

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

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. :

**DEFENDANT’S MOTION FOR RECONSIDERATION OF THE  
COURT’S DECISION ISSUED MARCH 15, 2004 (DOCKET # 89), UNSEALING  
DOCUMENTS RELATING TO SUMMARY JUDGMENT MOTIONS**

CHEP USA respectfully requests that this Court reconsider its March 15, 2004 Decision and Entry (Docket #89) sustaining in part Plaintiff Buckeye Recyclers’ (“Buckeye”) request to unseal the various documents correlating to the Court’s Docket Numbers 28, 29, 30, 33, 34, 35, 36, 37, 38, 40, 41, 42, and 43. **CHEP has no objection to the following documents being**

**unsealed:**

- Docket #29 (Buckeye’s Motion for Summary Judgment on CHEP USA’s Claims);
- Docket #33 (CHEP’s Reply Memorandum in Support of its Motion to Compel and In Opposition to Buckeye’s Motion for Protective Order);
- Docket #34 (Buckeye’s Reply Memorandum in Support of Motion for Protective Order);
- Docket #35/38 (CHEP’s Memorandum in Opposition to Buckeye’s Motion for Summary Judgment on CHEP USA’s Claims---duplicates of the same document have been assigned two docket numbers: 35 and 38);

- Docket #41 (CHEP's Reply Memorandum in Further Support of its Motion for Summary Judgment); and
- Docket #42 (Buckeye's Reply Memorandum In Support of Motion for Summary Judgment on CHEP USA's Counterclaims).

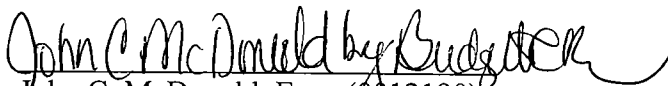
However, as is addressed in greater detail herein (and as CHEP attempted to explain in its May 6, 2003, Memorandum—Docket #59), with respect to Docket Numbers 28, 30, 36, 37 (Docket # 36 and 37 are duplicates of the same document), 40, and 43, there is good cause to keep these documents sealed because they contain sensitive commercial information that CHEP takes reasonable steps to protect from disclosure and that would be of use or benefit to one of CHEP's many competitors or otherwise disadvantage CHEP in the marketplace.

By way of example, the sensitive commercial information at issue includes, but is not limited to, contracts between CHEP and its customers, not mere references to contracts, but the contracts themselves, complete with pricing, volume and identification of key contact people. Several of these contracts contain express confidentiality stipulations encompassing the very information contained within the contracts that Buckeye seeks to open to the world. This information is of the sort that is known only to those within CHEP who have a business reason to know and is not information that CHEP has ever revealed publicly---let alone revealed to its competitors.

In addition, the five filings in controversy are all related to the summary judgment proceedings. This Court issued a thorough and well-reasoned decision on summary judgment. Given the Court's Decision (issued over six months ago and into which the parties' respective filings are essentially merged), there is no compelling (or urgent) need to now make public the arguments and evidentiary material submitted prior to that Decision, certainly not one that warrants compromising CHEP's confidential and proprietary information.

A supporting memorandum and the Affidavit of Elton Potts are offered in support of this Motion.

Respectfully Submitted,



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**MEMORANDUM IN SUPPORT**

**I. INTRODUCTION**

No one other than CHEP's competitors would have any reason to want to view CHEP's gross revenue information, CHEP's internal accounting information, CHEP's equipment costs, very specific customer information (including, but not limited to, pricing, volume, anticipated future growth, and key contact people), and information concerning what CHEP pays to its third-party service providers. It is this type of information that CHEP seeks to protect from broad-spectrum public availability.

