

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT DAYTON**

BUCKEYE DIAMOND LOGISTICS, INC. :	:	
fka BUCKEYE RECYCLERS, INC. :	:	
	:	
Plaintiff, :	:	
	:	Case No. C3-01-440
	:	
v. :	:	
	:	Judge Walter Herbert Rice
CHEP USA, a general partnership :	:	
	:	
Defendant. :	:	

**PLAINTIFF’S MEMORANDUM IN OPPOSITION TO CHEP USA’S  
MOTIONS IN LIMINE**

I. Introduction

This memorandum addresses twelve motions in limine filed CHEP USA in this case. CHEP has filed a total of fifteen motions in limine – nine in April 2003 and an additional six on January 30, 2004. In its August 11, 2003 Decision and Entry (Docket # 61), the Court found CHEP’s first motion in limine concerning damages (Docket # 56) moot. On February 19, 2004, Buckeye Diamond Logistics (“Buckeye”) filed its opposition to CHEP’s motion in limine number 12 (Docket # 76), which also concerned damages. On February 25, 2004, the Court, based on the agreement of the parties, found that CHEP’s Motion in Limine # 2 (Docket # 50) was also moot. See Decision and Entry dated Feb. 25, 2004 (Docket # 86). The memorandum will address the remaining twelve motions in limine – Docket #s 49, 51, 52, 53, 54, 55, 57, 71, 72, 73, 74 and 75. Because of the overlapping, often duplicative arguments in these remaining twelve motions, Buckeye hereby offers this consolidated Memorandum in Opposition.

Most of CHEP's motions misunderstand the relevance of Buckeye's evidence in light of the Court's August 11, 2003 Decision and Entry concerning the parties' summary judgment motions. While Buckeye does not intend to present all of the evidence identified in CHEP's motions, the vast majority of that evidence remains relevant either to (1) the liability and damage elements of Buckeye's claim for unjust enrichment; or (2) to defense of CHEP's conversion claim. Because CHEP's motions frequently seemed premised on a misunderstanding of the issues relevant to Buckeye's remaining claim for unjust enrichment and to its own claim for conversion, Buckeye will first address the scope of the issues that remain relevant for trial in this case on both its claim and CHEP's counterclaim. It will then address how the scope of the remaining claims bears individually upon CHEP's motions in limine, as well as set forth the other arguments each of these motions should be denied.

II. The Scope of the Claims Remaining in this Case

A. Buckeye's Unjust Enrichment Claim

By its Decision and Entry of August 11, 2003, the Court granted summary judgment to CHEP on all of Buckeye's claims other than Count 4 of its complaint, its claim for unjust enrichment. As the Court recognized in its decision, to prevail on its unjust enrichment claim, Buckeye must establish that "(1) it conferred a benefit upon the defendant, (2) the defendant knew of the benefit, and (3) the defendant would be unjustly enriched to retain the benefit without compensating the plaintiff." *Id.* at 41-42. If Buckeye proves its unjust enrichment claim, the authority cited by CHEP itself holds that Buckeye is entitled to damages based on the benefit of its activities to CHEP. See U.S. Heath Practices, Inc. v. Byron Blake M.D., Inc., 2001 WL 277291, at \*2 (Franklin Cty. Ct. App. Mar. 22, 2001) (copy attached at Tab A) (cited in

CHEP's Motion in Limine #12, at p. 2, n. 1) ("The difference between quantum meruit and unjust enrichment is the manner in which damages are computed. For unjust enrichment, damages are conferred in the amount the defendant benefited."). See also SEC v. Blavin, 760 F.2d 706, 713 (6<sup>th</sup> Cir.1985). "[T]he doctrine of unjust enrichment provides that a person shall not be allowed to profit or enrich himself inequitably at another's expense, but should be required to make restitution of or for property or benefits received, retained, or appropriated, where it is just and equitable that such restitution be made."); Harris v. Physicians Mutual Ins. Co., 240 F.Supp.2d 715, 722 (N.D. Ohio 2003) (Carr, J.) (citing Gavriles v. Verizon Wireless, 194 F.Supp.2d 674, 681 (E.D.Mich.2002); Glasstech, Inc. v. TGL Tempering Systems, Inc., 50 F.Supp.2d 722, 731 (N.D. Ohio 1999) (Katz, J.) (citing Norton v. City of Galion, 60 Ohio App.3d 109, 110, 573 N.E.2d 1208, 1209 (App. Dist. 3, Crawford Cty. 1989)); Shonac Corp. v. Amko Int'l, Inc., 763 F. Supp. 919, 946 (S.D. Ohio 1991) (Graham, J.) (plaintiff's damages not measured by its losses, but rather by defendant's gain). Accordingly, if it proves its unjust enrichment claim, may recover the profits CHEP made from Buckeye's recovery, sorting and separation of pallets as damages.

