

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CHEP USA, a New York partnership,)	
)	
Plaintiff,)	Civil Action File
)	No. 1: 02-CV-2053-BBM
vs.)	
)	
MOCK PALLET COMPANY,)	
a Georgia Corporation)	
)	
Defendant.)	

JUDGMENT

The above-captioned matter came on for a bench trial on July 26, 2006. Arguments of counsel were made, evidence was presented, trial briefs were filed and documentary evidence was introduced. After consideration of all of the above, as well as the pleadings, the first trial and rulings of this Court and the 11th Circuit, the Court hereby finds and concludes as follows:

I. FINDINGS OF FACT

1. CHEP’s pallet pool was originally designed so that the pallets never leave the control of CHEP or entities authorized by CHEP to use the pallets.
2. In 1998, CHEP, seeking to mollify its major customers who complained of having to keep inventories of white and blue pallets, permitted 110 manufacturers to ship CHEP-marked pallets to non-participating distributors or NPD’s.

3. The NPD's do not have a contractual obligation to return the CHEP pallets, and they do not tell CHEP to whom they sell the pallets.
4. CHEP knew that it would be difficult to recover pallets shipped to NPD's. Nonetheless, CHEP chose to let millions of pallets go to NPD's, not knowing when, if ever, they would be returned.
5. As the number of NPD's grew,¹ the number of pallets out of CHEP's control also grew, since CHEP cannot track the pallets when NPD's sell the pallets.
6. Despite being unable to locate millions of pallets, CHEP refuses to eliminate contracts that allow the shipments to NPD's.
7. In September, 2002, there were 9.9 million pallets out of CHEP's control. By April, 2004, when the jury trial occurred, CHEP reduced that amount by 31% to 6.9 million pallets. At that time, MPC had 29,686² CHEP pallets, or almost 75% of the subject pallets (Jury Trial, Vol. II, p. 48; p. 12).
8. CHEP has 3.8 million pallets out of its control, or a 55% reduction since April, 2004. Given these recovery rates, it is more likely than not that CHEP would not have recovered the pallets at MPC on its own.

¹ If CHEP eliminated the contracts to NPD's, there would be 6 or 7 million fewer pallets per year shipped to NPD's.

² There were about 295 pallets which looked like CHEP pallets, but were determined by CHEP not to be (Dep. Russell, p. 74).

9. Commencing in 2001, CHEP imposed a \$3.50 per pallet surcharge for shipments to cooperative NPD's and \$8.00 per pallet for its favored customers to ship to hostile NPD's. When CHEP retrieves a lost pallet, it does not return the surcharge to its participating manufacturer.
10. CHEP has a standard \$24.00 Lost Equipment Fee, which is levied upon participating distributors that lose pallets, and which CHEP does not return when it finds a lost pallet.
11. CHEP has already collected either a surcharge for those lost pallets at MPC that were shipped to NPD's, or a Lost Pallet Fee for each pallet lost by a participating distributor (Doc. No. 66, p. 14, Fn. 10).
12. When CHEP retrieved the 40,814 pallets from MPC,³ it did not refund the \$3.50, \$8.00 or \$24.00 penalties it had collected. It now rents the found pallets at an annual rate of \$13.82 per pallet for block pallets, and \$4.82 for the stringer pallets (34% of the pallets collected in June, 2004). CHEP has greatly benefited from the return of its lost pallets through the pallets

³ CHEP cannot track the movement of individual pallets (even those subject to a lawsuit), and therefore cannot provide information as to how much CHEP has already received for a particular pallet, or the total amount of revenue generated from each pallet after they were picked up at MPC.

generating over \$250,000.00 in annual revenue, which exceeds the amounts CHEP spent washing and repairing these found pallets.⁴

13. CHEP issues 220 million pallets per year, and CHEP sets aside monies equal to the Net Book Value of between 1 and 2% of all pallets it issues, because CHEP knows that it will not recover all of them.
14. MPC is a pallet recycler that acquires white wood pallets and recycles them for sale. MPC does not want CHEP pallets, but feels compelled to purchase them, rather than risk losing its customers. Since CHEP owns the pallets, MPC is buying pallets it cannot sell. Moreover, it does not want to be forced to transport pallets for its competitor for a loss.
15. Mr. Russell, an ex-CHEP employee now working for Peach State, an Atlanta recycler, states that Peach State acquires CHEP-marked pallets for \$1.10 per pallet, and “if I do not buy them, somebody else will, and then I do not get their [the street vendors’] white wood (Dep. Russell, p. 23).
16. Russell, while a supervisor in Asset Recovery for CHEP, visited MPC in 1998 and saw CHEP pallets outdoors. Cosby of CHEP visited MPC in 1999. CHEP did not offer money on either occasion to recover its pallets.

