

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

Before the Honorable Stephen J. McGuire
Administrative Law Judge

In the Matter of)
)
ASPEN TECHNOLOGY, INC.,)
a corporation)
_____)

PUBLIC VERSION

Docket No. 9310

MEMORANDUM OF LAW
IN SUPPORT OF PRAXAIR, INC.'S MOTION FOR *IN CAMERA*
TREATMENT OF CERTAIN DOCUMENTS DESIGNATED AS TRIAL EXHIBITS

Non-party Praxair, Inc. (“Praxair”) respectfully submits this memorandum of law in support of its motion for an order directing *in camera* treatment of a small number of competitively sensitive confidential documents that have been designated by Aspen Technology, Inc. (“AspenTech”) as Proposed Trial Exhibits. The confidential Praxair documents for which *in camera* treatment is sought fall into two general categories:

[REDACTED: *IN CAMERA* TREATMENT REQUESTED]

As discussed in more detail below and in the attached Declaration by Dante Bonaquist (Director, Research and Development for Praxair), these documents (hereinafter referred to as the “Confidential Documents”) collectively reveal **[REDACTED: *IN CAMERA* TREATMENT REQUESTED]** Giving Praxair’s competitors access to such highly sensitive information—which they would not otherwise have—would put Praxair at a serious and irreversible competitive disadvantage.

Praxair provided copies of the following Confidential Documents in response to a subpoena served by the Federal Trade Commission (“FTC”). Due to the competitively sensitive information that they contain, Praxair received “Restricted Confidential” treatment for the Confidential Documents (and other confidential Praxair documents not listed as Proposed Trial Exhibits) pursuant to the Protective Order entered in this proceeding.¹ The confidential basis upon which Praxair, as a third party, provided these documents should be maintained.

I. ARGUMENT

A. Standard For Granting *In Camera* Treatment

All of the Confidential Documents contain non-public information as defined under Section 4.10(a)(2) of the Federal Trade Commission Rules of Practice (“FTC Rule”), 16 C.F.R. §4.10(a)(2), and therefore warrant *in camera* treatment pursuant to FTC Rule §3.45(b), 16 C.F.R. §3.45(b). In affording *in camera* treatment, the FTC recognizes the importance of avoiding disclosure of competitively sensitive information that would cause serious competitive harm. *See* 16 C.F.R. §3.45(b). The party seeking *in camera* treatment must demonstrate that “the information concerned is sufficiently secret and sufficiently material to [its] business that disclosure would result in serious competitive injury.” *General Foods Corp.*, 95 F.T.C. 352, 355 (Mar. 10, 1980).

In considering the secrecy and materiality of such documents, the following factors should be weighed: “(1) the extent to which the information is known outside of [the party’s] business; (2) the extent to which it is known by employees and others involved in [the

¹ *See Aspen Technology, Inc.*, Docket No. 9310, September 16, 2003 Protective Order Governing Discovery Material.

party's] business; (3) the extent of measures taken by [the party] to guard the secrecy of the information; (4) the value of the information to [the party] and to [its] competitors; (5) the amount of effort or money expended by [the party] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." *Bristol-Myers Co.*, 90 F.T.C. 455, 456-457 (Nov. 11, 1977).

Furthermore, the Commission has recognized that requests for *in camera* treatment from third party competitors should be received as favorably as possible, and "deserve special solicitude." *Kaiser Aluminum & Chemical Corp.*, 103 F.T.C. 500, 500 (May 25, 1984). Praxair has no stake in the outcome of this proceeding. Praxair is a third-party by-stander in this action, and has complied with all of the FTC's discovery requests. Maintaining the secrecy of Praxair's confidential business information should be given particular respect, and its competitors should not benefit through forced disclosure of its competitively sensitive confidential information.

As described more fully below, an order for *in camera* treatment for the two categories of confidential Praxair documents is not only warranted in this case, but also necessary to ensure that Praxair does not suffer needless serious competitive injury.