It is well within the Court's discretion to afford CHEP the reasonable protection of sealing highly confidential and proprietary business information from broad public disclosure. All that this Court need do is determine that CHEP has good cause to keep its confidential and

proprietary information under seal. There are four categories of information that deserve protection here: (1) internal financial information; (2) internal strategy/business planning information; (3) customer information relating to CHEP's pricing, volume, projected growth and service and (4) specific customer information which CHEP is contractually obligated to protect and which contains competitively sensitive information. The information CHEP seeks to protect is confidential, proprietary, detailed information directly related to CHEP's business and absolutely intended to remain confidential by CHEP and its customers (and treated accordingly by CHEP). CHEP does not publicly disclose this information and has gone to great lengths to maintain the confidentiality of such information. It is information of the sort that, if opened to CHEP's competitors, would provide them an unfair advantage in the marketplace. In addition, the public disclosure of such information could cause disruption to CHEP's customer relationships -- again to the benefit of CHEP's competitors and to CHEP's detriment.

CHEP has not been alone in its concerns about the disclosure of its sensitive business information to competitors. Buckeye, the very party who seeks to throw open to the world CHEP's confidential and sensitive business information, refused to provide CHEP with information about the source of the CHEP pallets that came into its possession and has recurrently criticized CHEP for merely asking the question.<sup>1</sup> In addition, any reference to customer or sales information, profit & loss statements and financial statements that Buckeye has produced in this litigation have been marked by Buckeye with the "Outside Attorney's Eyes Only" designation, presumably because Buckeye regards *its* internal financial information,

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<sup>1</sup> In an effort to stem the flow of CHEP pallets into recycler's hands, an earlier version of CHEP's Asset Recovery Program sought from recyclers information about the source of the CHEP pallets coming to them. Buckeye has repeatedly complained that CHEP's mere request for this information, notwithstanding the legitimate purpose behind the request, is an unfair effort to obtain the recycler's customer information in order that CHEP might compete for that customer's business. (See, Buckeye's Memorandum in Opposition, pp. 13-15-Docket #40- and S. McAdow, Jr., Depo., p. 14-filed Feb. 19, 2003).

customer and sales information as proprietary and confidential. (See, e.g., attachments to Docket No. 10, CHEP's Memorandum in Opposition to Motion to Remand, filed 3/21/02).

Leaving aside the inconsistency in Buckeye's desire to protect its accounting, customer and sales information, and its desire to expose CHEP's sensitive internal financial and customer information, CHEP has good reason to be concerned about the motivation behind Buckeye's efforts to lay CHEP's sensitive and proprietary information bare. Buckeye's Chairman of the Board, Sam McAdow, Sr., is a frequent contributor to *The Pallet Board* ([www.palletboard.com](http://www.palletboard.com)), a web-based bulletin board frequented by CHEP's competitors. Mr. McAdow has used this forum to disseminate virtually every bit of information concerning CHEP to which he has been given access. Moreover, CHEP's competitors frequently post messages that show that they are waiting with baited breath for the Court to disseminate information about CHEP. (See pages 14-15 herein, and attachments "A" through "M").

Unsealing the disputed documents (Docket #28, 30, 36, 37, 40, and 43) would not, in any way, impact the pending litigation. Through informal agreement between the parties, Buckeye's Chairman has been provided access to the disputed confidential material. Thus, Buckeye has had what it needs for trial preparation. Therefore, Buckeye's needs have been satisfied, but there are, less legitimate motives likely at work here. Multiple examples exist of Buckeye's singular, controlling motive to harm CHEP in any way possible, including making public -- and even promoting -- much of CHEP's financial information, internal planning and strategies, pricing information, and customer information. The fact that Buckeye and CHEP share several customers means that Buckeye also has a *competitive* motive for seeking to gain access to CHEP's proprietary and confidential information. As set forth both here and in CHEP's Memorandum Contra Buckeye's Motion to Unseal the Documents (incorporated herein by

reference---Docket #59), there are numerous examples of Buckeye's "war on CHEP" which go far beyond the confines of the instant litigation. The Court should not allow Buckeye to use this litigation to further its marketplace battles.

