

**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.	:	

**BUCKEYE DIAMOND LOGISTICS’ BRIEF IN OPPOSITION
TO CHEP USA’S REQUEST TO LIMIT ACCESS TO COURT PROCEEDINGS**

I. Introduction

The controlling case in the Sixth Circuit regarding the right of access to civil litigation is Brown & Williamson Tobacco Corp. v. Federal Trade Commission, 710 F.2d 1165 (6th Cir. 1983). CHEP USA’s Bench Brief Regarding Confidential Information never mentions this case. Instead, in requesting that “for the duration of trial, this court exclude from the courtroom all persons except the Court’s personnel, the witnesses, and the parties counsel and representatives during any discussion of CHEP’s confidential and proprietary information,” CHEP Brief at 6, CHEP ignores the strong First Amendment presumption in favor of open courtrooms. Likewise, it declines the Court’s invitation to identify with particularity the harm that would befall it if the content of these exhibits is allowed in trial.

Exhibit A to CHEP’s brief sets forth in a boilerplate manner the supposed grounds for closing the Court. The simple response to this chart is that it fails to meet CHEP’s burden of showing “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, 464 U.S. 501, 510 (1984). In effect, CHEP seeks to reverse this burden, and place Buckeye in the position of having to prove each document does not contain a confidential trade secret. Nevertheless, Buckeye Diamond Logistics (“Buckeye”) has responded exhibit-by-exhibit to CHEP’s boilerplate assertions of confidentiality. Because such response requires discussing the content of documents CHEP has marked confidential under the Stipulated Protective Order in this case, Buckeye is filing that response separately, under seal, simultaneously with this filing. This Brief is intended to set forth the legal framework governing the high burden of overcoming the strong presumption that the courts of this nation will remain open.

II. The First Amendment Presumption that Civil Proceedings and Exhibits Will Be Open

In Brown & Williamson Tobacco Corp. v. Federal Trade Commission, 710 F.2d 1165 (6th Cir. 1983), the Sixth Circuit laid the framework for protection of the public’s right of access to civil trials. First, the court reviewed three historic benefits to open courtrooms:

(1) “[P]ublic trials play an important role as outlets for ‘community concern, hostility, and emotions.’” Id. at 1178.

(2) “Without access to the proceedings, the public cannot analyze and critique the reasoning of the court. Id.

(3) “[O]pen trial produce ‘true and accurate fact finding. ... Witnesses in an open trial may be less inclined to perjure themselves. Public access creates a critical

audience and hence encourages truthful exposition of the facts, an essential function of a trial.” Id.

The Sixth Circuit then went on to find that the First Amendment right to open access to trials applies as strongly in the civil as in the criminal context. Id. at 1198-79 (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 n. 17, 599 (1980); Gannett Co. v. DePasquale, 443 U.S. 368, 386 n. 15 (1979)).

The court then turned to the issue of whether Brown & Williamson’s data regarding tar and nicotine in its cigarettes could properly be sealed. In doing so, the Sixth Circuit created a high bar to courtroom secrecy or non-disclosure of exhibits. First, the court made clear that a conclusory statement that disclosure of information will be damaging “falls woefully short of the kind of showing that even raised an arguable issue as to whether it may be kept under seal.” 710 F.2d at 1180 (quoting Joy v. North, 692 F.2d 880, 894 (2d Cir. 1982)). Further, the court noted that an attitude of skepticism is appropriate with respect to corporate claims of the need for secrecy: “[C]ommon sense tells us that the greater the motivation a corporation has to shield its operations, the greater the public’s need to know.” 710 F.2d at 1180. Thus, the court found that the only time that public access should be denied was upon a clear showing of that a legitimate trade secret needed to be protected.