Thus, in presenting its claim for unjust enrichment, Buckeye is entitled to present any evidence that tends to show (1) that CHEP benefits when Buckeye recovers, sorts, separates and returns pallets to CHEP; (2) that CHEP knows of that benefit; (3) that it would be unjust for CHEP to retain that benefit without compensation to Buckeye; and (4) the degree to which CHEP profits from the activities of Buckeye. Based on the facts as they have developed in this case, Buckeye's proof as to the benefit CHEP receives when Buckeye sorts, separates and returns CHEP pallets is not limited to the costs CHEP would incur to do the same, if it were legally entitled to come onto Buckeye's property and perform those tasks in a manner that did not

interfere with Buckeye's own business. Rather, Buckeye will also offer evidence to prove that CHEP, with reason to know the consequences of its plans, has created and maintained a business model that seeks to place the cost of recovering CHEP pallets on Buckeye and similar recyclers. Thus the benefit CHEP receives for the return of its pallets is not limited to what it would cost CHEP to do what Buckeye does, but also includes the benefit of either receiving back pallets it has no reasonable expectation of receiving back from NPDs<sup>1</sup> or would not receive back from as quickly as they receive them through Buckeye's efforts. As evidence on these points, Buckeye intends to offer a number of CHEP documents, more specifically described below, which show the difficulty CHEP has getting pallets back from NPDs and other locations that have not contracted to return them to CHEP, the cost to CHEP of gaining the return of pallets for such entities, the fees CHEP charges its customers to cover its costs in gaining such returns and the financial consequences to CHEP of improving the recovery of such pallets. Buckeye is not offering this evidence to content CHEP has lost or abandoned these pallets. It understands that the Court has already resolved those claims as a matter of law. Buckeye offers this evidence because it remains highly probative of the elements of unjust enrichment in this case.

B. CHEP's Conversion Counterclaim

In Buckeye's view, CHEP's remaining claim is for conversion.<sup>2</sup> In order to prevail on its conversion claim, CHEP must show that it demanded the return of pallets marked with its logo, and that its agents did not consent to Buckeye holding those pallets for return to mutual

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<sup>1</sup> NPDs are 32,000 locations CHEP allows its pallets to be shipped to with whom it has no contractual relationship or basis to gain their return other than its own asset recovery activities or the activities of recyclers such as Buckeye.

<sup>2</sup> Buckeye believes that CHEP's claim for replevin is moot due to CHEP's failure to seek possession through the statutory procedures and Buckeye's return of all pallets bearing CHEP's logo immediately after receipt of the Court's August 11 Decision and Entry. See America Rents v. Crawley, 77 Ohio App.3d 801, 803-04 (Franklin County 1991) ("Chapter 2737, in clear and unambiguous language, states that replevin is a prejudgment remedy that is available only if specific procedures are followed.")

customers. See, e.g., NPF IV, Inc. v. Transitional Health Services, 922 F. Supp. 77, 81 (S.D. Ohio 1996) (holding that the plaintiff in a conversion case under Ohio law where property was initially lawfully acquired must show that it made a demand for the return of the property which was refused). In order to recover damages for loss allegedly caused by Buckeye's purported conversion, CHEP must further show that Buckeye's action proximately caused that loss. See, e.g., Sopronyi v. Asztalos, 101 N.E.2d 161, 163 (Montgomery Cty. Ct. App. 1949) (party asserting conversion claim seeking recovery for damage to property has burden of showing that damage exceeded normal wear and tear).