⁴ CHEP was in such a rush (after letting the pallets sit outdoors for four years during the pendency of the litigation) to rent these pallets that they paid \$0.89 per pallet to wash them instead of the customary \$0.25 (Dep. Pleasant, p. 45).

17. Russell returned to MPC in March, 2000. CHEP offered no money to acquire the pallets that MPC had purchased for an average price of \$1.25 (Dep. Russell, pp. 44-45; 49; Jury Trial, Vol. I, p. 55).
18. CHEP waited until September 14, 2001, which was one (1) year, five (5) months and (22) twenty-two days, to come back to check on their pallets that were being housed outdoors at MPC's yard in Covington.
19. Russell attributed "memory lapse," or that "I had bigger fish to try to get," and this was something that slipped through the cracks as to why CHEP waited over 17 months to return to MPC (Dep. Russell, pp. 50-51).
20. CHEP knew that leaving the pallets outside would cause their condition to deteriorate, if left outside long enough (Jury Trial, Vol. II, p. 155).
21. Despite the fact that MPC's average acquisition cost was \$1.25, in September, 2001, CHEP offered \$0.75 for MPC to use its own truck(s) to transport the pallets to McDonough, Georgia (a roundtrip of 61.4 miles).
22. In April, 2002, CHEP offered MPC \$1.50 per pallet for their return to McDonough, Georgia. MPC's costs, when having to load the pallets (CHEP charged \$0.37 per pallet) and transport them, are added in and are more than triple CHEP's best offer (Jury Trial, Vol. I, p. 55; 73-86). MPC offered to return the pallets for \$5.00 per pallet if CHEP picked them up.

23. It is CHEP's chosen business model which causes the lost pallets to end up in MPC's possession.
24. CHEP had the opportunity prior to filing suit to retrieve these pallets, but made a business decision not to.⁵
25. In July, 2002, CHEP filed suit, alleging that MPC had 5,000 pallets when, in fact, MPC had approximately 20,000 pallets (Doc. No. 1).
26. After filing suit, CHEP demanded that MPC return the pallets and pay to CHEP over \$1 million dollars or \$20.00 per pallet (the benefit to CHEP of recovering a lost pallet) (Doc. No. 53).
27. Despite having retrieved 40,814 pallets, CHEP has still not paid MPC. MPC has spent in excess of \$40,000.00 for these pallets. MPC has not earned any interest on the money it has expended (CHEP's weighted cost of capital is 9%), and it has stored the CHEP pallets rent-free.
28. The 11th Circuit ruled that MPC was justified in not returning the pallets to CHEP, as CHEP has been unjustly enriched, and CHEP has never made reasonable payment to MPC (Op. p. 6).

⁵ CHEP refused to pay \$5.00 per pallet, because "...if word gets out that CHEP is offering \$5.00 a pallet, then folks like the street vendors we talked about most likely will assume that they can get a higher price when they pick the pallets up..." (Jury Trial, Vol. II, p. 56). c.f. D-4 filed under seal.

29. In August 12, 2002, when CHEP was recovering less than 50% of its pallets in Georgia, MPC had 20,010 CHEP pallets (Jury Trial, Vol. II, pp. 5-12).
30. CHEP states that it currently collects 115%⁶ of the pallets it ships to NPD's. However, MPC still receives approximately 300 CHEP pallets per month, despite losing one of its three distribution center customers and having fewer street vendors sell them CHEP pallets.
31. MPC now pays an average of \$1.00 for a CHEP pallet.
32. MPC's handling charges at the time of the first trial was \$3.85. That did not include any profit or storage fees (Jury Trial, Vol. I, p. 86), and does not account for the increase in the price of fuel.
33. CHEP has never made reasonable payment or a reasonable offer for the return of the CHEP pallets possessed by MPC.
34. In April, 2004, CHEP's Motion to Release the Pallets was denied, because release of the pallets would cause MPC to lose its possessory lien, and "it is questionable whether any basis would remain for MPC to seek payment upon any bond posted by CHEP" (Doc. 98, pp. 1-2).

⁶ CHEP calculates this percentage by counting retrieval of current pallets shipped, plus a reduction in the millions of pallets that have been lost since 2002.

