

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

CHEP USA, a New York)	
Partnership,)	
)	
Plaintiff,)	
)	Case No. 02-CV-2053-BBM
v.)	
)	
MOCK PALLET COMPANY,)	
a Georgia Corporation,)	
)	
Defendant.)	

**CHEP USA’S PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

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CHEP USA’S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

NOW COMES CHEP USA (“CHEP”) and files its proposed findings of fact and conclusions of law:

I. SUMMARY

Since the early 1990’s, MPC collected 40,814 CHEP pallets that are now back in CHEP’s possession. Under the equitable doctrine of unjust enrichment, MPC is entitled to restitution based on the extent to which CHEP was benefited by MPC’s efforts in collecting and sorting CHEP pallets. To determine the amount of restitution, a one-day trial was conducted on June 26, 2006.

Because unjust enrichment is an equitable remedy, several equitable principles guide this determination. First, MPC is not entitled to a windfall;

second, equity follows the law; and third, there should be a rough correlation or nexus between the benefit conferred on CHEP and the efforts and costs MPC undertook to confer that benefit. Mindful of these guideposts, CHEP proposes that the measure of the benefit to CHEP is most simply and appropriately determined by starting with the amount CHEP pays to recyclers who return CHEP pallets under the Asset Recovery Program (“ARP”), then subtracting from that amount the costs CHEP incurred in loading and transporting the pallets back to the CHEP depot, since MPC did not perform these services that are normally performed under the ARP. In addition, because the focus of the unjust enrichment analysis is the actual benefit that CHEP realized from MPC’s conduct, the extra costs CHEP incurred in returning the pallets to a usable condition must be subtracted from the amount of the benefit.

MPC has proposed various alternative measures for valuing the benefit to CHEP, but they are inferior and legally insufficient to the method proposed by CHEP. MPC’s proposed methods for measuring the benefit to CHEP either lack a sound legal foundation (*e.g.*, measures based on CHEP’s profits or revenues), are not sufficiently related to the services performed by MPC (*e.g.*, measures based on CHEP’s surcharges or lost pallet fees), or simply cannot be determined with

reasonable certainty (*e.g.*, measures based on Glen Kolb's analysis). Most of MPC's proposed measures suffer from more than one of these problems.

Under CHEP's analysis, the total amount of MPC's restitution on its claim for unjust enrichment is \$15,932.26. The damages for CHEP's conversion claim are not disputed and total \$7,093.

II. PROPOSED FINDINGS OF FACT

A. CHEP'S Business Model.

- 1) CHEP is in the business of leasing wooden pallets. Trial Tr. 31:2-4 (June 26, 2006); *Id.* at 34:23. The majority of pallets in the United States are common white wood pallets which come in varying shapes, sizes, and levels of quality. Trial Tr. 86:11-24 (April 20, 2004). They bear no trademarks, names, or other distinguishing marks or characteristics. Generally, these pallets are bought by manufacturers who place their product on the wooden platforms. Trial Tr. 91:5-11 (April 20, 2004). The manufacturers then sell their product, along with the white wood pallets, to distributors. The distributors re-use these pallets and typically sell the excess to pallet dealers and recyclers, who repair the pallets and resell them to manufacturers, distributors, or others in need of pallets.

- 2) CHEP has distinguished itself by developing a higher-quality, wooden pallet that it identifies by a distinctive blue color, marks and labels, so that CHEP pallets are not confused with common white wood pallets. Trial Tr. 90:10-15 (April 20, 2004).
- 3) CHEP also distinguished itself in the pallet industry by using a unique pallet pooling system. In this system, CHEP pallets are never sold but instead are leased; CHEP retains ownership of its pallets at all times. Trial Tr. 31:2-4 (June 26, 2006); Id. at 34:23; Trial Tr. 91:14-16 (April 20, 2004). Empty CHEP pallets flow from CHEP service centers to participating manufacturers, who ship commercial goods and products on the CHEP pallets to participating distributors. See Trial Tr. 92:1-93:10 (April 20, 2004) (describing the flow of a CHEP pallet; CHEP Demonstrative Ex. 1). CHEP maintains agreements with both the manufacturer and distributor to ensure control over the pallets at all times. After the pallets have been used, the participating distributors return the pallets to CHEP service centers, at the distributor's cost. Trial Tr. 31:3-18 (June 26, 2006).
- 4) CHEP prints "Property of CHEP" on the side of each pallet. Trial Tr. 90:10-15 (April 20, 2004). Further, CHEP maintains a toll-free telephone number for reporting the whereabouts of CHEP pallets and that toll-free number is

stenciled onto many of CHEP's pallets and is contained in its flyers distributed to manufacturers, distributors, retailers, and pallet recyclers.

Trial Tr. 90:10-15 (April 20, 2004).

- 5) If a participating customer cannot account for a pallet, the customer may be charged a "lost pallet" fee. Trial Tr. 38:15-39:12 (June 26, 2006); Trial Tr. 45:9-13 (April 20, 2004). The amount of this fee is negotiated between CHEP and each participating customer. Trial Tr. 45:14-18 (April 20, 2004).
- 6) In late 1998, CHEP made a business decision and allowed a small percentage of its customer manufacturers to ship CHEP pallets to distributors who did not have a contractual agreement with CHEP. Trial Tr. 32:13-18 (June 26, 2006); Trial Tr. 34:3-7 (June 26, 2006); Trial Tr. 96:16-20 (April 20, 2004). These distributors are referred to as Non-Participating Distributors ("NPDs"). Trial Tr. 32:22 (June 26, 2006). At its peak, only 5.6% of shipments by CHEP went to NPDs. Trial Tr. 33: 25, 34:1-9 (June 26, 2006).
- 7) When a CHEP customer desires to ship a CHEP pallet to an NPD, the customer must notify CHEP of its intent, identify the particular NPD, and provide specific information regarding the name and location of the NPD, the volume of CHEP pallets to be transferred and the date of such transfer.

Trial Tr., 97:23-25, 98:1-12 (April 20, 2004). CHEP then immediately notifies that NPD by certified mail, by phone and/or by personal visits that it will be receiving CHEP pallets, that CHEP owns the pallets, and that the pallets are not to be bought or sold. CHEP also provides the NPD with contact information and a toll-free number, so CHEP can arrange to retrieve its property. Trial Tr., 99:7-14 (April 20, 2004).

- 8) If a CHEP customer ships a pallet to an NPD, it does not pay a “lost pallet” fee. Trial Tr. 39:13-15 (June 26, 2006). Instead, customers pay surcharges to ship pallets to NPDs.
- 9) The surcharge defrays the costs of CHEP asset protection and recovery operations, the increased dwell time during which the pallet is not earning revenue, and the higher refurbishing costs that typically attend pallets shipped to NPDs. Trial Tr. 36:24-37:8, 37:25-38:9 (June 26, 2006).
- 10) The amount of the surcharge depends on whether the customer ships the pallets to a “semi-cooperative” NPD — an NPD that allows CHEP to retrieve its pallets — or “a non-cooperative” NPD — an NPD that does not allow CHEP to retrieve its pallets. Trial Tr. 35:10 (June 26, 2006).

