallets and returns such pallets

for further use in shipping goods between manufacturers, distribution centers and retail stores. Intermixed with the pallets coming into Buckeye are pallets painted blue and stenciled with CHEP's logo.

CHEP claims, and this Court has found, that CHEP retains ownership of these pallets no matter who CHEP lets them be shipped to and no matter what the burden to a recycler's business the uncontrolled shipment of these pallets causes. CHEP, however, is not entitled to be unjustly enriched by putting Buckeye in the position of serving as CHEP's unwilling collection agent for pallets CHEP has no ability to track and over which it has completely lost control.

The evidence in this case – much of it from CHEP's own witnesses and documents – will show (1) that CHEP has knowingly created and maintained a system by which it is justly enriched by shifting the cost of recovering stray and unrecoverable pallets to Buckeye, and (2) that CHEP benefits from Buckeye's compelled recovery efforts by more than $10 per pallet recovered.[1] The evidence will also show that injunctive relief is necessary to prevent CHEP from continuing to unjustly profit from Buckeye's unwillingly being required to collect, sort and separate CHEP's pallets from the truckloads of pallets it receives daily. The evidence will show that Buckeye returned 15,981 pallets to CHEP immediately after the Court ruled against Buckeye on its ownership claim in August 2003, and up through May 27, 2005 has returned another 14,070 pallets to CHEP.

[1] The precise amount of such benefit, which Buckeye believes is shown in PX 35 ("Benefit of Paying Recyclers for Recovering CHEP Pallets (Per Pallet)") as a calculation of how non-recovered pallets lower CHEP's net assets has been designated confidential by CHEP and therefore the precise amount of damages per pallet Buckeye seeks to recover cannot be discussed in this Brief.

CHEP claims that Buckeye converted the 15,981 pallets it returned to CHEP after the Court's ruling on the ownership issue by filing this lawsuit rather than yielding to CHEP's demand for the uncompensated return of those pallets. CHEP does not know when Buckeye received the pallets it returned after the summary judgment ruling or where Buckeye got those pallets from. Buckeye had no business reason to track the timing or source of the receipt of such pallets, and did not do so until after the Court ruled against its ownership claim. CHEP speculates that as of the time this lawsuit was filed, Buckeye possessed approximately 4,245 pallets containing CHEP's marking, although a CHEP employee who surreptitiously visited Buckeye a few months earlier estimated the number to be approximately 2000 pallets. See PX 93 and 94. The evidence will show that before the filing of this lawsuit, CHEP's representative did not dispute Buckeye's right to hold these pallets until CHEP and Buckeye's mutual customers gave instructions as to their disposition. Nor will CHEP be able to offer admissible evidence of any actual damage caused by Buckeye's holding CHEP pallets until the Court's summary judgment ruling or that CHEP would have been better off if Buckeye had never received those pallets. Accordingly, Buckeye believes that the evidence will fail to show either that Buckeye converted pallets marked with CHEP's logo or that CHEP suffered any harm from anything Buckeye did.

II. Buckeye's Unjust Enrichment Claim

A. Essential Elements

Buckeye's claim for unjust enrichment arises from CHEP's decision that it is profitable for CHEP to let the largest lessees of its pallets send those pallets to whomever

they chose, regardless of whether those to whom the pallets are sent have any agreement or willingness to send such pallets back to CHEP. See, e.g., Final Pretrial Order, § IVB "Uncontroverted Facts" ¶ 12. From the inception of this breach in CHEP's supposedly closed looped system of pallet leasing, CHEP's management realized recovery of the pallets set to the so-call "non-participating distributors" or NPDs, but it went ahead with the program. See, e.g., PX 25. As the program rolled out, CHEP recognized that a huge number of these pallets were no longer at the NPDs, who did not want them or to deal with CHEP, and many had been sent to recyclers such as Buckeye. Soon CHEP added an "up charge," in addition to its customary basic fees, for its customers to ship to NPDs – $8 for shipments to the so-call "hostile" NPDs who do not cooperate in returning pallets marked with CHEP's logo to it. Final Pretrial Order, § IVB "Uncontroverted Facts" ¶ 16. Up to after the time this lawsuit was filed, CHEP steadfastly refused to offer any compensation to Buckeye or other recyclers who received CHEP pallets, instead maintaining that these recyclers should simply cut their business ties with the NPDs who send them unwanted CHEP pallets. To date, Buckeye has never been offered any compensation for the return of pallets to CHEP other than CHEP's non-negotiable asset recovery fee, and has not been paid a dime for the more than 30,000 uncollectible pallets it has returned to CHEP.

As the Court has already determined, 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.