## **II. FACTUAL BACKGROUND**

### **A. The Inclusion of CHEP's Confidential and Proprietary Information in a Number of the Sealed Documents Warrant These Documents Remaining Sealed.**

As noted above, CHEP is not arguing that every document implicated by the Court's Order should remain under seal. Rather, CHEP has focused only on the very sensitive and competitively valuable business information known only to those within CHEP who have a need-to-know. The information that appears throughout Docket Numbers 28, 30, 36, 37 (Docket Numbers 36 and 37 are duplicates of the same document), 40 and 43 fall into four categories of information that deserve protection: (1) internal financial information; (2) internal strategy/business planning information; (3) customer information relating to CHEP's pricing, volume, projected growth and service and (4) specific customer information which CHEP is contractually obligated to protect and which contains competitively sensitive information. The information CHEP seeks to protect is confidential, proprietary, detailed information directly related to CHEP's business and absolutely intended to remain confidential by CHEP and its customers (and treated accordingly by CHEP). CHEP does not publicly disclose this information. It is information of the sort that, if opened to CHEP's competitors, would provide them an unfair advantage in the marketplace and cause harm to CHEP.

Below is a matrix showing the specific proprietary and confidential information in the sealed documents that warrant protection and justify maintaining them under seal:

Docket Number	Document Description	The nature of the information at issue	Why it should be maintained in a sealed fashion (See, Elton Potts Aff.)
28	Appendix filed by Defendant CHEP (in connection with Summary Judgment)	<p>There are multiple pages within Docket No. 28 that warrant continuing to maintain it under seal:</p> <ul style="list-style-type: none"> <li>(1) Ex. 7 to Potts' Affidavit;</li> <li>(2) Norder Affidavit, at Para. 4;and</li> <li>(3) Exhibits 1, 2 and 3 to Norder Affidavit.</li> </ul>	<p>With respect to Ex. 7 of the Potts Affidavit, this document reveals the name, address and contact person of a member of the recycling industry that is cooperative with CHEP with respect to returning pallets. This is information that CHEP does not reveal to those outside of CHEP, takes reasonable steps to maintain the confidentiality of and would be useful to others in the recycling industry who (as is exemplified by The Pallet Board) are interested in disrupting CHEP's relationship with cooperative recyclers. Moreover, it is appropriate to protect this neutral third-party from annoyance or harassment, which may occur if its name is revealed publicly.</p> <p>With respect to the Norder Affidavit, at Para. 4, there is a disclosure of CHEP USA's annual rental revenue. This is information that CHEP does not reveal to those outside of CHEP and takes reasonable steps to maintain in a confidential manner. Although CHEP's parent reveals certain information concerning revenues, it does not do so with this same level of detail and in this precise format.</p> <p>With respect to Exhibits 1, 2, and 3 of the Norder Affidavit, these are Rental Agreements that reveal CHEP's customer's name and contact person as well as the terms of the business relationship between CHEP and the customer reflected thereon. CHEP does not reveal the identities of its customers and the names of contact persons within the customer-organization to those outside of</p>

			CHEP and takes reasonable steps to maintain in a confidential manner. This is information of the very sort that Buckeye does not want to reveal to CHEP, because the two businesses are competitors for many of the same customers. For the same reasons, CHEP protects this information and does not reveal it to competitors.
29	Plaintiff's Motion for Summary Judgment on CHEP USA's Claims	<b>CHEP has no objection to it being unsealed</b>	
30	Plaintiff's Motion for Summary Judgment on Count I of its Complaint	<p>There are several items within Docket No. 30 that warrant continuing to maintain it under seal:</p> <ul style="list-style-type: none"> <li>(1) Page 5 contains references to the "FIFO inventory value" for pallets and internal accounting treatment for same;</li> <li>(2) Page 7 contains references to the specific contents of a consulting report;</li> <li>(3) Page 9 contains references to a specific customer relationship and internal accounting adjustments related to same;</li> <li>(4) Page 13 contains references to the relationship between fees charged to CHEP</li> </ul>	<p>Items 1, 3 and 4 (identified in the column to the left) are all references to various internal accounting actions taken by CHEP. This is information that CHEP does not share with people outside of CHEP (with the exceptions of auditors, with whom it has privilege under Florida law, and its parent, Brambles). CHEP takes reasonable steps to safeguard this information from disclosure. It is, in addition, information that would be of use or benefit to CHEP's competitors.</p> <p>With respect to Item 2 (the consulting report), this is a report that, on its face, says "This information is confidential and was prepared by XXX solely for the use of our client it is not to be relied on by any 3<sup>rd</sup> party without XXX's prior written consent." While the factual underpinnings of the consultant's report have been seriously called into question by a number of witnesses' questions about the report (See, Norder, pp. 205-206, Miller, pp. 84-85, and Kirk, p. 66) the fact remains that CHEP takes reasonable steps to safeguard this information from</p>

