

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

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

**BENCH BRIEF OF DEFENDANT CHEP USA REGARDING CONFIDENTIAL
INFORMATION**

I. INTRODUCTION

Pursuant to the Court's direction during the final pretrial conference call on June 20, 2005, attached hereto as Exhibit "A" is a listing of exhibits that have previously been designated as "Confidential" or "Outside Attorney's Eyes Only" ("OAEO") by CHEP, or in some instances by Buckeye, pursuant to the Stipulation and Protective Order (Doc. # 8). Within Ex. A is a summary explanation as to the basis of confidentiality for each document.¹

During the course of the trial, it is certain that CHEP's confidential and proprietary commercial, financial, and business information will be discussed. The danger to CHEP of the disclosure of such information is evidenced by the protective order previously entered by this Court. (See Stipulation and Protective Order, Doc. # 8). The certainty of attendance at this trial by CHEP's competitors is illustrated by the efforts undertaken by Buckeye's Chairman of the Board, Sam McAdow, to keep CHEP's competitors apprised of the nature and progress of this

¹ CHEP has not listed several exhibits that are marked OAEO and will not object to those documents being discussed in open court.

litigation,² his offer to provide CHEP's competitors with copies of this Court's Summary Judgment Decision and Entry,³ his placement of certain court documents on a website available to the public,⁴ his attempt to solicit contributions toward Buckeye's legal fees from CHEP's competitors,⁵ his invitation to all pallet recyclers to fill the courtroom,⁶ and responses from CHEP's competitors illustrating their intention to fill the courtroom during the trial with "250 to 300" of these competitors.⁷ Additionally, during the final pretrial conference on June 20, 2005, counsel for Buckeye indicated that a reporter for a pallet recycler trade publication intends on attending the trial to report on the events.

Permitting CHEP's confidential and proprietary commercial, financial, and business information to be revealed in open court in the presence of CHEP's competitors would allow those competitors to gain knowledge of CHEP's confidential and proprietary information that they would otherwise not be privy to and would have an adverse effect on CHEP's commercial, business, and financial interests. For these reasons, CHEP hereby respectfully requests that the Court exclude from the courtroom all persons except for Court personnel, the witnesses, and the parties' counsel and representatives during any discussion of CHEP's confidential and proprietary information.

² See posting by Sam McAdow on February 17, 2003 at 9:08 on www.palletboard.com, attached hereto as Exhibit B.

³ See posting by Sam McAdow on August 20, 2003 at 11:34 on www.palletboard.com, attached hereto as Exhibit C.

⁴ See posting by Sam McAdow on September 22, 2003 at 14:44 on www.palletboard.com, attached hereto as Exhibit D.

⁵ See posting by Sam McAdow on February 17, 2003 at 16:10 on www.palletboard.com, attached hereto as Exhibit E.

⁶ See posting by Sam McAdow on August 15, 2003 at 7:46 on www.palletboard.com, attached hereto as Exhibit F.

⁷ See postings by Woodbug on May 3, 2003 at 21:23 and realsupport on May 5, 2003 at 15:50 on www.palletboard.com, attached hereto as Exhibits G and H, respectively.

II. ARGUMENT

A. The Confidential And Proprietary Information

Attached as Exhibit "I" is an Affidavit from Elton Potts ("Potts Aff."), Senior Vice President of Asset Management for CHEP, which demonstrates that there is a compelling need to maintain the confidentiality of CHEP's proprietary information.⁸ CHEP produced information to Buckeye only because of the security afforded by the Stipulation and Protective Order. (Potts Aff. at ¶ 3.) The public disclosure of CHEP's confidential information has the potential of causing great harm to CHEP as well as harm to CHEP's relationships with its customers and pallet recyclers who work with CHEP. (Potts Aff. at ¶ 7.)

Moreover, the information that CHEP is trying to keep as confidential is of the same type as those documents that the Court ordered to remain sealed in its Decision and Entry dated March 22, 2005 (Doc. # 168). In particular, the information concerns CHEP's contracts with its customers as well as the names and addresses of customer contacts. Much of the information contains confidential internal accounting procedures, a consultant's report, accounting issues related to CHEP's relationships with its customers, internal financial information and business strategies and improvement planning. As the Court held in its March 22, 2005 Decision and Entry, there are compelling reasons supporting the continued confidentiality of CHEP's information. (Doc. # 168 at pp. 4-6.)

