

**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 MEMORANDUM IN  
OPPOSITION TO CHEP USA’S MOTION FOR RECONSIDERATION  
OF COURT’S DECISION AND ENTRY OF MARCH 15, 2004 (Dock. # 89)  
UNSEALING DOCUMENTS FILED WITH THE COURT**

**I. Introduction**

CHEP USA’s Motion for Reconsideration of this Court’s March 15, 2004 Decision and Entry (Doc. # 89) directing the unsealing of documents raises no new grounds for reconsideration of the Court’s decision. Rather, ignoring the controlling precedents of this Circuit, CHEP offers only vague and unsubstantiated claims of confidentiality that do not even square with the company’s own admission.

Buckeye Diamond Logistics again requests that the Court remove the memoranda and exhibits offered in support of the parties’ cross motions for summary judgment from seal and place them in the public record. These cross motions were placed under seal because CHEP USA has used the stipulated protective order entered in this case to prevent Buckeye’s counsel from filing virtually any pleading in the public record or from using the expertise of his client by sharing information discovered in this litigation with its employees. Indeed, as demonstrated by the relatively few items CHEP can even argue

meet the standards for being placed under seal, much of the information CHEP has marked confidential is not. Accordingly, the Court should direct that all of these items be unsealed and placed into the public record, and the confidentiality designation attached to the accompanying documents and deposition designations removed.

As Buckeye pointed out in its Motion to Unseal, during the course of discovery, CHEP marked roughly 95% of the approximately 10,000 pages of documents CHEP produced "Outside Attorney's Eyes Only." Of the remaining documents produced, approximately 500 pages were marked "Confidential." Only about 60 of the approximately 10,000 pages produced contained no confidentiality designation whatsoever. Most recently, since the Court allowed Buckeye to obtain discovery concerning CHEP's belatedly-disclosed damage claim, CHEP has produced another approximately 4000 pages of documents, nearly all of which have been marked "Outside Attorney's Eyes Only." These include documents that contain no confidential business information whatsoever, but simply evidence CHEP's attempts to have its vendor create a falsified invoice to support its late-concocted damage claim. See Deposition of Derrick Smith (4/7/04) at 86-90 (copy attached at Tab B to Buckeye's Motion for Discovery Conference). CHEP's broad use of this confidentiality designation for documents that could not conceivably cause it competitive harm is simply intended to keep from conducting any independent investigation of CHEP's damage claims. Having put forth a \$159,000 damage claim, CHEP should not be permitted to hinder Buckeye's defense of that claim by the improper use of the protective order. It should be beyond dispute that Buckeye is entitled to a public trial of CHEP's damage claims, and is entitled to review

the documents supposedly supporting that damage claim with willing witnesses before that trial.

## **II. Argument**

### **A. CHEP's Failure to Address the Controlling Authorities in the Sixth Circuit and the Bases for the Court's Decision and Entry Requires that the Motion to Reconsider Be Overruled**

Nowhere in its Motion for Reconsideration does CHEP address the Sixth Circuit's standard for maintaining under seal documents filed with the Court. Review of that standard shows that CHEP has completely failed to provide grounds for reconsideration of this Court March 15, 2004 decision.

The standard for the protection of allegedly confidential information filed with the Court is strict. As the Sixth Circuit noted in Proctor & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 227 (6<sup>th</sup> Cir. 1996): "Rule 26(c) allows the sealing of court documents only 'for good cause shown' to the court that the particular documents justify court-imposed secrecy." The documents in question in Bankers Trust

Moreover, as Buckeye previously pointed out to the Court, the Sixth Circuit has made clear that a high burden exists for a party that wants to protect of documents or deposition testimony from public scrutiny: "Simply showing that the information would harm the company's reputation is not sufficient to overcome the strong common law presumption in favor of public access to court proceedings and records." Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1179 (6<sup>th</sup> Cir. 1983). The aversion to secrecy becomes stronger once materials are submitted to the court in pleadings or at trial: "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. This rule rests on long standing and fundamental concerns with the integrity of the judicial process:

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.