		<p>customers and accounting treatment of the pallets as well as CHEP's actual acquisition costs for certain materials.</p>	<p>disclosure. It is, in addition, information that would be of use or benefit to CHEP's competitors. Moreover, given the express confidential-label on each page of the consultant's reports from which these references were taken, it should be safeguarded by remaining sealed.</p>
<p>30 (Exhibits)</p>	<p>Exhibits to Plaintiff's Motion for Summary Judgment</p>	<p>The categories of confidential and proprietary information contained throughout Docket #30 are five:</p> <p><b><u>Customer Specific Info.</u></b></p> <p>(1) Contracts between CHEP and its customers which include terms of the relationship, fees, financial terms, anticipated growth, projections, volumes, pricing adjustment, and contact people at the customer (See Tab I; Tab J at pp: 69 – 70 and, 92; Tab Y). Certain of those documents contain express confidentiality stipulations between CHEP and its customer. (See, Tab I and Tab Y).</p> <p><b><u>Internal Financial Info.</u></b></p> <p>(2) Internal accounting accruals and write-offs (See,</p>	<p>CHEP takes reasonable steps to safeguard all of the types of information described in the column to the left. These types of information have competitive value and CHEP would be competitively disadvantaged by the disclosure of this information.</p> <p>The information described in the column to the left includes very specific customer information --- information that CHEP does not release internally except for those in the company with a need to know. Information from customer contracts is never disclosed outside the company. The release of such information would put CHEP at extreme competitive disadvantage, and would harm CHEP in the marketplace, and may also be harmful to CHEP's customers. Absent litigation and a carefully and properly crafted protective order (of the sort in place in this case), it is questionable whether CHEP could lawfully disclose such information to its competitors. Unsealing these records would have the same anti-competitive effect.</p> <p>The same holds true of the internal financial information and the strategy and planning information described in the column to the left. CHEP does report certain of this information <u>and</u></p>

		<p>Tab J, pp. 153 – 159, 223 – 224; Tab P, pp. 18, 20 – 21, 27 – 64; and Tab Q)</p> <p>(3) Internal Financial Data ---such as profit/loss info, margins &amp; costs (See, Tab W; Tab CC, pp. 13 -1 16 and 26; and Tab J, pp. 72)</p> <p><b><u>Business Strategies &amp; Improvement Planning</u></b></p> <p>(4) (See, Tab K, pp. 77 – 90; Tab J, pp. 153 – 156; Tab R; Tab U, and Tab X)</p> <p><b><u>Internal Reporting about Product Movement</u></b></p> <p>(5) (See Tabs S, T &amp; U)</p>	<p>information about pallet movement but does so in a broad summary fashion and not in the sort of specific detailed fashion produced by CHEP for Buckeye specifically subject to the protective order.</p>
33	<p>Defendant’s Reply Memorandum in Support of its Motion to Compel and In Opposition to Plaintiff’s Motion for Protective Order</p>	<p><b>CHEP has no objection to this document being unsealed</b></p>	
34	<p>Plaintiff’s Reply Memo in Support of Motion for Protective Order</p>	<p><b>CHEP has no objection to this document being unsealed</b></p>	
35/38	<p>Defendant’s</p>		