Decision and Entry dated September 8, 2004 (Docket # 110) at 5; Decision and Entry dated August 12, 2003 (Doc. #61) at 41-42. Buckeye believes the evidence at trial will clearly establish each of these elements.

1. The benefits conferred on CHEP

The requirement that CHEP have received a "benefit" by Buckeye's receipt and return of pallets to CHEP is satisfied by any form of advantage CHEP received from Buckeye's action. See Restatement (First) of the Law of Restitution § 1, Comment b. CHEP admits that Buckeye has conferred a benefit upon it since September 2003 when Buckeye notified CHEP of receipt of pallets marked with CHEP's blue logo received by Buckeye and allows CHEP to retrieve those pallets (Final Pretrial Order, § IVB "Uncontroverted Facts" ¶ 25), but denies that Buckeye conferred a benefit on it with respect to 15,981 pallets returned to CHEP in September 2003. Thus, with respect to those 14,080 pallets (as of May 27, 2005) Buckeye has returned since October 2003, the extent but not the fact of the benefit CHEP has received remains in dispute.

The evidence will show that Buckeye has conferred and continues to confer a benefit upon CHEP by Buckeye's unwilling participation in a distribution scheme created by CHEP in which, among other things:

- CHEP knowingly and profitably allows large numbers of pallets market with its logo to be shipped by its largest manufacturer customers to distributors who have no contractual obligation to return those pallets to CHEP;
- CHEP asserts continued ownership of those pallets even after they leave its supposed "closed-loop" system;

- Large percentages of the pallets sent to such non-participating distributors are not returned to CHEP by those companies and are sent to Buckeye instead;
- CHEP was required to create huge loss reserves for pallets sent and not returned by NPDs or that had otherwise leaked beyond CHEP's knowledge or control;
- Large numbers of other pallets are received by Buckeye from entities that CHEP has no record ever had pallets marked with CHEP's logo; and
- Non-recovery of pallets marked with its logo causes CHEP considerable expense both in the form of lost income due to high dwell times of pallets sent to NPDs and with respect to the outright loss of pallets that have leaked beyond CHEP's knowledge or control.

Buckeye's evidence will establish the benefits CHEP receives from the recovery of pallets sent to NPDs or that have otherwise leaked beyond CHEP's knowledge or control through CHEP's own business records and the testimony of their management employees. Further, Buckeye will show that if CHEP were required to (and lawfully could) have its own employees sort, separate and retrieve pallets brought into Buckeye, the expense to CHEP per pallet would be significant.

2. CHEP knew of the benefits created by Buckeye's retrieval, sortation and storage of pallets marked with CHEP's logo

CHEP has long known of the benefits conferred on it by Buckeye. CHEP knew that Buckeye received pallets marked with its logo, and regularly sent Buckeye form letters instructing that Buckeye segregate those pallets. Moreover, the evidence will show that CHEP knew that without recyclers such as Buckeye sorting and allowing

CHEP to retrieve pallets sent originally to NPDs or that have otherwise leaked beyond CHEP's knowledge or control, CHEP would have even higher levels of non-collections than its historically abysmal rates. Such proof includes:

- Wide-ranging concerns by CHEP management regarding the non-collection of pallets;
- Information CHEP management regularly received as to large percentages of the pallets sent to non-participating distributors and not returned to CHEP by those companies;
- Management discussions leading to loss reserves CHEP was required to create for pallets sent and not returned by NPDs or that otherwise leaked beyond CHEP's knowledge or control; and
- Management discussions regarding the need to gain cooperation from recyclers in order for CHEP to recover pallets sent to NPDs or that have otherwise leaked beyond CHEP's knowledge or control and calculations of the benefits CHEP receives when recyclers return pallets.

3. CHEP would unjustly be enriched if permitted to retain the benefit without compensating Buckeye

While CHEP has been paid an up charge of $8.00 for every pallet shipped to hostile NPDs while (until after this lawsuit was filed) never offering to pay Buckeye a dime for the return of pallets marked with its logo, CHEP denies that it is unjust to require Buckeye to bear the expense of CHEP's deliberate decision to do business in a manner that would cause its pallets to circulate out of control. Even today, CHEP refuses to negotiate compensation with Buckeye or other recyclers, and offers only a take-it-or-

leave-it program unconnected to the benefit CHEP derives from Buckeye's retrieval of its pallets.

These facts together, with CHEP's inability to recover pallets without Buckeye and other recyclers and its own calculations as to the benefits it receives from such returns, show that CHEP has intentionally maintained a system that seeks to allow it to shift the cost of allowing shipment to NPD to Buckeye in order to increase CHEP's own profitability. "Unjust" enrichment simply means that CHEP's enrichment by Buckeye's actions is unfair in the circumstances. 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). Here, CHEP unfairly uses the leverage of its claim to continued ownership of pallets marked with its logo to force Buckeye to assist its recovery efforts and thus reduce its recovery costs. But for the claim of ownership, Buckeye would have no reason to sort and separate these pallets. Like so many other pallets with stray markings, such pallets would simply be run through Buckeye's repair and reconditioning lines, and then be returned to general circulation.