Id. at 1177. Because of these concerns, the burden on the party seeking to shield materials from public disclosure once they have been submitted to the Court is heavy:

[A] naked conclusory statement that publication of the Report will injure the [defendant] in the industry and local community falls woefully short of the kind of showing which raises even an arguable issue as to whether it may be kept under seal. The Report is no longer a private document. It is part of a court record. Since it is the basis for the adjudication, only the most compelling reasons can justify the total foreclosure of public and professional scrutiny. The potential harm asserted by the corporate defendants is in disclosure of poor management in the past. This is hardly a trade secret.

Id. at 1180 (quoting Joy v. North, 692 F.2d 880, 894 (2<sup>nd</sup> Cir. 1982)). While the Court's decision ordering the unsealing of pleadings and exhibits thereto was expressly based on the Bankers Trust and Brown & Williamson decisions, CHEP's Motion for Reconsideration does not even bother to mention, let alone distinguish, either.

**B. CHEP's Failure to Demonstrate with Particularity the Harm that Disclosure of Documents Filed with the Court Would Cause It Requires that the Motion to Reconsider Be Overruled**

CHEP perfunctory attempt to assert that embarrassing documents and run of the mill contracts and routine business information are highly confidential business information fail completely to meet the prerequisites of Bankers Trust and Brown & Williamson, and thus show that its Motion for Reconsideration is without merit. Plainly,

the vague and unsubstantiated claim that competitive harm would befall CHEP if this supposedly confidential information is disclosed is precisely the type of unsubstantiated claim of confidentiality that the controlling precedents of the Sixth Circuit have deemed inadequate ground to shed filed documents from public scrutiny. While Buckeye is limited in its ability to point to the specifics of how CHEP's claims of confidentiality are baseless by the fact that those documents are still under seal, review of the individual items that CHEP maintains should remain under seal demonstrates the speciousness of CHEP's position.

Appendix to CHEP's Motion for Summary Judgment (Docket #28): CHEP claims that Ex. 7 to the Potts affidavit, paragraph 4 of the Norder affidavit and Exhibits 1, 2 and 3 all should be protected from public disclosure. None however meet the requirements of Bankers Trust and Brown & Williamson for such protection. Ex. 7 to the Potts' deposition is simply a single contact with a recycler who agreed to return pallets to CHEP. The information therein is hardly confidential – anyone who observed such a recycler for a few days could determine whether it was permitting CHEP to pick up pallets from its location. Conversely, no harm can come to such entities by disclosure that the recycler had agreed 2 ½ years ago to return of such pallets – neither Buckeye nor anyone else has the power to harm, economically or otherwise, any of these recyclers for doing business with CHEP. The notion that such information needs to remain confidential simply reflects CHEP's paranoid style of doing business. On the other hand, the information therein is highly relevant to Buckeye's claim for unjust enrichment. Such entities are highly likely to have received statements from CHEP employees affirming the benefit CHEP receives when recyclers return pallets to it – a fact CHEP has denied in this

case. Public disclosure of these names will allow Buckeye to conduct a legitimate investigation to gather further evidence to support its claims.

Likewise, the claim that either paragraph 4 or exhibits 1, 2 or 3 to the Norder affidavit contain any information that constitutes legitimate trade secret or otherwise genuine confidential information borders is entirely baseless. There is no way in which the disclosure of CHEP's gross rental income could in any way harm CHEP competitively. Likewise, the disclosure of eleven year old contracts from 1993 that contain no pricing or other trade secret information is specious. Indeed, the documents themselves contain no confidentiality provision. CHEP has identified no specific harm that the disclosure of this information could conceivably cause it, and thus has failed to meet its burden under the Court's March 15<sup>th</sup> decision and Sixth Circuit precedent.

Buckeye's Motion for Summary Judgment on Count 1 of its Complaint (Docket #30): CHEP's request to keep Buckeye's motion for summary judgment under seal is likewise not based on legitimate confidentiality concerns. Thus, CHEP:

- Fails to make any plausible showing that disclosure of the FIFO value of pallets written off its books more than 2 years ago (page 7) has any potential to harm it. There is no obvious reason CHEP would be harmed by the disclosure of the FIFO value of its pallets two years ago. Moreover, when Keith Norder testified to the same fact in his trial deposition, which CHEP did not designate as confidential.
- CHEP likewise offers no evidence that disclosure of the consultants report referenced at page 7 of Buckeye's Motion for Summary Judgment would in any way harm CHEP. Like the report in Brown & Williamson, 710 F.2d at

1180: “The potential harm asserted by the corporate defendants is in disclosure of poor management in the past. This is hardly a trade secret.”