(duplicates of the same doc.)	Memorandum in Opposition to Plaintiff's Motion for Summary Judgment on CHEP USA's Claims	<b>CHEP has no objection to this document being unsealed</b>	
36/37 (duplicates of the same doc.)	Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment on Count I of its Complaint	At page 11 of the memorandum, there is a reference to the revenue generated with respect to an <u>identified</u> CHEP customer.  At pages 15-16 of the memorandum, there is discussion of specific customer names.	This is information of the type that CHEP safeguards from disclosure. Other than internally, and then limited to those with a need-to-know, CHEP never discloses to third-parties what revenue it generates from any particular customer. This would be information that would be very useful to a competitor of CHEP and would give that competitor an unfair advantage in competing against CHEP for that customer's business.
40	Plaintiff's Memorandum in Opposition to CHEP USA's Motion for Summary Judgment	The categories of information contained throughout this document that are confidential and proprietary to CHEP are:  (1) Internal financial and accounting information (i.e. pp. 9 & 33 referring to gross margin and internal accounting treatments: pp. 14, 18 and Tab G referring to profit data; pp. 33 – 34 referring to accruals & write offs).  (2) Customer Information (i.e. pp. 9 – 12, 26, and 37).  (3) Business Strategy & Improvement	CHEP takes reasonable steps to safeguard all of the types of information described in the column to the left. These types of information have competitive value and CHEP would be competitively disadvantaged by the disclosure of this information.  Much of the information described here is the same type of customer-specific information or internal financial information or strategy/planning information discussed above. For the same reasons noted above, this information should be maintained in a sealed fashion.

		<p>Planning (i.e. pp. 9-12, 14, 21, 32, 38, and Tabs B, D, &amp; J)</p> <p>(4) The documents that the Court has excluded from evidence by <u>granting</u> CHEP's Motion in Limine concerning (See pp. 9 – 12 and Docket #89 at p. 11)</p>	
41	Defendant's Reply Memorandum in Further Support of its Motion for Summary Judgment	<b>CHEP has no objection to this document being unsealed</b>	
42	Plaintiff's Reply Memorandum In Support of Motion for Summary Judgment on CHEP USA's Counterclaims	<b>CHEP has no objection to this document being unsealed</b>	
43	Plaintiff's Reply Memorandum in Support of Motion for Summary Judgment on Count I of its Complaint	<p>The categories of confidential and proprietary information throughout this document are:</p> <p>(1) Internal Financial &amp; Accounting Information (See, pp. 3 – 6 referring to pricing; p. 7 and Tab A – Norder pp. 205 and 88 referring to margin &amp; profit information and</p>	<p>CHEP takes reasonable steps to safeguard all of the types of information described in the column to the left. These types of information have competitive value and CHEP would be competitively disadvantaged by the disclosure of this information.</p> <p>Much of the information described here is the same type of customer-specific information or internal financial information or strategy/planning information discussed above. For the same</p>

		<p>accounting treatments; and pp. 14 – 16 and Tab A – Norder Depo p. 88 referring to fees &amp; costs).</p> <p>(2) Customer Information, e.g. Tab A, Norder Depo, p. 88.</p> <p>(3) Business Strategy, Improvement Planning, and internal asset management information, see, e.g. pp. 3 – 6, 10, Tab A, pp. 10, 14.</p>	<p>reasons noted above, this information should be maintained in a sealed fashion.</p> <p><b>See prior page</b></p>
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The matrix above and the Affidavit of Elton Potts demonstrate that there is a compelling need to maintain CHEP’s confidential and proprietary information under seal. CHEP produced highly sensitive and commercially valuable business information in good-faith reliance on the safeguards reasonably afforded by the Protective Order. CHEP has demonstrated above and through the Affidavit of Elton Potts that certain of the information contained within Docket Nos. 28, 30, 36, 37<sup>2</sup>, 40 & 43 constitute confidential and proprietary business information worthy of being maintained under seal. Good cause exists for continuing to keep this commercially valuable information under seal.

**B. *The Pallet Board Postings Reveal the Improper Motive Behind Buckeye’s Efforts to Reveal CHEP’s Confidential and Proprietary Information***

Attached hereto are a *few* of the many, many postings by Mr. McAdow about CHEP:

**Ex. A** February 25, 2004, posting made shortly after Mr. McAdow received access to the trial exhibits revealing, in exact dollar figures, what CHEP paid a third-party service provider for washing its pallets, for replacement parts and for repair. (Also included is a responsive posting by “Joe Pallet” suggesting that recyclers

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<sup>2</sup> Docket #36 – 37 are duplicates.

treat CHEP pallets in the following fashion, “burn them-grind them-break them down-bury them” and another responsive posting by “Pallet Boy” suggesting that the EPA should be contacted about the third-party service provider that CHEP used to do washing to see if they are violating waste water discharge and reporting requirements.)