35. After judgment was entered in favor of MPC for \$584,000.00 on April 22, 2004 (Doc. 121), CHEP was permitted to retrieve the pallets, upon posting a \$600,000.00 bond. CHEP was not ordered to pay MPC, nor was MPC ordered to load, transport, repair or wash the pallets (Doc. 126).
36. MPC offered to load the pallets for \$0.35 a pallet and to wash them for \$0.50 a pallet, which represented a savings to CHEP, but CHEP refused the offer.
37. CHEP picked up 29,686 pallets in June, 2004; 9,526 pallets in December, 2005 through January, 2006; 613 pallets in March, 2006; 270 in April, 2006; 316 in May, 2006; and 403 in June, 2006 for a total of 40,814 pallets. They have paid nothing to MPC for their return.
38. In March, 2001, Roger Miller, the CFO of CHEP USA, asked Glen Kolb, a CHEP accountant, to analyze the benefits to CHEP of having recyclers return lost pallets. Kolb used CHEP's financial information in compiling this document, which was admitted into evidence as D-1, under seal.
39. Kolb testified in open Court that if CHEP could avoid losing a pallet 100% of the time, which it does when they know where its pallets are [at MPC], and can acquire them [for reasonable payment], it would gain \$7.75. He

calculated this by multiplying \$7.00 (the FiFa Net Book Value)⁷ times 100%, and then adding \$21.00 (the cost of a replacement pallet) times .07 (the financing rate) times 50% (CHEP's cost of capital) times 100%, which is the probability of their return when CHEP knows where they are, for a total gain of \$7.75 per pallet.

40. Kolb determined that the benefit to CHEP's balance sheet (what its investors and creditors looked to) would be \$14.00 if it could avoid a lost pallet 100% of the time. (See D-1 for further analysis).
41. Kolb did not prepare an analysis based on CHEP's current financial data, but indicated that since CHEP now has a \$20 million dollar annual budget to collect lost pallets, that would be a factor that he would need to consider.
42. Kolb testified that the benefit conferred upon CHEP would be the same, whether it recovered the lost pallets from a recycler or an NPD.
43. If a lost pallet is returned to CHEP by a recycler, in Fiscal Year 2005, CHEP gains \$3.02 per pallet by avoiding that cost of collection from its NPD (D-8); in Fiscal Year 2004, if a lost pallet is returned, the gain to CHEP was \$3.14 per pallet; in Fiscal Year 2003, the gain was \$2.03. From September 2003 to September 2005, it was \$3.04 per pallet. (See D-8).

⁷ CHEP purchases a replacement pallet for \$20.00 and not for \$7.00, the FiFa Net Book Value, which is the depreciated value of a six year old pallet.

44. In addition to the gain CHEP receives when it receives a lost pallet by avoiding the cost of collecting the pallets from an NPD, CHEP also avoids the need to replace that pallet. Although the cost of a replacement pallet has ranged between \$18.79 and \$21.00 since 2001, Potts calculates this additional benefit to CHEP by multiplying \$20.00, the value of a replacement pallet, times CHEP's weighted cost of capital of 9%, or \$1.80.
45. CHEP incurs annual depreciation costs of \$1.53 for a block pallet and \$2.00 to \$3.00 for stringer pallets.
46. When a recycler returns a pallet, CHEP benefits as follows⁸: (A) \$3.04 in avoiding the costs of collecting from an NPD; plus (B) \$1.80 in avoiding having to replace the pallet; and (C) \$1.53 in avoiding depreciation charges, for a benefit of \$6.37 per pallet (D-8; Doc. 215; pp. 19-20).
47. In addition, CHEP has recovered either a surcharge from its customers to permissively release the pallet to a NPD (\$3.50 or \$8.00), or a Lost Pallet Fee (\$24.00) for all the 40,814 pallets retrieved from MPC. Thus, at a minimum, it collected at least \$3.50 for each pallet it retrieved from MPC.

⁸ See D-4, plus the Kolb analysis, to buttress the 11th Circuit's holding that CHEP never made reasonable payment to MPC. The record before the 11th Circuit included CHEP's Asset Recovery Program. Based on that evidence, it concluded that not only did CHEP not make a reasonable offer, but that CHEP is unjustly enriched under its business scheme.