- 11) Roughly half of CHEP pallets shipped to NPDs are shipped to semi-cooperative NPDs, while the other half are shipped to non-cooperative NPDs. Trial Tr. 36:1-7 (June 26, 2006).
- 12) In 2001, CHEP recognized that CHEP pallets shipped to NPDs were not being returned to CHEP in a timely manner. Trial Tr. 2-7 (June 26, 2006). Over the next year, CHEP adopted a three pronged strategy to address this issue. Trial Tr. 101:5-7 (April 20, 2004).
- 13) First, CHEP increased its surcharge for shipping a pallet to an NPD. Prior to 2001, CHEP charged manufacturers \$0.35 per pallet if a manufacturer shipped a pallet to a semi-cooperative NPD and \$1.35 per pallet if the manufacturer sent CHEP pallets to a non-cooperative NPD. Trial Tr. 35:10 (June 26, 2006). CHEP increased these surcharges to \$3.50 and \$8.00 per pallet. Trial Tr. 35:10-15 (June 26, 2006).
- 14) Second, CHEP arranged a sales team to work with NPDs. Trial Tr. 2-7 (June 26, 2006). This team explained to NPDs the benefits of CHEP's pallet pooling system and how easily they could allow CHEP to retrieve its pallets and/or participate in CHEP's system. Trial Tr. 102:8-20 (April 20, 2004).
- 15) Third, CHEP initiated the first version of the Asset Recovery Program, known as "ARP I." Trial Tr. 44:2 (June 26, 2006). This program was made

available to all pallet recyclers who did not already have a business arrangement with CHEP. Trial Tr. 40:8-12 (June 26, 2006). ARP I compensated recyclers \$0.50 per pallet if CHEP picked up the pallets at the recyclers facility, \$1.50 per pallet if the pallets were delivered to a CHEP facility, and a transportation surcharge, in the rare instance that a recycler or dealer had to travel more than 200 miles to return the pallets. Trial Tr. 45:2-7 (June 26, 2006; CHEP Demonstrative Ex. 2).

- 16) Before the adoption of ARP I, Mr. Glen Kolb, CHEP's Director of Financial Planning and Analysis, was asked by Roger Miller, CHEP's Chief Financial Officer, to evaluate the proposed \$1.50 fee to recyclers. Trial Tr. 168:25-169:11 (June 26, 2006); Trial Tr. 173:1-4 (June 26, 2006).
- 17) Mr. Kolb conducted this analysis and concluded that the \$1.50 fee would probably be worthwhile to pay to recyclers. Trial Tr. 169:15-17 (June 26, 2006). He also noted that while the cost CHEP paid recyclers would always be known, the value of the benefit to CHEP would never be known with certainty. Trial Tr. 190:1-5 (June 26, 2006); MPC Ex. 2 (filed under seal).
- 18) In reaching this conclusion, Kolb determined a possible range of benefits that CHEP could receive for recovering pallets from recyclers. This range was from \$0.80 to \$1.18 on the low end and \$2.40 to \$4.67 on the high end,

with a likelihood that the benefit would be closer to the high end range.

Trial Tr. 188:3-10, 174:15-20 (June 26, 2006); Defendant's Exhibit 2.

- 19) The range of potential benefits was based on different probabilities associated with avoiding a "lost" pallet and reducing the dwell time of pallets shipped to NPDs. Trial Tr. 188:11-25, 189:1-24 (June 26, 2006). For example, Kolb calculated that if CHEP could avoid a "lost" pallet 100% of the time then the benefit could be as high as \$7.75. Likewise, if CHEP knew it would most likely get the pallets back without assistance from a recycler then the benefit was zero. Trial Tr. 181:15-25, 182:1-15 (June 26, 2006); Defendant's Exhibits 1 and 2.
- 20) When creating this possible benefit range, Kolb analyzed different benefit scenarios and the probability that each would occur by adopting the ARP. See Trial Tr. 171:3-172:17 (referring to the manner in which he determined his analysis).
- 21) A number of the probabilities that Kolb relied upon in making his analysis are inapplicable today and cannot be applied to this case, due to the current existence and operation of the ARP, which did not exist at the time of the Kolb analysis. Trial Tr. 170:14-16 (June 26, 2006).

- 22) For example, Kolb calculated the probability that CHEP would avoid a “lost” pallet by paying recyclers to return CHEP pallets. This probability decreases when analyzed from the perspective of a single recycler operating in a world with other recyclers regularly collecting and returning CHEP pallets because of the incentives created by the ARP. Trial Tr. 170:17-22 (June 26, 2006). This alteration would lead to a reduction in the overall benefit value, or a downward shift in Kolb’s benefit range. Trial Tr. 170:21-22, 171:3-10 (June 26, 2006).
- 23) Kolb’s analysis also assumed that CHEP pallets would be returned directly to CHEP as a result of the compensation paid to a recycler. Trial Tr. 171:24-172:2 (June 26, 2006). Because MPC did not return CHEP pallets to CHEP, Kolb’s analysis is inapposite. Trial Tr. 171:24-172:10 (June 26, 2006). Kolb’s range of possible benefit values would again move downward to account for this new factor. Id.
- 24) In 2003, CHEP ended the ARP I, replacing it with “ARP II.” Trial Tr. 44:10-11 (June 26, 2006; CHEP Demonstrative Ex. 2). ARP II responded to feedback from recyclers that ARP I did not offer sufficient compensation and did not reflect the costs recyclers actually incurred processing CHEP pallets. Trial Tr. 44:2-46:21 (June 26, 2006). Under ARP II, a recycler is

paid \$1.25 per pallet to load CHEP's truck at the recycler's facility, \$2.25 per pallet if the recycler returns the pallet to a CHEP service center, and a transportation surcharge if they have to travel over 200 miles. Trial Tr. 46:25-47:6 (June 26, 2006); CHEP Demonstrative Ex. 2.

- 25) In July, 2005, CHEP added a fuel surcharge to ARP II. Trial Tr. 48:1 (June 26, 2006). This surcharge is paid to recyclers who return CHEP pallets to CHEP facilities. Trial Tr. 47:2-6 (June 26, 2006).
- 26) The amount of the fuel surcharge varies depending on the current cost for a gallon of diesel fuel in the United States, as determined by the Department of Energy Diesel Fuel Index. Id.; CHEP Demonstrative Ex. 3. Indeed, since inception of the surcharge, it has ranged from a few pennies to approximately 23 cents per pallet. Trial Tr. 48:4-6 (June 26, 2006); CHEP Demonstrative Ex. 3.
- 27) Over 1,900 recyclers have signed up to participate in the ARP, including several recyclers in the Atlanta area. Trial Tr. 48:11-17 (June 26, 2006). Over 95% of the recyclers participating in the ARP return pallets to CHEP for \$2.25 plus any existing fuel surcharge. Trial Tr. 50:4-8 (June 26, 2006)
- 28) This participation has led to a steady increase in the number of pallets CHEP retrieves from NPDs. Trial Tr. 41:25-42:3 (June 26, 2006). CHEP

determines its retrieval figures by utilizing a “flow through ratio.” Trial Tr. 40:24-41:8 (June 26, 2006). This ratio compares the number of pallets shipped to NPD’s with the number of pallets CHEP collects from NPDs. Id. In 2002, when CHEP began the ARP, the flow through ratio was approximately 56%. Trial Tr. 41:3-7, 19-21 (June 26, 2006). This figure has steadily risen since the adoption of the ARP. Trial Tr. 41:25-42:3 (June 26, 2006). In 2004, the flow through ratio was approximately 99%. Trial Tr. 42:4-6 (June 26, 2006). Currently, the ratio is 115% — indicating that for every 100 pallets shipped to NPDs, CHEP recovers 115 CHEP pallets. Some of these pallets are those that had previously not been recovered. Trial Tr. 41:21-24, 42:7-19 (June 26, 2006).

- 29) Near the time CHEP adopted the ARP, the number of CHEP pallets CHEP had not recovered from shipments to NPDs was approximately 9.96 million. Currently, that balance has been reduced to approximately 3.8 million. Trial Tr. 42:7-22, 115:9-11, 116:1-2 (June 26, 2006) In all, CHEP has recovered over 4.5 million CHEP pallets through the ARP. Trial Tr. 48:11-17 (June 26, 2006). Since adoption of the ARP, CHEP has recovered all pallets shipped to NPDs and has reduced the balance of CHEP pallets previously not recovered by 62%.