At trial, Buckeye will offer evidence on at least two defenses to CHEP's conversion claim. First, testimony will show that CHEP employees who came to Buckeye were told that the pallets in Buckeye's possession were being held for the benefit of their mutual customers, and that upon receiving this information CHEP's employees consented to such an arrangement by not making further demand for the return of pallets marked with CHEP's logo. Buckeye will also present documentary evidence from CHEP's files consistent with such an arrangement, and circumstantial evidence of conduct by CHEP consistent with such consent. In addition, Buckeye will offer proof, which will overlap with its proof in its unjust enrichment claim, that will rebut CHEP's claim that actions of Buckeye proximately caused CHEP harm, including evidence that but for the actions of Buckeye the pallets in question would not have been recovered, or would have been recovered more slowly and with more damage than those Buckeye returned to CHEP.

### III. Responses to CHEP's Motions in Limine

Taken in order, CHEP's fifteen Motions raise the following arguments regarding Buckeye's evidence at trial:

A. Motion in Limine # 1 (Docket # 49)

Motion in Limine # 1 (Docket # 49) asserts that Buckeye should be precluded from introducing evidence from criminal prosecutions it initiated. In light of the Court's ruling on summary judgment dismissing Count 1 of Buckeye's complaint, Buckeye does not intend to present documentary evidence concerning criminal prosecutions brought by CHEP or testimony concerning such actions in support of its unjust enrichment claim. However, in defending CHEP's conversion counterclaim, to the extent that CHEP disputes Buckeye's assertion that CHEP consented to it holding pallets for the benefit of mutual customers, Buckeye believes such evidence is admissible because it confirms that CHEP did not believe that Buckeye was wrongfully holding the pallets in question. This evidence will show that CHEP was not reluctant to bring criminal prosecutions or civil actions when it believed that its rights in pallets were being interfered with, and indeed was will to set up a sting operation and criminal prosecution against a college age man who offered CHEP pallets for sale on E-Bay. CHEP having chosen not to bring any such action against Buckeye is evidence from which a jury could conclude, taken with Buckeye's other evidence, that CHEP had consented to Buckeye's holding pallets for return to mutual customers.

Given CHEP's position that it owns all pallets marked with its logo, it is difficult to understand its position that evidence showing that it was protecting its ownership interest by legal process would prejudice a jury. Plainly the "prejudice" of a jury hearing that CHEP has sought to exercise its legal rights does not outweigh the probative value of such evidence in supporting Buckeye's defense of consent on CHEP's conversion claim.

B. Motion in Limine # 3 (Docket # 51)

Motion in Limine # 3 (Docket # 51) asserts that Buckeye should be precluded from calling Miguel DeVaughn, a CHEP employee who falsely identified himself as an employee of another pallet dealer in order to gain access to Buckeye's property and inspect CHEP marked pallets on the property. This incident is again relevant to Buckeye's assertion that CHEP consented to Buckeye holding pallets for mutual customers. The fact that Mr. DeVaughn misidentified himself makes no sense if CHEP wanted to assert the right to have pallets returned to it rather than to investigate whether Buckeye was holding . However, Mr. DeVaughn's conduct makes complete sense in light of e-mails sent by CHEP employees at the time of this deception. Those e-mails, Buckeye trial exhibit 55, indicate that CHEP had full knowledge of Buckeye's arrangement to return pallets to mutual customers and did not object to that arrangement. Indeed, the e-mail concludes the discussion of Buckeye by stating: "Ultimately, Kroger is responsible and should be working with Buckeye to get the pallets returned." Allowing the jury to see the full context of this incident, Buckeye believes, is strong evidence bolstering its assertion that CHEP consented to allow Buckeye to hold these pallets for customer, and the Court should not preclude Buckeye from offering this proof.