- Ex. B** February 3, 2003, posting by Sam McAdow setting forth all of the issues in the lawsuit.
- Ex. C** February 17, 2003, posting by Sam McAdow soliciting contributions to Buckeye’s legal fund.
- Ex. D** August 15, 2003, posting by Sam McAdow discussing his motivation for initiating this lawsuit and suggesting that the recycler community initiate a coordinated boycott of CHEP for 30-days.
- Ex. E** August 15, 2003, posting by Sam McAdow pointing the recycler community to the fact that the Court’s decision reveals information that was previously protected from disclosure due to the Protective Order. (There is also a responsive posting on August 17, 2003, by “Pallet Phil” looking to obtain a copy of the Court’s decision.)
- Ex. F** August 20, 2003, posting by Sam McAdow offering to provide a copy of the Court’s decision on request.
- Ex. G** August 21, 2003, posting by Sam McAdow advising Pallet Board readers where they can download a copy of the Court’s decision.
- Ex. H** September 22, 2003, posting by Sam McAdow characterizing CHEP’s position regarding unapproved transfers of its pallets (this position was part of the memoranda filed with the Court on September 8 & 12, 2003—Docket Nos. 66,68).

The postings by CHEP’s competitors, in addition to those by Mr. McAdow and the responsive postings noted parenthetically above, reveal how voracious CHEP’s competitors are when it comes to learning any information produced by CHEP in this lawsuit. While there are literally hundreds of postings expressing a vengeful sentiment toward CHEP on *The Pallet Board*, here are a few demonstrating the acute interest that CHEP’s competitors have in using this lawsuit to acquire information about CHEP’s business activities:

- Ex. I** May 3, 2003, posting by “Woodbug” issuing a rallying cry to recyclers to attend the trial of this lawsuit: “...we should have a pallet meeting in Ohio and show up

in court. I wonder what the judge would think if 250-300 of us showed up? We could...go to court, do lunch and discuss all the news we just heard, go back to court for the day...and make more plans of how to market lost pallets..."

**Ex. J** May 5, 2003, posting by "Joebro" (responding to Woodbug), "Excellent idea Woodbug, maybe we should show up for court in support of Sam."

**Ex. K** March 18, 2004, posting telling Board watchers to "keep your eye on the courts" with reference to information that CHEP has "tried to hide."

**Ex. L** March 15, 2004, posting addressing the amount that CHEP pays to have its pallets washed (information that Mr. McAdow revealed through his February 25, 2004, posting).

**Ex. M** March 3, 2004, posting that, "I have heard that the proverbial stuff is about to hit the fan...stay tuned this is good stuff."

These website postings demonstrate that CHEP's concerns about the dissemination of its confidential and proprietary information to an eager group of competitors are well justified. The highly sensitive nature of the information at issue, coupled with its commercial and competitive value, when added to the seemingly motivation behind the effort at exposure, warrants maintaining CHEP's confidential and proprietary information under seal.

### **III. ANALYSIS**

#### **A. If a Party Demonstrates Good Cause, a Court is Well Within Its Discretion to Seal the Record or Certain Evidence.**

CHEP does not dispute that there is a presumption of access to judicial proceedings. *Nixon v. Warner Comm., Inc.*, 435 U.S. 589. However, the presumption is not absolute, and a trial judge has discretion to consider the relevant facts and circumstances in determining whether the presumption should stand. *Id.* at 599. A court, in its sound discretion, may seal the record for good cause. Fed.Civ.R. 26(c)(7). This exception is designed to encourage disclosure: "If [parties] suspect that their trade secrets may fall into the wrong hands, parties may be

uncooperative with respect to discovery requests. Assuring the safety of these sensitive disclosures often has the effect of encouraging the apprehensive litigants to fully cooperate with the discovery process.”<sup>3</sup> *Star Scientific, Inc. v. Carter*, 204 F.R.D. 410, 413-414 (S.D.Ind. 2001). Determining whether good cause exists “requires a balancing of the potential harm to litigants’ interests against the public’s right to obtain information concerning judicial proceedings.” *Id.* at 415.