48. Thus, in addition to the \$6.37 benefit, calculated above, CHEP, the unjustly enriched party, has gained an additional \$3.50 per pallet for a total gain of \$9.87 per pallet for the return of the subject pallets.
49. In 2002, CHEP initiated its Asset Recovery Program in 2002, approximately one (1) year after Kolb authored D-1, and at a time when its collection recovery rate in Georgia was less than 50%.
50. Notwithstanding Kolb's opinions as to the benefit CHEP receives when a recycler returns a pallet, CHEP offered a paltry \$0.50 to pick up its pallets.
51. The current ARP pays \$1.25 for CHEP to pick up the pallets, provided that the recycler loads these pallets on to the truck. This is \$6.75 less than the surcharge CHEP exacts from its manufacturer to ship to a hostile distributor to defray the costs of retrieving a pallet it anticipates losing.
52. Potts testified that 1,900 recyclers determined that CHEP's ARP is fair and is a determination of the "true" value conferred upon CHEP.
53. D-4 was admitted to rebut this statement and to impeach Potts' credibility on this issue, as well as to show that CHEP's offers to MPC leading up to this lawsuit were made in bad faith.
54. CHEP's ARP offers MPC three choices: (A) Allow CHEP to pick up the pallets for \$1.25, despite having acquisition and handling costs triple that

amount; or (B) Transport its competitors' lost pallets at a loss, with the added risk of a highway mishap; or (C) Be sued.

55. None of the above choices (in No. 53) are desirable. They also run counter to principles of free enterprise.
56. CHEP calculates its damages on the 1,970 pallets which MPC sold, as follows: (A) It costs CHEP \$3.04 to collect a pallet from a NPD (D-8); (B) CHEP's weighted cost of capital for the replacement pallets it purchases is \$1.80; and (C) Its annual depreciation cost is \$1.53, for a total of \$6.37⁹ per pallet. This is analogous to the gain CHEP receives when it recovers lost pallets (Doc. 215, pp. 19-20).
57. In calculating these damages, CHEP does not take into consideration that some or all of the 1,970 pallets may have been found, and that they might have already been generating rent, surcharges and/or Lost Pallet Fees. Since CHEP does not anticipate that the Asset Recovery will find these pallets, it is reasonable to conclude that in measuring the benefit conferred upon CHEP by MPC, that CHEP would not have found the subject 40,814 pallets on its own.

⁹ CHEP is now spending \$20 million a year to recover 4.5 million pallets or over \$4.00 per pallet.

II. CONCLUSIONS OF LAW

1. The 11th Circuit ruled that CHEP has been unjustly enriched, since: (A) A benefit has been conferred on CHEP; (B) There is no legal contract between CHEP and MPC; and (C) CHEP attempts to force MPC, a stranger to the contractual relationship between CHEP and its customers, to bear CHEP's costs of locating its pallets for a price dictated by CHEP.
2. CHEP swells its coffers by collecting \$8.00 per pallet from manufacturers to defray the costs of retrieving pallets it releases to NPD's. It is CHEP's chosen method of doing business that causes these pallets to come into MPC's possession. However, unlike the white pallets it buys, MPC is prohibited from selling CHEP's pallets. Thus, equity requires CHEP to give to MPC the enrichment CHEP's inequitable business model has secured. Yoh v. Daniel, 230 Ga. App. 640, at 641(1) (497 S.E.2d 392) (1998).
3. Thus, liability in unjust enrichment has to do with wealth being in one person's hand when it should be in another person's. Restitution measures the remedy by CHEP's gain and seeks to force disgorgement of that gain in order to prevent CHEP's unjust enrichment. Restitution which seeks to prevent unjust enrichment differs in principle from damage, which measures the remedy by MPC's loss and seeks to provide a compensation for that

loss. Peter Birks, Unjust Enrichment and Wrongful Enrichment, 29 Texas L. Rev. 1767, at 1789 (2001).

4. The unjust enrichment doctrine provides “that a party should not be allowed to profit or enrich itself inequitably at another’s expense.” White v. Arthur Enterprises, 219 Ga. App. 124 (1) (464 S.E.2d 225) (1995); and that “the unjustly enriched party should pay for its gain.” Yoh, supra, at 641. Felker v. Chipley, 246 Ga. App. 296, at 297 (540 S.E.2d 285) (2000) (holding that Felker, who was unjustly enriched, had not only to return the principal, but also the 16.37 percent return). J.C. Penney Company, Inc. v. West, 140 Ga. App. 110, at 111-112 (2) (230 S.E.2d 66) (1976) (holding that it was unconscionable for West, even though he was not at fault, to hold on to money mistakenly sent to him).
5. CHEP chooses not to eliminate its contracts which permit shipments to NPD’s. Since CHEP never relinquishes ownership of the lost pallets, it restricts the free flow of commerce by restraining recyclers from selling them, while exacting expensive surcharges from its customers. While this business scheme is legal, it is unjust. 11th Cir. Op., pp. 12-13.
6. The benefit conferred upon CHEP in this case by MPC is \$9.87 a pallet, as calculated in Findings of Fact 43-48. CHEP is damaged as a result of the specific conversion of the 1,970 pallets sold by CHEP at \$6.37 (the benefit

