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

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

CHEP USA'S MEMORANDUM IN OPPOSITION TO INDUSTRIAL REPORTING, INC.'S MOTION TO INTERVENE AND IN FURTHER SUPPORT OF MAINTAINING CONFIDENTIALITY OF PROTECTIVE ORDER

This case involves two business competitors – CHEP and Buckeye. The questions of whether or not CHEP has been unjustly enriched by Buckeye's actions or the extent to which CHEP has been damaged by Buckeye's conversion of its pallets involve factual issues which are unique to the Buckeye-CHEP litigation.

Despite Buckeye's repeated efforts to turn this into a "war on CHEP" or an industry crusade, the matter remains a private dispute between two private litigants. It does not involve discrimination, voting rights, antitrust, government regulation, public health or safety. It is a commercial dispute in which Buckeye is seeking to use the Court as a bully pulpit to eliminate CHEP from the field ("If everybody in the pallet industry would refuse to do any business with CHEP for 30 days, they would be done in the U.S." Sam McAdow, Pallet Profile, August 5, 2003, attached as Exhibit A). By causing the disclosure of dozens of confidential proprietary records including profit and loss and other financial statements and other trade secrets including customer lists and strategic planning records, Buckeye hopes to disrupt CHEP's Asset Recovery

Program (ARP) in a manner it cannot hope to accomplish in the context of the merits of the instant litigation:

> CHEP has been successful in keeping under wraps many things that Buckeye wanted to include in the case. But what Buckeye has managed to get put into the record may be damaging enough if the Protective Order is lifted.

(Pallet Profile, September 2004, attached as Exhibit B.)

Moreover, despite the fact that Industrial Reporting, Inc. ("IRI") claims it has reviewed CHEP's brief on this issue (Doc. # 175 at p. 2), IRI completely ignores the argument and case law cited by CHEP in support of its position. Rather, IRI relies on cases involving the government, criminal activity, and the health and safety of the American public at large. The case on which IRI and Buckeye relies so heavily, Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165 (6th Cir. 1983), is not only inapplicable, it actually supports CHEP's position.

Brown & Williamson involves a case between a cigarette manufacturer and the Federal Trade Commission in a preenforcement challenge to proposed changes. Conversely, the instant action does not involve the government or an administrative record. Again, this is a case between two private business competitors. The Brown & Williamson court expressly explained that there is a common law exception to the presumption in favor of openness when the litigation involves competing interests. Despite quoting extensively from the Brown & Williamson decision, IRI and Buckeye noticeably ignored the following discussion by the court:

> The right of access is not absolute, however, despite these justifications for the open courtroom. Courts have carved out several distinct but limited common law exceptions to the strong presumption in favor of openness. The exceptions to the practice of maintaining openness in the courtroom fall into two broad categories: those based on the need to keep order and dignity in the courtroom and those which center on the content of the information to be disclosed to the public.

* * * *

> It is the second group of limitations on access to court proceedings that concerns us here. Under the common law, content-based exceptions to the right of access have been developed to protect competing interests. In addition to the defendant's right to a fair trial, these interests include certain privacy rights of participants or third parties, trade secrets and national security. See Nixon v. Warner Communications, Inc., 435 U.S. 589, 598, 98 S. Ct. 1306, 1312, 55 L.Ed.2d 570 (1978); Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings,* 91 Harv.L.Rev. 1899 (1978).

Brown & Williamson, 710 F.2d at 1179 (emphasis added). The Brown & Williamson court concludes that "a court should not seal records unless public access would reveal legitimate trade secrets, a recognized exception to the right of public access to judicial records." Id. at 1180 (emphasis added). Thus, the very case on which IRI and Buckeye rely weighs in favor of limiting public access to CHEP's confidential and proprietary information and trade secrets.

It should not go unremarked that counsel for IRI (a Virginia corporation) is represented by another of Buckeye's lawyers, Austin P. Wildman of London, Ohio. Thus, it is clear that IRI is not "neutral" in the sense that the New York Times or the Dayton Daily News is neutral. Finally, with all deference to IRI, it does not report on items of great public interest. It is a publisher of periodicals reporting solely on the pallet industry.

Because IRI fails to cite any authority that would prohibit the Court from limiting public access in this case as requested by CHEP, IRI's Motion to Intervene should be denied and the Court should afford both CHEP and Buckeye the confidentiality to which they agreed at the outset of this private dispute.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Defendant's Trial Brief was served this 23th day of June, 2005, via the Court's electronic filing notification, upon:

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