- 30) From June, 2000, to August, 2003, CHEP's average cost to recover a CHEP pallet from an NPD itself is \$1.91. Trial Tr. 91:1-3, 146:21-25 (June 26, 2006). From June, 2000 through September, 2005, the average cost for CHEP to recover a CHEP pallet from an NPD itself was \$2.16. Trial Tr. 96:3-4 (June 26, 2006). Part of the surcharge a manufacturer pays to ship a pallet to a NPD defrays this cost of collecting pallets from NPDs. Trial Tr. 36:24-25, 37:1-8 (June 26, 2006).
- 31) CHEP expects to retrieve the pallets shipped to NPDs, even if it takes longer for those pallets to be returned. CHEP does not consider the pallets shipped to NPDs to be lost. Trial Tr. 151:3-25, 152:1-21 (June 26, 2006).

B. MPC's Accumulation of CHEP Pallets.

- 32) MPC is a pallet recycler in Covington, Georgia that is owned and operated by Ricky and Nancy Mock. Trial Tr. 191:6-18 (June 26, 2006). MPC receives or purchases used pallets from manufacturers and distributors and either recycles those pallets or repairs or re-manufactures those pallets for sale. Trial Tr. 191:6-18 (June 26, 2006).
- 33) MPC is not authorized to either receive or use CHEP pallets. See Trial Tr. 133:1-9 (April 20, 2004) (describing CHEP's unsuccessful efforts to recover its pallets from MPC).

- 34) As of the date of the trial, MPC had collected and held over 40,814 CHEP pallets. See Trial Tr. 5:23-25 (June 26, 2006) (discussing stipulation between CHEP and MPC that MPC collected this number of pallets).
- 35) While the number is decreasing year by year, on average, MPC currently continues to collect approximately 300 CHEP pallets per month. Trial Tr. 197:2-3 (June 26, 2006).
- 36) MPC received and continues to receive these CHEP pallets from two primary sources: (1) pallet vendors who bring pallets to MPC's place of business and (2) "drop-trailers" that MPC drops off with its customers, that are filled with pallets by customers and retrieved by MPC once the trailers are full. Trial Tr. 195:17-22 (June 26, 2006).
- 37) MPC is sometimes required to pay its customers for CHEP pallets. These "acquisition costs" are approximately \$1.00 per pallet. Trial Tr. 196:3-11 (June 26, 2006). Because MPC did not maintain records of the CHEP pallets it received prior to the commencement of litigation, it is unknown whether and how much MPC paid to acquire each CHEP pallet obtained before August, 2002. Trial Tr. 5:6-19 (April 20, 2004).
- 38) MPC converted 1,970 CHEP pallets by purportedly selling them to two customers for \$4 per pallet. Trial Tr. 90:11-22 (June 26, 2006).

C. Negotiations Between CHEP and MPC.

- 39) Beginning in the fall of 1998, several negotiations took place between MPC and CHEP for the retrieval of CHEP's pallets from MPC's facility. Trial Tr. 52:5 (June 26, 2006). CHEP originally offered to retrieve its pallets from MPC's property. Trial Tr. 52:5-7 (June 26, 2004). MPC refused the offer and requested that CHEP pay MPC \$5.00 per pallet. Trial Tr. 52:13-14. CHEP then offered MPC \$0.75 per pallet, which represented the payment CHEP made to recyclers under its transportation program — the precursor to the ARP. Trial Tr. 52:7-8 (June 26, 2004). MPC again refused and reiterated its demand of \$5.00 per pallet. Trial Tr. 52:12-13 (June 26, 2004). At that point, CHEP offered MPC the ARP I recovery rate (\$0.50 for a pallet CHEP retrieved and \$1.50 for a pallet brought to a CHEP facility). Trial Tr. 52:9-10 (June 26, 2004). MPC rejected CHEP's offer and again demanded \$5.00 per pallet. Trial Tr. 52:12-13 (June 26, 2004).
- 40) After MPC refused ARP I, CHEP brought a lawsuit against MPC for conversion of its pallets. Trial Tr. 52:10-13 (June 26, 2006). After the lawsuit was filed, CHEP adopted ARP II. Due to the existing litigation, it did not offer ARP II to MPC. Trial Tr. 52:22-24 (June 26, 2006). See Order on Motion for Reconsideration (Docket 66), p. 6, n. 3 (Dec. 8, 2003). MPC

never decreased its \$5.00 per pallet demand, and at one point increased its demand to \$6.50 per pallet. Trial Tr. 52:13-19 (June 26, 2006).

D. CHEP's Collection of Pallets From MPC.

- 41) In April of 2004, this Court entered an order granting CHEP the right to collect 29,686 CHEP pallets from MPC, as long as CHEP posted a \$600,000 bond. See Trial Tr. 53:19-23 (June 26, 2006).; Order (Docket 130) (May 24, 2004). In June of 2004, CHEP posted the required bond and collected these pallets from MPC's facility. CHEP Demonstrative Ex. 4; see also Trial Tr. 59:4-8 (June 26, 2006).
- 42) More CHEP pallets, however, remained at MPC's facility. Trial Tr. 59:8-18 (June 26, 2006). As MPC continually collected more CHEP pallets, this number increased over time.
- 43) Initially, MPC refused to allow CHEP to recover these pallets, but after discussions with a mediator and posting a second bond, CHEP was allowed periodically to recover its pallets. See Stipulation and Consent Order (Docket 202) (Jan. 23, 2006). CHEP did so in the following manner:

- In December 2005 and January 2006, CHEP collected 9,526 pallets. CHEP Demonstrative Ex. 4; Trial Tr. 61:11-15 (June 26, 2006).
- In March 2006, CHEP collected 613 pallets. CHEP Demonstrative Ex. 4.
- In April 2006, CHEP collected 270 pallets. Id.
- In May 2006, CHEP collected 316 pallets. Id.
- In June of 2006, CHEP collected 403 pallets. Id.

44) When CHEP retrieved its pallets, MPC imposed a number of rules on CHEP. For example:

- CHEP could only retrieve the pallets between the hours of 7:30 a.m. and 4 p.m.. Trial Tr. 54:8-10 (June 26, 2006).
- CHEP was required to bring in a portable restroom, as no other facility was made available to it. Trial Tr. 54:10-11 (June 26, 2006).
- CHEP was not allowed to bring more than two trailers and two forklifts on the site at one time. Trial Tr. 54:11-13 (June 26, 2006)

- CHEP was forced to use a loading dock that was approximately 450 feet away from the pallets, even though MPC had a loading dock closer to the pallets. Trial Tr. 54:13-15 (June 26, 2006).

45) In addition, CHEP, not MPC, loaded the pallets onto trucks to transport the pallets to CHEP's service center. Trial Tr. 54:17-19 (June 26, 2006). These costs included, among other things, renting forklifts, hiring a forklift operator for the first recovery, and paying for fuel and repairs on a forklift. Trial Tr. 58:7-12 (June 26, 2006). CHEP incurred the following costs loading its pallets:

- For the June 2004 retrieval, CHEP's loading costs totaled \$17,278.63. See Trial Tr. 62:22, 24, 63:22-25, 64:1-14 (June 26, 2006); CHEP Exs. 37A, 39A(1); CHEP Demonstrative Ex. 5.
- For the December/January 2006 CHEP's loading costs totaled \$8050.24. See Trial Tr. 62:25, 63:1-4 (June 26, 2006); CHEP Exs. 37B(1), 39B(1), CHEP Demonstrative Ex. 5.
- For the March 2006 retrieval, CHEP's loading costs totaled \$316.40. Trial Tr. 63:5-10 (June 26, 2006); CHEP Ex. 37B(2); CHEP Demonstrative Ex. 5.

- For the April 2006 retrieval, CHEP's loading costs totaled \$291.04. Trial Tr. 63:11-18 (June 26, 2006); CHEP Ex. 37B(3); CHEP Demonstrative Ex. 5.
- For the May 2006 retrieval, CHEP's loading costs totaled \$291.04. Trial Tr. 63:11-18 (June 26, 2006); CHEP Ex. 37B(4); CHEP Demonstrative Ex. 5.
- For the June 2006 retrieval, CHEP's loading costs totaled \$299.50. Trial Tr. 63:11-18 (June 26, 2006); CHEP Ex. 37B(5); CHEP Demonstrative Ex. 5.