B. Damages and Other Relief

1. Measure of Money Damages

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 costs Buckeye to take the actions that benefit 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. Decision and Entry of September 8, 2004 (Docket # 110) at 5-6; 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).

The evidence from CHEP's own files will show that CHEP benefits in numerous ways by Buckeye sorting, separating and allowing CHEP to retrieve pallets that CHEP allowed to be sent and did not recover from NPDs or that otherwise leaked beyond CHEP's knowledge or control: reductions in lost or destroyed pallets, significant reductions in the time pallets are out of CHEP's profitable use, reduced damage, wear and tear, and avoiding the cost of having a number of CHEP's own employees permanently stationed at Buckeye to sort and remove pallets as they come off of the loads of pallets Buckeye receives daily at three different unloading areas. Buckeye will offer the Court three alternative grounds for measuring these benefits to CHEP: (1) PX 35, which is CHEP's own measure of the benefit it receives when recyclers recover pallets for it; (2) CHEP's $8 surcharge to hostile NPDs, which the evidence will show was calculated based on the cost to CHEP of allowing shipment to those NPDs – costs which Buckeye's return of pallets eliminates; or (3) the terms of compensation other proprietary pallet owners have negotiated at arms length and without attempted coercion to pay Buckeye for comparable services.

2. Declaratory, Injunctive or Other Equitable Relief

In addition to money damages for the more that 30,000 pallets Buckeye has returned to CHEP to date, the evidence will show that Buckeye is entitled to both declaratory and injunctive relief in order prevent it from suffering on-going harm from CHEP's future actions. Specifically, the evidence will show that the Court should: (1) declare that CHEP is on an on-going basis obligated to compensate Buckeye in full for any benefits CHEP receives from Buckeye's return of pallets that CHEP allowed to be sent and did not recover from NPDs or that otherwise leaked beyond CHEP's knowledge or control; (2) enjoin CHEP from allowing its customers from shipping to any NPD that Buckeye chooses to identify as a source of CHEP pallets; and/or (3) order CHEP to provide Buckeye with quarterly accountings of the benefits it has received from Buckeye's return of pallets to CHEP containing sufficient information as to any changes to the benefit CHEP has received to allow recalculation of the appropriate level of compensation for the return of such pallets.

Declaratory judgment is appropriate when such a judgment will clarify and settle the legal relationships in question and will afford relief from future uncertainty and controversy. Aetna Cas. and Sur. Co. v. Sunshine Corp., 74 F.3d 685, 687 (6th Cir. 1996). If Buckeye prevails on its money damage claims against CHEP, and the Court has thus found CHEP has been unjustly enriched by its continuing business strategy of shifting costs to recyclers. Buckeye should also be awarded declaratory relief that CHEP is obligated to continue to compensate Buckeye in the future in the amounts by which profits from Buckeye's sorting, separating and allowing CHEP to retrieve pallets that CHEP allowed to be sent and did not recover from NPDs or that otherwise leaked beyond

CHEP's knowledge or control. It would be unfair to require Buckeye to engage in continuous litigation with CHEP to recover for the service CHEP forces Buckeye to unwillingly perform. Thus, the Court should include in its judgment a declaration of Buckeye's right to continuing compensation from CHEP for the full benefit CHEP receives from Buckeye's return of pallets that CHEP allowed to be sent and did not recover from NPDs or that otherwise leaked beyond CHEP's knowledge or control.

In addition or alternative to declaratory relief, the evidence will also show that Buckeye is entitled to injunctive relief against CHEP. In order to be entitled to permanent injunctive relief against CHEP, Buckeye must show that the failure of the court to issue such an injunction would cause it irreparable harm and that it has no other adequate remedy at law. United States v. Miami Univ., 294 F.3d 797, 817 (6th Cir. 2002). Here the irreparable harm CHEP causes Buckeye is two fold: First, CHEP irreparably harms Buckeye by allowing continuing shipments of pallets marked with its logo to NPDs who are customers of Buckeye by effectively putting Buckeye in a position where it has to perpetually profit CHEP by its actions. Second, Buckeye will be irreparably harmed if it cannot have regular access to CHEP's accounting records to determine whether the amount by which CHEP is profiting from Buckeye's actions has changed.