C. Motion in Limine # 4 (Docket # 52)

Motion in Limine # 4 (Docket # 52) asserts that Buckeye should be precluded from offering hearsay testimony from customers concerning their reasons for buying pallets marked with CHEP's logo. Initially, it is important to note that no customers bought CHEP pallets from Buckeye – rather they paid a fee to Buckeye for the handling and return of such pallets so that they could return the pallets to CHEP. Second, the testimony that CHEP identify as necessary to

exclude is testimony it elicited in deposition. To assert that because CHEP elicited hearsay statements in deposition that Buckeye intends to do the same at trial is without foundation. On the other hand, Buckeye's witnesses are free to testify as to statements made by customers that either (1) are not hearsay, e.g., verbal acts such as requesting the delivery of pallets; or (2) fall within one of Fed. R. Evid. 803 exceptions to the hearsay rule (e.g., a statement of present sense impression). Thus for example, CHEP offers the example (at page 2 of this Motion) of the question to a witness as to whether she knew how many calls were made by a the customer asking Buckeye if it had pallets marked with CHEP's logo, and if so what they would charge to get those back to the customer. Testimony as to such a statements would plainly not be hearsay – it would not be offered for the true of any assertion, but rather as proof of the “verbal act” of the customer in seeking to have Buckeye return the pallets. CHEP's motion is thus overbroad in its definition of what constitutes hearsay. More importantly, it is premature, in that the admissibility of particular customer statements can only be reasonably determine from the context in which such testimony is offered.

D. Motion in Limine # 5 (Docket # 53)

Motion in Limine # 5 (Docket # 53) asserts that Buckeye should be precluded from offering any evidence of CHEP's accounting treatment of pallets sent to NPDs or its loss reserves created with respect to pallets sent to NPDs. CHEP argues that such evidence is irrelevant to Buckeye's claims for loss or abandonment, and Buckeye acknowledges that the Court has already ruled in determining the summary judgment motions that such evidence was not sufficient to raise a genuine issue of material fact on these now-dismissed claims. However, as noted above, two of the elements of Buckeye's unjust enrichment claim are (1) that Buckeye

conferred a benefit upon CHEP, and (2) that CHEP knew of the benefit. CHEP's accounting records and loss reserves show that either delay or inability to recover pallets increase CHEP cost of doing business, and that CHEP knew that fact. Buckeye's proof, including proof from CHEP's own documents, will show that gaining the return of pallets sent to NPDs through a recycler such as Buckeye was and is essential to CHEP in reducing the delay or inability to recover pallets, and thus that the efforts of Buckeye benefit CHEP and satisfy an essential element of Buckeye's unjust enrichment claim.

Moreover, the documents and testimony that seeks to exclude is relevant for numerous other reasons. For example, Exhibit 19, a document CHEP's former CFO Keith Norder identified as having been prepared in the course of determining appropriate loss reserves, indicates that its loss rate (i.e., the percent of pallets not returned to CHEP within a defined period of time) showed an 80% loss rate. Buckeye is entitled to use such a document to show to the jury the context in which its return of pallets benefits CHEP. Further, Buckeye is entitled to use this document in defense of CHEP's damage claim on its conversion claim – if CHEP cannot show that it would have received pallets back more quickly but for Buckeye's alleged conversion, it cannot prove that it was harmed by that conversion.

CHEP documents concerning loss reserves and write-offs are relevant for another reason – they show that a substantial number of pallets that Buckeye returned to CHEP, so-called stringer pallets, had already been written off of CHEP's books because they were taken out of circulation by CHEP for reasons entirely unrelated to any action by Buckeye. Proof that a number of pallets that CHEP has included in its damage calculation no longer had any value to CHEP is obviously relevant to Buckeye's defense of CHEP's damage claims, and provides a separate basis for the relevance and admissibility of many of these financial documents.

E. Motion in Limine # 6 (Docket # 54)

Motion in Limine # 6 (Docket # 54) asserts that Buckeye should be precluded from introducing two of its exhibits (2 and 11) prepared by a consultant retained by CHEP to review the extraordinary difficulty CHEP has had recovering pallets from NPDs.

Former CHEP CFO Keith Norder identified this exhibit 2 and the consulting firm that prepared it during his trial deposition:

Q. Okay. Now, you're familiar with a company called Bain & Company, aren't you?

A. Yes.

Q. They were a consultant hired by CHEP prior to your tenure there, and they'd already done some work when you got there; is that right?

A. Correct.

\* \* \*

Q. One of the -- one of the things that Bain & Company studied, to your knowledge, was the issue of recovery of pallets from NPDs by CHEP; correct?

A. I recall they looked at NPDs in general. I can't recall specifically if they looked at collection rate. I know they looked at costs, but the specifics, I don't recall.