These figures are uncontested.

- 46) For the June 2004 and December 2005/January 2006 load, CHEP also incurred a cost to transport the pallets to CHEP's service center. This cost totaled \$12,967.24 for the June 2004 load and \$6,597.80 for the December 2005/January 2006 load. Trial Tr. 65:9-25, 66:1-10 (June 26, 2006); CHEP Exs. 41A and 41B; CHEP Demonstrative Ex. 6.
- 47) Finally, CHEP incurred incremental costs — over and above what it would normally expect to incur for a comparable sized load of pallets — to refurbish the pallets it collected in June of 2004. See Trial Tr. 66:23-25,

67:1-25, 68:1-20 (June 26, 2006) (describing the damage to the recovered pallets); CHEP Ex. 32. These incremental costs included the price that CHEP paid to: 1) wash and sort the pallets; 2) repair the pallets; 3) scrap pallets; 4) cover overtime labor expenses and travel expenses. See Trial Tr. 69:24-25, 70:1-18, 71:2-73:12; CHEP Exs. 34A, 34B, 38A(1), 38A(2), 39A(2); CHEP Demonstrative Ex. 7.

48) These costs were necessary due to the poor condition of the pallets. The pallets were dirtier than other pallets, requiring a special system to wash the pallets at a higher than normal cost and requiring more pallets to be repaired. See Deposition of James Pleasant, 69:7-25, 79: 15-25 (Dec. 29, 2005). The pallets were scrapped based on pre-existing criteria and specifications determined by CHEP. Pleasant Depo. at 51:25, 52:1-12. This incremental cost totaled \$41,418.83. CHEP Demonstrative Exs. 7 and 11.

III. ANALYSIS OF THE PROPOSED REMEDIES FOR CHEP'S CONVERSION CLAIM AND MPC'S CLAIM FOR UNJUST ENRICHMENT.

A. CHEP's Damages for Conversion of 1,970 CHEP Pallets Totals \$7,092.

The parties have stipulated that MPC converted 1970 CHEP pallets, selling them to two customers for \$4 per pallet. CHEP seeks damages under O.C.G.A. §

44-12-151(2). Because each CHEP pallet converted by MPC was painted CHEP blue and imprinted with CHEP's logo, CHEP believes it will recover the vast majority of these pallets through its normal pallet recovery operations. Therefore, rather than seeking the cost to completely replace these pallets, CHEP seeks damages equal to (1) the cost it expects to incur in recovering each pallet and (2) the cost it will incur to replace each pallet for one year. The one year replacement period represents the average amount of time CHEP has determined it will take to recover its pallets. CHEP presented evidence supporting the following calculation:

Number of pallets converted by MPC	1,970
Average cost to recover a CHEP pallet from an NPD	\$1.91 per pallet
Average cost of capital to replace a CHEP pallet for one year (\$18.79 at 9.0%)	\$1.69 per pallet
Total damages per pallet	\$3.60 per pallet
Total Conversion Damages	\$7,092.00

MPC does not contest CHEP's evidence of damages and, in fact, presented evidence that the conversion damages could be greater because CHEP's cost to recover pallets from NPDs has increased in recent years. However, CHEP is claiming \$1.91 per pallet as the average cost to recover pallets from NPDs during

the period of time when MPC converted the pallets.¹ MPC presented no evidence contesting the \$1.69 per pallet cost to replace the CHEP pallets for one year. Accordingly, CHEP's evidence meets the requirements of O.C.G.A. § 44-12-151(2), and MPC should be directed to pay CHEP damages totaling \$7,092.00 for the conversion of 1,970 CHEP pallets.

B. The Appropriate Measure of Damages for Unjust Enrichment Is the Cost CHEP Avoided by the Services MPC Provided.

The parties have presented alternative and competing arguments on the appropriate measure of the benefit conferred on CHEP for purposes of calculating the amount of restitution MPC should recover under its claim for unjust enrichment. In considering the merits of each argument, it is appropriate to review the principles involved in this claim.

Unjust enrichment is an equitable remedy premised upon the principle that a party cannot induce, accept, or encourage another party to furnish or render a service of value and avoid paying for the value of the service rendered. See, e.g., Engram v. Engram, 265 Ga. 804, 807, 463 S.E.2d 12, 15 (1995). See also

¹ MPC suggests that allowing CHEP to recover the cost associated with recovering its pallets from NPDs would result in a double recovery because CHEP has already received this money as part of the surcharge paid by customers to ship CHEP pallets to NPDs. However, CHEP did not collect this surcharge when MPC sold the pallets to its customers. So, CHEP will have to spend this amount again recovering the pallets from others. There has been no double recovery.

Hollifield v. Monte Vista Biblical Gardens, Inc., 251 Ga. App. 124, 130, 553 S.E.2d 662, 669 (2001) (“The theory of unjust enrichment is basically an equitable doctrine that the benefited party equitably sought to either return or compensate for the conferred benefits when there is no legal contract to pay.” (citations omitted)).

The remedy for unjust enrichment is restitution, which aims to return to the plaintiff the benefit it conferred on the defendant. In this way, the value of the benefit is measured from the perspective of the party who received it, rather than the party who provided it. See Hollifield, 251 Ga. App. at 130-131, 553 S.E.2d at 669 (citing Zampatti v. Tradebank Int’l. Franchising Co., 235 Ga. App. 333, 340, 508 S.E.2d 750, 757 (1998)). This is because restitution is equitable in nature and is not intended to be punitive. Therefore, restitution should not exceed the value of the benefit actually realized. See Watson v. Sierra Contracting Corp., 226 Ga. App. 21, 28, 485 S.E.2d 563, 570 (1997) (“Value of services ... must be determined from the perspective of the recipient to determine to what extent the party was benefited or enriched...; otherwise, ineffective, defective, or worthless services could create liability for the recipient.”). See also Zampatti at 340, 508 S.E.2d at 757 (noting in the context of a quantum meruit claim that “[a] party could render substantial services or transfer goods to another that were of little benefit to the defendant, therefore, benefit is measured from the standpoint of the person

upon whom such benefits were conferred.”); Restatement (First) of Restitution, § 1 Unjust Enrichment, cmt. d (1934) (“Ordinarily the benefit to one and the loss to the other are coextensive, ...”).²

In Georgia, it is well settled that measuring damages must not be left to speculation, conjecture and guesswork. Schill v. A.G. Spanos Development, Inc., 217 Ga. App. 260, 262, 457 S.E.2d 204, 205 (1995) (internal citations omitted); Greene v. Johnson, 170 Ga. App. 760, 761-62, 318 S.E.2d 205, 206-7 (1984) (“The

² MPC’s suggestion that “disgorgement” of money or profits is appropriate is based on a handful of cases that are inapposite to the facts here. Several involve a cause of action for “money had and received,” not unjust enrichment. See generally J.C. Penney Co., Inc. v. West, 140 Ga. App. 110, 111, 230 S.E.2d 66, 67-68 (Ga. Ct. App. 1976); Dep’t of Public Health v. Perry, 123 Ga. 816, 182 S.E.2d 493 (Ga. Ct. App. 1971)). “An action for money had and received lies in all cases where another party has received money which the plaintiff... is entitled to recover and which the defendant is not entitled to retain.” J.C. Penney Co., 140 Ga. App. at 111, 230 S.E.2d at 68 (internal citations omitted). The monies MPC seeks to disgorge -- surcharges and lost pallet fees -- are not appropriate recoveries for restitution.