III. Recycler Interest in this Case Is Not Nefarious or Inappropriate

A substantial portion of CHEP’s Brief, and most of its exhibits, are designed to paint the picture that the interest of other recyclers in this case is nefarious or inappropriate. It is not surprising that CHEP does not want recyclers to know the facts of this case when it is trying to sell claim that a \$1.25 or \$1.50 return fee is a generous

payment for the willing work those recyclers do. That attitude, however, runs directly contrary to the fundamental right of interested parties to witness the adjudication of important rights in the courts of law. As discussed above, a fundamental reason for open trials is that “public trials play an important role as outlets for ‘community concern, hostility, and emotions.’” Brown & Williamson, 710 F.2d at 1178. Further, “[w]ithout access to the proceedings, the public cannot analyze and critique the reasoning of the court. Id. The fact that other recyclers who have suffered from CHEP’s practices are interested in this case reinforces the need for an open trial of this matter – those recyclers cannot fully judge whether the adjudication in this case affects their rights with respect to CHEP within knowing what evidence the Court has heard and how that evidence compares with their own experiences of CHEP.

This case is not about Buckeye as CHEP’s competitor – it is about Buckeye as CHEP’s victim. As Buckeye has said before, this case concerns CHEP’s systematic attempt to shift the cost of recovering pallets marked with its logo to recyclers such as Buckeye. Buckeye is a pallet recycler – it receives excess pallets and other scrap wood from customers, sorts usable pallets, repairs broken pallets and returns such pallets for further use in shipping goods between manufacturers, distribution centers and retail stores. Intermixed with the pallets coming into Buckeye are pallets painted blue and stenciled with CHEP’s logo.

Buckeye does not “lease” pallets like CHEP does, Buckeye’s claims in this case have nothing to do with any kind of competitive relationship CHEP and Buckeye have. This case does not concern any attempt by Buckeye to gain a foothold in the pallet leasing business. Rather, it involves whether CHEP has successfully and unfairly

transferred its cost of recovering pallets to recyclers such as Buckeye. CHEP claims, and this Court has found, that CHEP retains ownership of these pallets no matter to whom CHEP lets them be shipped to and no matter what the burden to a recycler's business the uncontrolled shipment of these pallets causes. The Court has found, however, that CHEP must defend at trial Buckeye's claim that CHEP is not entitled to be unjustly enriched by putting Buckeye in the position of serving as CHEP's unwilling collection agent for pallets CHEP has no ability to track and over which it has completely lost control. Pallet recyclers are justifiably interested in the outcome of that issue.

The evidence in this case – much of it from the documents CHEP seeks to bury in judicial catacombs – will show (1) that CHEP has knowingly created and maintained a system by which it is justly enriched by shifting the cost of recovering stray and unrecoverable pallets to Buckeye, and (2) that CHEP benefits from Buckeye's compelled recovery efforts by more than \$10 per pallet recovered. Obviously, CHEP would prefer that this conduct not be held up to public judicial scrutiny and not be reported in the trade press. A desire for secrecy, however, does not turn a piece of business information into a trade secret.

Indeed, CHEP's briefing itself unintentionally gives a compelling example of the need for an open trial and free access the exhibits offered in this case. Specifically, in Exhibit A, CHEP mislabels PX 35, an important document titled "Benefit of Paying Recyclers for Recovering CHEP Pallets (Per Pallet)," to suggest that it shows recyclers benefit CHEP "90 cents - \$3.54." CHEP apparently hopes, because the document itself remains sealed, that it can use its publicly filed document to convince recyclers interested in that case that this is all they can hope the trial will show they might receive on an

unjust enrichment claim is 90 cents to \$3.54.. Buckeye's response – which CHEP's designations require be sealed from public view – shows that this is simply not what the document says, and not how it will come into evidence. As the Sixth Circuit has noted, “[p]ublic access creates a critical audience and hence encourages truthful exposition of the facts, an essential function of a trial.” Brown & Williamson, 710 F.2d at 1178. Closing this trial, as this small example shows, would have exactly the opposite effect.

