

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

BUCKEYE DIAMOND LOGISTICS, INC.,)	
)	
Plaintiff,)	
)	Case No. 3:01-cv-00440
)	
v.)	
)	Judge Rice
CHEP USA,)	
)	Magistrate Judge Ovington
Defendant.)	

*MEMORANDUM OF LAW REGARDING PUBLIC ACCESS TO TRIAL
OF INDUSTRIAL REPORTING, INC.*

Industrial Reporting, Inc., (“IRI”) is the publisher of *Pallet Enterprise* and *Pallet Profile Weekly*, which have reported on the pallet industry for 20 years. These publications intend to attend and report on the trial in the above captioned matter, which is of great interest in the pallet community insofar as it is likely to set important precedents with respect to the rights of pallet recyclers regarding CHEP USA. IRI has been advised by plaintiff that the Court is currently considering whether any portion of the trial in this matter will be treated as confidential. While IRI does not have access to the records that are subject of this dispute, it submits this Memorandum of Law in support of its position that no portion of this Court’s proceedings should be closed to the press or public.

1. Closing the courtroom in this case or denying the press or public access to the exhibits in this case would be contrary to the controlling precedent

of this Circuit. First, this Circuit has recognized that the press and public have a First Amendment right to access to civil trials:

The Supreme Court's analysis of the justifications for access to the criminal courtroom apply as well to the civil trial. The Supreme Court has acknowledged the broad application of these principles. Justice Burger's plurality opinion notes that "whether the public has a right to attend trials in civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open." *Richmond Newspapers, supra*, 448 U.S. at 580 n. 17, 100 S.Ct. at 2829 n. 17. Justice Stewart, concurring, states emphatically that "the First and Fourteenth Amendments clearly gives the press and the public a right of access to trials themselves, civil as well as criminal." *Id.* at 599, 100 S.Ct. at 2839. The historical support for access to criminal trials applies in equal measure to civil trials. See *Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n. 15, 99 S.Ct. 2898, 2908-09 n. 15, 61 L.Ed.2d 608 (1979) ("For many centuries, both civil and criminal trials have traditionally been open to the public.") See also Fenner & Koley, *Access to Judicial Proceedings: To Richmond Newspapers and Beyond*, 16 Harv.C.R.--C.L.L.Rev. 430-31 (1981); Cox, *Foreword: Freedom of Expression in the Burger Court*, 94 Harv.L.Rev. 1, 156 n. 42 (1980); Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings*, 91 Harv.L.Rev. 1899, 1921-23 (1978).

The policy considerations discussed in *Richmond Newspapers* apply to civil as well as criminal cases. The resolution of private disputes frequently involves issues and remedies affecting third parties or the general public. The community catharsis, which can only occur if the public can watch and participate, is also necessary in civil cases. Civil cases frequently involve issues crucial to the public--for example, discrimination, voting rights, antitrust issues, government regulation, bankruptcy, etc.

The concern of Justice Brennan that secrecy eliminates one of the important checks on the integrity of the system applies no differently in a civil setting. In either the civil or the criminal courtroom, secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption.

Finally, the fact-finding considerations relied upon by Justice Brennan obviously apply to civil cases. Openness in the courtroom discourages perjury and may result in witnesses coming forward with new information regardless of the type of the proceeding.

Brown & Williamson Tobacco Corp. v FTC (6th Cir. 1983), 710 F2d 1165, 1178-79; 1983-1 CCH Trade Cases ¶ 65460. Other Circuits have held to the same effect. See *Miller v Indiana Hosp.* (3rd Cir. 1994), 16 F. 3d 549, 1994-1 CCH Trade Cases ¶ 70518; *Rushford v New Yorker Magazine, Inc.* (4th Cir. 1988), 846 F. 2d 249, 15 Media L. R. 1437; *Publicker Industries, Inc. v Cohen* (3rd Cir. 1984), 733 F. 2d 1059, 10 Media L R 1777; *In Re Continental Illinois Secur. Litigation* (7th Cir. 1984), 732 F2d 1302, 10 Media L R 1593.

2. Open proceedings protect the core values of our judicial process, including the full resolution of disputes, trust in the courts and true and accurate fact finding:

The English common law, the American constitutional system, and the concept of the "consent of the governed" stress the "public" nature of legal principles and decisions. Throughout our history, the open courtroom has been a fundamental feature of the American judicial system. Basic principles have emerged to guide judicial discretion respecting public access to judicial proceedings. These principles apply as well to the determination of whether to permit access to information contained in court documents because court records often provide important, sometimes the only, bases or explanations for a court's decision.

In the leading case of *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980), the Supreme Court elaborated on the historical and philosophical underpinnings of the right of access. There the trial court had closed the proceedings to the press and public on the motion of the defendant and without objection from the prosecution on the ground that jurors would improperly obtain information through the media. Reversing the trial court, the Supreme Court in *Richmond Newspapers* found that the public right of access applies to criminal trials primarily because of the long history of open courtrooms. In England the practice developed from an obligation to attend into a right of access to be enjoyed at will by members of the community. *Id.* at 565, 100 S.Ct. at 2821. The Supreme Court concluded:

[T]he historical evidence demonstrates conclusively that at the time when our organic laws were adopted,

criminal trials both here and in England had long been presumptively open. This is no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial.