The remaining unjust enrichment cases cited by MPCs hold merely that the measure of damages for unjust enrichment can include the value of improvements made to real property . See Smith v. Huckeba, 232 Ga. App. 374, 501 S.E.2d 877 (Ga. Ct. App. 1998); Yoh v. Daniel, 230 Ga. App. 640, 641, 497 S.E.2d 392, 393 (Ga. Ct. App. 1998); Evans v. Evans, 237 Ga. 549, 550, 228 S.E.2d 857, 858 (Ga. 1976)). These cases also do not adequately address the proper measure of restitution in this case. After all, MPC did not improve CHEP’s property. To the contrary, there was ample evidence that CHEP’s property was actually damaged by MPC’s collection and storage process. See Trial Tr. 67:8-17 (June 26, 2006) (describing the damage to the recovered pallets).

jury must be able to calculate the amount of loss from the data furnished, and will not be placed in a position where an allowance of the loss is based on guesswork.”) (internal citations omitted). In fact, the party suing for damages has the burden of showing the amount of loss with “reasonable certainty.” Schill at 262, 457 S.E.2d at 205. This rule applies to equitable claims seeking restitution, including unjust enrichment. See Cochran v. Ogletree, 244 Ga. App. 537, 536 S.E.2d 194 (2000) (“Where an award of money damages is made for unjust enrichment [or quantum meruit], it must be supported by evidence from which it can be determined to a reasonable certainty that the [plaintiff] in fact realized such [gains].” (quoting White v. Arthur Enterprises, 219 Ga. App. 124, 464 S.E.2d 225 (2000))).

Accordingly, in determining the most appropriate measure of the benefit conferred upon CHEP, the Court must consider whether the evidence allows the valuation to be made with reasonable certainty.

In addition, Georgia has codified certain equitable principles. See generally O.C.G.A. § 23-1-1, *et. seq* (2006). Of particular relevance here is the first maxim of equity that “equity follows the law.” Codified at section 23-1-6, this maxim states that “[e]quity is ancillary, not antagonistic, to the law; hence, equity follows the law where the rule of law is applicable and follows the analogy of the law where no rule is directly applicable.” O.C.G.A. § 23-1-6 (2006). This maxim

means that MPC is not entitled to a windfall. Rather, the measure of restitution should roughly correlate to damages allowed under the analogous legal claim and there should be some nexus between MPC's effort in conferring a benefit on CHEP and the restitution awarded to it. See Dolinger v. Driver, 269 Ga. 141, 143, 498 S.E.2d 252, 254 (1998) (stating "Where rights are defined and established by existing legal principles, they may not be changed or unsettled in equity. Although equity does seek to do complete justice, it must do so within the parameters of the law"), quoted in, Mitchell v. Mitchell, 274 Ga. 633, 635, 555 S.E.2d 436, 438 (2001) (Carley, J.J., concurring in part and dissenting in part).

In applying these principles, the Court must decide how to measure the value of the benefit conferred on CHEP by MPC's actions in collecting and sorting CHEP pallets. CHEP did not realize any benefit when MPC held CHEP pallets, and the evidence shows that, in some instances, holding the CHEP pallets was detrimental to CHEP. Accordingly, only the collection and sorting of CHEP pallets should be considered in evaluating the benefit to CHEP.

There are five commonly recognized measurements and the selection of the appropriate measurement depends on the facts of each case: (1) the value of increased assets, (2) the market value of services or intangibles provided, (3) the use value of any benefits received, (4) the gains realized upon the sale or transfer

of the asset provided, and (5) profits earned from the asset received. See Dan B. Dobbs, Dobbs Law of Remedies § 4.5(1), at 628-29 (2d ed. 1993). As explained below, the most appropriate measure in this case is the market value of the services provided. This measure conforms to the principles of unjust enrichment, the principles of equity, and best represents the value of the benefit CHEP received from MPC's actions in collecting and sorting CHEP pallets.

1. MPC's Proposed Methods for Valuing the Benefit to CHEP Are Inappropriate for Measuring Restitution.

MPC has proposed numerous alternative methods for valuing the benefit conferred on CHEP. For the reasons set forth below, none of MPC's proposed measures of damages is appropriate here.

a. Analysis of CHEP's Conversion Damages.

MPC first contends that the benefit it conferred on CHEP equals the amount CHEP claims as conversion damages. As described above, CHEP's conversion damages (\$3.60/pallet) are based on the cost to CHEP of retrieving a CHEP pallet from an NPD (\$1.91/pallet), coupled with the cost CHEP incurs in financing the purchase of a new pallet to replace the converted pallet for one year (\$1.69/pallet). Characterizing this amount as the measure of unjust enrichment ignores both the legal and factual distinctions between CHEP's claim for conversion and MPC's claim for unjust enrichment.

Conversion is a tort; a party who commits a tort is liable for all damages that naturally flow from it. See Carr and Co. v. Southern Railway Co., 12 Ga. App. 830, 834, 79 S.E. 41, 43 (1913) (holding that "[t]he tortfeasor is liable for any damages consequent upon his act and which are directly traceable to it, if they could reasonably have been anticipated as likely to be the result of his neglect or failure to perform his duty."). This includes prospective damages. Conversely, unjust enrichment is an equitable remedy; its purpose is to reach an equitable result, by valuing the benefit actually conferred on the party unjustly enriched. See Watson, 226 Ga. App. at 28, 485 S.E.2d at 570 (restitution should not exceed the value of the benefit actually realized). While there may be similarities between these remedies, they are not equivalent and one cannot be substituted for the other.

The cost to recover a CHEP pallet from an NPD during the time MPC converted CHEP pallets is a benefit CHEP calculates to be \$1.91 based on the evidence it presented supporting its conversion damages. The evidence also shows that based on the accumulated recovery rates of CHEP pallets shipped to NPDs (*i.e.*, the flow through ratio) for the period of time that MPC has collected CHEP pallets and the number of pallets that CHEP has collected through the ARP, CHEP would have recovered the majority of pallets held by MPC from other recyclers. In doing so, CHEP would have paid other recyclers \$2.25 under the ARP for the

return of its pallets. Accordingly, while the Court could choose to use the \$1.91 figure for calculating the benefit conferred on CHEP, CHEP believes it is more appropriate to use the \$2.25 figure.

In contrast to the cost CHEP incurs in retrieving its pallets, the cost of replacing the converted pallets for one year is wholly unrelated to any benefit conferred on CHEP. By converting the CHEP pallets, MPC intentionally released the pallets into the stream of commerce, causing CHEP to incur the additional cost of replacing the pallets until they could be located. Thus, this is a damage naturally flowing from MPC's tortious act. For the CHEP pallets that MPC collected, sorted, and eventually returned to CHEP, CHEP did not avoid this cost. Instead, the pallets were not released into the stream of commerce, but were held by MPC, which refused to return them for years. The result was the same: CHEP did not realize the benefit of their timely return. It is, therefore, inappropriate to consider this cost as part of the benefit conferred on CHEP.^{3,4}

³ It also would be illogical to use the financing cost, see MPC's Judgment, Proposed Findings of Fact, ¶¶ 43-44, as a measure of unjust enrichment, because the financing cost increases with the length of time that a pallet is out of service. For example, the \$1.69 figure represents the cost of financing a replacement pallet for one year; for two years, the cost would be roughly double. Thus, under MPC's rationale, its restitution would increase the longer it held the pallets. This creates an absurd result, because CHEP is not actually benefited the longer its pallets are outside of its possession. The same problem arises with any measure of unjust enrichment that is tied to the length of time the pallets are outside of CHEP's

b. Analysis of the Value of a CHEP Pallet.

MPC next contends that CHEP is benefitted by the value of a new CHEP pallet. Thus, argues MPC, CHEP should pay MPC the value of a new pallet. There is, however, no evidence to support such a measure of restitution here. CHEP did not receive new CHEP pallets from MPC; it received severely degraded ones. While the evidence shows that CHEP has had more difficulty recovering its pallets shipped to NPDs than to participating distributors, none could be considered “lost” in the sense that CHEP never expects to gain their return. Instead, CHEP recognizes that it takes longer for CHEP to retrieve those pallets, and this additional time is reflected in the increased dwell time associated with CHEP pallets shipped to NPDs. In fact, the weight of the evidence supports CHEP’s contention, as discussed in Section II.B.3. below, that had MPC not

possession, such as the profit it earns on a pallet. MPC built no record that would support this theory.