IV. The Standards Governing Determination of Whether Material is a Trade Secret Weigh Against CHEP

The Sixth Circuit has made clear that everything a party seeks to hide in litigation, even if kept secret in its business, is a trade secret. Confidential information that is merely embarrassing, as opposed to truly something that would give a competitor an advantage in a specific competitive setting, is not the sort of “trade secret” that the First Amendment allows to be hidden at trial. Brown & Williamson, 710 F.2d at 1180 (“common sense tells us that the greater the motivation a corporation has to shield its operations, the greater the public’s need to know”); Joy v. North, 692 F.2d at 894; In Re Continental Illinois Secur. Litigation, 732 F.2d at 1314 (ordering a special litigation report disclosed); In re Search Warrant for Northwest Enviroservices, Inc., 736 F.Supp. 238, 239 (W.D.Wash.1989) (finding that “[t]he avoidance of unfavorable publicity is an insufficient ground to override the public right of access to court records” in ordering disclosure of search warrant materials).

In order to constitute a legitimate trade secret, CHEP must show its secret information gives it a specific advantage over its competitors. See State ex rel. Besser v. Ohio State University, 89 Ohio St.3d 396 (2000) (rejecting trade secret claims for

information whose disclosure was not shown to give competitors an economic advantage); Oriana House, Inc. v. Montgomery, 2004 WL 2008473 (10th Dist. Ohio Ct. App. 2004) (“In this case, although the bank records of Oriana, CHS, and Lawrence are confidential and financial in nature, the information simply does not rise to the level of a trade secret. All businesses maintain financial records and most individuals have personal bank accounts. There is nothing unique about maintaining bank records. Normal, customary bank records do not contain information that if disclosed, would give competitors a business advantage over appellants.”); R.G. Engineering & Manufacturing, v. Rance, 2002 WL 31168521 (7 Dist. Ohio Ct. App. 2002) (“appellants provided no evidence that the pricing information or customer list had independent economic values not generally known to other persons who could obtain economic value from its disclosure or use”); Ramco Specialists, Inc. v. Pansegrau, 134 Ohio App.3d 513, 517-18 (1998) (pointing out the plaintiff’s burden to prove “the savings effected and the value to the holder in having the information as against competitors” in affirming a judgment that no trade secret had been proven because the information in question did not give plaintiff “an advantage over its competitors in the equipment and process it uses”). Further, “the concepts of novelty, uniqueness, and obviousness may be considered by Ohio courts in analyzing whether information is worthy of trade secret status, since these concepts reflect the level of secrecy and thus protectability of the information.” R & R Plastics, Inc. v. F.E. Myers Co., 92 Ohio App.3d 789, 801 (1993).

CHEP’s Brief offers no proof that disclosure of any of the materials listed would harm it competitively, and little in the way of specifics for the assertion that the more than 100 exhibits it seeks to keep from open court are legitimate trade secrets. CHEP

does not claim that any of these documents contain secret formulations, manufacturing processes or business techniques that are unknown to the public and give it a competitive advantage. Nor, apart from labeling recyclers its competitors, does CHEP ever explain how any of the data over which it seeks to close the courtroom could actually assist recyclers in competing with CHEP. Seeking fair compensation for services CHEP forces recyclers to perform, put simply, is not “competing” with CHEP.

Essentially the documents CHEP seeks to protect fall into a few discrete categories: internal discussions as to how to deal with the crisis created by the massive loss of pallets sent to NPDs, documents dealing with how to create a loss reserve for unrecovered pallets, documents dealing with creating a program to pay recyclers for the return of pallets, audited financial statements, customer agreements, manuals and policies dealing with recovering and washing pallets, reports of pallets sent to non-customers and highly redacted management reports (and data derived from those reports) that will be offered to show the information CHEP had regarding the difficulty it was having recovering pallets. As detailed in Buckeye’s Response to CHEP USA’s Exhibit A in Support Of Its Brief Seeking to Limit Access to Court Proceedings, none of these materials reach the high standard required to show a legitimate, protected trade secret.

Indeed, the only specific discussion of a trade secret CHEP gives for the more than 100 exhibits it seeks to keep confidential is one case that discusses the possibility that in some cases customer lists can be trade secrets. Ironically, as discussed in more detail in Buckeye’s Response to CHEP USA’s Exhibit A in Support Of Its Brief Seeking to Limit Access to Court Proceedings, the pertinent parts of these documents are actually

non-customer lists – lists of the non-participating distributors who have declined to do business with CHEP.