Id. at 569, 100 S.Ct. at 2823. *See also Globe Newspaper Co. v. Superior Court, etc.*, 457 U.S. 596, 102 S.Ct. 2613, 2619-20, 73 L.Ed.2d 248 (1982).

The Supreme Court's historical argument is based on policy considerations developed in the past that remain valid today. First, public trials play an important role as outlets for "community concern, hostility, and emotions." *Richmond Newspapers, supra*, 448 U.S. at 571, 100 S.Ct. at 2824. When judicial decisions are known to be just and when the legal system is moving to vindicate societal wrongs, members of the community are less likely to act as self-appointed law enforcers or vigilantes. "The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.'" *Id.* at 571, 100 S.Ct. at 2824.

Second, public access provides a check on courts. ... Without access to the proceedings, the public cannot analyze and critique the reasoning of the court. The remedies or penalties imposed by the court will be more readily accepted, or corrected if erroneous, if the public has an opportunity to review the facts presented to the court. In his concurrence, Justice Brennan emphasized this link between access to the courtroom and the popular control necessary in our representative form of government. *Id.* at 592, 100 S.Ct. at 2835. Although the federal judiciary is not a majoritarian institution, public access provides an element of accountability. One of the ways we minimize judicial error and misconduct is through public scrutiny and discussion.

Finally, Justice Brennan points out that open trials promote "true and accurate fact finding." *Id.* at 596, 100 S.Ct. at 2838. *See also, Globe Newspaper Co. v. Superior Court, etc.*, 457 U.S. 596, 102 S.Ct. 2613, 2620, 73 L.Ed.2d 248 (1982). When information is disseminated to the public through the media, previously unidentified witnesses may come forward with evidence. *See In Re Oliver, supra*. Witnesses in an open trial may be less inclined to perjure themselves. Public access creates a critical audience and hence encourages truthful exposition of facts, an essential function of a trial.

Brown & Williamson Tobacco Corp. v FTC, 710 F2d at 1177-78.

3. The burden on a party seeking to close a civil trial is heavy. The party must show under the First Amendment that denial of access is necessitated by a compelling government interest and be narrowly tailored to serve that interest. *Rushford v New Yorker Magazine, Inc.* (4th Cir. 1988), 846 F. 2d 249, 15 Media L. R. 1437. Procedurally, a trial court in closing a proceeding must both articulate the countervailing interest it seeks to protect and make "findings specific enough that a reviewing court can determine whether the closure order was properly entered." See *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 104 S.Ct. 819, 824, 78 L.Ed.2d 629 (1984). Substantively, the record before the trial court must demonstrate "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 104 S.Ct. at 824.

4. Courts have found that the press and public's First Amendment rights outweigh claimed needs for secrecy in a number of contexts:

a. Information submitted to the Federal Trade Commission under a confidentiality agreement concerning the health effects of tar and nicotine in cigarettes. *Brown & Williamson*, 710 F.2d at 1180-81.

b. Private and confidential information from a defendant hospital in antitrust litigation. *Miller v Indiana Hosp.*, 16 F. 3d at 550.

c. Evidence showing poor management or that might cause unfavorable publicity. *Joy v. North*, 692 F.2d 880, at 894 (2nd Cir. 1982) (refusing to conceal special litigation committee report and noting that the "potential harm

... in disclosure of poor management in the past is hardly a trade secret."). See also *In Re Continental Illinois Secur. Litigation*, 732 F.2d at 1314 (special litigation report ordered disclosed); *In re Search Warrant for Northwest Enviroservices, Inc.*, 736 F.Supp. 238, 239 (W.D.Wash.1989) ("The avoidance of unfavorable publicity is an insufficient ground to override the public right of access to court records").

d. Evidence showing a defendant's business methods. *Poliquin v. Garden Way, Inc.* (1st Cir. 1993.), 989 F.2d 527.

e. Non-current, but confidential financial records of a media corporation, even though the corporation had always kept its financial position highly confidential because of the intensely competitive nature of its business. *Estate of Murphy v Commissioner* (1990), TC Memo 1990-346, 60 CCH TCM 73 (noting that this concern could not prevail against the strong presumption of public access to matters already part of the public record).

5. Closing the courtroom causes irreparable harm. Even the later disclosure of a transcript of the case cannot undo such harm because disclosing the contents of a transcript is not as "an adequate substitute for the presence of reporters and the public at the hearing." *In Re Iowa Freedom of Information Act*, 724 F.2d at 663. "[T]he availability of a trial transcript is no substitute for a public presence at the trial itself. As any experienced appellate judge can attest, the 'cold' record is a very imperfect reproduction of events that transpire in the courtroom." *Id.* (quoting *Richmond Newspapers, Inc.*, 448 U.S. at 597 n. 22, 100 S.Ct. at 2838 n. 22 (Brennan, J., concurring in the judgment)).

7. This Court itself has recognized that redaction of limited information from court records can protect legitimate privacy interests without causing proceedings to be closed or documents to be sealed. *In re Search Warrant* (S.D. Ohio Aug 20, 1996), 1996 WL 1609166.

Accordingly, IRI urges the Court, in accordance with its and others First Amendment rights, to keep the proceeds in this case open to the press and public.

Respectfully submitted,

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CERTIFICATION OF SERVICE

It is hereby certified that a copy of this Brief was served on June 23, 2005,
via the Court's electronic filing system, upon:

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