⁴ MPC also argues that CHEP’s annual depreciation expenses are somehow relevant to the benefit MPC conferred upon CHEP. See MPC’s Judgment, Proposed Findings of Fact, ¶ 45. MPC wholly misunderstands the purpose and effect of depreciation charges, which are merely an accounting convention that permits a company to spread the cost of acquiring assets over a longer time period. These expenses are reflected on CHEP’s balance sheet, but involve no actual cash payments or receipts. CHEP did not avoid any “depreciation charges,” whatever MPC means by that phrase, because of MPC’s actions. Any similar “balance sheet benefits” suggest by MPC at trial are far too speculative and uncertain to factor into the Court’s analysis. MPC built no record that would support this theory.

collected the CHEP pallets, then other recyclers would have collected them and returned the majority of them to CHEP.

Moreover, such a measure of restitution -- one that effectively forces the owner of the property to buy it back from the party returning it -- frustrates the very purpose of this equitable remedy. A property owner would have no incentive to seek the return of its property if it had to pay the retail value of the property to get it back. Using the value of the property as a measure of restitution also violates the first maxim of equity that "equity follows the law". See O.C.G.A. § 23-1-6 Utilizing the value of a CHEP pallet as the measure for restitution violates this maxim because there is no nexus between the effort expended or services performed by MPC and the value of a CHEP pallet. Measuring the benefit conferred on CHEP by the retail replacement cost of the CHEP pallets is not a valid, fair, or logical method of calculating damages in this case.⁵

c. Application of Glen Kolb's "Benefit Analysis."

MPC has urged the Court to adopt the analysis performed by CHEP employee Glen Kolb, which sought to determine the benefit to CHEP of avoiding a "lost" pallet. Mr. Kolb determined that in *March 2001*, the benefit to CHEP of

⁵ In addition, CHEP finances the cost of purchasing new pallets. Thus, even if the cost of a new pallet were an appropriate measure of restitution, the relevant cost, at most, is CHEP's cost of using money to purchase those pallets, not the cash price of the pallets.

avoiding a “lost” pallet by compensating recyclers to return CHEP pallets was between \$.80 and \$4.67. The analysis was based, in part, on probabilities, including the probability that CHEP would avoid a lost pallet or would reduce the dwell time of those pallets shipped to NPDs. Yet, the timing of his analysis renders it irrelevant to the majority of CHEP pallets at issue here. Mr. Kolb performed his analysis before adoption of the ARP. His analysis presumably was for the purpose of determining whether such a program would benefit CHEP. He testified unequivocally that the benefit range he calculated would not apply *after* the ARP was implemented. Trial Tr. 170:11-22 (June 26, 2006), and MPC presented no evidence to the contrary. This is because the probabilities had changed radically since implementation of the ARP. Rather than the 56% flow-through ratio that existed at the time Kolb made his analysis, the flow-through ratio is now 115%. Trial Tr. 41:21-24, 42:7-19 (June 26, 2006). The average dwell time also has been substantially reduced. In addition, other than recognizing a decrease in the benefit to CHEP, Kolb testified that he could not quantify the benefit to CHEP under circumstances where the ARP has allowed CHEP to recover substantially all of the pallets shipped to NPDs. Trial Tr. 171:3-23 (June 26, 2006).

Moreover, even if the Court were to accept these figures as reliable and relevant for the 20,010 pallets that MPC had collected by August 2002, MPC has offered no evidence to guide the Court in determining where in the \$.80 to \$4.67 range the benefit actually fell. Kolb testified that he believed it was most likely somewhere in the high range, between \$2.40 and \$4.67. Trial Tr. 188:3-10 (June 26, 2006); MPC Ex. 2. Yet, he also testified that the benefit would never be known with certainty. Trial Tr. 190:1-5 (June 26, 2006). That the high end of the range is nearly six times greater than the low end, coupled with Kolb's testimony that the benefit could never be known with certainty means, there is no way for the Court to measure restitution with "reasonable certainty" using Mr. Kolb's analysis.

d. NPD Surcharges or Lost Pallet Fees are too speculative to calculate restitution to a reasonable degree of certainty.

MPC also contends that the benefit conferred on CHEP by MPC is equal to either the varying surcharges it collects from its customers when they ship CHEP pallets to NPDs or the lost pallet fees it sometimes collects when its customers cannot account for all the CHEP pallets they have received. For several reasons, neither of these fees is an appropriate measure of the benefit conferred on CHEP.

With respect to the surcharge, MPC contends that because CHEP may charge its customers a fee to transfer its pallets to NPDs, CHEP should pay this fee

to MPC. As Mr. Potts testified, this surcharge is based on much more than the cost of collecting and sorting CHEP pallets -- the only benefit MPC conferred on CHEP. The surcharge defrays the costs of CHEP's asset protection and recovery operations; the increased dwell time during which a CHEP pallet is not earning revenue; and the higher refurbishing costs that typically attend pallets shipped to NPDs. Trial Tr. 36:24-37:8, 37:25-38:9 (June 26, 2006). There is no evidence, however, to establish what portion of the surcharge might be associated with the services that MPC provided, making it impossible to calculate damages with reasonable certainty.

Similarly, there is no evidence establishing the amount of any surcharge or whether a surcharge even applies to all of the CHEP pallets collected by MPC. CHEP did not institute the surcharge until 1998, and since that time, the surcharge has varied from \$.35 to \$8.00. Trial Tr. 32:13-22, 35:10-15 (June 26, 2006). Moreover, approximately 50% of CHEP pallets shipped to NPDs are shipped to semi-cooperative NPDs, who typically pay a charge of \$3.50. Trial Tr. 36:1-7 (June 26, 2006). The evidence, accordingly, is insufficient to use the surcharge as a basis for measuring the restitution due to MPC without engaging in speculation and guesswork.

A “lost” pallet fee is not collected when a pallet is shipped to an NPD. Pallets are not lost when customers report their transfer to NPDs. Rather, lost pallet fees are contractually negotiated fees that CHEP customers sometimes pay when the customers cannot account for pallets shipped to them, whether due to theft, improper tracking, or otherwise. There is no evidence that any lost pallet fee was collected for any pallet that CHEP retrieved from MPC. As with the surcharge, there is no way to calculate restitution based on the lost pallet fee with reasonable certainty. Nor is there is any relationship between the contractually negotiated surcharges and “lost pallet” fees and any benefit conferred on CHEP by the collection and sorting of blue pallets.

e. Future rental revenue is an inappropriate measure of restitution.

Life-time revenue generated by a CHEP pallet, or some more limited amount of revenue, is an inappropriate measure of restitution because it lacks any basis in the law and has no relationship to MPC’s actions. Using this measurement as the basis of restitution would provide MPC with an inequitable windfall.

While suggested by MPC as an alternative measure of restitution, there is no authority endorsing the recovery of future revenue as an appropriate measure of restitution. Disgorging profit as restitution, moreover, is an extraordinary remedy, reserved for cases in which the defendant’s actions suggest egregious conduct

supporting punitive damages. See Dan B. Dobbs, Dobbs Law of Remedies, § 4.1(4), at 567 (2d ed. 1993) (noting that “[i]n general, the defendant who is not a serious wrongdoer is held only to make restitution measured by actual gains in assets or gain in services or intangibles which he in fact sought in the relevant transaction.”) See also Restatement (First) of Restitution, § 1 Unjust Enrichment, cmt. e (1934) (noting that disgorging profit is generally reserved for breach of fiduciary relationship). Such is not the case here. CHEP did not coerce or trick MPC into collecting CHEP pallets. Indeed, CHEP prefers that MPC not collect CHEP pallets at all.