Q. If you could flip back to Exhibit 2, which is immediately before the previous exhibit you were looking at.

A. Okay.

Q. Do you recognize that as a report that you saw while you were at CHEP that had been prepared by Bain & Company?

A. Yes.

Q. And, in fact, the top of the first page of Exhibit 2 is your handwriting; correct?

A. Correct.

Norder dep. (2/17/04) at 30-31. Plainly, Mr. Norder's identification of these exhibit 2 is sufficient to authenticate it.<sup>3</sup>

Mr. Norder's answers are also sufficient ground for admission of Exhibit 2 as an admission of a party-opponent under Fed. R. Evid. 801(d)(2)(D). The exhibit was plainly and undisputedly created during the scope of Bain & Company's engagement by CHEP. Mr. Norder concedes that Bain & Company was a consultant hired by CHEP to address the issues studied in Exhibit. This conclusion is bolstered from the face of the exhibit. As such, this exhibit, and Exhibit 11, are both documents made by an agent of CHEP within the scope of that agency, and are therefore not barred from evidence by the hearsay rule. See Collins v. Wayne Corp., 621 F.2d 777 (5<sup>th</sup> Cir. 1980); Pino v. Protection Maritime Insurance Co., 599 F.2d 10 (1<sup>st</sup> Cir. 1979) (insurance broker as agent of insurer); Hadeed v. Abraham, 265 F. Supp. 2d 614 (E.D. Va. 2003) (real estate agent).

Finally, the Bain & Company documents are relevant to Buckeye's proof that CHEP benefited from the return of pallets by Buckeye. These documents show the massive problems CHEP faces in gaining the return of pallets from NPDs and the huge leakage of pallet CHEP has experienced due to its relationship with Wal\*Mart. Both pieces of proof thus show an essential element of Buckeye's unjust enrichment claim – the huge savings CHEP receives in the retrieval of pallets marked with its logo by Buckeye. Accordingly, CHEP's Motion in Limine # 6 is without merit, and should be overruled.

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<sup>3</sup> Elton Potts conceded he had seen pages "similar" to Exhibit 11 before. See Potts dep. at 46-47. Given that no other Bain & Company analysis of the Wall\*Mart situation was produced by CHEP, it is fair to conclude that Exhibit 11 is precisely what Mr. Potts saw.

F. Motion in Limine # 7 (Docket # 55)

Motion in Limine # 7 (Docket # 55) asserts that Buckeye should be precluded from introducing notes from "Simplex" meeting held at CHEP, where the problems of recovering pallets sent to NPDs and the benefits of compensating recyclers such as Buckeye for the return of pallets were discussed. CHEP does not assert that these are not accurate copies of documents it produced. Nevertheless, it claims that these minutes have not been authenticated by any witness and are hearsay. To the contrary, as the testimony of Keith Norder clearly authenticated one of these documents:

Q. If you could take a look at Exhibit 26, which would be in the second batch containing exhibits, and it'll start with CHEP 03608, a document that's headed "Fuzzy Situation."

A. Okay.

Q. And this is a document that you saw while you were at CHEP; correct?

A. I believe so.

Q. And these were notes created out of a Simplex process that you participated in; correct?

MR. MCDONALD: I'll voice an objection, based on lack of foundation, hearsay, and relevance.

A. I believe so.

BY MR. WILSON:

Q. And a member of the Simplex team would have created these notes and distributed them to you; correct?

A. Would have distributed them to the whole team.

Q. Right. And you were part of the team; correct?

A. Correct.

Norder dep. at 66-67. Moreover, Mr. Norder's testimony shows that the document and its content were admissions of CHEP pursuant to Fed. R. Evid. 801(d)(2)(D), since the Simplex

team members were clearly acting within the scope of their employment in engaging in this analysis.