B. Disclosure of Confidential [REDACTED: *IN CAMERA* TREATMENT REQUESTED] Will Cause Serious Competitive Injury.

Praxair's Confidential Documents relating [REDACTED: *IN CAMERA* TREATMENT REQUESTED] are "sufficiently secret" and "sufficiently material" as to warrant *in camera* treatment. Such documents effectively reveal [REDACTED: *IN CAMERA* TREATMENT REQUESTED] the disclosure of which would cause Praxair serious competitive harm.

The Proposed Trial Exhibits in Group 1 reveal **[REDACTED: *IN CAMERA* TREATMENT REQUESTED]** For example, the information contained in these documents relates to **[REDACTED: *IN CAMERA* TREATMENT REQUESTED]**

Should this information become publicly available, **[REDACTED: *IN CAMERA* TREATMENT REQUESTED]** Disclosure of such vitally sensitive information would place Praxair at a significant competitive disadvantage in the marketplace and **[REDACTED: *IN CAMERA* TREATMENT REQUESTED]**

Information regarding **[REDACTED: *IN CAMERA* TREATMENT
REQUESTED]**

The Commission has recognized that “the likely loss of such business advantages is a good example of a ‘clearly defined, serious injury’” that mandates *in camera* treatment under Rule 3.45. *Intel Corp.*, No. 9288, 1999 FTC LEXIS 227, at *4 (Feb. 23, 1999); *see also Int’l Ass’n of Conference Interpreters*, No. 9270, 1996 FTC LEXIS 298, at *4 (June 26, 1996). Allowing public disclosure through this proceeding most certainly would lose any “business advantage” Praxair **[REDACTED: *IN CAMERA* TREATMENT REQUESTED]** Furthermore, the documents relate to recent (i.e., less than 3 years old) confidential business decisions as well as strategies for the future.

For these reasons, Praxair respectfully requests *in camera* treatment for the above documents for a period not less than ten years. **[REDACTED: *IN CAMERA* TREATMENT REQUESTED]**.

C. **[REDACTED: *IN CAMERA* TREATMENT REQUESTED]**

[REDACTED: *IN CAMERA* TREATMENT REQUESTED]

[REDACTED: *IN CAMERA* TREATMENT REQUESTED] are held in the strictest confidence within Praxair, and **[REDACTED: *IN CAMERA* TREATMENT REQUESTED]**

[REDACTED: *IN CAMERA* TREATMENT REQUESTED]

[REDACTED: *IN CAMERA* TREATMENT REQUESTED]

D. Description of Confidential Praxair Documents

1. Documents Revealing [REDACTED: *IN CAMERA* TREATMENT REQUESTED]

The following Confidential Documents contain information that is highly material to the competitive success of [REDACTED: *IN CAMERA* TREATMENT REQUESTED]

Pages RX-1533-003 and RX-1533-013 of Proposed Trial Exhibit RX 1533, attached as Confidential Exhibits B and E respectively, are identical copies of **[REDACTED: *IN CAMERA* TREATMENT REQUESTED]**

Pages 001 to 012 of Proposed Trial Exhibit RX-1533, attached as Confidential Exhibit D, reference and contain **[REDACTED: *IN CAMERA* TREATMENT REQUESTED]**²

Pages RX-1534-004, 006, 009, 011, 012, and 013 of Proposed Trial Exhibit RX-1534, attached as Confidential Exhibit F, are excerpts from **[REDACTED: *IN CAMERA* TREATMENT REQUESTED]**³ **[REDACTED: *IN CAMERA* TREATMENT REQUESTED]**

Pages RX-1535-001 and 002 of Proposed Trial Exhibit RX-1535, attached as Confidential Exhibit G, are **[REDACTED: *IN CAMERA* TREATMENT REQUESTED]**⁴

Page RX-1535-003 of Proposed Trial Exhibit RX-1535, attached as Confidential Exhibit G, is a **[REDACTED: *IN CAMERA* TREATMENT REQUESTED]**⁵