B. The Court Should Take Action to Protect CHEP's Confidential and Proprietary Information

In order to protect CHEP's confidential and proprietary information, the Court should take action up to and including the closing of the courtroom during trial. While CHEP

⁸ Mr. Potts' affidavit was executed over a year ago in relation to Buckeye's earlier efforts to unseal various CHEP documents. Nevertheless, the rationale set forth in the affidavit is relevant and applicable to the instant matter as well and indeed many of the same exhibits that were the subject of those efforts have now been marked as trial exhibits.

appreciates the Court's expressed reluctance to close the courtroom, such measures have been taken under similar situations. Courts have held that court proceedings may be closed to protect privacy and confidentiality. See, e.g., Uniroyal Goodrich Tire Co. v. Hudson, 873 F.Supp. 1037, 1040 (E.D.Mich. 1994) (action brought by company seeking to enjoin former employee from divulging trade secrets and confidential information where the court granted company's request to close the courtroom during trial); In re Iowa Freedom of Information Council, 724 F.2d 658, 661 (8th Cir. 1983) (writ of mandamus action brought by the press seeking the release of a transcript under seal in a contempt hearing where the court held that substantial damage to a company's property rights in its trade secrets would have occurred had the hearing not been closed and that no reasonable alternative to closure existed to sufficiently protect these property rights); Sperry Rand Corp. v. Rothlein, 241 F.Supp. 549, 566 (D.C.Conn. 1964) (action by corporation for an injunction and damages against former employees for breach of fiduciary duty in making wrongful use of corporation's trade secrets where the courtroom was closed to protect corporation's trade secrets from the general public); Woven Electronics Corp. v. Advance Group, Inc. (Apr. 15, 1991), 1991 WL 54118, at *6 (appeal by corporation where the court found that an order closing the courtroom during disclosure of trade secrets would have been proper); In re National Broadcasting Co., Inc., 653 F.2d 609, 613 (D.C. Cir. 1981) (appeal by broadcast companies of order denying their application for permission to copy video and audiotapes introduced into evidence and played to the jury where the court found that "the public has in the past been excluded, temporarily or permanently, from court proceedings or the records of court proceedings to protect...trade secrets"); Stamicarbon, N.V. v. American Cyanamid Co., 506 F.2d 532, 539-542 (2d Cir. 1974) (appeal by licensor of trade secrets where the court found that

judges have the power at least partially to restrict access to court proceedings where testimony which would disclose a company's secrets is revealed).

Similar to the cases cite above, the information CHEP is seeking to keep confidential includes customer and financial information that are trade secrets under Ohio law. In Ohio, "trade secrets" specifically include business plans, financial information, customer lists⁹ and other confidential information.

'Trade secret' means information, including the whole or any portion or phase of any...business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:

- (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
- (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

O.R.C. § 1333.61(D).

As the foregoing demonstrates, this Court has the authority and ability to close the courtroom throughout the entire trial proceeding. At the very least, the Court should close the courtroom during any discussion of CHEP's confidential and proprietary information.

III. CONCLUSION

Permitting CHEP's confidential and proprietary business information to be made available to its competitors during this trial will render the protective order entered by this Court worthless, endanger CHEP's proprietary and confidential commercial, financial, and business information, and ignore CHEP's right to reasonable protection for its private and confidential

⁹ The Ohio Supreme Court has confirmed that a customer list and related information are trade secrets. See Consumer Direct v. Limach, 62 Ohio St. 3d 180, 183, 580 N.E.2d 1073, 1075 (1991) (explaining that "customer relations can be the most valuable asset that an enterprise has and information about that relationship, i.e., customer lists is a matter it might wish to keep from its competitors")

information. These significant concerns are exacerbated by Sam McAdow's blatant attempt to ensure that all of CHEP's competitors are kept fully apprised of the course of these proceedings and the interest demonstrated on the part of CHEP's competitors to attend the trial en masse.

For these reasons, CHEP hereby respectfully requests that for the duration of the trial, this Court exclude from the courtroom all persons except for Court personnel, the witnesses, and the parties' counsel and representatives during any discussion of CHEP's confidential and proprietary information.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served this 22nd day of June, 2005, via the Court's electronic filing notification, upon:

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s\ John C. McDonald
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