Furthermore, generating revenue or profit involves substantially more effort than merely collecting and sorting blue CHEP pallets. It was CHEP, not MPC, which developed its pallet leasing system, chose the appropriate lumber and components, specified its pallet leasing system, chose the appropriate integrity and strength, specified and implemented quality control processes, developed and implemented extensive marketing campaigns, and identified and negotiated contracts with customers, vendors, and service providers. CHEP’s profits hinge on these and a variety of other factors, wholly unrelated to MPC’s collection and sorting of CHEP pallets.

2. CHEP's Proposed Method for Valuing the Benefit Is The Appropriate Measure of Restitution.

The most appropriate and equitable measure of restitution is the market value of the service MPC provided in collecting and sorting CHEP pallets. This represents the expense that CHEP avoided due to MPC's services. This is the appropriate measure of restitution because, as the Court found, MPC had performed, in part, a service that CHEP requested, and CHEP did not pay MPC for that service. CHEP USA v. Mock Pallet Co., 138 Fed. Appx. 229, 235 (11th Cir. June 24, 2005). As discussed above, the measures of restitution proposed by MPC are inappropriate because they are not supported by the evidence and would bestow a windfall on MPC, while punishing CHEP. By contrast, CHEP's proposed measure is supported by the evidence, can be determined with reasonable certainty, and conforms with the law of unjust enrichment, including the maxim that "equity follows the law."

The measure of damages for unjust enrichment must have some nexus to the services performed by MPC. See O.C.G.A. § 23-1-6 (noting that equity should follow "the analogy of the law where no rule is directly applicable."). The market value of the services performed by MPC as the measure of restitution is the most

appropriate measure because it is directly related to MPC's conduct that unjustly enriched CHEP.⁶

A review of the prevailing law on restitution, moreover, supports the conclusion that measuring the benefit MPC provided by the cost CHEP avoided in having to pay another to provide the same service is the appropriate measure of restitution in cases such as this. As Dobbs explains in his treatise on remedies:

When the defendant seeks the plaintiff's services by requesting or contracting for them, or by indicating acquiescence in them, restitution if any may be measured by the value of those services in the labor market. Put otherwise, the measure of restitution is the costs that would be incurred by the defendant to purchase substantially similar services elsewhere.

Dan B. Dobbs, Dobbs Law of Remedies § 4.5(2), at p. 634 (2d ed. 1993). This measure of restitution is well-recognized in Georgia. See, e.g., Watson v. Sierra Contracting Co., 226 Ga. App. 21, 28-29, 485 S.E. 2d 563, 570-571 (1997); Georgia Tile Distributors, Inc. v. Zumpano Enterprises, Inc., 205 Ga. App. 487, 422 S.E.2d 906 (1992). See also Nextel South Co. v. R.A. Clark Consulting, 266 Ga. App. 85, 87, 596 S.E. 2d 416, 419 (2004) (holding under a claim for quantum meruit that "the provider may recover the reasonable value of goods or services transferred . . .") (internal citations omitted); Centre Point Investments v. Frank

⁶ This measure of restitution is also the most analogous to the damages afforded by a naked depository claim. See CHEP, 138 Fed. Appx. at 235.

M. Darby Co., 249 Ga. App. 782, 786, 549 S.E. 2d 435, 439 (2001) (stating, "the measure of recovery in quantum meruit is the reasonable value of the services rendered to the party who received them.") (internal citations omitted); Matthews v. Neal, Greene & Clark, 177 Ga. App. 26, 29, 338 S.E. 2d 496, 498-499 (1985) (determining that a jury properly found damages for quantum meruit by concluding that the value of the services were equal to the benefit provided).⁷ The facts support applying this measure of restitution.

⁷ This measurement of restitution is most frequently seen in cases involving claims for quantum meruit. See generally Mitchell & Pickering v. Louis Isaacson, Inc., 139 Ga. App. 733, 299 S.E.2d 535 (1976). However, because unjust enrichment is analogous to quantum meruit and their remedies are the same, see Watson at 28, 485 S.E.2d at 570, cases involving quantum meruit provide further guidance for the Court here. MPC suggests that this measurement runs afoul of the rule that "the measure of damages under unjust enrichment ... [is not based on] the cost to render the service or cost of goods." See MPC's Judgment, Proposed Conclusions of Law, ¶ 8 (citing CHEP, 138 Fed. Appx. at 235) MPC's position overstates Georgia law. The Eleventh Circuit's opinion quotes the Georgia Court of Appeals in Hollifield v. Monte Vista Biblical Gardens, Inc., 251 Ga. App. 124, 130-31, 553 S.E.2d 662, 669 (2001), which stated that "[t]he measure of damages under quantum meruit or unjust enrichment is based upon the benefit conferred upon the [recipient] and not the cost to render the service or the cost of the goods." This statement reiterates Georgia law that restitution for quantum meruit or unjust enrichment should be measured from the perspective of the recipient and not the provider. Thus, while the cost MPC incurred to collect and sort CHEP pallets is not an appropriate measure of restitution, the ARP is an appropriate measure because it reflects CHEP's perspective of the benefit it received from MPC. See id. at 130, 553 S.E.2d at 669 (holding that "the measure of damages would be the reasonable value of labor and materials of benefit to the recipient....").

Finally, this measure of restitution is readily supported by the evidence and can be determined with reasonable certainty. At trial, CHEP presented evidence that CHEP collects 115% of the pallets shipped to NPDs today and that as early as 2004, CHEP was collecting over 99% of those pallets. CHEP also presented uncontested evidence of the costs it incurred to recover CHEP pallets shipped to NPDs. The starting point was the \$2.25 per pallet price CHEP pays the majority of recyclers who return CHEP pallets under the ARP.⁸ Trial Tr. 50:4-8 (June 26, 2006). The evidence at trial established that over 1900 recyclers, including numerous recyclers in the Atlanta area, return CHEP pallets under the ARP. Accordingly, had MPC never collected the 40,814 CHEP pallets, the evidence establishes that CHEP most likely would have gained the return of those pallets from other recyclers at the ARP price of \$2.25 per pallet.

The \$2.25 ARP figure, however, is only a starting point and overstates the value of the actual benefit MPC conferred on CHEP. See Hollifield at 130-31, 553 S.E.2d at 669 (holding that “the measure of damages would be the reasonable value of labor and materials of benefit to the recipient....”). This figure includes

⁸ In July, 2005, CHEP began paying a fuel surcharge. Because the evidence did not clearly establish the amount of the surcharge for the periods after July, 2005, when MPC collected CHEP pallets, that number cannot be added with reasonable certainty. In any event, MPC did no transporting of pallets and so, the fuel surcharge is irrelevant.

loading CHEP pallets onto trucks and transporting them to CHEP service centers. It also assumes the prompt return of CHEP pallets. Because MPC provided none of these services, CHEP did not realize all of the benefits associated with this \$2.25 figure. Accordingly, the cost CHEP incurred to perform the services that MPC did not provide must be subtracted from this figure to reach an amount that reflects the value of the actual benefit CHEP received. In addition, the incremental cost to refurbish the pallets recovered from MPC should be deducted from the ARP \$2.25 figure because the evidence presented at trial shows that these costs were incurred as a result of the untimely return of the pallets to CHEP. Reducing the amount of the restitution to reflect these incremental costs reflects the actual benefit conferred on CHEP.

In general, MPC does not contest the costs CHEP incurred to load and transport its pallets from MPC to the CHEP service center. MPC does, however, contest the incremental costs of returning the pallets to a usable condition, arguing that they should not be subtracted from the benefit calculation because (1) MPC was entitled to retain the pallets until it received reasonable compensation; and (2) CHEP never offered MPC reasonable compensation for the return of the pallets. These arguments, however, ignore the most fundamental principle of unjust enrichment: the benefit is to be determined from the perspective of the enriched

party. Thus, it does not matter who is responsible for the condition of the pallets. To assess the benefit to CHEP, the Court only considers the condition of the pallets once they were recovered by CHEP. CHEP never realized the benefit of MPC's services until it gained the return of its property.