The Sixth Circuit in Warren v. City of Athens, No. 03-3580 (6th Cir. June 15, 2005) (File Name: 05a0261p.06), recently reaffirmed the availability of injunction relief where damage is on-going and future loss difficult to calculate:

> Even though it would seem that the Warrens could quantify their past lost profits due to the barricades and seek money damages in compensation, see Petereit v. S.B. Thomas, Inc., 63 F.3d 1169, 1186 (2d Cir. 1995), future lost profits are much harder to quantify. Moreover, if these lost

> profits were of such a magnitude that the viability of their business were threatened (thereby giving rise to an irreparable injury as described above), then the Warrens would indeed have no adequate remedy at law and a permanent injunction would be appropriate. See Auto. Elec. Serv. Corp. v. Assoc. of Auto. Aftermarket Distribs., 747 F. Supp. 1483, 1513-14 (E.D.N.Y. 1990); see also Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2d Cir. 1970) ("Of course, Semmes' past profits would afford a basis for calculating damages . . . . But the right to continue a business in which William Semmes had engaged for twenty years and into which his son had recently entered is not measurable entirely in monetary terms; the Semmes want to sell automobiles, not to live on the income from a damages award."); cf. Miami Univ., 294 F.3d at 819 (holding that an injury is not fully compensable by money damages if the plaintiff's loss would make damages difficult to calculate). Based on the record in this case, it was not an abuse of discretion for the district court to conclude that the Warrens could not obtain an adequate remedy at law for the potential loss of their business. We therefore affirm the district court's order of a permanent injunction.

Here the future profits that would have to be calculated are those of CHEP, making them doubly difficult to calculate.

Two forms of injunctive relief would limit this irreparable harm to Buckeye of continuing to be forced to serve as CHEP's unwilling collection agent for pallets that CHEP allowed to be sent and did not recover from NPDs or that otherwise leaked out of CHEP's "close looped system." First, CHEP should be enjoined from allowing its customers to continue to ship to any NPD it chooses to identify as its customer to CHEP.[2] Second, consistent with the historic remedy of an accounting in equity, CHEP should be required to provide Buckeye with regular (e.g., quarterly) reports with sufficient detail concerning the benefits CHEP receives from the return of such pallets to allow Buckeye to determine if an adjustment in compensation needs to be made.

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[2] The choice to identify such customers should lie with Buckeye. Otherwise, Buckeye would be forced to identify all of its common customers with CHEP, inviting CHEP (directly or through its manufacturer customers) to offer enticements to those NPD customers to leave Buckeye or to otherwise interfere with Buckeye's customer relationships. In some instances Buckeye may decide that the risk of losing a customer outweighs the benefit of being freed of the burden of returning pallets to CHEP. In other cases, Buckeye may decide that CHEP's lack of control over pallets is causing that customer to receive numerous blue pallets from other entities, making the injunction useless.

C. Evidentiary Issues

The Court has already addressed numerous evidentiary issues in its rulings on the parties' motions in limine. See Decision and Entry dated March 15, 2004 (Docket # 89); Decision and Entry dated September 8, 2004 (Docket # 111); Decision and Entry dated October 26, 2004 (Docket # 164) (memorializing rulings in October 13, 2004 telephone conference). At this time, Buckeye is unaware of any additional significant evidentiary issues relating to proof of its unjust enrichment claim.

III. CHEP's Counterclaim for Conversion

A. Essential Elements and Defenses

To prevail on its claim of conversion, CHEP must prove:

1. that CHEP was entitled to the immediate possession of the particular pallet held by Buckeye;

2. that Buckeye's continued possession of the pallet 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.

See 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).

The burden of proving the right to immediate possession at the time of alleged conversion is on CHEP. In granting CHEP summary judgment on its claim of ownership, the Court has found that CHEP had a right of immediate possession to pallets unless it had an agreement with another party, such as a distributor, by which the other party could seek return of the pallets ahead of CHEP. CHEP's own attorney has acknowledged that CHEP frequently cannot say with respect to particular pallets whether it has the right to possession of the pallets. See PX 101 ("CHEP always owns its pallets and does not sell or convey title to its pallets at any time. However, CHEP does not always claim the right to possession of its pallets, as its pallets are leased and pooled.") 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. See September 8, 2004 Decision and Entry (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).

CHEP must also prove that through its employees it did not consent to Buckeye's continued possession of some or all of the pallets. See Uhlenbrock v. Key Bank, 2001 WL 50465 *3 (Ohio App. 10th Dist. Franklin Cty. Jan. 13, 2001). Buckeye will present evidence that CHEP's employees consented to Buckeye holding pallets to return them, if needed, to mutual customers. If CHEP fails to show that it did not consent to Buckeye holding particular pallets for return to mutual customers, CHEP's claim that Buckeye converted those pallets fails.