- CHEP’s attempt to protect the reference to a specific customer in footnote 7 on page 9 of Buckeye’s motion ignores the fact that a number of public reports accurately reported precisely the information CHEP here seeks to conceal. The need to take a huge write-off for mismanaged pallets may be embarrassing to CHEP, but it is hardly a trade secret.
- The fees described on page 13 of the brief are likewise not trade secret information. The acquisition costs are in ranges that hardly disclose the specifics of CHEP’s actual acquisitions. CHEP’s lost pallet fee is well-know in the industry.

In short, none of the supposedly confidential subjects raised in the Motion for Summary Judgments meets the Sixth Circuit requirements for concealing information filed with the Court from the public.

Exhibits to Buckeye’s Motions for Summary Judgment (Tabs I, J, K, P, Q, R, S, T, U, W, X, Y, CC) (Docket #30): CHEP’s attempt to maintain under seal various exhibits to Buckeye’s Motion for Summary Judgment essentially rests upon a rehash of the arguments it advances for keeping the motion itself under seal. The document that CHEP complains should be protected clearly do not constitute trade secrets. While they do show the mismanagement of CHEP’s pallet pool that has led to thousands of pallets being delivered to Buckeye and other recyclers, such information is hardly competitively sensitive or trade secret. Thus, for example, the attempt to treat as confidential contracts that contain no confidentiality provision, some of which are more that 10 years old, and

that contain minimal price information, at most, is not appropriate. Who CHEP customers are is no great secret – after all, the foundation of CHEP arguments in this case is that all of those customers are using readily identifiable pallets. Likewise, the attempt to hid consultant reports and other documents that reveal poor management by CHEP is clearly not an appropriate ground for maintaining document under seal. Finally, the so-call “business strategies” CHEP seeks to hide from the public are nothing but internal discussion of the huge problem has with leakage and recovery of its pallets – embarrassing facts to CHEP, but hardly trade secrets.

Defendants Memorandum in Opposition to Buckeye’s Motion for Summary Judgment (Docket ## 36 and 37): CHEP can point to only two points in its Memorandum in Opposition to Buckeye’s Motion for Summary Judgment that merit concealing it from the public. The first is a reference to the total annual revenue received from a company widely known to be a CHEP customer. Again, it is impossible that CHEP could be competitively harmed by the mere disclosure of the total revenue it received in a year from a particular customer. Similarly, the fact that CHEP seeks to keep this memorandum filed under seal because on pages 15 and 16 it has listed the names of companies that both it and Buckeye do business with is specious. Buckeye was well aware of these relationships before this litigation began. In no way can the identity of these entities be considered a trade secret, or information that if disclosed would harm CHEP.

Buckeye’s Memorandum in Opposition to CHEP’s Motion for Summary Judgment (Docket #40): CHEP’s arguments with respect to the supposed trade secrets in Buckeye’s Memorandum in Opposition to CHEP’s Motion for Summary Judgment echo

the ones already dealt with above – vague claims that minor financial information would somehow harm CHEP competitively, suggestions that the mere name of a customer is ground to seal a document, and confusing embarrassing meeting notes with confidential strategy documents. Again, the Potts’ affidavit contains no specification of how disclosure of any of the information or documents referenced therein are protected trade secrets, the disclosure of which would harm CHEP competitively. For example, CHEP claims that Tab G, a document entitled “Benefit of Paying Recyclers for Recovery of CHEP Pallets (per Pallet)” is somehow a crucial strategy or finance documents when it previously asserted that this document is not even an authentic CHEP business record and not admissible on the very topic its title shows is the central issue on Buckeye’s unjust enrichment claim. But for CHEP’s designation of this document as for counsel’s eyes only, the fact that CHEP was falsely claiming that it did not know who authored this document would have been uncovered long before CHEP made that admission on March 26, 2004.<sup>1</sup> If the document is meaningless as CHEP claims (see CHEP Motion in Limine # 11), plainly it will cause CHEP no harm to have it disclosed. If it is a calculation, albeit conservative, of some of the benefits CHEP receives from the return of pallets to CHEP, it may be embarrassing to CHEP in light of public claims that CHEP does not benefit at all from such actions, but it is hardly a trade secret. Likewise, the various documents showing that CHEP itself recognized that it benefited from recycler’s action (Tabs B, D and J) simply show CHEP embarrassing inability to recover pallets without the help of recyclers, not any business strategy that rises to the level of a trade secret.