In *Star Scientific*, the court found good cause to grant a protective order and seal the record relating to two kinds of confidential information: (1) customer lists, information relating to consumer purchasing habits, pricing information, sales techniques and sales volumes and (2) information relating to the operation and handling of Plaintiff’s tobacco-cutting barns and the processing of burley tobacco, including a contract with a local farmer. First, the court noted that customer lists and pricing information are protectable trade secrets, as are consumer purchasing habits and sales techniques. *Id.* at 415. So too is information relating to plaintiffs’ method of conducting its business. *Id.* Because plaintiffs may suffer great economic harm if the information is disclosed, the court found good cause to seal the record. The court held:

Plaintiffs make a sufficient showing of good cause for the Court to enter a protective order. In the event that their trade secrets and confidential information are subjected to public dissemination (most notably, to one of its competitors), Plaintiffs may suffer great economic harm. For instance, discovery of Plaintiff’s customer lists, research relating to consumer purchasing habits, pricing information, and sales techniques and volumes may lead to a competitive disadvantage, and would permit Plaintiffs’ competitors to utilize the discovery process for improper purposes. [citation omitted]. Similarly, a competitor’s access to information relating to how Plaintiff’s process their product, its research and development, along with the terms and conditions of a contract with one of

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<sup>3</sup> Had CHEP known that there was a risk that these documents would be published to the world, it would have brought each of the above-cited items of confidential and proprietary information to the Court’s attention at the time that the document or information was requested, rather than rely on the protections afforded by the Protective Order. Had CHEP brought each of these issues to the Court’s attention at the time, this case would likely still be in its preliminary stages, rather than poised for a final hearing on damages. See, *Zenith v. Matsushita*, 529 F. Supp 866, 875 (E.D. Pa. 1981) which recognized that confidential information produced by a party who has voluntarily entered into a protective order to facilitate discovery, is more likely to be treated as such by the court.

their customers, also present potential dangers and may lead to a windfall to the discovering party.

[*Id.* at 416].

There can be no dispute that Buckeye's sole motivation is to disrupt CHEP's business, which Buckeye will accomplish if the seal is lifted. Buckeye, an avid competitor of CHEP, would (as it has in the past) disclose to the entire industry CHEP's internal financial information, customer information, protected customer contracts, sales techniques, sales volumes, financial projections and analysis, and the list goes on and on, as demonstrated by the chart, *supra*. Public disclosure of the information in question will have no impact whatsoever in the outcome of this litigation –the detailed financial, strategic and customer information was considered in the context of issues that were resolved by summary judgment months ago<sup>4</sup>. The sole purpose for public disclosure at this juncture is to put CHEP at economic disadvantage in the marketplace! This is not a case of great public interest in the confidential information - to be sure, the only interest in the information comes from Buckeye's cohorts and other CHEP competitors (Buckeye already has access to the information but may not disclose it to the public.) *See Walker Systems, Inc. v. Hubbell, Inc.*, 188 F.R.D. 428 (holding that a protective order should be granted “especially in cases between direct competitors”).

CHEP will be irreparably harmed by the unsealing of all of the documentary evidence and testimony it compiled in defending itself and prosecuting its rights in this Court. This is not a case of confidential and proprietary information limited to a single division, one region, a particular office or a particular customer. Rather, the information Buckeye wants to publish is vast and sweeping and thoroughly covers every aspect of CHEP's business ranging from its

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<sup>4</sup> Even if arguably relevant to the few remaining issues reserved for trial, this memorandum and the supporting affidavit of Elton Potts provides the “compelling need” to protect CHEP's confidential business information from broad-spectrum public disclosure through continuing to maintain these documents under seal.

accounting records to its sales practices, pricing its distribution methods and the contracts of some of its most important customers. There can be but one conclusion as to why Buckeye seeks to publish this information, and that reason is totally unrelated to the merits of this case. Buckeye's objective is to impose long-lasting harm on CHEP and to subject CHEP to improper competitive forces, all to the benefit of Buckeye and CHEP's competitors.