Relatedly, CHEP must also prove that it demanded that Buckeye return its pallets. See September 8, 2004 Decision and Entry (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 evidence, however, will show that when Buckeye informed CHEP it was holding pallets for return to mutual customers, CHEP withdrew its demand for the return of such pallets.

If CHEP establishes the other elements of its claim for conversion with respect to some or all pallets returned by Buckeye to CHEP in September 2003, it finally must show Buckeye, without any privilege to do so, refused CHEP's demand to allow it to collect pallets from Buckeye. See September 8, 2004 Decision and Entry (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). Buckeye admits that prior to September 2003, it did not return pallets to CHEP. Buckeye asserts however that, in addition to CHEP consenting to Buckeye holding pallets for return to mutual customers, Buckeye was privileged to hold pallets that accumulated shortly before this lawsuit was filed, and after its filing because it had reasonable doubts as to CHEP's ownership interest in them, and brought this lawsuit to resolve those doubts. See 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."); Underwood v. Dillon, 936 P.2d 612, 614 (Colorado Ct. App. 1997) ("A bailee may refuse to surrender an item of personal property in order to investigate the bailor's rights to return of the property if the bailee distinctly communicates the reason for the qualified refusal to the bailor"); In re Allen Woods Steel

Co., 2 B.R. 161, 164 (Bankr. E.D. Pa. 1980) ("A qualified refusal where the claim is doubtful and where the bailee has not laid adverse claim to the property so as to exclude assertion of the owner's rights, will not give rise to damages"); Bradley v. Roe, 282 N.Y. 525, 531, 27 N.E.2d 35, (1940) ("Where a person is rightfully in possession of property, continued custody of the property and refusal to deliver on demand of the owner until the owner proves his right, constitutes no conversion"). Buckeye has not found any case in which a party that in good faith brought a legal action to determine the rights of ownership and possession for disputed goods has been found liable in conversion. Here, moreover, CHEP could have regained possession of the pallets in question by simply pursuing the replevin relief it plead in this case. It did not. Taken together, these facts show that Buckeye was privileged to wait to return pallets to CHEP until the Court ruled on the parties' respective rights, which is precisely what Buckeye did.

B. Damages on CHEP's Conversion Claim

Apart from CHEP's inability to prove the elements of its conversion counterclaim, trial will also show that CHEP's proof of supposed damages falls well short of the standards of such proof under Ohio laws. Buckeye previously raised a number of these defects in its Motion in Limine Regarding CHEP USA'S Evidence of Damages (Docket # 128), which the Court, in light of its determination to hear this case to the bench, indicated that it would consider in the course of Buckeye's defense of CHEP's case.

1. The Measure of Damages Recoverable for Conversion under Ohio Law

The normal measure of damages for conversion under Ohio law is the market value of the goods converted. See, e.g., Decision and Entry dated Sept. 8, 2004 (Dock. # 111) at 6-7. However, if the goods have been returned, the measure of damages is the difference in the value of the property at the time it was received and when it was returned to the plaintiff. See 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"). Under Ohio law, proof of damages must not be based upon speculation, but rather on admissible proof from which such damages can be reasonably calculated. See Cincinnati Power Fluid, Inc. v. Rexnord, Inc., 797 F.2d 1386, 1393 (6th Cir. 1986).

CHEP first disclosed its theory and claim for damages on February 4, 2004, and has subsequently revised its disclosure three times. Each of these damage disclosures seeks damages on four flawed theories: (1) for depreciation (based on a bookkeeping calculation) of pallets while they were supposedly located at Buckeye; (2) for purported "cost of capital" for other pallets purchased by CHEP during the period pallets were supposedly located at Buckeye; (3) for supposed costs of washing and repairing pallets returned by Buckeye in September 2003; and (4) for handling and transportation fees Buckeye was paid by mutual customers for returning pallets to CHEP's supposedly "closed looped system."

2. CHEP's Depreciation Damage Evidence Is Not Probative of Damages Recoverable under Ohio Law

a. Bookkeeping Calculations of Depreciation Are Not Measures of Recoverable Damages

CHEP concedes that its claim for depreciation is based upon an accounting treatment, rather than any actual decrease in the value of the pallets in the marketplace. CHEP's witnesses concede that its depreciation calculations are an accounting treatment, not a measure of decrease in market value. Likewise, Buckeye will present expert testimony confirming the well-established accounting principal that a bookkeeping calculation of depreciation is not a measure of decrease in market value or of actual physical deterioration of the pallets. Given that the measure of damages under Ohio law on CHEP's conversion claim is the difference in the market value of pallets between the time the pallets were received by Buckeye and the time they were returned to CHEP, a bookkeeping calculation of depreciation is irrelevant to proof of damages in this case.