G. Motion in Limine # 9 (Docket # 57)

Motion in Limine # 9 (Docket # 57) asserts that Buckeye should be precluded from introducing evidence of CHEP's collection rates from NPDs. As discussed above, proof of CHEP's inability to collect its pallets from NPDs on a timely basis is central to Buckeye's proof that CHEP benefits from the recovery and return of pallets by Buckeye. Moreover, such proof is relevant to the jury's determination of the amount by which CHEP benefits from the return of pallets by Buckeye, since a jury can only reasonably measure the total benefit of a returned pallet to CHEP against the likelihood that CHEP would either not regain the pallet or would not regain it in a timely manner. Such proof will thus bolster Buckeye's assertion that the fee charged to a manufacturer for the right to ship to NPDs is a fair measure of the additional cost to CHEP of such shipments and, conversely, of the benefit CHEP receives when a pallet is returned promptly through the actions of Buckeye. Given the Court's limitation of this case to the remaining claim for unjust enrichment, there can be no risk that a jury will be confused into thinking such proof shows that CHEP has abandon its pallets.

Further, the admissions of CHEP's general partner, Brambles, regarding the widespread problem of recovering pallets from NPDs as set forth in the Brambles annual report is neither hearsay nor irrelevant to this case. CHEP concedes that Brambles is its general partner, and therefore by definition its agent. Thus, like other documents CHEP seeks to exclude, the Brambles annual report is an admission of a party opponent, and not hearsay. Further, as the

statement of CHEP's general partner, it is relevant evidence of the benefit CHEP receives when Buckeye expedites the return of pallets from NPDs.

H. Motion in Limine # 10 (Docket # 73)

Motion in Limine # 10 (Docket # 73) asserts that Buckeye should be precluded from examining Miquel DeVaughn and Ralph Buono at trial on the ground that any testimony they might give would be irrelevant at trial. Buckeye has addressed the primary subjects of Mr. DeVaughn's testimony, and their relevance and admissibility in its response to Motion in Limine # 3, above. However, Buckeye also intends to elicit testimony from Mr. DeVaughn concerning the actual workings of CHEP's relationships with distributors and his audits to insure that those distributors return pallets to CHEP in his examination at trial. These subjects are plainly relevant to the jury understanding the flow of pallets, how Buckeye's return of pallets assists CHEP customers and as a defense to the claim that CHEP was harmed when Buckeye returned pallets to such distributors for an agreed upon fee.

Likewise, Buckeye has addressed the relevance and admissibility of one of the areas of Mr. Buono's testimony – his knowledge of CHEP's efforts to use criminal laws to protect its pallets – in response to Motion in Limine # 1 (Docket # 49). Mr. Buono is also a relevant witness because he was in charge of CHEP's first program offering to pay recyclers for the return of pallets marked with CHEP's logo. As such, his testimony is relevant to rebut CHEP's assertion that it receives no benefit from Buckeye's return of pallets and to establish the scope of the benefit CHEP does receive.

I. Motion in Limine # 11 (Docket # 72)

Motion in Limine # 11 (Docket # 72) asserts that Buckeye should be precluded from using its Exhibit 35, a spreadsheet prepared by a CHEP employee captioned “The Benefits of Paying Recyclers for Recovering Pallets.” CHEP claims that this document has not been properly authenticated and is inadmissible hearsay. Neither assertion is true.

CHEP’s claims that this document is inadmissible from lack of authentication and as hearsay are belied by its own admissions. CHEP’s admission, and In response to Buckeye’s Second Set of Requests for Admission, CHEP admitted that this document (a) is a true and accurate copy of a spreadsheet prepared by a CHEP employee; (b) contains a CHEP employee’s assumptions, projections, and analysis of the benefits of paying recyclers for recovered pallets as of March 15, 2001; and (c) contains accurate mathematical computations. Further, in his trial deposition, CHEP’s former CFO further identified

Q. If you could take a look at Exhibit 35, which is going to be towards the end of that fax.

A. Okay.

Q. This is a document entitled CHEP USA Benefit of Paying Recyclers for Recovered CHEP Pallets (per pallet). Do you see the title?

A. Yes.

Q. This is a document that you saw in going through some old files at CHEP; is that correct?

MR. MCDONALD: I'm going to object to any inquiry as to this document on the grounds that there is no authentication available for the document, and it's inadmissible pursuant to Rule 901. It is also the subject of a separate motion in limine.

A. I believe I did see that going through old files.

BY MR. WILSON:

Q. Okay. Do you remember whose files?

A. They would have been the files in my

office.