Buckeye’s Reply Memorandum in Support of Summary Judgment (Docket #43):

CHEP itself concedes that the information in Buckeye’s Reply Memorandum raises no

---

<sup>1</sup> See Letter from Bridgette Roman to James Wilson dated March 26, 2004 (attached at Tab A).

new confidentiality issues beyond those raised in the other pleadings filed under seal. As shown above, CHEP has failed to meet its burden of showing that the public disclosure of any of this information would cause it competitive harm. Again, the fact that CHEP may be embarrassed that these documents contradict its public statements regarding its treatment of pallets and the claim that it receives no benefit when recyclers recover pallets does not make these documents trade secrets. Under the controlling precedents of the Bankers Trust and Brown & Williamson decisions, no basis exists for maintaining this information or these documents under seal.

**C. CHEP's Attacks upon Buckeye Are Not Grounds for Reconsideration**

Unfortunately, in CHEP's view, any criticism of its business practices equates to war and attack. There is no doubt that Buckeye's principal, Sam McAdow, has sought to exercise his right to free expression to bring the recycling community's attention public decisions in this case. Not surprisingly, given CHEP's strategy of pushing the costs of recovering pallets sent to NPDs onto recyclers, it is hardly surprising that Buckeye's willingness to stand up to CHEP have garnered great interest, and that the Court's decisions in this case are being viewed by other recyclers as important to their own decisions as to how to deal with CHEP. Moreover, it is neither surprising nor inappropriate that Buckeye has sought to use the resources of other recyclers to gather information both to support its affirmative claims and to undercut CHEP late-disclosed damage calculation. For example, CHEP's expansive use of the protective order in this case has kept Buckeye from investigating with CHEP customers a number of the factual assertions CHEP has made in this case. CHEP's incredibly expansive use of the protective order in this case, and its efforts to hid clearly non-trade secret information

from scrutiny by other recyclers demonstrates that removing these documents from seal not only is necessary to protect the historic principal that the judicial process is open and available for public view, but also the very practical concern that Buckeye be given full opportunity to investigate CHEP's claims not just by expensive depositions of CHEP employees, but also by informal gathering of relevant information from other recyclers and participants in the industry.

In addition, as the postings CHEP has offered make clear, this Court's decisions are being cited by both parties as relevant authority in other jurisdictions. As other recyclers face CHEP's claims that this Court's decision control their actions as well, those recyclers should be permitted to review the full record to assess whether their facts and circumstances are distinguishable, and whether other evidence they may develop could lead courts in their jurisdictions to reach other conclusions with respect to the claims Buckeye advanced in this case.

**D. Recent Evidence of CHEP's Failures to Produce Responsive Documents and Its Manufacture of Deceptive Documents Illustrate the Dangers of Allowing CHEP to Use the Protective Order to Conceal Documents**

Finally, the fact that CHEP continues to mark virtually every document it produces as confidential shows that the misuse of the protective order in this case by CHEP is not a moot point. As indicated above, Buckeye has been severely limited in its investigation of this case by the misuse of the protective order by CHEP. For example, Buckeye has not been able to test any of CHEP's documentation or claims with interviews of mutual customers because of CHEP designation of more than 90% of these documents as confidential. The Court should end this misuse of the protective order, and permit Buckeye to use in its investigation any document that CHEP cannot show with

particularity is a trade secret whose disclosure would harm CHEP's future business activities.

### **III. Conclusion**

For the foregoing reasons, CHEP's Motion for Reconsideration should be denied. Further, the Court should direct CHEP to remove confidentiality designations from all documents that do not comply with the strict requirements of Brown & Williamson.

s/ James A. Wilson  
\_\_\_\_\_  
James A. Wilson (0030704)  
Vorys, Sater, Seymour and Pease LLP  
52 East Gay Street  
P.O. Box 1008  
Columbus, Ohio 43216-1008  
(614) 464-5606  
Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of this Memorandum was served on April 23, 2004, by electronic delivery or facsimile upon:

John C. McDonald  
Bridgette Roman  
Schottenstein Zox & Dunn  
250 West Street  
Columbus, OH 43215

s/ James A. Wilson  
\_\_\_\_\_

James A. Wilson