In addition, the evidence will show that there is no causal connection with Buckeye's actions and the depreciation in question. CHEP's depreciation calculation would be the same regardless of whether the pallets in question were sitting at one of its depots, located at a customer or sitting on Buckeye's lot. Thus, CHEP's bookkeeping calculation of depreciation not only does not measure any decline in the market value of its pallets, it does not even measure a loss causally connected to Buckeye's alleged conversion of pallets.

b. The Depreciation Prong of CHEP's Damage Claim is Based on Speculation Rather than Admissible Evidence

In addition to the fundamental irrelevance of CHEP's depreciation calculation to actual damage in this case, in purporting to determine the period pallets marked with its logo were supposedly at Buckeye, CHEP relies on speculation rather than admissible evidence. Despite all of its protestations that it operates with a "closed loop system" so that it knows where its pallets are and when they got there, CHEP concedes that it has no idea when or from what source Buckeye received pallets. See Discovery Order dated September 10, 2004 (Docket # 112) at 6. Faced with no evidence on this crucial point of its damage claim, CHEP speculates that Buckeye must have received these pallets at the same rate as it has returned pallets to CHEP between September 2003 and July 2004, and thus has created a speculative "reverse calculation" of the time that Buckeye held the pallets returned to CHEP (as well as those returned to mutual customers). This calculation assumes that Buckeye received pallets returnable to CHEP at a constant rate and that that rate was the same rate before Buckeye began returning pallets to CHEP as it has since then. Moreover, this calculation is inconsistent with the reports and testimony of all the witnesses who actually saw pallets at Buckeye at different points. When CHEP's return rates increased in late 2004 and early 2005, CHEP suddenly decided it was tired of updating its calculations.

Indeed, the speculative and unreliable nature of CHEP's calculation is further demonstrated by that fact that CHEP also includes in the base number for this calculation pallets that were returned to mutual customers, even though such pallets would not be included in current counts of monthly returns of pallets. By including such pallets, CHEP inflates the base number into which it divides the number of pallets currently being

received, leading to an inflated calculation of the average length of time pallets were held by Buckeye. Such a manipulation demonstrates that even the baseline of CHEP's depreciation calculation is not based in reasonable probability, but in pure speculation.

Finally, the assumption throughout CHEP's damage calculation is that if the pallets Buckeye returned had not been sent to Buckeye, CHEP would have gotten them back immediately from the NPDs and other Buckeye customers who had no relationship with CHEP. The evidence will show, however, that the time pallets remained at typical NPDs (and those who sent their pallets on to Buckeye) was the same or longer than the time CHEP speculates those pallets were at Buckeye.

c. CHEP Is Not Entitled to Seek Depreciation Damages for Pallets Taken Out of Circulation

CHEP's depreciation calculation and damage claim include both block and stringer pallets. However, CHEP admits that stringer pallets were essentially taken out of circulation in 2001, and that substantial quantities of such pallets were physically scraped. CHEP itself estimates that 35% of the pallets returned by Buckeye were stringer pallets. CHEP simply cannot be entitled to claim depreciation damage on pallets it was taking out of circulation and scrapping independent of any action by Buckeye

d. CHEP's Depreciation Claim is Duplicative of the "Cost of Capital" and Repair Cost Prongs of Its Damage Claims

In addition to the defects already identified, the depreciation prong of CHEP's damage calculation is duplicative of both the "cost of capital" and "repair cost" prongs of CHEP's damage claim. CHEP's cost of capital claim seeks to recover CHEP's capital

costs for supposed replacement of pallets held by Buckeye. CHEP cannot seek both the cost of buying new pallets and the supposed decrease in value of old pallets.

Likewise, the depreciation prong of CHEP's damage calculation is duplicative of its claim for repair and washing costs for the pallets held by Buckeye. Pallets that are fully repaired and placed back into service, by definition, have had any decrease in market value restored. CHEP is not entitled to claim damages for both the supposed decrease in value measured by bookkeeping methods and by the costs of repair – such an approach, again, would give CHEP a duplicative recovery.

3. CHEP's Claim for Cost of Capital Damages Is Not Probative of Damages Recoverable under Ohio Law

CHEP also asserts that it is entitled to recover as damages on its conversion counterclaim the supposed cost of capital for pallets used to replace pallets held by Buckeye prior to their return. Evidence on this prong of CHEP's damage calculation should be excluded for at least four reasons: such damages are not recoverable under Ohio law, CHEP has not used its actual cost of capital in its calculations, CHEP's proof of such damages (like it is depreciation damage calculation) is based in speculation as to how long Buckeye held the pallets; and CHEP's calculations of such damages again include pallets CHEP undisputedly scraped rather than replaced.

a. <u>Cost of Capital Is Not a Measure of Recoverable Damages</u>

As noted above, the measure of damages for conversion in Ohio when goods are returned is the difference between the market value when they were taken and the market

value when they were returned. The "cost of capital" prong of CHEP damage calculation is irrelevant to this measure, and therefore should not be admitted into evidence.