Q. The files that you inherited when you came into your possession -- position? I'm sorry.

A. Correct.

Q. Okay. And I'm assuming that the benefit to CHEP of paying recyclers was something of interest to you?

MR. MCDONALD: Again, object. What you assume and what he knows are two different things.

BY MR. WILSON:

Q. The benefit of paying recyclers was of interest to you, Mr. Norder, while you were in your position?

A. I guess I can't draw that -- benefit of paying recyclers. I mean, I was interested in getting pallets back.

Norder dep. at 72-74. Thus, on its face the document indicates that it is a calculation of the benefit CHEP could receive by the return of pallets by recyclers such as Buckeye. CHEP admits it was prepared by an employee and contains the employee's assumptions, projections, and analysis of the benefits of paying recyclers for recovered pallets as of March 15, 2001. Further, there is no dispute that the document was sufficiently important to be found the company CFO's files. Taken together, notwithstanding CHEP's desire to sweep the admissions in this document under the rug, the record establishes that this document was created by an employee of CHEP while acting within the scope of his or her employment. The fact that CHEP has refused to identify this employee does not take the document out of the exception to the hearsay rule found in Fed. R. Evid. 801(d)(2)(D). See Davis v. Mobil Oil Exploration and Producing Southeast, 864 F.2d 1171, 1174 (5<sup>th</sup> Cir. 1989) (inability to identify the particular employee-declarant does not preclude admission under Fed. R. Evid. 801(d)(2)(D) when circumstantial evidence shows the individual was acting within the scope of his or her employment).

J. Motion in Limine # 13 (Docket # 74)

Motion in Limine # 13 (Docket # 74) asserts that Buckeye should be precluded from eliciting testimony or presenting evidence disputing CHEP's ownership of its pallets. As discussed above, Buckeye has no intention of ignoring the Court's previous ruling at trial. However, the evidence Buckeye intends to elicit, as was also explained above, is offered not on the issue of ownership, but on the elements of unjust enrichment. Thus, for example, proof in support of issue number 6 – that "CHEP's up-charges for shipments to NPDs compensate CHEP for, among other things, its increased cost of recovering those pallets, increased dwell time and lost income, or whether such fees in whole or in part compensate CHEP for unrecovered pallets" – is squarely relevant to the issues of liability and damages on Buckeye's unjust enrichment claim, and is therefore an appropriate area of proof at trial in this case.

K. Motion in Limine # 14 (Docket # 75)

Motion in Limine # 14 (Docket # 75) asserts that Buckeye should be precluded from presenting evidence of CHEP's alleged loss or abandonment of its pallets. As the discussion above indicates, Buckeye fully appreciates the limitation of the claim that remains in this case. Conversely, however, as also show above, in proving unjust enrichment, Buckeye is entitled to present proof of the benefits its actions provide CHEP by proof that but for its action, CHEP would incur substantial expense to recover its pallets, and that Buckeye's actions reduce or eliminate that expense.

L. Motion in Limine # 15 (Docket # 71)

Motion in Limine # 15 (Docket # 71) asserts that Buckeye should be precluded from presenting proof on “irrelevant issues in the Contested Issues of Fact.” Again, in Buckeye’s view, CHEP’s argument misses the elements of the unjust enrichment claim Buckeye is entitled to prove. CHEP’s practices with respect to the shipment of pallets to NPDs and its allowing Wal\*Mart to leak a huge number of pallets marked with CHEP’s logo into general circulation all show the circumstances in which Buckeye comes into possession of these pallets, as well as the benefit CHEP receives by Buckeye’s actions in returning such pallets. Like CHEP’s other motions in limine, this motion ignores the issues remaining for trial in this case, and seeks to circumscribe Buckeye to a different case than it has plead and is prepared to prove.

IV. Conclusion

For the forgoing reasons, CHEP’s remaining motions in limine should be overruled, and Buckeye should be permitted to present in full the evidence supporting its claim for unjust enrichment.

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

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of this Memorandum was served on March 1, 2004, by electronic delivery or facsimile upon:

John C. McDonald  
Bridgette Roman  
Schottenstein Zox & Dunn  
250 West Street  
Columbus, OH 43215

\_\_\_\_\_  
s/ James A. Wilson  
James A. Wilson