to CHEP when it recovers lost pallets such as those sold by MPC), less the \$3.50 it has already recovered, or \$2.87 per pallet, as the law does not permit a double recovery. Phillips v. State Farm Mutual Automobile Insurance Co., 121 Ga. App. 342, at 345 (1) (173 S.E.2d 723) (1970).

7. CHEP cannot force MPC to join its Asset Recovery Program and do work it does not wish to do for a price dictated by CHEP, its competitor.
8. “The measure of damages under unjust enrichment...[is not based on] the cost to render the service or the cost of the goods” (Op. p. 13). Therefore, CHEP’s ARP, which is based on the cost to render the service, is not the correct method to calculate damages.
9. MPC has no duty to mitigate its damages, since unjust enrichment sounds neither in tort nor in contract, and the 11th Circuit has decided as a matter of law, based on a record that included that defense (as well as unclean hands), that CHEP has been unjustly enriched as a matter of law.
10. The 11th Circuit ruled that “...we think that refusal to turn the pallets over without reasonable payment would not be wrongful where the result would be unjust enrichment of the pallets’ owner” (Op., at 6). Thus, according to the 11th Circuit, CHEP’s last offer to MPC, made when ARP II was in effect, did not constitute a reasonable offer.

11. CHEP's unreasonable conduct is further evidenced by D-1 and D-4 (not considered to show liability which had been adjudicated in MPC's favor or value). Towerridge, Inc. v. T.A.O., Inc., 111 F.3d 758, at 770 (10th Cir. 1997); Westchester Specialty Insurance v. U.S. Fire Insurance Co., 119 F.3d 1505, at 15 (2-1513) (11th Cir., 1997).
12. CHEP had opportunity, before it demanded more than \$1 million dollars and the return of the pallets, to make reasonable payment and disgorge the surcharge and the Lost Pallet Fees it has already amassed. It chose to litigate rather than to retrieve its pallets that it knew were being stored outdoors. Thus, CHEP should bear the responsibility for not making "reasonable" payment in a timely fashion when it had the opportunity to do so. CHEP is not permitted to deduct the cost of any "incremental damage," or clean-up costs, from the benefit they receive from recovering its lost pallets.
13. CHEP assumed the risk of any incremental damages by virtue of the length of time these pallets were exposed to the outdoors, as it was CHEP who acted unreasonably during the course of the negotiations. Furthermore, CHEP acted negligently and assumed the risk of the pallets being housed

outdoors, as they had been aware since 1998 that the pallets outside were subject to weather conditions.

14. Neither equity nor law “will assist those who neglect to take care of themselves.” Phillips v. Hayes, 212 Ga. 148, at 149 (91 S.E.2d 19) (1956). Equity will not grant relief to one who, by the exercise of ordinary diligence, could have prevented what CHEP now claims is incremental damage. Prince v. Friedman, 202 Ga. 136, at 140(2) (142 S.E.2d 434) (1947). Moreover, “equity aids the vigilant, not the slothful.” Raines v. Clay, 161 Ga. 574, at 576-578 (131 S.E. 499) (1925).

III. JUDGMENT

Based upon the foregoing, it is hereby ORDERED, ADJUDGED and DECREED that:

1. MPC shall have judgment awarded in its favor and against CHEP for \$402,834.18, which represents \$9.87 a pallet times 40,814 pallets.
2. CHEP shall be entitled to offset this judgment by \$5,669.90, which represents \$2.87 a pallet times 1,970 pallets.
3. Thus, the total judgment awarded to MPC and against CHEP shall be \$397,164.28.

This ____ day of _____, 2006.

BEVERLY B. MARTIN
United States District Judge
Northern District of Georgia

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CHEP USA, a New York partnership,)	
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Plaintiff,)	Civil Action File
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MOCK PALLET COMPANY,)	
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Defendant.)	

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing JUDGMENT upon counsel by depositing a copy of same in the United States Mail in a properly addressed envelope with adequate postage thereon to:

KING & SPALDING
W. Randall Bassett
1180 Peachtree Street
Atlanta, Georgia 30309

This 14th day of July, 2006.

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