Moreover, even if Ohio law allowed recovery of lost profits on a conversion claim – which it does not appear to – cost of capital is hardly a fair proxy for lost profits. Lost profits must be measured by the amount of revenue that would have been received less expenses necessary to gain such revenue. It requires proof that the pallets converted would actually be generating revenue, proof of the revenue that would be gained and consideration of the cost of gaining such income. Given that the financial statements CHEP has produced do not support this premise, it is hardly surprising that it seeks to improperly substitute cost of capital as a proxy for lost profits in this case.

Finally, the cost of capital prong of CHEP's damage calculation rests on the premise that CHEP actually had to acquire additional pallets to substitute for the one's held by Buckeye. CHEP's utilization disclosures, however, show to the contrary – during the entire period for which CHEP provided data, its utilization rate never rose high enough to justify purchasing new pallets to replace the ones at Buckeye. Thus, in addition to being unable to show that cost of capital is a legally relevant measure of damages, CHEP cannot even show that it needed to purchase additional pallets to replace the ones held by Buckeye – at its tightest point, CHEP had millions of pallets not in use that could serve its customers' needs.

b. CHEP's Cost of Capital Calculation Is Not Based on Actual Costs of Capital, but on an Arbitrary Accounting Measure by CHEP's General Partner

Further, even if cost of capital were a relevant measure of damages on a conversion claim, CHEP's calculation of this prong of damages is erroneously based not

what on it actually paid for capital, but on the accounting treatment its general partner, Brambles, chose to take with respect to its investment in CHEP, even if CHEP does not generate this return on investment. CHEP's cost of capital calculation has no basis in real costs to CHEP, but is based simply on what it aspires, but has failed, to return on the investment of its general partner. Further, CHEP's calculations are inconsistent with what its own financial statements say about how pallet acquisitions are financed at CHEP. As such, the cost of capital calculation CHEP offers is not a reasonable or reliable measure of damages.

c. The Cost of Capital Prong of CHEP's Damage Claim is Based on Speculation Rather than Admissible Evidence

Like the depreciation prong of it damage calculation, CHEP bases the time period for which it claims cost of capital damages on a speculative calculation that (1) assumes that current pallet return rates can be extrapolated into the past; (2) inflates its calculation by including in the base number pallets returned to mutual customers; and (3) takes no account of the average time such pallets remain at NPDs. Such speculation as to the time period that costs of capital can be calculated for is improper.

d. CHEP Is Not Entitled to Seek Cost of Capital Damages for Pallets Taken Out of Circulation

As was also shown above, even by CHEP's conservative estimate, 35% of the pallets Buckeye returned were stringer pallets that CHEP took out of circulation and did not replace. CHEP is not entitled to seek to recover the cost of capital for pallets that were never replaced.

4. CHEP Does Not Have Admissible Evidence of Cost of Repair and Washing Pallets Buckeye Returned

CHEP's calculation for the cost of repair and washing the pallets returned by Buckeye is just as defective as the depreciation and cost of capital prongs of its damage calculation. CHEP originally based this portion of its damage calculation on an invoice that it represented had been sent CHEP by Greenten Corp. However, CHEP now admits that its employees asked Greenten to create a false invoice (PX 68) not based on Greenten's actual work or charges, but upon numbers CHEP supplied based on speculation as to how many pallets had actually been repaired and how much was actually charged by Greenten for those repairs. In creating the invoice, Greenten relied on CHEP employees' guesses as to how many pallets needed to be repaired, rather than on any tracking of actual repairs and had used cost figures supplied by CHEP rather than its own cost figures. CHEP's employee also destroyed the only notes that existed regarding CHEP's inspection of the pallets returned by Buckeye – the documents upon which he based his estimate regarding the number of pallets that Greenten would need to repair.

On May, 13, 2004, shortly before a previous trial setting in this case, CHEP sought to distance itself from the fraudulent Greenten invoice by claiming to no longer rely upon it. Instead, CHEP created a summary exhibit (DX 28) that purports to show the costs of washing and repairing the pallets in question.[3] In it, CHEP continues to rely on its costs for repair of pallets, replaces the cost of component lumber with a new, unexplained number and continues to use its employee's estimates of how many pallets were repaired rather than actual repair numbers.

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[3] Based on CHEP's representations that its methodology had not changed in this new calculation of damages, the Magistrate Judge has denied Buckeye permission to take any depositions regarding CHEP's new exhibit.