² **[REDACTED: *IN CAMERA* TREATMENT REQUESTED]**

³ Pages RX-1534-011 and 013 **[REDACTED: *IN CAMERA* TREATMENT REQUESTED]**

⁴ RX-1535-**[REDACTED: *IN CAMERA* TREATMENT REQUESTED]**

⁵ RX-1535-003 **[REDACTED: *IN CAMERA* TREATMENT REQUESTED]**

Page RX-1535-007 of Proposed Trial Exhibit RX-1535, attached as Confidential Exhibit H, is a **[REDACTED: *IN CAMERA* TREATMENT REQUESTED]**

Pages RX-1536-001 to 004 of Proposed Trial Exhibit RX-1536, attached as Confidential Exhibit J, are **[REDACTED: *IN CAMERA* TREATMENT REQUESTED]**

Page RX-1538-003 of Proposed Trial Exhibit RX-1538, attached as Confidential Exhibit L, is a table reflecting **[REDACTED: *IN CAMERA* TREATMENT REQUESTED]**⁶

Page RX-1538-005 of Proposed Trial Exhibit RX-1538, attached as Confidential Exhibit L, is **[REDACTED: *IN CAMERA* TREATMENT REQUESTED]**⁷

Page RX-1538-007 of Proposed Trial Exhibit RX-1538, attached as Confidential Exhibit L, is a **[REDACTED: *IN CAMERA* TREATMENT REQUESTED]**⁸

⁶ RX-1538-003 also reveals **[REDACTED: *IN CAMERA* TREATMENT REQUESTED]**

⁷ RX-1538-005 **[REDACTED: *IN CAMERA* TREATMENT REQUESTED]**

⁸ Page RX-1538-007 also references **[REDACTED: *IN CAMERA* TREATMENT REQUESTED]**

Page RX-1538-009 of Proposed Trial Exhibit RX-1538, attached as Confidential Exhibit L, is **[REDACTED: IN CAMERA TREATMENT REQUESTED]**⁹

For the reasons stated above, Praxair respectfully requests that *in camera* treatment be granted for the above documents, for a period of no less than ten years.

2. Documents Revealing [REDACTED: IN CAMERA TREATMENT REQUESTED]

The following Confidential Documents contain information that is **[REDACTED: IN CAMERA TREATMENT REQUESTED]** The information contained in the Confidential Documents below reveals **[REDACTED: IN CAMERA TREATMENT REQUESTED]**

Pages RX-1533-001 and 002 of Proposed Trial Exhibit RX-1533, attached as Confidential Exhibit A, are **[REDACTED: IN CAMERA TREATMENT REQUESTED]**

Pages RX-1533-005 to 009 of Proposed Trial Exhibit RX-1533, attached as Confidential Exhibit C, are **[REDACTED: IN CAMERA TREATMENT REQUESTED]**

Pages RX-1534-001 to 003, 005, 007 to 008, 010, and 014 to 015 of Proposed Trial Exhibit RX-1534, attached as Confidential Exhibit F, are **[REDACTED: IN CAMERA TREATMENT REQUESTED]**

⁹ RX-1538-009 **[REDACTED: IN CAMERA TREATMENT REQUESTED]**

Pages RX-1535-004 to 006 and 008 to 010 of Proposed Trial Exhibit RX-1535, attached as Confidential Exhibit H, and Pages RX-1538-001 to 013 of Proposed Trial Exhibit RX-1538, attached as Confidential Exhibit L, are **[REDACTED: *IN CAMERA* TREATMENT REQUESTED]**

Page RX-1535-011 of Proposed Trial Exhibit RX-1535, attached as Confidential Exhibit I, **[REDACTED: *IN CAMERA* TREATMENT REQUESTED]**

Page RX-1537-001 of Proposed Trial Exhibit RX-1537, attached as Confidential Exhibit K, **[REDACTED: *IN CAMERA* TREATMENT REQUESTED]**

For the reasons listed above, Praxair respectfully requests that *in camera* treatment be granted for the above documents, for a period of no less than four years.

II. CONCLUSION

For the reasons stated above, Praxair, a non-party in this matter, having complied with its obligation to produce its documents, respectfully requests that the Commission issue an order granting *in camera* treatment to the above Proposed Trial Exhibits (for the periods specified) to avoid needless public disclosure of some of Praxair's most confidential commercial information.

Dated: April 29, 2004

Respectfully submitted,



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