V. Even for Trade Secret Material CHEP Must Show that the Balance of Interests Weighs in Favor of Limiting Public Access

Further, as the Fourth Circuit pointed out in Rushford v. New Yorker Magazine, Inc., 846 F.2d 249 (4th Cir. 1988), the standard for supporting closing the court under the First Amendment is even higher than it is under the common law: “Under the First Amendment, ... the denial of access must be necessitated by a compelling government interest and narrowly tailored to serve that interest.” Even if CHEP could show that a portion of any of the documents it wants to keep from the public record is a legitimate trade secret – a burden Buckeye does not believe it can meet – CHEP cannot show such an overriding interest in protecting this information as to outweigh the First Amendment right to an open trial. Most of these materials are three or four years old. If they ever had competitive value, that value has long passed.

VI. CHEP’s Assertion that the Materials It Calls Confidential Have Been Protected from Public Disclosure Are Belied by Public Reports about CHEP’s Business and Finances

Furthermore, once material is publicly disclosed, it loses any status it ever had as a trade secret. Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984)). Similarly, it is well established under Ohio law that information that is generally known in an industry is not “secret” and cannot be afforded trade secret protection. See Wiebold Studio, Inc. v. Old World Restorations, Inc., 19 Ohio App.3d 246 (1985); B.F. Goodrich Co. v. Wohlgemuth, 117 Ohio App. 493 (1963).

CHEP, contrary to Mr. Potts affidavit, has not maintained the secrecy of much of the information it asserts requires closing the courtroom in this case. Rather, both in sharing information with industry analysts and in the public reports of its general partner, Brambles, CHEP has widely disseminated much of what it now seeks to protect. Just a few examples of the dissemination of this supposedly confidential data are:

- Credit Suisse/First Boston's February 27, 2002 Report titled "Brambles Industries: CHEP USA—broken or damaged?" (relevant pages attached as Appendix A (parts 1 and 2)), which discusses in detail, among other things, declines in CHEP's asset turns and increases in dwell time, increases in pallet damage rates, growing portions of lost pallets, costs of pallet leakage, details regarding CHEP's financial statements and detailed information concerning CHEP's largest customers.
- Credit Suisse/First Boston's April 20, 2005 Report titled "Brambles: CHEP Americas Presentation" (attached as Appendix B), which discusses a conference call analysts had with CHEP Americas executives in which detailed information was shared regarding NPD strategy and conversions, financial results, costs and specific customer arrangements.
- CHEP's report of half-year results for the year ending December 31, 2001 (attached as Appendix C), which discusses CHEP's NPD problem and strategy and details the changes it made in accounting for depreciation and to create a loss reserve for pallets not recovered from NPDs.

VII. Any Genuine Concerns About Confidentiality on CHEP's Part Can Be Handled by Very Limited Redaction of Documents

Finally, if the Court finds that any of CHEP's confidentiality concerns reach the level of trade secret information, such concerns, as this Court held in In re Search Warrant, 1996 WL 1609166 (S.D. Ohio Aug 20, 1996), are best addressed by allowing CHEP to make minor redactions to the exhibits than by closing the courtroom. Since CHEP has offered only boilerplate descriptions of its basis for the secrecy it seeks to impose on these proceedings, Buckeye cannot anticipate what in those documents CHEP seriously considers a trade secret. However, if CHEP can show any such information exists, it should be required to prepare a proposed redacted version of the exhibits, in order to minimize the intrusion into the First Amendment protections accorded civil trials. Indeed, where only portions of documents relevant to the proof in this case, Buckeye has no objection to CHEP submitting versions with redacted information that does not bear on the claims in this case. That burden, however, should fall on CHEP, not Buckeye.

VIII. Conclusion

Trial in this matter should not be closed. CHEP has not shown any legitimate trade secret interest in the documents it seeks to keep from open court to justify an abrogation of the fundamental principle that trials should be open. Immaterial confidential information can be redacted from exhibits if CHEP chooses to bear that

expense. Information from those documents relevant to the claims in this case is not trade secret and should not be hidden from the public.

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CERTIFICATE OF SERVICE

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