DX 28 does not solve the fundamental defects in claim for repair and washing costs. First, by CHEP's own admissions, it is not based on actual costs. Second, the damage claim remains based on guesses that a CHEP employee made as to how many pallets would need to be repaired, rather than an actual count. CHEP had it within its powers to do a count at the time, but chose not to. Moreover, it failed to preserve even the documents that were generated in creating this estimate. CHEP by its own action has prevented accurate determination of the number of pallets returned by Buckeye that were repaired, and having done so, should not be allowed to rely on guesswork as to what its supposed damages were. Third, CHEP continues to claim damages for washing all pallets returned even though it made the determination to have them washed regardless of the need to do so under its own contamination policy. Further, CHEP seeks to recover for the washing, as well as for repair, of all of the stringer pallets that would be scrapped, as well as pallets that were scrapped because of their condition.

In short, CHEP's calculation of repair costs in DX 28 is no more accurate and reliable than the fraudulent invoice it originally offered the Court. CHEP, by its own actions, made a reliable determination of the cost of repair of the pallets recovered from Buckeye impossible to make, and it should not be permitted to mislead the jury by using DX 28, or arguments or testimony based thereon, to establish a claim for damages based upon repair or washing costs.

5. CHEP Cannot Prove Damages Caused by Buckeye's Return of Pallets to Mutual Customers

The final prong of CHEP's damage calculation seeks to recover from Buckeye fees that mutual customers paid Buckeye for returning pallets containing CHEP's logo

back to the customers when the customers had mistakenly sent such pallets to Buckeye. Despite all evidence to the contrary, CHEP's calculations refer to these returns as sales. As a matter of law CHEP cannot show any damage as the result of Buckeye returning such pallets to their mutual customers. CHEP's employees specifically suggest that customers follow this course. Buckeye is not engaging in conversion by sending pallets back to CHEP's bailee or lessee, and therefore no grounds exist for CHEP to claim Buckeye's transportation and handling fees for getting pallets back into CHEP's system as damages in this case.

C. Evidentiary Issues

As noted above, the Court has already addressed numerous evidentiary issues in its rulings on the parties' motions in limine. See Decision and Entry dated March 15, 2004 (Docket # 89); Decision and Entry dated September 8, 2004 (Docket # 111); Decision and Entry dated October 26, 2004 (Docket # 164) (memorializing rulings in October 13, 2004 telephone conference). Apart from a number of objections Buckeye has to the foundations of CHEP's proffered exhibits, two other evidentiary issues are likely to be raised at trial.

First, with respect to DX 27 and DX 28, which are summary exhibits that CHEP will presumably offer pursuant to Fed. R. Evid. 1006, CHEP has taken the position that any worksheets were prepared for litigation and are subject to the attorney-client privilege and the work product doctrine. See June 8, 2005 Letter from Kevin Murch to James Wilson (attached at Appendix A). In Buckeye's view, if CHEP wants to use these

exhibits, it can have no claim of privilege as to their creation. Having asserted a privilege as to their creation, CHEP should be precluded from using DX 27 and DX 28.

Relatedly, CHEP originally indicated that it intended to offer DX 31A and 31B as summary exhibits under DX 27 and DX 28. See June 6, 2005 Letter from Kevin Murch to James Wilson (attached at Appendix B). However, when Buckeye asked for the source information from which the exhibits were derived, CHEP changed positions, and indicated "[t]he pie charts in the exhibits are not really a summary so much as they are a demonstrative tool that will reflect Elton[Potts]' calculations." See June 16 E-mail from Kevin Murch to James Wilson (attached at Appendix B). Buckeye does not believe that Rule 1006 can be circumvented simply by claiming the exhibit is not a summary because it "demonstrates" a summary a witness testifies to, and will present that objection if CHEP seeks to offer DX 31A or DX 31B into evidence.

Finally, Buckeye will object to any attempt by CHEP to solicit expert opinions from Elton Potts. Mr. Potts has been identified as CHEP's chief damages witness. However, CHEP has steadfastly maintained that he is not being called as an expert witness. See, e.g., Tr. of October 13, 2004 Telephone Conference at 38 (by Mr. McDonald "We do not have a damage expert. Mr. Potts who is the senior vice president for asset management will elaborate on the specific issues that we have delineated, i.e., depreciation in value, cost of capital, cost of repair, matters that are within his personal knowledge.") Further, CHEP has made no expert disclosures under Fed. R. Civ. Pro. 26, and did not identify Mr. Potts as offering expert testimony in the Final Pretrial Order. According, Buckeye will object to any attempt of Mr. Potts (or any other CHEP witness) to testify regarding damages beyond his personal knowledge.

s/James A. Wilson

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Trial Brief was served on June 20, 2005, by electronic delivery upon:

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