**B. The Very Nature of the Information Calls for its Protection; Buckeye's Improper Motive Confirms that Fact.**

Disclosure for an improper purpose, such as placing a competitor under economic disadvantage in the marketplace, necessitates a finding of good cause for a protective order and sealing of the record. *See, e.g., United States v. Corbitt*, 879 F.2d 224, 228 (7<sup>th</sup> Cir. 1989) (*quoting Nixon, supra*, at 598) (“common law right of access is a flexible concept, which allows the district court to deny access where its records would be used for ‘improper purposes’ specifically, the discretionary decision whether to release judicial records should be informed by a ‘sensitive appreciation of the circumstances that led to...[the] production [of the particular document in question]’”); *United States v. Edwards*, 672 F.2d 1289, 1293 (7<sup>th</sup> Cir. 1982) (“Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes...[T]he decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.”).

So too here, Buckeye only seeks disclosure of this information for personal gratification or to pressure CHEP and escalate the stakes in its so-called "war." Disclosure will in no way alter the outcome of this litigation. Indeed, the very issues for which CHEP's exhibits were presented have already been decided! The record is replete with examples of Buckeye's attempts to end-run this litigation one way or the other to suit its own needs, which is solely to irreparably

damage CHEP, place it at an economic disadvantage and damage its relationships with its customers. This is exactly the type situation where courts refuse public disclosure of confidential and proprietary business information.

**C. Even Giving Buckeye the Benefit of the Doubt, There is no Legitimate Need for the Unsealing of Summary Judgment Documents at this Stage of the Litigation.**

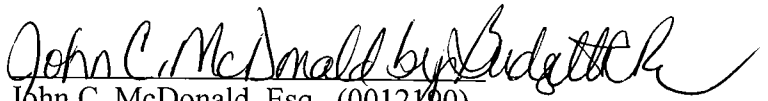
Buckeye cannot state any viable reason for disclosure. First, the documents placed at issue are principally related to the summary judgment motions, which this Court has previously ruled on. Therefore, this Court's decision is the only public pronouncement that is relevant or necessary. Certainly, the economic details and underpinnings for the summary judgment motions are irrelevant at this juncture. The forthcoming damage hearing presents another matter. Buckeye cannot rest on the pleadings at trial but must produce witnesses and documents. However, Buckeye has designated its Trial Exhibits and CHEP has facilitated Buckeye's presentation by "downgrading" its confidential protections so that Buckeye's counsel can properly disclose and prepare its witnesses using CHEP's confidential information. There is no need, however, to publish that information to CHEP's market-place competitors.

This is a serious issue to CHEP and not one merely to distract the Court or work a hardship on Buckeye. If that were the case, CHEP would not have 'downgraded' its designation to allow Buckeye's Chairman access to the disputed information. In the interest of cooperation and working out a compromise, CHEP allowed Buckeye use of CHEP's confidential information to adequately prepare for the scheduled damages hearing. So being, Buckeye cannot now articulate a single reason why it requires full disclosure of the summary judgment filings (and the supporting documents) at this late stage of the proceedings.

**III. CONCLUSION**

For the foregoing reasons, CHEP requests that Court reconsider its prior decision and continue to maintain as “sealed” the documents that are assigned Docket Numbers 28, 30, 36, 37, 40 and 43.

Respectfully Submitted,



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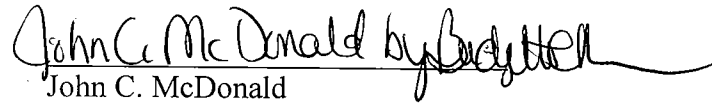
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing document was served by hand-delivery, the 25<sup>th</sup> day of March, 2004, upon:

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