In addition, MPC's argument is based on two assumptions: (1) that MPC's demand of \$5.00 per pallet was reasonable, and (2) that MPC had to retain possession of the CHEP pallets to maintain its claim for unjust enrichment. These assumptions, however, are faulty and do not support MPC's argument. At trial, there was substantial argument and evidence presented about whether CHEP's offers and MPC's demands were "reasonable." For purposes of determining the benefit conferred upon CHEP, this debate is irrelevant. The issue to be determined is the value of the benefit conferred upon CHEP. This amount is based on the condition of the pallets at the time they were returned to CHEP. How the pallets came to be in this condition is not a factor in this analysis. Thus, the Court should consider the cost CHEP incurred in returning the pallets to a usable condition, since these costs directly reduced the economic benefit conferred upon CHEP by the return of the pallets.

Under its claim as a naked depository, MPC was entitled to retain possession of the CHEP pallets until it received reasonable compensation for them. Likewise,

MPC was not required to return the CHEP pallets before asserting a claim for unjust enrichment. Yet, by choosing to hold CHEP's pallets, MPC bears the consequence of their subsequent deterioration. Just as the jury found that MPC failed to mitigate its damages under its naked depository claim, the value of the benefit CHEP realized from MPC necessarily abated the longer MPC held CHEP's pallets and allowed them to deteriorate. Contrary to its argument, MPC was not at risk of losing its claim for unjust enrichment had it returned CHEP's property to CHEP. In fact, MPC could have promptly returned the pallets to CHEP and pursued its unjust enrichment claim at the same time.⁹

C. A Review of CHEP's Calculation of Restitution to MPC.

CHEP's measure of restitution can be summarized as follows:

	<u>Number of Pallets</u>	<u>Net Benefit</u>
June 2004	29,686	\$1,791.75
Dec./Jan. 2006	9,526	\$11,733.99
March 2006	613	\$1,062.85
April 2006	270	\$316.46
May 2006	316	\$419.96

⁹ MPC also argues that in pursuing its naked depository claim, it had to retain possession of the CHEP pallets or lose its lien on them. However, MPC was not required to maintain its lien to pursue its claim as a naked depository or its claim for unjust enrichment. Rather, the lien only secured any judgment that MPC might obtain as a result of its claims.

June 2006	403	\$607.25
Total	40,814	\$15,932.26

The analysis is set forth below in more detail. The transportation and loading costs associated with collecting CHEP pallets from MPC were as follows:

	Maximum Benefit for Timely Participation	Load Costs Incurred	Transportation Costs Incurred	Subtotal
June 2004	\$66,793.50	\$<10,615.68>	\$<12,967.24>	\$43,210.58
Dec./Jan. 2006	\$21,433.50	\$<3,101.71>	\$<6,597.80>	\$11,733.99
March 2006	\$1,379.25	\$<316.40>	\$0.00	\$1,062.85
April 2006	\$607.50	\$<291.04>	\$0.00	\$316.46
May 2006	\$711.00	\$<291.04>	\$0.00	\$419.96
June 2006	\$906.75	\$<299.50>	\$0.00	\$607.25
Total	\$91,831.50	\$<14,915.37>	\$<19,565.04>	\$57,351.09
Per Pallet	\$2.25	\$<0.37>¹⁰	\$<0.48>	\$1.40

At the time the pallets were received at the CHEP depot, the benefit to CHEP was \$57,351.09. However, this does not represent the actual benefit CHEP received because CHEP incurred incremental costs to scrap, and repair the first 29,686 CHEP pallets.

¹⁰ There was some evidence that MPC offered to load CHEP pallets for \$.35 per pallet and a load of white wood pallets for each day of the recovery operation. Trial Tr. 54:23-25; 55:1-10 (June 26, 2006); CHEP Ex. 35 (memo dated June 10, 2004). CHEP's load cost per pallet, however, were less than MPC's offer.

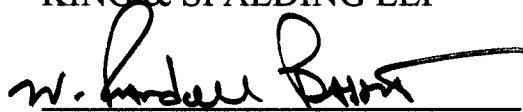
These incremental costs were necessitated by the length of time the pallets sat on MPC's yard. CHEP presented uncontested evidence concerning the average cost it incurs to refurbish pallets at its service center. This includes washing, repairing, painting, and scrapping pallets. CHEP claims that it incurred an additional \$41,418.83 servicing the first 29,686 pallets it collected from MPC. These additional costs represent \$18,733.91 in incremental costs to wash pallets, \$22,059.92 in incremental costs to repair and paint the pallets, and \$625 to scrap pallets that could not be repaired.

	Subtotal	Wash and Sort Costs	Incremental Repair Costs = 40% of Total	Incremental Scrap Costs	Net Benefit
June 2004	\$43,210.58	\$<18,733.91>	\$<22,059.92>	\$<625.00>	\$1,791.75
Dec./ Jan. 2006	\$11,733.99	\$0.00	\$0.00	\$0.00	\$11,733.99
March 2006	\$1,062.85	\$0.00	\$0.00	\$0.00	\$1,062.85
April 2006	\$316.46	\$0.00	\$0.00	\$0.00	\$316.46
May 2006	\$419.96	\$0.00	\$0.00	\$0.00	\$419.96
June 2006	\$607.25	\$0.00	\$0.00	\$0.00	\$607.25
Total	\$57,351.09	\$<18,733.91>	\$22,059.92>	\$<625.00>	\$15,932.26
Per Pallet	\$1.40	\$<0.46>	\$<0.54>	\$<0.01>	\$0.39

The ultimate benefit to CHEP, as a result of MPC's collection and sorting of CHEP pallets, is \$15,932. This amount represents a per-pallet benefit ranging from \$.06 for those pallets which were in MPC's possession for the longest time and suffered the most damage, to \$1.73 for those pallets which were received by MPC and promptly returned to CHEP. Accordingly, CHEP should be directed to pay MPC restitution totaling \$15,932.26 for the benefit it received by MPC's collection and sorting of 40,814 CHEP pallets.

This 17th day of July, 2006.

Respectfully Submitted,
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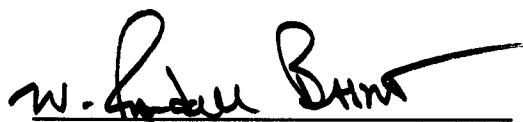
Attorneys for CHEP USA

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CERTIFICATION OF COMPLIANCE WITH L.R. 5.1B

I certify that the foregoing **CHEP USA'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW** has been computer processed with 14 point Times New Roman font in compliance with N.D.G.A. Local Rule 5.1B.

This 17th day of July, 2006.

A handwritten signature in black ink, appearing to read "W. Randall Bassett", written over a horizontal line.

W. Randall Bassett
Georgia Bar No. 041525

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

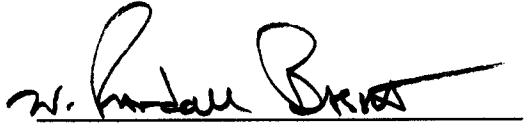
CHEP USA, a New York Partnership,)	
)	
Plaintiff,)	
)	
v.)	Case No. 02-CV-2053-BBM
)	
MOCK PALLET COMPANY,)	
a Georgia Corporation,)	
)	
Defendant.)	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **CHEP USA'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW** was served upon counsel for defendant by depositing same in the United States mail, with sufficient postage thereon to insure delivery, and addressed as follows:

Eugene D. Butt, Esq.
Ballard, Stephenson & Waters, LLP
P.O. Box 29
Covington, GA 30015.

This 17th day of July, 2006.



 W. Randall Bassett
 Georgia Bar No. 041525